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Legal Issues of Services of General Interest

Public Services and the European Union

Healthcare, Health Insurance and Education Services

Laura Nistor

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Dr. Laura Nistor
European Commission
DG Enterprise and Industry
45 Avenue d'Auderghem
1040 Brussels
Belgium
e-mail: laura.nistor@ec.europa.eu

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Series Information

The aim of the series *Legal Issues of Services of General Interest* is to sketch the framework for services of general interest in the EU and to explore the issues raised by developments related to these services. The Series encompasses, inter alia, analyses of EU internal market, competition law, legislation (such as the Services Directive), international economic law and national (economic) law from a comparative perspective. Sector-specific approaches will also be covered (health, social services). In essence, the present Series addresses the emergence of a European Social Model and will therefore raise issues of fundamental and theoretical interest in Europe and the global economy.

Series Editors

Prof. Johan Willem van de Gronden
Radboud University
P.O. Box 90049
6500 KK Nijmegen
The Netherlands
e-mail: j.vandegronden@jur.ru.nl

Prof. Markus Krajewski
Universität Erlangen-Nürnberg
Schillerstrasse 1
91054 Erlangen
Germany
e-mail: markus.krajewski@jura.uni-erlangen.de

Prof. Ulla Neergaard
University of Copenhagen
Studiestræde 6
1455 Copenhagen
Denmark
e-mail: ulla.neergaard@jur.ku.dk

Prof. Erika Szyszczak
School of Law
University of Leicester
University Road
LE1 7RH Leicester
UK
e-mail: ems11@leicester.ac.uk

Preface

Welfare states are changing. At present, the European dimension of welfare services—which was traditionally confined within each national territory—is being developed by several actors: patients travelling abroad to receive medical treatment, healthcare providers wishing to establish their seat or to provide services abroad, and students travelling abroad for education. In this context, some Member States have chosen to introduce competitive elements in the provision of their welfare services for efficiency reasons. This approach has triggered the application of European internal market and competition rules. Member States which organize their welfare differently have therefore been confronted by a common European dimension which they had to address.

Social system reform is complicated enough without the European aspect. Political agreement on how to organize the system is difficult to reach. Moreover, the changing of the State's role from providing services to providing only the legal framework and supervising the provision of services represents an apparent loss of powers for the Member States. With this as a background, the fact that European law applies gives the Member States the impression that they have lost control over these services.

The double function, social and economic, of the welfare services raises interesting questions, such as whether economic law applies to these services. Politically sensitive but also economically important, welfare services have opened a heated debate. The focus of this book is on health, health insurance and education because these fields have undergone important developments.

The evolution of the welfare services indicates that they are atypical domains of integration. The close interrelations between social and economic elements underline the fact that the social aspect cannot be ignored and that action needs to be taken to deal with the new problems that have emerged.

The failure of the political process to deal with the complicated problems raised by welfare services and the continuous development of the internal market integration leading to a spill-over into other fields has left the European Court of Justice with the difficult task of answering questions on the relationship between welfare and economic integration. The most significant development in the field of

welfare have come from the Court. Litigation provides the occasion for Member States to be forced to stop ignoring the existence of anything beyond the national dimension. This is the moment when Member States start to change to address their problems, or even to be active through soft law mechanisms. The outcome of this process is uncertain. It is even possible that European convergence towards common regulatory patterns may emerge, since the identical pressures on Member States can result in parallel behaviour, leading to conforming and compatible policies.

Difficult questions related to governance are posed by the developments in these fields. National reforms of the welfare systems need to take the new European dimension into consideration. This book has looked at the negative integration process and answered the questions related to the extent to which European law applies to welfare services and what kind of safeguards the Court offers for these services. The proportionality principle distinguishes itself as the central element, important in balancing the national and European interests. Being part of the broader integration process, negative harmonization leaves legislative lacunae and the book also looks at alternative solutions to the negative harmonization process: positive and soft law.

Welfare harmonisation is part of a broader integration process: it can be seen as a step in the progress from economic to social integration, but also as a part of economic integration. The Court established landmark cases that answered the problems raised in practice, thus ensuring further integration in a field where politics had failed. However, the negative integration practiced by the Court is not sufficient and needs to be corroborated by positive action. The positive action could come either from the part of the Member States or from the Community.

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Brussels, May 2011 Laura Nistor

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Chapter 1
Introduction

Welfare services have an important social role, but are also economically important. This duality raises different problems because different sets of rules apply to economic and social services. As a result of high levels of regulation and government control of these services, markets for them tend to be national. There is little cross-border provision of these services and competition is in an incipient phase. However, European Union law requires that all services with an economic character be open to cross-border competition, and freely provided between Member States. Hence, the existing organisation of welfare services is challenged by European Union law.

However, simply abolishing all these restrictive aspects of welfare would create not only chaos but also financial and social problems for the Member States, as well as causing political uproar and potentially conflicting with subsidiarity. According to European Union law, Member States remain primarily responsible for welfare, and should be able to choose their system and organisation. Hence the Court increasingly has to find a balance between the interests represented by competition and free movement law and the interests represented by the organisational forms chosen by Member States. In legal terms, it has to ask whether restrictive measures adopted by Member States are justified and proportionate to their aim. Proportionality appears to be the central instrument in accommodating different interests and the core concept that ensures further integration in the field of welfare.

Since the EU lacks specific powers with regard to these services, the Court is the one left to deal with difficult questions related to the application of European Union law. The application of economic law to welfare services raises discontent from the part of the Member States who feel their systems to be under threat. This book asks to what extent the law of the internal market applies to these welfare services. Does the application of economic law to these services represent a real threat as Member States argue, or do the restrictions imposed by Member States simply represent protectionist measures? Different conflicts take shape: between

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national social interests and between European Union economic interests; between individual interests and national general interests; between regulation and deregulation, centralisation and decentralisation. Against the background of all these divergences, the book asks the question whether there are sufficient safeguards for the protection of social interests. An analysis of the existent safeguards in the Treaty will be undertaken. The conflict between social and economic has been dealt with by the Court of Justice in its case-law. The proportionality principle becomes the tool for balancing different interests. Different intensity of review is applied depending on whether internal market or competition rules are involved or depending on what kind of interests are at stake.

The main developments in welfare have resulted from the unpredictable process of negative integration, but this book places the evolution which has occurred in the field of welfare services in the broader process of integration. Welfare harmonisation can be seen as a step from economic to social integration. Thus, in addressing the challenges and the questions raised by the negative integration process, the book asks whether positive and soft law could be alternatives to negative integration.

The Subject of Study

The subject of this study is welfare services. These are traditionally provided by the state, partly because access to these services is vital, and only the state could therefore be trusted with them. Increasingly, market actors are being involved in provision, which raises the complex problems which this book examines.

In particular, since welfare services are universal services,[1] which means that they must be provided throughout the whole territory, at an affordable price and at a specified quality and on a continuous basis, they present the characteristics of market failure (the market cannot deliver services to consumer in an efficient manner). As a result, public authorities are compelled to use sometimes different protectionist and restrictive measures to ensure their provision: financial aid, granting of special or exclusive rights for their provision, creation of compensation funds, tax exemptions, etc. All these measures have the effect of partitioning the market or distorting competition. As a result, they may conflict with European Union law, raising the questions whether such law applies to welfare and whether it ought to; do welfare services fall within the scope of European Union law, and if

[1] "The concept of universal service refers to a set of general interest requirements ensuring that certain services are made available at a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price" Cf. Article 3(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), (2002) OJ L 108/51.

so how can a balance between the market mechanisms and public service missions be ensured? The law on free movement and on competition, viewed in the light of economics and the principles and theory of European integration, help provide answers to these questions in this book.

From among the different services forming the welfare state this book focuses on health, health insurance and education. The reason for limiting examination to these services is that they are the most affected by the recent rulings of the Court. The main developments at European Union level have happened in these fields and have triggered political tumult. Patients travelling from one Member State to another to receive care, healthcare providers offering their services abroad, on a temporary or a permanent basis, students travelling in another Member State for studies, all these have raised different problems and underlined the necessity for coordination between the different national systems. These systems are organised according to principles that do not correspond anymore to the current realities—they are provided according to the principle of territoriality, which conflicts with European Union law that requires all national and protectionist barriers to be removed, but also conflicts with social cohesion at European level.

The EU and the internal market have therefore created a need for change in national systems. Access to health and education is still considered in the EU context to be fundamental rights of the citizens, but the use of EU citizenship, rather than just national citizenship, reinforces the conclusion that the provision of these services must take into account the European dimension of the market, thus finding a solution for the provision of these services throughout the territory of the European Union. Access to these services for those who avail of their rights to move freely within the European Union must be ensured. The European Union policy, largely formed through the Court's rulings, therefore aims at removing any existent obstacles to free movement. Different systems with different social, economical, institutional and political background have to adapt to the new common realities created by the common market.

Alongside this integrationist view, the European Union brings its competition policy, which aims to ensure effective competition in newly created welfare markets. It is believed that competition brings more efficiency to the provision of welfare because markets put pressure on the participants to offer better prices in order to attract consumers and maintain a fair share of the market. Inefficiency, by contrast, drives undertakings out of the market.

The participants on the market therefore become aware of costs; the state's endless pocket does not exist anymore and the resources are limited. The need to be competitive in order to survive leads to cost reduction, thus better prices are offered on the market and the resources are better allocated. The competitive process brings also a diversification of the products on the market, more choice for the consumer. An undertaking will gain more market share, depending on how well it can satisfy its customers and how well it can attract them. Competition brings also innovation; in order to be competitive, it is necessary to invest in research and development.

There are however voices, especially coming from Member States, that the introduction of market elements in the welfare system can be harmful. It is considered that the pursuit of profit goals conflicts with the aim of welfare services, which is a social one. In the case of welfare services "[T]he market mechanisms can fail to work optimally".[2] For example, the healthcare market is an atypical market. On the healthcare market there is no perfect information[3]; the products are not homogenous[4]; the resources are not mobile[5]; there are time lags[6]; there are barriers to entry for new firms[7]; healthcare services are universal services, which means that good quality services need to be provided on a continuous basis, throughout the territory, at an affordable price; there are moral hazards[8]—since the insured person does not bear the costs of care directly, he has no incentive to reduce the costs of healthcare but on the contrary, he might ask for healthcare that he does not need, thus leading to over-consumption; also adverse selection might occur.[9]

Due to all these characteristics national regulatory measures are necessary. These regulations are however challenged by European Union law. Nevertheless, they may serve legitimate interests and in this case they should be allowed. To what extent are they allowed and how can a balance of interests be ensured?

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[2] Averitt and Lande 1996–1997, p. 723.

[3] Mansfield 1985, p. 232. He states that: [P]erfect competition requires that consumers, firms and resource owners have perfect knowledge of the relevant economic and technological data. Consumers must be aware of all prices. Labourers and owners of capital must be aware of how much their resources will bring in all possible uses. Firms must know the prices of all inputs and the characteristics of all relevant technologies. Moreover, in its purest sense, perfect competition requires that all these economic decision-making units have an accurate knowledge of the future together with the past and present.

[4] According to Mansfield product homogeneity is describes as follows: [P]erfect competition requires that the products of any one seller be the same as the product of any other seller. This is an important condition because it makes sure that buyers do not care whether they purchase the product from one seller or another, as long as the price is the same. Note that the product may be defined by a great deal more than the physical characteristics of goods.

[5] According to Mansfield mobile resources are defined as follows: [P]erfect competition requires that all resources be completely mobile. In other words, each resource must be able to enter or leave the market, and switch from one use to another, very rapidly. More specifically it means that labour must be able to move from region to region and from job to job; it means that raw materials must not be monopolised; and it means that new firms can enter and leave an industry.

[6] Hirshleifer 1984. According to him: A perfect market would instantaneously digest the inputs and proclaim the correct market-clearing price. But no such magic machine exists in the real world. So a farmer bringing vegetable to a city produce market may by cleverness or chance realise a sale at a price higher than the (unknown) true equilibrium or unluckily, the farmer may accept a price lower than might have been obtained.

[7] Scherer and Ross 1990.

[8] Arrow 1963, pp. 941–973.

[9] Craswell 1994.

The Structure of the Book

Member States resist the application of economic law to welfare services because of the perception that market law conflicts with other values. This opposition might be legitimate, as it aims at protecting different social interests: however, this book argues that this resistance is largely unjustified: the European Union law does not endanger the national welfare systems but instead offers adequate mechanisms to ensure that all interests are considered; this way, through the balancing mechanisms that it offers, further integration in the field of welfare is ensured and enabled.

The protection of non-economic values will less and less be achieved by excluding welfare from the internal market, and more and more by balancing these values against economic ones. Therefore the main chapters in this book explore how the Court makes this balance. It looks at the kinds of reasons Member States have for their restrictive rules, and whether these are acceptable in principle.

The approach I took in analyzing the impact of European Union law on these services was to look first at how the negative integration process affected welfare services and how the balance between economic and social interests is ensured by the Court. Alongside this, the book looks to see whether alternatives such as positive and soft law are possible or realistic.

Chapter 2 defines welfare for the purposes of this book and provides an overview of the diversity of welfare systems in Europe and some of their features. This description makes subsequent chapters easier to understand and enables me to refer back. The diversity of the systems due to different historical developments, cultural, economic, and social reasons disclose the difficulty that harmonisation or co-ordination of these systems poses.

The following two chapters, Chaps. 2 and 3, look at the negative harmonisation process and at how the national rules have been challenged by the internal market (Chap. 2) and competition rules (Chap. 3). They consider when economic law applies to these welfare systems. Answers to these indicate that far more of welfare is potentially subject to European Union law than is often thought.

Chapter 3 looks at the impact of the internal market rules on the welfare services. This is done by looking at the impact of free movement of services, the impact of the establishment rules and the impact of free movement of people on the welfare services. The case-law analysis reveals how much scope there is for the application of internal market rules. The reach of internal market rules is extensive, taking into consideration the fact that the principle of non-discrimination applies even if there is no economic service. The application of the principle of non-discrimination and sometimes the application of the principle of non-discrimination in conjunction with the concept of citizenship or, even more, sometimes the application of the simple concept of citizenship has had a great impact on national welfare systems. A section is dedicated to defining the notion of services. This will determine to what extent internal market rules apply. Once being determined that the welfare services do not escape the internal market rules, the

book looks into what kind of safeguards Member States may use for the protection of these services. A section looks at the justifications that Member States put forward and considers the cases where the Court has weighed or balanced free movement against other interests in a welfare context. The aim is partly to see what kind of arguments Member States put forward, and how successful these are and why, and also to examine whether the Court seems to be favouring economic over non-economic interests (or vice versa), or whether it is engaging in a fair balance. The proportionality principle distinguishes itself as being at the heart of the balancing process. The protection granted to non-economic interests is done through the justification process. Member States are left with more or less discretion in dealing with welfare services depending on the stricter or more flexible application of the proportionality test.

Chapter 4, dealing with the application of competition rules to welfare services analyses whether in applying competition rules the Court ensures a sufficient equilibrium between social and economic aspects. A first subchapter deals with the scope of the application of competition rules. Since the concept of an undertaking is a dynamic one and the organisation of welfare is in continuous change, the protection of welfare services cannot be afforded by total exclusion from competition rules. The question raised is what other safeguards are there? The analysis of the safeguards is done by looking at the exceptions from competition rules and at the application of the principle of proportionality. It is interesting to see how much discretion the Court leaves to the Member States. The debate regarding what types of interests are considered during the process of justification is relevant for understanding the degree of protection that social interests receive. There are three subchapters which look into what kind of safeguards the competition rules ensure and this is done within the context of Article 101 TFEU (ex Article 81 EC), Article 106 TFEU (ex Article 86 EC) and Article 107 TFEU (ex Article 87 EC). In dealing with Article 101 TFEU (ex Article 81 EC) the book looks whether social values could be used to justify the infringement of competition rules and to what extent other goals than competition ones are accepted as justifications. Further, the book looks into the safeguards offered by Article 106 (2) TFEU (ex Article 86 (2) EC) which is an article of major importance because it balances different interests. It is a genuine compromise meant to avoid distortions of competition from the public sector on the one hand and to protect services of general economic interest from the rules of competition on the other. During the application of Article 106 (2) TFEU (ex Article 86 (2) EC) EC an important role is played again by the proportionality principle. The question that is addressed is what is the intensity of review that the Court applies and whether there is a different approach when it comes to welfare services. What is the proportionality test applied in competition cases? When are special and exclusive rights to be seen as necessary for the proper provision of services of general economic interest and when are they just protectionist measures? The justification contained in Article 106 (2) TFEU (ex Article 86 (2) EC) EC is important also in the case of state aids. The financial needs of an undertaking entrusted with the provision of services of general economic interest can be satisfied by means of state aid. Problems related to

cross-subsidisation may appear in cases where undertakings provide services on a competitive market in addition to the services of general economic interest. How much of the state financing provided is compensation for the provision of services of general economic interest and how much is state aid? Even when there is state aid, Article 106 (2) TFEU (ex Article 86 (2) EC) can be used as a justification. Does the compensation approach taken by the Court offer more protection for services of general economic interest and what are the conditions imposed in order to avoid over-compensation? How does the Court ensure a balance in order to have a proper provision of services of general economic interest and in the same time to also have an undistorted competitive environment?

Chapter 5 deals with positive harmonisation and soft-law measures concerning welfare. These represent alternatives and/or complements to negative harmonisation measures, and it is worth considering whether they are realistic or desirable. The study of positive harmonisation reveals the constitutional problems related to the division of powers between the Member States and European Union; it reveals the divergences related to whether action should be taken at national or supranational level, and whether the legislative lacuna left by the deregulatory effect of the negative integration requires positive action. It is interesting to see whether positive harmonisation is in the first place possible and furthermore if it can bring more clarity and legal certainty. The necessity for co-ordinating Member States' social systems and the fears that through positive action their powers would be diminished, also motivate Member States to engage in soft-law measures. What is the relevance of the use of soft law? Do these measures make an important impact?

Finally, a conclusion considers the broad themes. How is the European Union balancing economic and non-economic interests? Is the process adequate, and how should it change the future of a European welfare state or is there an alternative path? The final conclusions are that Member State integration of the principles of free movement and competition into their welfare states is the best way forward, and it is a practical way forward. Some concrete recommendations are made, including that rights of free movement should be enacted in positive national law.

The discussion of this book is built around two apparently antagonistic concepts: social issues and market issues. The relation between welfare and markets is an evolving one. We witness the changing relations between market and society.[10] Having this as a background this book suggests that the conflict between welfare and free movement and competition rules is a false one. Rather than taking the approach that Member States usually take, that the application of economic rules endangers the stability of welfare systems, the whole problem should be set in a broader context where the European Union dimension should be considered. Having this new aspect in the picture, Member States should acknowledge that so far they have largely failed to include in their policies the new changes. It is time for Member States to have a more active attitude towards changes. Both the national and European Union law have as their goal more welfare for the

[10] Dolfsma et al. (2004).

consumer. While at national level, the policy aims at ensuring more welfare, at European Union level, the internal market rules aims at ensuring that the equality principle is respected. Furthermore, the application of competition rules is necessary to realise the benefits of competition on the market. Since efficiency reasons have determined Member States to introduce competition, the competition rules are necessary to ensure that the rules of the game are respected and competition has a positive effect.

The methodology of this book consists of traditional legal research, based on jurisprudence, literature and European Commission documents. The research has been done according to the law as it stands at 1 December 2009. The main developments in case-law after this date have been taken into consideration and the book has been updated according to Lisbon Treaty. The articles have been updated according to Lisbon Treaty, even though, in the past, the EC/EEC Treaty articles would have been the appropriate reference.

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Chapter 2
The Organisation of Welfare

2.1 Introduction

> As globalization has reminded us most forcefully, problems of territoriality and space are too important to be left exclusively to geographers. Anything that eases the spatial movement of ideas, goods and persons also accelerates the course of history—and causes political problems in the process. Since the state is a combination of territory, people and government, every increase in the effective utilization and mastery of spatial distances made possible by technological progress has an initially negative and destructive impact on established social order.[1]

In the context of globalisation, of trade liberalisation, state policies are forced to change to face the need to adapt to growing competition. The removal of barriers to trade has a direct effect on living standards and economic development. Globalisation increases dependency between countries and the search for allocative efficiency not only affects trade relations but social policies, requiring the state to adapt to constant changes and pressures.

'The traditional welfare state is, in a sense predominantly a passive institution. It is only when an undesirable outcome has occurred, that the safety net is spread'.[2] The welfare state appeared in response to the social needs of citizens and has developed differently in different European states, corresponding to their diverse historical, socioeconomic conditions. The welfare state is constructed around the concept of citizenship: 'welfare states are national states'.[3] T.H. Marshall distinguishes three elements of citizenship: a civil element composed of rights to ensure individual freedom, a political one providing the right to participate in the exercise of political power and a social one comprising the right to a modicum of economic welfare, social security and cultural heritage.[4] Being organized around the concept

[1] Rieger and Leibfried 2003, p. 6.

[2] Vandenbroucke 2002.

[3] Offe 2000, pp. 63–89.

[4] Marshall 1963, p. 74.

L. Nistor, *Public Services and the European Union*,
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of citizenship, the rules organizing the welfare state come into conflict with European Union law.

The welfare state has suffered changes as a result of various pressures, such as globalization, the increased competition in the economy, the rapid growth of the population and population mobility. In Europe, the creation of the European Union has had a strong impact on the welfare state. Talking about the process of European integration, Leibfried[5] observes that it 'has eroded both the sovereignty (the legal authority), and autonomy (de facto regulatory capacity) of Member States in social policy'. Social policy in Europe is described by Leibfried as a multi-tiered policy, less the result of the welfare building ambitions of Eurocrats and more the result of the spill-over effect from the single market.

'Social harmonization was seen as an end product of economic harmonization rather than a prerequisite'.[6] This explains the lack of social policy objectives in the EEC Treaty. The EEC Treaty contained in its objectives the raising of standards of living (Article 2 EEC), the existence of a social fund (Article 3) and the promotion of cooperation in the social field (Article 118). Hantrais notes that there was a failure to agree on objectives but mechanisms were set up to achieve certain social goals. There were provisions on equal pay, the improvement of standards of living and social harmonization using Article 101 EEC (now Article 116 TFEU) as a legal basis insofar as they supported economic integration. There were also directives or measures intended to deal with the problems raised by the provisions on the free movement of workers, services and capital, and the freedom of establishment. There were different measures regarding the social security entitlements for mobile workers, and provisions for the recognition of qualifications.

The main impact on welfare states came, however, from negative integration. A Member State may not limit social benefits to its own citizens, it may not restrict the benefits and rights to its territory, it may not prevent other social policy regimes from directly competing on its territory and it cannot have exclusive rights to decide on claims for welfare benefits made by migrants.[7]

Liebfried points out that this complex process where the supranational efforts aim at extending the access to welfare and the national efforts aim at maintaining control has led to the creation of a hitherto unknown system.[8]

'Neither "supranationalization" nor "harmonization" seems an appropriate label for this dynamic, since each implies more policy control at the centre than currently exists. This process is more like a market-place of "coordination", with the ECJ acting as market police, a light and visible, but far-reaching hand,

[5] Leibfried 2005.

[6] Hantrais 2000, p. 1.

[7] Leibfried 2005, p. 264.

[8] Ibid.

reshaping the boundaries of national autonomy.'[9] According to Weiler, the Court is the policy making centre.[10]

The application of European Union law has had different impacts depending on the welfare system at issue. Different systems have been subjected more or less intensely to the application of European Union law. Moreover, under the impact of negative harmonization, welfare systems have endured modifications to various aspects, which have actually led to convergence between the different systems. While in the past the different welfare systems were confined to national territory and developed according to the socioeconomic and political factors existing in their respective Member States, today, the creation of the internal market exercises the same type of pressure on the diverse welfare systems. The existence of similar conditions influencing welfare states leads to the convergence of these systems. The reform of the welfare state is an ongoing process with unpredictable results.

Since the aim of this book is to study the impact of European Union law on welfare systems, it is important to introduce a few concepts related to welfare. The aim of this chapter is to define welfare for the purpose of this book and to provide an overview of the diversity of welfare systems in Europe and some of their features. This description will make subsequent chapters easier to understand and permit later reference.

2.2 The Meaning and Origin of Welfare States

In order to assess the impact that the internal market has on the functions of the welfare state, this section is aimed at first explaining the meaning and origin of the welfare state. By trying to provide a definition and considering the historical development of the welfare state, the conflict between the welfare state and the internal market becomes obvious. The establishment of the internal market, 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'[11] requires the removal of all obstacles to trade which can hinder 'directly, indirectly, actually or potentially intra-Community trade'.[12] The broad interpretation of what can constitute an obstacle to free movement leads to the extension of European Union competence and consequently to an assessment of whether national rules comply with European Union law. The application of Treaty rules extends to sensitive areas over which Member States wish to retain total control. If the welfare provisions fall within the scope of the Treaty then, consequently, Member States have to comply with Treaty rules, thus losing their power to decide as sovereigns the organization of welfare.

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[9] Ibid.

[10] On the role of the Court see: Weiler 1994, pp. 510–534; Weiler 1999; Burley and Mattli 1993, pp. 41–76; Stone Sweet and Caporaso 1998, pp. 92–133; Shapiro and Stone1994, pp. 397–420; Barnard 2000, pp. 49–69; O'Leary 2002; Chalmers 2004.

[11] Art. 14 EC Treaty.

[12] Case 8–74 *Dassonville* (*Procureur du roi* v. *Benoit and Gustave Dassonville*) (1974) ECR 837.

'A common textbook definition (of the welfare state) is that it involves state responsibility for securing some basic modicum of welfare for its citizens'.[13] The term citizenship carries with it the idea that welfare was confined within the national borders.

According to Robert Goodin and Deborah Mitchell, the welfare state is characterized by systematic social concern for the welfare of people who might otherwise lack the basic necessities required for their effective functioning within the community.[14] The welfare state is concerned with people's wellbeing. For some, the growth of the welfare state was a normal reaction to the hardships of early industrialization. The origins of welfare states seem to lie in the societal changes associated with the broad process of industrialization and, particularly with the breakdown of traditional forms of social provision and family life.[15]

Dealing with the foundations of welfare, Goodin and Mitchell present the evolution of the welfare state. Each society faces social problems: there are people who need assistance. Initially, individuals were the ones who provided for their own welfare, or the family ensured it. For those who could neither support themselves nor had a family to support them, the task of offering them social protection was entrusted to the church and later to the state.

Church and state activity traditionally occurred at a very local level, but as workers became mobile, the problem of to whom the poor belonged appeared. In England the Elizabethan Poor Law of 1601 solved the issue by requiring the poor to settle in a particular parish as a condition for receiving poor relief. This was a restriction to labour mobility.[16]

The fact that welfare is distributed on a national basis is exemplified by the appearance of the first mutual insurance schemes protecting workers against the risks of losing their jobs. Initially, they were created at the workers' initiative and were organized voluntarily. Since this created problems, mutual insurance was made compulsory at a national level. Furthermore, since this only applied to workers, and non-workers were not entitled to benefit, the next step was to universalize benefits, 'making them contingent merely upon membership in the community rather than upon a history of workplace contributions'.[17]

Welfare states appeared out of the need to ensure protection to special categories of people. Since this requires the expenditure of treasury money, the distribution of welfare states is confined within the boundaries of the national territory. Each country developed a welfare programme to offer protection to those affected by the economic conditions in that country. They created intricate systems for the collection and distribution of welfare benefits, based on national criteria and intended to meet the problems that appeared as a consequence of economic

[13] Esping-Andersen 2000, p. 154.

[14] Goodin and Mitchell 2000.

[15] Pierson 1998.

[16] Goodin and Mitchell 2000.

[17] Ibid., XII.

evolution in that country. The provision of social insurance is increasingly seen as part of the rights and duties which bind the state and the citizenry. Receiving welfare becomes a benefit of citizenship.

This national criterion for the distribution of welfare benefits conflicts with European Union policy regarding free movement, where states are not allowed to discriminate on grounds of nationality. Considering welfare benefits as social benefits, which European Union legislation and the ECJ' s practice make available to all with the status of worker, leads to an EC involvement in the state's social policy. States with a high level of social protection face an increasing financial burden, since they have to make benefits available on a non-discriminatory basis. Each state 'seeks to avoid becoming a welfare magnet attracting neighbouring states' poor'.[18] Will this lead to a race to the bottom, the states decreasing their level of social protection as their systems become increasingly burdened by this European Union policy? Moreover, welfare states cost money, which implies higher taxes in the states with more generous welfare services, which in turn is a disincentive for investment or for establishment. Therefore, on the one hand, the expenditure of a generous state increases while on the other hand, its funding decreases as companies are less likely to establish in a high tax environment.

According to Goodin and Mitchell the role of supranational bodies is to ameliorate the effects of international capital, to respond to the demands of economic globalization. It is well known that competition brings welfare as it tends towards allocative efficiency, as it is well known that states created intricate systems for the distribution of welfare; but in the context of globalization, of opening frontiers, things have become more complicated.

Welfare states appeared as a result of the need to ameliorate the negative effects of economic development, but the welfare apparatus increased to such an extent that it became a financial burden on those who contribute to the financing of welfare. It is a vicious circle: the welfare state requires funding—the higher the social protection, the higher taxes will be—the higher the taxes, the less the interest in inward investment, as firms will look for the most appropriate environment for their business—the fewer firms there are in the country, the less money returning to social system, thus, less money to provide welfare services. Consequently, the country risks not only that it places its companies at a competitive disadvantage, thus losing economically, but also risks being forced to reduce its welfare services, as a result of lack of funding. This is one of the dangers that the welfare state faces today.

In order to better understand the functioning of the welfare state it is important to know why welfare is provided by the state in the first place. There have been numerous studies regarding the welfare state and different theories have been offered.

According to Adam Smith,[19] the general welfare of society is but the sum of the welfare of the individuals within it: therefore, social welfare would be best secured

[18] Ibid., XIV.

[19] Pierson 1998, p. 9.

by maximizing the sum of individual welfare. Consequently, there is the need for a competitive market economy in which production is directed solely by the laws of supply and demand and individuals pursue their economic interests.

But a competitive market economy cannot only have winners. There are categories of people that need special protection and the mechanisms of the market cannot meet these needs. Because the market mechanisms may fail to provide welfare services optimally, state intervention is required.

The state became responsible for those who could not look after themselves and needed assistance: orphans, the elderly, widows and disabled people. They are the recipients of the social assistance offered by the state from its revenues collected from taxation. The aim of social assistance is often to provide the minimum level of subsistence. Furthermore, the state became responsible for social insurance as a result of the workers' failure to create a viable framework for their mutual insurance schemes. Their intention to cover the risks of the inability to work caused either by old age or by other factors were meritorious, but unfortunately, these schemes' voluntary character proved insufficient. Some people decide not to insure, and people who run lower than average risks have every incentive to opt out of a scheme, making the premiums exorbitantly expensive for those who remain. Moreover, in times where everyone does badly, mutual insurance schemes collapse.[20] Therefore, state intervention was imperative for the proper functioning of the insurance schemes. Through legislation, schemes were made compulsory, thus offering protection from negative eventualities.

The state is responsible for providing social services. As economic welfare increased, the state could afford to develop different programmes to increase its citizens' standard of living. Health and education were the basic services guaranteed by the state due to their vital importance—health concerning access to medical care, on account of the seriousness of disease; education concerning the education of children, preparing them for the future. Water, energy, postal services, railways, telecommunications also became state responsibilities.

2.3 Different Welfare Regimes

This section describes the different ways in which welfare states have been classified. The aim is to introduce ideas and terminology, rather than to choose between the classifications. Each adds some explanatory power in its own way, and is thus helpful in understanding the effects of the EU law on national welfare systems.

> […] in the context of European history, the growth of the modern welfare state can be understood as a response to two fundamental developments: the formation of national states and their transformation into mass democracies after the French Revolution, and the growth of capitalism that became the dominant mode of production after the Industrial Revolution.[21]

[20] Goodin and Mitchell 2000.

[21] Flora and Heidenheimer 1982, p. 22.

The welfare state is linked to the emergence of the mass democracies. Some interpret the welfare state as an answer to the demands for socioeconomic equality.[22] However, the welfare state brought 'the transformation of the state itself, of its structure, functions, and legitimacy'.[23] According to Marxist tradition, the welfare state is seen as an attempt to address the problems of capitalism. Flora and Heidenheimer note that the political sociological perspective of de Tocqueville and Weber, which considers that the welfare state emerged as a result of the growing mass democracies, and the political economy perspective of Marx and others, which holds that the welfare state emerged as a result of the expanding of capitalism, do not contradict and are in fact complementary. They conclude that the welfare state seems to be more a 'general phenomenon of modernization'.[24]

There are two approaches to explain the welfare state: a structuralist approach and an institutional approach.

According to the structuralist approach, the welfare state was made possible and necessary by industrial society because the old means of social protection, such as the family, the church and the guilds were destroyed by 'forces attached to modernization, such as mobility, urbanization, individualism and the market dependence.[…] Hence, the 'welfare function' is appropriated by the nation-state'.[25]

The delay between the destruction of the traditional social institutions and the emergence of the welfare state is explained by the fact that welfare requires a certain level of economic development which allows a surplus to be redistributed.[26]

Following the institutional approach, according to Polanyi, social policy is a precondition for the reintegration of the social economy.[27] Democracy is considered as playing an important role in the emergence of the welfare state. It is considered that the extension of full citizenship also includes social rights, or that the important role of the voter triggers the increase in public expenditure.[28]

The welfare state developed differently depending on different factors.

Titmuss[29] distinguishes three models of welfare: the residual model, where the state has a marginal role and intervenes only when the family and the market have failed to do so; the industrial-achievement-performance model where 'social needs were met on the basis of merit, work performance and productivity';[30] and the

[22] Marshall 1963.

[23] Flora and Heidenheimer 1982, p. 23.

[24] Ibid., 23.

[25] Esping-Andersen 1990, p. 13.

[26] Ibid., 4.

[27] Ibid., 15.

[28] Ibid., 15.

[29] Titmuss 1974.

[30] Hantrais 2000, p. 30.

institutional redistributive model where the welfare institutions provide universal cover.

In order to ameliorate the negative effects of economic development, countries have created social systems of welfare transfer based on three principles: need, universalism and reciprocity. Jochen Clasen and Wim van Oorschot identified three types of state response to social contingencies.[31] The first type of response aims at poverty relief and regards need as arising only from the moment that a minimal level of subsistence is not met. Resources are redistributed to the worst off. A second type of response, aimed at the preservation of living standards, sees need as arising when an achieved standard of living is threatened. It redistributes resources to those who are regarded as being in need on grounds of the equity principle: those who have achieved more, are given more, so that initial status (or income) differences are reproduced. The third type of response aims at general wellbeing. The resources are distributed on the principle of equality, since all citizens are viewed as having a right to a common standard of wellbeing.[32]

The state is no longer only a public order provider, but together with economic development it has become a provider of social security, social insurance and a provider of services.

The State is regarded as a welfare provider who uses its organized powers in order to 'modify market forces in at least three directions—first, by guaranteeing individuals and families a minimum income irrespective of the market value of their work or their property; second, by narrowing the extent of insecurity by enabling individuals and families to meet certain "social contingencies" (for example, sickness, old age and unemployment) which lead otherwise to individual and family crises; and third, by ensuring that all citizens without distinction of status or class are offered the best standards available in relation to a certain agreed range of social services'.[33] The State traditionally provides social assistance, social security and access to essential services. The provision of these services is achieved under different arrangements, depending on the type of welfare regime.

According to Esping-Andersen there are three regimes of welfare state. One type of welfare regime is the 'liberal' welfare state with 'means tested assistance, modest universal transfers, or modest insurance plans'.[34] Under this type of system, the benefits are modest and entitlement is restricted to those with low incomes. The state encourages the market 'either passively—by guaranteeing only a minimum—or actively—by subsidizing private welfare schemes'.[35] The United States, Canada and Australia are examples of countries with this welfare state model.

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[31] Clasen and Van Oorschot 2002, pp. 89–115.

[32] Ibid.

[33] Briggs 2000.

[34] Esping-Andersen 1990, p. 26.

[35] Ibid., 27.

Another type of welfare state regime according to Esping-Andersen is the 'corporatist' welfare state. The state can displace the market in the provision of welfare, with private insurance playing a marginal role. Austria, France, Germany and Italy maintain such regimes.

The third type of welfare is the 'social-democratic' regime. 'Rather than tolerate a dualism between the state and market, between working and middle class, the social democrats pursued a welfare state that would promote an equality of the highest standards, not an equality of minimal needs as was pursued elsewhere'.[36] Instead of waiting until a family's resources are exhausted it complements them. This type of welfare state takes direct responsibility in caring for children, the aged and the helpless. The Scandinavian countries have a social democratic regime.[37]

The essential criteria used for such a classification are related to the 'quality of social rights, social stratification, and the relationship between state, market and family'.[38]

Greece, Portugal and Spain were not included in Esping-Andersen's analysis and some authors consider that this was done because, since they relied on social insurance, they were expected to develop in the line with the continental model.[39]

Leibfried identifies four social policy regimes: the Scandinavian welfare states, the 'Bismark' countries, the Anglo-Saxon countries and the 'Latin rim' countries.[40]

The welfare systems of the founding members of the European Union displayed similarities because their systems were based on corporatist models. This 'continental' model, following the Bismarckian model, was based on the presumption that entitlement to benefits was granted as a result of participation in work. There was no solidarity between the members of society since there was no concern with redistribution from one sector to another. Initially, this model was introduced in Germany by Bismarck in old-age pensions and compensation was calculated according to earnings, without having a minimum income.[41]

Provision for health was also based on insurance contributions, though Italy adopted a national health service.[42]

Even if they shared the same principles, the arrangements existing in these countries were different. The state was involved to different degrees in the provision of welfare.

The United Kingdom and Scandinavian countries that acceded later, had different types of welfare models, the citizenship model or the social-democratic model inspired by the Beveridge model. The entitlement to welfare benefits was on the basis of citizenship. The collection of the required resources was achieved through taxation and benefits were distributed to all citizens on equal terms, in

[36] Ibid., 27.

[37] Ibid., 28.

[38] Ibid., 29.

[39] See Hantrais 2000, p. 31.

[40] Leibfried 1993.

[41] Hantrais 2000, p. 35.

[42] Ibid.

contrast to the continental model, where the collection of resources was by contribution and distribution was according to income, not on equal terms.

Greece, Spain and Portugal were characterized by a corporatist regime, though their health systems were national health systems funded through taxation.[43]

The Central and Eastern European countries, though possessing a tradition of state monopoly of welfare services, are moving towards corporatist regimes, where workfare is preferred to welfare.[44]

These classifications are made taking several criteria into consideration, such as the means of funding, the distribution of welfare, the benefits people are entitled to and the population groups covered. The various methods of organizing welfare systems are due to the different historical, social, economical and political developments experienced.

There are different standards of social protection which also depend on the economic development of a country.

It is interesting to note that all these welfare regimes, with all their diverse historical development, are now faced with similar problems. This leads to increasing resemblance between the systems and consequently to convergence. The increasing expenditure required by welfare determined Member States to adopt different solutions to cutting expenditure, one of which was to entrust the provision of some welfare services to private parties, hoping that better efficiency would be achieved. The provision of welfare is ever more a mix between public and private providers. In the United Kingdom for example, 'schemes for earnings-related payments and occupationally-based pensions and private health care had progressively been extended to other sectors of the working population'.[45]

According to Titmuss, social security and social service programmes are exposed to change because of their concern with the insecurities of industrialism.[46] In addition to the normal questions Titmuss addresses—on the direction of change, on to whether systems should be less universalistic and more concentrated on poverty, handicap or old age—another dimension concerning who to include in these programmes has to be considered: the Community dimension.

Though there is a distinction between these three types of regimes, no regime is pure, each rather being able to incorporate elements from the others.

2.4 Bismarckian versus Beveridgian Health Systems

It has been seen so far that there are different welfare regimes where the entitlement to social benefits varies. In the field of health, one component of social policy, can distinguish different characteristics according to the type of welfare regime.

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[43] Ibid.

[44] Ibid., 37.

[45] Ibid., 38.

[46] Titmuss 1976, p. 60.

Health services should be available to everyone, of good quality and at an accessible price. Access to healthcare must be guaranteed, which is why in the organisation of healthcare systems, solidarity constitutes an important element. Healthcare is one service that cannot be left to be provided entirely by the market. A system meant to ensure solidarity between healthy and sick people is necessary in order to guarantee that everybody has access to healthcare. The provision of a health service does not limit itself to services provided by doctors but also requires extensive and expensive infrastructure. The proper organisation of the financing of the system is therefore required.

The provision of healthcare can be achieved by public entities or by private entities, or by a mix of public–private undertakings. Under these circumstances, it is important to ensure that, when the provision of health is entrusted to private entities, some compensatory mechanisms are introduced in order to guarantee solidarity and to maintain the financial viability and fair competition between different funds. A rigorous planning of the costs and expenses is absolutely necessary.

Two important systems emerged, distinguished by the nature of the relationship between public intervention and the market. The Bismarckian system goes back to the reforms of Bismarck in 1880s, when he introduced the Health Insurance Act—setting the basis for compulsory sickness insurance—the Old Age and Disability Act and the Accident Insurance Act. The other system is the Beveridgian system, which dates back to 1911 when Winston Churchill and Lloyd George, assisted by William Beveridge, prepared the Liberal government's National Insurance Act.[47]

The health insurance program introduced by Chancellor Bismarck was aimed at providing healthcare for German workers. It aimed to cover those who participated in a professional group, organisation, industry or firm.[48] Inactive people were protected through complementary schemes. The cost of the health service was divided between the employees and employers. A variety of funds belonging to different industries administer the money collected from employers and employees. Health providers can be public or private. This model is found in Germany, Austria, France and the Benelux countries.

The Beveridgian system was aimed at universal cover and was introduced by William Beveridge in Britain in 1942. With the goal of offering to every person a minimum standard of living, in his Report on Social Insurance and Allied Services, Beveridge proposed that all working people pay a national insurance contribution in order to aid people who were sick, unemployed or retired. Entitlement to benefits was not dependant on worker status but on citizenship status. Today, the entitlement to benefits is dependent on residence status.

The funding is obtained through taxation. There is a single fund that administers the money, which permits the planning of health expenses. This system is found in the UK, Ireland, Denmark, Finland, Sweden, Spain, Portugal, Italy and Greece.[49]

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[47] Flora and Heidenheimer 1982.

[48] Hatzopoulos 2005.

[49] Ibid., 117.

In today's Europe, variations of these two distinct systems can be found in the domain of health: the Bismarckian model or health insurance system and the Beveridgian model or national health system.

The main differences between these two systems can be found in how they are financed and how the benefits are distributed. Funding is obtained through contributions in the Bismarckian system, while funding is obtained through taxation in the Beveridgian system. The contributions are collected by funds which can be public or private. In addition, health services can be delivered by public or private entities. This mix of public and private allows different combinations to be offered in the provision of health services.

With regard to the distribution of benefits, the Beveridgian system offers healthcare as a benefit-in-kind. Under the benefits-in-kind system, the patient goes to different hospitals or practitioners and receives services for free. When the treatment is offered by a public undertaking, the expenses are covered directly from the budget. When the treatment is offered by a private undertaking, the private provider receives a flat rate and a fee per capita treated plus actual expenses incurred.[50] Patient choice is restricted.

Another way to distribute benefits is the reimbursement system. The patient goes to the health provider, pays for the service received and is then reimbursed. There are countries with a Bismarckian model who offer benefits-in-kind (Germany, Austria) and there are countries belonging to the Bismarckian system who offer reimbursement (Belgium, France, Luxemburg), and there are Bismarckian systems offering both benefits-in-kind and reimbursement (the Netherlands).

The health systems following the Bismarckian model are more inclined to introduce competitive elements and are consequently subject to a greater degree to European Union law. Once European Union law is applied, it is important to allow patient mobility or to allow other service providers to enter a market. These are changes that have to be assimilated. The health systems following the Beveridgian system also had to switch from citizenship to residence-based entitlement to benefits. The impact of European Union law has also led to the introduction of a reimbursement mechanism into such systems.[51] Irrespective of the type of system chosen, Member States have had to adapt the organization of their systems to European Union requirements.[52]

Healthcare systems are funded by various means: taxation, social health insurance, voluntary (private) health insurance or out of pocket payments. Different Member States have a mixture of funding models. Depending how it is financed, healthcare can be declared as a service within the scope of the Treaty

[50] Ibid.

[51] In the following chapters it will be demonstrated that under the impact of Community law, Member States with NHS or benefits-in-kind systems must create reimbursement mechanisms in order to be able to reimburse the healthcare expenses incurred abroad by those who avail themselves of the freedom of services provisions.

[52] See Chap. 3.

or not. Since healthcare is a universal service and the whole population needs to have access to healthcare, independent of their financial situation or their health status, every Member State tries to ensure access to everybody. In the case of the Beveridgian system, everybody has access to healthcare. When States choose an insurance system to cover the whole population, they can opt for compulsory health insurance. This ensures a basic package that the whole population can benefit from. This type of insurance is characterized by solidarity. There is an obligation to insure the whole population, there is an obligation to accept everybody no matter whether they are good or bad risks and no matter what their financial situation may be. The contributions can be income-related or a price can be determined for the basic package, but the price does not depend on risk factors. The benefits granted depend on need. Since some funds may have more bad risks, there are different mechanisms to cross-subsidize between funds.

Voluntary health insurance is meant to add different services to the basic package for those who opt for it. This type of insurance can be encountered in both Beveridgian and Bismarckian systems. Voluntary health insurance can be substitutive, complementary or supplementary. For example, it is substitutive when some groups are not covered by compulsory health insurance. For example, in the Netherlands until 1 January 2006, civil servants were covered by special compulsory private insurance. Insurance is complementary when people are permitted to choose voluntary health insurance to cover costs of care in those systems where they are required to pay part of the costs of treatment, or where extra cover may be purchase additional to the basic package provided by statutory care. Voluntary health insurance is supplementary when some people choose to take alternative voluntary health insurance in order to avoid waiting lists or to have more choice.

Member States can implement a combination of these different types of system. They can opt for a national health system where people are allowed to take out complementary, substitutive and supplementary voluntary health insurance. Alternatively, they may implement a social insurance system, offering either benefits-in-kind or reimbursement, where people are allowed to take out substitutive, supplementary or complementary health insurance. It is possible that the entities which provide the statutory insurance cover are also engaged in providing different forms of voluntary insurance. The risk of cross-subsidization thus arises, requiring that the rules on subsidies are respected. There is also the risk of unfair competition when an undertaking offering statutory insurance enters the voluntary insurance market. There is a risk of predatory pricing or of abuse of dominance of the statutory market in order to gain market power on an additional market. The rules of competition must be strictly observed in order to avoid this. The rules of the internal market can also be infringed given the existence of regulations on establishment or the provision of services. The fact that the systems are organized differently can have different degrees of impact on European Union rules.

2.5 Education

The organization of education systems reflects the historical, social, economic and religious evolution of society. Education can be provided by public entities, or by private entities or by a mix of public and private entities.

The State can have different levels of involvement in the provision of education. It can be involved through funding, thus it can itself fund public and private education.

In some countries schools are funded mainly by the State[53] and education is under the authority of the State.

In some countries public schools are funded by public funds and private schools out of private contributions. For example, this was the case in the Netherlands during the nineteenth and early twentieth centuries, which led to the 'schools dispute'. This problem was solved by public and private schools being treated equally and receiving state funding. Some Member States have religious elements in their schools in their traditions, such as the catholic and protestant schools in the Netherlands. Some Member States provide freedom of establishment, freedom of organization of teaching and freedom of faith.[54] For example, in the Netherlands people can establish schools and may choose to base them on religious, ideological or educational beliefs. Private schools have the right to refuse pupils whose parents do not subscribe to the ideology or belief of the school. Private schools choose what to teach and how to teach and the role of the State is to set quality standards, to prescribe the subjects to be taught, to set targets, to set the content of national examinations, to set the number of teaching periods per year and to set qualification requirements for teachers.[55]

There are also various ways to organize higher education, which is the type of education for which cross-border movement is highest. Some Member States choose open access to university, others choose exam-based entry, while still others use GPA-based entry. Sometimes, Member States introduce a *numerus fixus* to restrict entry to programmes or universities, and particularly for medical studies. There are various types of *numerus fixus*, such as a single national quota, fixing the capacity of all institutions providing a particular course; a labour-market quota, which limits the supply of graduates to the demand on the market; and an

[53] In France, over 80% of the national education expenditure is funded by the State. See Eurybase, National summary sheets on education systems in Europe and ongoing reforms, January, 2009, available at: http://eacea.ec.europa.eu/ressources/eurydice/pdf/047DN/047_FR_EN.pdf. Accessed 15 April 2008.

[54] See Eurybase The Information Database on Education Systems in Europe, The Education System in the Netherlands 2006–2007, Directorate-General for Education and Culture, available at: http://eacea.ec.europa.eu/ressources/eurydice/eurybase/pdf/0_integral/NL_EN.pdf. Accessed 17 April 2008.

[55] Ibid.

institution quota, which permits individual institutions to fix their own limits.[56] The rules regarding access to universities may also be changed as the result of the application of European Union rules. For example, a testing system has been introduced in Austrian medical programmes for those programmes affected by eight *numerus clausus* study programmes in Germany, after the rules on *numerus clausus* were challenged and the ECJ issued its ruling. The testing system was supposed to last until 2007.[57] The Austrian national rules could still be contrary to European Union rules. As a result of the ECJ ruling of July 2005, the share of Austrian first-year students at Austria's medical universities decreased to 45% in 2005. The Austrian authorities introduced a 'Safeguard Clause' starting with 2006/2007 reserving 75% of all places for students holding a Reifeprüfung matriculation certificate issued in Austria.[58]

Universities can be funded through state resources, or through contributions from students in the form of tuition fees, or through a mix of public and private funding, or through private funding. The responsibilities for funding can be shared between the national and municipal administrations, with the state intervening whenever the municipal administrations neglect their obligations. Private schools can also receive subsidies from the state, in which case they may be required to be open to all.[59] The State can finance private education, as in the case of the Dutch and Swedish models. There, anyone satisfying the basic standards may open a school and receive finance from the State. They may be permitted to require additional fees and/or to make a profit. Private establishments can be financially independent or government dependent, depending on the country involved. When they are government dependent they need to comply with the requirements laid down in education legislation.[60]

There are various types of grants that students receive from their state for their studies. Students can receive grants in the form of allowances to cover living expenses, books, study materials tuition fees and travel costs. Students can receive

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[56] See Eurybase The Information Database on Education Systems in Europe, The Education System in the Netherlands, 2006–2007, Directorate-General for Education and Culture, available at: http://eacea.ec.europa.eu/ressources/eurydice/eurybase/pdf/0_integral/NL_EN.pdf. Accessed 17 August 2008.

[57] National Summary Sheets of Education Systems in Europe and Ongoing Reforms, Austria, January 2007, Directorate General for Education and Culture, available at: http://eacea.ec.europa.eu/ressources/eurydice/pdf/047DN/047_AT_EN.pdf. Accessed 17 August 2008.

[58] See Eurybase The Information Database on Education Systems in Europe, The Education System in Austria, 2006–2007, Directorate-General for Education and Culture, available at: http://eacea.ec.europa.eu/ressources/eurydice/eurybase/pdf/0_integral/AT_EN.pdf. Accessed 17 August 2008.

[59] See Eurybase, Structures of education, vocational training and adult education systems in Europe, Sweeden 2008, available at http://eacea.ec.europa.eu/ressources/eurydice/pdf/041DN/041_SE_EN.pdf

[60] See National Summary Sheets of Education Systems in Europe and Ongoing Reforms, Spain, July 2008, Directorate General for Education and Culture, available at: http://eacea.ec.europa.eu/ressources/eurydice/pdf/047DN/047_ES_EN.pdf. Accessed 17 August 2008.

loans at favourable interest rates, or loans which can be exempted from repayment if the student complies with certain requirements, such as the completion of studies within a given period. Grants may be performance-related, income-related or simply granted by the mere fact that the student attends courses.

With regard to grants to finance mobility, two types of support can be distinguished: support 'earmarked specifically for mobility' and portable national financial support.[61] The special support for mobility is granted by the national authorities so that students can undertake higher education abroad. The portability of financial support can be complete or conditional. Complete portability support is 'defined as the situation in which all kinds of support available for students in their home country may also be claimed, in accordance with the same conditions of award and payment, by the reference student who undertakes all or part of his or her study abroad'.[62] In this case the home country does not impose any restrictions. In the case of conditional portability there are additional restrictions: 'restrictions tied to the period spent studying abroad, the host country, the host institution, types of course, how courses or students progress, and language requirements'.[63] These restrictions could however conflict with free movement provisions and could be challenged by European Union law.[64] These restrictions must conform with European Union law and must be proportional. For example, in the Netherlands students can apply for financial assistance to pursue studies abroad. They can take courses in all twenty-nine countries involved in the Bologna process; however, the courses abroad must comply with Dutch quality standards, which are monitored by the Dutch organisation for international cooperation in higher education (Nuffic). There is no requirement that students should start their studies in Netherlands and there is no nationality requirement. However, there must be a link between the State and the recipient of the allowance and this should be proved by proving residence in Netherlands for at least 3 years in the preceding 6 years.

In Germany, since 2001, students have been granted the possibility to complete their studies in another EU Member State, after completing the first two semesters in Germany.[65] This rule was challenged and the ECJ ruled that Germany infringed European Union rules.

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[61] Key Data on Higher Education in Europe, Education and Culture DG, 2007, available at: http://eacea.ec.europa.eu/ressources/eurydice/pdf/0_integral/088EN.pdf, p. 145, Accessed 17 August 2008.

[62] Ibid., 146.

[63] Ibid.

[64] Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan* v. *Bezirksregierung Köln and Iris Bucher* v. *Landrat des Kreises Düren* (2007) ECR I-9161; Case C-76/05, *Marga Gootjes-Schwarz* v. *Finanzamt Bergisch Gladbach* (2007)ECR I-6849.

[65] See Eurybase The Information Database on Education Systems in Europe, The Education System in Germany, 2006–2007, Directorate-General for Education and Culture, available at: http://eacea.ec.europa.eu/ressources/eurydice/eurybase/pdf/0_integral/DE_EN.pdf.

The state is mainly in charge of quality assessment, surveillance, investigation, ensuring that regulations are respected, organizing tests, recognizing foreign degrees and financing.

Therefore, education systems present a great variety of organizational models, coming from different combinations of different factors. Every State has a different ideology behind the creation of its system. State involvement can vary in degree, but one clear conclusion can be drawn: it is a state responsibility towards its population to provide education. Different regulatory rules can conflict with European Union law. They may be simply protectionist or they may actually seek to further the ideology that underpins the national system. It is interesting to observe to what extent the European Union law applies and which rules are dismantled by the application of European Union law.

2.6 Conclusion

> The problem today consists not in the welfare state being too weak to defend its socio-political benefit standards, but in its inflexibility precisely because of its strength.

It has been observed that different welfare systems emerged in different states, moulded by their various socioeconomic and political realities. The creation of the internal market and population mobility brings the need to align welfare systems to the new socioeconomic realities into the discussion. As the European Union lacked the political power to harmonize in the welfare field, the Court answered the need for change in the organisation of the welfare state.

'Over a period of 50 years a complex patchwork of regulations and court decisions has partially suspended the principle of member state sovereignity over social policy in the interest of European Labour-market mobility. It now spreads to the freedom of service users and providers. The net effect is to limit national capacities to contain transfers 'by territory' and to shape welfare state reform trajectories, as we can see from just two examples'.[66] The two examples Leibfried is referring to are the pension system in Germany—where efforts have been made to avoid the 'export' of benefits to non-German citizens who had worked in Germany—and to the long term care insurance in Germany—where benefits-in-kind provisions aimed to prevent the Europeanization of benefits.

The Member States, since they have retained powers in the field of welfare, have to respond to the challenge and provide viable solutions not only to the social requirements originating within their territory, but also to requirements at the European Union level.

Different systems are exposed differently to the Competition law. A system that contains a mix of public and private is more susceptible to subjection to European

[66] Leibfried 2005, p. 263.

rules. The changes that the systems have to make can be greater or smaller depending on the type of system. The principles at the foundation of a welfare system should be carefully considered when European Union law is applied. Every Member State may decide to offer higher or lesser degrees of protection. For example, in defining what a service of general economic interest is Member States can decide that various services which are not necessarily regarded as basic are nevertheless important for the population and may qualify them as services of general economic interest. The obligation imposed on an undertaking to provide those services has at its foundation the principle that the welfare state pursues individual wellbeing and that more than basic subsistence should be offered. Member State choices regarding which services they consider important for their populations should be respected. This is reflected in the margin of discretion the Court leaves to the Member States.

In conclusion, the differences in organizing welfare have two important consequences. First, different systems determine the extent to which the European Union law applies. It is perhaps paradoxical that the systems which contain the most market like elements, and thus are most in tune with community philosophy, are often the ones most immediately impacted by European Union law. Secondly, in applying European Union law, the differences in organizing the systems are important in determining the margin of discretion given to Member States.

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Chapter 3
The Reach of Internal Market Rules

3.1 Introduction

Various rules related to the organisation of the welfare services enter into conflict with European Union law. If welfare is excluded from the application of European Union rules there is a risk of jeopardising the European Union's aims, as there is a risk of creating protectionism. Individuals and the process of free movement would suffer seriously. It is true that the creation of the internal market had economic goals behind it; however, the internal market is not complete if the service providers, service recipients, workers and European citizens are not able to benefit from their social rights. Without the application of European Union law there is a danger that the national systems will be permitted to close their borders which this could have negative economic effects.

The measures regulating welfare services can raise various types of restrictions. In the field of health, a patient might have limited choices: he might sometimes not be entitled to choose his provider, he may be restricted from going abroad, he might also need authorisation to go abroad to receive healthcare, sometimes the authorisation criteria are discretionary and hard to comply with, and a patient might be refused reimbursement for treatment obtained abroad. There may be limitations on products and on the amount of money to be reimbursed. Problems related to who determines what medical care is going to be reimbursed and who decides what is 'normal' and 'necessary' can arise. Under rules setting the list of reimbursable treatments, indirect discrimination can be concealed. Moreover, there can be limitations on providers—rules relating to market access might prove effective in keeping foreign providers abroad. Hospitals, clinics and service providers may wish to establish abroad, but various regulatory rules on the number of hospitals or practitioners allowed in a certain area, or on second establishment, or different authorisation requirements may prevent access to the market.

L. Nistor, *Public Services and the European Union*,
Legal Issues of Services of General Interest, DOI: 10.1007/978-90-6704-805-7_3,

There can be rules in the field of health insurance that raise obstacles to free movement, such as rules that limit the choice of providers, rules on who is entitled to provide health insurance, rules on the setting of limits to the number of health insurance providers or rules on partitioning a market between health insurance providers. There can be rules requiring health insurance companies to be nationally based, or rules related to licensing or non-profit-making. There can be rules on the nature of the product and the fees required; there can be rules requiring the provision of a basic package of healthcare or rules setting minimum or maximum prices; there can be rules on compulsory insurance or on compulsory participation in an equalisation scheme. Restricting the nature of a product can restrict the service itself, since foreign providers may have different but similar products to offer. Rules requiring the acceptance of all comers disregarding the risk could appear restrictive. The granting of an exclusive right automatically excludes a foreign provider from entering a market.

In the field of education there can be limitations on the choice that the provider and the recipient of the education services can make. There can be limitations on who can run schools: is it going to be a state monopoly or is education going to be provided by a mixture of private and public schools? If private providers are allowed, there can be rules stating that only private national schools are allowed to the exclusion of foreign providers. Will the state pay for the public schools and not for the private ones? This would obviously discourage foreign providers. Will the state pay for education abroad? Will foreign students be entitled to education grants, to loans or other social benefits? If not, are those measures that refuse foreign students access to grants obstacles to free movement? There can be limitations on the product and fees; the rules granting the state total control over the curriculum in schools might be restrictive. Are schools allowed to start new courses? Who is entitled to teach? Does the fact that the schools aim at maintaining the national character limit the access of foreign institutions or foreign providers? There can be restrictive rules related to the recognition of qualifications and several cases[1] can be found where Member States have failed to implement the secondary legislation related to directives on professional qualifications. There can be rules imposing a system of quotas for the access of foreign providers.

All these rules could raise barriers to free movement. It is easy to find a restriction to free movement because the threshold is low. However, they could also pursue legitimate aims and without these rules it is possible that welfare

[1] Case C-274/05 *Commission of the European Communities* v. *Hellenic Republic* [2008] I-7969; Case C-286/06 *Commission of the European Communities* v. *Kingdom of Spain* [2008] ECR I-8025; Case 39/07 *Commission of the European Communities* v. *Kingdom of Spain* [2008] ECR I-03435; Case C-456/05 *Commission of the European Communities* v. *Federal Republic of Germany* [2007] ECR I-10517; Case C-437/03 *Commission of the European Communities* v. *Republic of Austria* [2005] ECR I-9373; Case C-505/04 *Commission of the European Communities* v. *United Kingdom of Great Britain and Northern Ireland.*

systems could be disrupted. How much is it a positive effect on the welfare systems and how much is it protectionism? It is necessary to have a functional welfare system but it is important to have free movement as well. In order to decide whether the European Union rules apply, it is necessary to determine whether these welfare services fall within the scope of the Treaty. That is why Sect. 3.2 deals with defining the concept of service. Not only the Treaty rules related to services impact on welfare but also rules related to the freedom of establishment and the free movement of workers. Furthermore, even if some welfare services were not declared services for the scope of the Treaty, the application of the principle of non-discrimination and sometimes the application of the principle of non-discrimination in conjunction with the concept of citizenship, or even more so, sometimes the application of the simple concept of citizenship alone can have a great impact on national welfare systems. The economic and social aspects are however moderated by the proportionality principle, the concept used by the Court to reach a balance in these delicate issues. Member States tried to preserve their restrictive rules by putting forward various justifications; however, even if some of them were accepted by the Court, the Member States could still fail the proportionality test. The last section will deal with this topic.

3.2 The Impact of the Free Movement of Services

3.2.1 Introduction

Defining the notion of services[2] is aimed at assessing the extent to which the internal market rules apply to welfare services. The lack of any legislative initiative to clarify the status of these services is substituted by ECJ case-law.

The increasing mobility of the population has challenged the principle of territoriality around which health and education systems are organised. While traditionally the state was in charge of the provision of health and education services to its citizens, today the creation of the internal market, leading to the expansion of the borders of national markets, has led to a need to change the outdated organisation of health and education systems. Access to health and education are considered to be fundamental rights of citizens and the provision of these services must take into account the European dimension of the market, thus requiring the provision of these services throughout the territory of the European Union. Access to these services for those who avail of their rights to move freely within the European Union must be ensured and European Union policy through the Court's rulings aims at removing any existing obstacles to free movement. Different

[2] For a definition of the concept of service see: Davies 2002, 2006; Hartzopoulos VG 2002, pp. 683–729, 2002a; Van de Mei 1998, p. 277; Fuchs 2002, p. 536.

systems with different social, economic, institutional and political backgrounds have to adapt to the new common realities created by the common market.

The provision of these services at the European Union level would be ideal from a single market perspective; however, complicated problems related to the organisation, financing and provision of these services may prove insurmountable obstacles. Nonetheless, the European Union objective of having obstacles to trade removed and led to a series of judgements by the Court where, by interpreting the free movement rules, health services were caught by the market rules. An obvious conflict between economic and social problems took shape.

The European Union policy developed by the Court made it clear that health services are covered by internal market rules. The question is to what extent the economic rules of the internal market apply to the fields of health, health insurance and education, affecting the principles that were the basis of the construction of the welfare state.

The aim of defining the concept of service is to determine what falls under the free movement rules and to what extent. If the European Union cannot offer a balance between the social and economic through this definition, then the problem of justifications will be raised.

3.2.2 Defining the Notion of Services: Are Health, Health Insurance and Education Services Within the Scope of the Treaty?

3.2.2.1 Health and Education: Specific Characteristics

Health and education are services provided under particular conditions that require state intervention. Access for everyone to health or education services is vital, which is why public authorities were entrusted with the task of providing these services. The state's responsibility in ensuring access to education or health has not been changed (the state has a crucial responsibility in educating future generations or providing access to health), but the way these obligations are fulfilled has changed. If initially the state was the only provider of these services, economic reasons required that the efficiency of these services be improved, and thus the performance of these services was entrusted to private undertakings or to public–private partnership. There are several forces that determined Member States to transfer the burden of responsibility to private undertakings or private–public partnerships: budgetary constraints—the state cannot keep up with the high pace of cost increases; increasing competition compelling greater efficiency; European policy—forcing the elimination of all regulatory burdens raised by state; and international competition—forcing Member States to rethink their policies in order to become competitive at the international level. Exposed to these pressures, the role of the state has shrunk.

However, because health and education are universal services[3] and have the characteristics of market failure[4] (the market cannot deliver services to consumers efficiently), public authorities are sometimes compelled to use different protectionist and restrictive measures to ensure their provision: financial aid, granting of special or exclusive rights for their provision, creation of compensation funds, tax exemptions, etc. All these measures enter into conflict with European Union law and have the effect of partitioning the market or distorting competition. The question that has to be addressed is whether these services fall under the scope of European Union law, and if yes, how the market mechanisms and public service missions should be balanced.

Welfare services are meant to serve the citizen, they contribute to the improvement of the quality of life and it is for this reason that the providers of these services are subject to specific obligations,[5] and sometimes state intervention for the fulfillment of those obligations, especially since the state is ultimately responsible for the provision of these services.

The object of healthcare services is the protection of human life and the prevention of dangerous disease constituting a threat requiring rapid and effective intervention. The vital character of the health services qualifies them as universal services, implying that they must be provided continuously, at an equal quality and at an affordable price throughout the whole territory, thus requiring great expenditure. The importance of health services causes them to be strictly regulated, starting with the regulation of the doctor's profession and all additional essential personnel, and continuing with the organisation of the health system and its finance. Another specific characteristic of health services is the presence of a large infrastructure and the need for constant adaptation to technological development. The social character and great expenditure necessary for the survival of the health system require state intervention in the area, as the market will fail to provide this service universally.

'Education and training are traditionally viewed as part of national social policies because they are linked, via employment, to the role of the state in providing social protection for those who are unable to provide for their needs. […] In addition, education plays a 'state-building' function, in the sense of promoting national identity and a sense of civic belonging and hence obligation to the state'.[6]

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[3] 'The concept of universal service refers to a set of general interest requirements ensuring that certain services are made available at a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price' Cf. Article 3(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51.

[4] Akerlof 1970, p. 488.

[5] These obligations are identified in the Green paper on services of general interest, COM 2003 270 final.

[6] Hervey 1998b, p. 109.

If the market fails to provide these services, the state remains responsible and must ensure their provision. The importance of ensuring the provision of universal services is recognised at the European Union level, and European Union law allows Member States to take all necessary measures for the fulfillment of universal service obligations.

'A number of services of general interest are characterised by a continuity requirement, i.e. the provider of the service is obliged to ensure that the service is provided without interruption.'[7]

The satisfactory quality of the service provided should be ensured throughout the territory. In the field of health it is important that patients are guaranteed good quality services, especially since the service provided concerns human life. 'In areas in which the provision of a service is entrusted to a third party, the establishment of quality standards by public authorities is often indispensable in order to ensure that public policy objectives are met.'[8]

In order to guarantee high quality throughout the territory, the provisions of health and education services is subject to strict regulations. For example in the field of health access to the market is strictly regulated; the functioning of hospitals is subject to state supervision, the profession of doctor is strictly regulated.

> In discussing the question of quality of service, it is important to bear in mind that there is a trade-off between the quality and the cost of a service. It would be inefficient, for example, for a public authority to impose a costly obligation to provide a very high quality of service when consumers and users would prefer a lower but satisfactory quality at a lower price. Furthermore, the imposition of quality standards might be unnecessary in markets where there is effective competition, provided that consumers and users are able to make an informed choice between competing service providers. This emphasises the role for regulators in ensuring that adequate and accurate information is available to users and consumers.[9]

Health and education services should be offered at affordable prices. Whether you can afford good quality goods or not does not have the same significance as whether you can afford access to healthcare when you are in need. It is in the general interest to ensure that anyone can afford access to medical care. It is a public duty to ensure the education and training of the labour force, which ultimately plays an important role in the development and the competitiveness of national economy.

There may be people who, due to financial difficulties, may not be able to benefit from health services, which is why it is the state's responsibility to organise the healthcare system in such a way as to guarantee access for everyone. Therefore, within the organisation of healthcare and social insurance the element of solidarity is always present. 'Application of the principle of affordability helps to achieve economic and social cohesion within the Member States'.[10]

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[7] Green paper on services of general interest, COM 2003 270 final.

[8] Ibid., p. 38.

[9] Ibid.

[10] Ibid.

All these special characteristics distinguish these services from purely-economic services.

3.2.2.2 The Court's Interpretation of the Notion of Service: A Step-by-Step Approach

The special characteristics displayed by health and education systems could suggest the conclusion that they should be considered outside the scope of the free movement rules; Member States should be in charge of their finance, organisation and provision and no outside interference is desired. However, as stated in Webb,[11] the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement. Do they fall within the scope of the Treaty and to what extent?

Article 57 TFEU (Article 60 EEC, Article 50 EC) provides that 'Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'.

The text of the Treaty provides two elements that will determine the existence of a service within the meaning of the Treaty: the existence of remuneration and secondly the lack of other provisions relating to the free of movement for goods, capital and persons that may govern the services.

Davies[12] states that in deciding whether Article 56 TFEU (ex Article 49 EC) applies, the social importance of the services, the motives or the character of the provider or recipient or payer are not decisive. What is important is the use of market behaviour.

The removal of barriers between Member States led to the increasing mobility of people, and the territory of the internal market—due also to faster means of transportation—has become the equivalent of a national market. Access to health and access to education are considered fundamental rights that accompany the individual everywhere. Individuals cannot be refused access to healthcare when needed, or individuals should be able to avail of their right to free movement and receive health treatment in another Member State if they consider the treatment as being more effective. However, the complicated organisation and provision of health and education services can be an impediment in treating the European Union market as a national market. Despite these important obstacles, the European Court of Justice set itself on a road to ensuring the provision of these services throughout the European Union's territory, thus putting consumer protection at the core of its policies.

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[11] Case C-158/96 *Raymond Kohll* v. *Union des caisses de maladie* [1998] ECR I-1831, para 20; Case 279/80 *Webb* [1981] ECR 3305, para 10.

[12] Davies 2002, p. 27.

It is interesting to see the evolution of European Union policy with regard to these welfare services and to see how, starting from ensuring access to these services to people moving within the internal market, the European Union has gone a step further and become indirectly involved in influencing the organisation of these services. The lack of clarity relating to the extent to which internal market rules apply to these services allowed the European Union to extend its competences and to indirectly influence the national health and education systems.

Though the special characteristics displayed by the health and education systems suggest that they should be considered outside the scope of the free movement rules, the Court's practice has nonetheless revealed a contrary position.

A series of cases related to health laid down the European Union's position with regard to health services. These cases touched the subject of health services by addressing the problem of the recipient of services.

In a case from an incipient phase when the European Union was involved in the process of defining what the freedom of services encompasses, *Luisi &Carbone*,[13] the Court decided that the right to go to another Member State and receive a service is also included under the rights granted by the free movement of services provisions, even when the persons are tourists who travel for the purpose of receiving medical treatment, or persons who travel for the purpose of education or business.[14] People travelling abroad for the purpose of education or medical treatment should not be obstructed by any restrictions. The restrictions in *Luisi & Carbone* were related to payment restrictions, thus the ruling in this case did not signal any warning of what the future would hold.

In *Grogan*[15] the Court decided that termination of pregnancy is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity.

In *Decker*[16] the case involved the free movement of goods provisions. A Luxemburg national asked his insurance to fund the reimbursement of the price of a pair of spectacles which he purchased from an optician in Belgium. The Court ruled that the national rules under which the social security fund refused to reimburse the costs of the purchase made abroad was considered a barrier to the free movement of goods.

The *Kohll*[17] case came closer to the national health systems. Member States were confronted with a situation where their health insurance systems had to pay for treatment provided abroad. It was considered to be 'the first landmarks in a series of important recent decisions concerning the right to cross-border medical

[13] Joined Cases 286/82 &26/83 *Luisi & Carbone* [1984] ECR 377.

[14] Ibid., para 16.

[15] Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd* v. *Stephen Grogan and others*, [1991] ECR I-4685, para 18.

[16] Case C-120/95 *Nicolas Decker* v. *Caisse de maladie des employés privés* [1998] ECR I-1831.

[17] Case C-158/96 *Raymond Kohll* v. *Union des caisses de maladie* [1998] ECR I-1931.

care and the free movement of patients in the European Union'.[18] This ruling obviously challenged the traditional organisation of health systems around the principle of territoriality. According to this principle, people receive medical care from health providers established in a national territory and access abroad for the purposes of medical care is very limited and subject to authorisation from the insurer.

The *Kohll*[19] case dealt with a request for authorisation to receive treatment from an orthodontist established in another Member State. Mr Kohll, a Luxemburg national, had requested authorisation for his daughter, who was a minor, to receive treatment from an orthodontist established in Germany. His request was rejected on the grounds that the proposed treatment was not urgent and that it could be provided in Luxemburg. A preliminary question was addressed to the Court asking whether Articles 59 and 60 EEC should be interpreted as precluding rules under which reimbursement of the cost of benefits was subject to authorisation by the insured person's social security institution if the benefits were provided in a Member State other than the State in which that person resided. European Union law was seen as a potential source of protection for patients' rights.

In analysing the application of the free movement provisions to the field of social security, the Court diplomatically stated that European Union law did not detract from the powers of the Member States to organise their social security systems, quoting its rulings in *Duphar*[20] and *Sodemere*.[21] After assuring Member States of the European Union's non-interference in the organisation of their social security systems, the Court, quoting its previous ruling in *Webb*,[22] stated clearly that the special nature of certain services did not remove them from the ambit of the fundamental principle of freedom of movement.[23] The Court ruled that treatment provided by an orthodontist established in another Member State, outside any hospital infrastructure, was regarded as a service within the meaning of Article 60 of the Treaty (now Article 57 TFEU). Even if the national rules at issue did not deprive insured persons from receiving treatment from a service provider established in another Member State, by requiring prior authorisation or by refusing reimbursement of costs where authorisation was not obtained, the national measures had the effect of deterring people from receiving medical treatment abroad, thus infringing the free movement provisions.[24]

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[18] Cabral 2004, p. 674.

[19] For some comments on this case see Giesen 1999, p. 841; Cabral 1999, p. 387; Van de Mei 1998, p. 277; Fuchs 2002, p. 536; Bayens 1999, p. 6.

[20] Case 238/82 *Duphar BV and others* v. *The Netherlands State* [1984] ECR 523.

[21] Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl* v. *Regione Lombardia* [1997] ECR 3395.

[22] Case 279/80 *Webb* [1981] ECR 3305, para 10.

[23] Case C-158/96 *Raymond Kohll* v. *Union des caisses de maladie* [1998] ECR I1931, para 20.

[24] Ibid, para 34.

This ruling, deciding that free movement provisions apply, was handed down in relation to treatment provided outside hospital infrastructure and in a health system based on reimbursement. Fears were expressed after this judgement that if it were extended to cases where healthcare were provided through benefits-in-kind, then the right of Member States to organise their social security systems would be affected.[25]

The *Geraets-Smits*[26] case is the next step in a series of cases brought before the Court that determined to what extent the free movement of services applies to health services. This time the case dealt with a system where health services are provided as benefits-in-kind. In the Netherlands, the law regarding sickness insurance schemes established a system of benefits under which an insured person was entitled free treatment rather than reimbursement of the costs incurred. The laws were based on a system of agreements made between health insurance funds and providers of healthcare. Where there was a need for medical treatment outside the Netherlands (as in that case), the law required prior authorisation subject to the fulfillment of two conditions. Firstly, the treatment in question did not qualify for a reimbursement if it was not sufficiently well recognised in scientific circles or according to current thinking in the Netherlands, was regarded as experimental. Secondly, in order to qualify for reimbursement, it was necessary to consider the methods of treatment available in the Netherlands and ascertain whether adequate treatment could be available without undue delay. The case dealt with requests for treatment abroad of two Dutch residents, Mrs Geraets-Smits and Mr Peerbooms. Mrs Geraets-Smits suffered from Parkinson's disease and undertook treatment in Germany. When she requested the reimbursement of the costs incurred, she was refused on the grounds that satisfactory treatment could have been obtained in the Netherlands. Similarly, Mr Peerbooms lapsed into a coma following a traffic accident and was transferred to Austria where he received a treatment which he could not have received in Netherlands. He was refused reimbursement of the costs incurred. In the questions addressed to the Court, the national court asked whether Articles 59 and 60 of the Treaty were to be interpreted as precluding legislation in the Member States that made the reimbursement of the costs of care provided in a hospital established in another Member State conditional upon prior authorisation by the sickness insurance fund with which the insured was registered.

This case was slightly different from *Kohll*, since the system to which Treaty provisions were supposed to apply was a social security system based on benefits-in-kind. The fear was that the Treaty provisions on the free movement of services could apply to systems based on benefits-in-kind and thus disturb the financial equilibrium of the services and interfere with the organisation of health systems. The case was also different because it involved treatment provided within the

[25] Gobrecht 1999, pp.16–18 http://www.lse.ac.uk/collections/LSEHealthAndSocialCare/pdf/eurohealth/vol5no1.pdf.

[26] Case C-157/99 *B.S.M. Geraets-Smits and Stichting Ziekenfonds VGZ*, [2001] ECR I-5473; Steyger 2002, pp. 97–107.

hospital infrastructure, thus permitting the argument that the medical treatment could be considered a service within the scope of the Treaty.

The Court reiterated its statement from previous rulings that European Union law did not detract from the powers of the Member States to organise their social security systems and that it was up to the Member States to determine the conditions governing the right or duty to be insured with a social security scheme and the conditions for entitlement to benefits. However, the Court stated that Member States must comply with European Union law when exercising those powers.[27]

A number of governments argued that because the services were provided in a hospital context and as benefits-in-kind, they should not be considered as services within the meaning of the Treaty. The German Government argued that the patients could not decide for themselves the content, type and extent of the services received and the price they would pay, and consequently, medical care services did not fall within the sphere of the fundamental economic freedoms.[28]

In answering the problem regarding the fact that the service was provided in a hospital environment, the Court stood by the position it had taken in previous cases,[29] that there was no need to distinguish between care provided in a hospital environment and care provided outside such an environment.

Furthermore, in answering the claim that the services were not services for the purposes of the free movement rules because they were provided in the context of a sickness insurance scheme based on benefits-in-kind, the Court stated that the special nature of certain services did not remove them from the ambit of the fundamental principle of freedom of movement, and therefore, social security rules did not exclude the application of Articles 56, 57 TFEU (ex Articles 59 and 60 of the EEC Treaty). If a medical service was provided in one Member State and paid for by the patient, it should not cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment was applied for under another Member State's sickness insurance legislation, which happened to be one offering benefits-in-kind.[30] The fact that the system involved was one of benefits-in-kind, where someone other than the recipient of care paid for the service, was irrelevant in the eyes of the Court. As stated in *Bond van Adverteerders,*[31] Article 60 of the EEC Treaty (now Article 57 TFEU) did not require that the service be paid for by its beneficiaries. Consequently, the Court found that the payment made by the sickness insurance fund, even if it was a flat rate, was consideration for the hospital services.

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[27] Ibid, paras 44–46.

[28] Ibid., para 51.

[29] Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, para 16; Society for the Protection of Unborn Children Ireland, para 18, concerning advertising for clinics involved in the deliberate termination of pregnancies; and Case C-158/96 *Raymond Kohll* v. *Union des caisses de maladie* [1998] ECR I-1831, paras 29 and 51.

[30] Case C-157/99 *B.S.M. Geraets-Smits and Stichting Ziekenfonds VGZ* [2001] ECR I-5473, para 55.

[31] Case 352/85 *Bond van Adverteerders and Others* [1998] ECR 2085, para 16.

The Court did not go into further analysis to determine whether hospital services actually involve more costs than the simple provision of a service and that the financing of a hospital was more complicated, requiring state subsidy.

The next case, *Müller-Fauré*[32] also dealt with requests for the reimbursement of the costs incurred by treatment obtained abroad. Both cases again involved the Dutch health insurance system. Ms Müller-Fauré underwent dental treatment in Germany and afterwards was refused the reimbursement of the costs of her medical treatment. In the *Van Riet* case, Ms Van Riet underwent arthroscopy abroad (in Belgium), where examination was carried out much sooner than in the Netherlands, but was refused reimbursement for the treatment on grounds that the treatment could have been obtained in the Netherlands within a reasonable period. The Court, in answering the preliminary question addressed to it—whether Articles 56, 57 TFEU (ex Articles 59 and 60 EEC) apply to medical services such as those in question and whether the authorisation required for undergoing medical treatment aboard was contrary to Treaty provisions on free movement—reiterated the judgement in the *Geraets-Smits* case and ruled that the fact that the service was provided within a hospital infrastructure and the fact that the system involved offered benefits-in-kind were both irrelevant.

In *Watts*[33] the Court also had to consider the refusal of reimbursement of medical costs incurred abroad. This time the case concerned the United Kingdom NHS. The NHS also provided itself with a mechanism for handling finite resources, using a system of waiting lists where priority is granted to different treatments having regard to individual cases. Mrs Watts was suffering from osteoarthritis in both hips and needed a hip replacement. She applied for authorisation to go abroad to have bilateral hip surgery performed, but her application for an E-112 Form was refused on the grounds that her treatment has been classified as 'routine' and that the treatment could be provided in the Member State of residence 'within the time normally necessary'. After she consulted a specialist in France it was determined that her situation had deteriorated and she decided to have an operation in France. When she returned home she sought judicial review of the decision not to authorise treatment abroad and the reimbursement of medical costs.

The Court found that Article 56 TFEU (ex Article 49 EC) applies to patients travelling abroad to receive medical care, regardless of the organisation of the national health system from which reimbursement is claimed. The Court determined that it was not necessary to determine whether the provision of hospital treatment in the context of NHS was a service within the scope of the Treaty. What counted was the fact that the patient went abroad and received medical treatment for which she paid.[34] Therefore, even the NHS prioritisation systems were affected, since they now found themselves in the situation of having to create mechanisms for the reimbursement of healthcare costs incurred abroad.

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[32] Case C-385/99 *V.G. Müller-Fauré* [2003] ECR I-4509.

[33] Case C-372/04 *Watts* [2006] ECR I-04325; see also Cousins 2007, pp. 183–193.

[34] Ibid., paras 90–91.

The Court has adopted a different position in education than in health cases. In *Humbel*[35] the Court had to decide whether Article 59 TFEU (ex Article 49 EC) of the Treaty precluded the charging of a *minerval* to students who were not nationals, which home nationals were not required to pay.

In answering the question the Court started by defining the concept of services. Then it stated that the essential characteristic of remuneration lay in the fact that it constituted consideration for the service in question and was normally agreed between the provider and the recipient of the service.[36] It continued by stating that the characteristic was absent in the case of courses provided under a national education system. In providing education services the State did not seek to engage in gainful activity, but was fulfilling a duty towards its population. Moreover, the system was financed by the state and the fact that pupils or their parents sometimes paid enrolment fees, did not necessitate the conclusion that it was not publicly funded because those fees were just a contribution to the expenses of the system.[37]

The *Wirth*[38] case is particularly significant by virtue of the questions it addresses. The case dealt with an application for an educational grant in Germany submitted by Mr. Wirth, who was a German national who wanted to pursue a course in jazz saxophone in the Netherlands. He contended that he was obliged to pursue his training abroad because there were no places available at a German establishment. Under German law,[39] a German national permanently resident in a foreign State could receive an educational grant if the particular circumstances of his case justify it. However, Wirth did not fulfill the condition of being permanently resident in another Member State. However, the Verwaltungsgericht Hannover observed that until that law was amended, that grant could have been awarded if a student wished to study abroad, if that training could not be pursued in Germany and if the applicant had adequate linguistic knowledge.

The Court was asked to decide whether the pursuit of studies at an establishment of higher education in another Member State constituted the receipt of a service and whether according to Article 62 EEC (repealed by EC Treaty) it might not be subject to any restrictions. The question of whether the German law constituted a restriction within the meaning of Article 62 of the EEC Treaty (repealed by EC Treaty) was addressed. In answering this question the Court reiterated its judgement in *Humbel* and decided that education services did not fall within the ambit of free movement rules, since education was not an economic service. The Court stated, however, that education services were not economic as long as

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[35] Case 263/86 *Belgian State* v. *René Humbel and Marie-Thérèse Edel* [1988] ECR 5365.

[36] Ibid., para 17.

[37] Ibid., paras 18, 19.

[38] Case C-109/92 *Stephan Max Wirth* v. *Landeshauptstadt Hannover* [1993] ECR I-6447.

[39] Bundesausbildungsfoerderungsgesetz (Federal Law on grants for training and higher education, BAfoeG) of 26 July 1971 (BGBl. I, p. 1409), as amended by the Zwoelftes Gesetz zur Änderung des Bundesausbildungsfoerderungsgesetz (12th law amending the BAfoeG) of 22 May 1990 (BGBl. I, p. 936).

they were essentially financed out of public funds.[40] What is meant by essentially, i.e. how much public finance was required to be present in order not to apply free movement rules was left uncertain. The German law could not be considered as a restriction to free movement, since education services were not within the scope of the free movement rules.

Another interesting question addressed in this case was whether the principle of non-discrimination precluded a Member State from awarding educational grants to its nationals only if they pursued studies in their home state and not if they pursued studies abroad. The Court refused to answer this question by stating that at the then current stage in the development of European Union law, assistance given to students for maintenance and for training fell outside the scope of the Treaty.

However, in higher education there is space for economic elements. In some Member States higher education courses are provided by private universities. As Davies[41] notes, many universities, including public ones, charge fees for postgraduate courses and this is done with the aim of making profit. This can be considered as private funding. Moreover, parents can send their children to foreign schools. Davies makes an interesting point in anticipating a future case brought before the ECJ,[42] where a Member State refuses to export a financial grant and finds this refusal considered as an obstacle under the free movement provisions.[43]

Dougan[44] also addresses the question of the export of maintenance grants and other forms of student financial support from the student's home State. He draws a parallel with the export of benefits in the field of social security pursuant to Regulation 1408/71.[45] He considers that the loosening of territorial restrictions on student financial support is part of the Community programme under Socrates.[46] So far there has been no European Union secondary legislation to impose an obligation on national authorities to allow the payment of fees for courses pursued abroad, nor for the payment of maintenance grants for courses followed outside a national territory. Before the Court handed down its rulings regarding the exportability of grants, the question of whether students would be able to use free movement rules in order to force Member States to pay for their studies abroad

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[40] Case C-109/92 *Stephan Max Wirth* v. *Landeshauptstadt Hannover* [1993] ECR I-6447, para 16.

[41] Davies 2002, p. 27.

[42] Ibid., 27.

[43] Davies 2006, 2005, p. 227 http://www.jeanmonnetprogram.org/papers/06/060201.html; Van der Mei 2003; Dougan M 2005, p. 943.

[44] Dougan (2006).

[45] For the last official consolidated version of Regulation 1408/71, see [1997] OJ L28/1; Regulation 1408/71 was amended by Regulation 883/2004/EC on the coordination of social security systems [2004] OJ L166/2; amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 amending Regulation (EC) No 883/2004 on the coordination of social security systems, and determining the content of its Annexes [2009] OJ L 284/43.

[46] Dougan 2006.

was still being asked. The *Morgan* and *Gootjes Schwarz* cases answered to the affirmative.

If a student goes to another Member State and receives education services at a college or university for which he pays and then asks for reimbursement of the costs from his Member State, the situation would appear to be similar to the health cases. There is an identifiable payment, the service was consequently provided for remuneration and it can be argued that there is an obstacle to the free movement of services. In *Wirth* the German legislation had provisions granting educational grants to students going abroad for study, but with the condition that the course followed was not available in Germany. This bears a resemblance to the authorisation procedure for travelling abroad in health cases. In *Wirth* it was decided that education is not a service, but it was conceded that if the education service were financed essentially out of private funds, then it is a service and the free movement rules accordingly would apply.

The gates are opened to several hypobook and interpretations. Increased mobility of students is desired and several efforts to harmonise education systems have been made—for example the creation of the European Credit Transfer System and the adoption of a basic two stage (undergraduate and graduate) degree cycle. Greater mobility is desired for the promotion of the European idea and to increase the global competitiveness of European universities. The idea of exporting the financial support from the home state would even prove to be just another step towards the establishment of the internal market.

This sensitive problem was tackled by the Court in a few cases. *Gootjes Schwarz*[47] dealt with a German national living in Germany who educated his children in Scotland at the Cademuir International School. The German authorities refused him tax relief on his school fees because his children were attending a school in another Member State, and not in Germany. The provisions of the German law were considered to be contrary to European Union law. Paragraph 10(1)(9) of the Law on Income Tax states that a taxpayer enjoys tax relief with respect to the school fees paid for their children if the child pursues education at a substitute school approved by the State or authorised by the law of the Land, in accordance with para 7(4) of the Basic Law, or at a complementary school for general education recognised by the law of the Land. Paragraph 7(4) of the Basic Law of the Federal Republic of Germany of 23 May 1949 (Grundgesetz für die Bundesrepublik Deutschland, 'the Basic Law') provides:

> The right to set up private schools is guaranteed. Private schools as substitutes for public schools need the approval of the State and are governed by statutes of the State. Such approval is to be given if private schools are not inferior to public schools in their teaching aims and arrangements and the training of teachers, and separation of the pupils according to the means of their parents is not promoted. Approval is to be refused if the economic and legal standing of the teachers is not adequately secured.[48]

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[47] Case C-76/05 *Marga Gootjes-Schwarz* v. *Finanzamt Bergisch Gladbach* [2007] ECR I-6849.

[48] Ibid., para 3.

A preliminary question was referred to the Court enquiring whether Articles 21 (1), 45, 49 and 56 TFEU (ex Articles 8a (1), 48, 52 and 58 EEC) 'preclude legislation of a Member State which enables taxpayers to claim school fees paid to certain private schools established in national territory as special expenses giving a right to reduction of income tax, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State'.

The Schwarzes considered that free movement of services should have applied to this case. They contended that the education provided by Cademuir School was a service because it was a remunerated activity. They also contended that the German schools, which were subsidised, also acted in the capacity of providers of services and that the amount paid to the German schools might be higher than that paid to schools abroad.

The German government built its argument starting from the premise that Article 21 TFEU (ex Article 18 EC), Article 45 TFEU (ex Article 39 EC) and Article 49 TFEU (ex Article 43 EC) did not apply to such a situation. It excluded the application of free movement of services provisions arguing that it was not an economic activity and brought the *Humbel* case to motivate that. Furthermore, recalling the *Wirth* judgement the German authorities argued that even if the courses were essentially financed from private resources, it could not be deduced from the simple private character of financing that a school was carrying out an economic activity. The fact that parents paid fees could not lead to teaching being classified as a service. It continued by stating that it was not clear whether Cademuir School was financed privately or whether it constituted a profit-making establishment.

The Commission considered that this case represented an example of a 'passive' freedom to provide services, since it was the beneficiary of the service that moved. It went further, stating that the fact that the student paid a fee was not enough to qualify her schooling as a service provided for remuneration. Since the remuneratory nature of the services could not be based exclusively on examination of the situation of private schools favoured by the German system, the Commission decided that the applicability of the free movement of services provisions could not be called into question.[49]

Advocate General Stix-Hackl[50] in analysing whether Article 56 TFEU (ex Article 49 EC) applies had to determine whether education was a service. As regards the scope *ratione personae*, Article 56 TFEU (ex Article 49 EC) applied because there was a cross-border element and the individuals could rely on Article 56 TFEU (ex Article 49 EC) even against their own country. As regards the scope *ratione materiae*, AG Stix-Hackl underlined that the issue was the passive freedom to provide services. Could education be qualified as a service for the scope of Article 56 TFEU (ex Article 49 EC)? He recalled the *Humbe*l and *Wirth*

[49] Ibid., para 30.

[50] Opinion of Advocate General Stix-Hackl delivered in Case C-76/05 *Marga Gootjes-Schwarz* v. *Finanzamt Bergisch Gladbach* [2007] ECR I-6849.

judgements and reached the conclusion that what had to be determined was whether the financing of the school came from private funds. The fact that the students were paying fees could not lead to the conclusion that the financing was essentially private. He suggested that the national courts should determine this aspect, since there was insufficient information. Analysing the *Watts* case, AG Stix-Hackl concluded that this case led to a far-reaching liberalisation requirement. Furthermore, such a liberalisation requirement would be difficult to reconcile with the Court's case-law on the notion of an undertaking since that case-law takes into consideration the existence of solidarity. He concluded that on the basis of the decision in *Watts,* however, Article 56 TFEU (ex Article 49 EC) is applicable.

In deciding whether Article 56 TFEU (ex Article 49 EC) applied, the Court had to determine whether a service was provided for remuneration. It recalled its rulings in *Smits and Peerbooms*, *Humbel*, *Danner*, *Skandia* and *Ramstedt.* In determining whether the service provided by the schools abroad was an economic service, the Court referred to its previous rulings where it was found that the courses offered by some establishments forming part of a system of public education and financed entirely by public funds did not fall within the ambit of Article 50.[51] In this case, where public financing is found, the State carried out its tasks towards population in the social, educational and cultural field. However, the judgement in *Wirth*[52] stated that Article 50 EC applied where the courses offered are financed essentially from private funding.

It noted that the fee paid to the Cademuir School was around 10000 DM, which was higher than the fee charged by the German schools. The Court decided that it was up to the national court to decide whether that school was financed essentially from private funds.

It added that it was irrelevant whether the schools in Germany provided services within the meaning of Article 57 TFEU (ex Article 50 EC). It recalled the judgement in *Watts* and ruled that Article 56 TFEU (ex Article 49 EC) was applicable to facts such as those in the proceedings: specifically, where a person sent his children to a school in another Member State to receive education, provided that the school was essentially financed from private funds. It left the national court to verify that this condition was met.

It is evident that there is a slight difference between this judgement and the *Watts* judgement. In *Watts* it was considered that the service in question was a service within the meaning of Article 56 TFEU (ex Article 49 EC) because a patient going abroad to receive medical care pays for that service but here, the fact that the parents paid for the schooling of their children was not sufficient to qualify it as a service; the point required further investigation to see whether the institution where the education is received is privately or publicly funded.

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[51] Case 263/86 *Humbel* [1988] ECR 5365.

[52] Case C-109/92 *Stephan Max Wirth* v. *Landeshauptstadt Hannover* [1993] ECR I-6447.

Another similar case was *Commission* v. *Germany*,[53] where the Commission sought to have the Court rule on the German laws that excluded fees for attending a school abroad from the tax deduction. The ruling was pronounced on the same day as *Gootjes Schwarz*, and in determining whether a service was delivered as understood under the Treaty, the Court required a determination of whether the education service in the establishment abroad was essentially provided for remuneration.

Another case along the same lines was *Morgan*,[54] which addressed the joined cases of Ms Morgan and Ms Bucher who both brought a challenge against a German provision as contrary to the Treaty. Ms Morgan was a German national who had completed her secondary education in Germany. She continued her studies in applied genetics at the University of the West of England in Bristol. She applied in Germany for an education and training grant and claimed that the courses in genetics were not offered in Germany. Her application was however rejected on grounds that she did not fulfill the criteria necessary to receive such grant. According to German law, a number of conditions must be fulfilled in order to benefit from a grant to study abroad.

Paragraph 5(1) of the Bundesgesetz über individuelle Förderung der Ausbildung—Bundesausbildungsförderungsgesetz (Federal Law on the encouragement of education and training; 'the BAföG') states:

> An education or training grant shall be awarded to students referred to in para 8(1) where they attend an education or training establishment abroad each day from their permanent residence in Germany. The permanent residence within the meaning of this Law shall be established at the place which is the centre of interests, not only temporarily, of the person concerned, irrespective of the intention to become permanently established; a person who resides at a place only for education or training purposes has not established his permanent residence there.[55]

Paragraph 5(2) of the BAföG states that students who have their permanent residence in Germany shall be awarded a grant to study abroad if they have attended a German education or training establishment for a period of at least one year and they have to continue education and training started in Germany.

It was considered that Ms Morgan had not complied with this requirement, since she had not started her studies in Germany and she had not studied in Germany for at least one year.

The other case concerns also a German national, Ms Bucher, who started her studies in ergotherapy at the Hogeschool Zuyd in Heerlen (the Netherlands). She lived with her parents in Bonn then moved to Duren, where she registered her principal residence, and from there travelled to Heerlen for study purposes.

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[53] Case C-318/05 *Commission of the European Communities* v. *Federal Republic of Germany* [2007] ECR I-6957.

[54] Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan* v. *Bezirksregierung Köln and Iris Bucher* v. *Landrat des Kreises Düren* [2007] ECR I-9161.

[55] Ibid., para 3.

She also applied for an education and training grant for her studies and was refused on grounds that the conditions laid down in para 5(1) of the BAföG and para 5(2) of the BAföG were not met.

A preliminary ruling was addressed to the ECJ asking whether Articles 20 and 21 TFEU (ex Articles 17 and 18 EC) preclude conditions such as those contained by the German law in para 5(1) and 5(2) of the BAföG. The Court was accordingly asked to determine whether the free movement of citizens precluded the refusal of the award of a study grant for courses undertaken abroad on the grounds that the course does not constitute a continuation of studies pursued for at least one year at an education or training establishment located in the home member state. It was also asked whether the free movement of citizens prohibited the refusal of a grant to study abroad to a home national on the grounds that she resided at the border only for education and training purposes and that the place was not her permanent residence. The similarity of this case and *Gootjes Schwarz* is striking. However, the case was not addressed from the point of view of Article 56 TFEU (ex Article 49 EC) and the ECJ solved the case using the citizenship article. Advocate General Ruiz-Jarabo Colomer[56] considered that the case should have been regarded not only from the perspective of the free movement of citizens, but also from the perspective of the free movement of services. He noted a resemblance between students going abroad to study and patients going abroad to receive medical treatment.

3.2.2.3 Distinguishing the Free Movement of Services from Other Treaty Rules

Services will be considered as services within the meaning of the Treaty as long as they are not governed by other fundamental freedom provisions. An important distinction that has to be drawn is that between services and establishment, since the rules on establishment require a service provider to comply with national rules. This is all the more important in the health and education sectors, since they are heavily regulated, meaning that national rules could otherwise be avoided by invoking the application of rules on services.

The distinction between the two fundamental freedoms was drawn in *Gebhard*,[57] where the Court defined the concept of establishment as follows: 'The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a European Union national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social

[56] Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered in Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan* v. *Bezirksregierung Köln and Iris Bucher* v. *Landrat des Kreises Düren* [2007] ECR I-9161.

[57] Case C-55/94 *Reinhard Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 25.

interpenetration within the European Union in the sphere of activities as self-employed persons'.

The difference between services and establishment is that services are provided on a temporary basis. In the same case the Court laid down guidelines regarding the temporary nature of a service. '…the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question'.[58]

In *Sodemare*,[59] a profit-making company established in Luxemburg set up more for-profit companies in Italy, in order to run homes for the elderly in that country. Under Italian law on the reorganisation and planning of social welfare services of 1980, the running of the system is entrusted to establishments directly managed by municipalities and by the bodies responsible for local services, and to those operating under the auspices of other public bodies which have contractual arrangements within the meaning of the 1980 Law. Private undertakings may also participate in the running of the social welfare system. In order to participate in the planning and organisation of the local and welfare centres, private operators must apply for a certificate and must fulfill one condition—to be non-profit-making.

Sodemare, after unsuccessfully attempting to rely on the rules on establishment in challenging the non-profit requirement, tried to employ the free movement of services rules, arguing that they were providing in their homes for the elderly services for beneficiaries established in another Member State. The Court relied that 'Article 59 of the Treaty does not cover the situation of a company which, having established itself in a Member State in order to run old people's homes there, provides services to residents who, for that purpose, reside in those homes permanently or for an indefinite period'.[60]

Thus the free movement of services rules cannot be relied on when free movement of establishment applies. The free movement of services can be relied on by an undertaking against the State in which it is established if it provides services for people from another Member State, but in the case in question, a national of one Member State was travelling to the territory of another MS and establishing itself there in order to provide services for an indefinite period.

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[58] Ibid., para 27.

[59] Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl* v. *Regione Lombardia* [1997] ECR I-3395.

[60] Ibid., para 40.

3.2.2.4 Remuneration

The principle that remuneration is important in characterising a service as a service within the meaning of the Treaty is reiterated by the Court in a number of cases.[61] The presence of an economic element will trigger the application of the Treaty rules. However, the distinction between economic and non-economic is hard draw.

There are cases where a service is provided by a non-profit organisation, or there are complicated cases where the service is publicly—or partly publicly—funded but the provision is entrusted to private undertakings. There can also be various relationships between the service provider, the service recipient and the payer for the service, and the examples could continue. In these cases it is hard to distinguish an economic from a non-economic service. Moreover, the distinction between economic and non-economic is evolving over time and across jurisdictions.

The distinction between public and private is of no help in identifying the economic or non-economic character of a service, since there are public undertakings that carry out economic activities and private undertakings entrusted with the provision of services in the general interest and which cannot be classified as economic.

Health, health insurance and education services are very difficult cases since they involve social aspects and require State intervention exactly because they are universal services and the market may fail to provide them. These services are increasingly provided through market-like mechanisms and consequently, there is additional confusion in determining the nature of the services.

There are no clear criteria for the distinction between the economic and non-economic nature of services and this leads to legal uncertainty because it is not clear whether a given service falls within the scope of the Treaty or not. What we have so far is a number of decisions of the Court of Justice meant to shed some light onto the subject and some Communications from the Commission regarding services of general interest, where it tries to tackle the problem of health and education.

Is there remuneration present when a patient travels to receive medical care from a doctor? As Advocate General Colomer stated in his Opinion in *Smits and Peerbooms*,[62] traditionally medicine has been practiced by independent professionals. In this case, the doctor has received remuneration for his services. However, due to the importance of healthcare and progress in medicine requiring sophisticated equipment, healthcare has come to be organised in different systems with a large infrastructure, with the State being responsible for the provision of these services. Today, doctors are employed by social security systems, or work as

[61] Case C-20/92 *Hubbard* [1993] ECR I-3777, para 13; Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd* v. *Stephen Grogan and others* [1991] ECR I-4685, para 17; Case C-205/84 *Commission* v.*Germany* [1986] ECR 3755, para 18; Joined Cases C-286/82 and 26/83 *Luisi & Carbone* [1984] ECR 377, para 9.

[62] Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-157/99 *B.S.M. Geraets-Smits and Stichting Ziekenfonds VGZ* [2001] I-05473.

self-employed under contract with health institutions, or work for both social security systems and in private medical practice. Not only is the framework under which the doctors work altered, but the financing of the health system has also changed. There are various ways to finance healthcare—taxation, contributions paid by insured persons and employers, and state subsidies. In a system where the financing is achieved through taxation, the State controls the organisation and finance of the health system and the provision of benefits. In a system where the financing is obtained through contributions from the general population, another actor is present: the sickness insurance funds. We thus have complicated relations between three participants.

When a patient pays for health services and then gets reimbursed, it is clear that a payment was made. When a patient pays contributions to a health insurance fund in order to be entitled to free medical care when he goes to the doctor, the payment relation exists, though only remotely. The sickness insurance scheme to which contributions are made is what pays for the costs of the medical services. When a patient receives free medical care and the relevant payment is made by the State from the treasury, and the State collects tax contributions and provides services through the NHS, it is hard to identify the payment. When a student goes to school and receives education, it is likewise hard to identify any payment. Even if the financing of education is achieved through taxation, it is very difficult to establish a connection between the payment and the service received.

Davies[63] finds clear differences in the welfare arrangements. The first is indicated by the link between the service recipient and payer, which is stronger in the healthcare context. The second difference is indicated by the existence of an identifiable payment related to specific services in the health context. The third difference identified is that the payments in the education case seem more internal to a single system.

In determining whether there is a payment, Davies also analyses whether there are separate institutions that provide and pay for the service and he finds that in the education cases the idea of remuneration is artificial due to funding arrangements where the payer and the provider are the same entity.[64] The degree of separation between the provider and the payer constitutes an important criterion in determining whether there is a service within the scope of Article 56 TFEU (ex Article 49 EC). In the case of the social insurance systems the payer and the provider are easier to identify. In the case of a national health system or education systems, the payer and the provider are integrated. The payment originates from the health insurance fund in the case of the social insurance system and from the treasury in the case of the NHS. However, when a patient travels abroad and receives medical care, he needs to be reimbursed. In this case remuneration is easy to identify and it is irrelevant whether the money to be reimbursed comes from the national treasury or from the health insurance fund. Indeed, because the patient goes abroad and

[63] Davies 2002, pp. 27–41.

[64] Ibid., p. 35; See also Van der Mei 2003 and Flear 2004, pp. 209–233.

receives medical care, the situation is altered in the sense that by changing provider, the patient has made it possible to distinguish between the payer and the provider. There is a clear separation. Had the patient remained to be treated at home, in a NHS-like system, it would be difficult to identify the separation between the payer and provider.

Assessing the link between the payer and the recipient of a service is irrelevant in determining whether there is a service for the purposes of Article 56 TFEU (ex Article 49 EC), notes Davies.[65] The argument put forward by the German government that the recipient was a too passive party does not affect the nature of a service. In analysing the existence of an identifiable payment, Davies concludes that it would be hard to escape the Treaty provisions by cleverly drafting contracts so as to render the identification of the payment difficult.[66]

However, the controversial health and education cases involved the moving of the recipient of the service. In these cases the payment is easily identifiable. In the health cases it was decided that there is a service within the meaning of Article 56 TFEU (ex Article 49 EC) regardless of the organisation of the national health system to which the patient applied for reimbursement. The fact that the patient travelled abroad and paid money for his treatment qualified it as a service. Nevertheless, in the education cases the Court adopted a different approach. In *Gootjes Schwarz*,[67] though parallels to *Watts* can be drawn, the Court held to its judgement in *Wirth* where in order to apply Article 56 TFEU (ex Article 49 EC) to education, it had to be proved that the courses offered were financed essentially from private funding. Even if there had been an identifiable fee paid abroad which was higher than the fee charged by the German Schools, the Court still left it to the national courts to determine whether the schools abroad were essentially funded from private funds.

The question raised is why the Court adopts a different approach in education and health cases. It can be argued that in the case of health, when the bill is issued, the hospital abroad charges the patient a certain price which is equivalent to the costs of the treatment. In the case of education, as a result of the Court's rulings, it is not possible to charge a different fee than the one charged to the nationals, which makes this service less economically viable. If the education services are subsidised, and thus the main source of financing comes from the public purse, education establishment still cannot demand that the whole cost of education be included in the fee charged to foreign recipients because that would infringe the principle of non-discrimination. It would be considered a service within the scope of Article 56 TFEU (ex Article 49 EC) only if the funding of that education service was essentially private money. In *Morgan* the question was not even addressed and the Court decided the case on the basis of Article 21 TFEU (ex Article 18 EC).

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[65] Davies 2002, p. 34.

[66] Ibid., p. 24.

[67] Case C-76/05 *Marga Gootjes-Schwarz* v. *Finanzamt Bergisch Gladbach* [2007] ECR I-6849.

The different approach in health and education cases shows the political sensitivity of the debate around these services. It would be difficult to draw a pattern from the Court's rulings and to state that some criteria were determinant in deciding whether there is an economic service or not when the Court itself has difficulties in making a firm statement. In health cases the remuneration element seems to prevail while in education cases the proportion of public–private funding seems to prevail. The Court was reluctant to take the same determined stance as it did in the healthcare cases. Education is influenced by ideological goals regarding the upbringing of future generations. A declaration that education is a service when a student goes abroad and receives education for which he/she pays would have provoked vehement reactions from the Member States. Instead, the Court has chosen to apply the citizenship article since, ultimately, it aims at offering rights to individuals; the citizenship article is a more legitimate means for this.

3.2.2.5 Public versus Private

Does the distinction between public and private funding make a difference in determining whether there is a service within the scope of Article 56 TFEU (ex Article 49 EC)? A closer look to the education cases would answer this question in the affirmative. In *Humbel* and *Wirth* the Court stated that education is not an economic service since it is essentially funded out of public funds. In these cases the Court underlined the fact that the state was fulfilling its duty towards the population. In order to determine whether there was a service within the meaning of Article 56 TFEU (ex Article 49 EC) in *Gootjes Schwarz*, the Court required a determination of whether the education offered in an institution abroad was essentially funded from the public purse. Therefore, whether the financing was public or private was determinant in deciding whether Article 56 TFEU (ex Article 49 EC) applied.

However, in the health cases the fact that a patient went abroad and received paid-for medical care led to a finding of a service within the meaning of the Treaty. There was no assessment of whether the healthcare received abroad was publicly or privately financed.

This dichotomy could be explained by the fact that the Court wanted to avoid declaring education within the scope of the Treaty. It can also be explained as stated above by the fact that when a patient goes abroad to receive medical treatment there is more room for economic elements than when a student goes abroad to receive education. When a patient goes abroad there is an identifiable payment that covers the costs of his treatment. When a student goes abroad and pays a fee for education, it might not reflect the costs of education. If that education course is essentially funded by the state, the state is fulfilling an obligation towards its citizens and has an obligation not to discriminate against other nationals, thus it cannot require different fees.

Therefore, in education cases this distinction is important in determining whether a service falls within the scope of the Treaty. However, in healthcare cases this distinction does not appear to matter, since there are other elements such

as the existence of an identifiable payment and the separation of institutions that pay and provide the service that have to be taken into consideration. Thus in education cases it is important whether funding is private or public. However, it is irrelevant whether the providers of these services are public or private parties.

3.2.2.6 Hospital and Non-Hospital Services

The distinction between intra-mural and extra-mural care[68] was not found to be relevant by the Court in excluding health from the scope of the Treaty.

The *Kohll* and *Decker* cases were decided with relation to services received in a non-hospital environment. The question was whether hospital services were caught by the scope of free movement rules. The financing of hospitals is more complicated and sometimes involves state subsidies—therefore, the provision of benefits is provided according to the territoriality principle as it is not desired that people who do not contribute should benefit from hospital services.

Advocate General Saggio in the *Vanbraekel*[69] case contends that even if it was established in the *Decker* and *Kohll* judgements that 'the principle that provisions of national law on the provision of services, and on the import and export of products related to the medical sector, do not as such escape the general principle of freedom of movement, that interpretation was not extended to services and products which form an integral part of the national health scheme, services and products which in this case may be part of the organisation and functioning of hospital systems.'[70] He considered that hospital care was removed from the scope of free movement provisions because free movement rules do not apply to services that fall under a national healthcare scheme, organised and financed from the public purse.

However, the Court ruled in *Smits and Peerbooms*[71] that there was not necessary to distinguish between care provided in a hospital environment and care provided outside such an environment.[72]

The fact that hospital care involves high fixed costs, the fact that it involves sophisticated and expensive equipment and would accordingly require special protection was taken into account when applying justifications. The distinction between hospital and non-hospital care was relevant only for the purpose of justifying restrictions.[73] But even so, the Court ruled in *Commission v France*[74] that the main

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[68] For extramural care see: Jorens et al. 2005.

[69] Case C-368/98 *Abdon Vanbraekel and Others* v. *Alliance nationale des mutualités chrétiennes* [2001] ECR I-5363.

[70] Opinion of Advocate General Saggio delivered in Case C-368/98 A*bdon Vanbraekel and Others* v. *Alliance nationale des mutualités chrétiennes (ANMC),* [2001] ECR I-5363, para 17.

[71] Case C-157/99 *B.S.M. Geraets-Smits and Stichting Ziekenfonds VG* [2001] I-05473.

[72] Ibid., para 53.

[73] De Vries 2006, p. 81.

[74] Case C-512/08 *European Commission* v. *French Republic* [2010] nyr.

distinction should be made between services with require high investment and those who do not require such financial investments. There was a fear that insured persons would go abroad to receive hospital care and that the capacity of domestic hospitals would be under-used, while the fixed costs would remain the same, thus undermining the proper functioning of hospitals or of those establishments which invested a lot in expensive equipments. Since the State is responsible for safeguarding health in its territory, the measures it takes to ensure the effective functioning of hospital services, or of services which imply high financial investments, if they are justified, can be accepted even if they disrespect free movement provisions.

3.2.2.7 Social Security

It was contented in *Kohll* that the fact that the national rules in question concern social security, should render the free movement rules inapplicable. The fact that Member States have the power to organise their social security sectors does not automatically remove them from the scope of the free movement rules. In a series of competition law cases[75] it was decided that the activity of health insurance fund entrusted with the organisation of the State social security system 'is not an economic activity and therefore, the organisations to which it is entrusted are not undertakings within the meaning of Article 85 and 86 of the Treaty'.[76]

However, as Advocate General Tesauro[77] remarks, the scope of that case-law is more limited in free movement cases. The fact that the institutions involved in the organisation of social security system were declared as not being economic cannot automatically lead to the conclusion that their activities do not present economic aspects for the purposes of the free movement rules. Only institutions that operate social security schemes based on the principle of solidarity are excluded from the ambit of competition rules. The decision taken in competition cases was meant to allow those institutions to function sheltered from the competitive environment, this being essential for their functioning. However, the same result cannot be presumed for the free movement rules. They aim at removing any discrimination based on nationality. It is for this reason that the conclusion reached pursuant to the free movement provisions was different than the one reached in competition cases. The total removal of social security from the scope of free movement provisions was not seen as a solution, as it was necessary to ensure that the non-discrimination principle applied; whether the proper functioning of the system was endangered, whether there were reasons that required the imposition of barriers to trade, were all issues important in applying justifications.

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[75] Joined Cases C 159–160/91 *Poucet and Pistre* v. *Assurances Generales de France* [1993] ECR I-637.

[76] Ibid., para 19.

[77] Joined opinion of Advocate General Tesauro delivered in Case C-120/95 *Nicolas Decker* v. *Caisse de maladie des employés privés* and Case C-158/96 *Raymond Kohll* v. *Union des caisses de maladie* [1998] ECR I-1831.

Thus, in the competition cases there is an exception regarding social security. However, the same exception is not desired for the free movement of services, because to permit it would result in the maintenance of the principle of territoriality as a relic of the past, raising barriers and allowing discriminatory treatment.

3.2.2.8 Different Organisation Forms

The line of cases in the health and education fields revealed how far the limits of internal market have been expanded. Having the aim of ensuring that the right to free movement is respected, the Court adopted a broad interpretation of what constitutes a service for the purposes of the free movement rules. It can be argued that the interpretations offered by the Court are somehow purposive because national health provisions meant to ensure the proper functioning of the system have been declared subject to free movement provisions in the interests of avoiding market partitioning and to ensure effective cross-border medical care. Fuchs[78] stated that 'in a Europe of the future, cross-border receipt of health care must not be restricted by national policies aimed at isolation'.[79] By subjecting all health insurance systems to the free movement provisions and by forcing health systems to interact with each other, it is perhaps hoped that the harmonisation of health system will occur indirectly.

Different opinions and different positions have been expressed in relation to these cases. It was clear from *Luisi and Carbone* that health services fall within the ambit of the free movement rules. However, it was not clear to what extent Treaty provisions apply. The case-law decided that a service, in order to be a service within the meaning of the Treaty, must be provided for remuneration. The question of whether the free movement of services provisions apply to health services when they are provided in the context of social security schemes was answered positively by the Court. The special nature of the health services could not remove them from the ambit of the fundamental principle of the freedom of movement as it was stated in *Webb*. Even if the Court stated that European Union law does not detract from the powers of the Member States to organise their social security systems that still did not mean that they are automatically outside the scope of the Treaty.

Does the fact that social security issues are concerned affect the applicability of the free movement rules? Given the existence of different health systems, do free movement rules apply to health services irrespective of the system they are provided in?

The *Kohll* case left some questions unanswered. Since the system involved in the case was a system based on reimbursement, it was not unclear whether systems based on benefits-in-kind or national health systems were included, and consequently whether if they were subject to Treaty rules, they would then have to change and make a reimbursement mechanism available. Would way the financial balance of national social security systems be disrupted thus?

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[78] Fuchs 2002, pp. 536–555.

[79] Ibid., p. 555.

The organisation of health systems differs from country to country, as demonstrated in the previous chapter. Though there are different ways of financing health systems and different ways of distributing health, all these systems present a common feature: there is little or no cross-border movement of health services. Better organisation and a better control of expenditure are possible if the health system is organised on a national basis. In countries where healthcare is funded through taxation, entitlement to health is based on residence criteria.[80] In countries that use social insurance systems to fund health services, contracts are concluded between the insurer and health providers and these contracts are limited within the territory of the Member State. Prior authorisation is required where there is a need to receive health services outside national borders.

It is clear that National Health Systems leave very little room for the application of free market and competition principles, while the Social Insurance Systems, especially those based on reimbursement, are more adapted to such preoccupations.[81]

The market has a different impact on these systems. It was decided that a service is a service within the meaning of the Treaty if it is provided for remuneration, thus an economic aspect must be present in order to apply free movement provisions. However, as the Member States tried to argue in these cases, some of these systems lack the economic aspect.

A. Reimbursement System

The *Kohll* case was decided with relation to such a system. The cost of treatment is met by patients who apply for a refund from the insurance funds. There is an identifiable payment which is made by the patient and it is obvious that the health services were provided for remuneration.

Since remuneration is present and consequently the provisions of free movement of services apply, discrimination between national and foreign providers is not permitted. Conditions on access abroad may be imposed, but they have to be justified.

B. Benefits-in-kind System

The next two cases brought before the Court dealt with a system of benefits-in-kind and involved the Netherlands.

> Social protection can be grouped into two branches on the whole. First, the universal AWBZ[82] insurance covering the whole population for long-term treatment and for treatment which private insurance does not normally cover (treatment of mental illness,

[80] Mossialos E and McKee M 2001, www.ose.be/health.

[81] Hartzopoulos 2002a, b, p. 684, footnote 5.

[82] Algemene Wet Bijzndere Ziektekosten [General Act on Special Sickness Costs].

care for disabled, care at home). For 'normal' essential medical treatment (consulting a GP, hospitalisation, pharmaceutical products, physiotherapy, dental care for children, etc.), people whose income is below the statutory ceiling[83] (63% of the population) are covered by compulsory ZFW insurance. Furthermore, a special public-law insurance covers civil servants (6% of the population). Finally, categories that are not covered by any of these compulsory schemes (31% of the population) are free to take out private insurance.

Central government regulates the public and private health insurance sectors. However, as part of a reform process, central government decided to give care providers and insurance bodies greater responsibility in this field. As a result, central planning is gradually giving way to self-regulation based on market mechanisms. The government retains all its powers in respect of compulsory insurance, strategic hospital planning and the tariff setting. It also has a direct hand in determining the macrobudget for overall health expenditure, including the private sector.[84]

The compulsory health insurance is organised on the basis of benefits-in-kind. The patients do not receive bills and do not normally contribute towards their medical costs. The funds by which patients are insured enter into agreements with health providers which provide treatment free of charge to those affiliated. The agreements are seen as necessary to control expenditure (volume and price of health care) and to control quality.

In this type of system the remuneration element is not as evident as in the case of systems based on a reimbursement mechanism. Regarding the existence of an identifiable payment, the Court stated that when a patient from a system based on benefits-in-kind goes to another Member State where he receives treatment for which he makes a payment, this is an obvious payment.[85] If the patient applies for reimbursement of the costs in a benefits-in-kind system, this is irrelevant. As it was mentioned, it does not matter whether the payment is made by a third party. This decision ruled out all arguments proposing that benefits-in-kind systems do not fall within the ambit of the free movement rules. The fact that a patient receives medical care for free does not implicitly mean that there is no payment. The economic element is provided by the fact that a payment is made by the sickness insurance funds. Even if the payment is a flat rate, the Court considered that it was consideration for hospital services.

Advocate General Colomer[86] reached a different conclusion than the Court. To him, the fact that medical care was provided in a benefit-in-kind system made a difference. Under the Dutch system, all persons whose income did not exceed a certain threshold were covered by a compulsory sickness insurance scheme. This was financed by contributions paid by insured persons and employers, and

[83] NLG 64 300 in 1999.

[84] Palm W et al. 2002, p. 58, http://www.aim-mutual.org.

[85] Case C-157/99 *B.S.M. Geraets-Smits and Stichting Ziekenfonds VGZ*, [2001] ECR I-5473, para 55.

[86] Opinion of Advocate General Ruiz-Jarabo Colomer delivered in Case C-157/99 *B.S.M. Geraets-Smits and Stichting Ziekenfonds VGZ* [2001] ECR I-5473.

also an annual payment made by the State from public purse, to a general sickness insurance fund.

Advocate General Colomer stated that even if it was decided in *Bond van Adverteerders* that the payment of the service could be made by a third person, the payment made by the sickness insurance funds could still not equate to a real payment. He argued that it was first necessary to determine how much the health insurance fund contributes to hospitals. The financing of a hospital was complicated. '[I]t is necessary first of all to determine the budget for each hospital in order to establish the permissible costs, and then to ascertain the supplementary charges and the attendance charge, that is to say the charge for each day a patient is accommodated in hospital, although that charge does not reflect the real cost of accommodation. The charges are intended to finance the budget of each health-care institution; the budget is adjusted year on year, so that, if income exceeds expenditure, the attendance charge for the following year will be reduced and, if expenditure has exceeded income, it will be increased.'[87]

He contended that the charges agreed by the health insurance fund did not represent consideration for the service provided to a patient, but were calculated according to an arithmetical formula.[88] The funds concluded agreements with healthcare institutions and independent medical practitioners which determined in advance the amount of benefits to be provided and also the financial contribution that the fund would make which, for practitioners, consisted of the payment of a fixed flat-rate amount and, for each hospital, the payment of an attendance charge, which was intended to finance the institution rather than cover the real cost of hospital accommodation.[89]

He drew a parallel with the judgements in *Humbel* and *Wirth* where it was decided that the essential characteristic of remuneration was the fact that it constituted consideration for the service in question, the amount of which was agreed upon between the provider and the recipient of the service. Since in the case of the sickness insurance funds the charges paid by the funds were not consideration for

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[87] Ibid., para 28.

[88] Paragraph 29 of Opinion of Advocate General Ruiz-Jarabo Colomer (delivered in Case C-157/99 *B.S.M. Geraets-Smits and Stichting Ziekenfonds VGZ*, [2001] ECR I-5473) presents the method for calculating the charges the health insurance fund pay: 'They are calculated by means of an arithmetical formula whereby amount A, representing average income, is added to amount B, representing the average cost of running a practice, the sum of which is divided by a factor representing the workload (on the basis, for example, of 2,350 patients a year, in the case of a general practitioner, and however many deliveries a year, in the case of a midwife). That calculation means that, for the year 2000, a general practitioner will receive from the sickness insurance fund with which he has concluded a health-care agreement the amount—known as a subscription charge—of NLG 133 for every insured person who has chosen to be treated at his surgery, irrespective of the number of patients he actually sees, and regardless of the fact that some may need to be seen more often than others and some may not need to be seen at all at any time during the year.'

[89] Opinion of Advocate General Ruiz-Jarabo Colomer delivered in Case C-157/99 *B.S.M. Geraets-Smits and Stichting Ziekenfonds VGZ* [2001] ECR I-5473, para 30.

remuneration, but a flat rate set according to a mathematical formula, he concluded that health services lack the remuneration element and were consequently outside the scope of free movement provisions.

In *Wirth* the Court found that even if most education institutions were financed from public funds (thus the state was not seeking to engage in an economic activity but was fulfilling its duties towards its own population), some were still financed out of private funds, thus becoming commercially profitable. When courses were provided at such an establishment, they became services within the meaning of the Treaty. It is possible to also argue that in a system based on benefits-in-kind, if an analysis of the costs reveals that the majority of funding comes from the public purse, then they are outside the scope of the Treaty.

However, the Court, aiming at having free movement barriers removed, did not pursue such an analysis and concluded that Treaty rules apply even to a system based on a benefits-in-kind mechanism.

C. The NHS System

If the payment was obvious under an the reimbursement system and the payment was considered to be made by a third party under a benefits-in-kind system, such as the National Health Service, it is very hard to identify any payment. In this type of system, 'any person, regardless of age, income and state of health is entitled to health care services for which he or she pays nothing'.[90]

The system is financed through taxation and provides access to healthcare free of charge. The State through the NHS is responsible for the provision of health. The NHS simultaneously organises and provides medical services.[91]

Following the criteria laid down in *Humbel,* it is impossible to identify the payment made in consideration of the service provided. The ruling in *Peerbooms* had political repercussions on those states which organised their healthcare like the NHS. In UK the authorities granted reimbursement for those applications for reimbursement which could have ended up before the ECJ, thus avoiding a ruling from the ECJ which could have had an adverse effect on the organisation of their system.[92] However, the *Watts* case did reach the Court of Justice and it was decided that when a person goes abroad to receive medical care there is a service within the meaning of Article 56 TFEU (ex Article 49 EC), irrespective of whether the system to which the patient turns for reimbursement of medical costs is a NHS-type system where health services are not services under Article 56 TFEU (ex Article 49 EC).

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[90] Palm W et al. 2002, p. 59, http://www.aim-mutual.org.

[91] Ibid.

[92] Ibid., p. 87.

3.3 The Impact of Establishment Rules on Welfare Services

Not only service recipients' move, but sometimes service providers and the service itself. There are situations where hospital operators would like to open hospitals in other Member States and are faced with different restrictive measures. The rules related to establishment are thus aimed to ensure that national laws do not 'hinder or make it less attractive' the access to the market for foreign hospital operators.

The process started by patients, the recipients of care, moving across borders to receive medical care is continued by the movement of health providers. Hospitals trying to establish in another Member State met several regulatory barriers. The movement of care providers is increasing and the regulatory measures of the Member States are being increasingly challenged.

Since hospitals require considerable infrastructure and therefore incur high costs, to improve the management of resources it is necessary to be able to calculate and plan the costs and expenses. There can therefore be rules restricting the number of hospitals on the market. It is important that the existing hospitals are used at their maximum capacity to avoid the risk of wasting resources. There can be rules related to the quality criteria that a hospital must fulfill. Different authorisations might be required of hospitals imposing various criteria. All these restrictive rules can be caught by the Treaty rules on establishment.

Article 49 TFEU (ex Article 43 EC) prohibits restrictions to the freedom of establishment of nationals of a Member State in the territory of another Member State. It also prohibits restrictions to secondary establishment such as the setting up of agencies, branches and subsidiaries. However, not all providers benefit from the freedom of establishment that results from Article 54 TFEU (ex Article 48 EC):

> Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.
>
> 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Therefore, non-profit-making companies do not benefit from these rules. However, whenever a hospital operator decides to establish in another Member State it is hard to believe that they are not motivated by a desire for profit. 'Considering the Court's claim that the freedoms should be interpreted broadly, it seems accurate to qualify such hospital operators as profit-making under the Treaty rules on establishment—which means they can benefit from them.'[93] Only hospital operators intending to make profit can benefit from the Treaty provisions on establishment.

Stoger[94] identified different types of restrictions: authorisation requirements, the needs test requirements, rules favouring certain hospitals over others, specific rules

[93] Stoger 2006, p. 1547.

[94] Íbid.

for State hospitals. He reaches the conclusion that Member States 'enjoy considerable freedom in regulating national hospital markets without violating the freedom of establishment. This may be concluded from the Court's case-law in the field of health care services, in which it shows great respect for the Member States' need to organise their hospital system in a way that allows careful planning of the available capacities to avoid "any wastage of financial, technical and human resources".'[95]

A more detailed analysis of the case-law in the field of establishment, however, shows that Member States operate the same practice as in the field of services when they raise purely protectionist measures. It is true that the Court respects Member States' powers to organise their systems; however, it does not tolerate protectionism. The continuous evolution of the healthcare and education markets will bring more cases before the Court and more national measures will be challenged. The cases that have been dealt with by the court or the applications submitted to the court show that when there were reasonable and non-discriminatory rules, the Court allowed them, but when the rules were discriminatory, or when the rules failed the proportionality test the Court refrain from ruling against those measures just because sensitive rules were involved.

A. Authorisation Requirements or Different Administrative Practices

In the field of healthcare and education it is important to maintain good quality services and most of the time the health services providers, education services providers, hospitals and education institutions must fulfill certain requirements. One of the most important issues concerning the freedom of establishment is access to the market. Different rules regulating access to the market could be restrictive. Does the Court allow these rules? Does the Court allow restrictions to one of the freedoms on the grounds that it is necessary for different reasons? Rules related to the establishment of a hospital or rules related to the second establishment have been challenged before the Court.

In *Commission* v. *Hellenic Republic*[96] the Court was tasked with determining whether a Greek law that did not permit a qualified optician as natural a person to operate more than one optician's shop restricted freedom of establishment. The Greek law in question required a legal person who wanted to establish an optician's shop to have an authorisation and this authorisation for establishment and operation of an optician's shop had to be granted to a recognised optician who was a natural person; the person holding the authorisation to operate the shop had to hold at least 50% of the company's share capital and had to participate to that extent in the profits and losses of the company; and it was required that the company should be in the form of a collective or limited partnership. Moreover,

[95] Ibid., p. 1558.

[96] Case C-140/03 *Commission* v. *Hellenic Republic* [2005] I-3177.

the opticians were restricted from participating in more companies; they could participate at most in one another company owning an optician's shop, with the condition that the authorisation for establishment and operation of the shop was in the name of another authorised optician. These laws were contended as infringing the freedom of establishment.

The Court ruled that the Greek law amounted to a restriction of Article 49 TFEU (ex Article 43 EC) when it prohibited qualified opticians from operating more than one optician's shop. It also ruled that as far as legal persons were concerned, the rules under Greek law restricted the freedom of establishment. In both cases the Court found restrictions, despite the rules being applied without discrimination on the grounds of nationality.

The national authorities tried to justify such rules on the grounds of protection of public health. It was contended that the rules were aimed at building consumer trust in the optician's shops. It was stated that in case of fault, absolute liability would fall on the optician who operated the shop. It was argued that it was important that an optician did not spend physical and mental energy running other shops.

The Commission, however, argued that these measures were inadequate to protect public health or that they were disproportionate in relation to the objective. It stated that there were other means to achieve the same public health protection aim by giving guarantees that certain actions would be carried out by qualified opticians, or under supervision. As far as the liability was concerned, the Commission stated that there were less restrictive legal provisions to protect the interests of consumers who were victims of opticians.

With regard to the legal persons, the Greek government argued that the level of participation of opticians in the share capital was necessary in order to reduce the risk of complete commercialisation of optician's shops.

The Court ruled that with regard to the need to protect public health, there were less restrictive means such as the requirement that a qualified, salaried optician or associates be present in each shop, or the existence of rules concerning civil liability for actions of others or rules requiring professional indemnity insurance. The Court found the Greek measures to be disproportionate.

In the case brought against Germany,[97] the Court was asked to declare that Germany had failed to fulfill its obligations under Article 49 TFEU (ex Article 43 EC) in applying the transitional rules in such a way that only psychotherapists who carried out their activities under German statutory sickness insurance schemes would obtain authorisation or admission to practice their profession independent of the applicable rules governing the admission to practise.

Starting from 1 January 1999 the law on Psychotherapists provided a system of quotas for psychotherapists who wished to practise under the statutory sickness

[97] Case C-456/05 *Commission of the European Communities* v. *Federal Republic of Germany* [2007] ECR I-10517.

insurance scheme. The quota system was set according to the needs of the region and psychotherapists could establish themselves in a given region only if the number of psychotherapists did not exceed the quota considered necessary.

The transitional provisions constituted a derogation from the quota system and only psychotherapists who treated patients under German compulsory sickness insurance benefited from it. The problems occurred between 1 January 1997 and 31 December 1998 and affected psychotherapists established elsewhere, but also German psychotherapists who were established in Germany but who during that period chose to establish themselves in another Member State.

The German authorities contended that the transitional provisions were not discriminatory since they intended to protect the status of psychotherapists established in a region of Germany in which they worked. Such legislation prevented the loss of patients and aimed at ensuring that psychotherapists were not forced to move.

The Court found that the rules infringed Article 49 TFEU (ex Article 43 EC) since they favoured psychotherapists established in Germany over those established in other Member States.

The German authorities tried to justify the rules by stating that there were overriding reasons related to the public interest such as the need to protect those already established, and the retention of patients following several years of professional activity. The Court accepted this as a justification, but it went on to see whether the proportionality test was fulfilled. The Court assessed whether the measures were necessary in order to attain the stated objective. The Court ruled that taking account of the activities of the psychotherapists established in other Member States would have had no effect on the situation of those established in Germany. The Court ruled that the transitional provisions excluded psychotherapists established in other Member States without including an upper numerical threshold. The German law which offered transitional exemption from quota provisions included only psychotherapists that practiced under the German sickness scheme for a period of three years. It would have been possible that a higher or a lower number of psychotherapists would be required. The Court ruled that Germany failed to prove that taking those psychotherapists established in other Member States into consideration during the envisaged period would have resulted in having to consider such a large number of persons that it would have jeopardised the objective of the transitional provision. The rule was found to be disproportionate.

In *Commission* v. *Luxemburg*[98] the Court was asked to decide whether, by having a rule that requires doctors, dentists or veterinary surgeons to have a single practice, Luxemburg failed to fulfill its obligations under Articles 49 and 54 (ex Articles 48 and 53 EEC). The Luxemburg Government contended that the rule was essential to the continuity of care. However, the rule was applied more strictly to doctors and

[98] Case C-351/90 *Commission of the European Communities* v. *Grand Duchy of Luxembourg* [1992] ECR I-3945.

dentists practicing in other Member States than to those practicing in Luxemburg. Moreover, Article 16 of the Law concerning the exercise of the medical, dental and veterinary professions permitted derogation from the single practice rule to doctors and dentists established in Luxemburg on the condition that the second surgery was in a region where there was no doctor practicing or in the case of dentists, where there was insufficient cover. The Court acknowledged the fact that those rules concerning the medical and dental professions were meant to protect the health of individuals and that the rules regarding the veterinary profession were meant to achieve health objectives. However, such rules had to be applied in a non-discriminatory manner. Since the rule permitted derogations only for persons practicing in Luxemburg, this led to discrimination. The fact that the derogation could be extended by ministerial decision to persons established in other Member States did not detract from the discriminatory aspect of the rule because the principle of equality could not depend on the unilateral will of national authorities.

The Luxemburg government tried to justify the rule on grounds of public health, public policy and on the grounds of protecting the general interest. The Luxemburg authorities stated that the continuous presence of a practitioner at his surgery was required in order to ensure that care were permanently available. Moreover, they stated that emergency services would be disrupted if practitioners were in more than one place. The Court did not accept these arguments, stating that it was not necessary for a general practitioner, dentist, veterinary surgeon or even a medical specialist to be close to the patient at all times. Moreover, the practitioner's availability cannot be guaranteed by having a rule for single practices since the practitioner could travel and offer his services elsewhere without having a second practice. Other restrictive means were available, such as rules requiring a minimum attendance. The Court found that the rules infringed the provisions related to establishment and the provision of services.

In *Commission* v. *France*[99] the Court was asked to rule on the French rules requiring doctors and dental practitioners established in another Member State to cancel their enrolment or registration in that other Member State in order to be able to practice in France as an employee, as a locum or as a principal in practice.

The French authorities tried to argue that this measure was justified on grounds of public health. The doctors or dentists were required to be in the vicinity of the patients and medical care should be continuous. For these reasons, the dentists and doctors should be easily accessible to patients. The French authorities argued that the Councils of Professional Organisations were strict in ensuring that practitioners who occupied a second position as an employee or who had a second practice complied with their ethical obligations; however, for the doctors established abroad this was not possible. Thus the French rule was applied more strictly with regard to doctors and dentists established abroad. The Court ruled that rules having the effect of restricting the free movement of workers, the right of establishment and the freedom to provide services were compatible with the Treaty as long as the

[99] Case 96/85 *Commission of the European Communities* v. *French Republic* [1986] ECR 1475.

restrictions were justified in the context of the general obligations inherent to proper practice; however, they must be non-discriminatory.

The Court ruled that the French measure requires that a practitioner should have only one practice in order to ensure the continuity of medical care was applied more strictly with regard to practitioners from another Member State. Moreover, the Councils of the Ordre des Medicins authorised doctors established in France to open a second practice only at a short distance from their main practice; however, doctors established in other Member States, even close to frontier were never permitted to open a second practice in France. Furthermore, the French legislation allowed dental surgeons established in France to be authorised to open one or more secondary practices, but a dental practitioner established in another Member State was never allowed to open a second practice in France.

The Court stated that in the case of certain medical specialists, it was not necessary to be near a patient on a continuous basis after the treatment had been administered.

The Court decided that the prohibition of enrolment in the register of the Ordre in France of any doctor or dental surgeon who was still enrolled in another Member State could not be justified by the need to ensure continuity of medical treatment.

The Commission brought a case against Italy,[100] seeking a declaration from the Court that the Italian government failed to fulfill its obligations under Article 43 and 39 EC. The complaint was related to Italian legislation that required a practitioner to reside in the same district as the professional body or association he was a member of. Moreover, in the event of residence being transferred abroad, the dentists with Italian nationality were removed from the registry.

With regard to the residence requirement, the Commission contended that it was an infringement of the freedom of establishment since it prevented dentists established in another Member State from opening and running a second surgery in Italian territory.

The Italian government, however, contended that there had been an amendment to the Legislative Decree from 1946 and that in the amended version from 1991 it was stated that in order to be registered, it was sufficient to practise the profession within the district of the association concerned; the amended provision allowed the interested party to set up or maintain more than one centre of activity on European Union territory. The Italian government continued by stating that the amendments made in 1991 applied to all professions and the fact that few local associations or the National Federation misinterpreted the legislation in force was of little importance.

The Court ruled that a measure that required dentists to reside in the district of the professional association where he was registered constituted a restriction on freedom of establishment and the free movement of workers and that it was not possible to justify such restriction on grounds of public interest. Moreover, it ruled that Member States were obliged to ensure not only that European Union law was

[100] Case C-162/99 *Commission of the European Communities* v. *Italian Republic* [2001] ECR I-542.

applied, but also to adopt rules of law capable of creating a sufficiently precise, clear and transparent situation which would allow individuals to know the full extent of their rights and rely on them before the Court. Moreover, it ruled that the requirements of precision, clarity and transparency should be satisfied when general principles of law are involved, such as the general principle of equal treatment, and especially when provisions of European Union law are intended to grant rights to nationals of other Member States. The Court ruled that it should be applied in the case in question because the exact scope of the legislative amendment could be determined only by referring to rules of interpretation which were specific to national law. In this case the infringement of European Union law came from the way the law was applied in practice. Moreover, the National Federation was encouraged in its misinterpretation by the fact that the Italian authority did not give any guidance on the question referred by the Federation on the application of the residence condition to European Union nationals wishing to practise as dentists in Italy. Thus even if the law was by itself not contrary to European Union law, the Italian government failed to comply with European Union law because there were no clear, precise and transparent rules and as a result of this, in practice there was an infringement of Treaty rules. Consequently, by this ruling the Court aimed to prevent Member States from avoiding European Union law through its misapplication in national law.

With regard to the measure that required removal from the professional association register in the event of transfer of residence to another Member State, the Commission contended that this was an infringement of the freedom of establishment and the free movement of workers since its effect was to prevent dentists established in another Member State to open a second dental surgery in Italy or to work there as an employed person. Furthermore, it contended that the rule was discriminatory since dentists established and resident in Italy were not precluded from opening a second surgery in another Member State, provided that they continued to reside in the district of the association to which they belonged in Italy. The Court found the rule to be discriminatory and contrary to Articles 39 and 43 EC. The Court ruled that the Italian government failed to fulfill its obligations under Articles 39 and 43 EC by restricting the possibility of maintaining registration with an association to dentists of Italian nationality in the event of residence in another Member State.

In *Bouchocha*[101] a preliminary question was addressed to the Court asking whether the French law prohibiting unlicensed practice as a doctor was compatible with European Union law. Mr Bouchocha held a French State diploma as a masseur-kinesitherapist and a diploma in osteopathy issued on 1 October 1979 by the European School of Osteopathy, Maidstone, Great Britain. He also held a diploma of 'Doctor of Naturopathy' from the London College of Applied Science. However, he held no diploma, certificate or other qualification entitling him, pursuant to Article L 356-2 of the Code de la santé publique (French Public Health Code),

[101] Case C-61/89 *Criminal proceedings against Marc Gaston Bouchoucha* [1990] ECR I-3551.

to practice as a doctor. Criminal proceedings were brought against him on grounds that he had illegally practised medicine. Mr Bouchocha argued that his diploma in osteopathy granted by the European School of Osteopathy entitled him to practice that activity in Great Britain and by prohibiting him from practicing osteopathy in France on grounds that he was not a doctor of medicine was contrary to Article 49 TFEU (ex Article 43 EC).

The diploma from the European School of Osteopathy did not enjoy mutual recognition within the European Union. The Court ruled that Member States could have a legitimate interest to prevent certain nationals from evading national legislation regarding vocational training. It was decided that in the absence of harmonisation at the European Union level regarding activities which fall solely within the scope of the practice of medicine, Article 43 did not preclude a Member State from restricting an activity ancillary to medicine, such as osteopathy in this case, to persons holding the qualification of doctor in medicine.

In an action brought against Austria[102] the Court was asked to declare that by imposing an obligation on every medical doctor established in Oberösterreich (Land of Upper Austria) to open a bank account with the Oberösterreichische Landesbank to which fees for benefits-in-kind are transferred by the health insurance funds, the Republic of Austria had failed to comply with its obligations under Articles 43, 49 and 56 EC. The Court has yet to rule on this case. However, it is obvious that this is a restriction to the free movement rules. It will be interesting to see how the Court rules and what justification will be ventured by Austria.

In the field of education, in *Commission* v. *Germany*[103] the Court found that the rule refusing the deduction from income tax of fees paid for the education of children abroad infringed the free movement of establishment. A taxpayer who established himself in Germany but who wanted his children to continue school in the State of origin is placed at a disadvantage by such a rule. Rules that deter a national from leaving his country of origin in exercise of his right to free movement constitute an obstacle to free movement.

In *Blanco Perez*[104] the Court had to determine whether Article 49 TFEU precluded the rules of the Autonomous European Union of the Principality of Asturias which imposed restrictions on the issue of licences for the opening of new pharmacies by providing that: 'in each pharmaceutical area, a single pharmacy may be opened, as a general rule, per unit of 2,800 inhabitants; a supplementary pharmacy may not be opened until that threshold has been exceeded, that pharmacy being established for the fraction above 2,000 inhabitants; and each

[102] Case C-356/08 *Commission of the European Communities* v. *Republic of Austria* [2009] ECR I-00108.

[103] Case C-318/05 *Commission of the European Communities* v. *Federal Republic of Germany* [2007] ECR I-6957, paras 101–123.

[104] Joined cases C-570/07 and C-571/07 *José Manuel Blanco Pérez and María del Pilar Chao Gómez* v. *Consejería de Salud y Servicios Sanitarios*, nyr.

pharmacy must be a minimum distance away from existing pharmacies, that distance being, as a general rule, 250 m.'[105]

The Court found such rules to be restrictions to free movement of establishment since they hindered and made less attractive the exercise by pharmacists from other Member States of their activities on Spanish territory.

However, the Court pursued to determine whether such rules could be justified on grounds of protecting the public health and on grounds of ensuring that the provision of medicinal products to the public is reliable of good quality.

The Court ruled that the imposition by Member States of stricter rules than others in relation to the protection of public health did not mean that those rules were incompatible with Treaty provisions. Also it ruled that infrastructure might be subject to planning which raised the need for prior authorisation. The system of authorisation was seen as necessary also because some areas might be less attractive than others and it was necessary to ensure full coverage. Moreover, when there are uncertainties with regard to the existence of a risk, it is not necessary to wait until the reality of those risks become apparent.

Mr. Blanco Perez argued that such rules denied access to independent professional activity, and advantaged those already established.

The Court ruled against such claims and found that the competent authorities organise once a year a procedure for issuing licenses for setting up new pharmacies and that neither the professional experience as a pharmacy license-holder, nor other type of qualification is taken into consideration. Moreover, priority is to be given to those who have not held license.

The Court found the rules related to the conditions linked to population density and the minimum distance between pharmacies as appropriate to ensure attainment of the objectives pursued; however, the Court went further to analyse whether the objective is pursued in a systematic and consistent manner and if the restriction did not go beyond what was necessary. It found that the legislation allowed to adjustment measures, so that whenever the population was smaller than 2,800 in rural areas, pharmacies could have been established; also in case of higher density population, the rules on distance between pharmacies were subject to adjustments. Also, a supplementary pharmacy was to be opened if the threshold was to be exceeded by a fraction of 2,000 inhabitants.

With regard to the criteria for the selection for licensing new pharmacists, the Court found the rules as infringing the rules on freedom of establishment. In case the candidates had equal score, licenses were to be granted to those pharmacists who had pursued their professional activity within the Autonomous European Union of Asturias. Since this criteria was more likely to be fulfilled by pharmacists who were nationals, the Court found this rule as discriminatory.

[105] Ibid., para 51.

In *Neri*[106] the Court was asked to decide whether an administrative practice under which degrees awarded by a university in one Member State were not recognised by another Member State when the courses of preparation of those degrees were provided in the latter Member State by another educational establishment in accordance with an agreement made between the two establishments was not incompatible with Articles 45, 49 and 56 TFEU (ex Articles 39 EC, 43 EC and 49 EC).

The European School of Economics (ESE) is an institution established in UK, having different establishments in other Member States. It was registered with Rome Chamber of Commerce and provided courses through its Italian establishments in Italy. However, Italian law recognised degrees if students have attended courses in the State in which the degrees are issued. The Court found this to be an infringement of the free movement of establishment.

The Italian government tried to justify this rule on grounds of the needs to ensure high standards of education. They argued that such agreement on university education would prevent direct quality control of these bodies by both the authorities of the Member State of origin as well as the host Member State. The Court ruled that the proportionality principle was not satisfied since the Italian law allowed such agreements between Italian universities and other Italian establishments of higher education which were comparable with the agreement at stake. The non-recognition of degrees related only to degrees awarded to Italian nationals.

All these cases show that national rules related to first and second establishments can create restrictions to the free movement provisions. Sometimes these restrictions are discriminatory and the Court does not accept them, in other instances they are found to impede the establishment of companies established in another Member State even without being discriminatory. The Court performs an analysis of these rules when determining whether other imperative reasons might constitute good reasons to allow such rules; however, Member States consistently fail the proportionality test. Where rules are necessary for the pursuit of a profession or such rules are necessary to ensure public health and they are proportionate as in *Bouchocha and Blanco Perez*, they are cleared by the Court.

B. Needs Test

A requirement that allows entry to the market only if it is proved that there is a need for that service is automatically a restriction on the freedom of establishment. The welfare services can be protected from competition by using this requirement. However, do the markets for health, health insurance and education sustain competition? From recent developments in different Member States, of which a good example would be the Netherlands, it can be concluded that competition can be a way

[106] Case C-153/02 *Valentina Neri* v. *European School of Economics (ESE Insight World Education System Ltd)* [2003] ECR I-13555.

to provide welfare services. It is true that a needs test is the instrument used to help plan the costs and expenses in a system. It is necessary to have permanent healthcare, and permanent access to effective and affordable health services. The needs test can easily be justified for a hospital. However, when it comes to outpatient treatment, the same protection could be questioned on the basis of whether it was actually merely an instrument to protect the existing market structures.

A preliminary question addressed to the Court in *Hartlauer Handelsgesellschaft*[107] has asked whether the Austrian legislation requiring authorisation for the establishment of a private hospital in the form of an out-patient clinic and under which such authorisation can be refused if according to the stated purpose of the institution and the services envisaged there is no need for the planned outpatient dental clinic, taking into account the existing provision of such care by established doctors working on a contractual basis with the sickness insurance funds.

The Court ruled that such a rule constitutes an infringement of free movement of establishment provisions. This type of legislation had the effect of preventing undertakings from other Member States to pursue their activities on the territory of the Austria. Hartlauer was denied access to the market in dental care in Austria.

The Court went to determine whether such a rule could be justified on grounds of the protection of public health. It made a reference to *Muller Faure* and *Watts* where it was acknowledged the need to restrict the freedom to provide services insofar as the maintenance of treatment capacity or medical competence on national territory was essential for the public health. The planning of medical services is intended to control the costs. The Court ruled that the restrictions such as those in the main proceedings are necessary to ensure the maintenance of a balanced high-quality medical care open to all and preventing the endangering the financial balance of the social security system.

The Court recognised the need for planning also for out-patient clinics and motivates this on grounds that such a system of prior authorisation would be necessary to fill the gaps in access to out-patient care and to avoid the duplication of structures so as to ensure that medical care is adapted to the needs of the population and covers the entire territory and takes into account disadvantaged regions.

Even if such justification was accepted, The Court ruled that the national legislation must pursue this objective in a consistent and systematic manner. However, the national rules required such a system of prior authorisation only for outpatient dental clinics, whatever their size, but the group practices were not subject to such requirement. The outpatient clinics and group practices had comparable features and patients did not notice the differences between them. The group practices offered the same medical services as outpatient dental clinics and were subject tot the same market conditions.

The Austrian authorities did not explain why these two categories of providers of services with comparable features and comparable number of practitioners, and

[107] Case C-169/07 *Hartlauer Handelsgesellschaft mbH* v. *Wiener Landesregierung and Oberösterreichische Landesregierung* [2009] I-01721.

liable to affect in the same way the economic situation of contractual practitioners in certain geographical area were treated differently. Therefore, the Court ruled that the national measures were inconsistent in pursuing the public health goals.

Moreover, such a system of prior authorisation must be based on objective and non-discriminatory criteria known in advance. The Austrian rules were not based on such objective and non-discriminatory criteria. The issue of such authorisation was conditional upon the existence of a need. However, different criteria were used depending on different provinces. Moreover, the need in some provinces was determined on the basis of the answers of the practitioners. This method had serious effects on the objectivity and impartiality of the treatment of the application for authorisation.

The Court concluded that such a measure is not appropriate to achieve the objective of maintaining a high-quality medical service open to all and of preventing the risk of serious harm to the financial balance of the social security system.

This ruling constitutes a very important decision. The existing Austrian regulation prevented access on the market for dental clinics. This means that there are a number of doctors offering these services and they are protected against competition. If market access had been opened, then competition between parties on the market would have occurred. The Court however was very careful in not allowing this and ruled that even for out-patient care such authorisation system could be accepted if it were proper justifications and if the aims would be pursued in a consistent manner and the rules for authorisation were based on objective and non-discriminatory criteria known in advance.

It should be noted that this case is related to out-patient care, which implies that no complicated and expensive hospital infrastructure is required. This means that it is easier to manage such care and to calculate the costs and there is no need to have a certain amount of beds constantly available to meet the potential need of the population. Very often such a requirement actually conceals protectionist measures and the case at stake was a clear example of such protectionism. Dentists sometimes act in the market as a sort of cartel where they divide the market among themselves, set prices and through legislative measures prevent access to the market. Therefore, competition in this market could be possible. If access to the market were open, then there would be price and service competition between the providers; patients would have greater choice and probably better services if the there is competition on the market and if the competitive process is not disturbed by cartels. However, the Court carefully ruled that this could be prevented. In the present political context of financial crisis the Court gave priority to social needs and underlined the freedom of Member States to organise their national systems as they wish, conditional upon respecting EU law.

In this case, as in many others, Member States failed to pass the necessity and proportionality test. If different restrictions are accepted as a sign that other values than economic ones have precedence, still, Member States abuse those justifications and go for protectionist measures.

C. Rules Favouring Certain Hospitals over Others

Sometimes it is necessary to save a hospital even if it is financially burdensome. The necessity of having a hospital in a remote area could lead to measures favouring certain undertakings. Ideological reasons could be behind such rules. The rules favouring certain hospitals could take the form of favouring access to the market, or offering exclusivity in the market. The favouring rules could also take the form of financial aid; however, these rules would be caught by state aid rules.

In *Sodemare*[108] the Court was faced with such a rule, being asked to decide on an Italian law that only allowed non-profit-making private operators to participate in the running of the social welfare system through concluding contracts that entitled them to be reimbursed by the public authorities for the costs of providing social welfare services. Sodemare was a Luxemburg company that established profit-making companies in Italy in order to run old people's homes. In determining whether the Italian law was contrary to the free movement of establishment, the Court reiterated its statement that Community law does not detract from the powers of the Member States to organise their social security systems. The non-profit condition forms part of a law which was aimed at promoting and protecting the health of the population through social welfare and health services. The Court took the fact that the Italian system of social welfare was based on the solidarity principle into consideration and the fact that it was designed to assist those in need due to insufficient recourses. The persons receiving care were required to bear some costs, but these were established in accordance to family income. According to Italian law, non-profit organisations were allowed to conclude contractual arrangements and to contribute to the running of the social welfare system. They were supposed to provide a certain quality of services to the recipients. The costs of the services provided were supposed to be reimbursed.

The reason why the Italian law required that operators be non-profit organisations was explained on ideological grounds. This was considered to be a logical approach, having regard to the exclusive social aims of the system. The obligation not to pursue profit was intended to ensure that social aims had priority. Moreover, the rules were indistinctly applicable and affected all providers in the same way. The Court took the discrimination approach and found that the measures were not liable to place profit-making companies from other Member States is a less favourable situation than the profit-making companies established in Italy.

The Court ruled that Articles 43 and 49 EC do not preclude Member States from having rules restricting participation in the running of the social welfare system to non-profit-making private operators by concluding contracts entitling them to reimbursement by the public authorities for the costs of providing social welfare.

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[108] Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl* v. *Regione Lombardia* [1997] ECR I-3395.

D. Conclusions

As the markets for healthcare and education become more open, health and education establishments challenge the national rules. The Court, confronted by the task of deciding whether to allow such rules, applies the proportionality test. As was seen from the above cases, whenever the Member States have been discriminatory or have failed to pass the proportionality test they have had to change their national rules. Whether the proportionality test delivers sufficient certainty will be analysed in a later section. It is interesting however to observe that the application of the establishment rules is in an incipient phase. As a result of the continuous evolution of the welfare markets it is expected that new cases will be brought in front of the Court.

3.4 Free Movement of People

People going abroad with their families, students travelling for study purposes, people moving freely, all affect the welfare state. The problem posed is which Member State should be responsible for granting welfare benefits to these people. A strong connection between people availing of their free movement rights and a Member State is necessary for them to use the welfare services of that Member State. European Union law aims at ensuring that this category of people, who travel from one Member State to another and who contribute to social and cultural cohesion, are not excluded from protection.

There are two categories of people that avail themselves of the free movement provisions: economically active and non-economically active persons.

A. Economically Active Persons

The worker, as an economically active person, benefits from different rights attached to his status. The status of workers and their rights are to be found in a series of directives and regulations.[109] Their movement within the Community

[109] Regulation EEC/1612/68 of the Council 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2; Regulation EEC/1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2; Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers [1997] OJ L 199/32; Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1; Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

created the need for provisions related to the exportability of their rights. The fact that the workers move from one Member State to another requires the harmonisation of social security schemes and cooperation between Member States. This section is aimed only at providing a short overview of the entitlements to health and education that workers and their families have.

Workers' entitlement to healthcare is regulated by Regulation 1408/71, which is further analysed in the chapter on positive harmonisation. In the field of education the migrant worker and his family are entitled to access to education and also to different benefits. According to Article 7(2) of Regulation 1612/68[110] the worker shall have access to training in vocational schools and retraining under the same conditions as national workers. Directive 2004/38,[111] which amends Regulation 1612/68, does not change much since workers have the right to equal treatment. The case-law sustains this right to equal treatment.[112]

Therefore, the worker is entitled to studies while simultaneously holding the status of worker. If he works and subsequently starts studying, according to Article 7(3)(d) of Directive 2004/38 he retains the status of worker if he embarks on vocational training; however, the training needs to be related to the previous employment.

The worker's family members are also entitled to education.[113] Article 12 of Regulation 1612/68 provided:

> The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

The Court interpreted what is meant by the right to education broadly. In *Casagrande*[114] the Court stated that Article 12 of the Regulation 1612/68, which conferred on the children of a worker employed in the territory of another Member State the right to be admitted to educational courses 'under the same conditions as the nationals' of the host State, also included measures intended to facilitate educational attendance. Thus a child of a migrant worker was entitled to an educational grant under the same conditions as the children of a national worker.

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[110] Regulation EEC/1612/68 of the Council 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2.

[111] Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77, Art. 24.

[112] Case 235/87 *Matteucci* [1988] ECR 5589; Case C-3/90 *Bernini* [1992] ECR I-1071; Case C-337/97 *Meeusen* [1999] ECR I-3289.

[113] Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77, Art. 24.

[114] Case 9/74 *Casagrande* [1974] ECR 773.

In *Echternach and Moritz*[115] the Court had to address the situation of a child of a worker of a Member State (Germany) who had been employed in another Member State (the Netherlands). The child received primary and secondary education in the Netherlands. His father returned to Germany and settled there with his family. However, due to a refusal by the Germans to recognise the Dutch diplomas, the child returned and continued his studies in Netherlands. The Court decided that the child continued to retain worker's family status within the meaning of Regulation 1612/68 even after the rest of the family had returned to its Member State of origin and only the child remained in the host State to continue studies which could not be pursued in the home State. Consequently he was entitled to the grants provided by the Netherlands Wet op de Studiefinanciering (Law on Study Finance).

The *Di Leo*[116] case dealt with the refusal by the German authorities to offer an educational grant for pursuing courses outside Germany to an Italian national whose father was a migrant worker employed in Germany, on the grounds that the educational grant applied for was awarded only to Germans. The Court ruled that the German rule allowing only Germans to benefit from such a grant infringed Article 12 of Regulation 1612/68 which provided that Member States should ensure equal treatment to the children of workers who are nationals of another Member State. If the Member State decided to offer such a grant to pursue studies abroad to its nationals, the children of a migrant worker should benefit from the same advantage, even if the courses are in his State of origin.

In *Lubor Gaal*[117] the Court had to rule on whether the definition of 'child' for the purpose of Article 12 of Regulation 1612/68 was limited to children who were under twenty-one or were dependant. It decided that Article 12 was not subject to the same conditions of age and dependency as were the rights under Articles 10(1) and 11 of Regulation 1612/68 because this would conflict with the principle of equal treatment.

In *Baumbast*[118] the Court decided that the children of a migrant worker were entitled to reside in order to attend general educational courses according to Article 12 of Regulation 1612/68 even if the parents got divorced and the only parent who was citizen of the European Union ceased to be a migrant worker.

In *Bernini*[119] the Court ruled that a grant for study from a Member State to the children of the workers constituted a social advantage within the meaning of Article 7(2) of Regulation 1612/68 and that the child of a migrant worker could rely on Article 7(2) to obtain grants for study under the same conditions as the children of national workers.

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[115] Cases 389–390/87 *Echternach and Moritz* [1989] ECR 723.

[116] Case C-308/89 *Di Leo* [1990] ECR I-4185.

[117] Case C-7/94 *Lubor Gaal* [1995] ECR I-1031.

[118] Case C-413/99 *Baumbast* [2002] ECR I-7091.

[119] Case C-3/90 *Bernini* [1992] ECR I-1071.

Since the concept of 'worker' should not be interpreted narrowly, the Court in *Meeusen*[120] decided that a dependent child of a migrant worker could rely on Article 7(2) of Regulation 1612/68 in order to obtain a grant for study from the State where his father was employed, even if they maintained their residence in the State where they were nationals. It ruled that a residence requirement could not be imposed because this would infringe the equal treatment principle. However, if the employment relations with the State of employment cease, then the migrant worker who returned to his State of origin cannot rely on Article 48 or on Article 7(2) of Regulation No 1612/68 in order to obtain study support for his children from the State where he was formerly employed.[121]

B. Non-Economically Active Persons

The principle of non-discrimination and the concept of citizenship played an important role in the case of non-economically active persons.

Even if some welfare services were not found to be services for Treaty purposes, the internal market can still impose its influence through other means. Its impact is felt through the principle of non-discrimination, which underpins the four freedoms and applies even when a service is non-economic. Furthermore, the introduction of citizenship[122] turned out to be of significant importance. Even if it was initially thought that citizenship was 'toothless',[123] it was later given such an interpretation as is liable to 'alter the shape of national solidarity'.[124]

> 'Citizenship' is an open-textured concept in whatever milieu it is raised or applied, capable of being invested with a host of meanings, and susceptible to interpretation or even manipulation in the service of an ulterior political or ideological motive.[125]

According to Article 21 TFEU (ex Article 18 EC) 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty'. When a person does not have the right to move as an economic actor, he derives his right to move freely from Article 21 TFEU (ex Article 18 EC). And while he moves freely he must not be discriminated against. The principle of non-discrimination in conjunction with the citizenship article was used by the Court to remove national

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[120] Case C-337/97 *Meeusen* [1999] ECR I-3289.

[121] Case C-33/99 *Fahmi and Amado Hassan Fahmi and M. Esmoris Cerdeiro-Pinedo Amado* v. *Bestuur van de Sociale Verzekeringsbank* [2001] ECR I-2415.

[122] Shaw 1997, pp. 554–572, 2007; La Torre 1998; O'Leary 1996; Soysal 1994; Kostakopoulou 2005, p. 233; 2000, p. 477; Rostek and Davies (2006, p. 89); Davis 2002, p. 121; Dougan 2006, pp. 613–651; Somek 2007, pp. 787–818; Hailbronner 2005, pp. 1245–1267.

[123] O'Keeffe 1994, p. 87; Wilkinson 1995, p. 417; d'Oliveira 1995, p. 82; Shaw 1998, p. 293; Iliopoulou and Toner 2003, pp. 389–397; Somek 2007.

[124] Somek 2007, pp. 787–818.

[125] Shaw 1997, pp. 554–572.

restrictive measures.[126] Even though Article 21 TFEU (ex Article 18 EC) was subject to limitations and conditions laid down in the Treaty, the Court decided that these limitations should not be applied disproportionately. Where the economic rules could not impact on welfare, the Court used the non-discrimination principle or the non-discrimination principle in conjunction with the citizenship article, later even using the citizenship article alone, to eliminate obstacles to free movement.

The principle of non-discrimination[127] prohibits comparable situation from being treated differently and different situations being treated identically, unless differentiation is objectively justified. The principle of non-discrimination was used to strike down regulatory barriers between Member States. The prohibition of discrimination on the grounds of nationality can be found in different Treaty articles.[128] It is the principle that lies behind the free movement provisions, thus ensuring effective market integration. Article 18 TFEU (ex Article 12 EC) also contains a general prohibition of non-discrimination and this proved to be of particular importance in removing regulatory barriers when certain services could not have been brought within the economic sphere.[129] 'In the socio-economic and socio-cultural sphere, the principle of non-discrimination transcends functionalism and acquires the status of a fundamental right'.[130]

It is interesting to see how the non-discrimination principle proved to be an effective instrument in removing regulatory barriers that were obstacles to free movement in some fields that were believed to fall outside the scope of the Treaty.

Students going abroad for their studies had to pay higher tuition fees than national students, they found stricter admission rules than those applied to national students or they found obstacles created by the non-recognition of diplomas. Students were refused domestic financial aid that they would have received from their own Member State if their education were pursued in a school established in their national territory. All these regulatory barriers were subjected to the application of the non-discrimination principle.

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[126] See also Hatzopoulos 2005, pp. 1599–1635.

[127] See Davies G 2003; Hilson 1999, pp. 445–462; Daniele 1997, pp. 191–200; Bernard 1996, pp. 82–108; Wouter 1999, pp. 98–106; Prechal 2004, pp. 533–551.

[128] As G. van Hecke correctly pointed out, 'Tout le traite n'est en quelque sorte que la mise en œuvre de ce principe fondamental de l'interdiction de discrimination en raison de la nationalité'—'La notion de discrimination', *in Les aspects juridiques du marche commun* (Liege 1958), p. 128, as cited in Wouter (1999, pp. 98–106).

[129] The use of Article12 is highly relevant for the cases regarding education where it was uncertain that education services were to be considered services within the scope of the free movement provisions.

[130] Wouter 1999, pp. 98–106.

In education cases the principle of non-discrimination was applied in a more daring manner. Though education was not declared to be an economic service,[131] the principle of equal treatment was nonetheless applied in connection with the citizenship article. This led to the application of the non-discrimination principle to non-economical actors.

Treating all European Union citizens equally is a beautiful dream and considerable efforts have been made to achieve it. Every advance was made in small steps. Eliminating bureaucratic obstacles raised by Member States for the simple reason that 'they' are not nationals is a welcomed intention. These small steps started with *Gravier*[132] where the Court decided that foreign students must be treated in the same way as national students and that the imposition of a registration fee as a condition for access to vocational training on students who were nationals of other Member States was discrimination on the grounds of nationality since the same fee was not charged to students who were nationals of the host Member State.

Equal treatment was applied only with regard to fees charged for access to education. In the *Lair*[133] and *Brown*[134] the Court decided that the principle of non-discrimination does not apply with regard to maintenance grants. However, the judgment did not calm Member States' fears because the Court ruled that maintenance grants fall outside the scope of the Treaty only 'at the present stage of development of Community law'.

How far could the Court go in its judgments? Could it require Member States to show social solidarity for all European Union citizens? The introduction of the concept of citizenship provided the European Union with new horizons in interpreting European Union law. The status of EU citizen was used by the Court to extend the entitlement to social benefits to non-economic actors. In *Grzelczyk*[135] the Court revisited its previous position in *Lair* and *Brown*.[136] The ruling in *Grzelczyk* 'suggests that the scope of Union citizens' right to equal treatment in other Member States is, in principle, unlimited, which for students indeed seems to imply that they now enjoy in the host State equality of treatment in relation to

[131] In *Humbel* the Court ruled that education is not an economic service since the remuneration element is absent because the education is provided by the state who is not engaging in a gainful activity but is fulfilling its duties towards its population and because education is funded from the public purse. However, education is increasingly provided according to economic criteria and all the elements that were taken in consideration when deciding that education is not an economic service could be reanalysed and a different result could be reached.

[132] Case 293/83 *Françoise Gravier* v. *City of Liège* [1985] ECR 0593.

[133] Case C-39/86 *Lair* [1988] ECR 3161.

[134] Case 197/87 *Brown* [1988] ECR 3205.

[135] Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

[136] See Dougan M 2005, p. 943.

maintenance grants'.[137] When the ruling was handed down new elements were introduced to the EC Treaty: citizenship of the European Union and the new Title VIII of the Part three, which contain articles on education and vocational training. Reading the article on citizenship and the article that prohibits discrimination together, the Court decided that entitlement to non-contributory social benefits, such as a minimum subsistence allowance, may not be made conditional on having the status of a worker within the meaning of Regulation 1612/68[138] in the case of nationals of other Member States when no such condition applies to nationals of the host Member State.

It was contended that the Member States' welfare systems were threatened by the ruling in *Grzelczyk*. Assistance benefits and grants were made available regardless of the economic status to European Union citizens using the principle of non-discrimination. In *Bidar*[139] the Court stated that 'assistance, whether in the form of subsidized loans or of grants, provided to students lawfully resident in the host Member State to cover their maintenance costs falls within the scope of application of the EC Treaty for the purposes of the prohibition of discrimination laid down in the first paragraph of Article 12 EC'.

However, Article 3 of Directive 93/96[140] states that the 'Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence'. This secondary legislation appears to contradict the right to equal treatment contained in the primary legislation. Dougan considers that since the Court uses Article 21 TFEU (ex Article 18 EC) on citizenship and Article 18 TFEU (ex Article 12 EC) on non-discrimination together, and since Article 18 should be subject to 'limitations and conditions' imposed under the Treaty, then this Directive should be considered such a limitation. However, he considers that such a limitation on the exercise of the fundamental right to free movement for Union citizens should be subject to the principle of proportionality.[141] This interpretation permits Member States to protect their welfare systems but simultaneously ensures that migrant students continue to be protected against disproportionately discriminatory treatment.

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[137] Van der Mei 2005, p. 226.

[138] Regulation 1612/68 [1968] OJ L 257/2.

[139] Case C-209/03 *Bidar* [2005] ECR I-2119; See also Barnard (2005), 'Case C-209/03, *R (on the application of Danny Bidar)* v. *London Borough of Ealing, Secretary of State for Education and Skills*, judgment of the Court (Grand Chamber) 15 March 2005, not yet reported' (2005) *CMLRev*, pp. 1465–1489.

[140] Directive 93/96 [1993] OJ L317/59; This Directive was repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

[141] Dougan M 2005, p. 964.

In *Grzelczyk* it was stated that the concept of citizenship has limitations and in *Bidar* the Court ruled that Member States may ask to for a link[142] to be proved between the person receiving aid and the State. However, the limits to citizenship should be proportional and non-discriminatory.

In *Trojani*[143] the Court stated that recourse to a State's social assistance system should not automatically trigger expulsion. 'The Court of Justice thus submitted the interpretative construction of Community law to a proportionality test.'[144]

In *D'Hoop*[145] the Court had to decide whether the national legislation refusing the grant of a tide-over allowance to a national student seeking employment on the ground that he had completed his secondary education in another Member State was contrary to European Union law. The case was decided using citizenship together with the non-discrimination principle.

The Court stated that:

> Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy within the scope ratione materiae of the Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[146]

That case involved the exercise of the right to move and reside freely within the territory of the Member States as conferred by Article 21 TFEU (ex Article 18 EC). A citizen of a Member State must be treated equally with the nationals of other Member States. The less favourable treatment received by a national who avails himself Minister may by regulation designate of the right to move freely was found to be contrary to free movement rules. The Court preferred to use the non-discrimination principle and avoided basing its judgement entirely on Article 21 TFEU (ex Article 18 EC). It decided that someone should not be penalised because he decided to use his right to move freely and pursue education in another Member State.

Article 18 TFEU (ex Article 12 EC) prohibiting discrimination on grounds of nationality was used by the Court to grant equal access to education, even though in a system that provides open-access to education, this can become a real burden that is difficult to sustain financially. In *Commission* v *Austria*[147] an action was brought before the Court by the Commission as a result of a failure of the Austrian government to ensure access to higher and university education for the holders of

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[142] For a more detailed discussion on the link between the person receiving the benefit and the State see O' Brien 2008, pp. 643–665.

[143] Case C-456/02 *Michel Trojani* v. *Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573.

[144] Somek 2007, p. 793.

[145] Case C-224/98 *Marie-Nathalie D'Hoop* v. *Office national de l'emploi* [2002] ECR I-6191.

[146] Ibid., para 28.

[147] Case C-147/03 *Commission of the European Communities* v. *Republic of Austria* [2005] ECR I-5969; See also Rieder 2006, pp. 1711–1726.

secondary education diplomas awarded in other Member States under the same conditions as holders of secondary education diplomas awarded in Austria.[148]

The conditions put forward by the Austrian government with regard to the access of foreign students to Austrian higher and university education deterred foreign students from following education in that country. By applying the equal treatment principle, Member States can be forced to make changes regarding the organisation of their education systems.

In *Gootjes Schwarz*[149] the Court used the citizenship article alone to declare the German rules contrary to free movement. The German government stated that legislation like that in question was not contrary to Article 18, while the Commission stated that even if Article 56 TFEU (ex Article 49 EC) was not applicable, then the German law certainly infringed Article 12 and Article 18(1) EC.

In its analysis the Court started by stating that the status of the citizen of the Union grants nationals finding themselves in the same situation the right to enjoy the same treatment in law within the area of application *ratione materiae* of the EC Treaty irrespective of their nationality, subject to such exceptions as were expressly provided for in that respect.[150] It considered that there was an infringement of the right to free movement if a national was given less favourable treatment when he used his right to move freely. The Schwarz children used their right to free movement and as stated in *Zhu and Chen*,[151] even young children may make use of their free movement rights. The national legislation at stake

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[148] On the conditions of admission to the Austrian universities of foreign students see Case C-147/03 Commission *of the European Communities* v. *Republic of Austria* [2005] ECR I-5969, para 6. Paragraph 36 of the Law on University Studies, (Universitäts-Studiengesetz, 'the UniStG'), entitled 'university entrance qualification' (Besondere Universitätsreife), provides: '(1) In addition to possession of a general university entrance qualification, students must demonstrate that they meet the specific entrance requirements for the relevant course of study, including entitlement to immediate admission, applicable in the State which issued the general qualification. (2) Where the university entrance qualification was issued in Austria, that means passes in the additional papers prescribed for admission to the relevant course of study in the Universitätsberechtigungsverordnung [University Entrance Regulation]. (3) If the course of study for which the student is applying in Austria is not offered in the State which issued the qualification, he or she must meet the entrance requirements for a course of study which is offered in that State and which is as closely related as possible to the course applied for in Austria. (4) The Federal Minister may by regulation designate groups of persons whose university entrance qualification is to be regarded, by reason of their close personal ties with Austria or their activity on behalf of the Republic of Austria, as issued in Austria for the purposes of establishing possession of the specific university entrance requirements. (5) On the basis of the certificate produced in order to demonstrate possession of a general university entrance qualification, the principal of the university shall determine whether the student meets the specific entrance requirements for the course of study chosen.'

[149] Case C-76/05 *Marga Gootjes-Schwarz* v. *Finanzamt Bergisch Gladbach* [2007] ECR I-6849.

[150] Ibid., para 86 where the Court quotes its rulings in Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31; Case C-224/98 *D'Hoop* [2002] ECR I-6191, para 28; Case C-148/02 *GarciaAvello* [2003] ECR I-11613, paras 22 and 23; and Case C-224/02 *Pusa* [2004] ECR I-5763, para 16).

[151] Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para 20.

disadvantaged those nationals who availed themselves of the right to move freely, thus was contrary to Article 18(1).

In *Morgan*[152] Advocate General Colomer underlined the fact that the Court was frequently being asked to demark the contours of European citizenship and of the rights attached to it.[153] He stated that discrimination on grounds of nationality was prohibited and that this could have been invoked by any European citizen. Any European citizen has the right to free movement, the right to reside. The principles of free movement and equality were opposed to the state of origin and to the host state. It can be noted that obstacles were raised on both sides, and that European Union principles attacked these obstructive rules.

Advocate General Colomer looked at the characteristics of aid granted for study abroad and at the possibility of invoking the right to free movement. He analysed the aid granted by Member States for education undertaken in other Member States. The allowances granted by Member States to sustain the education of their citizens were varied. Some were directly linked to education, such as aid granted to cover tuition fees, or scholarships, others were indirectly linked to education, such as a reduction in the purchase of books or other educational material, aid for transportation and different maintenance allowances.

In compulsory education, the state is obliged to guarantee education. However, when it comes to higher education the state needs to guaranteed equality in exercising the right to education, avoiding discrimination based on economic reasons. Thus, the state offers direct aid—scholarships—or indirect aid—exemption from tuition fees.[154] When a student decides to go abroad for study, fresh problems arise: the home state does not export aid and the host state does not subsidise the free movement of students. Usually aid is granted under certain conditions.

Advocate General Colomer took position regarding the observations submitted to the Court that the European Union had no competence with regard to education aid. His argument followed two lines. One regards the field of application of free movement. Free movement can be invoked by an individual against his own state. The creation of a European Union citizenship that provides the right to move freely within the European Union represents a qualitative progress as long as it dissociates the freedom of movement from its functional and instrumental elements (as long as it is not linked with the exercise of an economic activity or with the creation of the internal market) and as long as it is raised to the rank of independent right.[155] He concluded that the Member States are competent when deciding on aid for study aboard, but if Member States grant such aid, it then falls

[152] Opinion of Advocate General Damaso Ruiz-Jarabo Colomer in Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan* v. *Bezirksregierung Köln and Iris Bucher* v. *Landrat des Kreises Düren* [2007] ECR I-9161.

[153] Ibid., para 64.

[154] Ibid., paras 70–78.

[155] Ibid., paras 89–96.

under European Union law because the conditions laid down in order to benefit from such aid must not restrict free movement.

The other line around which he builds his argument is that of competences with regard to education. According to Article 165 TFEU (ex Article 149 EC) the European Union is not competent in the field of education. He deduced from the Treaty that the Member States have the exclusive right to regulate the fundamental aspects connected to study, but not everything.

He distinguishes between the core issues related to education and issues which are ancillary to education. The programmes of study and the organisation of the system are aspects central to education and fall within the competences of Member States. However, there are ancillary aspects where the link with European Union principles varies. Therefore, aid for starting or continuing studies does not have a direct link with the core issues of education and European Union law thus has a greater presence.

The Court has included in the field of application of European Union law the conditions of access to professional training (*formation profesionnelle*), which includes higher education and universities. Since aid granted to students is aimed at eliminating economic obstacles, this being actually related to the conditions of access, he consequently concludes that aid does not fall within the exclusive competences of Member States, but has to respect European Union law and guarantee the fundamental principles.[156]

The Court in *Morgan* stated that German nationals could rely on Article 20(1) TEFU (ex Article 17(1) EC) since they were citizens of the European Union and could rely on the citizenship right even against their state of origin.[157] The Court admitted that according to Article 165(1) TFEU (ex Article 149(1) EC) Member States had exclusive rights with regard to the content of teaching and the organisation of their system; however, in exercising those competences, they had to comply with European Union law.[158] It also recalled that national legislation which placed its nationals at a disadvantage simply because they availed themselves of the right to move freely was an infringement of Article 21(1) TFEU (ex Article 18(1) EC).[159] The Court recalled the importance of the right to move freely in the field of education quoting its previous cases *D'Hoop*[160] and *Commission* v. *Austria.*[161] The Court considered that if a Member State decided to

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[156] Ibid.

[157] See Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, para 19.

[158] Case C-308/89 *Di Leo* [1990] ECR I-4185, paras 14, 15; Case C-337/97 *Meeusen* [1999] ECR I-3289, para 25; Case C-147/03 *Commission* v. *Austria* [2005] ECR I-5969, paras 31-35; and Case C-76/05, *Marga Gootjes-Schwarz* v. *Finanzamt Bergisch Gladbach* [2007] ECR I-6849, para 70.

[159] Case C-406/04 *De Cuyper* [2006] ECR I-6947, para 39; Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, para 31; and Case C-76/05, *Marga Gootjes-Schwarz* v. *Finanzamt Bergisch Gladbach* [2007] ECR I-6849, para 93.

[160] Case C-224/98 *D'Hoop* [2002] ECR I-6191, para 32.

[161] Case C-147/03 *Commission* v. *Austria* [2005] ECR I-5969, para 44.

award grants to students for studying abroad, it should ensure that those rules did not create an unjustified restriction of the right to move and reside within European Union. The rule to spend the first year of study in Germany was found to be liable to discourage citizens to leave their Member States and study abroad.

Unlike health services, which were declared by the Court to be economic services within the scope of the application of free movement provisions and thus permitting the application of the non-discrimination principle in connection with the free movement of services provisions, education saw the Court choose not to apply the non-discrimination principle in connection with the article referring to citizenship because of the uncertain character of education services.[162] Therefore, access to education according to the non-discrimination principle was granted not only to economically active actors[163] and their families,[164] but was also extended to non-economic actors. This is more important since there is no economic link between non-economic actors and their request for access to education and benefits. There are fears on the part of the Member States that 'free-riding students' will abuse their welfare systems and that Member States might have to reduce their

[162] See Davies 2002, 2006, http://www.jeanmonnetprogram.org/papers/06/060201.html; Hartzopoulos 2002a, b, pp. 683–729

[163] For the worker's entitlement to education, see Dougan M 2005, p. 945 where he presents the conditions where workers are entitled to education: 'The worker may derive educational rights from Art. 39 EC in two main situations. First, where the claimant simultaneously works and studies (assuming the former indeed constitutes effective and genuine economic activity, e.g. Case C-357/89 *Raulin* [1992] ECR I-1027; Case C-3/90 *Bernini* [1992] ECR I-1071). In this situation, Art. 7(2) Regulation 1612/68 confers various rights to equal treatment as regards access to and maintenance assistance with education, e.g. Case 39/86 *Lair* [1988] ECR 3161; Case 235/87 *Matteucci* [1988] ECR 5589; Case C-3/90 *Bernini* [1992] ECR I-1071;Case C-337/97 *Meeusen* [1999] ECR I-3289. This situation has not been materially affected by the introduction of Directive 2004/38. Secondly, where the claimant works and subsequently undertakes studies. Three possibilities arise in this situation. a) The ex-worker resides within the host State pursuant to the right to remain under Regulation 1251/70 (or now thanks to the right to permanent residency under Directive 2004/38): equal treatment applies as per fully-fledged workers. b) The ex-worker resides within the host State without such a right to remain (or permanent residency): equal treatment, in particular as regards access to maintenance support, depends on factors such as the voluntary or involuntary nature of the unemployment, and whether the previous economic activity was merely ancillary to the current studies, in accordance with judgments such as *Lair*, (*supra*); Case 197/86 *Brown* [1988] ECR 3205; *Raulin*, (*supra*); *Bernini*, (*supra*); Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187. This case-law has been (at least partially) codified in Arts. 7(3)(d) and 24(2) Directive 2004/38. c) The ex-worker no longer resides within the host territory: equal treatment applies only as regards social advantages directly linked to the claimant's previous employment (which is unlikely in most cases to include educational support in the form of payment of fees or grants etc.), e.g. Case C-57/96 *Meints* [1997] ECR I-6689; Case C-43/99 *Leclere* [2001] ECR I-4265; Case C-33/99 *Fahmi and Amado* [2001] ECR I-2415.'

[164] Case 76/72 *Michel S* [1973] ECR 457; Case 9/74 *Casagrande* [1974] ECR 773; Case 197/86 *Brown* [1988] ECR 3205; Case 263/86 *Humbel* [1988] ECR 5365; Cases 389–390/87 *Echternach and Moritz*, [1989] ECR 723; Case C-308/89 *Di Leo* [1990] ECR I-4185; Case C-7/94 *Lubor Gaal* [1995] ECR I-1031; Case C-413/99 *Baumbast* [2002] ECR I-7091. On the scope of Art. 7(2), e.g. Case C-3/90 *Bernini* [1992] ECR I-1071; Case C- 337/97 *Meeusen* [1999] ECR I-3289; Case C-33/99 *Fahmi and Amado* [2001] ECR I-2415; see also O'Leary 2005, pp. 39–89.

financial support for students in order to be able to sustain the increasing demand for education coming from abroad. There are fears that a 'race to bottom' effect may occur. Are Member States' fears founded; are Member States' educational systems in danger from European Union law? How exactly can a balance between the free movement and Member States interests in organising their education systems be ensured? If the non-discrimination principle promoted student mobility, can the proportionality principle protect Member States' interests?

The non-discrimination principle has proven to be a very effective instrument in removing restrictions to free movement and, moreover, in establishing a certain degree of solidarity for citizens of other Member States.

Whenever there is discrimination, the next question to ask is whether the measure can be saved by a justification. The Court accepted a number of reasons as valid justifications to allow Member States to offer the necessary protection for their systems, however, the balance between the economic interests of the European Union and social interests of the Member States is ensured by applying the proportionality principle.

3.5 Justifying Restrictions

3.5.1 Introduction

'Community law does not detract from the power of the Member States to organise their social security systems.'[165] This formula, which according to Davies has achieved the status of catechism,[166] ensures that the Member States are in charge of the organisation of their welfare systems. However, the Court states that this power is not unlimited and that Member States must comply with Community law when exercising that power. As a result of the application of Community law, many Member State rules have been found to be restrictions to the free movement provisions.

The special characteristics of health, social security and education services require special protection from the state. At this point the exceptions meant to ensure a balance between the European Union's economic interests and the Member States social aims come onto the scene. There are two types of justifications: treaty exceptions and legally created exceptions. The exceptions found in

[165] Case 238/82 *Duphar and Others* [1984] ECR 523, para 16; Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, para 27; Case C-158/96 *Kohll* v. *Union des Caisses de Maladie* [1998] ECR I-1931, para 17; Case C-157/99 *B.S.M. Geraets-Smits and Others* [2001] ECR I-5473, para 44.

[166] Davies 2002, pp. 27–40.

the Treaty are however limited and are narrowly interpreted.[167] The broad interpretation given to the concept of restriction required in turn a larger number of reasons that could be relied upon to preserve national rules that served objectively justifiable purposes. 'The Court has consistently held that, as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by overriding reasons related to the general interest and which apply to all persons or undertakings pursuing an activity in the State of destination. In particular, the restrictions must be suitable for securing the attainment of the objective which they pursue and they must not go beyond what is necessary in order to attain it.'[168]

When applying these judicially created exceptions, some conditions must be met: national measures that hinder or make less attractive the exercise of fundamental freedoms 'must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary to attain it'.[169]

This section is aimed at identifying the possible justifications that can be accepted by the Court. Once a reason is found to be a valid justification, it can still conceal protectionist intentions and thus the principle of proportionality must apply.

3.5.2 Types of Justifications

Member States may have good reasons for maintaining their restrictive measures. Reasons such as: preserving the financial balance of the system, the maintenance of a balanced service open to all, the safeguarding of the essential characteristics of the system, preventing abuse of European Union law, protecting the quality of the service, consumer protection, the cohesion of the tax system and public policy were all motivations formulated in cases brought before the Court. Does the Court accept such justifications? The Court's policy is that purely economic reasons cannot be accepted as justifications for infringing free movement provisions. When the Court and Member States speak of preserving the financial stability of the system, or the maintenance of a balanced service open to all, or the prevention of an abuse of European Union law, it is readily apparent that all these reasons boil down to economics. There are different ways approaching economic reasons. However, even if in economic terms the safeguarding of the financial stability of the system can be reduced to a matter of saving money, the importance of having a

[167] Case 352/85 *Bond van Adverteerders and others* v. *The Netherlands State* [1988] ECR 2085, para 36; Kapteyn and van Verloren Themaat 1998, p. 757.

[168] Case C-398/95 *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion* v. *Ypourgos Ergasias* [1997] ECR I-3091, para 21.

[169] Case C-55/94 *Gebhard* [1995] ECR I-4165, para 37.

functional health or educational system represents an overriding reason, beyond simple economic concerns.

There are two types of justifications put forward by Member States: those related to economics and others related to the philosophy underpinning the creation and organisation of a health, health insurance or educational system. **In** the Court's analysis, even where the justifications are accepted as good reasons for retaining restrictive measures, Member States failed the proportionality test. They failed to bring evidence to sustain their arguments. Member States are required to make changes to comply with European Union law and sometimes, compelled by practical considerations, they need to revise their philosophical beliefs.

3.5.2.1 Justifications Related to Economic Aspects

3.5.2.1.1 Economic Justifications

Can economic justifications be used to maintain a state regulatory measure that is contrary to Treaty provisions? In *Kohll*[170] it was stated that: 'It must be recalled that aims of purely economic nature cannot justify a barrier to the fundamental freedom to provide services'.[171]

It is clear from the Court's rulings that economic aims cannot justify a restriction of the fundamental freedoms guaranteed by the Treaty. However, in a series of cases the Court discusses the safeguarding of the financial balance of social security system. Can the maintenance of the financial balance of a sector be regarded as an economic aim?

Advocate General Jacobs makes some interesting comments in his opinion in *Commission* v. *Austria*.[172] In addressing the Austrian government's defence, which sought to justify its restrictive measures by invoking the financial stability of the education system, he stated:

> […] at the present stage of development of Community law, I have some reservations about the application to the field of higher education of the statements made by the Court in *Kohll* and *Vanbraekel* as regards national social security systems. As a preliminary remark it must be noted that, by accepting aims of a purely economic nature as possible justifications, *Kohll* and *Vanbraekel* represent a departure from the orthodox approach of the Court that such aims may not justify a restriction of the fundamental freedoms guaranteed by the Treaty. In fact, they provide for a double derogation, first from the fundamental principles of free movement and second from the accepted grounds on which

[170] Case C-158/96 *Raymond Kohll* v. *Union des caisses de maladie* [1998] ECR I-1831, para 41.

[171] See Kapteyn and van Verloren Themaat 1998, p.757; Article 2(2) of Council Directive 64/22 EEC of 25 February 1964 on the coordination of apecial measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ Spec Ed 850/64, p. 117.

[172] Case 147/03 *Commission of the European Communities* v. *Republic of Austria* [2005] I-5969.

> those derogations can be justified. In view of this, any justification argued on their basis, especially by analogy, needs to be treated with circumspection.[173]

Advocate General Jacobs considers that accepting a justification such as the safeguarding of the financial balance of the system would mean to derogate from the Court's policy that economic aims cannot justify restrictions. He added that such derogation on economic grounds for services provided in the framework of public healthcare systems is understandable given the sensitive nature of the public sector.

Does the Court indeed derogate from its policy that economic aims cannot justify obstacles to trade? In *Campus Oil*[174] the Court apparently accepted that rules that have obvious economic aims could be used to justify an obstacle to trade.

In this case the Court was asked whether the Irish rules that required importers of petroleum products to purchase a certain proportion of their requirements at prices fixed by the competent minister from a state-owned company which operated a refinery in Ireland were compatible with the Treaty. Since the measure was obviously an obstacle to trade, the Irish government tried to justify it using public policy and public security exceptions, stating that the heavy dependence of Ireland on imports required maintaining refining capacity on national territory to enable it to enter into long-term contracts with suppliers of crude oil.

The rule indeed aimed at ensuring that the refinery did not operate at loss and this should have been regarded as an economic aim. However, the Court stated that 'in the light of the seriousness of the consequences that an interruption in supplies of petroleum products may have for a country's existence, that aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and thus capable of constituting an objective covered by the concept of public security'.[175]

Thus the Court accepted some restrictions to trade if higher interests exceed purely economic goals. It looked at the potential effects that an energetic crisis could have for countries that totally depend on importers for their supplies of petroleum products and decided that the measures meant to avoid any financial losses for the refinery exceeded economic aims. However, the Court entrusted national courts with the task of applying the principle of proportionality and determining whether the quantities and prices set by the government did not go beyond what was necessary to ensure the survival of the refinery.

Indeed, though ensuring the financial balance of a sector is regarded as an economic aim, the fact that the sectors affected are health, social security or education should be taken into consideration. It can be considered as Snell rightly observed that "the economic aim was not an end in itself, but only the means to achieve a legitimate public security objective".[176] The disruption of the financial

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[173] Ibid., para 31.

[174] Case 72/83 *Campus Oil Limited and others* v. *Minister for Industry and Energy and others* [1984] ECR-2727.

[175] Ibid., para 35.

[176] Snell 2002, p. 174.

balance of the social security, education or health systems have effects in social planning. If the financial stability of these sectors were endangered, services vital for the population would no longer be provided properly. Financial problems can thus lead to the deprivation of the population of essential services, where the preservation of human life is involved. This cannot be compared to any other economic area, where going out of business has purely economic consequences. Thus the financial stability of these systems cannot be regarded as an economic aim. "[…] where it is clear that economic aims are crucial for the realisation of 'non-economic aims, they are justifiable".[177]

Because of the double nature of health, social security and education services, it is important when applying exceptions to attend to the circumstances to determine whether the social or the economic aspect carries more weight. For example, in *Watts*[178] Advocate General Geelhoed, in determining whether authorisation would seriously undermine the NHS system of administering medical priorities using waiting lists, looked first at the system of waiting lists and concluded that they appeared to be based on considerations of purely economic nature that could not justify a restriction on trade.[179] Waiting lists were indeed aimed at controlling expenses and establishing priorities, but in the case in question the waiting lists did not take into account the individual pathological condition of the patient, his medical records and the evolution of his disease. Responding to the stated intention that the waiting lists should 'be managed actively as dynamic and flexible instruments which take into account the needs of patients as their medical condition develops' he concluded that the management of the waiting lists did not meet any of these conditions and that behind the waiting lists lay purely economic reasons. Therefore, the conditions for granting authorisation to receive medical care in another Member State were designed to guarantee the financial stability of the system; however, because the method of managing waiting lists did not take the human aspect into consideration but only economic aspects related to saving money, the justification put forward by the national authorities had a purely economic character and could not be accepted.

3.5.2.1.2 The Financial Balance of the System

Can restrictions to trade be justified by the need to maintain the financial balance of the system? How is it possible to determine whether the financial stability of a system is endangered without undertaking an economic analysis? What evidence can be brought to sustain such a justification?

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[177] De Vries 2006, p. 55.

[178] Opinion of Advocate General Geelhoed delivered in Case 372/04 *Watts* [2006] ECR I-04325.

[179] Ibid., para 84.

1. Healthcare Cases

This justification was put forward in a series of cases involving healthcare.[180] As stated in *Kohll*[181] the Court admitted that the risk of seriously undermining the balance of the social security system could constitute an overriding reason in the general interest capable of justifying a barrier to the freedom to provide services. The financial balance of the social security system could be disturbed by: (a) raising the costs of the healthcare (if patients were allowed to freely go abroad to receive medical care and then require the reimbursement of medical costs incurred abroad) or (b) by disrupting the organisation of the social security system.

a) Raising the Costs of Health Care (Immediate Costs)

The financial balance of a health insurance system could be threatened if the reimbursement of medical costs is paid in accordance with the tariffs in place in the country where the treatment was obtained. This could cause real problems where medical costs differ from one country to another, and indeed, it can be accepted that owing to different standards, the reimbursement of costs incurred in other Member States could threaten financial equilibrium. In this case, rules fixing the reimbursement of costs to match the tariffs of the home State would be meant to safeguard the financial balance of the social security system. If the costs of medical treatment obtained abroad are higher than the reimbursement rate in the home Member State, then better protection for patients who urgently need medical care abroad is ensured by Regulation 1408/71, which provides that reimbursement should be made in accordance with the tariffs in the country where the treatment was given.

However, it is hard to demonstrate that the reimbursement of costs incurred abroad would endanger the financial balance of the social security system.

In *Stamatelaki*[182] the Court dealt with the refusal of a Greek insurance fund to reimburse the expenses of medical treatment incurred abroad by a person who was over fourteen and who received medical treatment from a private hospital abroad. According to Greek legislation, the cost of treatment incurred abroad in a private hospital was reimbursed only if the patient was under the age of fourteen.

The Court reiterated its ruling in *Watts* where it stated that the fact that the treatment was provided in a hospital or non-hospital environment is irrelevant when qualifying medical care as a service for the purposes of Article 56 TFEU (ex Article 49 EC). If a Greek citizen received care in a public establishment, or in

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[180] Case C-157/99 *Gaerets Smits and Others* [2001] ECR I-5473; Case C-385/99 *V.G. Müller and Others* [2003] ECR I-4509; Case C-158/96 *Kohll* v. *Union des Caisses de Maladie*; Joined Cases C- 115/97 to 117/97 *Brentjens' Handelsonderneming BV* v. *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025; Case C-67/96 *Albany International BV* v. *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR5751; Case C-8/02 *Ludwig Leichtle* v. *Bundesanstalt für Arbeit* [2004] I-2641.

[181] Case C-158/96 *Kohll* v. *Union des Caisses de Maladie* [1998] ECR I-1931, para 41.

[182] Case C-444/05 *Aikaterini Stamatelaki* v. *NPDD Organismos Asfaliseos Eleftheron Epangelmation (OAEE)* [2007] I-03185.

a private establishment in another Member State and with which an agreement has been entered into, then there was no need to pay. However, if the patient went to a private hospital no reimbursement would be received if the patients were over fourteen. If the patient goes to a private hospital in Greece with which there is no agreement in an emergency, he will be reimbursed. If he is admitted in an emergency to a private hospital abroad with which there is no agreement, he will not be reimbursed. The discriminatory treatment is obvious and these rules were found to be contrary to the freedom to provide services.

The Greek government tried to preserve this rule by stating that without being able to rely on the agreements with private hospitals the balance of the social system would be compromised, given the higher rates charged by private hospitals. While it was accepted that the need to maintain the balance of the social security system was a reasonable justification, the Greek measures were still found to be disproportionate. Less restrictive rules such as the adoption of an authorisation scheme could have been chosen to safeguard the financial balance of the system.

b) Disturbing the Organisation of the Social Security System (Long-Term Costs)

The stability of the social security system is ensured by complicated mechanisms meant to control the expenses. An authorisation procedure is thought to be able to assist the control of expenditure by allowing the planning of the costs. Medical services provided in hospitals involve high costs due to their organisation, geographical distribution and the equipment necessary for their proper functioning. Systems designed to aid in planning for these costs are therefore welcomed.

In *Geraets Smits* the health insurance fund was required to contract with persons and establishments offering one or more forms of care in order to ensure the better functioning of the Dutch benefits-in-kind health system. The health insurance fund was free to contract with any care provider with two reservations: that the health insurance fund should enter into agreement with establishments in the area in which they operated, and that the agreements should be made with establishments which were authorised to provide the care. If medical care had to be obtained at a non-contracted establishment, authorisation was required. This authorisation procedure, which constituted an obstacle to free movement, was meant to control costs and to prevent any waste of financial and human resources. Controlling expenses in the health sector is all the more important since this sector faces increasing demands and limited financial resources.

There were fears that if patients were allowed to go abroad to receive medical care, this would endanger the principle of having contractual arrangements with hospitals and undermine the planning of expenses in the health sector, leading to imbalances in supply, overcapacity and financial waste. Allowing patients to go abroad to receive medical treatment could have adverse consequences on waiting lists and priorities. Waiting lists are a means of controlling and limiting costs; by allowing patients to go and receive treatment abroad without prior authorisation the financial balance of the system would be threatened.

In *Müller-Fauré*,[183] the United Kingdom government puts forward the defence that if hospital services were to be liberalised, they would be unable to predict the loss of demand that would follow from the flow of patients to other Member States or the increase of demand that would follow from persons insured in other Member States seeking health care in the United Kingdom. This was considered as likely to have damaging consequences on the management and financial viability of the system.

The protection of the financial balance of the social security system is accepted as a justification for barriers to the free movement of services; however, this overriding requirement must satisfy the requirement of proportionality. Using this exemption as a shield, Member States could adopt protectionist measures that would ultimately partition the market. Member States cannot rely on such an exemption to manifest their discretionary powers. Indeed, while the Court found that the financial stability of the social security system could be used as a justification for having restrictions on the freedom provisions and that an authorisation procedure was an accepted means of controlling the costs of health even if it obstructed the provision of services, it also found that authorisation concealed protectionist measures. The Court decided that some requirements must be fulfilled to allow derogations from the fundamental freedoms. Any derogation should provide sufficient guarantees that discriminatory decisions are not hiding behind a legitimate aim. Therefore, in *Gaerets Smits*, the Court required that the prior administrative authorisation had to be based on objective non-discriminatory criteria which were known in advance and which would not allow the exercise of national authorities' discretion, in order to be justified. It also required that a procedural system had to be available to ensure that a request for authorisation would be dealt with objectively and impartially within a reasonable time and that a refusal to grant authorisation could be challenged in judicial or quasi-judicial proceedings.

These objective criteria are necessary for the exclusion of the protectionist effect of national measures such as those in *Geraets Smits*. In this case, national law requires prior authorisation that must fulfill two conditions. Firstly, the treatment in question would not qualify for a reimbursement if it was not sufficiently recognised in scientific circles and, according to current thinking in the Netherlands, was regarded as experimental. Secondly, in order to qualify for reimbursement, it was necessary to consider the methods of treatment available in the Netherlands and ascertain whether adequate treatment could be available there without undue delay.

As it is easily observed, the first requirement implicitly leads to refusal of authorisation, as only treatments recognised in the Netherlands can benefit from reimbursement, and the second requirement, by its very nature, limits the circumstances under which authorisation for treatment abroad can be obtained. They both consider whether the treatment in question is available in the

[183] Case C-385/99 *V.G. Müller-Fauré* [2003] ECR I-4509; See also Van der Mei 2004, p. 57–67; Flear 2004; Davies 2004, pp. 94–107.

Netherlands, irrespective of whether it is available in an establishment with whom the health insurance fund has an arrangement or not. Therefore, priority is given to national service providers and the non-discrimination principle is infringed. Indeed, an authorisation system could be justified on the grounds that it is necessary for the safeguarding of financial equilibrium, but the conditions found in this case exceeded what was necessary for the attainment of that objective and introduced protectionist conditions.

In *Watts*[184] the refusal of authorisation was justified on the grounds that by granting authorisation the proper administration of waiting lists would be upset and without waiting lists, the financial balance of the system would be endangered. Waiting lists were indeed a means of controlling the costs; however, the waiting lists should be 'managed actively as dynamic and flexible instruments which take into account the needs of patients as their medical conditions develops'.[185] As Advocate General Geelhood rightly noted, if the waiting lists did not take the medical condition of persons and the evolution of their physical condition into consideration, then the measure protecting waiting lists could not be justified. If in the management of the waiting lists regard was not given to the medical needs of the patient, then the refusal for authorisation could not be justified for the sake of preserving the financial equilibrium of the system, because in this case the refusal for authorisation was made simply to save money, and purely economic reasons cannot be accepted as justification. Thus, the refusal of an authorisation could in principle be justified on grounds of maintaining the financial equilibrium of the system, but in the present case, by not considering the health status and the evolution the patient's condition, protectionist intentions were being hidden behind a reasonable justification.

Leichtle[186] dealt with a refusal of the Bundesanstalt für Arbeit (Federal Labour Office, the Bundesanstalt) to reimburse expenditure incurred in connection with treatment which Mr. Leichtle had intended to take in Italy. The German law governing the grant of assistance to civil servants and federal judges and to retired federal civil servants in the event of sickness, treatment, birth and death (hereinafter the BhV) was alleged to infringe the free movement of services because in order to be reimbursed for medical costs there was a mandatory condition of prior recognition of eligibility for assistance that needed to be satisfied.

In this case there is a national provision that subjects the grant of assistance towards certain expenditure related to treatment obtained in another Member State to restrictive conditions distinct from those which apply when is obtained in the national territory. The Bundesansalt argued that a complete opening up of access to European treatment establishments would endanger the financial equilibrium.

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[184] Case 372/04 *Watts* [2006] ECR I-04325.

[185] Opinion of Advocate General Geelgoed delivered in Case 372/04 *Watts* [2006] ECR I-04325, para 84.

[186] Case C-8/02 *Ludwig Leichtle* [2004] ECR [2004] I-2641.

The problem in the case was not the strict terms determining the grant of assistance with respect to the medical services provided in the course of a treatment obtained in another Member State, since the amount of the assistance was limited to that which would have been paid if the treatment was provided in Germany, but rather those controlling assistance with respect to board, lodging, travel costs, visitors' tax and the final medical report, which in the case of medical care obtained outside Germany would be reimbursed only if the person had obtained prior recognition of eligibility, itself subject to restrictive conditions.

Such a measure could have been saved by one of the derogations allowed by the Treaty or an overriding general interest reason. The fact that treatment obtained in a Member State other than Germany is subject to the condition that a medical official or medical consultant decides that the treatment is absolutely necessary owing to greatly increased prospects of success outside Germany in order to qualify for assistance, in principle could be justified by the need to preserve the financial balance of the social security system. However, the national authorities could not bring a clear argument to explain how the obtaining treatment outside Germany would have any negative impact on the financial equilibrium of the social security system.

In the case in question there was an obvious protectionist measure which had nothing to do with the financial equilibrium of the social security system and which was found to be disproportionate. If the care abroad proves to be too expensive with relation to existing funds, then a measure setting a threshold for the reimbursement of the expenses incurred abroad would be sufficient to ensure that financial equilibrium remained undisturbed and would eliminate the risk of creating a protectionist framework for the benefit of the national healthcare establishment. The Court suggested that such a limitation for eligibility for assistance on the expenditure on board, lodging, travel, visitors' tax and the production of a final medical report could have been set to an amount equal to the cost of such care, affording equivalent therapeutic effectiveness had it been available and had been obtained in Germany.[187] However, such a limitation must be based on an objective, non-discriminatory and transparent criteria.[188] In determining this limit, objective criteria should be used. Member States should not use this threshold as a protectionist means to make it more attractive to pursue medical care in the home Member State.

c) Non-Hospital and Hospital Services v. Establishments Containing Expensive Medical Equipment

A justification such as the financial balance of the social security system is accepted; however a distinction must be drawn between hospital and non-hospital services.

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[187] Ibid., para 48.

[188] Ibid.

In *Kohll*[189] the Luxemburg Government and the Commission maintained that the national authorities' requirement that prior authorisation be granted was justified by the overriding reason of preserving the financial balance of the social security scheme. In his defence Mr Kohll argued that the financial burden on the budget of the Luxemburg social security institution was the same whether he approached a Luxemburg orthodontist or one established in another Member State, since he had asked for reimbursement at the rate applicable in Luxemburg.[190] The Court recalled its rulings in its previous cases which held that aims of purely economic nature could not justify a barrier to the fundamental freedom to provide services.[191] The problem which then arose was how to draw the line, how to determine when a given measure indeed aims at preventing the risk of seriously undermining the financial balance of the social security system and when it is purely protectionist.

Since the reimbursement of the medical expenses is carried out according to the state insurance tariff, this cannot have an impact on the financial stability of the social security system. Such a justification is permitted insofar as the maintenance of a treatment facility or medical service on national territory is essential for the public health and survival of the population.[192]

In *Kohll* we have a patient benefiting from medical services provided outside hospital. It is difficult to accept a justification like that put forward by the Luxemburg government since the amount of money reimbursed calculated at the rate applicable in Luxemburg. It could be argued that if all patients went abroad then the national orthodontists would suffer from a loss of patients, and may even be forced to go out of business. It is important to ensure the presence of treatment facilities close to the population, but if patients prefer a service provided abroad for different reasons, then there are no reasons to allow measures that would protect a national service provider.

In *Geraets Smits* and *Müller-Fauré* the Court distinguished between hospital and non-hospital services, though it admitted that in practice it was difficult to actually draw a clear line between the two.

The Netherlands government tried to rely on the justification that the financial balance of the Dutch social security system would be undermined if patients like *Müller-Fauré* were allowed to go abroad without prior authorisation[193] (Ms. *Müller-Fauré* received non-hospital services). However, this assessment was not supported by any evidence. There was no evidence that patients would travel abroad in such great numbers, despite the linguistic differences, as to create a financial imbalance. If there was a great outflow of patients then the insurance funds could solve this problem by entering into contractual arrangements with

[189] Case C-158/96 *Kohll* v. *Union des Caisses de Maladie* [1998] ECR I-1931, para 38.

[190] Ibid., para 40.

[191] Ibid., para 41.

[192] Ibid., para 51.

[193] Case C-385/99 *V.G. Müller-Fauré* [2003] ECR I-4509, para 93.

those foreign providers. Moreover, the Court noted that it was up to the Member States to determine to what extent insured persons were covered. Therefore, even if they went abroad to receive medical care, they would be reimbursed only within the limits of the cover provided by the sickness insurance they were affiliated to.[194]

The non-hospital services would not be more burdensome on national social security systems since the costs of medical care would be reimbursed. Unlike hospital services, there is no extensive infrastructure requiring great costs. Moreover, services provided abroad could sometimes be even cheaper and thus the funds could save money. In order to maintain effective control of the costs, the home Member State could fix the amount of reimbursement claimable for healthcare received abroad, which would be a less restrictive measure that would not impede patients from going abroad, and this amount should be determined according to objective, transparent and non-discriminatory criteria. However, if non-hospital services contain equipment which requires heavy investments, than the Court ruled that they should have the same treatment as hospital services.

In the case of hospital treatment, the extensive infrastructure and the urgent nature of the health services provided require having care facilities on the national territory. The effective planning of hospital expenses is required because of the number of hospitals, their geographical distribution, their infrastructure and the nature of the care provided.[195] The maintenance of such infrastructure requires the efficient management of expenditure in order to avoid under-financing or waste of financial, technical and human resources.

However, the Court's tendency is to consider that in all cases where there is an infrastructure that requires heavy investments, restrictions to free movement are allowed. In *Hartlauer*[196] the Court allowed a system of prior authorisation that was infringing free movement of establishment for out-patient clinics. This case is especially interesting because while the Court recognised Member States the need to have planning for dental clinics, and allowed a system of prior authorisation, when it applied the proportionality test, it found that the prior authorisation measure was not proportional and that actually there was inconsistency in national policies.

In *Commission v France*[197] the Court allowed restrictions to free movement of services in the out-patient sector, justifying this on the need to sustain the financial balance of the social security system. It ruled that a system where reimbursement for medical services provided outside a hospital setting requiring the use of major medical equipment is subject to the grant of prior authorisation constitutes an infringement of free movement of services. However, it found the system to be justified. It found such system necessary in order to avoid any waste of financial, technical and human resources since such expensive medical equipment is

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[194] Ibid., para 98.

[195] Ibid., para 77.

[196] Case C-169/07 *Hartlauer Handelsgesellschaft mbH* v. *Wiener Landesregierung and Oberösterreichische Landesregierung* [2009] I-01721.

[197] Case C-512/08 *European Commission* v. *French Republic* [2010] nyr.

necessary to be accessible throughout the territory. The Court considered that the planning efforts of the national authorities and the financial balance of the supply of up-to-date treatment would be jeopardised if persons were allowed to go to another Member State and receive the treatment there. This was considered to lead to under use of the medical equipment in the Member State of affiliation. It ruled that such a system of prior authorisation must be based on objective, non-discriminatory criteria, known in advance so that Member States would not have absolute discretion. Moreover, a procedural system which would allow the request for authorisation to be dealt with objectively and impartially and which would allow the person requesting authorisation to challenge the decision in judicial proceedings should be created.[198]

The Court ruling however is very succinct. There is no separate analysis of justification and proportionality. In this respect the Court ruled that the Commission has not challenged the procedural and substantive rules regulating the prior authorisation measure.

Advocate General Sharpston[199] pursues a more detailed analysis and follows the usual steps by looking first whether the measure is justified and then continues with the application of the proportionality test. She admits that the system of prior authorisation is fundamental to healthcare strategy as it allows authorities to plan the available resources.[200] She makes a clear distinction between the necessity of having a prior authorisation for medical services involving heavy financial investments and medical services which require the use of standard, inexpensive equipment. She acknowledged the fact that the equipment in the case at stake is not the ordinary x-ray machine. The equipment for which authorisation was required was very expensive and it also needed maintenance by qualified personnel.[201] It went further and applied the proportionality test. She reached the conclusion that such equipment required substantial investment, high operating costs; the equipment was found to be specialist equipment (dedicated to a particular medical procedure); the equipment was likely to be used after the patient have been through preliminary screening process, so it involved equipment other than the one necessary for the first stage of diagnosis/treatment; the equipment required trained staff to install, maintain and operate.[202] All these elements in her opinion tended to suggest that the requirement of prior authorisation was proportionate. However, she notices that the Commission failed to challenge whether the items listed were not major equipment that would require prior authorisation. It failed to challenge the fact that their inclusion on the list was not proportionate. Since such challenge was not made, she concluded that France was not expected to respond to an argument which has not been raised.

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198 Ibid., paras 33–45.

199 Opinion of Advocate General Sharpston given in Case C-512/08 *European Commission* v. *French Republic* [2010] nyr.

200 Ibid., para 65.

201 Ibid., para 73.

202 Ibid., para 79.

In conclusion, the financial equilibrium of the social security system is accepted as a valid ground for justifying obstacles to the free movement provisions. When determining whether the justification is accepted, a distinction between hospital and non-hospital services was not found sufficient and the Court made a distinction between equipment requiring heavy investment and normal equipment which is used for diagnosis/initial treatment.

2. Education

Can this exception be used in education cases? Can the financial balance of the education system be used as a justification for restrictions related to the subsidisation of education for foreign nationals or the 'exportability' of education?

Mobility in education was very important in light of Lisbon strategy, which sets Europe the goal of becoming the most competitive knowledge-based economy. The benefits of mobility in education services are great—stronger cohesion within Europe, the modernisation of education systems, and preparing the labour force for employment in European markets and not only in national ones.

Can mobility for education services endanger public finances? All the benefits of mobility are welcomed but the question raised is who is to pay for it? Education is intended to prepare future generations, a task of which Member States are usually in charge, though investing in their future workforces. At the European Union level, discussion centres on European Union citizens, where European cohesion is desired and a workforce educated according to European Union needs is desired, but for this, funds are necessary. At the European Union level there have been several programmes[203] promoting mobility since the launch of Community-funded action programmes in the mid-1980s. However, despite these programmes, mobility is relatively limited.[204] The reason for this is mainly the

[203] Erasmus, Leonardo da Vinci, Comenius and Grundtvig.

[204] According to the Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions—Report on the follow-up to the Recommendation of the European Parliament and the Council of 10 July 2001 on mobility within the Community of students, persons undergoing training, volunteers and teachers and trainers COM/2004/0021 final, 'the Erasmus programme has supported in 2002 the mobility of some 115 000 students, which means about 1% of the total yearly population of higher education students in Europe. Considering that higher education studies last on average 5 years, this rate means that approximately 5% of students benefit from a transnational mobi./lity period in the framework of Erasmus. To reach the target rate of 10% participation specified in the Socrates decision, Erasmus mobility would have to more than double. The Leonardo da Vinci programme has supported in 2002 the mobility of some 45 000 trainees, which falls well short of 1% of persons participating in vocational education and training in Europe. The 5 500 mobility experiences (EUR-30) for training staff supported under Leonardo da Vinci in 2002 included trainers and language trainers as well as human resources managers and guidance staff. Within the framework of the Community programmes a very small number of school teachers (40 000 in 2003) and only a proportionally higher share of university teachers (16 000 in 2002) have undertaken a mobility activity. Such mobility periods are frequently of very short duration; the great majority of mobile school teachers, for example, typically take part in project meetings of only a few days at a partner school.'

regulatory obstacles which persist and the lack of sufficient resources to finance more Community programmes.

A boost to increasing mobility was provided by the Court as it struck down Member States' regulatory barriers. Granting allowances to foreign students or financing the education of home nationals studying in another Member State could lead to increasing mobility and to better European cohesion. However, this is regarded as solidarity between states and a question that can be raised is whether the national welfare systems are willing and capable of financially sustaining such mobility.

A Member State that grants allowances or pays for the education of its nationals abroad does not have any guarantee that it will benefit from the skilled workforce in which it invested. Therefore, it might choose to raise protectionist barriers. This section analyses the extent to which this justification—preserving the financial balance of the system—can be used to justify an obstacle to free movement.

The financial stability of the system can be disturbed either by the large number of foreign students going to study in a given Member State or by the large number of students whose studies abroad a state has to finance.

a) Importability of students

The removal of all obstacles to equal access to education for foreigners and the equal right to maintenance assistance has been achieved not through use of the free movement of services provisions, but by applying Article 18 TFEU (ex Article 12 EC) (equal treatment) and Article 21 TFEU (ex Article 18 EC) (citizenship).

It is argued, especially by the Member States, that equal access to education can sometimes become a genuine burden on those systems that provide open-access to education. In *Commission* v. *Austria*[205] an action was brought before the Court by the Commission as a result of a failure of the Austrian government to ensure access to higher and university education for the holders of secondary education diplomas awarded in other Member States under the same conditions as holders of secondary education diplomas awarded in Austria.

The conditions put forward by the Austrian government with regard to the access of foreign students to Austrian higher and university education deterred foreign students from following education in that country. The Austrian government tried to justify such restrictive measures on the grounds that to do otherwise would cause financial problems. It argued that a great number of students from other universities would enrol in Austrian universities and thus increase the financial burden on the Austrian education system.

The Court accepted the justification; however, the Austrian government could not produce any evidence to support its assertion. After this case, another infringement case was brought against Austria.[206] In June 2006 Austria introduced

[205] Case 147/03 *Commission of the European Communities* v. *Republic of Austria* [2005] I-5969.

[206] Infringement Case 1998/2308.

a quota system for medicine and dental studies according to which 75% of places were reserved for holders of Austrian diplomas, 20% of places for holders of secondary diplomas awarded in another Member State and 5% for holders of third country diplomas. In its reply to the letter of formal notice Austria replied that without such a measure there would be a potential shortage of health professionals practicing in Austria. The Commission suspended the case for a period of five years in order to give Austria the opportunity to provide more complete and detailed data to justify that the measure was justified and proportionate. The Commission will monitor the situation for five years.[207] It is important to see that the Commission acknowledged in this case the difficulties in proving a justification and the necessity for measuring and assessing the situation on a longer period. A similar infringement was brought against Belgium where in June 2006 a decree was issued instituting a quota regime. According to this decree, for certain medical studies 70% quota was allocated for students who were resident in Belgium. The same reply as in the Austrian case was given by the Belgian authorities. They argued that without such a system the French Community would be unable to maintain sufficient coverage.[208] The Commission suspended this infringement procedure in order to monitor the situation for 5 years.

If national governments attempted to justify restrictive measures in cases concerning access to universities on the grounds that the financial balance of the system and consequently its existence would otherwise be endangered, this justification could be used with even greater chances of success with relation to student benefits.

Student grants, social security and assistance benefits, and state loans are means employed by the state to financially assist students, which is viewed as a part of the state's responsibility to take care of future generations. Since all these maintenance grants have been declared by the Court as falling within the scope of the Treaty and thus as being subject to the principle of equal treatment, a significant problem may arise—namely, that more generous systems will receive a large number of students from abroad and will thus not be able to cope financially. In this case there are two possibilities—one is to reduce benefits—meaning that the system will arguably not be able to offer its students the type of financial assistance desired and not be able to organise education as desired—and the other is to impose some restrictions on foreign students' access to benefits, though this would probably be regarded as discrimination.

However, Article 3 of Directive 93/96[209] stated that the Directive did not create a right for students benefiting from the right of residence to maintenance grants. Nonetheless, Article 12 required that foreign students should be treated equally.

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[207] Press Release IP/07/ 1788, Brussels, 28 November 2007.

[208] Ibid.

[209] Directive 93/96 [1993] OJ L317/59; repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77.

Some hold the opinion[210] that this provision was contrary to the Treaty and should have been set aside. However, a Directive is a legislative act which reflects the political will and it has democratic legitimacy. According to Dougan[211] the restriction to maintenance grants constitutes a legitimate restriction imposed by the Community legislature to Article 12. This reflects the conflict between the desire to have European students prepared for the European labour force, and the impossibility of sustaining this financially. According to Directive 2004/38/EC, Member States are not obliged to confer entitlement to maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons and persons who retain such status and members of their families prior to the acquisition of the right to permanent residence.[212]

In *Grzelczyk*[213] the Court ruled that entitlement to non-contributory social benefits should not be made conditional for nationals of other Member States on falling within the scope of Regulation 1612/68 when no such condition applies to nationals of the host Member State as long as they are legally resident. The fact that they no longer have resources does not cause them to lose their right to residence, which could only be lost if they became an unreasonable burden on the social assistance system. It is extremely hard to prove that the social assistance system would be burdened by any single application for benefits.

This residence condition for the entitlement to benefits should not serve as indirect discrimination and must comply with the proportionality principle. Such a measure could easily be explained by the need to safeguard the financial stability of a social security system. However, an individual case such as that in *Grezelczyk* cannot place in jeopardy the financial equilibrium of a system and the proportionality principle should be applied.

Another way to subsidise education is by granting loans. Though loans are repayable, they can still become a burden on the system. In *Bidar*[214] the conditions imposed by the Education (Student Support) Regulations 2001 in England and Wales were considered by the Court to be restrictive and contrary to the equal treatment principle.

The United Kingdom government tried to save the existing requirement by stating that they were necessary in order to preserve financial equilibrium. They put forward some figures to sustain their assertion. It can be argued that this type of benefit is actually a loan that will be reimbursed and that the financial equilibrium of the social assistance system cannot therefore be endangered. This loan is

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[210] See Arnull et al. 2000; Van der Mei 2005.

[211] See Dougan 2001, pp. 117–119.

[212] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77, para 24(2).

[213] Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

[214] Case C-209/03 *Bidar* [2005] ECR I-02119.

provided however at an interest rate below the normal commercial rate and becomes repayable after the students complete their studies, only once they earn more than GBP 10,000. At that income and above, they have to pay an annual amount equivalent to 9% of their income. The United Kingdom government argued that the loan represent a cost to the state because of the low interest rate charged and because of the condition that the loan only becomes repayable if the borrower's income exceeds GBP 10000. The Secretary of State for Education and Skills estimated that the cost of the loan is equivalent to 50% of the amount of the loan. He continued by stating that in the academic year 2000/01 the average loan made for a student was GBP 3155 and that the financial burden would be too great if the 41,713 EU nationals who studied in England and Wales were entitled to such a loan.[215]

The Court accepted that Member States were entitled to take all measures necessary to ensure that the grant of subsidised loans did not become an unreasonable burden that could have consequences on the overall level of assistance granted by the State.[216] Nonetheless, as always, whenever an obstacle is accepted, the proportionality principle should be applied. It is indeed legitimate to require a link between the student that requires the loan and the employment market of the state that grants that loan, but the conditions imposed should be proportional to the scope pursued. Therefore, the Court accepted that entitlement to student loans could be conditional on the existence of a certain degree of integration in the host society. In this case three conditions were applied: to be resident in England and Wales on the first day of the first academic year of the course, to be resident in the United Kingdom and Islands for the preceding three years, and that this residence for three years be not for the purposes of education.

The Court found this latter condition to go beyond what is necessary to show that there was a certain degree of integration in the host society because it made it impossible for a national from another Member State to obtain the status of settled person while studying.

b) Exportability of Students

Justification on the basis of maintaining the financial balance of the education system was accepted as an overriding reason for measures that prohibit student grants when the student chooses to study abroad. However, Member States encountered the same problems as in health cases: it was difficult to pass the proportionality test and to provide evidence that the financial balance was actually endangered.

In *Gootjes Schwarz*,[217] in order to justify discrimination, the German government stated that since funds were limited, it was necessary to avoid additional financial burden. The part of the *Bidar* judgement where the Court recognised the

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[215] Ibid., para 25.

[216] Ibid., para 56.

[217] Case C-76/05 *Marga Gootjes-Schwarz* v. *Finanzamt Bergisch Gladbach* [2007] ECR I-6849.

right to lay down criteria for the grant of assistance to cover the maintenance costs for students was referred to. The German government feared that extending preferential tax treatment to schools abroad would lead to a financial burden on the budget. AG Stix Hackl stated:

> However, that objection is not without problems. As the Court has consistently held, shortfalls in tax revenue are neither among the grounds referred to in Article 46 EC in conjunction with Article 55 EC, nor are they to be taken into consideration as matters of overriding general interest. In so far as the Federal German Government regards the extension of the tax deductibility of payments of school fees to certain foreign schools as problematical, because it leads to shortfalls in tax revenue, there appears to be no justification for the abovementioned breach of the principle of freedom to provide services.[218]

He considered that the exclusion from tax relief of school fees paid to attend a school abroad was disproportionate because there were less restrictive means available. The measure was aimed to avoid excessive expenditure from the budget, since the schools abroad had higher fees; however, a measure limiting the amount deductible would have constituted a less restrictive means to achieve the same result.

In answering the argument that the tax relief granted for fees paid to schools aboard would be an unreasonable burden, since schools abroad have higher fees because they have to finance themselves, the Court also replied that there were less restrictive means to prevent this, such as a limit on the amount deductible. Therefore, though it was legitimate to seek to avoid an extra burden on the budget, the measure chosen by the German government was disproportionate.

In *Morgan*[219] the German authorities tried to put forward the justification that if the entirety of a student's studies were pursued abroad, this would amount to an unreasonable burden which could lead to a general reduction in study allowances granted in the Member State of origin. In tackling this justification the Court recited the *Bidar* judgement and stated that it was legitimate for a Member State to seek to avoid an unreasonable burden on its system, and that it considered it to be legitimate for a Member State to require that a certain degree of integration in society be demonstrated. However, the measure in question was disproportionate because the degree of integration in society could have been shown by other means. Advocate General Colomer[220] also considered that the requirement stipulating that a student should have commenced education and have studied one year in the country of origin was not a proper one. He considered that Finland had better measures available to it that could establish such a link, such as the requirement to have lived in the country at least two years in the five preceding study abroad.

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[218] Opinion of Advocate General Stix-Hackl delivered in Case C-76/05 *Marga Gootjes-Schwarz* v. *Finanzamt Bergisch Gladbach* [2007] ECR I-6849 para 60.

[219] Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan* v. *Bezirksregierung Köln and Iris Bucher* v. *Landrat des Kreises Düren* [2007] ECR I-9161.

[220] Opinion of Advocate General Damaso Ruiz-Jarabo Colomer in Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan* v. *Bezirksregierung Köln and Iris Bucher* v. *Landrat des Kreises Düren* [2007] ECR I-9161.

With regard to the budgetary constraints, he noted that the requirement that the student should have already studied one year in Germany was not fit to solve any financial problems.

In *Commission* v. *Germany*[221] the Commission brought an action against Germany asking the Court to declare that the Article 10(1)(9) of the Einkommensteuergesetzes (EStG) (German Law on income tax) was incompatible with the freedom to provide services in that it infringed European Union law by excluding school fees with respect to education abroad. According to the German law on income tax, taxable persons in Germany are able to deduct 30% of the fees paid to state-approved or recognised private schools from their taxable income as special expenses. It is not possible to deduct tax with respect to school fees paid to private schools established in another Member State. The Court decided that the refusal to grant such a tax advantage for school fees paid to schools in another Member State could be justified by the objective of ensuring that no unreasonable financial burden is placed on the State. However, the specific measure did not pass the proportionality principle since there were less restrictive measures available, such as the limitation of the amount deductible to a given level.

3.5.2.1.3 The Maintenance of a Balanced Service Open to All

As in the case of education, national authorities may pursue different policies through different organisational frameworks. Since some of these rules may conflict with European Union law, can these rules be saved by the justification that they are necessary for the maintenance of a medical and hospital service open to all? To what extent is a measure really justified and to what extent is it purely protectionist?

The maintenance of a balanced system open to all is related to the characteristics of the universal services. In *Geraets Smits* the national authorities tried to justify the existence of a prior authorisation requirement by arguing that the hospital infrastructure demanded such a system of authorisations. It was argued that medical care provided within the hospital infrastructure presents specific characteristics: they require costly equipment, and their geographical distribution and the type of medical services that they offer require planning. It is indeed important that everybody has permanent access to high-quality hospital treatment, which in turn explains the need for the effective control of costs.

Were it not for this authorisation system, care providers would never accept to participate in a system of agreements. This contractual system deals with the availability, volume, quality, effectiveness and cost of services and it ensures the better organisation of the financing of the health system by adjusting the expenses to the needs. Because of finite financial resources, every system creates methods to

[221] Case C-318/05 *Commission of the European Communities* v. *Federal Republic of Germany* [2007] ECR I-6957.

reduce expenses. Waiting lists represent one of these methods. In the absence of this authorisation system, the Member States feared a probable outflow of patients that would undermine the efficiency of the contractual system, resulting in no doctors being interested in joining the system. This system is thus vital for a good management of health expenses.

Hartzopoulos[222] notes that 'the reasoning of the Court has been somehow trickier: the ECJ acknowledges that this is a valid objective but denies that it may constitute an overriding reason of general interest'. The Court considers such a reason as being connected to economical aims. The maintenance of a balanced medical care and hospital service open to all is recognised as being intrinsically linked to the method of financing of the social security system and the Court admits that this may fall within the Treaty public health exception.[223]

3.5.2.1.4 Preventing Abuse of European Union Law

The very generous interpretation provided by the Court in education and health cases raised Member State fears that some people could abuse European Union law to benefit from their generous provisions. Are Member States allowed to raise obstacles to free movement in an effort to avoid 'benefit tourism'? Whenever a freedom of movement is extended, there will always be people trying to shop around for the best deals. Particularly in the case of welfare services, there will always be the temptation to benefit from the provisions of a more generous system. Are these fears justified or do they just conceal protectionist intentions?

In practice, people trying to benefit from less restrictive rules in one Member State with regard to access to university can be found, as can people trying to benefit from the generous financial subsidies granted by a given Member State.

In *Commission* v. *Austria*[224] a restrictive measure which imposed an additional burden on foreign students who wanted to follow their studies in Austria was justified by the Austrian authorities on the grounds that it was aimed at preventing the abuse of European Union law. It stated that foreign students were trying to evade the application of their national legislation regarding training for a trade or profession.[225] The Austrian system was an open-access system, meaning that everybody who wanted to pursue higher or university education could just enrol without restriction. This type of system attracted many German students, especially in medicine, since in Germany the rules regarding access to university were stricter. Therefore, the Austrian authorities considered that foreign students were

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[222] Hartzopoulos 2002a, b, p. 138.

[223] Case 157/99 *B.S.M. Geraets-Smits* v. *Stichting Ziekenfonds VGZ and H.T.M. Peerbooms* v. *Stichting CZ Groep Zorgverzekeringen* ECR [2001] I-5473, para 73; Case C-158/96 *Raymond Kohll* v. *Union des caisses de maladie* [1998] ECR I-1931, para 50.

[224] Case 147/03 *Commission of the European Communities* v. *Republic of Austria* [2005] I-5969.

[225] Ibid., para 54.

trying to avoid the stricter admission rules in their own Member States by using the freedom of movement and considered that this should not be allowed.

The Court ruled in *Knoors*[226] and *Bouchoucha*[227] that a Member State may have a legitimate interest in preventing its nationals from circumventing its national legislation by making use of the facilities created by the Treaty. However, as Advocate General Jacobs stated in his opinion in *Commission* v. *Austria*, those cases concerned measures adopted by the Member States against abuses committed by their nationals who were using European Union law in order to evade national legislation. He continued by noting that it was hard to accept that there was an abuse of European Union law where foreign students were trying to enter Austrian higher education system under the same conditions as Austrian nationals. Moreover, the Court had found in its previous cases that abuse or fraudulent conduct should be examined individually, on a case-by-case basis.[228]

Therefore, the justification could not be accepted in order to defend such a restrictive rule, which applied to everybody and which had the effect of discouraging mobility. Moreover, even if the justification could be accepted as legitimate in the case in question, the proportionality test could still not have been passed, since the Court stated clearly that any abuse should be handled on a case-by case basis.

With regard to benefits, the Court's position is that a certain degree of solidarity must exist between the Member States in assisting each other's nationals residing lawfully on their territory. It can been seen from *Bidar* that student grants fall within the scope of the Treaty and even if Article 3 of Directive 93/96 did not establish an entitlement to student grants for migrant students, nevertheless, the general principles of European Union law—the principles of equal treatment and proportionality—should be considered. With regard to social assistance benefits granted to students, there was nothing in Directive 93/96 stating whether migrant students were entitled to these types of welfare benefits. Therefore, the European Union principle of equal treatment applied with regard to these benefits. In not wanting to subsidise migrant students from their own resources, Member States sometimes make entitlement to such social security benefits conditional upon the fulfillment of a residence requirement. The question is whether such requirements, which are indirectly discriminatory since they are liable to affect foreigners more than nationals, can be saved by the justification that they are intended to avoid an abuse of European Union law.

Therefore, since Member States cannot discriminate directly, provisions making the entitlement to grants and benefits conditional on fulfilling a residence requirement are likely to discriminate indirectly. In *Bidar* the national authorities made the granting of student loans conditional to three years residence prior to application.

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[226] Case 115/78 *Knoors* [1979] ECR 399.

[227] Case C-61/89 *Criminal proceedings against Marc Gaston Bouchoucha* [1990] ECR I-3551; Case C-308/89 *Di Leo* [1990] ECR I-4185.

[228] Case C-436/00 *X and Y* [2002] ECR I-10829 para 42; Case C-212/97 *Centros* [1999] ECR I-1459, para 25.

The United Kingdom government contented that this measure was necessary in order to ensure that there was a link between the student and the Member State or its employment market. This measure was aimed at preventing the abuse of the national student support scheme, at preventing 'benefit tourism'; and how can 'benefit tourism' be prevented if not by ensuring the existence of a previous contribution that would entitle the applicant to benefit from the grant. Therefore, the United Kingdom government attempted to ensure that the parents contributed sufficiently through taxation to permit their children to benefit from the grants.[229]

The Court accepted that a condition requiring evidence of a real link with the Member State of study was justified.[230] Though Member States must show a certain degree of solidarity with nationals from other Member States, it was nonetheless accepted that it was not desired to have an increased number of students benefiting from a generous grant system.

However, even when such justification is accepted, the proportionality principle continues to apply to eliminate any protectionist measures from concealing themselves under the umbrella of a good justification. Since the aim of the three-year residence rule was aimed at showing a certain degree of integration into the host society, the national rule stating that remaining in the United Kingdom for the purpose of receiving full-time education did not count as a previous residence was disproportionate because it precluded a national from another Member State from obtaining the status of a settled person as a student, even if he could show a genuine link with the society.

In *Morgan*[231] the German government argued that the restrictive measure was necessary because in the absence of coordination between Member States there was a risk of duplicating grants. However, the Court could not see how an obligation to pursue one year of study in Germany could avoid the duplication of grants.

Avoiding the duplication of grants, avoiding the evasion of more restrictive national laws, or preventing the avoidance of waiting lists can be regarded as targeting abuses. However, the Court ruled that even if preventing the abuse of European Union law is a fair reason, less restrictive means could nonetheless be used to avoid such problems. This justification has economic aspects in its intrinsic nature, since such problems would not be raised if funding were unlimited.

3.5.2.1.5 The Cohesion of the Tax System

Member States can invoke the cohesion of the tax system as an overriding reason where in the existing taxing system there is a link between the contributions received and the money paid out. Sometimes Member States grant tax concessions

[229] Case C-209/03 *Bidar* [2005] ECR I-02119, para 55.

[230] Ibid., paras 56, 57.

[231] Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan* v. *Bezirksregierung Köln and Iris Bucher* v. *Landrat des Kreises Düren* [2007] ECR I-9161.

related to the amounts paid for different insurance or education services. The fact that such tax preference is not granted in connection with the contributions paid abroad is considered a restriction to free movement. However, the Court accepted that when it comes to taxation there must be a link between a tax concession and the taxpayer benefit.

A refusal by the national authorities to allow the deduction from the total occupational income of contributions paid in another Member State for sickness and invalidity insurance and pursuant to a life assurance contract can be regarded as contrary to the free movement of services provisions. This is the situation encountered in *Bachmann*,[232] a case where the Court was asked to rule on Belgian rules that restricted the deductibility of sickness and invalidity insurance contributions and pension and life assurance premiums from the contributions paid in Belgium.

A justification put forward by the Belgian, Dutch and Danish governments was that such provisions are necessary to ensure the cohesion of their tax systems with relation to pensions and life assurance.

The Court observed that under the Belgian legislation, there was a connection between the deductibility of contributions and the liability to tax of sums payable by insurers under pension and life assurance contracts.[233] In such a system, the loss of revenue resulting from the deduction of contributions from the total taxable income was offset by the taxation of pensions, annuities or capital sums payable by the insurers. Where such contributions were not deducted, those sums were exempted from tax.[234] Therefore, to allow this kind of deduction for the contributions paid in another Member State, the sums payable by the insurers would have to be taxable.

The position of the migrant worker working in Belgium and paying contributions in Germany was not similar to the situation of the Belgian worker paying contributions in Belgium because the pension of the Belgian worker was taxable in Belgium, while the pension of the migrant worker was not taxable. Therefore, according to the Belgian system, the loss of revenue incurred by granting deductions to Belgian workers was offset by the taxation of their pensions.[235] The Court accepted that the cohesion of the Belgian tax system as a valid overriding reason.

In *Jundt*[236] the national authorities tried to explain their refusal to exempt from income tax expense allowances received from an institution abroad as a result of the education services obtained abroad on the basis of the need to safeguard the cohesion of the German tax system. It was argued that the exemption from tax of allowances received in a national establishment assisted the education system since the State benefited because this way, it could cover the teaching and research

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[232] Case C-204/90 *Bachmann* [1992] ECR I-249.

[233] Ibid., para 21.

[234] Ibid., para 22.

[235] Arnull et al. 2000, p. 451.

[236] Case C-281/06 *Hans-Dieter Jundt* v. *Finanzamt Offenburg* [2007] I-12231, paras 65–73.

needs of its universities at a lower cost. It was pointed out that there could be a direct link between the tax exemption granted to the taxpayer for her secondary teaching activities. It was contended that the concession served a public interest because the teaching was carried out for the benefit of an institution established in Germany and that the disadvantage of granting such tax concessions was offset by the benefit the concession constituted to the public interest. The Court however stated that such a rule could not be saved by relying on the need to ensure the cohesion of the tax system because there was no direct link between the tax concession and the taxpayer benefit. The existing benefit was too general and too indirect to be used as a justification.

3.5.2.2 Justifications Related to Non-Economic Aspects

The organisation of different education and health systems may be underpinned by different philosophical reasons and different ideologies. For example, a Member State could have chosen to have a university system with open access because it aims at ensuring that people have access to higher education and aims at achieving a high level of education. It could have chosen an NHS system because it wants people to have free access to healthcare. Access to some schools may be conditional to giving a declaration that the student shares some religious views. It is interesting to see whether the Court accepts these justifications.

3.5.2.2.1 The Homogeneity of the System

Can Member States preserve their regulatory barriers on the grounds that they are necessary for the homogeneity of their systems? Can free movement in the field of education services really jeopardise this homogeneity?

When discussing the homogeneity of their systems, the Member States are referring to the ideology upon which the organisation of these systems is based. For example, each State may have differing views about the aims pursued by their education systems, about the degree of education they may want to provide or about the curriculum to be followed. Some of these measures could restrict free movement and the Court may ask the Member State to modify them, thus challenging the whole philosophy a system is based on.

In *Commission* v. *Austria* the Austrian government tried to justify all the restrictions regarding the access of foreign students to Austrian higher and university education on grounds that they aim at safeguarding the homogeneity of its higher and university education.

The Austrian education system is a free-access system under which students do not have to meet any requirements in order to enrol to higher or university education.

The Austrian government tried to argue that if the rules governing the academic recognition of diplomas awarded in other Member States and the access by holders of those diplomas to higher education were not taken into consideration, then a

large number of holders of diplomas granted in other Member States would invade Austrian university and higher education courses, causing structural, staffing and financial difficulties. It even made reference to the situation found in *Kohll* and *Vanbraekel*. As a result, it contended that it might not be able to further maintain the open-access system and might thus be forced to abandon the ideology upon which that the system was based.

The Court did not give a clear ruling whether such a justification was accepted as a valid reason. Firstly, it pointed out that the measure in question was liable to affect students from other Member States more than national students and consequently that the measure was indirectly discriminatory, meaning that only the Treaty exceptions could save it. The Court continued by stating that the risk alleged by Austria is also faced by other Member States.[237] The Court however turned to the application of the proportionality test. 'The reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and specific evidence substantiating its arguments.'[238]

The conclusion reached by the Court was that Austria failed to demonstrate that in the absence of the restrictive rule in question the existence of the Austrian education system and the homogeneity of higher education would be jeopardised. Since the Court applied the proportionality test, it is implicit that the homogeneity of the system was accepted as a valid reason for justifying restrictions. The Austrian authorities failed to produce any evidence that the homogeneity of the system was endangered and failed the proportionality test.

As evidence, the Austrian government simply claimed that there was a possibility that the number of students for medicine courses would be five times the number of available places. With regard to other courses, no estimated were put forward.

Sometimes, Member States pursue different objectives through their education policies. In the case in question, the Austrian government intended to grant unrestricted access to all levels of study. Since the percentage of Austrian citizens with a higher education qualification was the lowest in the EU (according to the Austrian government), this policy aimed at increasing the number of Austrian citizens with higher education. However, education is under the scope of the Treaty and the non-discrimination article should be respected. Can the same logic be applied to people as to goods and services—the principle of mutual recognition? Why give preference to Austrian students? The Member States may argue that it is their duty to ensure the education of their nationals. But on the other hand, the European Union speaks of European citizens who should be treated equally, and speaks of increasing student and teacher mobility.

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[237] Case 147/03 *Commission of the European Communities* v. *Republic of Austria* [2005] I-5969.

[238] Ibid., para 63.

The Austrian government put forward other alternatives to the existing system.[239] It found that access without restriction would not be a solution given the difficulties to support its high expenses; quotas for foreign students would be even more restrictive; verification on a case-by-case basis of the qualifications of those holding non-Austrian diplomas would pose too many practical problems; an entry examination would be contrary to the policy pursued by the Austrian government regarding higher and university education; and a minimum average grade in secondary education would also be contrary to the policy of open access to university studies.[240] Advocate General Jacobs argued however that a more appropriate means to ensure the homogeneity of the system would be 'to check the correspondence of foreign qualifications with those required from holders of Austrian diplomas.'[241] The fact that the implementation of these measures would be costly and would imply practical difficulties cannot constitute a valid excuse, since economic justifications cannot be accepted.

Advocate General Jacobs was of the opinion that the risk of having an excessive number of students was also faced by other Member States. The United Kingdom was by far the biggest importer of foreign students. He continued by stating that Member States had introduced modifications to their systems to manage these problems. He concluded that a certain degree of solidarity between the nationals of a host Member State and the nationals of other Member States was required, as stated in *Grzelczyk*, and that Member States should comply with European Union rules, even if this implied the modification of their systems.

Consequently, there is this conflict between Member States' desire to retain the power to organise their systems and to pursue the policies they consider the best for the education of their nationals on the one hand, and the European Union requiring the application of the non-discrimination principle on the other hand. Member States must obey the non-discrimination principle, even if this requires modifying their systems or introducing some less restrictive requirements, regardless the cost.

3.5.2.2.2 Safeguarding the Essential Characteristics of the System

This justification is used in the field of health and corresponds to the justification encountered in education cases—safeguarding the homogeneity of the system. Member States feel are concerned that the application of European Union law will undermine their powers in the field of education, health and social security. The Court stated in several cases that 'the Community law does not detract from the

[239] See Case 147/03 *Commission of the European Communities* v. *Republic of Austria* [2005] I-5969, para 6 for the conditions that foreigners had to met in order to be admitted to the Austrian higher education or university systems.

[240] Opinion of Advocate General Jacobs delivered in Case 147/03 *Commission of the European Communities* v. *Republic of Austria* [2005] I-5969, para 48.

[241] Ibid., para 52.

power of the Member States to organise their social security systems.'[242] In the absence of harmonisation at the Community level, Member States are free to organise their welfare systems. However, Member States must comply with Community law when exercising that power.[243]

Each Member State has chosen a particular way to organise of its welfare system and, as a result of the application of European Union law, they are required to make modifications to comply. For example, in the Netherlands the health system is organised as a benefits-in-kind system where patients go and receive medical care without having to pay. The Court stated clearly that the achievement of the fundamental freedoms require some adjustments of the national social security systems.[244] Therefore, in order to ensure the free movement of health services, a reimbursement mechanism for the costs incurred abroad should be introduced.

The Dutch government underlined the fact that insured persons could now turn to non-contracted care providers to receive healthcare and apply afterwards for reimbursement of costs. This would oblige Member States to 'abandon the principles and underlying logic of their sickness insurance schemes'.[245]

The Court asked whether the removal of the requirement for sickness insurance funds to grant prior authorisation for reimbursement would call into question the essential characteristics of access to healthcare.

The same problem is encountered in a system organised as a national health system where the funding is obtained through taxation and the healthcare is provided as benefits-in-kind. Patients are not entitled to receive medical treatment whenever they want or wherever they want. They do not have the freedom of choice, but the NHS health providers decide when and where they are going to receive medical treatment. This situation is similar to that of the Netherlands where a refund mechanism had to be introduced. It was pointed out that the patients could not go to private healthcare providers in the United Kingdom because the system was designed to be one of benefits-in-kind, and that allowing the patients to go abroad would have put at a disadvantage the national private providers. However, this is a purely internal situation and it is up to the national authorities to design their system in such a way that this kind of reverse discrimination disappears.

The need to safeguard the particular characteristics of the system cannot be used as a justification for raising obstacles to the free movement of services. Member States are free to organise their systems as they wish as long as they comply with Treaty provisions. The fact that some modifications must be made in

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[242] Case 238/82 *Duphar and Others* [1984] ECR 523, para16; Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, para 27.

[243] Case C-120/95 *Nicolas Decker* v. *Caisse de maladie des employés privés* [1998] ECR I-1831, para 23 and Case C-158/96 *Raymond Kohll* v. *Union des caisses de maladie* [1998] ECR I-1931, para 19.

[244] Case C-385/99 *V.G. Müller-Fauré* [2003] ECR I-4509, para 102.

[245] Ibid., para 99.

order to bring national provisions in line with European Union law does not mean that the Member States' power to organise their systems is infringed. It is just an obligation that when organising these systems, the new reality created by the European Union should be taken into account. Member States still retain the power to determine the extent of the cover provided (what types of treatments are included and what the limits for reimbursement are). This is the Court's position. Advocate General Colomer[246] argues that:

> I understand that point of view but I do not share it. I am aware of the difficulty of reconciling that fundamental freedom under the Treaty with the idiosyncrasies of the sickness insurance systems of 15 countries, most of which grant benefits in kind. However, it must be borne in mind that the Member States have never had the intention of harmonising their laws in this field and have confined themselves to coordinating them by means of Regulation No 1408/71 in order to achieve the objectives required under Article 42 EC. Although it is true that, when organising their social security systems, the Member States must comply with Community law, that obligation cannot require them to abandon the principles and philosophy which has traditionally governed their sickness insurance, nor require them to undergo restructuring on a scale such as to enable them to reimburse those of their insured persons who choose to go to the doctor in another Member State.

Advocate General Colomer maintains that Member States should keep to the principles and philosophies behind the organisation of their systems and that they should not radically restructure their systems in order to enable the reimbursement of the costs of medical care undergone abroad. The Court however argues that modifications of the system are necessary in order to allow the reimbursement of the costs of care obtained abroad using the right to free movement. One thing is certain: Member States cannot create obstacles to trade and refuse the reimbursement of costs for medical care obtained by patients abroad on the grounds that there is no reimbursement mechanism, and it cannot be argued that the introduction of such a reimbursement mechanism requires additional expenditure because economic reasons cannot be accepted as justifications for obstacles to trade. Furthermore, if Member States decide to address the reverse discrimination problem and modify their systems it is their choice. We can easily see that the European Union has a strong indirect influence on the organisation of the health and social security systems. Ultimately, change should occur, owing to the fact that though everything is organised at national level, there is a European Union dimension which will have to be considered.

3.5.2.2.3 Safeguarding Public Health

Protecting the public health represents an important value whose protection needs to be safeguarded. The health of the nation is high priority. Healthcare is a universal service and people should have access to high quality care, at any time,

[246] Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered in Case C-385/99 *V.G. Müller-Fauré* [2003] ECR I-4509, para 58.

at affordable prices. The existence of permanent access to hospitals, doctors, to the provision of good quality care, and the existence of well trained and qualified doctors, are all part of the broad system aimed at safeguarding public health. Different rules meant to ensure that patients receive medical care could enter in conflict with free movement rules; the fact that these rules are aimed at safeguarding public health could save them, though they still need to pass the proportionality test.

In *Deutsche Paracelsus Schulen*[247] the Austrian legislation prohibiting the exercise in Austria of the profession of Heilpraktiker, which was recognised in Germany, was considered to be an infringement of the free movement of establishment and free movement of services provisions. However, the rule was justified on the grounds that it was meant to safeguard the public health. Deutsche Paracelsus Schulen argued that there less restrictive measures could have been chosen, such as the prescription of a certain period of practice. The Court recalled that the choice of a Member State to adopt a different system of protection did not make that rule disproportionate and incompatible with European Union law. It continued by stating that in the absence of a definition at the European Union level, Member States could decide whether to authorise practitioners lacking qualification as doctors to conduct activities of a medical nature. The Court ruled that the Austrian law in question was justified on the grounds of public health and did not go beyond what was necessary to safeguard this aim.

In *Commission* v. *France*,[248] the Court was asked to rule that France failed to fulfill its obligations under Articles 43 and 49 EC because it required biomedical analysis laboratories established in another Member State to have their place of business in France to obtain the requisite operating authorisation, and it also precluded any reimbursement of the costs of biomedical analyses carried out by a biomedical analysis laboratory established in another Member State.

The Commission argued that France deprived laboratories established in another Member State from the possibility of having a second establishment. The Commission argued that the French rules infringed not only the rules on the freedom of establishment but also the rules on the freedom of services.

The Court found no infringement with regard the freedom of establishment since neither the French laws nor the evidence adduced by the Commission demonstrated that a national from another Member State or a company established in another Member State was prevented from managing a laboratory in France as a branch or a subsidiary of a laboratory which was managed in another Member State. In addition, the French rule did not require a laboratory established in another Member State to transfer all its activities to France.

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[247] Case C-294/00 *Deutsche Paracelsus Schulen für Naturheilverfahren GmbH* v. *Kurt Gräbner* [2002] ECR I-6515.

[248] Case C-496/01 *Commission* v. *French Republic* [2004] I-2351.

With regard to the freedom of services the Court found that the measure infringed Article 56 TFEU (ex Article 49 EC), since laboratories which were not established in France could not provide services in France.

The French authorities tried to justify the rule on the grounds that it was aimed at maintaining the quality of medical services, a justification which was covered by the larger derogation contained in Article 52 TFEU (Article 46 EC), the attainment of a high level of health protection. The Court ruled however that the rule failed the proportionality test because it went beyond what was necessary to protect public health. The Court ruled that there were less restrictive rules, such as a requirement for laboratories located in another Member State to comply with the French authorisation requirements. However, it stressed that these requirements should not simply duplicate the equivalent statutory conditions which have already been satisfied in the place of establishment. These authorisation rules could also impose a requirement that the laboratories established in another Member State ensure that their analysis reports would be understood by doctors practising in France.

With regard to the need for effective control, the French Government failed to show that the competent authorities could not fulfill their supervisory function effectively without the laboratories having permanent establishments in France. The Court ruled that even if the French authorities could not carry out on-the-spot checks in other Member States, they could ask those laboratories to prove that the controls carried out by the competent authorities in the Member State in which they have their place of business were no less strict than those applicable in France, and monitor compliance with provisions safeguarding at least the same level of health protection as the French rules did. The French government argued that it could not assess the level of supervision in other Member States because it was not aware of the quality criteria or the control procedures. The Court however ruled that when requiring authorisation, the French authorities could ask for the appropriate information and could acknowledge the criteria and the rules laid down in the rules of other Member States. Moreover, if the conditions imposed by the French rules were not met, the French authorities could withdraw or suspend authorisation.

With regard to the rules concerning the refusal to reimburse the costs of biomedical analyses carried out in another Member State, the French authorities argued that the rules were necessary in order to ensure a high level of public health protection. The Court acknowledged the fact that in the absence of harmonisation at the European Union level a Member State could impose its own level of public health protection on laboratories established in another Member State; however, the Court ruled that the refusal to reimburse the costs of analyses carried out by laboratories established in another Member State went beyond what was necessary to achieve the aim of protecting public health. As is evident, there were no quality criteria or reasonable motives why the costs would not be reimbursed. The only reason they refused reimbursement was that the laboratory was not established in France.

In *Commission* v. *Hellenic Republic*[249] the Greek authorities justified restrictive rules that did not permit a qualified optician to operate more than one optician's establishment and did not allow the participation of opticians in other companies on public health grounds. The national authorities considered that it was important that people trust these shops; they laid stress on the liability of the optician and considered it important that absolute liability fell on the optician; moreover, they considered that it was more efficient if the optician spent more time in one establishment and did not spend energy running different more than one. The Court accepted that it was important that public health be protected, but it ruled that there were less restrictive rules available, such as the imposition of guarantees that certain activities would be carried out by qualified opticians, or under supervision. With regard to liability the Court ruled that rules requiring professional indemnity insurance could have been introduced. The Greek government measures were found to be disproportionate.

In *Commission* v. *Luxemburg*[250] there was also a rule requiring doctors, dentists or veterinary surgeons to have a single practice which the Luxemburg authorities tried to justify on grounds of public health. The Court admitted that this was a valid reason and acknowledged the necessity of having the continuous presence of a practitioner to ensure that care was permanently available; however, the Court ruled that such an aim could have been achieved by less restrictive means such as the introduction of rules requiring minimum attendance. The fact that these practitioners had only one establishment could not have prevented them from offering services on a non-established basis. Again, the proportionality principle was infringed.

A similar situation was encountered in *Commission* v. *France*, where doctors and dental practitioners were obliged to cancel their registration in another Member State if they wanted to establish in France or to work as an employee in France. Again, public health was the reason used by the Member State to justify the rule. The need to be readily accessible to patients was a motivation put forward by France. In addition to the fact that the rule was discriminatory, in allowing French doctors to open a second practice close to their first establishment, the Court ruled that the rule was disproportionate, stating that in the case of certain specialists it was not necessary to be close to patients on a continuous basis.

In all these cases the public health objectives could have been achieved by using less restrictive means.

3.5.2.2.4 Quality of the Service, Consumer Protection

Can a justification such as the protection of the quality of the services provided save a restrictive measure? Member States have always been circumspect

[249] Case C-140/03 *Commission* v. *Hellenic Republic* [2005] I-3177.

[250] Case C-351/90 *Commission of the European Communities* v. *Grand Duchy of Luxembourg* [1992] ECR I-3945.

regarding other States' standards. Intending to protect their own nationals, Member States could try to save their restrictive measures by arguing that, given the special characteristics of these services, they must ensure the best services for their population.

Regarding the quality of services, it is possible to identify two problems: one related to the quality of the services provided abroad and another related to the quality of the services provided by the national system. This type of justification regarding the quality of the service could be used either to justify a restriction on the grounds that it is aimed at ensuring the quality of the services provided within the national territory or it could be used to justify a restriction on the grounds of a lack of confidence in the quality of the service provided abroad.

With regard to the quality of services provided abroad, due to differences between Member States, there have been always problems with accepting other Member States' standards. It was difficult to accept the principle of mutual recognition and to admit something that does not comply with national specifications. Can the principle of mutual recognition be applied with regard to welfare services, where there are very strict regulatory measures meant to ensure a certain level of quality?

In *Kohll* the Luxemburg Government tried to justify its refusal to grant authorisation to travel abroad to receive services on the grounds that this rule aimed to guarantee the quality of medical services. It argued that the quality of medical services could be ascertained only at the time of the request for authorisation. Mr. Kohll argued that there was no scientific evidence to prove that the treatment provided in Luxemburg was more effective.

It was difficult to accept such a justification, especially since the medical professions had been the subject of several coordinating or harmonising directives. Therefore, the free movement of health services has been facilitated by adopting common standards at European level. Under these circumstances, an excuse based on the existence of better healthcare in a given Member State cannot be accepted. The Court could not accept the protection of the quality of medical services provided in other Member States as a justification for restrictive regulatory measures when there are harmonising directives.[251]

If in the field of health there have been directives harmonising health standards, the same cannot be said about education. The field of education is even more sensitive, since it is regarded as a means of instructing and forming future generations, with every Member State choosing its own way of organising the system, each with its own curriculum. Can a Member State prevent its nationals from pursuing courses abroad on the grounds that the quality of the courses provided abroad is insufficient?

In a system where the state provides finance directly to students for higher education, the possibility exists that the student might want to use these funds to pursue education at a university beyond the national frontiers. Therefore, in an

[251] C-158/96 *Kohll* v. *Union des Caisses de Maladie* [1998] ECR I-1931, para 49.

education system that uses vouchers, the potential for free movement is greater. The family receives a voucher and with this, the student can go to any school. The school receiving the voucher becomes entitled to funding. Can a state using such a voucher system prevent a student from pursuing education abroad on grounds that the quality of the education is lower?

For example, the Dutch law on grants for study, *Wet op Studiefinanciering* (WSF), provided that students over 18 would receive grants to pursue higher education. However, according to Article 9(1) of the WSF, only studies pursued in a Dutch institution could give rise to an entitlement to study finance; Article 9(3) provided for an exception to that rule in the case of certain foreign institutions which are treated as Dutch institutions for the purpose of applying the WSF. Could such a restrictive measure have been justified on the grounds that it aimed at ensuring that students receive quality education? This law was changed in September 2007, before the question could be raised. Since the old legislation could have been challenged by European Union legislation, its new provisions eliminated any potential conflict between national and European Union law. Students resident in the Netherlands who wish to pursue full-time or part-time studies abroad can apply for financial assistance. The new scheme covers courses in all 29 countries involved in the Bologna Process and certain countries outside Europe. It gave students maximum freedom to choose the course of their choice. To address the problems related to the quality of the studies, it was provided that all courses abroad should meet Dutch quality standards. It was stipulated that NUFFIC (the Dutch organisation for international cooperation in higher education) would monitor these requirements. In order to comply with the latest developments in European Union law, it was provided that students were not obliged to be registered at a Dutch higher education institution in order to be eligible for a grant. In order to avoid abuse, it was provided that the grants should be given to all students resident in the Netherlands for at least three of the six years prior to commencing their studies.[252]

A Member State which grants funding could argue that in order to give money for education it must have control over the establishment that provides education services. Education is regarded as an investment in future generations and a state could argue that it needs to have some sort of control over the quality of the education being funded. It can argue that it requires control over the curriculum because it invests the money and wants to have the students prepared for the needs of the national market, and in order to see a return on its investment from a well instructed labour force. However, Member States need to look beyond their national markets because the reality now is that there is a European market. With regard to quality, whenever a student travels abroad for studies it does so because

[252] Eurybase, The information database on education systems in Europe directorate-general for education and culture the education system in the Netherlands 2006–2007, available at: http://eacea.ec.europa.eu/ressources/eurydice/eurybase/pdf/0_integral/NL_EN.pdf.

it wants to receive better education. For the student too, education is an investment for the future and students will tend to choose high quality establishments.

A justification based on the notion that a Member State's standards or quality levels are better cannot be accepted. The principle of mutual recognition should be applied. Moreover, in the field of education at the European Union level, efforts are being made to create 'a European dimension in quality assurance' according to the Bologna Declaration.

With regard to the quality of the services provided by national systems, the arguments that can be made are related to financial considerations. In *Geraets Smits* the Dutch government argued that restrictions are necessary to ensure a sufficient and permanent access to a balanced range of high-quality hospital treatment in the state concerned. Because health is a universal service, high quality medical services should be open to all. Without a means of controlling expenditure, there is no guarantee that the quality of the service can be maintained. When deciding whether the financial balance of the system is endangered, the need for a high-quality medical service should be considered.

The same can be said for the education field. The quality of education services are related to financial considerations. Therefore, when deciding whether the financial balance of the system is disturbed, high quality standards should be taken as a reference.

Consumer protection has been a reason invoked, particularly with regard to free movement of goods cases, where the consumer must be protected against the harm that some products can cause. In the case of services, the consumer is very important since the rules actually have the ultimate aim of providing protection. The rules on qualifications, the rules meant to ensure the financial equilibrium of the system or various rules setting quality requirements all have the goal of protecting the consumer. All the kinds of justifications discussed in this section have the ultimate goal of consumer satisfaction. The quality requirements are more closely linked with consumer protection since a failure to provide good quality healthcare services, for example, can have immediate and severe effects. Nevertheless, healthcare, health insurance and education services are strictly regulated and controlled in every Member State and the Court requires that Member States apply the mutual recognition principle. National measures prohibiting the practice of medical activities by someone not holding a medical title are accepted, even if in other Member States, someone may be permitted to exercise activities of a medical nature without holding the title of doctor.[253] This was the case in *Deutsche Paracelsus Schulen*,[254] where in Germany some medical services could be provided by a Heilpraktiker, a person not holding the title of doctor. Austria recognised no such title, reserving medical practice to qualified medical practitioners. However, if a person from Austria wishes to receive medical treatment

[253] Case C-294/00 *Deutsche Paracelsus Schulen für Naturheilverfahren GmbH* v. *Kurt* Gräbner [2002] ECR I-6515.

[254] Ibid.

from a Heilpraktiker and travels to Germany to receive it, his right to free movement entitles him to do so. It is up to individuals to choose the type of healthcare they wish to obtain and a Member State cannot have control over the regulations in another Member State.

Having analysed all the case-law related to healthcare, health insurance and education it is readily evident that the Court was very consumer-friendly that in all the cases it enforced individual rights. Patients were aided in receiving medical care more quickly by being allowed to go abroad, thus cutting waiting lists. Students have been encouraged to go to others Member States, and sometimes they gained the right to various sources of financial support. While the individual was given more rights, Member States argued that this was done to the detriment of the general interest. However, all the measures they took to address this have been unjustified or have been disproportionate.

The importance of consumer protection is reflected in the large volume of secondary legislation issued in this regard. Perhaps the existence of more detailed secondary legislation could also explain why in the Services Directive,[255] consumer protection is not among the exceptions from the free movement of services.

3.5.2.2.5 National Values and Interests

National values form part of the European Union's social heritage. The European Union promotes unity in diversity and national values must be protected and promoted. A recollection of the *Groener*[256] case reminds us of the Court's ruling which stated that the requirement for linguistic knowledge for appointment to a permanent full-time post as a lecturer in public vocational education institutions was not contrary to the free movement of workers provisions. The Court argued that such a measure, requiring knowledge of the Irish language, was part of a broader policy meant to 'promote the use of Irish as a means of expressing national identity and culture.'[257]

This case is important in illustrating that education is not only about preparing students to become members of a skilled workforce, but also implies educating people according to national values. Education can be considered a means of preserving national identity.

Could a justification such as the need to preserve national values be used in order to justify a restriction to free movement provisions? As stated in the *Groener* case, the European Union accepts the promotion of national identity and culture. How can the free movement objectives that promote internationalisation and the

[255] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Article 16.

[256] Case C-379/87 *Anita Groener* v. *Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967; See O'Leary 1992, pp. 138–157.

[257] Ibid., para 18.

acceptance of other Member State standards and values coexist with the policy of preserving national values?

The Court ruled in *Groener* that the implementation of a policy meant to promote the Irish language should not infringe the fundamental freedoms.[258] The solution found in that case was to apply the proportionality principle. If the national policy is legitimate, then the requirement meant to implement that policy should not be disproportionate in relation to the aim pursued and must not be discriminatory.

In order to be able to apply the principle of proportionality correctly, a distinction should be drawn between basic and higher education. While educating students according to national values can be accepted at the stage when a child receives basic education the same cannot be said about the higher education. Higher education is a source of trained and educated personnel and it constantly adapts to the market's changing needs, to the society's demands. Higher education is more market-oriented and must answer the European Union workforce's needs. Therefore, the different scope of higher education renders justifications such as the need to protect national culture or national values unacceptable. Whether these justifications would be accepted with regard to basic education, is another question. In principle the answer is yes, on condition that the principle of proportionality is respected. However, the mobility of students at this level is fairly low and so far has not posed problems.

Nevertheless, when national interests are related to the economic ones, the Court does not accept justifications such as the promotion of teaching, research and development in order to preserve a restrictive measure. In *Jundt*[259] the national authorities attempted to apply the public interest exemption related to the promotion of teaching, research and development in order to preserve a rule according to which, exemption from income tax for expense allowances received from a university established outside Germany was refused on the grounds that exemption was granted only to allowances received from German public law bodies. The German authorities argued that the German government had no interest in supporting universities in other Member States and that they could not be required to subsidise education in other Member States by waiving tax to which it was entitled, since it had no control over the organisation of education in other Member State. The national authorities thus sought to promote national education, research and training and had no interest in subsidising services offered or obtained abroad. The Court reiterated its judgement in *Laboratoires Fournier*[260] where it stated that the promotion of research and development could be an overriding reason related to the public interest. However, it stated that the argument that a Member State could not be required to promote research carried out in another Member State had to be rejected because Article 165(1) TFEU (ex Article 149(1) EC) required that the

[258] Ibid., para 19.

[259] Case C-281/06 *Hans-Dieter Jundt* v. *Finanzamt Offenburg* [2007] I-12231.

[260] Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057.

European Union should contribute to the development of quality education by encouraging cooperation between Member States and that according to Article 165(2) TFEU (ex Article 149(2) EC) the mobility of students and teachers should be encouraged. The legislation in question was found to be contrary to those objectives since it discouraged teachers from teaching in another Member State by denying them a tax concession which they would have obtained if they had offered those services on the national territory. The Court stated that the German authorities did not prove that the objective of promoting education could have been achieved by other means which would not have infringed the teachers' choice of where they offered their services. Therefore, in these cases, the promotion of national education as such is regarded as a protectionist measure. It is not a certain national value that is intended for protection, as in the case of *Groener*, but just the system as a whole, something the Court does not accept as a justification.

Promoting national values is accepted as they are parts of the sum of European Union values and diversity, and the preservation of Member State values is encouraged. On the other hand the economic side to the promotion of national education, research and training is not accepted to the detriment of free movement. The promotion of national education should be pursued in a broad context, taking into consideration the existing obligations related to the promotion of cooperation between Member States and the promotion of student and teacher mobility.

3.5.2.2.6 Public Policy

Public policy is a Treaty exception contained in Article 52 TFEU (ex Article 46 EC) and it should be interpreted strictly. Unlike the judicially created justifications, the Treaty exceptions can be applied to discriminatory rules as well.

O'Leary notes that the use of public policy as a treaty exception and the public interest as the 'rule of reason' can be misleading. 'Though the two express different elements of the same concept, a margin of discretion for the State, it is best to keep their application separate.'[261] She observes that the authorities' discretion is greater in the case of public policy. However, even if the discretion is greater, still the proportionality test must be passed in order to save a restrictive rule.

Public policy is defined as a 'genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'.[262] Though the concept of public service 'cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community', still 'the particular circumstances justifying recourse to the concept of public policy may vary from one country to another'.[263] Member States

[261] O'Leary 1992, p. 145.

[262] Case 30/77 *Regina* v. *Bouchereau* [1977] ECR 1999.

[263] Ibid., paras 33, 34.

have discretion in determining which values they want to protect. However, in applying this justification the proportionality principle should be respected.

It is possible that some services are considered legal in one country and illegal in another, depending on the policy choices made by a Member State. Patients could be obstructed from going to a Member State where a given service is legal, and thereby avoiding the national prohibitions. Such rules are obvious restrictions to free movement of services which raise the question whether they can be preserved by the public policy justification.

In *Grogan*[264] the Court had to determine whether a general prohibition on the distribution of information with regard to the medical pregnancy termination services lawfully provided in another Member State could be justified on grounds of public policy. In this case the Irish constitutional rules protect the life of unborn children to the extent that abortion was prohibited. This entered into conflict with the freedom to provide services, since the distribution of information regarding the possibility of having an abortion in another Member State was prohibited. Member States were argued to be entitled to defend such prohibitory rules as a policy choice of a moral and philosophical nature. Advocate General van Gerven[265] considered that the prohibition complied with the proportionality principle since the Irish authorities were concentrating the prohibition on the distribution of information by way of assistance.

O'Leary[266] expresses her regret that in his Opinion, Advocate General van Gerven did not apply the public policy concerns or the imperative requirements related to the public interest separately as grounds for justification. The Court however did not find the distribution of information to be an economic activity, since the information was not distributed on behalf of an economic operator. As such the case concerned an activity that was merely a manifestation of the freedom of expression and the Court therefore did not go on to consider whether the measure was justified.

O'Leary[267] mentions a case where the Irish High Court restrained a girl from obtaining an abortion in another Member State by restraining her from leaving the jurisdiction for a period of nine months. This infringement was motivated on grounds of public policy. As O'Leary notes, the Court of Justice has never accepted such a justification for the restriction of access to a service provided legally in another Member State. In his analysis of the application of the proportionality principle in *Grogan* Advocate General van Gerven also notes that barring a pregnant woman from going abroad and receiving a service would be a

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[264] Case C-159/90 *Society for the Protection of Unborn Children* v. *Grogan* [1991] ECR I-4685.

[265] Opinion of Advocate General van Gerven delivered in Case C-159/90 *Society for the Protection of Unborn Children* v. *Grogan* [1991] ECR I-4685, para 29.

[266] O'Leary 1992, pp.138–157.

[267] Ibid., p. 149.

disproportionate.[268] The abovementioned ruling was overturned by the Irish Supreme Court but in deciding the case the freedom of services provisions were not applied.

Another case involving a medical service permitted in one Member State but prohibited in another is that of Diane Blood, a British woman who used the free movement rules in order to avoid a prohibition in her Member State. She wished to use sperm collected from her deceased husband to conceive by artificial insemination treatment. However, his consent was not obtained for the collection of sperm. Under UK law the use of the sperm was prohibited; however, the English Courts decided that she could receive such treatment in another Member State.[269] Therefore, some Member States may prohibit some services depending on their various policy views; however, the free movement of services does not allow them to restrict their nationals from to going to another Member State where the treatment is legal to receive it there.

Accordingly, though different policy choices in different Member States that raise obstacles to free movement can be justified since Member States have broad discretion in defining their public policy, Member States must nonetheless respect the proportionality principle. Furthermore, they must respect the principle of mutual recognition, this implying that if another Member State provides that a given service is legal, they cannot prohibit their nationals from going abroad to receive that service.

3.5.3 Proportionality

Sometimes national measures which constitute obstacles to trade can be successfully justified, as can be seen above. At that point, the balance between the economic interests of the Community and other interests of the individual Member States is weighed using the proportionality principle.

The principle of proportionality is of particular importance in European Union law. Meant to protect the individual against state intervention,[270] it has been developed by the Court of Justice and has become the main element which ensures a balance between European Union and national interests.

The application of the principle of proportionality contains three parts.[271] First, whether the measure is suitable to achieve its intended goal has to be determined; second, whether the measure is necessary to achieve the aim must be established;

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[268] Opinion of Advocate General van Gerven delievered in Case C-159/90 Society for the Protection of Unborn Children v. Grogan [1991] ECR I-4685, para 29.

[269] *R* v. *Human Fertilisation and Embriology Authority,* ex parte *Blood* [1997] 2 All ER 687; See also Hervey 1998a, b, p. 207; Morgan and Lee 1997, p. 840.

[270] See Tridimas 1999a, b, pp. 65–85; Schwarze 2006.

[271] De Búrca 1993, p. 105; Tridimas 2006; Tomuschat 1997, p. 97.

and third, it has to be established that the measure does not go beyond what is justifiable or reasonable to achieve the objective pursued. However, when applying the proportionality principle, the Court does not apply all three of these tests.

Proportionality[272] is part of the justification process, where Treaty exceptions and legally created exceptions are put forward by the Member States. 'The Court has consistently held that, as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by overriding reasons relating to the general interest and which apply to all persons or undertakings pursuing an activity in the State of destination. In particular, the restrictions must be suitable for securing the attainment of the objective which they pursue and they must not go beyond what is necessary in order to attain it'.[273] The proportionality principle is what ensures that the national measures intended to guarantee the proper functioning of the welfare services are protected from the interference of European Union law on the one hand, and that no protectionist measures shelter beneath good justifications on the other.

Applying the proportionality test in cases involving welfare services is a very delicate matter, given the fact that the Court has to weigh European Union free movement interests against politically sensitive national interests. As de Burca underlines, 'if the nature of these interests and the subject matter to which they relate are of a broad and complex nature, a court in balancing the costs and benefits of such a measure would be adopting the same sort of role as that of the original decision-maker'.[274]

It is argued that the balancing process that the Court is entrusted with gives too much power to the Court. The Court indeed, is left to decide on aspects which could find no solution in the legislative process. The failure of the Member States to agree on some issues leaves the task of finding an acceptable way out on the shoulders of the Court.

> At the same time, the incapacity to reach decisions in the political forum has left judicial institutions with the responsibility for solving political conflicts. Sometimes this is even a conscious choice taken by political actors, either to avoid political conflicts or to confer on political decisions the legitimacy of the law. The law-making process in the European Union and the plurality of national and ideological interests therein, emphasises these problems: deadlocks in the legislative process lead the Court to intervene and supplement the work of the Community legislative process; and the lack of consensus among States leads them to adopt multi-meaning normative statements; agreement is reached in the form of words when there is no agreement on what the words mean.[275]

Applying the proportionality principle gives the Court an active role. It is argued that by applying the proportionality test the Court interferes with national regulatory powers. Measuring the benefits of a restrictive measure against the

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[272] Tridimas 1999a, b; Emiliou 1996; De Búrca 1993, pp. 105–150; Jans 2000, pp. 239–265.

[273] Case C- 398/95 *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion* v. *Ypourgos Ergasias* [1997] ECR I-3091, para 21.

[274] De Búrca 1993.

[275] Poiares Maduro 1998.

harm produced to free movement of trade is not an easy task. It has to find a balance between two policies. The Court does not apply the principle systematically.[276] Since proportionality is a relative concept, it is interesting to see how it is applied by the Court in relation to welfare services. Is there a structured test for proportionality?

A. A Strict/Flexible Test?

Craig and de Burca[277] note that in some cases the Court applies all three steps of the proportionality test; however, when the case can be decided at an earlier stage it will not apply all three tests. Moreover, they note that the Court also sometimes 'folds' stage three of the inquiry into stage two. It is also up to the Court to decide the intensity of the review it applies, depending on the cases brought before the Court. Craig and de Burca distinguish three types of cases: firstly, those where individual rights have been restricted by administrative action—where the Court applies a vigorous scrutiny; secondly, cases where penalties imposed are attacked on grounds of being excessive—in these cases the penalties impinge on individual liberty but if the penalties are struck down, administrative policy would be undermined, so the Court typically adopts a moderate, reasonable stance; thirdly, cases where individuals challenge the policy choices made by the administration, claiming that they are disproportionate—here the Courts apply proportionality less intensively.[278]

This appears to be a classification of the application of the proportionality test when applied to national laws. Things can become very complicated at the European Union level when citizens' rights are restricted by Member States' policy choices. In protecting the individual rights, the Court should apply a more restrictive test, but when applying this test to policy choices, the Court should frame a more flexible test.

From the above analysis it can be easily concluded that the Court gave preference to individual rights: patients going abroad to receive medical care were given the right to be reimbursed; patients could skip the waiting lists if their health status required it; resident students were given access to education in other Member States on conditions equal to home national, they did not have to pay higher fees just because they did not possess the citizenship of the respective Member State; doctors have been given the right to establishment or to second establishment; medical staff, teachers and students have received the right to have their qualifications recognised; students managed to claim allowances from their host Member States and even if the European Union law did not entitled them to such a request, the Court has asked Member States to react proportionally to such

[276] Kapteyn and van Verloren Themaat 1998; Van Gerven 1999.

[277] Craig and De Búrca 2003, p. 372.

[278] Ibid., p. 373.

requests; students have managed to challenge the quota system imposed by a Member State, thus challenging the fundaments of a system; and students have been given the right to export their grants. Apparently individual rights undermine general ones. However, a closer analysis of the case-law and of the application of the proportionality principle leads to a different conclusion.

Balancing economic and non-economic interests would mean to weight the costs and benefits of a measure. It would be hard to compare the positive effects of a national regulation and its negative effects on trade. In order to avoid judging the value of a national measure, the Court considers the policy objective and whether there are less restrictive means that could be used to achieve that objective. It is evident from the cases analysed above that the Court looks to see whether the measure does not go beyond what is necessary to achieve its objective and it also requires proof that there are no other less restrictive means meant to achieve the objective pursued.

For example, in *Gaerets Smits* the proportionality principle was infringed because the requirements imposed in order to receive authorisation were of such a nature as to render impossible the obtaining of authorisation. The Court stated that an authorisation system was necessary to control expenses in a hospital environment; however, the criteria for authorisation had to be non-discriminatory, objective and set in advance. Member States must not have unfettered discretion in granting these authorisations. Moreover, in order to secure objectivity, the Court required that patients would have access to a procedural system that would deal with the refusal to grant authorisation. In *Watts*[279] the Court accepted that a waiting list was necessary in order to better calculate and control the costs; however, because such a system did not take into consideration the health status of the patient and the course of the disease, the Court found that the measure in place went beyond what was necessary to achieve its aim. In *Commission* v. *Austria* The Court asked the national authorities to adopt other, less restrictive means. In *Leichtle* the Court decided that less restrictive means were available, such as setting a maximum amount for expenses. In *Gootjes Schwarz* the Court ruled that limiting the amount deductible was a less restrictive means to avoid an unreasonable burden on the budget. The same ruling was given in *Morgan* with regard to avoiding a financial burden on the budget. With regard to the degree of integration, the Court decided that a rule that requiring a minimum period of residence in Germany would have been a less restrictive measure. In *Commission* v. *France*[280] the Court ruled that the French authorities could have opted for less restrictive rules, such as a requirement for laboratories placed in another Member State to comply with French rules to obtain authorisation, rather than require them to be established in France in order to obtain the requisite authorisation. With regard to checking the quality of the laboratories, even if the French authorities could not have carried out on-the-spot-checks, they could still have asked

[279] Case 372/04 *Watts* [2006] ECR I-04325.

[280] Case C-496/01 *Commission* v. *French Republic* [2004] I-2351.

laboratories for appropriate information and could assess whether the criteria and the rules of other Member States would be sufficient to guarantee a level of effective quality control. In *Commission* v. *Hellenic Republic*[281] the Court ruled that there were less restrictive means to guarantee public health, such as a requirement that a salaried optician or associate be present in each shop, and rules on civil liability could have been alternative measures. In *Commission* v. *Luxemburg*[282] the Court ruled that the public health aim could have been achieved by less restrictive means such as the introduction of rules requiring minimum attendance.

Others measures were found to be excessive, permitting the Court to apply the abbreviated proportionality test, where it balanced the negative and positive effects of measures to conclude that the negative effects outnumbered the positive ones. However, such balancing implies weighing the social benefits and economic negative effects, a very difficult task, since they are different values, hard to evaluate. The balancing is made even more difficult because the social benefits can be divided into individual benefits and general benefits. By analysing the cases, it can be observed that the Court applies the abbreviated proportionality test when it was obvious that individual rights are totally eliminated while the gain for general rights is not very great, and where it would be impossible for the individual to meet the conditions set.

In *Bidar* the Court found that the measure was excessive and that it went beyond what was necessary to achieve its aim because it rendered it impossible for a national of another Member State to obtain settled status while studying.

In *Geraets Smits* and *Müller-Fauré* the Court also found the measures to be excessive since the refusal to grant authorisation as based solely on the ground that there were waiting lists. No regard was given to the patient's medical condition. It was argued that public health required having the system of waiting lists. However, the Court ruled that such long waiting lists actually restrict access to balanced high-quality hospital care. The conditions required to obtain authorisation were impossible to fulfill. The requirements that the treatment be recognised in scientific circles in the Netherlands and that it be considered whether alternative treatment methods were available in the Netherlands and whether adequate treatment would have been available without undue delay restricted the reimbursement of such treatment only to those treatments recognised by the Dutch scientific circles and allowed considerable discretion in deciding whether to grant reimbursement to the authorities. The Court asked for clear and objective criteria to be set in advance in order to protect the patient against Member State discretion.

In *Watts* the Court ruled that authorisation should not be refused when the delays arising from waiting lists exceeded an acceptable period, taking into consideration the medical condition and the disease evolution.

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[281] Case C-140/03 *Commission* v. *Hellenic Republic* [2005] I-3177.

[282] Case C-351/90 *Commission of the European Communities* v. *Grand Duchy of Luxembourg* [1992] ECR I-3945.

In most of these cases the Member States had to prove that the financial stability of the system was endangered. Since individual rights suffer as a direct result of a restrictive measure, the Member States have to prove that there are indeed serious reasons to restrict the freedom of movement.

De Burca identified four variables that affect the intensity of the Court's review.[283] Firstly they noticed that the Court tends to be more intensive in its review as time has gone on. This can also be observed in the above cases. Given the nature of the services considered, the Court developed its case-law one step at a time, with a steady and visible evolution in scope. In the field of healthcare, the first challenged by free movement were social security systems based on reimbursement, next those based on benefits-in-kind and in the end also NHS systems. In the field of education the first challenged were discriminatory fees, then social benefits, equal access and in the end the export of education grants. It is normal that initially the Court would have adopted a more flexible attitude to touchy issues that could upset Member States.

Secondly, Craig and de Burca found that the intensity of the Court's review was acuter depending on the Member State's attitude to the problem in question. For example, it was observed in the cases related to the freedom of establishment that the Court accepted public health as a justification; however, the fact that the authorities allowed their own nationals the right to have a second establishment while the foreigners were denied such a right made caused the Court to decide that the measure was discriminatory and could not be justified.

Thirdly the intensity of review was found to depend on the nature of the subject matter. Indeed, the Court shows more consideration when social issues are at stake than when only purely economic aspects are involved. The final variable in the intensity of review found by Craig and de Burca differs from the previous. They note that the Court passes some cases to the national courts. According to them this should not be understood as a more deferential attitude. The Court provides guidelines and the Member States have to decide the case based on those guidelines.

Based on how flexibly or how strictly the proportionality principle is applied, the Court allows more or less discretion to the Member States.

In the cases analysed above it can be seen that Member States failed the proportionality test. They went beyond what was necessary to achieve the aim of the measure or ignored the existence of less restrictive rules. When less restrictive rules are available, they should be adopted even if they are more costly for the Member States, because economic reasons cannot be accepted to excuse infringement of European Union rules. However, it is hard to determine how costly those less restrictive rules will be and this clearly implies an interference with national policies. In *Commission* v. *Austria* the Court again stated that Member States should comply with European Union rules that they should apply the non-discrimination principle and that they should accept a certain degree of solidarity between nationals of a host Member State and nationals of other

[283] Craig and De Búrca 2003, p. 378.

Member States, even if this implies a modification of their systems. According to Snell, if a State has not adopted less restrictive means to achieve a certain goal it means that it is either "protectionist or incompetent".[284]

Considering the varying degrees of deference in applying the principle of proportionality, de Burca[285] feels that the Court adopts a deferential approach in cases with financial implications for the State and with implications on the organisation of national social policy. However, from the cases reviewed we do not see a deferential approach but on the contrary a strong will to have obstacles removed, even if that implies some modifications of the welfare systems.

It is true that the proportionality test has its drawbacks. There are problems related to issues such as who should apply the proportionality test, the national courts or the ECJ; problems related to differences of opinion regarding the meaning of a term; problems related to the existence of different standards; and evidential problems.

With all these drawbacks, negative integration—with its non-discrimination and proportionality principle ensuring a balance between the European Union and Member States interests—remains far from an effective mechanism to ensure further integration. To date, no Member State has been able to prove that equal treatment and the application of free movement provisions have had a strong, damaging effect. Almost all the problems related to mobility and entitlement to benefits can be reduced to concerns about money. Solidarity between Member States is difficult to achieve or to be financially sustained. However, no damaging effects on the financial stability of welfare systems have been proved.

B. The Burden of Proof

The most difficult issue regarding the application of the proportionality test is the evidential problem. Some of the cases are preliminary rulings and some are cases brought by the Commission against Member States.

EU law does not have its own procedural rules on evidence. The Court has adopted the 'unfettered evaluation of evidence, unconstrained by the various rules laid down in the national legal systems'.[286] Despite this, the Court draws inspiration from the common legal traditions of the Member States.

As a rule, a complainant has to bring evidence to support a complaint. Thus the first burden in the present context falls on those who seek to argue that national rules infringe free movement provisions. If this is proved, then the burden of proof shifts and the Member States can bring evidence to prove that even if their measures infringe free movement provisions, they are nonetheless justified.

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[284] Snell 2002, p. 200.

[285] De Búrca G (1993, p. 112).

[286] Opinion of Advocate General Vesterdorf in Cases T1-4 & 5-15/89 *Rhone-Poulenc SA* v. *Commission* [1991] ECR II-867.

Member State rules were found to be restrictive because they were either discriminatory or they imposed a double burden on foreigners, or even—if they were indistinctly applicable—because they made the provision of services in another Member State less attractive. Once this was proved it was up to the Member States to show that they had a good reason for having such measures and that the measures were proportional.

As is observed above, in most cases the Member States failed the proportionality test. Even if they put forward good reasons, they still failed to bring evidence in support.

In those cases where the Court applied the necessity test, the Court found that there were less restrictive measures that could have achieved the pursued objective. Those less restrictive measures should have been adopted even if this implied making changes to the system. Therefore, the NHS and the Dutch health insurance system based on benefits-in-kind had to introduce reimbursement mechanisms which had not existed before. In *Commission* v. *Austria* the Court required national authorities to make changes even though the changes implied the adoption of different rules, contrary to the ideology and philosophical reasons on which their educational systems was based.

In the cases where the Court applied the proportionality test and had to determine whether the measure went beyond what was necessary to achieve its goal, the Member States usually have to determine whether the financial stability of their system is endangered. Safeguarding the financial stability of the system was accepted by the Court as a good reason. Why did the Member States lose those cases where this reason was invoked?

It is difficult to define what constitutes the financial equilibrium of a system and it is even more difficult to determine when it is endangered and when not, considering that it is hard to measure the cumulative effect of the measure[287] or its effect in time. Sometimes the Court does not have the expertise to make an economic analysis to determine the actual impact of a measure on a system. Moreover, it is very costly to undertake such an analysis. However, when Member States have invoked this justification they have brought no evidence. In addition, all the cases brought before the Court have involved single cases. While it is accepted that in the case of a large number of patients the financial stability of the system could be disrupted, it is unlikely that single cases could have serious effects. If Member States were confronted by spectacular increases in the outflow of patients, the proof they could bring before the Courts would be more consistent. Moreover, patient mobility is not very high. However, it is true that the low level of patient mobility can be explained precisely by the existence of the restrictions to free movement. There is no immediate threat to the financial stability of the system. The only real threat that can be posed is that in the long term, patient mobility would make it impossible to calculate in advance the system's needs and potential costs, thus affecting planning. However, this was also not proved by the

[287] O'Leary 2005, pp. 39–89; Dougan and Spaventa 2003a, b, p. 699.

Member States. Therefore, Member States have failed to bring sufficient evidence to sustain their cases.

3.6 Conclusions

The welfare state is subjected to the impact of European Union law. Increasingly many welfare aspects are caught by economic rules. However, even if the economic rules do not always get applied, the principle of non-discrimination and the concept of citizenship break down national regulatory barriers and challenge the compartmentalised structure of the welfare services.

The Court's decisions in various cases that involved welfare services determined that the special characteristics of welfare services cannot remove them from the ambit of the Treaty. To the surprise and discontent of the Member States, even health systems providing benefits-in-kind and NHS-type systems have been affected by the internal market rules. Education, however, was declared to be a service only if it was essentially funded out of a private purse. There is a dichotomy in the Court's approach with regard to health and education cases. When a patient goes abroad to receive a medical service, it is a service within the scope of the Treaty regardless whether the system which grants reimbursement is an NHS-type system. However, if a student goes abroad and receives education in another Member State, the Court still requires it to be proved that the establishment where he receives education is essentially privately financed in order to apply the free movement of services rules.

However, even if some of the welfare services are not services for Treaty purposes the reach of the internal market is extended through the principle of non-discrimination and the concept of citizenship. As Advocate General Colomer stated in *Morgan*, the creation of European Union citizenship represents a qualitatively progressive step as long as it dissociates the freedom of movement from its functional and instrumental elements (as long as it is not linked with the exercise of an economic activity or with the creation of the internal market) and as long as it is raised to the rank of an independent right.[288]

The internal market rules challenge the regulatory powers of Member States. The conflict between economic and social aspects found solutions before the Court. The proportionality principle seems like the central axiom around which the interests are balanced. It is probably the central concept to the internal market, the concept that solves the problems incident to the inclusion of economic elements into welfare systems.

While the Court accepts that those restrictive measures pursue legitimate aims, the proportionality test was nonetheless failed. Member States either went beyond

[288] Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan* v. *Bezirksregierung Köln and Iris Bucher* v. *Landrat des Kreises Düren* [2007] ECR I-9161, paras 89–96.

what was necessary in order to achieve their respective aims, or they had other less restrictive means which could have been chosen. It was proved that the obstacles raised by Member States were pure protectionism. The Member States failed to adapt the existing systems to the internal market rules and this failure was sanctioned by the Court.

It is true that in the internal market cases the Court adopts a stricter test of proportionality, sometimes requiring Member States to change something in the organisation of their systems even if this implies higher costs. For example, Member States had to introduce reimbursement mechanisms if they lacked one. This implied changing their systems to permit the calculation of costs. This is regarded by the Court as a normal change that Member States must perform in order to comply with the internal market rules. Moreover, the creation of a system that would allow the calculation of the cost of healthcare could lead to greater transparency of the financial resources and consequently to more efficiency and better management.

This case-by-case approach as adopted by the Court proved to be effective in removing regulatory barriers and at achieving a good balance between European Union's economic interests and the Member States' social interests. However, it is argued that this case-by-case approach does not provide much legal certainty. Are the national courts prepared to strike such balance? Does the Court provide sufficient guidance regarding how this balance should be performed? In its cases the Court of Justice accepted some reasons as valid while rejecting others. The main problem that Member States have had in these cases was that they could not bring evidence to support their arguments. For example, it is difficult to prove that the financial balance of the system is endangered, when the proof consists exclusively of singular cases. Perhaps the Member States should have waited to see whether this mobility of patients and of students would become a significant phenomenon and only then express their fears that their welfare systems would collapse. Without such an extensive phenomenon the restrictive rules of the Member States look more like a stubborn resistance to change.

It is up to the Member States to organise their welfare systems and it is up to them to decide whether they introduce more economic elements, thus allowing European Union law to have more involvement. It has been argued that because the Court has created entitlement to some grants to foreign students, or because the Court has allowed the export of study grants abroad, the Member States would react and would reduce their allowances or repeal the laws which provide for grants to be exported. This can indeed be done but it is up to the Member States to determine whether they choose to close their systems and isolate themselves or whether they choose to accept the existence of this new internal market as a fact which cannot be ignored.

At the moment this process of balancing the economic and social interests before the Court proved to be effective means for integrating these welfare sectors. If it is argued by the Member States that this case-by-case approach results in legal uncertainty, perhaps for them on their part to take positive action and acknowledge the existence of the internal market, and to adapt to it. Rather than waiting for the

next judgement to break down some of their rules, perhaps a pro-active attitude would eliminate the existing uncertainty.

No one is happy with the unpredictability of negative harmonisation. However, the integration of the welfare field comes naturally as a spill-over effect from economic integration and it is normal that these welfare services adapt to the common market reality. Moreover, the Lisbon Strategy, aiming at making Europe 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion' is meant to meet the challenges brought by globalisation, and achieving these objectives requires not only the 'radical transformation of the economy', but also a 'challenging programme for modernising social welfare and education systems'.[289] The importance of education appears to exceed national borders, education being part of the objective of making Europe the most dynamic knowledge based economy. Economic integration and economic development cannot ignore the educational aspect, which have become prerequisites for economic growth.

Hervey expresses her fears that negative integration may jeopardise national social policy provision and that 'the application of the principle of non-discrimination may operate to constrain national policy options, by affecting the legality and the financial or political viability of certain policy measures.'[290] However, a different opinion is expressed by Davies:

> The panic that Europe seems to be experiencing currently is partly a result of the awareness that it is in fact in control of its own destiny; that nothing forces it to be peaceful, tolerant, or redistributive. The fear is that released of the belief that constitutions and institutions guarantee this, the continent may lose its way and its soul. The opportunity arises because it may not; it may freely choose for the values that previously it believed were beyond question. The market may invite loss of solidarity, but the continent may choose not to let it go.[291]

The reach of the internal market rules is deep. The application of the proportionality principle allows the Court to balance European Union interests against Member State interests. This is a method intended to provide guarantees for the safeguarding of Member States' welfare systems but also as a method to remove protectionist measures that might hide behind legitimate reasons. The protection of the Member States' welfare systems is ensured not directly through a coherent European Union policy, but by the means of exceptions.

Negative integration is currently the main means to ensure further integration. Indeed, in the process of determining the proportionality of a measure the Court may sometimes appear to interfere with the organisation of national education

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[289] Education and Training 2010, 'The success of the Lisbon strategy hinges on urgent reforms—Joint interim report of the Council and the Commission on the implementation of the detailed work programme on the follow-up of the objectives of education and training systems in Europe', Official Journal C 104, 30/04/2004 p. 0001-0019.

[290] Hervey 1998a, b, p. 36.

[291] Davies 2006, http://www.jeanmonnetprogram.org/papers/06/060201.html

systems and it may appear to have a legislative role; however, these effects should be regarded simply as sacrifices that should be made in order to reform the welfare systems. A welfare system has at its heart the concept of solidarity between citizens belonging to a state. However, as Dougan and Spaventa underline, the concept of solidarity should be regarded as a dynamic one.[292] Negative integration, with all its drawbacks, makes the first steps towards European Union solidarity.

The role played by the Court was to strike down the regulatory barriers that impede free movement. However, further positive action or the coordination of Member State actions is required. The Court is just showing the road, stating that mobility is necessary and that European Union principles guarantee that mobility. It is up to the national governments to mark the road opened by the Court, with the Commission as the active element that takes initiative for further developments.

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Chapter 4
The Application of the Rules on Competition

4.1 Introduction

The application of competition rules to welfare services could prove damaging for the welfare services according to the Member States. The state protection granted to these services through state aids or through exclusive rights could be challenged by competition rules. Since services are increasingly declared to be economic and thus subject to competition rules, the question that arises is whether the existing competition rules can ensure effective protection of these services, and whether the existing rules provide appropriate safeguards.

Gerber[1] rightly notices the advantages and disadvantages of competition: 'Competition has been the God and devil in Western civilisation. It has promised and provided wealth and economic progress; it has also altered the distribution of wealth, undermined communities and challenged moral codes.'

It is clear that welfare services have progressively lost their immunity from the application of competition rules. Fears have been expressed that the market and competition rules might affect the functioning of these vital services and could deprive consumers of a good quality service provision.

At first sight there is indeed an apparent contradiction between the aim of competition that is mainly focused on efficiency, profit and the social aims that these services are intended to achieve. However, on closer inspection the contradiction fades if it is analysed against the scope of European Union competition law. The ultimate beneficiaries of European Union competition law are consumers. The prevention of cartelisation of undertakings or the abuse of a dominant position or the European Union policy in the field of state aids and exclusive rights is aimed at protecting the consumer, at ensuring low prices in the market, at ensuring the existence of an increased number of participants in the market.

[1] Gerber 1998.

L. Nistor, *Public Services and the European Union*,
Legal Issues of Services of General Interest, DOI: 10.1007/978-90-6704-805-7_4,

Particular importance is granted to consumer welfare by the competition policy. In its report on competition policy the Commission states that 'competition policy endeavours to maintain or create effective conditions of competition by means of rules applying to enterprises in both private and public sectors. Such a policy encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole and for the benefit, in particular of the consumer.'[2]

In the XXIXth Report on Competition Policy, Commissioner Monti emphasised that 'The protection of the interests of consumers, and therefore of European citizens, is at the heart of Community competition policy.'[3] Recital 9 Regulation 1/2003[4] states that the scope of Article 81 and 82 EC is to protect competition, but that the benefits coming from having competition on the market should ultimately profit consumers. The prohibition of excessive prices and the elimination of cartels ultimately benefit consumers.

An example of the importance accorded to consumers can be found in the Article 101 TFEU (ex Article 81 EC) in condition inserted in Article 101(3) TFEU (ex Article 81(3) EC), which states that the consumer must receive a fair share of efficiencies, which was supposed to be fulfilled by a restrictive agreement in order for it to be granted exemption under Article 101(3) TFEU (ex Article 81(3) EC).[5] In its Guidelines on the application of Article 101(3) TFEU (ex Article 81(3) EC), the Commission states that:

> The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product.[6]

The aim of the European competition law is however not only efficiency.[7] This is achieved when a healthy competitive environment is created. Some authors[8] argue that 'In Europe efficiency may be sacrificed on the altar of internal market.' It is interesting to see how the need for a single, unpartitioned market can interact with the way welfare services are organised, which is usually according to the principle of territoriality. However, this raises a number of questions central to the

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[2] European Commission, I. Report on competition policy 1971, 1–12 cited in Van den Bergh and Camesasca 2001, p. 50.

[3] XXIXth Report on Competition Policy 1999, p. 9.

[4] Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 001/1.

[5] According to Article 1 of the Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 001/1, *the exemption contained in Article* 81(3) *is no longer in force since:'Agreements, decisions and concerted practices caught by Article* 81(1) *of the Treaty which satisfy the conditions of Article* 81(3) *of the Treaty shall not be prohibited, no prior decision to that effect being required.*'

[6] Guidelines on the application of Article 81(3) of the Treaty, 2004/C 101/08, point 33.

[7] For the development of EC Competition law see Gerber 1998.

[8] Van den Bergh and Camesasca 2001, p. 7.

following sections. Can competition break into the national welfare structures and ensure further integration? Are the competition rules sufficient to ensure the protection of these services; does the Treaty provide enough guarantees to safeguard the provision of the welfare services? What types of interests do the competition rules protect?

Once markets have been liberalised, the competition rules play an important role in disciplining them. The aim of this chapter is to analyse the impact of competition rules on welfare services and to determine how much protection competition rules can offer to welfare services. How can a balance be struck between competition goals and non-competition goals?

It is often argued that competition is injurious to the welfare services and that these services should be kept out of reach of competition rules. However, if Member States choose to introduce economic elements into their systems, they have done so in the pursuit of efficiency. Liberalising welfare services carries with it the need for competition rules, since undertakings will always be tempted to adopt non-competitive behaviour to serve their own interests at the cost of others and of the broader commonwealth. Without the application of competition rules, the efficiency pursued through liberalisation cannot be achieved. That is why, once the market is opened, the application of competition rules is to be welcomed. An analysis of the application of Article 101 TFEU (ex Article 81 EC) and Article 102 TFEU (ex Article 82 EC) with regard to welfare services will try to reveal the importance of the application of competition rules for this sector. Moreover, it will analyse how non-economic values are regarded when competition rules are applied.

Furthermore, Member States could still try to protect these welfare services by various means—by granting special or exclusive rights or by granting state aids. It is important to determine to what extent such measures would be accepted. Are they justified or purely protectionist? An analysis of the application of Article 106 TFEU (ex Article 86 EC) and Article 107 (ex Article 87 EC) acknowledges the necessity of state intervention but also determines how a balance between the economic goals of the Treaty and the non-economic interests of the Member States can be ensured.

> […] as they learn to compete in order to survive, European welfare states must also learn to compete in ways that acknowledge their interdependence, their common vulnerability, and their common commitment to the values of social integration and solidarity. Even though they cannot realise these values through uniform policies adopted at the European level, they must pursue their national solutions in ways that are compatible with their European obligations, and that reflect their membership in a community that is committed to restraining the use of strategies which, if pursued by all, could only harm everyone.[9]

The aim of this chapter is to analyse the application of competition rules to welfare services and to analyse whether a sufficient equilibrium between social and economic aspects is ensured. First the scope of competition rules and to whom these rules apply is examined. Defining the concept of an undertaking

[9] Scharpf 1999, p. 197.

and determining what is economic and what is not is not an easy task. However, since the line between the two is hard to draw, the conclusion to be drawn is that the focus should be placed on the justifications for restrictions and distortions of competition, on the balancing process where economic and social interests are weighted. The concept of undertaking is a dynamic one and the organisation of welfare is in continuous flux. Since the protection of social aspects cannot be afforded by their total exclusion from competition rules it is interesting to analyse whether the competition rules provide sufficient safeguards to avoid endangering the effective provision of welfare. Furthermore, the application of competition articles to welfare services, the extent of protection granted through competition rules and the kind of safeguards competition rules contain are examined. The competition article of primary importance when it comes to an analysis of welfare services is however Article 106 TFEU (ex Article 86 EC) because it contains a justification. This justification is more important because it applies not only in conjunction with Articles 101 TFEU (ex Article 81 EC), Article 102 TFEU (ex Article 82 EC) and Article 107 TFEU (ex Article 87 EC) but also when it comes to free movement provisions. The justification applies whenever services of general economic interest are at stake. Attention is also paid to how the Court and the Commission balances economic and social aspects when it has to deal with infringements of competition rules that are defended on the basis of Article 106 TFEU (ex Article 86 EC). Furthermore, since welfare services require state involvement and state financing, state aid rules are examined.

4.2 The Concept of Undertaking

The cases brought to the Court and the Commission reveal the complexity of the problems posed by the application of the competition rules to the welfare services. Elements of competition have been introduced in the welfare systems of the Member States to varying degrees. Questions related to how far the competition rules apply and to what extent the welfare services are caught by the competition rules are raised.

Defining the concept of undertaking[10] is important in deciding what falls under the umbrella of competition rules. It defines the scope *ratione personae* of the competition rules. What is the position of bodies that fulfill social functions? Are social elements relevant for not applying competition rules? Since the health services have been found to contain economic elements whose territorial restriction has been declared an obstacle to free movement, it is interesting to see whether competition rules apply. This is all the more important since healthcare

[10] Jones and Sufrin 2008, p. 129, Odudu 2006, Louri 2002, pp. 143–176, Winterstein 1999, pp. 332–333, Karl 2002, Baquero Cruz 2005, Lasok 2004, pp. 383–385, Nihoul 2000, pp. 408–414, Belhaj and Van de Gronden 2004, pp. 682–687, Slot 2003, pp. 580–593 and Bartosch 2007, pp. 563–570.

systems present strong regulatory provisions that are potential restrictions to competition—barriers to entry on the market, price fixing, etc.

The EC Treaty provides no definition of the concept of an undertaking, but the case-law of the Court of Justice offers assistance. In *Höfner*,[11] 'The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.' The ECJ has also stated that any entity engaged in the provision of goods or services on a given market is an undertaking.[12]

In determining whether there was an economic activity in *Höfner*,[13] the Court examined whether that activity can be offered by a competitive market. The absence of competition on one market does not lead to the conclusion that there is no economic activity. The fact that employment activities were normally entrusted to public agencies did not affect the economic nature of such activities since employment procurement is not always carried out by public entities.[14] In *Ambulanz Glöckner*[15] the Court determined that the emergency and ambulance services have not always been carried out by public authorities. The Court used a comparative criterion and looked at other markets to see whether that activity can be provided by a profit-making undertaking. This can lead to a broad interpretation of the notion of undertaking since almost anything can be provided on a market by private companies.[16] Besides the comparative criteria, the Court developed another criterion meant to identify an activity of an economic nature—it looked at the participation of the undertaking in the market.[17] In *Commission* v. *Italy*,[18]

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[11] Case C-41/90 *Klaus Höfner and Fritz Elser* v. *Macrotron GmbH* [1991] ECR I-1979, para 21; This definition was reiterated in Joined Cases C-159–160/91 *Poucet and Pistre* v. *Assurances Generales de France* [1993] ECR I-637, para 17; Case C-364/92 *SAT Fluggesellschaft* v. *Eurocontrol* [1994] ECR I-43, para 18; Joined Cases C-180–184/98 *Pavlov* v. *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, para 74; Case 218/00 *Cisal di Batistello Venanzio &Co* v. *Instituto Nazionale per L'Assicurazione Contro Gli Fortuni Sul Lavoro* (*INAIL*) [2002] ECR I-691, para 22.

[12] C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para 1*;* Joined cases C-180/98–C-184/98 *Pavlov* v. *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451*,* para 75.

[13] Case C-41/90 *Klaus Höfner and Fritz Elser* v. *Macrotron GmbH* [1991] ECR I-1979.

[14] Ibid., para 22.

[15] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089*,* para 10.

[16] See Opinions of Advocate General Jacobs in Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089 para 67 and Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband and Others* [2004] ECR I-2493, para 27; and Opinion of Advocate General Maduro delivered in Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria* (*FENIN*) v. *Commission of the European Communities* [2006] ECR I-6295, para 12.

[17] See Opinion of Advocate General Maduro in Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria* (*FENIN*) v. *Commission of the European Communities* [2006] ECR I-6295, para 13.

[18] Case 118/85 *Commission* v. *Italy* [1987] ECR 2599, para 7.

in *Pavlov*[19] and *Ambulanz Glöckner*[20] the Court stated that 'any activity consisting in offering goods and services on a given market is an economic activity.'[21]

Advocate General Jacobs analysed the Court's approach vis-à-vis the definition of an undertaking in the following terms

> […] the Court's general approach to whether a given entity is an undertaking within the meaning of the Community competition rules can be described as functional, in that it focuses on the type of activity performed rather than on the characteristics of the actors which perform it, the social objectives associated with it, or the regulatory or funding arrangements to which it is subject in a particular Member State. Provided that an activity is of an economic character, those engaged in it will be subject to Community competition law.[22]

The fact that an activity is provided under market conditions will qualify the entity providing it as an undertaking. Consequently, it is up to the State to decide whether to open a given market to competition. Once it has decided to do so, it has to comply with competition rules.

The general test is therefore whether an economic activity is involved, but determining the economic character of an activity is not an easy task in the case of welfare services. The presence of the social element, the involvement of the state in the provision of these services and the mixture of public and private players complicate things even further. There are no clear criteria for distinguishing between economic and non-economic activities. The limitation of competition is sometimes necessary for the achievement of social objectives. There are some activities characterised as market failures which cannot be undertaken if not protected from the competition rules. Is this relevant to defining an economic activity; are these activities characterised as market failure going to fall outside the scope of competition rules? Where the Court has to assess whether competition rules apply or not, it has to take into consideration and analyse several factors. These factors will now be examined, focussing on the case-law of the Court.

4.2.1 Public–Private Entities

Whether an entity is privately or publicly owned is irrelevant for the purpose of the application of competition rules. While it is clear that competition rules apply to private undertakings, when it comes to public undertakings the situation is more

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[19] Joined cases C-180/98–C-184/98 *Pavlov* v. *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-645.

[20] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para 19.

[21] Joined Cases C-180/98–C-184/98 *Pavlov v. Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, para 75. See also C-309/99 *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, para 47, and Case C-82/01 *P Aéroports de Paris v. Commission* [2002] ECR I-9297, para 79.

[22] AG Jacobs in his Opinion delivered in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband and Others* v. *Ichthyol-Gesellschaft Cordes,* [2003] ECR I-2493, para 26.

confused. The fact that they are entrusted with a public service task does not of itself exclude competition rules. Also, the fact that entities are public in nature does not lead automatically to their exclusion from the applicability of competition rules. The only relevant test is whether they are engaged in an economic activity. The Court has found the following public bodies or quasi-public bodies as being undertakings: a public employment agency engaged in the business of employment procurement,[23] a voluntary old-age pension scheme for agricultural workers in France,[24] a sectoral pension fund to which workers were compulsorily affiliated by government regulation,[25] and medical aid organisations providing ambulance services in Germany.[26]

The Court decided in *Höfner*[27] that the fact that employment procurement activities were normally entrusted to public agencies did not affect the economic nature of such activities. It stated that employment procurement had not always been carried out by public entities.[28] If the activity in question could, at least in principle, be carried out by a private undertaking for profit, then that entity can be classified as undertaking. Thus, it may often be irrelevant that an activity is carried out by a public undertaking because there will usually be a neighbouring country where the same activity can be found being carried out by a private undertaking for profit.

The fact that public entities are not automatically outside the scope of competition rules is very important, since the provision of health and education implies a high degree of state involvement.

There are, however, two exceptions from the application of competition rules.[29] Firstly, entities (public or private) which act in the exercise of an official authority will have immunity from the application of competition rules.[30] Competition rules will not apply if the entity performs a task of public nature, connected with the exercise of public powers. This is understood as being more than just public service, a service important to the public or in the public good, but acting using powers that are inherently governmental, that derive from the authority vested in the state. "When assessing activities of state bodies the Court has insisted on the

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[23] Case C-41/90 *Höfner* v. *Macroton* [1991] ECR I-1979.

[24] Case C-244/94 *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs* v. *Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013.

[25] Case C-67/96 *Albany International BV* v. *Stichting Bedrijfpensioenfonds Textielindustrie* [1999] ECR I-5751.

[26] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

[27] Case C-41/90 *Höfner* v. *Macroton* [1991] ECR I-1979.

[28] Ibid., para 22.

[29] Berend Jan Drijber 2005, pp. 523–533, 528.

[30] Case C-343/95 *Diego Calì* v. *SEPG* [1997] ECR I-1547; Case C-364/92 *SAT Fluggesellschaft* v. *Eurocontrol* [1994] ECR I-43; Case 30/87 *Corrinne Bodson* v. *Pompes Funebres des Regions Liberees SA* [1998] ECR 2479; Case T-155/04 *SELEX Sistemi Integrati SpA* v. *Commission of the European Communities* [2006] ECR II-4797.

distinction between the role of the state as public authority, exercising imperium and its other functions."[31]

There are two representative cases where the Court dealt with this. In *Eurocontrol*[32] the Court had to decide whether the European air traffic control organisation was an undertaking within the scope of competition rules. SAT claimed that Eurocontrol was an undertaking and it infringed Articles 102 TFEU and 106 TFEU (ex Articles 86 and 90 EC) by charging different route charges for equivalent services. SAT claimed that even air navigation control is an economic activity since in some Member States such control is exercised by private undertakings. The Court found that Eurocontrol carried out, on behalf of the Contracting States, tasks of public interest aimed at contributing to the maintenance and improvement of air navigation safety.[33] In collecting the route charges, the Court decided that Eurocontrol should be regarded as public authority acting in the exercise of its powers. 'Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition.'[34]

In *Diego Calì*[35] an anti-pollution surveillance and intervention task was entrusted to a private undertaking, SEPG. Diego Calì challenged the charges levied by the SEPG, arguing that it abused its dominant position. The Court, in deciding whether SEPG was an undertaking, ruled that the task that entrusted to SEPG, a preventive anti-pollution surveillance entity, formed part of the essential function of the state and that in exercising that function, SEPG should be regarded as exercising the powers of a public authority.

It should be taken into consideration the distinction between the exercise of economic activities in the public sector and the exercise of regulatory functions of such activities.[36] Only when that undertaking exercises the powers of a public authority, 'imperium', do the competition rules not apply. It is also irrelevant whether the exercise of *imperium* is done by a public or by a private undertaking, as was the case in *Diego Calì*.

Secondly, in a series of cases in the field of social security[37] a combination of several elements (the pursuit of social objectives, the existence of a high degree of

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[31] Winterstein 1999, pp. 326–327.

[32] Case C-364/92 *SAT Fluggesellschaft* v. *Eurocontrol* [1994] ECR I-43.

[33] Ibid., para 27.

[34] Ibid., para 30.

[35] Case C-343/95 *Diego Calì e Figli Srl* v. *SEPG* [1997] ECR I-1547.

[36] Buendia Sierra 1998, 6.

[37] Joined cases C-159–160/91 *Poucet and Pistre* v. *Asserances Generales de France* [1993] ECR I-637; Case C-218/00 *Cisal di Battistello Venanzio & C. Sas* v. *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* (*INAIL*) [2002] ECR I-691; Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband et all* v. *Ichthyol-Gesellschaft Cordes, Hermani & Co* [2004] ECR I-2493.

solidarity, the lack of intention to make profit, high state involvement) determined the Court to rule that the competition rules do not apply to those bodies. These cases will be further discussed in the following section.

This second exception has great significance, since entities which fulfill an exclusively social function will be outside the ambit of competition rules and sheltered from the pressures of competition. However, in order to decide whether those activities fulfill an exclusively social function a case-by-case analysis is required. Such bodies are not, therefore, certain whether they are protected from the competition rules. Moreover, a finding of the presence of economic elements may lead to a decision that competition rules apply. This has significance when considered alongside the fact that welfare services often continue to have dated organisation and structures which states feel under pressure to change. In reorganising these systems, some competitive elements may be introduced for the sake of greater efficiency, with the consequence of attracting the application of competition law rules.

4.2.2 The Nature of the Service: Social Function

Determining whether an entity is engaged in an economic activity becomes a more difficult task when social issues are involved. The opposition between economic and social elements can lead to the conclusion that the existence of social elements excludes an economic character and consequently could render competition rules inapplicable.

Both competition and the social sphere form part of the European Union objectives according to Article 3(1)(g)EC[38] and Article 3(1)(j)EC.[39] Consequently, a balance between the two has to be found in applying the competition rules. However, it has been contended that social matters should be considered as being outside the scope of the competition rules because the applicability of competition would jeopardise the achievement of social objectives. This question of whether there is a general exception for the social field from the applicability of competition rules has been addressed by the Court in a line of cases involving social security.

In a series of cases involving pension funds,[40] the funds claimed that competition law should not apply, given the special features of the social field. As Advocate General Jacobs stated in his opinion in Albany, the Treaty would have

[38] Article 3 para 1 was repealed by TFEU and replaced, in substance, by Articles 3–6 TFEU.

[39] Ibid.

[40] Case C-67/96 Albany International BV v. Stichting Bedrijfpensioenfonds Textielindustrie [1999] ECR I-5751; Case C-244/94 *Fédération Française des Sociétés d'Assurance et all* v. *Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013; Joined Cases C 159–160/91, Poucet and Pistre v. Asserances Generales de France [1993] ECR I-637.

contained an express derogation if it intended to remove certain activities from the ambit of the competition rules.[41]

In cases like *FFSA*, *Albany*, *Brentjens*, *Drijvende Bokken* and *Pavlov* the Court ruled that competition rules applied, while in cases like *Poucet et Pistre*, *Cisal* and *Kattner Stahlbau* the Court ruled that competition rules did not apply. The different results that the Court reached are the outcome of analysis of different factors.

In *Poucet et Pistre*[42] the Court was asked whether the concept of undertaking within the meaning of Article 81 encompasses the entities charged with the management of compulsory social security schemes (the sickness and maternity insurance scheme for self-employed persons in non-agricultural occupations). There were some characteristics of the scheme that led the Court to classify it as not being an undertaking:

- The scheme was established by law.
- The social security scheme pursued social objectives—it was intended to provide cover for all persons to whom it applied, regardless of their financial status, their state of health and time of affiliation.[43]
- The social security scheme embodied the principle of solidarity: contributions were proportional to income and benefits were identical for all who receive them. Additionally, solidarity entailed the redistribution of income between those who were better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover[44]; contributions paid by active workers served to finance the pension of retired workers; and there was also solidarity between the various social security schemes—those in surplus contributed to the financing of those with structural financial difficulties.[45]
- The fund could not change the amount of contributions, the use of assets and the fixing of the level of benefits because it could only apply the law.[46]
- The management of the sickness and maternity scheme was entrusted to certain organisations.[47]

Taking all these characteristics into consideration, the Court decided that the funds involved in the management of the social security system fulfilled an exclusively social function, the activity was based on the principle of solidarity

[41] AG Jacobs in his Opinion in Joined Cases C-115/97–C-117/97 *Albany International BV* v. *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

[42] Joined Cases C 159-160/91 *Poucet and Pistre* v. *Asserances Generales de France* [1993] ECR I-637.

[43] Ibid., para 9.

[44] Ibid., para 10.

[45] Ibid., paras 11, 12.

[46] Ibid., para 15.

[47] Ibid., para 15.

and was entirely non-profit-making—consequently the funds were declared not to be undertakings.

Therefore, an entity must fulfill an exclusively social function, act according to the principle of solidarity and must be non-profit-making in order to escape the competition rules. The Court examines whether all these elements are present and the mere fact that one condition is fulfilled will not be sufficient to remove an activity from the scope of competition rules.

In *FFSA*,[48] the Court was asked to decide whether a non-profit-making organisation which managed an old-age insurance scheme, established by law as an optional scheme and operated according to the principle of capitalisation was to be regarded as an undertaking for the purposes the of competition rules.

Indeed, the scheme pursued a social purpose, since it was created to protect against various risks run by the section of the population whose income was lower and whose average age was higher than those of other socio-economic categories, and whose basic old-age insurance scheme was insufficient.[49] "The rights and obligations between the managing organisation and the persons insured are not governed by a contract under private law but flow from regulations adopted under public law which cannot be amended on the initiative of the parties concerned or to suit their interests."[50] Some elements of solidarity were present but they were not significant in the Court's view.

In particular:

- The managing institution was a non-profit-making body administered by volunteers.
- Management was controlled by the State.
- The collected funds could be used only for certain investments authorised by the Government.[51]

Whatever the state's role, the absence of profit, the existence of a social purpose and the presence of some elements of solidarity were insufficient here to declare the competition rules inapplicable:

- The scheme also provided supplementary pensions.
- Membership of the scheme was optional.
- The scheme operated in accordance with the principle of capitalisation.
- Contributions were related to income.
- Benefits to which it conferred entitlement were dependent solely on the amount of contributions paid by the recipients and the financial results of the investments made by the managing organisation; benefits and contributions were determined not by law but by the board of the managing fund.

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[48] Case C-244/94 *Fédération Française des Sociétés d'Assurance and others* v. *Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013.

[49] Ibid., para 8.

[50] Ibid., para 9.

[51] Ibid., para 11.

- Only a few elements of solidarity were present—contributions were not linked to the risks incurred; no prior medical examination was required and no selection took place; there was a mechanism for granting exemption from the payment of contributions for reasons connected with the economic situation of the holding; in the event of the premature death of a member, the accumulated credit units were placed at the disposal of the scheme.[52]

It was accepted that the scheme pursued a social purpose and was thus subject to more restrictions (for example regarding investments) than other private companies, thus being less competitive. However, this was not considered to be sufficient to eliminate the application of competition rules. The Court decided that all those limitations could instead be used to justify exclusive rights. The lack of an exclusive social function was decisive in declaring the body an undertaking within the scope of competition rules.[53]

The same conclusion was arrived at in *Albany*,[54] where the Court was asked to decide whether a pension fund responsible for managing a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector and to which affiliation had been made compulsory by the public authorities for all workers in that sector was an undertaking within the meaning of Article 81 of the Treaty.

There were elements that would indicate the social function of the scheme:

- The compulsory affiliation of all workers in a given sector to a supplementary pension scheme pursued an essential social function, since the statutory pension was calculated on the basis of the minimum statutory wage.[55]
- The supplementary pension scheme was established by a collective agreement within a framework laid down by law and was made compulsory by public authorities; it constituted an element of the Dutch system of social protection and the sectoral fund responsible for the management of the scheme must be regarded as contributing to the management of the public social service.[56]
- The sectoral pension fund was non-profit-making.
- The management was undertaken by a committee that represented both sides of industry and fixed an average contribution; this average contribution however, tried to strike a balance between the amount of the premiums, the value of the benefits and the extent of the risks.[57]

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[52] Ibid., para 19; the Court noted that this kind of solidarity manifested through the exemption from payment of contributions in case of sickness, or the suspension of payment for reasons connected with economic situation already existed in certain groups of life insurance policies.

[53] Case C-244/94 *Fédération Française des Sociétés d'Assurance and others* v. *Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013.

[54] Case C-67/96 *Albany International BV* v. *Stichting Bedrijfpensioenfonds Textielindustrie* [1999] ECR I-5751.

[55] Ibid., para 73.

[56] Ibid., para 73.

[57] Ibid., para 74.

- The presence of solidarity elements: the obligation to accept all workers without prior examination; exemption from the payment of contributions in case of incapacity from work; in case of insolvency of the employer, there was a discharge of arrears of contributions from the employer; the indexing of the amount of the pensions; the lack of equivalence between the contribution paid and pension rights; the contribution paid is not linked to the risks; the existence of compulsory affiliation.[58]

However, there were elements that led the Court to decide that the competition rules applied:

- The contributions levied were invested on a capitalisation basis.[59]
- The amounts of benefits depended on the financial results of the investments made by the fund.[60]
- The sectoral fund determined itself the amount of contributions to be paid.[61]
- Exemptions from the affiliation were allowed: where an undertaking had provided a pension scheme for its workers for at least six months before the request for making the affiliation to the fund was submitted and if the rights were at least equivalent to those offered by the fund; moreover, an exemption could be granted where an undertaking offered its workers a pension scheme, provided that compensation was offered to cover the damage suffered by the fund.[62]

Even if the fact that the pursuit of a social objective entailed restrictions and controls on investments made by the sectoral pension fund, thus rendering the service provided by the fund less competitive than insurance companies, nonetheless, this was not a reason to exclude it from the application of the competition rules. However, the Court stated that these constraints could be used to justify the exclusive rights of such a body.

In Brentjens,[63] Drijvende Bokken[64] and Pavlov[65] the Court reached the same conclusion as in FFSA and Albany, deciding that the fund was an undertaking within the scope of competition rules. The fact that the funds decided the amounts of the benefits and contributions and the operation of the fund according to the capitalisation principle cast those entities more in the likeness of private

[58] Ibid., para 75.

[59] Ibid., para 74.

[60] Ibid., para 82.

[61] Ibid., para 81.

[62] Case C-67/96 *Albany International BV* v. *Stichting Bedrijfpensioenfonds Textielindustrie* [1999] ECR I-5751, para 83.

[63] Joined cases C-115/97–C-117/97 *Brentjens' Handelsonderneming BV* v. *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025.

[64] Case C-219/97 *Maatschappij Drijvende Bokken BV* v. *Stichting Pensioenfonds voor de Vervoer* [1999] ECR I-6121.

[65] Joined cases C-180/98–C-184/98 *Pavlov* v. *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451.

undertakings. The fact that the funds were non-profit organisations and that there were elements of solidarity present were insufficient of themselves to disapply the competition rules, but were useful in justifying restrictions of competition.

In *Cisal*,[66] INAIL was entrusted with the operation of a scheme of insurance against risk deriving from accidents at work and occupational diseases.

A preliminary reference was lodged to determine whether INAIL was an undertaking within the scope of competition rules.

There were elements that could have determined the application of competition rules:

- The contributions were linked to the insured risks.
- The sub-division of risks into ten categories according to an economic and commercial criterion.
- Insurance benefits are financed by contributions.
- The link between contributions and benefits, both being calculated as a percentage if the victim's earnings.[67]
- INAIL's obligation to perform its activities in accordance with sound economic and business practices.
- After making the insurance compulsory for craft workers, the Italian legislature accepted compulsory private insurance as an alternative to the insurance provided by INAIL for a transitional period.[68]

However, there were also elements that would indicate the non-application of competition rules and would indicate the social scope of the scheme:

- The social aim pursued.[69]
- The presence of solidarity elements—the automatic nature of the benefits, which are paid even if the employer fails to pay the contributions due. Even if automatic cover were abolished for self-employed workers, benefits would still be paid in the event of regularisation.[70]
- The existence of compulsory affiliation.[71]
- The absence of profit-making.[72]
- The benefits comprise not only of cash allowances but also of participation in prevention, rehabilitation and social assistance activities.[73]

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[66] Case C-218/00 *Cisal di Battistello Venanzio & C. Sas* v. *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* (*INAIL*) [2002] ECR I-691.

[67] Ibid., para 25.

[68] Ibid., para 14.

[69] Case C-218/00 *Cisal di Battistello Venanzio & C. Sas* v. *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* (*INAIL*) [2002] ECR I-691, para 28.

[70] Ibid., para 36.

[71] Ibid., para 14.

[72] Ibid., para 14.

[73] Ibid., para 28.

- The benefits cover not only immediate and direct damage but also the more indirect economic consequences of an accident.[74]
- Those benefits connected to earnings and not to the damage are governed by criteria fixed by law and do not depend on contributions.[75]
- The absence of a link between the benefits and contributions which shows solidarity between the people participating in the scheme.[76]
- As regards the financing of the system, not all contributions are proportionate to the risk and there are some risks such as asbestos or noise risks which are borne by other sectors according to the solidarity principle.[77]
- The pensions for accidents at work are paid according to the pay-as-you-go principle with only a portion corresponding to the capital value of the initial pension being put aside to constitute a technical reserve to guarantee payment of benefits.[78]
- The amounts of benefits and contributions are subject to the State's supervision.[79]

The Court reiterated its finding in *Pavlov* and stated that 'the social aim of an insurance scheme is not itself sufficient to preclude the activity in question from being classified as an economic activity.'[80] It concluded that INAIL fulfills an exclusively social function and the competition rules do not apply.[81]

In *Kattner Stahlbau*[82] the Court had to decide whether a body such as Maschinenbau- und Metall- Berufsgenossenschaft (MMB—Employers' liability insurance association in the mechanical engineering and metal sector), to which undertakings in a particular branch of the industry and a particular territory must be affiliated in respect of insurance against accidents at work and occupational diseases is an undertaking for the scope of competition law rules. Such a scheme pursued a social objective since it aimed at preventing accidents at work and occupational diseases and at restoring the health and the capacity to work of the insured persons and at providing financial compensation to insured persons or their dependants. The persons insured received cover irrespective of any fault committed by the victim of by the employer. Moreover, the social aim is given also by the fact that the benefits are paid even if the due contribution has not been paid. However, the Court ruled that even if the scheme pursues a social aim, this would not be sufficient to exclude it from the application of competition ruled.

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[74] Ibid.

[75] Ibid.

[76] Ibid., para 42.

[77] Ibid., para 30.

[78] Ibid.

[79] Ibid., para 44.

[80] Ibid., para 37.

[81] Ibid., para 45.

[82] Case C-350/07 *Kattner Stahlbau GmbH* v. *Maschinenbau- und Metall- Berufsgenossenschaft* [2009] ECR I-1513.

Following *FFSA*, *Albany*, *Brentjens*, *Drijvende Bokken* and *Pavlov* it appears that if a social aim is pursued in an economic fashion, competition rules will still apply. Only where a social aim is pursued in an entirely solidarious way, as in *Poucet and Pistre* and *Cisal*, can competition rules be escaped.

4.2.3 The Solidarity Principle

Solidarity means sharing advantages and burdens equally and justly. This principle obviously conflicts with competition principles. An entity that functions according to the principle of solidarity cannot survive in a competitive environment and requires protection from competition rules. The market left uncorrected will fail to provide services that require the principle of solidarity to be respected. That is why this principle was among the elements that determined the Court to rule out the application of competition rules.

In *Poucet*, the social security scheme embodied the principle of solidarity—contributions were proportional to income; benefits were identical for those who received them; solidarity entailed the redistribution of income between those who were better off and those who, in terms of their resources and state of health, would have been deprived of the necessary social cover; contributions paid by active workers served to finance the pension of retired workers; and solidarity also existed between the various social security schemes, as those in surplus contributed to the financing of those with structural financial difficulties. The high degree of solidarity corroborated with other elements (such as the lack of intention to make profit, the social function of the service, the lack of economic elements, led the Court to declare the body running the compulsory social security scheme as not being an undertaking.

In *Kattner Stahlbau*[83] the solidarity can be found in different elements of the scheme: the contributions do not depend only on the risk insured but also on the earnings of the insured persons; there is solidarity at the community level, since the risks are shared by all the members of employers' liability insurance association and not only by a branch of the industry; the national court remained to determine whether by indirectly capping the level of contributions even where the insured risk was high did not strengthen solidarity; the laying down of a uniform minimum contribution was also adding to the solidarity of the scheme; the value of the benefits paid by the employers' liability associations was not necessarily proportionate to the insured person's earnings; there is a lack of direct link between the contributions paid and the benefits granted.

However, a lesser degree of solidarity may be decisive in reaching a contrary conclusion and declaring the competition rules applicable. In *FFSA*, only a few

[83] Case C-350/07 *Kattner Stahlbau GmbH* v. *Maschinenbau- und Metall- Berufsgenossenschaft* [2009] ECR I-1513.

elements of solidarity were present—contributions were not linked to the risks incurred; no prior medical examination was required and no selection took place; there was a mechanism for granting exemption from the payment of contributions for reasons connected with the economic state of the holding; in the event of premature death of a member, the accumulated credit units are placed at the disposal of the scheme (regarding the latter point, the Court noted that such provisions already existed in certain groups of life insurance policies).

Some of the solidarity elements enumerated above could have been found in certain groups of life insurance policies. Moreover, membership to the scheme was optional, this being an element that underlines the lack or the lesser degree of solidarity. Where a high degree of solidarity was found, such as in *Poucet*, compulsory membership is vital for the functioning of the scheme. The scheme also functioned according to capitalisation principle. The pay-as-you-go scheme found in *Poucet* underlines the existence of solidarity between generations and required special protection to ensure that the scheme would be permanently functional.

The same conditions can be found in *Albany* and *Pavlov*, where solidarity was found to be present but its degree was considered insufficient.

4.2.4 Lack of Intention to Make Profit

The lack of intent to make profit is not decisive in deciding whether an activity is economic or not.

In *FFSA* the fact that the managing organisation of the fund was a non-profit body did not deprive the activity it carried out of its economic character. The lack of intent to make profit should be corroborated with other elements such as solidarity in order to determine whether an activity fulfills an exclusively social function and may thus be declared non-economic.

The same conclusion was reached in *Albany*.[84] The sectoral pension fund in question was non-profit-making, with several elements underlining its non-profit-making character—the contributions were fixed by a committee who represented both sides of the industry and they were fixed at an average amount, which established a balance between the amount of the premiums, the value of benefits and the extent of the risks; the contributions had lower and upper limits, the upper limit being intended to preserve the non-profit-making status; the investments were made under the supervision of the Insurance Board and in accordance with the provisions of the relevant law[85] and the statutes of the sectoral pension fund, even though contributions were invested on a capitalisation basis. However, a non-profit-making

[84] Case C-67/96 *Albany International BV* v. *Stichting Bedrijfpensioenfonds Textielindustrie* [1999] ECR I-5751, para 74.

[85] PSW (the Wet van 15 mei 1962 houdende regelen betreffende pensioen- en spaarvoorzieningen (Law of 15 May 1962 on pension and savings funds).

character has to be supported with sufficient elements of solidarity to characterise an activity as non-economic.

The conclusion that can be drawn is that the presence of profit is a reliable indicator that an activity is economic. By contrast, the absence of profit is not sufficient to show that it is not economic, but is merely an additional corroborating factor alongside solidarity and social utility.

4.2.5 The Level of State Control

Sometimes it is possible that the stronger connection between the State and the undertaking may lead to rule out the competition rules.

In *Albany*, there were some elements that tended to place the fund outside the scope of the competition rules. The supplementary pension was established by collective agreement under the framework laid down by law and the scheme was declared compulsory by the public authorities.

However, the fact that in *Albany* the fund operated according to the capitalisation principle excluded more intervention from the state. For example, in the case of a body that offers a pension scheme based on the redistribution principle on the open market, State intervention would be absolutely necessary because otherwise no one would be prepared to pay for the pensions of others without a guarantee that the next generation would do the same.

There were also schemes where the benefits and contributions were established by the state and schemes where the levels of contributions and benefits were established by the funds independently. In *FFSA*, the managing institution was a non-profit body administered by volunteers, management was controlled by the State, and the funds collected could be used only for certain investments authorised by the Government.

In *Poucet et Pistre*, the fund could not change the contribution amounts, the use of assets and the level of benefits as they were set by law, while the management of the sickness and maternity scheme was entrusted by statute to social security funds whose activities were subject to control by the State.

In a competitive environment it is necessary that undertakings should be able to determine their own conduct on the market. It is therefore interesting to see the Court's statement in *Pavlov*,[86] where it had to decide whether the LSV (Landelijke Specialisten Vereniging der Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst (National Association of Specialists of the Royal Netherlands Society for the Promotion of Medicine, hereinafter the LSV)) was an association of undertakings. In defending LSV, it was submitted that it was a body governed by a public law statute. However, the Court decided that the fact that was

[86] Joined Cases C-180/98 to C-184/98 *Pavlov* v. *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451.

governed by public law statute did not preclude the application of competition rules. Consequently, the legal framework within which an association decision was taken and the legal definition to that framework was given by the national legal system were not decisive for the applicability of the Community rules on competition.[87] The Court nevertheless stated:

> Admittedly, a decision taken by a body having regulatory powers within a given sector might fall outside the scope of Article 85 of the Treaty where that body is composed of a majority of representatives of the public authorities and where, on taking a decision, it must observe various public-interest criteria (Case C-96/94 Centro Servizi Spediporto v Spedizioni Marittima del Golfo [1995] ECR I-2883, paras 23–25, and Case C-35/96 Commission v Italy, cited above, paras 41–44).[88]

Determinant elements for the non-application of competition rules were that the body was primarily composed of public authorities and that there was a requirement that the public interest be pursued in decisions making. These conditions were not complied with by the LSV because at the time it decided to establish the Fund it was composed of self-employed specialists and it did not pursue a public-interest objective, but its own interests.

In *Wouters*, the Bar of the Netherlands neither exercised powers typical of a public authority (thus unable to fall outside the scope of the competition rules provided by the state-authority test—*SAT Fluggesellschaft*), nor did it fulfill a social function based on the principle of solidarity (thus unable to fall under exemption granted by the market-economy test—*Pouce*t); the governing bodies were composed exclusively of members of the Bar and the national authorities could not intervene in the appointment of the members of its Supervisory Boards; and when it adopted measures it was not required to do so by reference to specified public interest.

In *Cisal*[89] the activity of INAIL (a body entrusted by law with the management of a scheme providing insurance against accidents at work and occupational diseases) was subject to the supervision of the State; the amount of contributions and benefits were fixed in the last resort by the State. The amount of contributions is subject to approval by the competent minister who can reject the scales proposed by INAIL and who can request a new proposal. The amounts of benefits paid are fixed by law and they are paid regardless of the contributions. In this case also the level of State control was a condition which corroborated to the absence of making profit, the fulfillment of a social function, the solidarity elements led to the conclusion that INAIL is not an undertaking for the scope of competition rules.

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[87] Ibid., para 85.

[88] Ibid., para 87.

[89] Case C-218/00 *Cisal di Battistello Venanzio & C. Sas* v. *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* (*INAIL*), [2002] ECR I-691.

In *AOK Bundesverband*[90] also the funds were compelled to offer the same benefits which did not depend on the amount of the contributions. The lack of the possibility of controlling the benefits was corroborated with the absence of the intention to make profit, the social function, the existence of solidarity and led to the conclusion that there were no undertakings for the scope of Articles 81 and 82 EC.

In *Kattner Stahlbau*[91] the Court ruled that the fact that the MMB was given a degree of latitude, within the framework of a system of self-management, to lay down the factors that determine the amount of contributions and benefits did not change the nature of the association's activity. What was important was that the degree of latitude was established and limited by law. It was up to the national court to determine whether the national law was respected.

In general, the stronger the connection to the state, the more likely it is that the body in question will be not be declared an undertaking. The presence of the state in controlling a body may bring that body closer to being granted exemption on the basis of satisfying the first test—the state-prerogative test—because the State, by controlling the behaviour of that body, is actually exercising its prerogatives of public authority and the protection of the public interest. However, in determining whether there is a non-economic activity, the existence of state control should be corroborated with other factors.

4.2.6 Upstream Market–Downstream Market

In determining whether an entity is an undertaking for the scope of competition rules, a normal approach would be to see whether it is an economic activity. However, the Court had to determine whether the relationship between the upstream and downstream market is important in determining whether an undertaking falls within the scope of competition rules. This issue was dealt with in FENIN,[92] the case which concerned an association (Federación Española de Empresas de Tecnología Sanitaria ('FENIN')) which marketed medical goods and equipment used in Spanish hospitals. FENIN was selling goods to the national health system (Sistema Nacional de Salud ('SNS')). The late payment of debts owed by SNS to FENIN was argued to

[90] Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband, Bundesverband der Betriebskrankenkassen* (*BKK*) *and Others* v. *Ichthyol-Gesellschaft Cordes, Hermani & Co* [2004] ECR I-2493; See Krajewski and Farley 2004, pp. 842–851.

[91] Case C-350/07 *Kattner Stahlbau GmbH* v. *Maschinenbau- und Metall- Berufsgenossenschaft* [2009] ECR I-1513.

[92] Case T-319/99 *Federación Española de Empresas de Tecnología Sanitaria* (*FENIN*) v. *Commission of the European Communities*, [2003] ECR II-357, case which was appealed and it was dismissed by the ECJ in Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria* (*FENIN*) v. *Commission of the European Communities*, [2006] ECR I-6295; see also Krajewski and Farley 2007, pp. 111–124, Van de Gronden 2004, Louri 2005, pp. 87–97, Roth 2007, pp. 1131–1142.

be an abuse of a dominant position. The Commission dismissed the FENIN's complaint, explaining that SNS's management bodies were not undertakings within the scope of the competition rules and moreover, the purchase of medical goods and equipment could not be dissociated from the use of those goods and equipment. The Court of First Instance[93] decided that SNS was not an undertaking on the basis of the presence of the solidarity element. This ruling was appealed and the Court of Justice dismissed the appeal.

In determining whether SNS is an undertaking, the applicants considered that the Commission was wrong in applying the approach adopted in *Poucet et Pistre*, since that case concerned the relationships between the providers of healthcare and their members, meanwhile, the case in question concerns the relationships between the providers of healthcare and third parties. It was submitted that the service of buying goods and equipment provided by SNS could be provided private parties in Spain or in other Member States. Moreover, the complainants contended that public hospitals in Spain could provide paid-for services for foreigners, which should determine the economic character of the service. The applicants criticised the approach of the ECJ in *Poucet et Pistre* and relied on the opinion expressed by Buendia Sierra[94] that it is not appropriate for social security to fall outside the competition rules, since the exception provided in Article 106(2) TFEU (ex Article 86(2) EC) should be sufficient to protect those services.

The applicants also made mention of the Opinion of Advocate General Cosmas in *Ferlini*,[95] where he stated that public hospitals act as undertakings within the meaning of Article 81 as regards patients who are not members of the social security scheme by which it is financed.

Moreover, FENIN criticised the Commission's argument that the purchasing activity could not be dissociated from its activity of providing healthcare.

> The fact that the SNS needs to obtain supplies and equipment in order to be able to provide health services does not prevent that purchasing activity from being an economic activity. Contrary to the Commission's assertion in the contested decision, it is not necessary for an activity to be autonomously viable in order for it to be regarded as an economic activity and for the body which carries on that activity consequently to be regarded as an undertaking within the meaning of Article 82 EC.[96]

The Commission however argued that in *Poucet et Pistre* the Court found that the body in question was not an undertaking within the scope of competition rules and did not create any distinction resembling the one suggested by the applicant.[97] Regarding the link between upstream and downstream markets, it said that it was

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[93] Case T-319/99 *Federación Española de Empresas de Tecnología Sanitaria* (*FENIN*) v. *Commission of the European Communities*, [2003] ECR II-357.

[94] Buendia Sierra 1999.

[95] Case C-411/98 *Ferlini* [2000] ECR I-8081.

[96] Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental* (*FENIN* v. *Commission of the European Communities* [2003] ECR II-357, para 30.

[97] Ibid., para 32.

difficult to dissociate purchasing activity from the provision of services.[98] Furthermore, it argued that when hospitals offer services to foreigners, this should be taken into account in determining whether those hospitals, and not the bodies concerned in the case, are undertakings when dealing with private patients.

The Court stated that it was the act of offering goods and services that characterised an economic activity and not the act of purchasing. It sustained the Commission's position and ruled that it was wrong to dissociated purchasing activity from the subsequent use. Therefore, if the subsequent use of goods was not an economic activity, the purchase of those goods and equipment can also not be qualified as economic.[99] The Court concluded that SNS was not an undertaking within the scope of the competition rules as it operated according to the solidarity principle,and was funded from social security contributions and other state funding and provided services free of charge on the basis of universal cover.[100]

With regard to the fact that SNS provided services for foreigners, the Court refused to rule, stating that the applicant made no reference to this in its original complaint.[101]

However, Advocate General Maduro disagreed with the Court's ruling and stated that it made two errors in law: 'the first in failing to give a functional interpretation to the concept of an economic activity, and the second in giving a wide interpretation to the principle of solidarity.'[102] He considered that the Court of First Instance had failed to classify each activity of SNS separately; since SNS was providing compulsory health insurance and health services, a separate assessment of these two activities was necessary. In the case of health insurance the principle of solidarity was present; in the case of health services, those insured were free to choose who would treat them. He considered that each activity should be assessed separately,[103] especially since some activities pursued might be economic and some non-economic.

Furthermore, the Advocate General considered that the Court of First Instance was wrong in classifying SNS's activity of providing health services as non-economic; he argued that the principle of solidarity was interpreted too broadly. In determining the non-economic character of the measure, the Court of First Instance applied the criteria laid down in *Poucet et Pistre*, *FFSA and Others* and *Albany*; however, the Advocate General considered that those criteria were not

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[98] Ibid., para 33.

[99] Ibid., para 36.

[100] Ibid., para 39.

[101] Ibid., paras 43, 44.

[102] Opinion of Advocate General Poiares Maduro in Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria* (*FENIN*) v. *Commission of the European Communities*, [2006] ECR I-6295, para 40.

[103] In sustaining this he mentions previous case-law: *AOK-Bundesverband and Others*, para 58, and Case 118/85 *Commission* v. *Italy*, para 7; point 114 of the Opinion of Advocate General Cosmas in Case C-411/98 *Ferlini* [2000] ECR I-8081.

appropriate to determine the character of healthcare provision.[104] Indeed, though there was compulsory membership to sickness insurance, it was the activity of providing healthcare and not that of providing health insurance that was meant to be assessed. Both health insurance and healthcare were provided by SNS.

In order to determine whether SNS was an undertaking, Advocate General Maduro considered that it had first to be established whether the state intended to exclude the healthcare activity from all market actors by entrusting the activity to state bodies exclusively and by having them guided by the solidarity principle. SNS was indeed obliged to guarantee universal cover; however, there was insufficient information provided to determine whether the healthcare services were provided only by state bodies or whether there were private organisations involved in the provision of healthcare. AG Maduro suggested that the CFI should inquire further into whether private and public health sectors coexist and whether solidarity is predominant.[105]

Even if SNS were to be declared a non-undertaking, the link made by the Court of First Instance between the purchase and subsequent use was also contested. In analysing this issue Advocate General Maduro started from the premise that the relevant criterion for classifying an entity as an undertaking was its participation in the market.[106] The appellants referred to the judgement in *Pavlov* where a distinction was made between activities related to the medical practitioners' economic sphere and activities related to their personal sphere. In that case the Court made a distinction between intermediate demand and final demand. The purchase of goods for the personal sphere was considered to be meeting final demand and falling outside the competition rules, while the purchase of goods to be used for the economic sphere was considered to be meeting intermediate demand and falling within the scope of competition rules. Advocate General Maduro underlined that the CFI ruling was not in contradiction with the judgement in *Pavlov* and stated that:

> Where public organisations carry out both economic activities and activities of another kind, it is only demand which is linked to their economic activities which may fall within the scope of competition law. By contrast, purchases intended for use in non-economic activities are comparable to final demand by consumers and are not subject to competition law. But it cannot be denied in the present case that the purchase of medical goods and equipment is linked to the activity of the SNS in providing health care services.[107]

Thus the purchase of goods and equipment were considered to be equivalent to final demand and outside the competition rules.

The appellant contended that an analysis of whether the state purchasing activity had anti-competitive effects should have been carried out to determine

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[104] Opinion of Advocate General Poiares Maduro in Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria* (*FENIN*) v. *Commission of the European Communities*, [2006] ECR I-6295, para 47.

[105] Ibid., para 54.

[106] Ibid., para 62.

[107] Opinion of Advocate General Poiares Maduro in Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria* (*FENIN*) v. *Commission of the European Communities* [2006] ECR I-6295, para 64.

whether the purchasing activity was economic or not. However, Advocate General Maduro stated that this would have meant that all state purchasing activities would have been subject to the competition rules.[108]

Roth disagrees with the Advocate General's opinion, stating that not all purchasing activities would have been subject to competition rules but only those made by an entity in a dominant position.[109] He finds no reason why the application of competition rules upstream should depend on whether competition rules are also applicable to the downstream market. He requires an explanation for such an approach.[110] He underlines the fact that this approach leads to unequal treatment on the upstream market between those undertakings which offer non-economic services and who can thus also be subsidised, and those who offer services on an economic basis. The justification provided by the Advocate General was that the effectiveness of European Union rules on public procurement would be weakened if the purchasing activities such as those in question were qualified as economic. Roth stressed that there are many non-public undertakings that are not subject to public procurement rules that offer public goods. Moreover, he states that the rules on public procurement were aimed at fostering the effectiveness of the basic freedoms and at eliminating discrimination; consequently, he questions the relationship between competition and free movement rules to conclude that it should be one of convergence[111] and cooperation.[112]

Thus, competition law would apply only if the purchasing activity was part of the exercise of an economic activity. Advocate General Maduro finds this consistent with economic theory that considers a monopsony as not posing a serious threat to competition as it does not have any effect on the downstream market.[113] Roth considers that this argument relates to the question of whether buyer power should be the concern of competition law, stating that the answer is to be found in Articles 101 and 102 TFEU (ex Articles 81 and 82 EC), where indeed the buyer's power is within the ambit of competition rules since a monopsonist can influence the prices on the market by reducing the quantity of inputs.[114]

Advocate General considered how national courts and competition authorities determine the economic activity question and concluded that the national authorities followed the CFI's approach. In criticising Advocate General Maduro's opinion, Krajewski and Farley[115] observed that the criteria applied by the CFI and the ECJ in FENIN were not found in German Law. In German legal practice,

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[108] Ibid., para 65.

[109] Roth 2007, p. 1138.

[110] Ibid., 1139.

[111] See Mortelmans 2001.

[112] Roth 2007, p. 1139.

[113] Opinion of Advocate General Poiares Maduro delivered in Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria* (*FENIN*) v. *Commission of the European Communities* [2006] ECR I-6295, para 66.

[114] Roth 2007, p. 1139.

[115] Krajewski and Farley 2007, pp. 111–124; see also Van de Gronden 2004, pp. 87–94; Winterstein 1999, pp. 332–333. In this context see also Karl 2002, pp. 169–171.

competition law applies to purchases made by public entities even if the subsequent use of the purchased goods is non-economic.[116]

In the United Kingdom, in *Better Care* v. *The Director General of Fair Trading*[117] the question was raised whether a managing body of the National Health Service is an undertaking with regard to its purchasing activities.

North & West Belfast Health & Social Services Trust ('N&W') was required under statute to provide nursing home and residential care services for elderly persons. N&W was the owner of residential and nursing homes, some of which were managed by private undertakings. The case was between N&W and Bettercare, from which N&W purchased residential and nursing care. Bettercare accused N&W of abusing its dominant position by offering unreasonably low contract prices and unfair terms. The Competition Commission Appeal Tribunal ('CCAT') had to decide whether the purchasing activities were economic or not. The CCAT rejected the argument that purchase without resale is not an economic activity, since it was not a matter of the mere purchase of household goods by the consumer. It decided that N&W operated as an undertaking. The 'decisive factor for determining whether an activity is economic was "whether the undertaking in question was in a position to generate the effects which the competition rules seek to prevent."'[118]

The case was forwarded to the Office of Fair Trading[119] where it was found that N&W's conduct did not constitute an abuse.

After the ruling in FENIN, the Office of Fair Trading issued a policy note[120] which gave guidance in cases concerning purchasing activities involving public bodies. This note followed the FENIN ruling.

> In particular, the OFT concluded firstly, that 'it is likely to close cases concerning public bodies that are engaged only in purchasing in a particular market and not involved in the direct provision of any goods or services in that market, on the grounds that such bodies are not undertakings for the purposes of the Competition Act 98, and secondly, that 'for the time being, it is unlikely, in the absence of exceptional circumstances, to take forward cases concerning public bodies which are engaged in a mixture of purchasing and direct provision of goods and services for non-economic purposes, for example, purposes which are purely social, environmental or national security related.'[121]

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[116] Krajewski and Farley 2007, p. 120.

[117] *Bettercare Group Ltd* v. *Director General of Fair Trading*, Case 1006/2/1/01, August 1, 2002; This decision can be found at www.catribunal.org.uk/ (click 'Judgments', then search for 'Bettercare'); see Currie and Bright 2003, pp. 111–124; Van de Gronden 2004, pp. 87–94; Opinion of Advocate General Poiares Maduro in Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria* (*FENIN*) v. *Commission of the European Communities*, [2006] ECR I-6295, para 24; Prosser 2005.

[118] Louri 2005, pp. 87–97, quoting Case No. 1006/2/1/01, *BetterCare Group Limited* v. *Director General of Fair Trading*, 1 August 2002, para 190.

[119] Case CE/1836-02, BetterCare Group Ltd/North & West Belfast Health & Social Services Trust (Remitted case), 18 December 2003.

[120] Policy note 1/2004, *The Competition Act* 1998 *and public bodies*, January 2004, OFT443.

[121] Louri 2005, p. 95.

In the Netherlands, the Netherlands Competition Authority[122] ruled that agencies managing public insurance schemes were considered to be undertakings in their activities of purchasing services from other providers, 'to the extent that they had sufficient freedom to influence the activities of providers in the healthcare sector.'[123]

In considering the relationships between the upstream and the downstream markets the Court concluded that where the activities provided are non-economic on the downstream market—in that case healthcare services—then the activity of purchasing goods on the upstream market will also be a non-economic activity. It can be noticed the reluctance of the Court to declare purchasing activities as economic by linking these purchasing activities with the subsequent use of the goods or services purchased. This was done irrespective of the impact these purchasing activities had in the upstream market. Unfortunately the Court failed to allow the competition rules to be involved with situations such as the one at stake where the great buying power of a monopoly has effects on the market.

As Van de Gronden[124] notes, the different approaches taken by the CFI, the ECJ and the national courts reflect the fact that the application of competition rules in the field of health is developing.

4.2.7 The Presence of Economic Elements

The fulfillment of an exclusive social function is important in ensuring that an undertaking is sheltered from the competition rules. However, the presence of economic elements has caused the Court to rule that the competition rules apply despite the presence of social elements. In *Albany*, the presence of the capitalisation element had influenced the Court in deciding that the fund was an undertaking for the purpose of competition rules. The sectoral pension fund determined the amount of the contributions and benefits itself. Moreover, the amount of benefits provided by the Fund depended on the financial results of the investments made by it and as a result it was subject, like an insurance company, to supervision by the Insurance Board. The Court decided that the pension fund in question engaged in an economic activity in competition with insurance companies. The capitalisation element belongs in the domain of market mechanisms, while the redistribution principle requires State intervention to the exclusion of competition.

The fact that the presence of the economic elements can be decisive for the application of competition rules is very important for the reorganisation and reform of obsolete health and social security systems. In order to achieve more

[122] Decision of the NMa of 10 March 2000, Case No. 181/Ontheffingsaanvraag Zorgkantoren, as quoted by Louri 2005, pp. 87–97.

[123] Ibid., 94.

[124] Van de Gronden 2004, pp. 87–94.

effectiveness Member States may decide to introduce competitive elements in their health insurance systems. This has already occurred in Germany and the Netherlands.

In the *AOK Bundesverband* case,[125] the Court had to determine whether AOK Bundesverband and a number of other German federal fund associations (hereinafter the fund associations) were undertakings within the scope of the competition rules. These sickness funds administered the statutory the health insurance scheme, to which the vast majority of the population belonged. These sickness funds were independently managed bodies governed by public law and possessing legal personality.

It was compulsory for employees to be insured under the statutory scheme, this obligation being necessary to ensure the functioning of the solidarity principle. 'The benefits provided by the fund were financed through contributions levied in most cases in equal shares on insured persons and their employers. The amount of contributions was set according to the insured persons' income and the contribution rate set by each sickness fund.'[126]

This statutory insurance scheme had however a particular characteristic: the fund associations were in competition with regard to contribution rates in order to attract contributors for whom an insurance scheme was obligatory and those for whom insurance scheme was voluntary. Insured persons could freely choose their insurer and the doctor or hospital from which they received treatment.[127]

The sickness scheme was based on a benefits-in-kind system. However, the prescription fees for the medicinal products were borne by the patient, who was afterwards reimbursed by the fund within certain limits determined in accordance with the law. Amounts exceeding the maximum reimbursed were met by the patient. The solidarity element is present since there is a risk-equalisation scheme intended to remedy the financial differences that appear as a result of insuring people with different risks.[128]

In order to reduce health costs, according to the German Law a Federal Committee of Doctors and Sickness Funds—a body composed of doctors' representatives and the representatives of the funds—compiled the list of those medicinal products for which a maximum amount would be set. The funds associations determined the maximum amount reimbursed for these medicinal products. If a maximum amount was not set, the decision was taken at the ministerial level.[129]

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[125] Joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband, Bundesverband der Betriebskrankenkassen* (*BKK*) *and Others* v. *Ichthyol-Gesellschaft Cordes, Hermani & Co* [2004] ECR I-2493; See Lasok 2004, pp. 383–385; Belhaj and Van de Gronden 2004, pp. 682–687; Slot 2003, pp. 580–593.

[126] Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband, Bundesverband der Betriebskrankenkassen* (*BKK*) *and Others* v. *Ichthyol-Gesellschaft Cordes, Hermani & Co* [2004] ECR I-2493, para 7.

[127] Ibid., para 8.

[128] Ibid., para 10.

[129] Ibid., paras 13–17.

Pharmaceutical undertakings and undertakings marketing medicinal products brought a case against the fund associations on the basis of the fixed amounts set by the funds. Several preliminary questions were addressed to the ECJ, including ones asking the Court to decide whether the fund associations are undertakings and whether the determination of the fixed maximum amounts restricted competition.

The fund associations contended that they were not undertakings within the meaning of competition law since the funds fulfilled an exclusively social function, are non-profit-making, function according to the principle of solidarity and have the state exercising control over their activities.

The pharmaceutical companies on the other hand considered that the funds were undertakings because the amounts of the contributions set by the funds were meant to attract patients and because though the benefits were laid down by law, the funds had some freedom with regard to optional additional benefits. Moreover, there were competitive elements in the system—the funds competed with each other with regard to the management and organisation of their operations and they ran promotional and marketing campaigns.[130]

In its decision the Court reiterated its previous rulings where it stated that in the field of social security, the Court had held that certain bodies entrusted with the management of statutory health insurance and old-age insurance schemes pursue an exclusively social objective and do not engage in economic activity.[131] The pursuit of social objectives, the presence of solidarity, the fact that the bodies were non-profit-making and the fact that the fund associations merely applied the law and could not influence the amount of contributions, the use of assets or the fixing of the level of benefits were all determinant in declaring the funds to be pursuing exclusively social objectives and not to be undertakings.

The fact that the funds association competed with each other did not lead the Court to declare the applicability of competition rules. Instead, the Court ruled that the presence of an element of competition is a choice of the German system aimed at encouraging the funds to operate in accordance with the principle of sound management, to become more effective and less costly. The competition elements were regarded as a purely managerial choice taken to make a statutory scheme more effective. It is interesting that the Court was not convinced not even by the fact that there was competition with regard to contribution rates.

Advocate General Jacobs reached a different result from the Court. While acknowledging that there are similarities between German statutory health insurance and the schemes in *Poucet et Pistre* and *Cisal*, he also identified the presence of competitive elements as distinguishable characteristics that must be taken into account.

He found that there was competition not only between the fund associations but also between the funds and private insurance companies, as they tried to attract people not covered by the compulsory insurance scheme to contract with them

[130] Ibid., paras 38–43.

[131] Ibid., para 47.

by making their services more attractive. Indeed, the notion of undertaking is a relative concept, meaning that a given entity could be regarded as an undertaking for part of its activities while the rest falls outside the competition rules, but in the present circumstances we can identify a problem—there is the danger that the resources from the non-competitive activities could be used to finance competitive activities and thus distort competition on the market for private insurance.[132]

Advocate General Jacobs concluded that the sickness funds were undertakings for purposes of the competition rules. He considered that the level of competition should lead to this conclusion. The funds were competing with regard to the level of contributions and also with regard to the services they offered since they could decide to offer complementary and preventive treatment.

The Court was unwilling to subject the statutory health insurance schemes to the rules of competition, due to their exclusively social objectives and also due to the sensitive nature of the problem. If statutory insurance had been opened to the competition rules, it would have meant that other unwanted gates would also be opened. All the regulatory systems present in the health sector would have been challenged. Of course, everything can be justified under Article 106(2) TFEU (ex Article 86(2) EC), but it must have been felt to be too much to submit the organisation of a health insurance system to a justification procedure.

Comparing this case with the previous ones, Belhaj and van Gronden found the Court willing to declare doctors and hospitals as undertakings but acting with greater caution when it came to health insurers.

'The question has to be addressed whether elements of competition or elements of solidarity prevail. Competition and solidarity are two sides of the same coin.'[133]

Belhaj and van de Gronden note that the Court strangely reached the conclusion that the sickness funds were not in competition with private funds, even while they competed with private funds to attract civil servants or those whose income exceeded a statutorily prescribed level.[134] Drawing a parallel between the German and the Dutch insurance funds, Belhaj and van de Gronden observed that while in *Brentjes*, the sickness fund was found to be an undertaking, and there was less competition than in the German case. The Dutch pension fund rarely competed with a private insurance company.

Thus the presence of competitive elements does not have as much weight as the solidarity element. This is a controversial judgement and the Court seems to have made a step backwards from its previous cases. It is obvious that there is competition on prices and that the funds compete with each other—the contribution rates vary between the funds (on 1 January 2002 the highest rate exceeded

[132] This issue is addressed by the Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings OJ L312/47 which will be discussed later.

[133] Belhaj and Van de Gronden 2004, p. 685.

[134] Ibid., pp. 682–687.

the lowest by a third).[135] They compete also on the management and organisation of their operations by offering different services to consumers. There is also marketing and promotional activity going on. All these elements should have led to the conclusion that there is an undertaking for the scope of Article 101 TFEU (ex Article 81 EC). However, the Court considers that the existence of a risk-equalisation scheme allows an equalisation to be made between those funds who have high expenditure and those with low expenditure. It could be probably true that the Court considers that the existence of this risk-equalisation scheme annuls the effect of having competition on prices. Without the existence of evidence that there is an intention to make profit, or without the existence of a capitation method as in *Albany*, the Court considered all those competitive elements to be annihilated by the solidarity elements.

4.2.8 Universities as Undertakings

There have not yet been any cases brought before the Court to determine whether universities are undertakings within the scope of competition rules. So far, the Court has been reluctant to declare education as being a service within the scope of the free movement rules. In the recent case *Marga Gootjes-Schwarz*[136] the Court departed from the approach taken in *Watts*[137] and decided that if a student goes abroad and receives education for which he pays, this is not a service unless it can be proved that the establishment where the education is provided is mainly privately financed. 'Universities are problematic. They act as employers and providers of the public service of education… As a result of the ruling in Foster, it is clear that no definite categorisation of universities can be given for the purposes of Community law.'[138]

However, with respect to the competition rules, it is irrelevant whether the service is provided by a public or private entity. Private universities could be qualified as undertakings since they offer education services in exchange for remuneration, thus their activities are of an economic nature. With regard to public universities, Louri[139] considers that the services provided can be considered of an economic nature if remuneration in the form of fees is involved. Applying the comparative approach and paraphrasing the wording in the *Höfner* case, Louri states that: 'Education *has not always been*, and *is not necessarily*, carried out by

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[135] Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband, Bundesverband der Betriebskrankenkassen* (*BKK*) *and Others* v. *Ichthyol-Gesellschaft Cordes, Hermani & Co* [2004] ECR I-2493, para 40.

[136] Case C-76/05 *Marga Gootjes-Schwarz* v. *Finanzamt Bergisch Gladbach* [2007] ECR I-6849.

[137] Case C-372/04 *The Queen on the application of Yvonne Watts* v. *Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325.

[138] Szyszczak 1990, p. 868.

[139] Louri 2002, p. 165.

public universities.'[140] Applying the functional approach, we note that public universities can be involved in providing research services or consultancy, or in organising conferences and[141] thus offer services of an economic nature in competition with other entities.

4.2.9 The Mix of Economic and Non-Economic

To complicate things even further, an entity can be declared to be an undertaking for only some of its activities. Therefore, economic and non-economic activities can be provided by the same entity.

In *AOK* the statutory insurance was declared outside the reach of the competition rules, while the activities falling outside statutory insurance were economic. In *FENIN* the question of whether the services provided for foreigners could lead to the qualification of those activities as economic was not answered since this argument was brought later in the proceedings. However, if the Court had had to answer this question, it is likely that it would have found a part of the activities economic while others were not.

In *Wouters*, even if the Bar had been declared an undertaking, the measures taken to ensure proper practices in the legal profession were considered to fall outside the competition rules.

In *Meca Medina*, when dealing with anti-doping rules, the Court stated that purely sporting rules have nothing to do with economic activity. Paragraph 27 states that the purely sporting nature of some measures cannot have the effect of removing that entity from the scope of the Treaty. It referred to the judgement in *Wouters* and stated that even if the entity is an undertaking for the scope of competition rules, not every measure adopted by that entity falls within the scope of competition rules, even if competition is restricted. The overall context in which a decision is taken should be considered and in the case in question it was decided that the measure constituted an inherent restriction, necessary for the organisation and proper conduct of competitive sport.

In *Selex Sistemi*[142] the CFI had to clarify the concept of undertaking with regard to the European Organisation for the Safety of Air Navigation (Eurocontrol), a body entrusted with the task of air traffic management. It ruled that the activities of an entity can be severed from those in which it engages in the exercise of its

[140] Ibid.

[141] See C-380/98 *The Queen* v. *H.M. Treasury, ex parte The University of Cambridge* [2000] ECR I-8035.

[142] Case T-155/04 *SELEX Sistemi Integrati SpA* v. *Commission of the European Communities* [2006] ECR II-4797, para 54.

powers as a public authority.[143] The activities of an undertaking must be considered individually and the fact that the undertaking is engaged in some activities where it exercises its powers as a public authority does not necessitate the conclusion that it cannot also provide activities which are economic. Therefore, it is necessary to assess whether the activities of an undertaking can be severed from those which fall within the public remit and after that they should be assessed to determine whether they are economic or not.

Standardisation was declared as not being an economic activity, as was the purchase of goods necessary for that activity, thus linking the purchase of goods to their subsequent use.[144] The activity of research and development was also found to be non-economic. However, the activity of assisting the national administrations was found to be an economic activity. This activity was found to be separable from airspace management and the development of air safety and was not found to be indispensable to ensure the safety of air navigation. The fact that these activities are not provided by private undertakings does not mean that they are not economic since they are capable of being carried out by private undertakings.[145]

Therefore, even if an undertaking is declared to be an undertaking, it is possible that some of its activities will fall outside the competition rules. It is also important to consider whether the activities of an undertaking are severable because even if it exercises the powers of a public authority overall, some of its activities can be economic.

4.2.10 Conclusions

Defining the notion of undertaking is relevant for determining the subjects to whom competition rules apply. Any entity engaged in an economic activity regardless of legal status and mode of financing is considered an undertaking. The difficult task is determining what an economic activity is. The Court used a comparative approach, trying to determine whether the activity can be provided by a profit-making undertaking. Since this led to a very broad interpretation of the concept of undertaking, the Court used a functional approach[146] and looked at the participation of the undertaking in the market. An undertaking offering goods or

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[143] Case T-155/04 *SELEX Sistemi Integrati SpA* v. *Commission of the European Communities* [2006] ECR II-4797; See also Case 107/84 *Commission* v. *Germany* [1985] ECR 2655, paras 14, 15, and Case T-128/98 *Aéroports de Paris* v. *Commission* [2000] ECR II-3929, para 108.

[144] Case T-155/04 *SELEX Sistemi Integrati SpA* v. *Commission of the European Communities* [2006] ECR II-4797, para 61.

[145] Ibid., paras 86–92.

[146] For the implications of the functional approach see Spaventa 2003, pp. 271–291 and Hatzopoulos 2002, pp. 683–729.

services on a market in exchange for remuneration was considered an undertaking within the scope of the competition rules. However, when faced with cases involving social issues, the Court proved less severe. When it had to decide whether health, pension, or other insurance services fall within the scope of competition law, 'the Court has departed from the functional approach.'[147] Social insurance services based on solidarity and with compulsory affiliation were taken out of the ambit of competition rules. The universal cover disregarding risk, the contributions proportional to income, the financing of the pension scheme through a pay-as-you go system, the equalisation system intended to compensate the losses incurred by some funds, all these were considered as solidarity elements to be taken into account when deciding whether the pension system fell within the scope of the competition rules.[148]

The Court was also reluctant to apply competition rules where competitive elements had been introduced in the system[149]: it linked purchasing activities to subsequent use and refused to consider the purchasing activities as economic so long as the activities on the upstream market were not economic.[150] Gyselen considers that the Court does not make a proper distinction between jurisdiction and justification.[151]

The Court is faced with the difficult task of deciding whether competition rules apply to services containing both social and economic elements. Its decisions could appear arbitrary and open to criticism from both sides. On the one hand, criticism is brought by those who consider that welfare services should not be subject to competition rules, and on the other hand there are those who consider that the Court does not apply the competition rules sufficiently strictly when competitive elements are present. Caught in the middle and constantly asked to provide greater clarity, the Court finds itself in the almost impossible position of having to lay down the guidelines to define a dynamic concept. There are different elements that the Court takes into consideration when deciding whether an entity is qualified as an undertaking. What it actually does is to determine whether the social or the economic issues have more weight and in doing so, solidarity plays an important role in determining whether the undertaking pursues an exclusively social function. The Court was reluctant to declare the whole insurance system subject to competition rules in *AOK*, even though competitive elements were present, on the account of the high degree of solidarity. There are three factors employed to measure solidarity:

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147 Winterstein 1999, p. 336.

148 Ibid., 338.

149 Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband, Bundesverband der Betriebskrankenkassen* (*BKK*) *and Others* v. *Ichthyol-Gesellschaft Cordes, Hermani & Co* [2004] ECR I-2493.

150 Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental* (*FENIN*) v. *Commission of the European Communities*, [2003] ECR II-357.

151 Gyselen 2000, p. 439.

compulsory membership, the link between the contributions payable and the risk, the link between the benefits and the contributions paid.[152]

It is true that the Court talks about 'some competition' or about 'predominant solidarity' raising the level of ambiguity. However, as Krajewski[153] correctly notes, the use of ambiguous terms allows the Court to be flexible in future cases. The Court is confronted with a task that can be defined as political, and it tries to solve it by balancing the economic and social issues on a case-by-case basis. The organisation of the welfare systems is within the competences of the Member States. Once they introduce economic elements, however, the competition rules apply. The Court however, shows deference even when the Member States decided to introduce competitive elements and considers whether the social or the economic aspects prevail.

The definition of the concept of undertaking is a first filter that can ensure that particular services that cannot be provided in a competitive environment are left outside the ambit of the competition rules.

As it has been seen there are two exceptions that rule out the applicability of the competition rules. Undertakings are not considered undertakings for the purpose of the competition rules when they act in the exercise of official authority. The other exception is given in *Poucet*, where the undertaking pursues an exclusively social function. In order to determine whether that undertaking fulfills an exclusively social function, the Court developed a concrete test requiring an assessment of several elements: social objectives, solidarity, the character of the entity (profit or non-profit-making), whether the entity has the power of decision or is just applying the law and the absence of economic elements. However, the decision whether an entity is an undertaking or not depends on what elements are more prominent and to what degree—a lesser degree of solidarity can lead to the application of competition rules.

In all these judgments the Court's intention to grant core social services protection from competition rules is evident, and it can also be deduced from *AOK*, where the Court allowed competitive elements in a statutory health insurance scheme, declaring that it is a matter for the national authorities to decide how to make their compulsory health systems more effective. Several bodies characterised by the presence of social elements were nonetheless declared as undertakings, leaving them to be protected from competition rules by justification.

Despite the criticism that the welfare services are endangered by the application of the competition rules, it is apparent that the Court is actually cautious in deciding what falls within their scope. Furthermore, even if the competition rules are applied, there remain justifications to permit the social aspects to be considered.

Comparing free movement and competition fields, we notice that the results are different. A service can be declared an economic one within the ambit of the free

[152] Opinion of Advocate General Maduro in Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria* (*FENIN*) v. *Commission of the European Communities*, [2006] ECR I-6295, para 30.

[153] Krajewski and Farley 2007, pp. 111–124.

movement rules while falling outside the reach of the competition rules. The scope of competition and free movement rules is different. Krajewski[154] remarks that competition law concerns a 'general' principle which 'can accommodate structured exceptions to its application, without its effectiveness being undermined' while the free movement of services 'is a fundamental individual right, a basic freedom, which would be affected to a greater degree by such structural exceptions.' This differentiated approach shows once more that the welfare services are not simply subjected to economic rules. The Court shows consideration for individuals trying to use their right to move freely and sometimes, even if the service is not an economic one, the citizenship provision and the non-discrimination principle are used to ensure no obstacles to movement. However, in the same time the same service can be found not to fall within the scope of competition rules, thus acknowledging the necessity for state intervention and state protection for these services.

4.3 The Application of Article 101 TFEU (ex Article 81 EC)

The existence of economic elements triggers the application of competition rules. It is contended that the application of competition rules to services which are not purely economic may be damaging for the normal provision of those services. However, once the market has been opened to such services, the non-application of competition rules can lead to anti-competitive market behaviour or to the changing of the market structure on the part of those undertakings that are in charge of the provision of services which are of double nature: economic and social. That is why the application of competition rules should be welcomed every time economic elements are present. The existence of non-economic values is however not set aside and the European competition rules take non-economic values into consideration. The exceptions contained in Articles 101(3) TFEU and 106(2) TFEU (ex Articles 81(3) EC and 86(2) EC) cover the problem of non-economic considerations.

Article 101 TFEU (ex Article 81 EC) contains a prohibition and an exemption. The aim of Article 101 TFEU (ex Article 81 EC) is to prevent agreements between undertakings, associations of undertaking and concerted practices that tend to distort competition. Article 101 TFEU (ex Article 81 EC) applies to vertical and horizontal agreements. Undertakings on the market may prefer the comfortable compromise of a cartel to the fierce competition of the open market, where the actors engaged may be eliminated from the field. In most markets the behaviour of an undertaking will determine the behaviour of other undertakings. The firms on the market can adopt different types of behaviour. They can charge low prices or they can charge high prices. A cartel is formed when the behaviour of the firms on the market tend to avoid competition and to prefer co-ordinated behaviour.

[154] Ibid.

Some may cheat on the cartel, thus obtaining even higher profits.[155] Depending on the rapidity of reaction of the other undertakings however, soon, fierce competition may reappear.

Since the aim of competition policy is to maximise consumer welfare it is important to have effective competition.[156] The market for welfare services is a different type of market from most, where distortions or restrictions of competition lead not only to a reduction in consumer welfare, but it could also lead to serious dysfunctions of the welfare systems, since not only simple economic services but also services of general interest are involved. That is why competition authorities need to be vigilant with regard to competition on such a market.

Competition rules are highly important in a market which has been opened to competition. Rules preventing cartelisation and abuses on the market are vital to ensure effective competition. Once competition has been introduced, it is important that the objective of achieving efficiency is not endangered by the behaviour of the participants on the market. As Bishop and Walker state,[157] regulators intervene in the market because they think it is not subject to effective competition. The intervention is meant to increase consumer welfare. The application of Article 101 TFEU (ex Article 81 EC) can benefit the consumer and can increase the efficiency of welfare services.

In a new market such as that of welfare services it is important to determine when intervention is absolutely necessary and when intervention is purely protectionist. It is also important to determine which restrictions are acceptable and which are not: how a distinguishing line can be drawn and at what stage it can be assessed whether they are allowed or not.

The structure of Article 101 TFEU (ex Article 81 EC) contains a prohibition (which implies the existence of undertakings; the existence of a collusion; the collusion must have as its object or effect the prevention, restriction, or distortion of competition; there must be an appreciable effect on competition and an appreciable effect on trade between Member States), a declaration of nullity and a legal exception.[158]

Though Article 81 is addressed to undertakings, the State could influence the behaviour of the undertakings or it may intervene in the market by enforcing some pre-existing collusive agreements or by granting its regulatory rights to different

[155] See the problem of the 'Prisoner's Dilemma' in Bishop and Walker 2002, p. 28.

[156] For a discussion of effective competition see Bishop and Walker 2002, pp. 11–41.

[157] Bishop and Walker 2002, pp. 11–41.

[158] If the four conditions contained in Article 81(3) are fulfilled, the prohibition contained in Article 81(1) does not apply to an agreement. Initially Article 81(3) was an exemption and agreements could benefit of an individual exemption granted by the Commission after the agreement was previously notified or of a block exemption granted by the Commission to certain categories of agreements. The Commission had the power to grant such exemptions. However, Regulation 1/2003 grants the Commission, the national courts and the national competition authorities the right to apply Article 81(3) EC, without the need to notify in advance the agreement.

undertakings. Because such actions could prevent, restrict or distort competition, the Court created the *effet utile* doctrine which states that:

> While it is true that [Article 82] is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on member states not to adopt or maintain in force any measure which could deprive that provision of its effectiveness.[159]

Sometimes the undertakings may not have an autonomous behaviour and their actions may be controlled by the State. In such circumstances the respective undertakings can use the state-defence doctrine in order to escape the application of competition rules. Since it is the State that entrusts the provision of welfare services to private actors and since the welfare field is highly regulated, sometimes the State may entrust the regulatory powers to private undertakings. Are state regulatory measures which constitute a restriction of competition to be caught by the provisions of Article 81? Are the regulatory measures issued by private parties to be caught by Article 81? Is there a difference between measures issued by the State and measures issued by private parties?

Since competition rules apply to undertakings and regard them as entities which pursue economic activities, it is worth asking what the position of non-economic values is in those rules. Since welfare services have a double character, it is particularly relevant to them to analyse how Article 81 can balance economic and non-economic values. At what stage are these interests balanced; are they balanced when applying Article 101(1) TFEU (ex Article 81(1) EC) or when applying Article 101(3) TFEU (ex Article 81(3) EC)? Whether the balancing it is done under Article 101(1) TFEU (ex Article 81(1) EC) the question that is addressed is what is balanced: Article 101 TFEU (ex Article 81 EC) against non-competition concerns; anti-competitive effects against concerns unrelated to competition or anti-competitive against pro-competitive effects.

Some restrictions in competition are accepted under Article 101 TFEU (ex Article 81 EC) if certain exhaustive conditions are fulfilled. What types of justifications are accepted? Can these justifications offer a good protection for welfare services? What is the process whereby economic and non-economic interests are balanced; what is the status of non-economic values; are they treated at the same level or is there a hierarchy? These questions are the subject of the following sections.

4.3.1 Defining the Market

The concept of the relevant market is important to EC competition law. Determining what is the relevant market is in general not an easy task and determining the relevant market with regard to the welfare field is no exception.

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[159] Case 13/77 *GB-INNO* v. *ATAB* [1977] ECR 2115.

> Market definition is a tool to identify and define the boundaries of competition between firms. It allows to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining their behaviour and of preventing them from behaving independently of an effective competitive pressure.[160]

Demand and supply substitution are taken into account in defining the relevant market. With regard to demand substitution, two dimensions of the market are considered: the product market and the geographical market. In determining the relevant product market the test usually applied is the SSNIP test,[161] which aims at determining whether a small but significant and non-transitory increase in the price of a product will cause consumers to turn to another product. If the consumers turn to another product as a result of the price increase or if the consumers turn to other geographical areas, then it means that these products are interchangeable and form part of the same product market. If consumers turn to another geographical market as a result of an increase in price for a product, then products of the appropriate types in those areas are substitutable and form part of the same geographical market. The geographic market comprises an area 'in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.'[162]

If ultimately the result is that there are no substitutes within the product and geographical boundaries chosen, the conclusion is that the providers of those services hold the monopoly on the market. However, when it comes to welfare services, if there is an attempt to raise prices, the State is entitled and will probably use its regulatory powers to intervene in the market in order to ensure the access and availability of the service.

Defining the market is necessary for a further assessment of the size of the undertakings on the market and identifying the existence of market power that can endanger the competitive process. The process of defining the market is also important in determining what the barriers to entry are.

In the welfare field, the various forms of provision and institution, and the complexity of the products, make determining the market particularly subtle.

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[160] Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372 on 9 December 1997, para 2.

[161] SSNIP test is used by the competition authorities to determine the relevant market. It stands for a Small but Significant Non-transitory Increase in Price. In the Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law [1997] OJ C372/5, the test is applied to determine the relevant market by determining whether the customers would switch to other substitutes or other suppliers as a response to a hypothetical small but permanent increase in price in the products and areas under consideration. See also Bishop 1997.

[162] Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law [1997] OJ C372/5.

In the field of social insurance, for example, it is interesting to see whether the insurance services provided by statutory health insurance are part of the same market as services provided by undertakings functioning under a non-compulsory health insurance schemes. In the field of education, it is important in defining the relevant market to determine whether, with regard to education services provided by universities, undergraduate and postgraduate education are part of different markets and whether in an establishment funded by public funds, the graduate courses funded partially from private funds enter in competition with graduate courses provided by establishments funded essentially from private funds. In order to define the relevant market in the field of health, the question addressed is whether the relevant market encompasses all health services or whether there are different markets for different types of health services: for example, is general medicine a part of the same market as specialised services such as heart disease treatment and cancer therapy?

In analysing supply side substitution, when determining whether the producers are able to respond to an increase in price of the service supplied and enter the market where there is potential for profit, account has to be taken of the fact that barriers to entry on the welfare market are high, since these services are highly regulated.

Defining the relevant geographic market implies determining the undertakings that exercise constraints on other undertakings within a defined geographical area. Problems are raised by this, especially in cross-border areas. Usually, patients prefer to be treated closer to their homes, and therefore in border areas we find that the nationality of the provider may become a secondary consideration, as patients go to be treated regardless of the nationality of the hospital, as long as it is closer to their homes. These border areas demonstrate that these services should not be treated as something national and that the territoriality principle is an artificial obstacle, just a barrier to the patients' right to receive proper treatment. In the field of education it is interesting to consider whether an increase in the price of a Master's programme at a university in England will cause students to turn to a university in other Member State. Many factors will be taken into account in choosing a school, and the language of the programme is an important factor.

4.3.2 State Intervention: Effect Utile/State Action Defence

The field of services of general economic interest presents specific particularities and a market characterised by free competition is not an optimal solution for these services. Undertakings will always seek profit and there is a risk that in this search the public service tasks will be overlooked. That is why managed competition[163]

[163] According to Ted Marmor 'the very term managed competition is somewhat oxymoronic. Competition requires the freedom of actors to negotiate about prices and volumes of their goods and services whereas regulation seeks to restrain that freedom' (in Marmor and Maynard 1994, as quoted by Grass et al. 2001).

is the preferred solution to afford special protection to these services. The term managed competition was developed in this context by Alan Enthoven,[164] and he argues that under managed competition the economic agents act as though in a perfectly competitive environment. 'Price signals and competitive pressures are designed to bring cost-conscious consumers and capable profit-seeking providers together in an efficient manner. Informational asymmetries, adverse selection and moral hazard are dealt with by imposing some ground rules and creating particular institutions.'[165]

An important role is played by the State in the managed competition scheme. Its role has indeed changed. The State now only provides the framework, the rules and the supervision for the market in services of general economic interest, rather than providing the services themselves. However, even if its role has changed, according to the loyalty principle[166] contained in Article 3(4) TEU (ex Article 10 EC), Member States must not adopt or maintain in force measures which could deprive the competition rules of their effectiveness.[167] Thus Member States may not require, favour or reinforce cartel-like behaviour and may not delegate their own powers to take such economic intervention to private parties.[168] If they do so they can be held responsible for infringing European Union law. This liability is attracted because private parties engage in prior agreements or forbidden anti-competitive practices which the State then supports or entrenches. This is the *effet utile* doctrine.

In *GB-INNO* v. *ATAB*[169] the Court ruled that Member States may not enact measures enabling private undertakings to escape from the restraints imposed by the competition rules. The case dealt with the introduction in the national legislation of provisions according to which for the sale to consumers of imported and home-produced goods, a minimum and maximum selling price was fixed by the manufacturers or importers. Poiares Maduro underlined that this case addressed the problem of national regulatory burdens placed on national undertakings.[170]

Van Eycke[171] case dealt with the banking sector in Belgium where different banks entered into an agreement which set the maximum rate of interest and premium. Since not all the financial institutions adhered to that agreement, the Minister of Finance issued a decree. The Court had to determine whether the national legislation which restricted the benefit of an exemption from income tax in respect of a certain category of savings deposits solely to deposits on which the interest rates and premiums paid do not exceed the maximum levels fixed by

[164] Enthoven 1988.

[165] Bartelsman and Ten Cate 1997, pp. 34–38.

[166] Temple Lang 1997, 2006, Gormley 2000 and Constantinesco 1987.

[167] See Case 13/77 *GB-INNO-BM* v. *ATAB* [1977] ECR 2115.

[168] See Case 267/86 *Van Eycke* v. *Aspa* [1998] ECR 4796.

[169] Case 13/77 *GB-INNO-BM* v. *ATAB* [1977] ECR 2115, para 33.

[170] Maduro 1998.

[171] Case 267/86 *Paul Van Eycke* v. *ASPA NV* [1988] ECR 4769.

decree is compatible with Article 81 in conjunction with Article 3(4) TEU (ex Article 10 EC).[172] The Court reiterated the Member States' obligation not to introduce or maintain in force measures which may render ineffective the competition rules. It ruled that Member States were not allowed to require or to favour the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU (ex Article 81 EC); Member States were not allowed to reinforce the effects of such agreements; Member States were not allowed to deprive their legislation of the official character by delegating to private traders responsibility for taking decisions affecting the economic sphere. The ECJ left the national court to determine whether the decree was meant to reinforce the previous agreement.

In *Ohra Schadeverzekeringen NV*[173] insurance companies operating in the Netherlands were prohibited from granting rebates or other financially quantifiable advantages. However, *Ohra NV* advertised a number of benefits available to anyone concluding a contract with it. It advertised that it would not invoice for the costs relating to the conclusion of the contracts and promised to offer policyholders a credit card free of charge or to grant them a rebate on the price of that card.

In answering the question of whether Articles 10 EC (now Article 4(3) TEU) and 81 EC (now Article 101 TFEU) precluded State rules prohibiting companies from granting financial advantages to policyholders or beneficiaries of policies, the Court noted that those rules did not have the effect of reinforcing an anti-competitive agreement and that the state did not delegate to private traders the responsibility for taking decisions affecting the economic sphere. Thus the Court concluded that Article 101 TFEU (ex Article 81 EC) read in conjunction with Article 10 EC does not prohibit Member States from prohibiting insurance companies from granting financial advantages to policyholders or beneficiaries of policies. In conclusion, State regulations having an anti-competitive effect are not subject to Article 101 TFEU (ex Article 81 EC) if private undertakings are not involved. The state maintains its authority in regulating, even if these regulations reduce competition.

This outcome is to be welcomed, especially with regard to services of general economic interest, as national regulations will therefore not in general be challenged by competition rules, allowing the state to continue its regulatory function.

In *Meng*[174] the Court was asked whether state rules which had the effect of restricting competition between economic agents were compatible with Article 10 EC[175] and 81(1) EC. According to German law, the transfer of commission is prohibited. Mr. Meng, who was a professional financial adviser, transferred to his clients the commission paid to him by insurance companies when concluding insurance contracts.

In order to determine whether Article 101 TFEU (ex Article 81 EC) read in conjunction with Article 10 EC precluded such State regulations, the Court again

[172] Article 10 EC was repealed and replaced by Article 4(3) TFEU.

[173] Case C-245/91 *Ohra Schadeverzekeringen NV* [1993] ECR I-5851.

[174] Case C-2/91 *Meng* [1993] ECR I-5751.

[175] Repealed and replaced in substance by Article 4(3) TEU.

had to determine whether the rules in question had the effect of reinforcing an anti-competitive agreement or whether the State had delegated its regulatory power to private entities. The Court concluded that the rules at issue were not preceded by any agreements in the sector. The Commission contended that certain undertakings had concluded an agreement intended to prohibit transfers of commission in the life insurance sector and that the State reinforced those rules by rendering that agreement applicable to other sectors. However, the Court stated that in order for rules to be considered as reinforcement of the effects of pre-existing agreements, decisions or concerted practices, they must simply reproduce the elements of those agreements.[176]

Advocate General Jacobs in *Albany* stated that whenever private parties are involved, the competition authorities should be able to scrutinise such agreements even if they deal with special areas such as insurance or social policy. The reason for this is that private actors act in their own interest and not in the public interest. In analysing collective agreements between management and labour the Advocate General laid down some conditions regarding immunity,[177] being of the opinion that such agreements as have potentially harmful effects on the competitive process should be subject to competition scrutiny and that different interests can be balanced under Article 101(3) TFEU (ex Article 101(3) TFEU (ex Article 81(3) EC).[178]

The Advocate General found that the original agreement between employers to set up a sectoral pension fund was not contrary to Article 101 TFEU (ex Article 81 EC) and that when the authorities decide to make affiliation to the sectoral fund compulsory, this was their decision and the State has sole power to take such a decision. Since the original agreement was thus not contrary to Article 81, the State measures that require or favour certain agreements between undertakings or reinforces their effects are not caught by Articles 10 and 81 EC. The Court arrived at the same conclusion as AG Jacobs in *Albany*,[179] *Brentjes*[180] and *Drijvende Bokken*.[181]

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[176] Ibid., para 19.

[177] Advocate General Jacobs in *Albany* laid down three conditions for *ipso facto* immunity: the agreement must be made within the formal framework of collective bargaining between both sides of industry; the agreement should be concluded in good faith; and it must 'delimit the scope of collective bargaining immunity, so that the immunity extends to those agreements for which is truly justified.', paras 190–194.

[178] Case 26/76 *Metro* [1977] ECR 1875, para 43; Case 42/84 *Remia v Commission* [1985] ECR 2545, para 42; Synthetic Fibres, OJ 1984 L 207, 17, para 37; and Ford/Volkswagen, OJ 1993 L 20, 14, para 23.

[179] Joined cases C-115/97 to C-117/97 *Albany International BV* v. *Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751.

[180] Joined cases C-115/97–C-117/97 *Brentjens' Handelsonderneming BV* v. *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, [1999] ECR I-6025.

[181] Case C-219/97 *Maatschappij Drijvende Bokken BV* v. *Stichting Pensioenfonds voor de Vervoer* [1999] ECR I-6121.

In *Arduino*[182] the Court had to answer a preliminary question addressed to it by the Pretore di Pirnolo asking whether the fixing of binding tariffs for the professional activity of members of the Bar came within the scope of the prohibition in Article 101(1) TFEU (ex Article 85(1) EEC). The Court observed that the fact that a Member State required a professional organisation to produce a draft tariff for services did not automatically divest the tariff ultimately adopted of the character of legislation. The National Bar Council (Consiglio nazionale forense, 'CNF') was required to present a draft tariff for fees payable to members of the Bar every two years, including minimum and maximum limits. The Court decided that when drafting the tariff, the CNF did not conduct itself as an arm of the State working in the public interest. The Italian government did not delegate its powers of decision to the CNF since the CNF was responsible only for drafting the tariff, which was not compulsory. The Minister's approval was required for the draft tariff to enter into force. Moreover, the Minister had the power to amend the draft tariff, and two public bodies (the Consiglio di Stato and the CIP) were required to state their opinion before approval was given to the tariff. Thus the Court reached the conclusion that there was no delegation of powers.

In *Cipolla*[183] there was a similar situation with the one in *Arduino*. He Court had to answer a preliminary question addressed to it which asked whether Articles 3(4)[184] TEU, Article 101 and 102 TFEU (ex Articles 10, 81 and 82 EC) precluded Member States from adopting legislative measures which were based on a draft produced by a professional body of lawyers such as CNS (Consiglio Nazionale Forense) and which established minimum and maximum fees for members of a legal profession. The Court decided that by requiring a professional organisation composed of lawyers to draft scale of fees the State does mean that the State delegated its responsibility for taking decisions. There were no procedural or substantive requirements that would lead to the conclusion that the professional body of lawyers acted as an arm of the State working in the public interest. Moreover, the Ministry of Justice had to approve the scale and had the power to amend the draft; the Ministry was also assisted by two public bodies whose opinion must be obtained before approving the scale of fees.

With regard to state measures which reinforce the effects of an agreement, Advocate General Léger[185] laid down three conditions which must be satisfied to avoid application of Article 4(3) TEU[186] and Article 101 TFEU (ex Articles 10 and 81 EC): (1) the Member State must exercise effective control over the content of the agreement, decision or concerted practice; (2) the State measure must pursue

[182] Case C-35/99 *Arduino* [2002] ECR I-1529.

[183] Joined Cases C-94/04 and C-202/04 *Federico Cipolla and Others* v. *Rosaria Fazari, née Portolese, and Roberto Meloni* [2006] ECR I-11421.

[184] Article 10 EC was repealed and replaced by Article 4(3) TFEU.

[185] Opinion of Advocate General Léger delivered in Case C-35/99 *Arduino* [2002] ECR I-1529.

[186] Article 10 EC was repealed and replaced by Article 4(3) TFEU.

a legitimate public interest; (3) the measure must be proportionate to the aim which it pursues.[187]

These conditions are meant to ensure that the State has control over the agreement and does not allow private undertakings to impose their conditions and decisions; it is also important that the state acts take into account the public interest, since the parties who drafted the agreement are considered likely to pursue only their interests. Finally, the proportionality principle applies because whenever a state enforces a private arrangement, even if it is in the public interest, the restrictive effect on competition should not go beyond what is necessary to achieve that public objective. Therefore, Advocate General Léger considers that whenever the state intervenes and restricts competition, its intervention should be subjected to the proportionality principle, even if the state pursues the general interest.

Maduro considers that the cases brought in front of the Court fuelled the process of constitutionalisation. The litigation process challenged the national laws and also according to Maduro created the possibility of new trends in European Community law.[188]

> On the one hand, this helps the legitimacy of Community law which provides individuals with new rights *vis-a-vis* national political process and gives them important "voice" in the discourse shaping the European Economic Constitution. It may also help in promoting legislative innovation at national level and challenging national regulatory regimes dominated by special interests.[189]

The *effet utile* doctrine is important because it challenges the state intervention which creates distortions of competition. Article 101 TFEU (ex Article 81 EC) in conjunction with Article 3(4) TEU (ex Article 10 EC)[190] catches States' regulatory rules only if there is a link to private undertakings. This is relevant since States are free to intervene on the market whenever they feel the general interest requires, without being subject to competition rules as long as their intervention does not require or favour the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU (ex Article 81 EC), does not favour or reinforce anti-competitive agreements between private parties, or does not amount to delegation of regulatory power to private parties or the grant of exclusive or special rights. Thus, when a State decides to liberalise its health, insurance or education services, it still retains a broad discretion to intervene and ensure that services are provided under appropriate conditions.

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187 Ibid., para 91.

188 Maduro 1998, p. 29.

189 Ibid.

190 Article 10 EC was repealed and replaced in substance with Article 4(3) TFEU.

4.3.3 Rule of Reason/Ancillary Restraints

Sometimes undertakings might pursue public policy or social policy objectives, even if those objectives were not imposed by the State. For example, associations of undertakings might impose some rules which could restrict competition, but because of the different social or public aims pursued they fall outside the scope of competition rules. These measures are usually declared to infringe Article 101(1) TFEU (ex Article 81(1) EC) and then are assessed under Article 101(3) TFEU (ex Article 81(3) EC). However, there are some agreements which are necessary and are ancillary to the main purpose of the agreement. These are inherent restrictions and are not caught by Article 101(1) TFEU (ex Article 81(1) EC).[191] Because there are reasonable public interests concerned, such ancillary restrictions fall outside the scope of Article 101(1) TFEU (ex Article 81(1) EC).

There have been discussions whether the balancing of Article 101 TFEU (ex Article 81 EC) against non-competitive concerns or the balancing of anti-competitive concerns against public policy or social policy or other concerns unrelated to competition or the balancing of anti-competitive effects against pro-competitive effects should be done under Article 101(1) TFEU (ex Article 81(1) EC) or under Article 101(3) TFEU (ex Article 81(3) EC). The balancing of anti-competitive and pro-competitive elements done under Article 101(1) TFEU (ex Article 81(1) EC) is equivalent to the "rule of reason"[192] style analysis inspired from American competition law.[193] The balancing of market elements and issues of general interest relate to a sort of '*Cassis de Dijon* rule of reason.'[194] The Court accepts a '*Cassis de Dijon* rule of reason' while in *Metropole* it rejects the US type of rule of reason. The problem of inherent restrictions is clearer, however, the application of the rule of reason in competition cases meets controversies. When applying Article 101(1) TFEU (ex Article 81(1) EC) it is necessary to take into account the conditions of competition, the economic context in which the undertaking is active.[195]

Article 101(1) TFEU (ex Article 81(1) EC) prohibits agreements which have as their object or effect the prevention, restriction, or distortion of competition. Some agreements contain hard-core restraints such as agreements fixing prices, output limitations and sharing of markets and customers in the case of horizontal agreements, or in the case of vertical agreements the hard-core restrictions include fixed and minimum resale price maintenance and restrictions providing absolute territorial protection. These are hard-core restraints because they have as their

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[191] Case 42/84 *Remia* v. *Commission* [1985] ECR 2545; Case C-250/92 *Gøttrup-Klim* [1994] ECR I-5641.

[192] For the rule of reason see Odudu 2002, pp. 100–105 and Monti 2002, pp. 1057–1099.

[193] See *Metropole*.

[194] See *Wouters* and *Meca Medina*.

[195] Joined Cases T-374/94, T-375/94, R-384/94 *ENS, Eurostar, EPS, UIC and SNCF* v. *Commission* (*European night services*) [2008] ECR II-311.

object restriction of competition. Justifications for such restraints can only be considered under Article 81(3) EC. Criticism have been addressed that in applying Article 81(1) in such cases there is no economic analysis of the market.

> One might have expected [it] to be applied only after a careful commercial and economic analysis of the market they affect… To see whether an agreement restricts competition, it is not enough to examine its provisions. One needs to know about the market and the commercial reasons for inserting restrictive provisions.[196]

With regard to agreements which restrict competition by effect, first it has to be decided whether there is a restriction of competition. Is there a rule of reason in competition cases? The concept of rule of reason is borrowed from US antitrust law. The fact that according to Sherman Act any restraint of trade is a prohibition led to the necessity of interpreting this provision in a reasonable way.[197] Due to the lack of exemptions, the rule of reason was introduced. This permits the weighing of pro and anti-competitive effects and, where there is a positive balance, allows disapplication of the rules.

The rule of reason according to Joliet's view[198] "is limited to whether a certain practice has produced an anti-competitive effect or was intended to impair competition. […] The question of reasonableness is a question of degree. Reductions of competition which, because of their insignificance, do not offend the policy of the statute, can escape the ban of the Sherman Act." Another meaning of the rule of reason and the one close to the formulation of the Article 101(3) TFEU (ex Article 81(3) EC) is that it implies "an inquiry into whether restrictive practices are likely, under certain circumstances, to better serve the public good than unfettered competition."[199]

In US antitrust law the first question that is asked is whether the competition was unreasonably restrained and the answer implies pursuing three inquiries: first, whether the competition is prejudiced by the defendants' conduct; secondly whether the competition can benefit from the restriction which implies asking the question whether the purpose pursued is legitimate; thirdly whether the measure passes the proportionality test which means that after the negative and positive effects have been found the questions that follow are: whether the restraint is necessary to achieve the legitimate purpose, how is the restraint connected to the legitimate purpose and whether there are less restrictive ways of achieving it.[200]

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196 Korah 1986, pp. 92–93.

197 S.1 of the Sherman Act (Act of July 2, 1890) establishes that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal…."

198 Joliet 1967, p. 5.

199 Ibid.

200 Areeda 1986.

The structure of Article 101 TFEU (ex Article 81 EC) is however different. The rule of reason[201] in EC law was necessary out of different motives. If under the Sherman Act any restraint of trade is a restriction, Article 101 TFEU (ex Article 81 EC) contained however exceptions. Nevertheless, because according to Regulation 17/62 the Commission had the monopoly of granting exemptions, such a rule of reason was useful for the national courts to "take decisions that are closer to the economic reality."[202]

Manzini opposes to the rule of reason in EC competition law on grounds that firstly, the provisions of EC competition law and Section 1 of the Sherman Act are not analogous and secondly on grounds that Article 81(2) constitutes an obstacle to the application of the rule of reason.[203]

Whether the balancing of anti and pro-competitive aspects of an agreement was done under Article 101(1) TFEU (ex Article 81(1) EC) or Article 101(3) TFEU (ex Article 81(3) EC) was important in the past since before Regulation 1/2003 the national courts and the national competition authorities could not apply Article 81(3) which meant that if an agreement was found to infringe Article 101(1) TFEU (ex Article 81(1) EC) then that agreement must have been notified in order to benefit from the exemption contained in Article 101(3) TFEU (ex Article 81(3) EC). After the adoption of Regulation 1/2003 and the removal of the Commission's monopoly in granting exemptions, national courts and the national competition authorities are allowed to apply Article 81(3) which means that whether the balancing is done under Article 81(1) or Article 101(3) TFEU (ex Article 81(3) EC) is irrelevant. Whether Article 81(1) is interpreted broadly, this gives more importance to Article 101(3) TFEU (ex Article 81(3) EC). Moreover, the existence of the rule of reason has important procedural consequences related to the burden of proof. If there is a rule of reason, the defendant can ask the claimant that the negative effects on competition outweighs its positive effects.[204]

Because of the procedural implications of the interpretation given to Article 101(1) TFEU (ex Article 81(1) EC), it was important to take a "more economically sophisticated approach" [205] when determining whether Article 81(1) applies. In *Société Téchnique Minière* the Court accepted the rule of reason and stated:

> The prohibition of anti-competitive agreements of Article 85(1) (now Article 81(1)), involved that in considering whether an agreement has as its object the interference with competition within the common market it is necessary first to consider the precise purpose of the agreement in the economic context in which it is to be applied… where an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered, and for it to be caught by

[201] Black 1997, pp. 145–161, Forrester and Norral 1984, Gyselen 1984, Kon 1982, Manzini 2002, pp. 392–399, Schechter 1982, Steindorf 1984 and Whish and Sufrin 1987.

[202] Manzini 2002, pp. 392–399.

[203] Ibid.

[204] Wesseling 2005.

[205] Jones and Sufrin 2004, p. 182.

> the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.[206]

The Court upheld in *Luttikhuis*[207] its ruling given in *Société Minière*:

> […] it is settled case-law that in defining the criteria for the application of Article 85(1) to a specific case, account should be taken of the economic context in which the undertakings operate, the products or services covered by the agreements, the structure of the market concerned and the actual conditions in which it functions.

In *Grundig*[208] the Court refused the application of the rule of reason, it excluded the balancing of pro and anti-competitive effects under Article 81(1):

> Although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of Article 85(1) merely because it might increase the former.

In *Metro*[209] the Court accepted the balancing of pro and anti-competitive effects under Article 101(1) TFEU (ex Article 81(1) EC) as well as under Article 101(3) TFEU (ex Article 81(3) EC).

> for specialist wholesalers and retailers the desire to maintain a certain price level, which corresponds to the desire to preserve, in the interests of consumers, the possibility of the continued existence of this channel of distribution in conjunction with new methods of distribution based on a different type of competition policy, forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in Article 85(1), and, if it does fall thereunder, either wholly or in part, coming within the framework of Article 85(3).

In *Métropole*[210] the Court of First Instance takes a different approach than the one taken by the Court of Justice and it states that:

> The existence of a rule of reason in Community competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement.

The Commission's view was that Article 81(3) was a better forum for balancing the restrictive effects against the benefits.

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[206] Case 56/65 *La Technique Miniere* v. *Maschinenbau Ulm* [1966] ECR 35.

[207] Case C-399/93 Oude*Luttikhuis* [1985] ECR I-4515 para 10; See also Case C-250/92 *Goettrup-Klim & Co*. [1994] ECR I-5641.

[208] Cases C-56 and 58/64 *Consten-Grundig* v. *Commission* [1966] ECR 341.

[209] Case C-26/76 *Metro* v. *Commission* [1977] ECR 1875.

[210] Case T-112/99 *Métropole télévision* (*M6*), *Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA* (*TF1*) v. *Commission of the European Communities* [2001] ECR II-02459, para 107.

> The Commission has already adopted this approach to a limited extent and has carried out an assessment of the pro- and anti-competitive aspects of some restrictive practices under Article 85(1). This approach has been endorsed by the Court of Justice (47). However, the structure of Article 85 is such as to prevent greater use being made of this approach: if more systematic use were made under Article 85(1) of an analysis of the pro- and anti-competitive aspects of a restrictive agreement, Article 85(3) would be cast aside, whereas any such change could be made only through revision of the Treaty. It would at the very least be paradoxical to cast aside Article 85(3) when that provision in fact contains all the elements of a "rule of reason." It would moreover be dangerous if modernisation of the competition rules were to be based on developments in decision-making practice, subject to such developments being upheld by the Community Courts. Any such approach would mean that modernisation was contingent upon the cases submitted to the Commission and could take many years. Lastly, this option would run the risk of diverting Article 85(3) from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations.[211]

The ECJ however appears to apply a '*Cassis de Dijon* rule of reason.' The aim of the rule of reason analysis is according to Joliet[212] to form a judgement about the competitive significance of the restraint and not to decide whether a policy favouring competition is in the public interest or in the interest of the members of an industry.

In *Wouters*[213] the Dutch Bar Association prohibited its members from practicing in partnership with accountants. The measure adopted stated that members of the Bar were not authorised to form partnerships if the primary purpose of each partner was not to practice law. As a result of this rule a partnership between the members of the Bar and accountants were prohibited. The Court had to answer whether that rule represented a restriction of competition.

On the one hand were the arguments that removal of the prohibition would have pro-competitive effects as it would permit lawyers to better satisfy their clients' needs by offering integrated services. Such partnership could also lead to economies of scale and have positive effects on costs.

On the other hand, it was suggested that association with a profession as concentrated as accountancy would lead to a decrease in competition.

The Court stated that 'not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty.'[214] It stated that close attention should be paid to the context in which the decision was taken, the objectives pursued and, in the case in

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[211] White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty [1999] OJ C132/1, para 57.

[212] Joliet 1967.

[213] Case C-309/99 *Wouters* v. *Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577; See also Vossestein 2002, pp. 841–863, Denman 2002), Andrews 2002, pp. 281–285 and O'Loughlin 2003, pp. 62–69.

[214] Case C-309/99 *Wouters* v. *Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, para 97.

question, the requirement that integrity and experience were somehow thereby guaranteed. These guarantees were provided by the rules relating to organisation, qualifications, professional ethics, supervision and liability.[215]

The measure adopted by the Bar was intended to avoid the conflict of interests and to preserve professional secrecy. The members of the Bar were required to be independent vis-à-vis public authorities, other operators and third parties, and they had to act in the interest of the client. Accountants were not subject to such requirements.

The regulation was therefore considered to be necessary to ensure the proper practice of the legal profession. The Court found that there were no less restrictive means to achieve that goal.

The Court declared that the measure adopted by the Dutch Bar did not infringe Article 81 EC 'since that body could reasonably have considered that the regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.'[216]

Advocate General Leger considered that the argument put forward by the parties which contended that the prohibition of multi-disciplinary partnership between lawyers and accountants was necessary to protect independence and loyalty to the client,and was equivalent to the introduction of public-interest objectives into Article 81(1).[217] Contrary to the decision adopted by the Court, he found this to be an infringement of Article 101(1) TFEU (ex Article 81(1) EC).

The Court, though it declared the Bar as an association of undertakings, ruled that its conduct in adopting the measure in question fell outside the competition rules for ethical reasons.

There are various interpretations of the judgement in *Wouters*[218]: it is understood as incorporating the *Cassis de Dijon* 'rule of reason'; as balancing Article 101 TFEU (ex Article 81 EC) against non-competition concerns; as balancing anti-competitive effects against concerns unrelated to competition and thereby accounting for restrictions inherent in the achievement of the regulatory objectives, thus ancillary restraints; or as balancing anti-competitive effects against pro-competitive effects and non-competition objectives.

The Court tries to accommodate economic and public-interest objectives. A case like *Wouters* shows that the Court tries to find the best compromise of these interests and find a better test. The rule of reason was not used in weighing pro and anti-competitive effects. The approach taken by the Court in *Wouters* was determined precisely because of the existence of non-economic interests. Even if the Bar was declared to be an association of undertakings, thus *ratione personae*

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[215] Ibid.

[216] Ibid., para 110.

[217] Advocate General Leger in his Opinion in Case C-309/99 *Wouters* v. *Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, para 105.

[218] See Nazzini 2006, p. 524.

falling within the scope of competition rules, the Court still tried to find a compromise and declare that the conduct did not fall within the scope of competition rules because those were just ancillary restrictions necessary for the proper practice of the profession. The Court seems to be more considerate when it comes to public policy issues.

In the *Meca Medina*[219] case, dealing with the anti-doping rules of the International Olympic Committee, the Court decided that the anti-doping rules did not infringe Article 101(1) TFEU (ex Article 81(1) EC). It followed the Court's judgement in *Wouters*, stating that regard must be had for the context in which a decision was taken or produces its effects. The aim was to combat doping and to ensure fair opportunities to all athletes, to ensure the athletes' health, to maintain ethical values.

> Therefore, even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.[220]

The restrictions were inherent to the organisation and proper conduct of competitive sport and were found to be proportionate.

Thus, when non-economic objectives are closely related to public policy objectives, the Court tries to follow a different route than subjecting everything to competition rules. This approach is welcomed. It is true that Article 101(3) TFEU (ex Article 81(3) EC) should be the forum where the pro and anti-competitive aspects should be balanced. However, when applying Article 101(1) TFEU (ex Article 81(1) EC) in the conceptual definition of the notion of restriction should include an analysis of the economic context in which the undertaking operate. The advantage of such approach would be a better application of the competition rules and would exclude from the application of competition rules those agreements which are "sufficiently deleterious." However, looking at the legal and the economical context might require an analysis of the competition environment with and without the restriction. This could impose a high evidence burden on the Commission.

In *Meca Medina* the Court talks about the restriction of the freedom of action which does not implicitly mean a restriction of competition. The proper organisation of certain activities requires such inherent restrictions and the Court understands the necessity of such restrictions and does not subject them to Article 101(1) TFEU (ex Article 81(1) EC).

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[219] Case C-519/04 P *Meca Medina* [2006] ECR I-6991.

[220] Ibid., para 45.

4.3.4 Different Types of Restrictions

4.3.4.1 Price Fixing

Once the welfare sector is liberalised, Article 101 TFEU (ex Article 81 EC) is intended to ensure that agreements between undertakings will not restrict competition. For example, agreements between hospitals and doctors with regard to the prices they charge, or price agreements between hospitals and doctors on the one hand and insurance companies on the other. This will be to the detriment of the consumer who actually pays the price for the service and has no control whatsoever over this price and the level of premium that will be paid. This is the point at which the State through its authorities could intervene in order to afford protection to consumers. The intervention can take different forms: price fixing, setting maximum or minimum prices—all of which are prima facie infringements of competition law. Competition entails asking the price the consumer is willing to pay; competition on prices leads to greater efficiency and without this, in general, the reason for liberalising the welfare market—to make it more efficient—disappears.

Price fixing is one of the hard-core restraints of competition.[221] However, because welfare services are a type of service that needs to be affordable to everybody, national authorities are entitled to intervene on the market whenever they consider it appropriate to achieve this and related goals, and their measures regarding prices are not going to be challenged by competition rules since State anti-competitive regulations are not subject to antitrust law. If all State measures were subject to antitrust rules, then the majority of State regulations would be subjected to the scrutiny of the Court, which would thus have the last word in matters concerning economic policy.

It is possible that the State fixes the prices for different products or that different associations of undertakings fix those prices and the State enforces them. If the State is the on who has control over the setting of prices, then the undertakings can use the state defence doctrine in order to escape the competition rules.

The *Reiff*[222] case dealt with the fixing of tariffs, requiring the Court to decide whether the fixing of tariffs infringed Articles 85(1) and 5 [now Articles 81(1) and 10 EC]. In Germany the tariffs for long-distance road transport were fixed by tariff boards on the basis of certain statutory criteria. The board that was composed of experts chosen by the Federal Minister of Transport from among the persons suggested by undertakings or associations in the sector concerned. The decisions of the Tariff Boards had to be approved by the Federal Minister of Transport acting in agreement with the Federal Minister for Economic Affairs. The Minister of Transport can set the tariffs themselves if the public interest requires it. The Court

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[221] Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition Under Article 81(1) [2001] OJ C 368/13.

[222] Case C-185/91 *Bundesanstalt für den Güterfernverkehr* v. *Gebrüder Reiff GmbH & Co. KG*. [1993] ECR I-5801.

rightly observed that the experts were not bound by orders from undertakings and that when fixing the tariffs they took into consideration not only the interests of the undertakings engaged in transport but also the interests of the agricultural sector, medium-sized undertakings and regions which are economically weak or have inadequate transport facilities. Moreover, the tariffs are set only after compulsory consultation with an advisory committee made up of representatives of services users. Thus the Tariff board was not considered as representing the interests of the undertakings. Furthermore, the Court found that the public authorities did not delegate their power regarding the setting of tariffs. Thus, as long as the State did not delegate its regulatory powers and as long as the tariff board was not representing the private parties' interest but the public interest, Article 101 TFEU (ex Article 81 EC) read conjunction with Article 3(4) TEU (ex Article 10 EC)[223] did not apply.

There is a fear that once the market for welfare services is liberalised, private parties seeking profit would conclude agreements meant to allow them to maintain a certain level of prices. This is why antitrust rules are determinant in ensuring that services are provided at affordable prices. Since private parties control health insurance, who concludes agreements with health providers with the goal of offering their customers appropriate services, there is the danger that prices could increase. If this happens then the State can intervene and set prices for the services provided, or can set a maximum threshold for the premiums that customers pay. The difference between what is necessary to cover the costs and the money that has been actually collected can be covered by the State through subsidy to consumers or institutions, subject to the rules on State aids. Thus the State is still free to intervene in a market that has been liberalised if the public interest requires it.

There are dangers that there can be collective negotiations between general practitioners and health insurers. It is important to have the competition authorities supervising the health insurance market to prevent cartels and abuses of dominant position. There is also the danger that the insurance companies will collude on the price to be paid to health practitioners.

The State can intervene to set prices, this being regarded as an economic method of controlling the costs and of maintaining the financial viability of the system. The state also has a duty not to adopt measures allowing undertakings to agree on prices. The intervention of the State on the market could however as well infringe competition rules. It has been demonstrated earlier that the *effet utile* doctrine prevents Member States from distorting competition. For example the recommended prices set by national authorities may facilitate the coordination of prices between providers or can mislead the consumers about reasonable price levels.[224] In the Report on competition in professional Services it is stated that the professional associations have defended the recommended prices because they

[223] Article 10 EC was repealed and changed in substance by Article 4(3) TEU.

[224] Communication from the Commission 'Report on Competition in Professional Services' COM (2004) 83 final, para 37.

offer useful information about the average price of the service and that they reduce the costs of setting and negotiating fees on an individual basis and that they serve as a guide for practitioners who lack experience in determining fees. However, the Commission stated that there are alternative methods for achieving this, such as the publication of historical or survey-based price information by independent parties.[225] In the 'Professional Services—Scope for more reform', a follow-up on Competition in Professional Services, the Commission underlined the need for urgency pro-competitive reforms in the field of professional services that would bring significant economic and consumer benefit. 'In practical terms, this means Member States taking 'political ownership' of this work at national level to drive forward the reform process.'[226]

Also the target prices set by different associations of undertakings contrary to Article 81 because it allows the participants in the market to predict the pricing policy pursued by competitors.[227] In *Belgian Architects*[228] the Commission found that the scale of minimum fees adopted by the National Council of the Belgian Architects' Association infringed Article 81 and that the co-ordination of prices was not necessary to ensure the proper practice of the architect's profession.

In Czech Republic, the Czech Medical Chamber, supplemented the "Catalogue of above-standard health care" by prices of ambulatory health care services which were supposed to be observed by the Chamber's members. This was found to be an infringement of the Act on the Protection of Competition.[229]

In Germany, four pharmaceutical wholesalers were engaged in price-fixing cartel. Andreae-Noris Zahn AG (Anzag) had increased the discounts it granted to pharmacists in order to expand its market share. Following a change in the company's board of directors, Anzag decided to end the "discount battle" and agreed with other three pharmaceutical wholesales to re-distribute the market shares. The German Competition Authority fined the four companies and seven of their executives.[230]

Van den Bergh and Camesasca criticise the Commission's approach to introduce more competition in markets for professional services. 'The specific characteristics of the markets for professional services make the design of the "optimal" regulation, which not unnecessarily restricts competition, very difficult.

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[225] Ibid., paras 38, 39.

[226] Professional Services—Scope for more. Follow-up on Comptition in Professional services (SEC (2005) 1064).

[227] Case 8/72 *Vereeniging van Cementhandelaren* v. *Commission of the European Communities* [1972] ECR 977.

[228] Commission decision relating to a proceeding pursuant to Article 81 of the EC Treaty concerning case COMP/A.38549—Belgian Architects' Association, [2005] OJ 4/10.

[229] Czech Office for Protection of Competition, Press Releases, February 17, 2003; available at: http://www.compet.cz/en/information-centre/press-releases/competition/czech-medical-chamber-fined-450000-czk/.

[230] German Competition Authority, Press Releases, April 19, 2007; available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2007/2007_04_19.php.

Consequently, all limitations of competition, including fee and advertising restrictions, must be more carefully assessed.'[231] Three market failures impede a full satisfaction of the consumers: information asymmetries, externalities and the concept of public good. They consider that competition between professionals would be counterproductive if not accompanied by measures to improve quality assessment and guarantee the provision of public goods. Thus the solution would be a managed competition. Fixed prices and targeted prices could be regarded as some sort of managed competition, where the state or different associations decide a certain price policy which could be set in the public interest. However, this intervention should be proportional and if there were other less restrictive means as the Commission found in *Belgian Architects* case, then the price intervention is declared contrary to competition rules.

Thus price fixing is contrary to Article 81. If the prices are set by the State then this is part of the State policy and it is not caught by competition rules. The State can intervene and ensure the competitive process on the market, by supervising the market. However, the State could as well intervene and distort or restrict competition by creating the conditions for price fixing, or by enforcing previous agreements between undertakings or by delegating its regulatory powers. If the price intervention proves to be required by the public interests reasons, then it should be proportional.

4.3.4.2 Market and Customer Sharing

With regard to market-sharing the Commission stated:

> Market-sharing agreements are particularly restrictive of competition and contrary to the achievement of a single market. Agreements or concerted practices for the purpose of market-sharing are generally based on the principle of mutual respect of the national markets of each Member Sate for the benefit of the producers' resident there. The direct object and result of their implementation is to eliminate the exchange of goods between the Member States concerned. The protection of their home market allows producers to pursue commercial policy—particularly a pricing policy-in that market which is insulated from the competition of other parties to the agreement in other Member States, and which can sometimes only be maintained because they have no fear from competition from that direction.[232]

The fact that welfare services are organised according to the territoriality principle and the fact that mobility of individuals is still low, can lead to a situation where even if the markets for these services are liberalised there will be a tendency to divide markets and to share customers. This separation between markets can easily occur given the dated organisation of welfare systems. For example, when liberalising the health insurance market the Dutch authorities gradually introduced elements of competition. Initially, they decided that a region should be allocated to

[231] Van den Bergh and Camesasca 2006.

[232] Jones and Sufrin 2008, p. 981.

each insurance fund and the funds were obliged to enter into contracts with all providers from their allotted region. This maintained the compartmentalisation of the market. However, since competition was chosen by the Dutch authorities as the best method of reducing costs and of organising their health insurance system, they felt that more competition was required. Therefore, from 1992, it was decided to make the funds more competitive: the funds were allowed to operate nationally and, instead of charging determined tariffs, the insurance funds were allowed to set their premiums. Moreover, the funds were no longer obliged to enter into contracts with every professional practitioner who wished to contract with them. The funds were however obliged to enter into contracts with all institutions. All these changes made room for competition between funds.

The Dutch authorities acknowledged the necessity of more competition; however, their rules granting some entities the exclusive right to provide services in a region could also have been challenged as infringing competition rules. It was uncertain whether the way the Dutch insurance system was organised would make it subject to European Union competition rules or not. However, the Dutch authorities avoided the problem of infringing European Union law by introducing a health insurance system in 2006 that would benefit from the fruits of competition.[233]

Once competition is introduced on a market it is important that the authorities ensure that private companies do not partition the market through their agreements. The introduction of market elements forces an opening in the welfare services, since efficiency requires that the provision of certain services is not restricted to a certain determined territory. The introduction of competitive elements challenges the territoriality principle and enables the provision of welfare services on large markets. However, regard should be had to the ease of reintroducing the separation of markets and the strength of the tendency towards sharing customers; it is for this reason that the application of anti-cartel rules is so important once market elements are present.

4.3.4.3 Restrictions of Output

If the undertakings cannot agree on the prices, they can fix quotas which in the end will lead to increased prices since demand is under satisfied. In the Commission Report on Competition in professional Services[234] the Commission refers to business structure and ownership regulation as a means of restricting competition. It is remembered from *Wouters* that there were professional rules that prevented partnership between lawyers and accountants. In this case the Court stated that

[233] Health Insurance Act—Zorgverzekeringswet (Stb. 2005, 358, entry into force on 1 January 2006, Stb. 2005, 649).

[234] Communication from the Commission 'Report on Competition in Professional Services' COM (2004) 83 final paras 59–64.

because such rules are necessary to ensure the proper practice of the legal profession, they did not infringe Article 101(1) TFEU (ex Article 81(1) EC). The Commission however considers that such business structure regulations may have a negative impact if they inhibit providers from developing new services or cost-efficient business models.[235] Ownership regulations such as prohibition of incorporation may also hinder new entry on the market. The Commission admits that the business structure and the ownership regulation might be necessary to ensure the practitioner's responsibility and liability and to avoid the conflict of interests. However, the Commission considers that collaboration between members of the same profession is less likely to reduce the profession's independence or ethical standards. Moreover, it considers that in professions where there is no need to protect the independence of the practitioner such regulations are not justified.[236]

Undertakings on the market may decide to set sales quota. For example in *Vitamins*,[237] the undertakings agreed to maintain the existing market shares and to pay compensations in case quotas were exceeded.

In the case of the liberalisation of the health and health insurance market the collective negotiations may lead to restrictions of output. For example the concentration of the general practitioners who negotiate collectively, this can lead to higher prices and less varied services.

4.3.5 Exceptions

Decisions taken by undertakings and decisions taken by national authorities are treated differently. The later are considered to be aimed at protecting the public interest and are not subjected to competition rules.[238] The former are scrutinised for compliance with competition rules. Whenever there is an agreement between private parties or a decision by associations of undertakings, or a concerted practice, competition rules apply. However, public policy factors are sometimes taken into account by private parties. That is why Article 101 TFEU (ex Article 81 EC) contains an exception. The balancing of pro-competitive and anti-competitive aspects of the agreement is done under Article 101(3) TFEU (ex Article 81(3) EC). Monti[239] states that

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[235] Ibid., para 60.

[236] Ibid., paras 62, 63.

[237] Commission Decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512—Vitamins), [2003] OJ L6/1; See also Case T- 26/02 *Daiichi Pharmaceutical Co.Ltd* v. *Commission of the European Communities* [2006] ECR II-497.

[238] They are not subject to competition rules except where the decisions are meant to confer special or exclusive rights.

[239] Monti 2002, pp. 1057–1099.

> From a neo-classical perspective, the inclusion of Article 81(3) makes no economic sense: if an agreement's anti-competitive harms are outweighed by its pro-competitive benefits, then the agreement does not restrict competition at all.

From this perspective it is considered that the assessment of pro and anti-competitive effects should be done under the first para of Article 101 TFEU (ex Article 81 EC).

However, in *Metropole*[240] the CFI rejected the existence of a rule of reason in European Union competition law, even though it acknowledged that in a number of cases the Court of Justice had favoured a more flexible interpretation of the prohibition laid down in Article 81(1).[241] The CFI explained that the approach taken in those cases was only meant to take into account the actual conditions in which the agreements functioned, the economic context in which an undertaking operates, the products and services covered by agreement and the actual structure of the market concerned when the applicability of Article 101(1) TFEU (ex Article 81(1) EC) was assessed.[242] That approach was meant to avoid an abstract application of Article 81 but it was not intended to weigh the pro and anti-competitive effects of an agreement when applying Article 101(1) TFEU (ex Article 81(1) EC).

It is not intended here to focus on the problem of whether there is a rule of reason or not, or whether the balancing process should be done under Article 81(1) or 81(3) EC and after the adoption of Regulation 1/2003 this difference does not matter that much. What matters is that aspects other than purely economic ones are taken into consideration when applying competition rules. The existence of exemptions is important, especially when dealing with services that have a double nature: economic and social. Article 101(3) TFEU (ex Article 81(3) EC) can be considered an instrument meant to offer a certain protection to other European Union and national policies.[243] It is interesting to see what types of justifications are accepted under Article 101(3) TFEU (ex Article 81(3) EC). Along the other European Union policies, it is interesting to see whether the national interests are accepted as legitimate justifications. The application of Article 101(3) TFEU (ex Article 81(3) EC) aims to benefit consumers. Moreover, when applying exemptions, the benefits for consumers are taken into consideration. This is all the more important since the

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[240] Case T-112/99 *Métropole Télévision* (*M6*) v. *Commission* [2001] ECR II-2459, para 76.

[241] Case C-399/93 *Oude Luttikhuis* [1997] ECR I-4515; Case 258/78 *Nungesser* v. *Commission* [1982] ECR. 2015; Case 161/84 *Pronuptia* [1986] ECR 353; Joined Cases T374, 384 & 388/94 *European Night Services* v. *Commission* [1998] ECR. II-3141; Case C-250/92 *Goettrup-Klim & Co.* [1994] ECR I-5641.

[242] Case T-112/99 *Métropole Télévision* (*M6*) v. *Commission* [2001] ECR II-2459, para 76; Case C-234/89 *Delimitis* v. *Henniger Bräu* [1991] ECR I-935, para 31; Joined Cases T374, 384 & 388/94 *European Night Services* v. *Commission* [1998] ECR. II-3141.

[243] Gyselen 2002, pp. 181–197, referring to the interests balanced under Article 81(3) states: […] the balancing test under Article 81-3 EC is about weighing an agreement's benefits against the harm that some of its clauses may cause for competition. It is not about comparing apples (social welfare benefits of whatever kind and wherever they are located) versus "oranges" (harmful effects on competition in a particular market); See also Bourgeois and Bocken 2005, pp. 111–121.

provision of welfare services has at its heart the consumer. Whenever a restriction of competition is allowed, consumers should benefit more than they lose from restricting the competition if the restriction is to be permitted.

4.3.5.1 Goals Pursued

The process of balancing the pro and anti-competitive effects of an agreement is very important because at this stage not only are economic aims taken into account, but also other policies. For services which are not purely economic, the process of exemption means that consideration is given to other issues, such the social. This means that social aspects receive protection and the competition process does not entirely threaten these services, but is able to ensure protection at the level of exemptions.

Agreements that restrict competition can have pro-competitive effects.[244] The restriction of competition can sometimes lead to greater efficiency that leads to lower prices, better or new products. Article 101(3) TFEU (ex Article 81(3) EC) balances the anti-competitive and pro-competitive effects of the restrictions, and if the pro-competitive effects outweigh the anti-competitive effects, the restriction would be declared compatible with the competition rules.[245] Odudu[246] considers that under Article 101(3) TFEU (ex Article 81(3) EC) the determinant question is whether the allocative efficiencies are outweighed by the productive efficiency gains.

Collusion can lead not only to allocative inefficiency but also to productive inefficiency. For example, where there is collusion between undertakings with the aim of reducing output and the undertakings hold market power, then they have no incentive to minimise costs.[247] Undertakings also tend to spend money to maintain market power.[248]

However, collusion can lead to productive efficiency because undertakings sometimes collude with the aim of reducing costs: when there are inequalities with regard to bargaining power, it can lead to equality and consequently to lower prices. Collusion can also lead to economies of scale and implicitly to productive efficiency, and ultimately to technological progress, since it is argued that only undertakings holding market-power and making profits are able to invest in innovation, or that undertakings invest only of they have the guarantee that their investment will yield super-normal profits.[249]

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[244] Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C 101/97, para 33, Case T-112/99, *Metropole Television* (*M6*) v. *Commission* [2001] ECR II-2459, para 77.

[245] Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C 101/97, para 33.

[246] Odudu 2006.

[247] Frantz 1988, pp. 64–65; Odudu 2006, p. 130.

[248] Odudu 2006, p. 131.

[249] Ibid., 135.

All these competitive and anti-competitive issues are weighed when applying Article 101(3) TFEU (ex Article 81(3) EC). Four conditions are required for the application of an exemption from Article 101(1) TFEU (ex Article 81(1) EC): the agreement must lead to an improvement in the production or distribution of goods or the promotion of technical or economic progress; the consumer must have a fair share of the resulting benefit; the restrictions must be indispensable; and the agreement must not afford the parties the possibility of substantially eliminating competition.[250]

The benefits to competition must 'show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.'[251]

The Commission in its Guidelines on the application of Article 81(3) identifies different categories of efficiencies,[252] which according to it 'are intended to cover all objective economic efficiencies.'[253] It does not intend to draw a clear distinction between various efficiencies, though it does distinguish between cost and qualitative efficiencies.

Cost efficiencies can result from the development of new production technologies and methods[254]; from the integration of the existing assets[255]; from economies of scale[256]; from economies of scope[257]; from agreements that lead to better planning of production.[258] Qualitative efficiencies can be the result of technological and technical developments[259]; the combination of assets[260]; and distribution agreements.[261]

> Under the first para [of Article 81 EC], an agreement which restricts competition (understood as an undue restriction of the economic freedom of the parties or a restriction on other market participants) is prohibited, but under the third para the agreement is exempted if it increases efficiency, with two conditions: first, that the efficiencies resulting from the restrictive agreement be passed on to consumers (as a way of preventing too much wealth being accumulated by the parties to the agreement), and second that competition is not eliminated "in a substantial part of the products in question" (signifying that the agreement cannot suffocate the economic freedom of other market participants).

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[250] Article 81(3) EC.

[251] Cases 56 and 58/64 *Etablissements Consten SA & Grundig-Verkaufs-GmbH* v. *Commission* [1966] ECR 299.

[252] For different categories of efficiency see: Gyselen 2002, pp. 181–197 and Faull and Nikpay 2007, para 2.127–2.153.

[253] Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C 101/97, para 59.

[254] Ibid., para 64.

[255] Ibid., para 65.

[256] Ibid., para 66.

[257] Ibid., para 67.

[258] Ibid., para 68.

[259] Ibid., para 70.

[260] Ibid., para 71.

[261] Ibid., para 72.

> These conditions reflect the ordoliberal concern over the accumulation of economic power, which requires the Commission to grant exemptions based not only on utilitarian values of total efficiency, but also based on distributive justice.[262]

The accent is put indeed on efficiency and on the consumers that need to benefit from the achieved efficiencies. Since competition rules deal mainly with economic objectives, this raises the question of whether non-efficiency goals are accepted under Article 101(3) TFEU (ex Article 81(3) EC).

In the Communication from the Commission with regard to guidelines on the application of Article 101(3) TFEU (ex Article 81(3) EC),[263] the Commission states in para 42 that 'Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3).' Thus, an objective can be pursued under Article 81(3) EC only if the four conditions contained in Article 81(3) are fulfilled. Article 81(3) EC cannot be used as 'a basis for pursuing aims that cannot be subsumed under these conditions.'[264]

Kjolbye notes that 'it is not the role of the competition authorities and courts enforcing Article 81 EC to allow undertakings to restrict competition to the detriment of consumers in order to pursue non-competition aims.'[265]

Consequently, other aims are considered, but they are only ancillary to the main goal of competition. For those who oppose the application of competition rules to welfare services, the subordination of social goals to competition rules cannot be regarded as satisfactory. They would rather have these services out of the reach of competition rules. However, this cannot be done because, as has been shown, once economic elements are present, the undertaking involved in the provision of these services could be tempted to engage in anti-competitive behaviour. If this anti-competitive behaviour is actually necessary to fulfill some social objectives, these other aims are taken into consideration during the process of exemption, on condition that the four requirements contained in Article 101(3) TFEU (ex Article 81(3) EC) are fulfilled. This is because once a State has decided to open its welfare services to competition, it has implicitly acknowledged that greater efficiency is needed and the competition rules ensure that this will be achieved.

Lugard and Hancher[266] believe that confusion has been created by stating that these other objectives, such as environmental and social considerations, may be taken into account only to the extent that the four conditions of Article 101(3) TFEU (ex Article 81(3) EC) are fulfilled. They feel that this is a stricter test than the one used in the past practice of the Commission.

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[262] Monti 2002, p. 1061.

[263] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08).

[264] Kjolbye 2004, p. 572.

[265] Ibid.

[266] Lugard and Hancher 2004, pp. 410–442.

In the *CECED*[267] decision the Commission took into consideration non-competition concerns when it considered the application of the exemption contained in Article 101(3) TFEU (ex Article 81(3) EC). The case dealt with an agreement not to manufacture or import washing machines that do not meet certain criteria regarding energy efficiency. The Commission stated that machines that consume less energy are more technically efficient, and the reduction of electricity consumption leads to the reduction of pollution from energy generation. In its XXXth Report on Competition Policy the Commission stated that:

> Although participants restrict their freedom to manufacture and market certain types of washing machine, thereby restricting competition within the meaning of Article 81(1) of the EC Treaty, the agreement fulfils the conditions for exemption under Article 81(3): it will bring advantages and considerable savings for consumers, in particular by reducing pollutant emissions from electricity generation. The Commission decision to exempt the agreement takes account of this positive contribution to the EU's environmental objectives, for the benefit of present and future generations.[268]

In its decision in *Ford/Volkswagen*[269] the Commission considered employment policy issues when dealing with the creation of a joint venture for the development of MPVs as a result of an agreement between Ford and Volkswagen. It stated that the creation of the joint venture would have positive effects on the infrastructure and employment in one of the poorest regions of the European Union. It was the largest foreign investment in Portugal and created a large number of jobs. The creation of this joint venture was considered to contribute to the reduction of regional disparities and to further European integration.

Non-economic aims are important when applying exemptions from Article 101(1) TFEU (ex Article 81(1) EC). However, in *Wouters* they were also considered under Article 101(1) TFEU (ex Article 81(1) EC) and the Court ruled that competition rules did not apply.

All these benefits are non-economic benefits and as Gyselen notices, they are not located in the relevant market or a neighbouring market, being social welfare benefits.[270] The Commission seems to subordinate these other policies to the competition goal. In the Commission's Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements[271] the Commission acknowledged that environmental agreements are important in achieving the goals laid down in Article 174 EC and Article 2, as well as the European Union

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[267] Commission Decision 2000/475/EC of 24 January 1999 (CECED), OJ [2000] L187/47; See also Van Gerven 2004, pp. 429–430 and Vedder 2003.

[268] *XXXth Report on Competition Policy,* 2000, paras 96–97, http://ec.europa.eu/comm/competition/annual_reports/2000/en.pdf

[269] Commission Decision 93/49/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.814-Ford/Volkswagen) [1993] OJ L20/14, paras 23, 28, 36.

[270] Gyselen 2002.

[271] OJ C 3/2 of 6 January 2001.

environmental action plan.[272] However, it stated that such agreements should be compatible with competition rules.

Komninos[273] considers that it would be better to balance competition as a whole against other fundamental aims and to avoid the inclusion of other goals within the competition goal, thus maintaining the independence of competition analysis. He considers that there should be a balance between the two fundamental values and that it would be dangerous to introduce into the substantive competition analysis extraneous theories and concerns which could jeopardise the purity of antitrust analysis.

However, the Commission takes a different approach and applies competition rules whenever there is an economic element. Other goals pursued by the Treaty are taken into account when applying Article 101(3) TFEU (ex Article 81(3) EC) but to the extent that the four conditions contained in para three are fulfilled. Thus, other European Union goals are accepted as restrictions of competition but only if they fulfill the substantive legality test, which means that other European Union goals are treated by means of an exemption whenever there is an economic element present.[274]

Odudu[275] notes that non-efficiency goals have been taken into consideration within the framework of Article 101 TFEU (ex Article 81 EC) by use of the teleological interpretation.[276] Since competition policy is one of the policies set in Article 3(1)(g) EC[277] to achieve the objectives set in Article 2 EC,[278] teleological interpretation was used, especially when Article 81(3) was applied. The Court ruled that the objectives of the Treaty must be taken into account when interpreting competition rules.[279] The wording of Article 81(3) allows a broad interpretation to be applied.[280] The CFI stated in *Metropole*:

> Admittedly, in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty.[281]

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[272] Vth Environmental Action Programme (OJ C 138, 17 May 1993, p. 1); European Parliament and Council Decision No 2179/98/EC of 24 September 1998 (OJ L 275, 10 October 1998, p. 1).

[273] See Komninos 2005.

[274] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 42.

[275] Odudu 2006, p. 160.

[276] See Arnull et al. 2000, pp. 539–541 and Koopmans 1986, pp. 928–929.

[277] Article 3 para 1 of the EC Treaty was repealed and replaced in substance by Articles 3 and 6 TFEU.

[278] Article 2 EC was repealed and replaced in substance by Article 3 TEU.

[279] Case 6/72 *Europemballage Corporation and Continental Can Company Inc* v. *Commission* [1973] ECR 215, para 22.

[280] See Bouterse 1994, pp. 138–140.

[281] Cases T-528/93, T-543/93 & T-546/93 *Metropole and Others* v. *Commission* [1996] ECR II-649 para 118.

Moreover, non-efficiency factors have been taken into consideration as a result of the development of the European Union agenda.[282] The so-called flanking policies were introduced into the Treaty and internal market and competition policies encroached upon these new policies. Some of the articles referring to these new flanking policies require that the respective policies should be taken into consideration when implementing other European Union policies.[283]

Amato considers that antitrust should be liberated from the multiple purposes, 'enabling it to be…antitrust pure and simple.'[284]

According to Odudu, there are problems related to the legitimacy of additional goals and he considers that the legitimacy can be challenged on three grounds: reconsideration of jurisdictional questions, the direct effect given to provisions incapable of having direct effect and the intended relationship between Treaty provisions.[285] He defends an efficiency role for Article 101 TFEU (ex Article 81 EC) and considers that 'balancing of Article 81 EC against other Treaty goals is properly external to the competition law assessment.'[286]

The exclusion of other goals from the assessment that takes place under Article 81(3) would indeed simplify things; the exclusion of welfare services from the scope of competition rules would also simplify things. However, the presence of economic elements cannot rule out the application of competition rules and the presence of social aspects cannot exclude these other goals from being taken into consideration under Article 101(3) TFEU (ex Article 81(3) EC). There are questions that are raised regarding whether there is a hierarchy between these goals.[287] Baquero Cruz considers that there is a hierarchy of goals in the Treaty and that some provisions presuppose the existence of others and those presupposed have a higher rank.[288] Wesseling on the contrary considers that 'priorities are selected on a case by case basis.'[289] Monti considers that it would be unlawful to exempt an agreement that restricts competition if other European Union policies are achieved by that agreement but if the core aims of competition policy are not achieved; it would also be useless to consider other factors if exemption from competition rules were granted regardless, as a result of satisfying the core

[282] Odudu 2006, p. 161.

[283] Example: Article 6 EC referring to the environment; Article 127(2) EC referring to employment; Article 153(2) referring to consumer protection; Article 157(3) referring to industrial policy.

[284] Amato 1997, p. 116.

[285] Odudu 2006, p. 164.

[286] Ibid., 174.

[287] Monti 2002, p. 1070.

[288] Baquero Cruz 2002, pp. 63–66.

[289] Wesseling 2000, pp. 48–49.

competition goals.[290] How much weight should be given to these other goals in the assessment made under Article 101(3) TFEU (ex Article 81(3) EC)?

The supporters of a reduced scope for non-economic factors put forward several reasons why these factors should be eliminated from the assessment made under Article 101(3) TFEU (ex Article 81(3) EC).[291] One of the reasons is that the enlargement requires yet more attention to be paid to the scope of market integration. However, this does not justify not allowing non-economic factors to be taken into consideration when setting aside competition rules. In the process of market integration, other European Union policies should also be considered. Another reason asserted was that since the activism of the EC in other policy areas has increased, competition law should no longer be used to implement other policies. It was argued that negative integration through competition should be diminished. It is true that the introduction of the new policy areas has added to the existing conflict between the national and community interests another conflict within the Treaty between different policies. However, the fact that the European Union increased its activism in these areas as a result of different coordination measures does not eliminate the possibility of having cases where social and economic interests meet. In the field of welfare services it is highly important to have social interests taken into consideration when applying the exemptions. Another reason put forward is from a practical perspective: it is argued that since there is decentralisation of enforcement, it would be easier for the national courts to apply Article 101(3) TFEU (ex Article 81(3) EC) if non-economic aspects were left out. With regard to this aspect, it can be argued that even an economic analysis is a difficult task for the courts. Moreover, the national courts are asked to balance economic and social factors in internal market cases, which is also not an easy task. Even the Court sometimes leaves important issues to be solved by the national courts. The difficulty of balancing social and economic aspects should not be considered as a strong reason for overlooking some important aspects of European Union law.

Competition rules should be considered in their broader context when applied. The fact that competition rules and other European Union policies cannot be clearly separated should be taken into account. The broader scope of competition rules requires more consideration to be given to non-economic aspects when applying exemptions from competition rules. Moreover, the new European Union policy is that economic and social considerations should walk hand in hand. It is therefore undesirable to limit efficiency goals when other aspects, such as welfare fall within the scope of competition rules.

Odudu is of the opinion that the balancing process under Article 81 does not solve the problems and a solution at a constitutional level is necessary to clarify the hierarchy of goals.[292] Leaving aside the problems that confront the

[290] Monti 2002, p. 1070.

[291] Ibid., 1092; Bouterse 1994 and Schmid 2000, pp. 156–157.

[292] Odudu 2006.

achievement of such a constitutional solution, we question whether a hierarchy of goals would not lead to less flexibility in dealing with sensitive issues.

Monti proposes a rewriting of Article 81 EC and proposes a para 4 that would take into consideration other European Union objectives and which would not have direct effect: the Commission would be asked to exempt those agreements which do not satisfy the conditions in Article 81(3).[293]

This would not bring much novelty to the issue. It is acknowledged that more exemptions are required. However, at this moment there are sufficient exemptions that allow non-economic objectives to be considered. It was shown in *Wouters* and *Meca Medina* that where restrictive measures are inherent to the achievement of a certain non-economic objectives, they are declared to fall outside the competition rules. Article 101(3) TFEU (ex Article 81(3) EC) is also not unequipped to account for non-economic aims. The Commission's approach is that other goals are taken into account, but restrictions to competition are accepted only if the conditions set in Article 101(3) TFEU (ex Article 81(3) EC) are fulfilled. Competition policy should be interpreted in a broader context where the weighing of economic and non-economic interests offers a proper balance between these two.

An approach such as the one in *Wouters* and *Meca Medina* would allow a better consideration for services of general interest. Besides Article 101(3) TFEU (ex Article 81(3) EC) an 'extra-step of exceptions' would allow non-market elements to be given emphasis. Moreover, such approach would offer an extra-protection for social elements, since it is not necessary that the conditions of Article 101(3) TFEU (ex Article 81(3) EC) be fulfilled. Maybe this approach would bring a compromise: an analysis of the economical context would lead to eliminate ancillary restraints from the application of competition rules; this would respond to the criticism that non-economic objectives should not be considered when applying Article 101(3) TFEU (ex Article 81(3) EC).

4.3.5.2 National Interest

In dealing with welfare services, a question to be addressed is whether the national interest can be taken into account when applying the exemptions in Article 81(3). Since these welfare services aim at protecting the consumer and since they are confined within national borders, they tend to offer protection to national consumers. Can these national interests be considered as legitimate restrictions of competition?

Other policies must be taken into consideration when implementing European Union policies. This is stated in a number of Treaty articles that contain

[293] Monti 2002, p. 1097.

cross-section clauses.[294] We have seen above that other European Union policies must be taken into account when applying competition rules. Is it the national interest[295] or the European Union interest that would be taken into account? Komninos[296] states that

> We must stress, however, that most of these cross-section clauses mean that the Community must take into account not *national* but only *Community* policies aiming at the protection of these aims.

However, it is the national interest that welfare services are trying to protect, restrictions on competition are maintained just to give protection to these interests. For example, protection of employment in a certain region, the quality of a professional service, social reasons and national cultural reasons have all been accepted by the Court as justification for restricting competition. Monti[297] feels that the fact that granting an exemption to an agreement also benefits national employment policy should be considered as a mere coincidence, as this is not the aim of Article 101(3) TFEU (ex Article 81(3) EC).

In the Merger Regulation[298] it is stated that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the Regulation, on the condition that they are compatible with the general principles and other provisions of Community law.

Social reasons, the quality of professional services and a measure's importance to society as a whole have been considered by Advocate General Jacobs[299] as grounds for granting an exemption under Article 101(3) TFEU (ex Article 81(3) EC).

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[294] Article 6 referring to environment states: 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3'; Article 127(2) referring to employment states: 'The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities'; Article 151(4) referring to culture states: 'The Community shall take cultural aspects into account in its action under other provisions of this Treaty'; Article 153(2)referring to culture states: 'Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities'; Article 159(1) referring to economic and social cohesion states: 'The formulation and implementation of the Community's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 158 and shall contribute to their achievement.' .

[295] For a broader discussion referring to the national interest see Monti 2002, pp. 1057–1099.

[296] Komninos 2005, p. 6.

[297] Monti 2002, p. 1083.

[298] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 024/1, Article 21(4).

[299] Opinion of Advocate General Jacobs delivered in Joined Cases C-180/98 to C-184/98, *Pavlov* v. *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, para 90.

In *Ford/Volkswagen*[300] the Commission considered the necessity of protecting employment in a region. In *Remia*[301] the Court, citing its decision in *Metro*,[302] gave consideration to the survival of the undertaking and the preservation of jobs, objectives that could be considered for granting an exemption under Article 101(3) TFEU (ex Article 81(3) EC).

Schmid[303] argued with reference to culture that since the Community lacks a competence in the field of culture, 'the Community's duty to consider cultural aspects in any action Art. 151 (4) EC Treaty) can only be read as a *renvoi* to national culture.' The same can be said about all flanking policies where the Community lacks specific competence. In analysing the resale price maintenance for books in Germany Monti[304] remarks that the agreements on resale price maintenance are allowed if they are national in scope; if the books are destined for export, or if a book is sold on the German market for other Member States, then they are not subject to resale price maintenance. In a press release Monti[305] explains that:

> the Commission has no problem with national book price-fixing systems which do not appreciably affect trade between Member States. By clearing the German price-fixing system the Commission, from a perspective of subsidiarity, also takes account of the national interest in maintaining these systems which are aimed at preserving cultural and linguistic diversity in Europe.

In *Drijvende Bokken*[306] in applying the rule of reason the Court referred to the general interests protected by the Treaty. However, in Wouters the interests invoked (ethical reasons) are not found in the Treaty, but are national public policy concerns.

The conclusion must be that national non-economic interests should and can be taken into account when applying exemptions, provided that all four conditions included in Article 101(3) TFEU (ex Article 81(3) EC) are fulfilled.

4.3.6 Conclusion

Non-economic values are clearly considered under Article 101 TFEU (ex Article 81 EC). The market for welfare services presents specific particularities. Some commentators argue that competition rules should not apply to welfare services, others argue that non-economic objectives should not be considered when applying

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[300] Ford/Volkswagen, OJ 1993 L 20, p. 14, para 23.

[301] Case 42/84 *Remia v Commission* [1985] ECR 2545, para 42.

[302] Case 26/76 *Metro* [1977] ECR 1875.

[303] Schmid 2000, pp. 153–170.

[304] Monti 2002, pp. 1057–1099.

[305] Press Release IP/02/461 22 March 2002.

[306] Case C-219/97 *Maatschappij Drijvende Bokken BV* v. *Stichting Pensioenfonds voor de Vervoer* [1999] ECR I-6121.

Article 101(3) TFEU (ex Article 81(3) EC), on the grounds that this spoils the pure economic analysis that should take place in the field of competition and introduces political aspects. To satisfy both sides, a clear distinction between economic and social would be necessary. Since this is impossible, another formula should be found.

The competitive environment is important for a more effective provision of the welfare services, and competition rules are important to avoid any restriction of competition which would endanger the achievement of the aim pursued—greater efficiency.

The State has changed its role from provider to regulator. The State as regulator still intervenes and its intervention can be necessary or can be purely protectionist. It can also entrust its regulatory powers to private parties. This subchapter has tried to answer the question of whether the State's regulatory powers or private parties' regulatory powers are caught by Article 101 TFEU (ex Article 81 EC).

Since managed competition is a better model for welfare service provision, an important role in this model is played by the State. Even if its role has changed, the principle of loyalty embedded in Article 10 still obliges it not to maintain in force rules which could deprive competition rules of their effectiveness.

The State is not allowed to favour or reinforce cartel-like behaviour; it must not support or reinforce agreements between private parties establishing anti-competitive practices.

It is important to observe that Article 101 TFEU (ex Article 81 EC) does not challenge the State authority to regulate. This is all the more important since the amount of regulations remains high in the welfare field. Article 81 catches only the conduct of undertakings; the State's regulatory powers remain intact. However, if there is a previous agreement between undertakings restricting competition, and the State enforces it or the State delegates its regulatory powers to private parties, then Article 81 EC applies.

Different types of restrictions to competition can be presented and the existence of the exemptions represents an escape for non-economic values. This subchapter has tried to determine the status of non-economic values under Article 101 TFEU (ex Article 81 EC). Non-economic goals were taken into consideration when applying Article 81(3) following a teleological interpretation. Moreover, the introduction of other policies into the Treaty and the requirement that they should be given consideration when implementing other European Union policies has led to greater protection of other values.

The proposal that there should be a clear hierarchy written in the law between economic and non-economic values should be regarded with scepticism because this would lead to less flexibility when balancing these values.

Competition policy cannot be severed from its broader context and it should be interpreted in the light of other European Union policies and objectives.

Since welfare is so close to the concept of citizenship, the protection given to different social issues is indirectly related to national interests and national policies. These are also considered under Article 81(3), on the condition that all the other requirements of that provision are fulfilled.

Faced with the problem of subjecting welfare services that include social aspects to competition rules, the Court responded in two ways. First, it introduced the rule of reason and stated that measures which are inherent to achieve a certain non-economic goal should fall outside competition rules. Secondly, it included non-economic values in its assessment under Article 101(3) TFEU (ex Article 81(3) EC), without however disregarding the competition aspects and making sure that the conditions set in Article 101(3) TFEU (ex Article 81(3) EC) are fulfilled.

'European competition law also reflects the concerns of European societies in the twentieth century for social equity, freedom from exploitation, and consumer welfare.'[307]

4.4 The Application of Article 106 TFEU (ex Article 86 EC)

4.4.1 Introduction

The architecture of Article 106 TFEU (ex Article 86 EC) reveals its essence: a compromise between two interests, the first para being aimed at challenging state monopolies and the second para at allowing the Member States to use their exclusive powers to achieve different policies.

Article 106 TFEU (ex Article 86 EC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81–89.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

The role of Article 86 with its derogations is to 'to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community' s interest in ensuring

[307] Van den Bergh and Camesasca 2001, p. 62.

compliance with the rules on competition and the preservation of the unity of the Common Market.'[308]

The word social could be added to 'economic or fiscal' since today, Member States also pursue social policies when granting exclusive rights. Different other interests than economic ones are considered in order to justify the existence of a monopoly. As Van der Woude states,

> A monopoly may be justified if it is necessary for the protection of public health (a national health service), the environment (waste disposal), public security (guaranteed oil supplies), or the protection of workers (national employment agency).[309]

This section looks into the intricacies of Article 106 TFEU (ex Article 86 EC), which is addressed to the Member States and to undertakings, and which appears to interfere with the Member States' regulatory rights but simultaneously offers safeguards from competition rules.

Article 106 TFEU (ex Article 86 EC) is directed at public authorities, requiring them initially not to enact or to maintain in force any measure contrary to Treaty rules. Addressing the essence of Article 106 TFEU (ex Article 86 EC), Advocate General Tesauro[310] refers to the 'clear obscurity' of this article, caused by 'the objective difficulty of reconciling the actual idea of a monopoly or undertaking holding exclusive rights with a system of free competition and a common market.'[311]

The granting of special and exclusive rights is an expression of state intervention. This intervention can have serious effects on the competitive environment but also on the internal market, since a monopoly may raise barriers to free movement and is able to partition the market.

Article 106 TFEU (ex Article 86 EC) in combination with Article 102 TFEU (ex Article 82 EC) is more commonly used to attack state measures than Article 81 in combination with Article 3(4) TEU (ex Article 10 EC). In order to apply Article 101 TFEU (ex Article 81 EC) it is necessary to show a link between the State measure and the cartel: otherwise, all national regulations could be subject to competition rules. This is not desired, since some national rules are meant to pursue different objectives and flood of cases challenging the legality of national regulations could be the result. In practice this would mean interpreting Article 81 extremely broadly, in a similar manner to that adopted by the Court in *Cassis de Dijon* with regard to free movement provisions. However, Article 101(3) TFEU (ex Article 81(3) EC) does not contain the exceptions necessary to cover the whole spectrum of problems that require protection from competition rules, resulting in the Court opting to restrict its initial application.

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[308] Case C-202/88 *French Republic v. Commission of the European Communities* (*Telecommunication Terminal Equipment*) [1991] ECR I-1223, para 12.

[309] Van der Woude 1991, p. 4.

[310] AG Tesauro in his Opinion in Case C-202/88 *French Republic* v. *Commission of the European Communities* (*Telecommunication Terminal Equipment*) [1991] ECR I-1243, para 11.

[311] Ibid.

The application of Article 106 TFEU (ex Article 86 EC) is however more limited in any case, since it applies to State measures granting special or exclusive rights which distort competition. The different application of Article 106 TFEU (ex Article 86 EC) (in conjunction with Article 102 TFEU (ex Article 82 EC) and Article 101 TFEU (ex Article 81 EC) (in conjunction with Article 3(4) TEU (ex Article 10 EC) as stated by Bacon[312] is based on differences between Articles 101 TFEU and 102 TFEU because Article 102 TFEU (ex Article 82 EC) 'already includes a mechanism allowing the separation of certain measures of economic policy from those whose main purpose is anti-competitive.'[313]

According to Article 102 TFEU (ex Article 82 EC)), an abuse of a dominant position is prohibited; however, when the undertaking committing the abuse was induced to such behaviour by a State measure, then it cannot be held totally responsible. Also the state defence doctrine as it was seen above is applied in relation to Article 101 TFEU (ex Article 81 EC). Moreover, the state measure could pursue different objectives that require its exemption from the application of competition rules. That is why Article 106(2) TFEU (ex Article 86(2) EC) provides exemptions from the application of competition rules.

Under the pressure of the internal market, the state is forced to open its traditional sectors to competition. It is well known that the state protects social interests while private undertakings aim only at profit maximisation. Can market forces replace the Member State role and provide services of general interest on the same conditions as the state does, supplying products throughout the whole territory, so that everybody can have access and benefit from the same quality, at an affordable price? As Skudder and Slot observe, competition and the free market are harsh tools that take no account of socially important aspects.[314] There are conflicts between the national interest that promotes social interests and the European Union goals that promote economic objectives. State intervention will be permitted to the extent that market forces are not hindered. To what extent can Member States continue to provide services of general interest? How can the state continue to fulfill its obligations towards its citizens once it has lost its power to regulate as sovereign? 'Member States have lost the power to organise their national markets along monopolistic lines or to reserve the provision of certain services to certain firms. Market integration has become the priority.'[315]

The European Union's policy has challenged Member States' monopolies. Due to the impact of several factors, Member States started the process of liberalising and privatising the market of their former monopolies. Privatisation aims to achieve economic efficiency, tries to avoid the wasteful use of resources and aims to achieve economies of scale. Indeed, though social purposes and interests may be affected a question is raised: is the European Union policy not a solution to the

[312] Bacon 1997b, pp. 283–291.

[313] Ibid., 291.

[314] Slot and Skudder 2001, p. 122.

[315] Hancher 1999, p. 721.

increasing pressures coming from the international level, thus preparing Member State economies to face increasing competition coming from international trade liberalisation? As Hancher observes, 'the challenge to traditional forms of providing collective goods has not emanated from Community institutions, but from new or potential new entrants who have taken their grievances to court.'[316] Increasing competition on the international stage, the demand for efficiency and innovation and technological development, all impel States towards liberalisation.

Education, healthcare and health insurance are services that require intervention by the state to ensure their effective provision. Where Member States have decided to liberalise these services can Article 106(2) TFEU (ex Article 86(2) EC) EC offer enough protection for them?

Buendia Sierra raises the problem of what would happen if some social security systems were privatised in some Member States and not in others. 'Social security markets and social security undertakings would appear. In such cases it would be difficult to deny the application of the competition rules or the free supply of services. The question would then arise whether the same activity could be economic in some Member States and not in others. If the answer is "yes", this would result in an unacceptable lack of homogeneity: the undertakings of all Member States would have access to the markets of the privatising Sates, while the other States' markets would remain firmly closed. If the answer were 'no', this would mean accepting that the more liberal Member States in fact dictated the meaning of the concept of economic activity to the whole European Union.'[317]

This situation has already happened. Take for example the liberalisation of the Dutch health insurance market, where competition rules apply. This is already a case where health insurance is an economic activity in one Member State and not in other Member States. Moreover, in those Member States that open their market to competition, the State still intervenes to ensure that there is an appropriate provision of that service. The question is to what extent should the State interventionist measures be subjected to competition rules.

The grant of special and exclusive rights is an instrument of state intervention to ensure that the market does not fail to provide certain services. However, the grant of exclusive rights is not considered illegal per se. The state measure has to be contrary to one of the Treaty provisions: Articles 18, 34, 56, 101, 102, 107 TFEU (ex Articles 12, 28, 49, 81, 82 or 87 EC). Thus the grant of an exclusive right can create an obstacle to free movement as well as a restriction of competition. According to Article 106(2) TFEU (ex Article 86(2) EC) EC, undertakings entrusted with the operation of services of general economic interest are not subject to the rules contained in the Treaty if the application of those rules obstruct their performance in law and in fact of the particular tasks assigned to them. This means that if the grant of exclusive rights infringes free movement and competition provisions, or simply the non-discrimination principle, Article 106(2) TFEU

[316] Ibid., 725.

[317] Buendia Sierra 1999, p. 62.

(ex Article 86(2) EC) EC applies. This is important since, as will be demonstrated below, the assessment of exemptions under Article 106(2) TFEU (ex Article 86(2) EC) EC is not as strict as the assessment of exemptions under the free movement provisions.

This section will look at the impact that competition rules have on welfare services. So far, Article 106 TFEU (ex Article 86 EC) has been used in the liberalisation of the postal, telecommunication, energy and transport sectors. It is interesting to see to what extent it applies to welfare services and to what extent the safeguards contained in para 2 of Article 106 TFEU (ex Article 86 EC) can ensure the proper protection of these services.

There are no general principles regarding the application of Article 106 TFEU (ex Article 86 EC), but a series of cases decided by the Court give some guidance. However, due to this case-by-case development, legal certainty is still remote.

4.4.2 Granting of Exclusive Rights: Illegal per se?

There are two schools of thought in the debate on whether the granting of special or exclusive rights is contrary to competition rules.[318] One argues that special or exclusive rights are not illegal per se, but the grant of special or exclusive rights is illegal when the State measure leads the undertaking to abuse its dominant position. This is the behaviour doctrine. The other argues that Article 86(1) is breached when a state measure produces similar effects to those produced by a cartel or an abuse of a dominant position.

There are several interpretations with regard to the special or exclusive rights in the Court's jurisprudence. Advocate General Jacobs[319] identifies three types of cases. *ERT*-type cases see the granting of exclusive rights as not incompatible with the Treaty as such, but exclusive rights as liable to create a situation in which that undertaking is led to infringe the Treaty rules. *Höfner*-type cases see the granting of exclusive rights as not incompatible with the Treaty as such, but the Member States as infringing the Treaty if the undertaking in question cannot avoid abusing its dominant position merely by exercising the exclusive right granted to it.[320] In *Corbeau*-type cases the Court followed the form of analysis adopted in their

[318] See Buendia Sierra 1999.

[319] Advocate General Jacobs in his Opinion in Joined Cases C-115/97 to C-117/97 *Albany International BV* v. *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, *distinguishes between ERT-type, Höfner -type and Corbeau-type cases.*

[320] Case C41/90 *Höfner* [1991] ECR 1979; Case C-55/96 *Job Centre Coop. arl* [1997] ECR I-7119, Case C-163/96 *Silvano Raso* [1998] ECR I-533; Case C-67/96 *Albany International BV* v. *Stichting Bedrijfpensioenfonds Textielindustrie* [1999] ECR I-5751; Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion* (*FFAD*) v. *Københavns Kommune* [2000] ECR-3743; Cases C-180-184/98, *Pavlov* v. *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451; Case C-475/99 *Firma Ambulanz Glöckner* v. *Landkreis Südwestpfalz* [2001] ECR I-8089.

namesake, where it did not identify whether the Belgian law was contrary to Article 106 TFEU (ex Article 86 EC) and Article 102 TFEU (ex Article 82 EC) but merely stated that Article 106 TFEU (ex Article 86 EC) should be read in conjunction with Article 102 TFEU (ex Article 82 EC)) and started to apply the exemption contained in Article 106(2) TFEU (ex Article 106(2) TFEU (ex Article 86(2) EC) EC). In analysing State measures which affect the structure of competition, Buendia Sierra[321] states that the application of Article 106 TFEU (ex Article 86 EC) and Article 102 TFEU (ex Article 82 EC) to exclusive rights related to the structure of the market did not arise suddenly but evolved from the behaviour doctrine and that the seed of this change can be found in the change of interpretation 'where not only were measures which obliged abusive behaviour prohibited but also those which simply induced such behaviour.'[322]

In the Telecommunications Terminal Equipment Directive[323] and in the Telecommunications Services Directive[324] the Commission gave a new interpretation to Article 106 TFEU (ex Article 86 EC). In the these Directives' recitals[325] the Commission stated that the granting of special or exclusive rights gave rise to a situation contrary to Article 3(f) EEC; it further stated that the exclusive rights must be regarded as incompatible with Article 86 EEC (now Article 102 TFEU) in conjunction with Article 3 EEC, and that the grant of such exclusive rights is prohibited by Article 90(1) EEC [Article 86(1) EC; now Article 106(1) TFEU]. Competition is eliminated by the grant of the exclusive rights and not by the behaviour of the undertaking that benefits from such rights.

The Court, in summary, adopts two different positions: one which finds exclusive rights contrary to Articles 106 TFEU (ex Article 86 EC) and Article 102 (ex Article 82 EC) because there is a real risk of potential abusive behaviour as a result and another which finds that Article 106 TFEU (ex Article 86 EC) and Article 102 TFEU (ex Article 82 EC) are infringed because the exclusive rights produced similar effects to an abuse.

Why is this distinction important with regard to welfare services? Closer examination of *Corbeau* and the Telecommunications Terminal Equipment Directive and Telecommunications Services Directive on the one hand and the *ERT* and *Höfner* type cases on the other hand, reveals two types of exclusive rights. In the Directives the cases deal with the extension of exclusive rights to ancillary markets. Since these new ancillary markets appeared as a result of technological development and since the legislator's intention was not to grant an

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321 Buendia Sierra 1999, p. 160.

322 Ibid.

323 Commission Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment, [1988] OJ L 131, 73–77.

324 Commission Directive 90/388/EEC on competition in the markets for telecommunications services, [1990] OJ L192, 10–16.

325 Commission Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment, [1988] OJ L 131, 73–77, recital 13; Commission Directive 90/388/EEC on competition in the markets for telecommunications services, [1990] OJ L192, 10–16, recitals 13–17.

exclusive right to these new markets, the Court did not assess whether there was an abuse; it considered that exclusive rights on that market segment illegal per se. This is significant for the type of services where additional new markets have appeared and especially for the balancing process, because though in these additional segments market rules can be applied unfettered, the importance of the services provided on the basic market can still be a reason to interfere with these ancillary markets. It is important to see for example in the case of health insurance, whether the exclusive rights from the basic market can be expanded to the supplementary or complementary health insurance market and whether exclusive rights can be maintained in the complementary market on account of the importance of the basic sector.

In *GB-Inno*[326] the Court stated that

> It is sufficient to point out in this regard that it is the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which is prohibited as such by Article 86, or by Article 90(1) in conjunction with Article 86, where that extension results from a measure adopted by a State. As competition may not be eliminated in that manner, it may not be distorted either.

In analysing whether the exclusive rights of a sectoral fund to manage supplementary pensions in a given sector falls within one of the three types of cases, AG Jacobs in *Albany* concluded that with regard to the *ERT*-type cases, there are no circumstances that would lead to an abuse of a dominant position in the Dutch system. With regard to *Höfner*-type cases, in determining whether by simply exercising the exclusive rights the undertaking cannot avoid abusing a dominant position, AG Jacobs considered that the Court is not in the position to make such analysis, since detailed economic analysis of facts is required. He considers that in making the assessment of whether an undertaking granted exclusive rights cannot avoid abusing its dominant position, the national courts should examine whether the abuse is the result of the granting of exclusive rights or whether the inability to satisfy the demand comes from the bad management of the undertaking. Because of the difficulty of making an economic assessment, Member States enjoy a margin of discretion in deciding whether this is an abuse or not.

Therefore, an economic analysis is necessary to determine whether by merely exercising the exclusive right granted to it, an undertaking led to an abuse. The Court did not consider that granting of exclusive rights was illegal *per se*.[327]

In conclusion, where the state grants exclusive rights the Court does not consider them illegal per se, as they will only be caught by Article 86(1) if the grant leads to an abuse or if the exclusive rights are liable to create a situation where undertakings are led to infringe the Treaty rules. However, the Court considers exclusive rights illegal per se where the exclusive rights already existed

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[326] Case C-18/88 *Régie des télégraphes et des téléphones* v. *GB-Inno* [1991] ECR I-5941, para 24.

[327] Case C-67/96 *Albany International BV* v. *Stichting Bedrijfpensioenfonds Textielindustrie* [1999] ECR I-5751, para 93.

in one sector and were extended to an ancillary market which appeared as a result of technological development. In this case there was no new intervention of the state in granting an exclusive right, but the extension happened automatically. As Hancher[328] notes in her analysis of *Corbeau*: 'The first part of the Court's reasoning in *Corbeau* suggests that failure to redefine a right conferring a wide-ranging exclusivity can indeed amount to a breach of Articles 86(1) and 82, unless there are objective justifications for maintaining a monopoly of this scope.'

4.4.3 Types of Infringements

As stated in Article 106(1) TFEU (ex Article 86(1) EC), 'In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81–89'.

Thus, Article 106(1) TFEU (ex Article 86(1) EC) is aimed at state measures contrary not only to the competition rules but also contrary to the Treaty rules, thus including rules contrary to free movement and non-discrimination provisions.

An exclusive right is by nature discriminatory, because it is addressed to a single undertaking, usually having the nationality of a Member State. Whenever there is an infringement of free movement provisions and the infringement is connected with the granting of an exclusive right, it is going to be assessed from two perspectives: from the free movement perspective and from competition rules perspectives. This is important when it comes to the exceptions.

The exception contained in Article 106(2) TFEU (ex Article 86(2) EC) applies to state measures contrary to Article 106(1) TFEU (ex Article 86(1) EC) read in conjunction with Articles 101, 102, 107, 37 TFEU (ex Articles 81, 82, 87, 31 EC) and the free movement provisions. Therefore, the types of infringement covered by Article 86 are not only infringements of competition rules. This is important with regard to who can invoke the existence of an infringement and also with regard to the application of the exception contained in Article 106(2) TFEU (ex Article 86(2) EC).

4.4.3.1 Exclusive Rights and Article 102 TFEU (ex Article 82 EC)

Article 106 TFEU (ex Article 86 EC) is usually read in conjunction with Article 102 TFEU (ex Article 82 EC). Since the granting of special or exclusive rights leads to a dominant position,[329] competition rules seek to sanction the abuses that could be

[328] Hancher 1994, p. 116.

[329] For a discussion on defining dominance, see Korah 2007, Azevedo and Walker 2002 and Jones and Sufrin 2008.

committed by the holder of exclusive rights. As has been seen, the granting of exclusive or special rights is not incriminated per se. What is incriminated is behaviour that can be abusive. Dominance is not desired because it gives the undertaking holding a dominant position the opportunity to act independently of its competitors, customers and consumers[330]: it gives the undertaking the possibility of reaping monopoly profits, thus is detrimental to consumer welfare.

There are different types of abuses that can be committed under Article 102 TFEU (ex Article 82 EC). However, only those most commonly encountered types of abuses to be found where undertakings are entrusted with special or exclusive rights will be examined.

The Court has identified in various cases the circumstances in which the grant of an exclusive right can lead an undertaking to engage in abusive behaviour. Buendia classifies these circumstances into two categories: the demand limitation doctrine and the conflict of interests doctrine. The first is illustrated by *Höfner* where the grant of exclusive rights did not infringe Article 106 TFEU (ex Article 86 EC) but the State measure created a situation where the undertaking that was granted the exclusive right could not satisfy existing demand. The second is illustrated by *ERT*, where the abusive conduct was determined by the existence of a conflict of interests.

Since some health insurance systems introduced competition elements and since the need for certain protection and for ensuring universal provision of the service requires certain regulatory intervention, a conflict between regulations intended to ensure the provision of health services and competition rules can occur. Since entirely free competition is not possible in a market where social elements are involved it is interesting to see how much regulation is allowed. The need to ensure a certain level of solidarity will require different restrictions, such as the requirement that some funds operate in a defined part of the market, or that affiliation is made compulsory for certain complementary insurance schemes. The allocation of the market or the closing of the market to other undertakings represent restrictions of competition.

To draw a comparison with other sectors that have been liberalised, different markets can be identified within welfare services: the basic market and the ancillary market. The problem then is whether an extension of the exclusive rights from the basic market to the ancillary market is allowed. Whenever an undertaking is engaged in different markets, the problems related to cross-subsidisation and predatory pricing can appear.

4.4.3.1.1 Demand Limitation Doctrine

The granting of special or exclusive rights can be necessary in order to avoid market failures. Sometimes, the extension of exclusive rights to another market,

[330] Korah 2007.

ancillary to the reserved one is accepted on grounds that the profits obtained in the ancillary markets can be used to finance services on the reserved market. However, these exclusive rights are accepted only as long as the undertaking entrusted with those rights can satisfy the demand.

In *Höfner*[331] the Court had to consider an exclusive right granted to an employment company. However, the recruitment activities of other undertakings were tolerated. The Court, in answering the question of whether there was an abuse, decided that if the employment company was incapable of satisfying the demand on the market and if other recruitment consultants were prevented from offering services as a result of the measure in force, then there would be an abuse.

In *Ambulanz Glöckner*[332] the Court adopted the same approach when dealing with the grant of an exclusive right for patient transport to an undertaking that was entrusted with the operation of public ambulance services. In order to decide whether the extension of exclusive right to patient transport was allowed, it was necessary to determine whether the undertaking was able to satisfy demand and to fulfill not only its statutory obligation to provide ambulance emergency services, but also to offer efficient patient transport services. Thus, the Court decided that the Member States were allowed to entrust exclusive rights to undertakings assigned with the operation of services of general economic interest if the restriction of competition or even the exclusion of all competition was necessary to ensure the performance of the particular tasks entrusted to them. It was accepted that the losses from the less profitable sectors could be offset with the profits from profitable sectors. Furthermore, it decided that the extension of the exclusive rights to the non-emergency sector enabled the undertakings to discharge their general-interest task; without the extension of the exclusive rights there was the risk that private operators would concentrate in the non-emergency sector on more profitable journeys and thus the viability of the services provided by the medical aid organisations would be affected. However, the Court decided that if the medical aid organisations which have been entrusted with the operation of the public ambulance services were unable to satisfy the demand for the emergency and patient transport, then the extension of the exclusive rights based on the task of general interest could not be accepted. The national courts were left with the task of deciding whether the medical aid organisations were able to satisfy the demand and to fulfill their statutory obligation to provide public emergency ambulance as well as to offer efficient patient services.

The problem with exclusive rights is that the law creates barriers to entry on a specific market. If the demand on that market is not satisfied as a result of under-capacity in the undertaking entrusted with that special right then the consumer is the one that suffers. Under these circumstances, the Court sanctions any abusive behaviour.

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[331] Case C-41/90 *Klaus Höfner and Fritz Elser* v. *Macrotron GmbH* [1991] ECR I-1979.

[332] Case C-475/99 *Firma Ambulanz Glöckner* v. *Landkreis Südwestpfalz* [2001] ECR I-8089.

4.4.3.1.2 Conflict of Interests Doctrine

A conflict of interests could appear in the case of newly liberalised markets where the holder of a monopoly on the reserved market has the power to regulate various issues on the new ancillary market where it is also actively involved.

In *ERT*[333] the Greek government entrusted exclusive rights in original broadcasting and retransmitting of programmes to a radio and television undertaking. Another undertaking was established by the Mayor of Thessaloniki and started to broadcast television programmes. Greek law prohibited undertakings to carry out activities for which ERT had exclusive rights without authorisation by ERT.

The Court ruled that it was prohibited to grant 'an exclusive right to retransmit broadcasts to an undertaking which has an exclusive right to retransmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article 82 of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes.'[334]

RTT[335] was similar in that an undertaking had the public telecommunication network monopoly and was also in charge of granting or withholding authorisation to connect telephone equipment to the network. It also had the power to set the technical standards to be met by that equipment, and the power to check whether equipment not produced by it conformed to the specifications it laid down.[336] The Court decided that a system of undistorted competition required equality of opportunity between different actors. It found the existence of a conflict of interest in undertaking an marketing terminal equipment and also being entrusted with drawing up the specifications for such equipment. An independent body was required to ensure fair competition.

In *Albany* it was argued that there was a conflict of interests since the Fund fulfilled a dual role, as manager of the pension scheme and as the authority vested with the power to grant exemption. In the case at stake, according to Article 5(1) of the Guidelines, the fund was required to grant exemption when an undertaking has made available to its workers a pension scheme granting at least equivalent rights to those offered by the fund and this scheme was set up at least six months before the request was lodged. The Court ruled that there was no abuse of powers since the fund merely checked whether the conditions laid down by the minister were complied with. Furthermore, another exemption was granted according to Article 1 of the Guidelines when an undertaking offered its workers a pension scheme at least equivalent with the one offered by the fund and when in the event of the withdrawal from the fund, it was offered a compensation considered reasonable by the Insurance Board for the damages suffered by the fund as a result of withdrawal.

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[333] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou* v. *Dimotiki Etairia Pliroforissis* [1991] ECR I-2925.

[334] Ibid., para 37.

[335] Case C-18/88 *RTT* v. *INNO-BM SA* [1991] ECR I-5973.

[336] Ibid., para 15.

The Court rules that the exercise of the power of exemption required an evaluation of complex data related to the pension scheme and the financial equilibrium of the fund and this implied a wide margin of appreciation. Because of the complexity of such evaluation the Court ruled that the fund should be granted the power of exemption. However, the Court ruled that the decisions of the fund should be subject to review in order to check whether the power to grant exemption was not used in an arbitrary manner and that the principle of non-discrimination and the other conditions for the legality of that decision have been complied with.[337]

Thus, when liberalising former monopoly markets, it is necessary to ensure that there is no conflict of interest and that equal opportunities are given to all competitors.

4.4.3.1.3 Cross-Subsidisation and Predatory Pricing

Cross-subsidisation is assessed under the rules of Article 102 TFEU (ex Article 82 EC) whenever there is an abuse of a dominant position; it is assessed under the state aid rules whenever there is an undertaking owned or controlled by a state. This section considers cross-subsidisation assessed under Article 82 in conjunction with Article 106 TFEU (ex Article 86 EC). These two articles are read together because the state intervenes and grants exclusive or special rights in the case of welfare services. For example, an undertaking might enjoy exclusive rights on the market for basic health insurance and at the same time be engaged in providing complementary health insurance services. In the case of higher education, universities can be involved in the provision of research services, thus entering into competition with the private companies on the market. However, there is the possibility of cross-subsidisation: it is difficult to identify the costs, especially costs related to the infrastructure and equipment used for research, and which is provided by the state.

When special or exclusive rights are entrusted to an undertaking or where an undertaking enjoys a monopoly there is the danger of cross-subsidisation where the same undertaking operates on different markets. The temptation to use market power on one market to dominate other markets can lead to anti-competitive practices.

Cross-subsidisation can be beneficial when it involves services of general economic interest. For example, the charging of the same tariff for postal services throughout an entire territory is important to ensure access for everybody to these services. Charging common tariffs involves cross-subsidisation because the profitable parts of the market are used to finance the less profitable parts of the market. Moreover, where an undertaking is engaged in providing services on a reserved market and on a competitive market, cross-subsidisation may be necessary to finance the services on the reserved market by using the profits on the competitive market. These two are types of cross-subsidisation that are accepted and are

[337] Case C-67/96 *Albany International BV* v. *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paras 112–121.

actually used as means of financing services of general economic interest. However, where an undertaking is engaged in providing services both on a reserved and on a competitive market, there is the danger of allocating more costs to the reserved market where the financing is covered by state resources. This is a type of undesirable cross-subsidisation.

'The problem for the competitor is that the dominant company is able to spread its common costs over two sets of operations instead of only one in other words, it has economies of scale or scope.'[338]

There are different economic approaches that determine whether there is cross-subsidisation. The existence of common costs is an incentive to cross subsidise, but allocating costs between different markets is not always considered cross-subsidisation. One of the main problems with cross-subsidisation is identifying the costs and determining whether there is cross-subsidisation.

In finding cross-subsidisation it is important to determine which method is used.[339] There are two important concepts that should be examined to detect cross-subsidisation: incremental cost ('IC') and stand- alone cost ('SAC'). Incremental cost is defined as the increase in costs associated with producing a 'second' unit of output. If the price of the product is higher than the incremental cost, then there is no cross-subsidy, since the other costs would be borne by the firm no matter whether the second output is produced or not. Stand-alone cost is defined as the hypothetical cost of producing each unit of output in isolation from other outputs. According to Faulhaber[340] the rule for detecting cross-subsidy is that 'there is no subsidy when the price of an output is greater than or equal to its IC and less than or equal to its SAC.'[341] According to the fully distributed cost method,[342] an 'output which bears a considerable share of common costs may be accused of subsidising other outputs.'[343]

In the *Deutsche Post AG*[344] decision the Commission took an incremental-cost approach which can be considered very favourable to an undertaking holding a dominant position on the reserved market. The case involved an undertaking, Deutsche Post AG, which had a statutory monopoly over the letter-post market and also provided services in the mail-order parcel market. Deutsche Post was accused of using revenue from the profitable letter-post monopoly to finance the below-cost provision of parcel services.

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[338] Temple Lang and O'Donoghue 2002, p. 34.

[339] Temple Lang and O'Donoghue 2002 and Abbamonte 1998, pp. 414–433.

[340] Faulhaber 1975.

[341] Abbamonte 1998, p. 417.

[342] According to the fully distributed cost method, all costs, including common costs, are allocated to all outputs—See Abbamonte 1998, p. 417.

[343] Ibid.

[344] *Deutsche Post AG* [2001] OJ L125/27; See also: Bergman 2001, pp. 351–354, Bartosch 2001, pp. 195–210, Diez Estella 2006, pp. 184–196, Temple Lang and O'Donoghue 2002, p. 83 and Nicolaides 2001, pp. 390–393.

In determining whether there was cross-subsidisation the Commission stated that

> From an economic point of view cross-subsidisation occurs where the earnings from a given service do not suffice to cover the incremental costs of providing that service and where there is another service or bundle of services the earnings from which exceed the stand-alone costs. The service for which revenue exceeds stand-alone cost is the source of the cross-subsidy and the service in which revenue does not cover the incremental costs is its destination.[345]

The Commission defined the incremental cost as comprising the costs incurred in providing a specific parcel service. It did not include the fixed costs incurred only as a result of providing a specific service.[346] It was considered that the reserved area was a source of funding. The incremental cost incurred in providing mail-order parcel services comprised only of the additional cost of providing that service. The common fixed costs were considered to be incurred only as a result of providing mail-order parcel services. When calculating the common fixed costs, the Commission looked at the characteristics of the obligation Deutsche Post was entrusted with on the reserved market. Because basic letter post was a universal service, Deutsche Post had to maintain a capacity reserve large enough to cover any peak demands that could arise on the reserved market. Even if it ceased to provide mail-order parcel services, it would still have to provide over-the-counter parcel services and those fixed costs would continue to exist. Deutsche Post had an obligation to maintain that capacity independently of the services provided and the volume of parcels processed. Common fixed costs cease to exist only when the statutory obligation no longer applies.

In order to avoid cross-subsidisation the Commission required that the revenue on the mail-order parcels cover the incremental costs. The common costs of providing network capacity were not taken into consideration when deciding whether there was cross-subsidisation. However, the revenue earned on the additional market was not enough to cover the incremental costs and thus there was cross-subsidisation.

The Commission in this case was generous with the undertaking entrusted with public service obligation and involved in an additional competitive market because only the incremental costs were considered while the common costs were overlooked. This incremental-cost approach can create barriers to entry for other undertakings that want to enter the mail-order parcel markets but have to also face the fixed costs of creating a network and simultaneously competing with the incumbent whose lower prices do not include fixed costs. Bergam[347] considers that this decision has the potential to 'curb competition on merits.'

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345 *Deutsche Post AG* [2001] OJ L125/27, para 6.

346 Ibid., footnote 8.

347 Bergman 2001, pp. 351–354.

Cross-subsidisation is not prohibited per se, but only abusive conduct. In the case of Deutsche Post the financing of low prices on the competitive market with funds obtained on the reserved market was considered an infringement of Article 82.

In *UPS Europe*[348] however, the Court found that there was no abuse when an undertaking operating on a statutory market used the profits from its reserved market to acquire shares in a company active in a competitive market. This case involved the acquisition of a company active in a competitive market by an undertaking holding a statutory monopoly in the postal sector. Deutsche Post acquired joint control of DHL International Ltd. The applicant (UPS) contended that Deutsche Post was not entitled to use its resources from the reserved market to acquire shares in DHL, an undertaking operating in a competitive market, and that its exclusive rights on the reserved market should be used only to fulfill its obligation to provide the services of general economic interest entrusted to it. This was considered by the applicant to be an abuse of a dominant position. UPS argued that using the resources from the reserved market to finance the acquisition of an undertaking active on a competitive market was the same as using the resources from the reserved market to subsidise activitThe Court stated that according to the Commission's Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services,[349] the subsidisation of activities from the competitive market with funds from the reserved market indeed distorted competition and constituted an abuse of a dominant position. However, dominant companies are allowed to act in a business-like manner and are allowed to compete with other undertakings on price or take steps to improve their cash flow, unless the prices are predatory or conflict with the relevant national or Community rules.

ies on the competitive market. The reasoning followed by UPS was that the objective of Article 82 is to ensure fairness between different companies operating on a market, to protect the position of competitors and to protect consumers from long-term harm. It considered that practices not based on normal business performance to be contrary to these objectives.

However, the Court disagreed with the applicant's position. It considered that the fact that an undertaking was entrusted with the provision of services of general interest did not preclude that undertaking from making a profit. The Court considered that the competition rules would be infringed only if the funds used to acquire shares in an undertaking active on a competitive market came from excessive or discriminatory prices, or from unfair practices in the reserved market. Since there was no proof that those funds were obtained by abusive behaviour on the reserved market the conclusion was that the acquisition was legal.

Drawing a parallel with the cases regarding state aid, the Court of First Instance tried to ensure that the competition was not distorted, but at the same time sought

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[348] Case T-175/99 *UPS Europe SA* v. *Commission* [2002] ECR II-1915.

[349] Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services [1998] OJ C 39/2.

to ensure equal treatment between companies entrusted with services of general economic interest and undertakings operating in competitive markets that do not have to fulfill public service obligations on a statutory market.

One of the problems that cross-subsidisation poses is that it can lead to predatory pricing. In any competitive environment an undertaking will seek to acquire more market share and drive its competitors out of the market. One of the instruments used for eliminating competition is predatory pricing. This is defined as where a dominant firm uses prices to restrict competition by driving out the existing competitors or preventing potential ones from entering the market.[350]

The predator accepts that he will make short-run losses but hopes for higher profits in the long run. The consumer will of course enjoy low prices. However, the competition authorities must protect the consumer in the long-term and prevent the accumulation of market power by an undertaking as a result of predatory pricing. Bork[351] considers predatory pricing to be rare because it is not a rational business practice. It is believed that instead of using predatory pricing to eliminate competitors, a practice that requires predicting market outcomes for the long-term and the behaviour of the competitors on the market, eliminating competitors by acquisition would be a better strategy.

There are several rules for dealing with predatory pricing.[352] There is the 'no rule approach', where it is considered that there is no need to have distinct rules to deal with predatory pricing because predatory pricing is speculative and is unlikely in practice. When an undertaking engages in predatory pricing, in order to recoup its losses it has to reap monopoly profits later. This would in turn, however, draw many competitors eager to benefit from prices above competitive levels. Another approach is 'cost-based rules.' The model used under this approach is the Areeda-Turner test,[353] according to which 'a price lower than reasonably anticipated short-run marginal cost is predatory, while a price equal to or higher than reasonably anticipated short-run marginal cost is not predatory.'[354]

Short-run marginal cost is defined as 'the marginal cost based on a firm's existing plant and equipment, not on that which would be the most efficient."[355] The marginal cost is judged by what seemed reasonable at the time.'[356]

Another approach would be 'non-cost based rules.' A few approaches have been put forward as alternatives to the cost-based rules. 'One approach, advocated by Oliver Williamson, is to assess the dominant firm's strategic positioning of output to effectively deter new entry without pricing below cost.[357] Williamson

[350] Joskow and Klevorick 1979.

[351] Bork 1978.

[352] See Temple Lang and O'Donoghue 2002.

[353] Areeda and Turner 1975, p. 697.

[354] Ibid.; For criticism see Scherer 1976a, Areeda and Turner, Posner 1976, Scherer 1976b.

[355] Jones and Sufrin 2008, p. 445.

[356] Ibid.

[357] See Williamson 1977.

argued that a dominant firm can choose a plant size and capital structure in anticipation of new entry that permits it to respond to entry in such a way as to ensure that the entrant loses money. A more extreme approach, advocated by William Baumol, is to require the dominant firm to continue any price reduction for a fixed period if the rival exits.'[358]

The Commission in its decision in *AKZO* reached the conclusion that an undertaking, in order to be abusive, does not need to have prices beneath its total average costs. An aggressor could eliminate competition even if the cut in prices is not below total average costs.[359]

In *AKZO* the Court stated that

> prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which because of their smaller financial resources, are incapable of withstanding the competition waged against them.[360]

The test the Court adopted in *AKZO* is different to the Areeda–Turner test because the Court considered that prices below average total costs but above variable costs are abusive if there is the intention to eliminate a competitor. The intention to eliminate a competitor was found in the direct threats.

Criticism has been levelled at the test used in *AKZO*. Jones and Sufrin consider that the Court failed to provide guidance on how the costs should be allocated in multi-product firms; that sometimes companies may have good reasons for setting prices below average variable costs; that it relied on intention, which can be quite problematic because as at any time, any undertaking would like to have a competitor eliminated; that the emphasis was put on the intention and not on the effect; that it did not focus on recoupment; that the rules applied should differ according to industry.[361]

It was thus decided that prices below average variable costs are abusive and that prices below average total costs but above variable costs are to be considered abusive if an intention to eliminate competitors can be shown. Opinions are divided on this. There are scholars[362] who consider that prices above variable costs are or should be lawful and others[363] that consider that they are predatory and anticompetitive.

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[358] Temple Lang and O'Donoghue 2002, p. 20.

[359] Commission Decision relating to a proceeding under Article 86 of the EEC Treaty (IV/30.698-ECS/AKZO), [1985] OJ L374/1, para 79.

[360] Case C-62/86 *AKZO Chemie BV* v. *Commission of the European Communities* [1991] ECR I-3359.

[361] Jones and Sufrin 2008, p. 450.

[362] See Posner 1976, p. 188 and Areeda and Turner 1976, p. 706.

[363] See Yamey 1972 and Edlin 2002.

In this context it is interesting to note the Court's position on recoupment of losses resulting from pricing below cost. In *Tetra Pak II*[364] it stated that it was not necessary to demonstrate that 'the undertaking in question had a reasonable prospect of recouping losses so incurred.'[365]

Therefore, whenever an undertaking is active on a reserved and on a competitive market there will always be the danger of cross-subsidy. Predatory pricing is not very likely to occur because it is more a speculative behaviour. Some types of cross-subsidisation are accepted following the application of the exemption contained in Article 106 (2) TFEU (ex Article 86(2) EC. Other types of cross-subsidisation are prohibited. Fair competition requires fair opportunities for all competitors on a market. A solution to avoid cross-subsidy is the separation of accounts. However, this is sometimes difficult to achieve because of the presence of common costs. As has been shown, there are several tests to determining whether there is cross-subsidy. When the Court had to deal with an undertaking holding an exclusive right on a reserved market but simultaneously involved in providing services on an ancillary market, it was very generous in allowing the fixed costs to be passed on to the reserved sector. However, when it dealt with cross-subsidy and predatory pricing in *AKZO* it decided that there was abuse when prices were below average variable costs and that there is a grey area when prices are below total costs, but above variable costs. In such circumstances other requirements have to be fulfilled.

A better solution for the problem of cross-subsidisation is to allocate common costs between the reserved and competitive market. This would ensure competition on an equal footing. However, there are different methods to allocate the common costs: 'it can allocate costs in proportion to the intensity of use, to the time of use, the volumes or other objective criteria.'[366]

4.4.3.2 Exclusive Rights and Free Movement Provisions

As stated above, Article 106 TFEU (ex Article 86 EC) applies in conjunction not only with competition rules but also with free movement rules. The importance of services of general interest is reflected in the fact that the exemptions contained in Article 106 (2) TFEU (ex Article 86 (2) EC also apply to internal market rules regarding free movement.

In the case of free movement provisions, regulatory intervention by the State can raise obstacles to trade. The broad interpretation of what constitutes an obstacle to trade had led to a large number of state measures being classified as restrictions. Whenever the granting of an exclusive right is qualified as a restriction

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[364] Case T-30/89 *Tetra Pak International SA* v. *Commission of the European Communities* [1991] E.C.R. II-1439.

[365] Ibid., para 150.

[366] Hancher and Buendia Sierra 1998.

to free movement, the fact that the service provided is a service of general economic interest can be safeguarded only by exceptions expressly provided in the Treaty. The mandatory requirements created by the Court cannot be used since an exclusive right is by its nature discriminatory. Moreover, the restrictions contained by the free movement provisions receive a strict interpretation and only non-economic aims are accepted as the basis for exemptions.[367]

Exclusive rights can infringe free movement provisions. For example, in Telecommunications Terminal Equipment[368] the Court ruled that exclusive importation and marketing rights in the telecommunication terminal sector are capable of restricting intra-Community trade. In *Port of Genoa*[369] the Court stated that a measure that facilitated the abuse of a dominant position and which was capable of affecting trade between Member States is contrary to free movement of goods provisions.

In the case of the health insurance market, the granting of exclusive rights to certain funds, confined to the national territory or the sharing of the market between a few national funds can be considered infringements of free movement provisions. Exclusive rights have to thus pass two filters, the competition rules and the free movement provisions.

Since free movement provisions deal with state measures, the question of whether the exceptions contained in Article 106(2) TFEU (ex Article 86(2) EC) apply to the restrictions resulting from this type of provisions was addressed in *Campus Oil*.[370] According to the Court, 'Article 90(2) [now Article 106(2) TFEU] does not however, exempt a Member State which has entrusted such an obligation to an undertaking from the prohibition on adopting, in favour of that undertaking and with a view to protecting its activity, measures that restrict imports from other Member States contrary to Article 30 (now Article 28) of the Treaty.'[371] Thus the Court refused to apply Article 106(2) TFEU (ex Article 86(2) EC) to State measures contrary to the free movement provisions. However, this approach was not continued by the Court.

In *Port of Genoa*[372] and *GB-Inno*[373] the Court accepted that Art 86(2) can be applied to a state measure which infringed free movement of goods provisions.

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[367] Case C-189/95 *Criminal proceedings against Harry Franzen* [1997] ECR I-5909.

[368] Case C-202/88 *French Republic* v. *Commission of the European Communities* [1991] ECR 1223, para 36.

[369] Case C-179/90 *Merci convenzionali porto di Genova SpA* v. *Siderurgica Gabrielli SpA* [1991] ECR I-5929, para 21.

[370] Case 72/83 *Campus Oil Ltd and others* v. *Minister for industry and energy and others* [1984] ECR 2752.

[371] Ibid., para 19.

[372] Case C-179/90 *Merci convenzionali porto di Genova SpA* v. *Siderurgica Gabrielli SpA* [1991] ECR I-5929.

[373] Case C-18/88 *RTT* v. *INNO-BM SA* [1991] ECR I-5973.

In *Dutch* and *Italian Electricity Monopoly*[374] the Court states that Article 106(1) TFEU (ex Article 86(1) EC) should be interpreted to ensure that the Member States do not circumvent Treaty prohibitions such as those in Articles 28, 29 and 31 by using their influence over undertakings and obliging or forcing them to engage in conduct contrary to those rules. The Court acknowledged the use of Article 106(2) TFEU (ex Article 86(2) EC) to justify restrictions to Article 37 TFEU (ex Article 31 EC) only on the condition that the performance of the tasks assigned to the undertaking entrusted with exclusive rights would not be possible without the grant of such rights.

In the *French gas* and *electricity case*[375] the Commission contended that Article 106(2) TFEU (ex Article 86(2) EC) cannot be used to justify State measures incompatible with free movement provisions. However, the Court ruled to the contrary, stating that Article 106(2) TFEU (ex Article 86(2) EC) could be invoked as an exception for Article 37 TFEU (ex Article 31 EC) when the undertaking was entrusted with a service of general interest and when the application of free movement provisions would obstruct the performance in law or in fact of the obligations entrusted to that undertaking. It is not necessary for the survival of the undertaking to be under threat.

The granting of exclusive rights in the case of welfare services could infringe free movement provisions and it is important to have a safeguard such as the one offered by Article 106(2) TFEU (ex Article 86(2) EC) EC which requires a less strict test than the exceptions existent under the free movement rules. Vedder[376] raises an interesting question related to the application of Article 106(2) TFEU (ex Article 86(2) EC) to the free movement provisions, asking how the economic reasoning found in Article 106(2) TFEU (ex Article 86(2) EC) can justify a restriction to the free movement of goods. He suggests that the "Court should be willing to recognise the underlying non-economic objectives of restrictions of the free movement of goods that are based on economic reasoning."

4.4.4 Exceptions: Article 106(2) TFEU (ex Article 86(2) EC)

Once the prohibitions have been infringed the next step is to determine whether the exceptions apply. Since the application of competition rules to former public monopolies has a great impact when it comes to welfare services, the exceptions are of major importance. This is the stage at which the interests of Member States

[374] Case C-157/94 *Commission of the European Communities* v. *Kingdom of the Netherlands* [1997] ECR I-5699, paras 30–32; Case C-158/94 *Commission of the European Communities* v. *Italian Republic* [1997] ECR I-5789, paras 41–43.

[375] Case C-159/94 *Commission of the European Communities* v. *French Republic* [1997] ECR I-5815.

[376] Vedder 2001, p. 116.

are protected. As Pappalardo[377] states, Article 90 of the EEC Treaty (Article 86 EC; now Article 106 TFEU) has experienced a curious fate: initially it appeared that the article would never play any role in European Union integration. This Article was introduced at the insistence of the Benelux countries, which feared unfair competition due to State intervention from some economies. Article 106(2) TFEU (ex Article 86(2) EC) was introduced at the insistence of France which wanted to have some sort of safeguard that competition rules would not affect some domains that were thought to be State's responsibility.

Thus Article 86 appears to be a genuine compromise meant to avoid distortions of competition from the public sector on the one hand and to protect services of general economic interest from the rules of competition on the other. Fears that the application of competition rules could lead to the inability of undertakings entrusted with the operation of services of general economic interest to perform their tasks led to the introduction of para 2 to Article 86.

While initially there was not much scope for the application of Article 86, the extensive interpretation of what constitutes an economic activity led to increasing attention being paid to Article 106(2) TFEU (ex Article 86(2) EC). 'In the context of increasing liberalisation throughout the European Union the debate about the scope of the exception in Article 90(2) (now Article 106(2) TFEU (ex Article 86(2) EC)) soon took an unexpected political dimension.'[378]

A pertinent question that can be raised is whether the exception contained in Article 106(2) TFEU (ex Article 86(2) EC) provides sufficient safeguards for the protection of public services. The antagonism between the economic and social issues appears to be irreconcilable. Some argue that special protection should be granted to these public services that competition rules should not interfere and that European Union law should not reshape the organisation of these services. However, the antagonism is only apparent because social and economic elements coexist in the same type of service. This leads to the conclusion that the rules intended to protect the social aspects and the rules meant to ensure competition can coexist.

The analysis now turns to the application of exceptions to see how the balance is ensured. It can be argued that the cases are often confined to their own facts, but can some patterns be found?

4.4.4.1 Services of General Interest

The subject of services of general interest is going to be further detailed in the next chapter. The scope of this subchapter is to shortly introduce few concepts such as services of general economic interest, public services, universal services and services of general interest. For the scope of Article 106(2) TFEU (ex Article 86(2)

[377] Pappalardo 1991, pp. 29–39.

[378] Buendia Sierra 1999, p. 274.

EC) EC it is interesting to see what is a service of general economic interest, since an undertaking entrusted with the provision of such a service of general economic interest benefits from exemption from the application of competition rules.

In the Communication from the Commission on services of general interest[379] few definitions are given:

Services of general interest are defined as:

> This term covers market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.

Services of general economic interest are defined as:

> This is the term used in Article 86 of the Treaty and refers to market services which the Member States subject to specific public service obligations by virtue of a general interest criterion. This would tend to cover such things as transport networks, energy and communications.

Public service is defined as:

> This is an ambiguous term since it may refer either to the actual body providing the service or to the general interest role assigned to the body concerned. It is with a view to promoting or facilitating the performance of the general interest role that specific public service obligations may be imposed by the public authorities on the body rendering the service, for instance in the matter of inland, air or rail transport and energy. These obligations can be applied at national or regional level. There is often confusion between the term public service, which relates to the vocation to render a service to the public in terms of what service is to be provided, and the term public sector (including the civil service), which relates to the legal status of those providing the service in terms of who owns the services.

Universal service is defined as:

> Universal service, in particular the definition of specific universal service obligations is a key accompaniment to market liberalisation of service sectors such as telecommunications in the European Union. The definition and guarantee of universal service ensures that the continuous accessibility and quality of established services is maintained for all users and consumers during the process of passing from monopoly provision to openly competitive markets. Universal service, within an environment of open and competitive telecommunications markets, is defined as the minimum set of services of specified quality to which all users and consumers have access in the light of specific national conditions, at an affordable price.

In distinguishing between universal services and public services, Nihoul and Rodford[380] find that both have common objectives: the need to be provided at a certain quality level; they need to be affordable; they must be available. Equality is an objective of the public services. The distinction between these two is made taken as an example the telecommunication services. The public services regime had two aspects: activities were not left to private undertakings; activities were subject to

[379] Communication from the Commission-Services of general interest in Europe [2001] OJ C 17/04.

[380] Nihoul and Rodford 2004, p. 612.

specific rules. There are specific obligations imposed to ensure their performance. In the case of the universal services, public ownership is not prohibited, but not excluded either; markets are opened to competition and protection from competition is prohibited; obligations are imposed on all undertakings.[381]

In defining services of general interest, Nihoul and Rodford state:

> This expression [services of general interest] designates a technique used in general competition law in order to designate services established by national authorities and functioning under a special regime as regards the application of these rules. Unlike the two other concepts, services of general interest cannot be regarded as a policy-oriented idea. The expression rather designates a technical instrument meant to verify to what extent a national policy may be implemented in derogation of Treaty rules, in particular competition rules.[382]

The case-law might create confusion in associating public services and universal services. In Nihoul and Rodford opinions this is due to the fact that the cases were dealt during the liberalisation process. During the transition from public service to universal service, universal services were not yet organised and Member States still imposed policy objectives in the sectors involved.[383]

It is interesting to see who defines what is a service of general economic interest. Is it a Community or a national concept? "Suppose the decision is granted to the European institutions- for instance the Commission. The margin left to Member States will be limited. By contrast, any power granted to Member States to decide whether an item qualifies for an Article 106(2) TFEU (ex Article 86(2) EC) derogation implies that they have a substantial margin of manoeuvre in determining how entire sectors of the economy may be organised."[384]

In BUPA the Court stated that:

> That prerogative of the Member State concerning the definition of SGEIs is confirmed by the absence of any competence specially attributed to the Commission and by the absence of a precise and complete definition of the concept of SGEI in Community law.[385]

However, even if the definition is left to the Member State, still, it is subject to European Union scrutiny for manifest error. This means that is certain European Union supervision over what Member States include in this concept. This is necessary since otherwise, Member States might use the services of general economic interest cover to hide different protectionist measures. In the same judgement in BUPA the Court asks Member States to establish "certain minimum criteria common to every SGEI mission within the meaning of the EC Treaty, as explained in the case-law, and to demonstrate that those criteria indeed satisfied the particular case. These are notably, the presence of an act of public authority

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381 Ibid., 614–615.

382 Ibid., 615.

383 Ibid., 617.

384 Ibid., 599.

385 Case T-289/03 *British United Provident Association Ltd* (*BUPA*) *and Others* v. *Commission of the European Communities* [2008] ECR II-00081, para 166.

entrusting the operators in question with an SGEI mission and the universal and compulsory nature of that mission."[386]

Thus, there is a large margin of discretion left to the Member States to define SGEI; however, this discretion is not unlimited. Member States have to fulfill some minimum criteria. In the Protocol on services of general interest annexed to the Lisbon treaty there are inserted the shared values which SGEI must contain: "a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights."

4.4.4.2 What Types of Exceptions?

In applying the exemptions under Article 106(2) TFEU (ex Article 86(2) EC) there is a need to identify the type of exceptions that are applied first, thereafter the proportionality principle determines whether the services of general interest receive protection from the Treaty articles.

The wording of Article 106(2) TFEU (ex Article 86(2) EC) states that the rules contained in the Treaty and the competition rules in particular do not apply to undertakings entrusted with the operation of services of general economic interest or a revenue-producing monopoly if the application of such rules obstruct the performance, in law or in fact, of the particular tasks entrusted to the undertaking.

As is evident, special protection is granted with regard to the fact that the services in question are services of general economic interest. This subject is treated in more detail below. Services of general economic interest are defined as 'market services which the Member States or Community subject to specific public service obligations by virtue of a general interest criterion.'[387] Typically, these services are characterised by market failures and state intervention is required. This is the point at which the national and European Union interests intersect. The balance between these two is ensured by the application of the proportionality principle.

Various reasons are invoked in defending exclusive rights: the obligation to provide a universal service, security of supply and the maintenance of financial equilibrium. Mainly, all defences are reduced to arguing that the service in question cannot be provided in a competitive environment. How much restriction of competition is allowed and to what extent the competition rules can be set aside, remains to be decided by the Court on a case-by-case basis.

The main difference between the application of free movement exceptions and the exception contained in Article 106(2) TFEU (ex Article 86(2) EC) is that the latter exception refers to some rules which could infringe the Treaty that are actually vital for the functioning of that service. For example, in the case of free

[386] Ibid., para 172.

[387] Communication on services of general economic interest [2001] OJ C17/4, Annex II.

movement provisions, different reasons could be employed to justify why an obstacle should be accepted, but economic interests cannot be used.

In the case of Article 106(2) TFEU (ex Article 86(2) EC) economic justifications are accepted. In the case of competition rules it is accepted that there is no need to prove that the financial balance or economic viability of the undertaking is threatened. It is acknowledged that the proper functioning of these services is necessary and that in the absence of this the undertaking cannot perform the tasks it is entrusted with. Accordingly, the stricter requirements of the free movement provisions do not apply here.

4.4.4.3 Proportionality

4.4.4.3.1 Introduction

The principle of proportionality is the one that balances different interests that need to be accommodated. It is hard to establish a clear hierarchy of different interests. The Court accepts that some interests could be used to justify various restrictions and these are given precedence. However, the precedence is not invariable and everything is subjected to the proportionality principle. Since there is no established hierarchy, what the proportionality principle tries to establish is to what extent opposing rights should be restricted 'in order to optimise their effectiveness.'[388] Schwarze,[389] referring to the historical origins of the proportionality principle, states: 'where intervention by the public authorities is justified by reference to social objectives, such intervention must be limited by its effectiveness and consequently also by its proportionality in relation to the interest it seeks to defend.' Thus, at any level, the solution for conflicting interests can be found in the proportionality principle.

Interestingly, there is no fixed test for the application of the proportionality principle. Thus the balance of interests at European Union level and the proper protection of social interests are ensured not only by the application of the proportionality principle, but also by a flexible interpretation of this principle.

Tridimas noted that 'in Community law, far from dictating a uniform test, proportionality is a flexible principle which is used in different contexts to protect different interests and entails varying degrees of judicial scrutiny.'[390]

In applying the proportionality principle it is interesting to observe what the 'appropriate level of review'[391] is. Jacobs addresses pertinent questions, querying the intensity of review, how far the Court can go in reviewing national measures and whether the principle should be applied by the Court or whether the Court

[388] Schwarze 2006, p. 690.
[389] Ibid., 679.
[390] Tridimas 1999, p. 69.
[391] Jacobs 1999.

should merely give guidance.[392] These are questions that reveal problems related to legal certainty, since the Court applies a different intensity of review to the proportionality principle depending on the issues involved and because the Court usually leaves the decision to the national Courts.

Criticism has been brought to the application of the proportionality principle, especially to its application in its rigorous forms 'on grounds that it goes beyond the judicial function.'[393] Jacobs states that 'courts are not well suited to evaluating social, economic or political choices.'[394]

Indeed, it is true that social, economic or political choices should belong to Member States. However, for the sake of integration, some aspects of the welfare systems may need to undergo changes. When applying a rigorous proportionality test, the Court sometimes requires the use of alternatives which could be considered less intrusive. However, in the case of welfare services, the Court is more considerate in applying the proportionality principle in the context of the competition rules. It is important to have competition rules applied once the competition elements have been introduced into the system, and it is also important to allow Member States to ensure the proper functioning of their welfare systems. What the Court does is to establish a balance between these two interests by applying a flexible test.

4.4.4.3.2 Flexibility of the Proportionality Test

The exception contained in Article 106(2) TFEU (ex Article 86(2) EC) should be interpreted strictly.[395] In pursuing certain social and economic aims, Member States are free to organise their social security systems and they thus have a margin of discretion. However, by applying a strict interpretation of the exceptions, Member States' discretion is restricted. The question is how strict the interpretation of the exception should be?

Drawing a parallel between the exceptions to the free movement provisions and the exception contained in Article 106(2) TFEU (ex Article 86(2) EC), there are differences between these two types of exceptions. As we saw in the previous section,[396] economic interests cannot be used to justify infringements of free movement provisions. Buendia Sierra[397] states that

> the objective exception contained in Article 86(2) is stated as being to guarantee the fulfillment of certain objectives of general economic interest. […] The distinction

[392] Ibid., 8.

[393] Ibid.

[394] Ibid.

[395] Case C-157/94 *Commission* v. *Netherlands* [1997] ECR 523, para 37.

[396] See Sect. 3.5.2.1.1.

[397] Buendia Sierra 1999, p. 302.

commonly made is that in the case of Article 86(2) the objective is economic, whereas in the case of Article 30 and mandatory requirements it is non-economic.

However, he continues by stating that in reality, the objectives protected by Article 106(2) TFEU (ex Article 86(2) EC) are also non-economic.

In interpreting the proportionality principle applied in the context of Article 106(2) TFEU (ex Article 86(2) EC), Buendia Sierra draws a distinction between a strict and flexible interpretation of the proportionality principle. When applying the strict interpretation of the principle of proportionality the question asked is whether there are less restrictive means to achieve the objective pursued. If there are less restrictive means this leads to the conclusion that the exclusive rights are not indispensable to the achievement of the goal pursued. 'The supporters of a more flexible interpretation argue that the elimination of an exclusive right would make the maintenance of a universal service much more difficult, by ruling out the possibility of the undertaking financing these requirements itself and by obliging the undertaking to have recourse to external financing from the State.'[398]

The application of the principle of proportionality to exclusive rights is different from its application to the free movement provisions; in the latter case the exceptions would be accepted only if financial stability was endangered. In the case of Article 106(2) TFEU (ex Article 86(2) EC) the Court has held that in order to apply an exemption it is not necessary that the survival of the undertaking to be threatened.[399] It is sufficient to prove that the application of competition rules would obstruct the performance of the special obligations entrusted to the undertaking. Comparing competition and free movement provisions, it is apparent that the test used in competition cases is more flexible.

A flexible interpretation of the proportionality principle to the competition rules implies inquiring into whether there are other means of attaining the objective pursued and whether those alternatives would not make the provision of that service more difficult.[400] In the case of free movement provisions, less restrictive alternatives should be used and then only if the provision of the service was to be endangered would the restrictions be accepted. This is because free movement rules aim at creating the internal market, removing any obstacles and are mainly addressed to individuals. With competition rules, however, restrictions are more easily accepted when a balance between economic and social aims has to be drawn, since the main aim of competition is economic efficiency.

The exclusion of competition under Article 106(2) TFEU (ex Article 86(2) EC) is accepted 'in order to allow the holder of the exclusive rights to perform its task of general interest and in particular to have the benefit of economically acceptable conditions.'[401] However, the Court does not define what is meant by economically

[398] Ibid., 306.

[399] Case C-157/94 *Commission* v, *Netherlands* [1997] ECR 523, para 43.

[400] Buendia Sierra 1999, p. 306.

[401] Case C-320/91 *Corbeau* [1993] ECR I-2533, para 16.

acceptable conditions. The question that is now addressed is to what extent the competition rules can be set aside.

The case-law regarding the application of Article 86 to different state monopolies such as telecommunications, postal services, energy and transport provides some guidance with regard to how the exception contained in para 2 of Article 86 is applied.

In *Sachi*[402] the Court applied a strict interpretation of the exemptions. It stated that since exemptions are to be interpreted restrictively, it is not sufficient that the performance of the service of general interest be simply hindered or made more difficult. In *Corbeau*[403] it was argued that the resources needed to compensate non-profitable sectors of activity do not have to come from general interest activities. The Court stated that with regard to ancillary markets, the exclusion of competition was not justified but, accounting for the conditions in which such specific services were provided and their nature, the extension of exclusive rights to the additional markets was accepted in so far as the economic equilibrium of the service of general interest performed by the undertaking holding the exclusive rights was endangered.[404]

The relaxed interpretation adopted in *Corbeau* allowed the undertaking to cross-subsidise. The Court considered that private undertakings would provide services only for the profitable parts of the market and consequently would skim the cream. If profits from the profitable market are necessary in order to offset the losses from the unprofitable market, then an extension of the exclusive rights from the basic market to the additional market was allowed, and the Court did not look for the alternative measures that could have been used to finance the losses. The *Corbeau* judgement is consequently a turning point.

In *Almelo*[405] the Court stated that restrictions to competition were allowed if they were necessary for the undertaking to perform the task of general interest. The Court stated that in allowing the disapplication of the competition rules, the economic conditions in which the undertaking operates should be taken into consideration, especially the costs that it has to bear and the legislation to which it is subject. Thus the Court provides a few guidelines regarding the elements that must be taken into consideration when setting aside competition rules.

AG Darmon[406] adopted a strict interpretation of the exceptions, considering that competition rules are disapplied only where it is shown that the application of those rules is incompatible with the performance of services of general interest. He maintained that the exception contained in Article 106(2) TFEU (ex Article 86(2) EC) could be applied only if it were demonstrated that no other means existed to

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[402] Case 155/73 *Sacchi* [1974] ECR 409, para 15.

[403] Case C-320/91 *Corbeau* [1993] ECR I-2533, para 19.

[404] Ibid., para 19.

[405] Case C-393/92 *Almelo* [1994] I-1477, para 49; See Hancher 1995.

[406] Opinion of Advocate General Darmon given in Case 393/92 *Municipality of Almelo and others* v. *NV Energiebedrijf Ijsselmij* [1994] ECR I-1477.

achieve the objectives pursued and that the exclusive purchasing rights were the only means available.

When analysing the cross-subsidisation between profitable and non-profitable routes in *Air Inter*,[407] the Court of First Instance underlined the necessity of performing an economic analysis. The French authorities put forward the justification that an exclusive right was necessary to contribute to regional development. However, they failed to show that in the event of competition on that specific market there would be a loss of income, and they failed to show whether that loss of income would lead to the impossibility of providing services on certain routes. In analysing whether competition rules could be set aside, the Court of First Instance draws a distinction between the means and ends of the public service. In this case the exclusive rights were only a means intended to achieve regional development. It considered that there are other means to achieve that end, and consequently that the exemption contained in Article 106(2) TFEU (ex Article 86(2) EC) could not be used to allow the exclusive rights.

In deciding whether a strict or flexible test should be applied, Buendia Sierra identifies few principles that must be taken into consideration. First, he considers it important to distinguish between means and ends, which are of great importance to the proportionality principle, as the Court did in *Air Inter*. He also distinguishes between traditional and newly established exclusive rights and considers that a more flexible proportionality test should be used with regard to traditional exclusive rights. Moreover, in applying the proportionality principle, it is necessary to perform an economic analysis, aiming to quantify the costs incurred by the universal service, to quantify the benefits brought by the granting of the exclusive rights and to compare these figures. Other advantages granted to that undertaking, for example state aid, should also be taken into account. The burden of proof should be on the party invoking the exception.

The application of a stricter proportionality test can be interpreted as an interference with the States' right to choose the type of system they desire. For example, if a State has a certain organisation of the health insurance system which is found to be restrictive of competition, State aids can be always found to be less restrictive alternative measures to the existing exclusive rights.

In *Albany*[408] it is contended that there were less restrictive measures which could have been adopted such as laying down minimum requirements for pensions. The Court followed its approach, stating that Article 106(2) TFEU (ex Article 86(2) EC) sought to reconcile Member States' interests in using certain undertakings as instruments of economic or fiscal policy with the Community's interest in ensuring compliance with competition and internal market rules. It continued by stating that the Member States could not be precluded from deciding what services of general economic interest they entrust to certain undertakings. It was recognised

[407] Case T-260/94 *Air Inter* [1997] ECR II-0997.

[408] Case C-67/96 *Albany International BV* v. *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

that the supplementary pension scheme fulfilled an essential social function, and that the importance of the supplementary pension scheme was also recognised by European Union law. In determining whether Article 106(2) TFEU (ex Article 86(2) EC) applied, the Court looked at whether in the absence of the rights at issue the undertaking was placed in the position of not being able to perform the tasks entrusted to it, or whether without those rights the undertaking would not be able to perform the tasks under economically acceptable conditions. Without the existence of the exclusive rights it was considered that undertakings with young employees in good health and engaged in non-dangerous activities would seek more advantageous insurance. The remaining unattractive risks would increase the cost of pensions and the funds would not be able to offer pensions at an acceptable cost. All these elements of solidarity, which had been insufficient to exempt the undertaking from competition rules, were considered when the proportionality test was applied. Thus, the obligation to accept all workers without prior medical examination, the fact that contributions did not reflect the risk that the pensions rights continued to accrue despite exemption from the payment of contributions in the event of incapacity for work, the discharge by the Fund of arrears of contributions due from an employer in the event of insolvency and the indexing of the amount of the pensions to maintain their value,[409] all combined to make the service provided by the Fund less competitive than other private undertakings and thus require an exemption. With regard to the argument that there were less restrictive measures that could have been taken such as minimum requirements for pensions offered by insurance companies, the Court stated that it was up to each Member State to decide what the minimum requirements should be and the level of protection that it sought to guarantee. Therefore, the Court adopted a flexible proportionality test, stating that even if there were less restrictive measures, it would have been an interference with the Member States' right organise their security systems.

The fact that the Court did not engage in determining whether there were less restrictive means was considered by some authors[410] as disappointing. The Court referred to *Duphar*[411] and stated that the Member States have discretion and that it is up to the Member States to decide what level of protection they considered appropriate. Thus the Court takes a 'deferential attitude on the proportionality issue.'[412]

With regard to the analysis of the application of the proportionality principle, the Advocate General noted that in deciding whether the Dutch system of compulsory affiliation went beyond what is necessary to achieve the objective of an adequate level of social protection, there were still too many disputed points with regard to the factual background. He stated that there were certain funds that

[409] Ibid., para 109.

[410] See Gyselen 2000, pp. 425–448.

[411] Case 238/82 *Duphar and Others* [1984] ECR 523, para 16.

[412] Gyselen 2000, pp. 425–448.

survived in the absence of compulsory affiliation and that the parties disagreed on whether and to what extent average contributions and benefits were a typical feature of Dutch supplementary pension funds. He concluded that a detailed examination of the economic, financial and social matters was required and that it was up to the national courts to decide whether the Fund would not be able to satisfy demand or whether the performance of services of general interest would be obstructed without the exclusive rights.

With regard to the fact that the Fund fulfilled a dual role—as the manager of the pension scheme and as the authority entrusted with the power to grant exemptions from compulsory affiliation—the Court found that the conditions for granting exemptions were already established by law and that the fund's responsibility was to check if the conditions laid down by law were fulfilled. The exercise of the power to grant exemption required an evaluation of complex data relating to the pension schemes involved and the financial equilibrium of the fund and thus the fund was the body in the better position to make such an assessment. However, guarantees that the exemption would not be granted in an arbitrary and discriminatory manner were necessary, hence the decisions of the fund were subject to the review of the national courts. Thus, the circumstances were different to *GB-Inno-BM*.

In *Ambulanz Glöckner*[413] the Court had to determine whether the national provision granting exclusive rights for non-emergency transport could be justified on the basis of the undertaking being tasked with operating a service of general economic interest, within the meaning of Article 106(2) TFEU (ex Article 86(2) EC) of the Treaty. The main argument put forward to defend the exclusive rights was that the exclusive rights for non-emergency transport were necessary in order to offset the losses incurred by emergency transport services. The undertaking was tasked with providing non-stop emergency transport services, throughout the whole territory, which required costly investment in equipment and qualified personnel. It was argued that without the exclusive rights, private operators would focus only on the profitable parts of the market.

The Court applied the flexible test identified in *Corbeau* and asked whether the restriction or even the elimination of competition was necessary in order to ensure the performance of a particular task assigned to that undertaking. It accepted that in order to perform its tasks in conditions of economic equilibrium it was permissible to offset less profitable sectors against profitable sectors. It restated the ruling in *Corbeau* that the exclusion of competition for those parts of the market severable from the services of general economic interest is accepted only in so far as the economic equilibrium of the service of general interest performed is not compromised. Furthermore, it noted that in the present case these services were linked and it was difficult to sever non-emergency transport services from emergency transport services. However, Advocate General Jacobs argued that even if it was necessary to compensate less profitable sectors from profitable sectors, if there

[413] Case C-475/99 *Firma Ambulanz Glöckner* v. *Landkreis Südwestpfalz* [2001] ECR I-8089.

were an inability to meet demand, the justification could not be applied. The Court left the national court to decide whether the medical organisation in question was capable of satisfying demand and thus determine whether the exception contained in Article 106(2) TFEU (ex Article 86(2) EC) applied.

Drawing a parallel with the developments that have occurred in the field of postal services and telecommunications, services that have been subjected to liberalisation and where state monopolies have been challenged, it is apparent that the approach taken in applying competition rules to these services was dynamic.[414] Aiming at removing restrictions to competition but at once making sure that the universal service benefited from safeguards to ensure effective provision, a flexible assessment was applied at the initial phase and a restrictive approach was followed later. For example, in the telecommunication sector, some restrictions were accepted to achieve modernisation of the telecommunication networks and total coverage. Once this goal had been achieved, the restrictions imposed on ancillary markets, initially allowed merely for the sake of fulfilling the universal service tasks, were considered as no longer necessary.

A flexible test was applied in the postal sector, a stricter one in the telecommunication sector, while in the air transport cases, the strict interpretation was applied to examine other existing alternatives and find that the fact that state subsidies could have been used to finance the less profitable routes meant that the proportionality principle had not been respected. Therefore, depending on the sensitivity of the sector, the Court adopts a different intensity of proportionality principle review. This means that the proportionality principle is an instrument which adapts to different situations. It is not a strict rule that applies indistinctly to different situations, but a very flexible rule that allows different interests to be given different consideration. Moreover, the principle of proportionality is a dynamic concept, which means that a different intensity of review is applied in the same sector at different times, depending on the interests pursued.

As the Commission states, universal service is a 'dynamic and evolving concept and must respond to changes in the needs and expectations of European's citizens.'[415] Writing on the liberalisation of State monopolies, Gerardin[416] states that the concept of 'deregulation' used to describe the liberalisation process is misleading because in fact liberalisation is just a change in the style of regulation. Applying this to welfare services, it becomes apparent that once deregulation is effected through the Court's judgements, a legislative lacuna will appear.

Drawing a parallel with the other service sectors that were considered universal services, it is clear that while liberalisation was an aim in the case of the other universal services (telecommunication, energy, postal services), in the case of

[414] See Buendia Sierra 1999, Edward and Hoskins 1995, p. 167, Hatzopoulos 1994, pp. 67–90 and Kovar 1996.

[415] Communication of the Commission, Universal Service for Telecommunications in the Perspective of Fully Liberalised Environment, COM (96) 73.

[416] Gerardin 2000, p. 181.

welfares services the application of competition rules does not form part of a liberalisation plan but is rather merely a necessity present to ensure the better functioning of those services which had already been liberalised by state decision. Since some states choose to involve private parties in the provision of welfare services, it is important that a competitive environment is maintained, since liberalisation is not sufficient to bring competition on its own.

In the liberalised sectors experience shows that the intervention of European Union legislation was more efficient than judicial intervention.[417] At the moment, however, positive European Union involvement in the field of welfare may need to wait.

It is hard to assess the effects of the liberalisation of former state monopoly services. One important change is that there is more diversity on the market. As a result of the changing of the provision of the welfare services the consumer is transformed from the passive consumer into an active one. The role of the consumer changes.

4.5 State Aid

4.5.1 Introduction

State involvement in the provision of services in the market varies to different degrees. Since the need for more efficiency led to the introduction of more market elements in fields which were previously state monopolies, the qualification of those services as economic determined the application of competition rules. The application of state aid rules poses intricate problems due to the mixture of public and private, and especially due to the mixture of economic and non-economic elements found sometimes in the same undertaking. 'Major difficulties arise with those aids which are not transparent but are hidden in the jungle of legislative and administrative powers exercised by State authorities.'[418]

In determining whether there is state aid[419] or not, several conditions must be fulfilled: an advantage must be conferred on an undertaking; the aid should be granted through State resources; the aid should distort or threaten to distort

[417] Ibid., 185.

[418] Quigley 1988.

[419] For state aid analysis see: Bacon 1997a, La Chimia 2007, pp. 513–534, Hancher et al. 2006, Kurcz and Vallindas 2008, pp. 159–182, Ross 1989, p. 167, Slootboom 1995 and Winter 2004, pp. 475–504.

competition; the aid should have an effect on inter-state trade.[420] The application of state aid to welfare services could raise several problems. Because the sectors involving this kind of service are highly regulated, this can present difficulties in distinguishing between general measures of economic policy and state aid. Welfare services contain social elements and qualify as services of general interest. It is interesting to see what legal framework applies to these services to provide them with the special protection that they require. The market failures that characterise services of general interest can require the provision of state aid to satisfy the financial needs of the undertakings entrusted with the operation of public service obligations. The fact that an undertaking can provide other services on a competitive market in addition to services of general economic interest raises problems related to cross-subsidisation. For example, health insurers can be engaged in providing services on a basic statutory market but can also be involved in providing supplementary insurance and ambulance services could be involved in providing services of general interest and services on an open market. In the field of education there are situations where the services provided have a commercial character (for instance, universities sometimes provide research services, organise conferences, or provide consultancy,[421] required and paid for by third parties) which could raise issues related to state aid.

The fact that welfare services are often characterised by market failures often requires more state intervention to ensure a good provision of the service. The Commission in its State Aid Action Plan[422] considers state aid as a 'second best' option because distortions of competition arise. It therefore considers that other, less distortive measures should be explored to remedy a market failure.

Member States have wide discretion in defining the nature and content of services of general economic interest. The Commission's role is to ensure the efficient functioning of these services and simultaneously ensure that the aid granted to the undertakings entrusted with the provision of services of general economic interest does not exceed what is necessary for the undertaking to perform those services under conditions of financial equilibrium.[423]

It is important to know the scope of European Union rules on state aid. Problems related to what constitutes an aid need to be clarified: what constitutes state

[420] Some authors consider that the test involves determining whether five conditions are met: '(a) aid must be granted by the state or through state resources; (b) this aid must confer and advantage to the recipient; (c) the advantage must favour certain (selected) undertakings or economic activities; (d) aid must affect trade between Member States; and (e) aid must distort competition in the common market'; see Nicolaides et al. 2005, p. 10.

[421] See Case C-380/98 *The Queen ex parte The University of Cambridge* v. *H.M. Treasury* [2000] ECR I-8035.

[422] State Aid Action Plan-Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005–2009 COM 2005 107 final, 7.

[423] Report from the Commission on the state of play in the work on the guidelines for state aid and services of general economic interest (SGEIs), available at http://ec.europa.eu/competition/state_aid/studies_reports/sieg_en.pdf.

aid, does compensation for public service obligation constitute state aid and what are the necessary conditions to disapply the rules on state aid?

Aid should be granted to the extent necessary to cover market failure. What exceeds this has a distortive effect on competition. On the one hand, state aid is necessary for the proper functioning of services of general economic interest, on the other hand anything beyond what is necessary to ensure proper functioning has a harmful effect on the competitive environment. Under these circumstances a balance is required to secure the proper provision of services of general economic interest but also an undistorted competitive environment.

This section looks at the application of state aid rules to welfare services. As this deals with services of general economic interest the exception contained in Article 106(2) TFEU (ex Article 86(2) EC) has significant importance. It is interesting to see how the Court deals with state aid granted to undertakings entrusted with public service tasks and what kind of protection is granted to these services.

A stricter control of state aid rules requires separate accounting in undertakings that provide services of general interest and services for the open market. Separate accounts require a better definition of costs, making undertakings more aware of the costs of the services and perhaps stimulating greater efficiency. The fact that in order to be considered as being outside the state aid rules a number of requirements have to be met, such as the entrustment of contracts to a public procurement procedure, this constitutes a first step towards the identification of costs.

The State appears to be as a limitless supply funding and the introduction of market elements entails competition and implicitly of state aid rules that lead to more control over existing costs. It is interesting to see how state rules apply to welfare services and how much protection is ensured by the exceptions contained in Article 106(2) TFEU (ex Article 86(2) EC).

The application of state aid rules aims at eliminating distortions of competition, and at eliminating the advantages that some undertakings can have as a result of state regulations. Ensuring a level playing field is desirable for a healthy competitive environment that will ultimately yield better services, better prices and better consumer satisfaction. However, these services require financial assistance for proper functioning. Whether the application of state aid rules ensures a balance between the need for a competitive environment on the one hand and the need to ensure protection of welfare services on the other hand is examined below.

4.5.2 Assessment of State Aid Granted to Undertakings Entrusted with Public Service Obligations

A shelter against the application of internal market and competition rules has always been desired for welfare services; however, their special status and the fact that they contain social aspects cannot on their own place them outside the scope of competition and internal market rules. State aid constitutes one of the methods

of financing public service obligations and of ensuring a proper functioning of services of general economic interest. A certain protection against the application of EC state aids rules is offered by the exemptions contained in Article 106(2) TFEU (ex Article 86(2) EC). However, the application of Article 106(2) TFEU (ex Article 86(2) EC) is controversial. The problem lies in determining whether the compensation for the operation of a service of general economic interest is to be classified as state aid and then to be exempted by applying Article 106(2) TFEU (ex Article 86(2) EC) ('state aid approach') or whether the compensation for the service of general economic interest is considered to fall outside the state aids rules ('compensation approach'). The choice between the state aid and the compensation approach is important for services of general interest. Many voices have asserted that welfare services should fall outside the remit of competition rules. By adopting the compensation approach, provided that some conditions are fulfilled, the state aid rules do not apply.

Initially, in *ADBHU*[424] the Court applied the compensation approach. This case involved a Community Directive permitting Member States to grant indemnities to certain undertakings in exchange for the services which they performed in collecting and disposing of waste oil. These indemnities did not exceed the actual yearly costs. The Court considered that the indemnities in question did not constitute state aid but compensation for the service provided.

In *Banco Exterior de España*[425] the Court adopted the state aid approach when finding that a tax exemption for public banks was state aid.

In *FFSA*[426] a complaint was lodged stating that the tax concessions granted to the French Post Office (La Poste) by a new law on the principles and basic measures for the reform of post and telecommunications services submitted to the Assemblée Nationale (National Assembly) were state aids. Addressing the complaint, the Commission decided that the tax concession was not state aid within the meaning of Article 107 TFEU (ex Article 87 EC) because the amount of the concession did not exceed the costs incurred by La Poste in performing its public-interest tasks. However, the Court of First Instance took a different approach and stated that when determining whether a measure should be classified as state aid or not it is necessary to determine its effect on competition and not its purpose or form.[427] The CFI quoted a previous ruling of the Court of Justice[428] stating that Article 92 [now 87] 'does not distinguish between the measures of State intervention… by reference to their causes or aims but defines them in relation to their effects' and that 'consequently, the alleged fiscal nature or social

[424] Case 240/83 *Procureur de la République* v. *Association de défense des brûleurs d'huiles usagées* (*ADBHU*) [1985] ECR 531.

[425] Case C-387/92 *Banco de Crédito Industrial SA, now Banco Exterior de España SA* v. *Ayuntamiento de Valencia* [1994] ECR I-877.

[426] Case T-106/95 *FFSA and Others* v. *Commission* [1997] ECR II-229.

[427] Ibid., para 139.

[428] Case 173/73 *Italy* v. *Commission* [1974] ECR 709, para 13.

aim of the measure in issue cannot suffice to shield it from the application of Article 92.' Furthermore, it considered that the exception contained in Article 106(2) TFEU (ex Article 86(2) EC) could be used in the field of state aid if the purpose of the aid was to offset by the additional costs incurred by operating the general economic interest task assigned to the recipient undertaking.[429] Some authors consider this approach as providing a clear and certain procedural and conceptual framework, with the Commission at its centre.[430]

In *Ferring,*[431] however, the Court of Justice took a different approach. This case concerned undertakings entrusted with the operation of services of general economic interest and dealt with a preferential tax treatment granted to wholesale distributors of medicines. A tax exemption granted to wholesale distributors was indeed found capable of distorting competition since it gave those undertakings an advantage over their competitors, the pharmaceutical laboratories. This could have been qualified as state aid. The Court admitted that a tax on direct sales could have been qualified as state aid since it did not apply to the wholesale distributors. Nevertheless, it went on to consider what kinds of tasks were imposed on wholesale distributors. It was found that the wholesale distributors had to keep a permanent range of medicinal products sufficient to meet the requirements of a specific geographical area and to deliver requested supplies within a very short time over the whole of that area, in such a way that the population as a whole could be guaranteed an adequate supply of medicines at all times.[432] The fulfillment of those tasks required additional costs, which the other competitors did not incur.

The Court ruled that not subjecting the wholesale distributors to the tax on direct sales was not state aid but compensation for the services provided. This was a way of placing wholesale distributors on an equal footing with pharmaceutical laboratories which did not have to carry out tasks of general interest. However, the advantage should not exceed the costs that the wholesale distributors bore in discharging their public service obligations.

These two approaches have been criticised. Advocate General Leger in his Opinion in *Altmark*[433] disagreed with the Court's ruling in *Ferring*. He stated that the Court in *Ferring* confused the characterisation of a measure as being state aid with the justification of a measure which is state aid. He referred to the fact that in characterising a measure as state aid the social aim, its fiscal character or its general objectives should not be taken into account. Since a state aid measure is an objective concept, only its effects should count when determining whether a measure is state aid. It is interesting to draw a parallel with the application of free

[429] Case T-106/95 *FFSA and Others* v. *Commission* [1997] ECR II-229, para 178.

[430] Bovis 2005, pp. 79–109.

[431] Case C-53/00 *Ferring SA v. Agence centrale des organismes de sécurité sociale* (ACOSS) [2001] ECR I-9067; see also Louis and Vallery 2004, pp. 53–74.

[432] Case C-53/00 Ferring *SA v. Agence centrale des organismes de sécurité sociale* (ACOSS) [2001] ECR I-9067, para 21.

[433] Opinion of Advocate General Leger delivered in Case C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg* v. *Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

movement and competition provisions, where the Court has been intransigent and stated that free movement and competition rules apply despite all the causes or aims of a measure. However, with regard to state aid, the Court took a different position to that of the Advocate General Leger and thus inspired the some authors' criticism.[434]

Advocate General Leger considered that the 'compensation approach' deprived Article 106(2) TFEU (ex Article 86(2) EC) of its effects since this exemption did not apply where the compensation did not exceed the costs generated by the operation of the service of general economic interest. He also expressed fears that the Commission no longer had control over state aid since there was no notification obligation. Nicolaides[435] considered that under the 'compensation approach', the distortions of competition are greater than under the 'state aid approach.' Even through the application of the exemptions contained in Article 106(2) TFEU (ex Article 86(2) EC) to state aid measures, distortions of competition were created since the exemptions were applied with no regard to the efficiency of the undertaking entrusted with the operation of a task of general economic interest.

In *GEMO*[436] Advocate General Jacobs criticised a generalised application of both approaches and advanced a *quid pro quo* approach. He started by stating that the notion of state aid was an objective concept. He then distinguished the two approaches:

> Under the first approach—to which I will refer for convenience as the State aid approach—State funding granted to an undertaking for the performance of general interest obligations constitutes State aid within the meaning of Article 87(1) EC which may however be justified under Article 86(2) EC if the conditions of that derogation are fulfilled and, in particular, if the funding complies with the principle of proportionality.
>
> I will refer to the second approach as the compensation approach, the term compensation being intended to cover an appropriate remuneration for the services provided or the costs of providing those services. Under that approach State funding of services of general interest amounts to State aid within the meaning of Article 87(1) EC only if and to the extent that the economic advantage which it provides exceeds such an appropriate remuneration or such additional costs.

He emphasised that the most important substantive question in both approaches was whether the state funding exceeded what was necessary for the provision of the service of general interest. The main difference lay in the procedural implications:

> Where, on the basis of the compensation approach, a given financing measure does not constitute State aid, the measure falls outside the scope of the State aid rules and need not be notified to the Commission. Moreover, national courts can decide directly whether

[434] See Rizza 2004 and Nicolaides 2003, pp. 561–573.

[435] Nicolaides 2003.

[436] Case C-126/01 *Ministre de l'Économie, des Finances et de l'Industrie* v. *GEMO SA* [2003] ECR I-13769.

> State aid is involved and do not have to wait for an assessment by the Commission of the compatibility of the measure.[437]

He noticed that the Court adopted either the state aid[438] or the compensation approach in different cases.[439]

Disagreeing with a generalised application of the state aid approach he put forward his arguments. First, the concept of state aid in Article 87(1) EC applied only to measures which provide an economic advantage and which distort or threaten to distort competition, and he found no reason why these two requirements should not apply where the State funding of services of general interest was involved. Second, where the State purchases goods or services on the market, there would be state aid only if and to the extent that the remuneration paid exceeded what was appropriate, and there are no reasons why the analysis should be different where the State purchases services that are to be provided to the community (e.g. waste disposal services). Third, the procedural implications related to the notification requirement and standstill requirement have to be taken into account. Thus he admitted that with regard to the provision of certain services (e.g. disposal of toxic waste, ambulance services) it could be difficult or impossible to wait for prior authorisation by the Commission, but if a Member State implemented the aid before such an authorisation was granted, the aid would be illegal with all the consequences which that illegality entails.[440]

With regard to a generalised application of the compensation approach, he considered that if this approach were followed, then Article 106(2) TFEU (ex Article 86(2) EC) and the conditions which it imposes would be deprived of any role in the control of State aid. If the financing did not exceed the costs incurred in the operation of the service of general interest, then according to the compensation approach there would be no state aid and no need to examine the compatibility with Article 106(2) TFEU (ex Article 86(2) EC); where the financing exceed what was necessary, the measure could not be justified under Article 106(2) TFEU (ex Article 86(2) EC) because it would infringe the proportionality principle.[441]

The key offered by Advocate General Jacobs to this problem is to 'make a distinction between two different categories of cases based (1) on the nature of the link between the financing granted and the general interest duties imposed and (2) on how clearly those duties are defined.'[442] Thus, the compensation approach would apply to the cases where the financing measures are intended for

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[437] Opinion of Advocate General Jacobs delievred in Case C-126/01 *Ministre de l'Économie, des Finances et de l'Industrie* v. *GEMO SA* [2003] ECR I-13769, para 112.

[438] Case C-387/92 *Banco Exterior de España* [1994] ECR I-877; Case T-106/95 *FFSA and Others* v. *Commission* [1997] ECR II-229.

[439] Case 240/83 *ADBHU* [1985] ECR 531; Case C-53/00 *Ferring* [2001] ECR I-9067.

[440] Opinion of Advocate General Jacobs delievred in Case C-126/01 *Ministre de l'Économie, des Finances et de l'Industrie* v. *GEMO SA* [2003] ECR I-13769, para 115.

[441] Ibid., para 116.

[442] Ibid., para 118.

clearly-defined general interest obligations and he gives as an example contracts awarded after public procurement procedures.[443] The state aid approach would apply to cases where it is not clear from the outset that the State funding is intended as a *quid pro quo* for clearly-defined general interest obligations.[444] He explains different solutions given by the Court using this solution.[445]

AG Stix-Hackl[446] in *Enirisorse* also underlines the insufficiencies of the approach taken in *Ferring*, stating that this approach can be adopted only where the service and the consideration are clearly identifiable. Where the general duties have not been defined clearly, it is impossible to calculate the costs and thus the compensation approach cannot be used.

This *quid pro quo* approach has also been criticised[447] on account of the fact that it undermines the assessment of state aid taken by the Court. When determining whether there is a state aid, the Court looks at the effects[448] of the measure, though according to this approach it is also necessary to look at the intention behind the measure.

The Court however developed the compensation approach taken in *Ferring* and refined it in *Altmark*.[449] In order for a measure to be regarded as compensation for the services provided for carrying out a public service obligation and in order to avoid distortion of competition, there are several conditions that must be met[450]:

> [t]he recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.[451]
>
> the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.[452]
>
> the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.[453]

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[443] Ibid., para 119.

[444] Ibid., para 120.

[445] For criticism of the proposed solution of distinguishing between the 'compensation' and 'state aid' approach see Nicolaides 2003, pp. 561–573.

[446] Opinion of Advocate General Stix-Hackl delivered in Joined Cases C-34/01 to C-38/01 *Enirisorse SpA* v. *Ministero delle Finanze* [2003] ECR I-14243, paras 154–155.

[447] See Bovis 2005.

[448] See Case C-173/73 *Italy* v. *Commission* [1974] ECR 709, para 27; Case C-56/93 *Belgium* v. *Commission* [1996] ECR I-723 para 79; Case C-241/94 *France* v. *Commission* [1996] ECR I-4551, para 20; and Case C-5/01 *Belgium* v. *Commission* [2002] ECR I-3452, paras 45, 46.

[449] Case C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg* v. *Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

[450] Ibid., para 88.

[451] Ibid., para 89.

[452] Ibid., para 90.

[453] Case C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg* v. *Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, para 92.

> where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.[454]

The difference between these two approaches is mainly procedural. In the case of the 'compensation' approach there is no need to notify to the European Commission since compensation for the service of general interest is not considered to be state aid. The stand-still obligation does not apply either.

The *Altmark* judgement solves some of the deficiencies of the compensation approach applied in *Ferring*. In *Altmark* the Court ruled that it is not state aid where the advantage granted did not exceed the costs that the undertaking had to bear in discharging its public service obligations. Since compensation must not exceed the costs incurred with the public service obligation it is important to have these obligations clearly defined. Moreover, since greater transparency is required in the case of state aid and since the main problem with state aid is that it tends to cover all kinds of costs for the provision of services of general interest, including those arising from inefficiency, the conditions in *Altmark* require to establish *ex-ante* in an objective and transparent manner the parameters for compensation. According to the parameters set in advance it is possible to better control state aid and thus there is no room for arbitrary payments. The third criterion is meant to ensure that there is no over-compensation. However, the fact that the undertakings are allowed to make profit creates some uncertainty. The undertaking providing services of public interest is compensated for the costs incurred for the discharge of those public services but is simultaneously allowed to make reasonable profit. Furthermore, public procurement procedures are preferred when choosing an undertaking for the provision of services of general economic interest. However, if there were no public procurement procedure, the compensation should be determined by comparison with a well run undertaking, taking into account reasonable profit as well. The problem with this test is that it is hard to determine what a 'typical undertaking well run' is or how much it would charge. These conditions nevertheless prevent the state from providing unlimited aid, thereby funding inefficiencies.

In analysing the impact of the *Altmark* test on national healthcare systems, Hatzopoulos[455] notices that the application of EC law requires the introduction of the concept of services of general interest, or the concept of public service in the national legislation. The Belgian authorities introduced a clause that states that 'hospitals perform a task of general interest' in order to fall under the *Altmark* criteria. However, the rest of the criteria contained in *Altmark* were not specified,

[454] Ibid., para 93.

[455] Hatzopoulos 2008.

but the Belgian Parliament considered that they could have been inferred from existing legislation.[456] Thus, one direct effect of EC law would be the changing of the national framework to bring more legal clarity. Hartzopoulous[457] also stresses that it is for the European Union to define the set of healthcare services of general interest since not all services provided by hospitals are of general interest. Furthermore, he states that Member States are free to fix the limits of these services and the Commission should interfere only in cases of manifest error.[458] A more radical idea put forward by Chavrier[459] is that hospitals do not offer public services, as the funds who finance the hospitals are the true public service providers.[460]

Thus, Member States have broad discretion in determining what services of general interest are and the power to decide whether they comply with the *Altmark* criteria.

In *BUPA*[461] the Court of First Instance had to apply the conditions set in *Altmark* case. The CFI as Sauter puts it, re-wrote the *Altmark* conditions.[462]

In Ireland, private Medical Insurance was introduced in 1957 in order to allow persons not eligible under the public sickness insurance scheme to obtain cover for hospitalisation. Voluntary health Insurance Board (VHI) was the only operator licensed by the Ministry of Health to provide private medical insurance services. However, since 1991 the public health insurance system was changed so as to cover the entire Irish population irrespective of income. From this moment, the private medical insurance is just alternative insurance. Moreover, in 1994 the Irish private medical insurance was liberalised. BUPA Ireland operated on the Irish private medical insurance since 1997 and had a market share of 15% by members and 11% by receipts.

The Minister of Health was authorised by the Health Insurance Act in 1994 and by the Health Insurance Regulation in 1997 to establish a Risk-Equalisation Scheme (RES). The Health Insurance Authority was entrusted with the commencement of payments under RES. BUPA lodged a complaint to the Commission arguing that the RES infringed Article 87(1) EC. The RES is a mechanism that allows that private medical insurers with a risk profile which is less healthy than the average market risk profile to be compensated by those private medical insurers whose risk profile is healthier than the average market risk profile.

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456 See Hatzopoulos 2008.

457 Ibid.

458 See Decision 2005/842/EC [2005] OJ l312/67, recital 7 and Community framework for State aid in the form of public service compensation OJ C297/4, recital 9.

459 Chavrier 2006, pp. 274–287.

460 Hatzopoulos 2008.

461 Case T-289/03 *British United Provident Association Ltd BUPA and Others v Commission of the European Communities* [2008] ECR II-00081.

462 Sauter 2008.

Though in theory RES is meant to apply to every private medical insurer, in practice, being given the current situation, its application leads to a transfer of funds from BUPA for the benefit of the VHI.

The Commission decided not to raise objections concerning the RES. The CFI had to deal with several pleas among which was the misapplication of Article 87(1) EC. The applicants considered that the Commission was wrong when it decided that there was no state aid because there was compensation for the SGEI obligations. They considered that the *Altmark* criteria were not met.

With regard to the first condition that states that there must be clearly-defined SGEI obligations, the applicants contended that the obligatory criterion required for a service to be characterised as a universal service was missing since the service provided was not obligatory. When defining services of general economic interest, common elements such as universal service, continuity, quality of service, affordability, as well as user and consumer protection must be present. The applicants argue that while the State regulation imposing an obligation on an undertaking may be regarded as being in the general interest, this does not lead to the conclusion that all obligations are SGEI obligations. The Member States should respect the limited definition of the SGEI, otherwise it would be possible to evade Article 107 (1) TFEU (ex Article 87(1) EC). They argued that the concept of SGEI obligation is a concept of European Union law and must be interpreted objectively. They acknowledged the fact that Member States are free to determine the way in which they intend to provide and regulate the provision of a SGEI, however, they contend that the qualification of a SGEI obligation is subject to the control of the Community institutions.[463] They dispute the assertion that the concept of SGEI is subject to control only for manifest error. The applicants criticise the fact that the Commission did not analyse whether the SGEI obligations invoked by the Irish authorities such as the requirement for open enrolment community rating, lifetime cover and minimum benefits were objectively SGEI obligations. They argue that the Commission ignored the need for a strict and objective definition of SGEI obligations.

The applicants put forwards arguments why the private medical insurance obligations did not qualify as SGEI obligations. First there was no obligation to provide PMI. Secondly the argument that PMI providers had to ensure PMI services for all persons in Ireland, at an affordable price, on similar quality conditions was not true because elderly persons and those suffering from pre-existing diseases were excluded from PMI services. PMI insurers were entitled to exclude those over the age of 65. Thirdly, the applicants denied that there were uniformly affordable rates since the rates were fixed by the market and since persons under 18 or people aged between 18 and 23 benefited from significant

[463] Case T-289/03 *British United Provident Association Ltd* (*BUPA*) *and Others* v. *Commission of the European Communities* [2008] ECR II-00081, para 100.

premium reductions. Fourthly, PMI services were only optional, thus were complementary or supplementary to the universal service.[464]

In answering to this plea, the Court stated that there was no clear and precise regulatory definition of the concept of SGEI mission and no established legal concept definitively fixing the conditions that a Member State had to satisfy in order to invoke the protection given by a SGEI obligation. It ruled that Member States have discretion in defining SGEI and that the Community is limited to control of manifest error.[465] The European Union has no competence in defining such concept.

Even if Member States have discretion in defining SGEI mission, still the Court stated that that mission must satisfy a minimum criteria common to every SGEI mission and to demonstrate that those criteria are satisfied. With regard to the fact that there must be an entrustment of a SGEI mission by an act of public authority, the Court ruled that indeed it was necessary such entrustment. The simple fact that the national law, acting in the general interest imposes certain rules of authorisation, functioning or control on all operators in a sector does not mean that there is a SGEI mission. Furthermore, the existence of a SGEI mission does not necessarily imply the existence of an exclusive or special right to carry it out. The Court decided that in the case at stake there was an act of the public authority entrusting the SGEI mission and that the act clearly-defined SGEI obligations. The Health Insurance Act from 1994 and its amendment and the Health Insurance Regulations defined in detail the PMI obligations. These were considered to be acts of a public authority creating and defining a SGEI mission. The Court also considered that there was a clear and precise definition of the SGEI obligation. Since there was no exclusive right entrusted and since the obligation was imposed on all operators, the Court decided that there was no need to have separate acts entrusting each operator with SGEI mission.[466]

This is a broad interpretation of the act of entrustment and of its clarity given by CFI. This interpretation is useful for the Member States who have imposed public service obligations on different entities but there is no express act. If the existent regulatory acts contain a description of the SGEI mission and if the definition of the SGEI obligations is clear and precise, then the condition is fulfilled.

With regard to the universal and compulsory nature of the services which contain a SGEI mission, the Court ruled that in order to be characterised as a SGEI, the service in question does not need to constitute a universal service in the strict sense, such as the public social security scheme.[467] It continued by stating that the concept of universal service does not mean that it must respond to a need common to the whole population or be supplied throughout a territory. The court stated that besides the classical type of SGEI, there are other types which member

[464] Ibid., paras 105–108.

[465] Ibid., para 166.

[466] Ibid., paras 165–170.

[467] Ibid., para 186.

States may decide to create and they have discretion in doing so. The Court ruled that the concept of a SGEI does not exclude those services with limited territorial or material application. It criticised the applicant's restrictive approach regarding SGEI that followed the Commission's reports and documents and ruled that those documents of the Commission are not legally binding. Regarding the argument that services in question are luxury, the Court underlines the compulsory nature of the private medical insurance. All operators on the market are required to offer the service on the market, in compliance with SGEI obligation. The SGEI mission at stake does not presupposes a predetermined content. The Court ruled that there can be freedom in deciding the content and pricing of the service. In the absence of an exclusive or special right, the Court ruled that it was sufficient to conclude that the service is compulsory and that the operator entrusted with the SGEI is under an obligation to provide the service to any user requesting it. The compulsory nature of the service is the characteristic that distinguishes the SGEI from any other service provided on the market.[468]

The Court considered that the various obligations imposed on all PMI insurers, such as open enrolment, community rating, lifetime cover and minimum benefit obligations qualify that service as compulsory. The PMI offered uniform rates, no matter what the personal situation of the insured, the health history and the frequency of the claims would be. The lifetime cover condition was considered to be fulfilled since PMI insurers could not cancel the contracts and could not refuse to renew a contract. The minimum benefits condition was also considered to be fulfilled. The low level of cover which in practice was exceeded even by the basic insurance policy did not affect the compulsory nature of the service. The Court ruled that the compulsory nature of the service did not imply the deprivation of the operator concerned of his commercial freedom; moreover, the fact that the benefits are not much about the minimum prescribed benefits does not affect the compulsory nature of the service, since the operator still has to observe that he offers those benefits, no matter how small.[469]

The Court dealt also with the optional character of the scheme and ruled that it does not affect the compulsory nature of the service. The fact that the consumers choose whether they want the service or not does not matter because the obligation to contract imposed on the operators exist because the State considers that this service is important and in the current case it even covered 50% of the Irish population. Moreover, the fact that an insurer may withdraw voluntary from the PMI market does not affect the continuity of supply.

With regard to the exceptions existent in the PMI services, such as the fact that the persons over 65 could be refused, or the fact that people below 65 could be faced with waiting periods which could be between 55 and 53 weeks for persons between 55 and 65, or the fact that people suffering from a pre-existing disease were subject to waiting periods of 5–10 years before they were eligible to

[468] Ibid., paras 186–196.

[469] Ibid., paras 196, 197.

payments for certain care, all these were considered by the Court to be limited in practice. It considered that the population over the age of 65 was only 8% of the Irish population and it considered that the number of these people would decrease since most people started to take private insurance at younger age. With regard to the waiting periods it was considered that they were essential and lawful because they prevented abuse; it was meant to prevent people from getting only temporary cover in order to obtain treatment rapidly, without contributing before.[470]

On this point, the CFI's decision must be criticised. The universal cover is exactly meant to cover all. By excluding from the scheme the population above 65 implies excluding a big part of the bad risks. An operator in a private insurance market which is a competitive market would have chosen the same behaviour, which would be to exclude the older population. Whether the percentage of the population excluded is lower or higher is irrelevant. Moreover, the waiting periods while they are indeed necessary in order to prevent abuses, however, the length of the waiting period seems to be disproportionate. To ask someone who has a pre-existing disease to wait up to 10 years until is eligible for benefits may also exclude those with pre-existing disease from PMI services. During this long span of time it is possible that the respective person may not survive, or if he/she survives. It also depends on what kind of pre-existing disease we deal with.

The Court considered however that there was a SGEI mission within the first condition of *Altmark*.

With regard to the second condition, the existence of clearly-defined parameters for the calculation of compensation, the applicants contended that the Health Insurance Authority (HIA) had considerable leeway in determining that risk differential between PMI on the basis of the "market equalisation percentage" formula. HIA had discretion in determining whether or not to recommend the commencement of risk equalisation if the differential was between 2 and 10%. The Minister for health had discretion in accepting the HIA's recommendation. In the event of a decision deciding to activate the risk-equalisation scheme, the commencement day was also at the Minister for Health discretion. The calculation of the RES payments was done on a discretionary basis, taking into consideration the submission of returns by the insurers, the deemed risk differential or the "market equalisation percentage." The applicants sustained their arguments by the three divergent reports published by HIA where contradictory conclusions were drawn.[471]

The Court rules that there was confusion between the risk differentials which is a preparatory step to the decision to commence RES payments and the calculation of the compensation paid in the form of RES payments. It stated that the Irish authorities' discretion in calculating RES payments is not incompatible with the existence of objective and transparent parameters. The national authorities are allowed to have certain discretion to determine the compensation for the costs incurred in discharging a SGEI mission. The Court notices that the appellants did

[470] Ibid., para 198.

[471] Ibid., paras 112–116.

not dispute the precise, transparent and objective nature of those parameters, but they criticised the discretion of the authorities with respect to the decision to activate payments.

CFI in deciding on the second *Altlmark* condition took a too narrow interpretation of what constitutes clearly-defined parameters for the calculation of compensation for the RES. The clarity of those parameters should imply that whenever certain conditions, certain parameters are reached, then the compensation mechanism is triggered. This condition is aimed exactly at avoiding discretionary powers of the public authorities in deciding when there is compensation or not. Thus, the preparatory steps that trigger the compensation procedure and the calculation of the compensation should be seen as a whole.

With regard to the third *Altmark* condition that the compensation should respect the proportionality principle, the applicants argued that even if the PMI obligations were classified as SGEI obligations, still, they would not create a financial burden for PMI insurers. They base their assertion on the fact that they can refuse the bad risks since they are not obliged to offer insurance for people above 65 or they can impose long waiting periods for people who are ill. Moreover, they state that PMI insurers are able to adjust their contractual terms and to differentiate premiums to take account of varied risks. Even if the PMI would imply costs for the PMI insurers, still, the applicants argue that the calculation of the risk differential has no relation to the costs incurred by the PMI insurers in relation to the SGEI obligations.[472]

The defendants replied in their defence that the applicants have not demonstrated that the Commission has made a manifest error in assessing proportionality nor that determined that the RES was manifestly disproportionate. They contend that the argument that RES was not linked to the costs generated by compliance with the SGEI obligations. They argue that RES is linked with the costs generated by the differentials in risk profile between PMI insurers and do not exceed what is necessary to cover the costs incurred in discharging the PMI obligations. Because of the nature of the RES there is no correlation between the risks and receipts because this would be contrary to the principle of community rating. Moreover, the defendants contend that the RES is not intended to equalise the costs but is intended to grant compensation to PMI insurers only in respect of the difference between their own risk profile and the average risk profile on the market. When calculating payments it is stated that they take account of the costs generated by requests for payment addressed to PMI insurers to the exclusion of other costs such as administrative and marketing costs which means that the method of calculation does not include inefficiencies.[473]

With regard to the argument that the PMI insurers can reject the bad risks the defendants argue that it is not true, since there is no flexible determination of premiums and since they cannot impose more expensive cover on high-risk consumers. Moreover, the RES payments are calculated not by reference to all

[472] Ibid., paras 117–122.

[473] Ibid., para 226.

claims settled by PMI insurers, but only by reference to the claims covered by the most widely-sold and the least expensive PMI covers.[474]

The Court decided that even if the insurers can decide the quality and the price of the PMI cover, still, once they have chosen to make an offer, they have to comply with community rating obligation which means that they have to offer the same premium to everybody, independently of the age, sex and state of health. Compliance with the obligation may entail additional burden for the insurer who cannot cover it by adjusting the premiums. The Court stated that the applicants did not explain how these additional burdens imposed by the SGEI obligation would be offset by the practice of differentiating cover and premiums that would be lawful by reference to the community rating obligation. The Court rejects the applicants' argument that PMI insurers could protect themselves against excessive burdens by refusing to cover people above 65 or by introducing waiting periods. Moreover, the Court rules that the waiting periods is just a temporary avoidance of the bad risks.[475]

With regard to the necessity of having a link between the compensation system set in place by the RES and the costs incurred by the obligations imposed on PMI insurers, the Court stated that in calculating the RES payments, the costs taken into account are those incurred by PMI insurers when settling members' claims, thus they are closely linked with the supply of the PMI services. The Court notices that the RES is different than the system existent in *Altmark*. It stated that indeed it is hard to establish a direct relationship between the amount paid by the insurer for a claim and the compensation awarded by means of the RES. The aim of the RES is not to pay for the additional costs incurred by the performance of the SGEI mission, but to equalise the additional burdens which result where an insurer has a negative risk profile. The open enrolment and community rating operation are aimed at spreading the burdens fairly among the entire market. The Court ruled that the RES is designed to offset those additional burdens which an insurer must bear on account that he has a negative risk profile in comparison with the average market risk profile.[476]

In answering to the applicants argument that the Commission did not take into account the receipts and the profit of the insurers, the Court ruled that the RES does not aim to compensate for the costs linked to the supply of the PMI services and thus there was no need to take into consideration the receipts obtained in order to determine the additional; cost incurred by the SGEI obligation. The Court states that this would run contrary to the community rating principle because it would require that premiums reflect the risks. The system at stake is different than the one existent in Altmark and according to the Court, a strict application of the third condition existent in Altmark would amount to challenging the Irish authorities' choice for such a system. The Court ruled that in the case at stake the additional

[474] Ibid., para 227.

[475] Ibid., paras 227–233.

[476] Ibid., paras 234–237.

costs were those incurred by the existence of bad risks which exceeded the average market risks and that the difference between the *Altmark* system and the one at stake require a different approach in determining whether there was overcompensation or not. Therefore, the Court ruled that the third condition is fulfilled.[477]

From the Court's assessment it is easy to see the great problems raised by the existence of different schemes. Since in *Altmark* the condition that the compensation must be strictly necessary implied that calculation of the costs incurred by the fulfillment of a SGEI mission and the determination of whether the money received exceeded those costs or not, in the present case the RES functions differently. It does not imply the calculations of the benefits and costs but it simply compensates for the negative risks above the average risk on the market. The aim of the RES is to ensure equal footing competition; the aim of the third condition is to determine whether the money received does not overcompensate. Since the compensation is given on account that an insurer has more bad risks implies that this compensation is granted exactly as a result of the fulfillment of his SGEI obligation of accepting those bad risks.

With regard to the fourth *Altmark* condition that requires a comparison with an efficient undertaking, the applicant argue that there were no comparison made. The Court stated that indeed, in the case when a SGEI mission is not entrusted pursuant a public procurement procedure, the level of the compensation must be set on the basis of the analysis of the costs with an undertaking well run would have made in discharging SGEI obligations. It ruled that the Commission was entitled to consider that there was no need to compare between the potential recipient of the RES payments and the efficient operator since the RES payments are determined by reference to the comparison with the average market risk profile. It continued by stating that since it is unknown who would benefit from compensation, the Commission could not identify the potential beneficiaries and could not make a specific comparison of their situation with an efficient operator.[478]

Since the fourth *Altmark* condition was aimed at ensuring that there is no compensation for inefficiency, the Court notices that the Commission found out that the RES took into account PMI insurers' own average claim cost, thus avoiding the equalisation of their costs and allowing them to keep the benefits of their efficiencies. These claim costs did not include management, administrative or marketing costs for which PMI insurers are responsible.[479] The Court stated that the applicants did not provide any proof to show how inefficiencies were reflected in the settlement of claims. The fact that BUPA Ireland's daily costs were 17% lower than the market average reflects the favourable risk profile that it had. HIA considered that this difference is given by the difference in efficiency, by the state of health of those covered, by the PMI products. The Court however states that the

[477] Ibid., paras 238–243.

[478] Ibid., para 248.

[479] Ibid., para 250.

applicants failed to indicate whether the difference in efficiency to which HIA refers is due to efficiency in the management of the PMI insurers or the efficiency in management of the hospitals. The applicants also failed to state how those differences are taken into account when setting the payment costs and how they are reflected in the equalisation payments.[480] Moreover, the Court noticed that in calculating the costs of the compensation, the costs of meeting claims are taken into account only up to a sum of 550 per day of hospitalisation, even if the average hospitalisation costs of the VHI were of 640 per day of hospitalisation. This measure was aimed exactly at avoiding over-consumption.

The defendants admitted that in the method of calculating the RES payments it was possible to share among insurers the costs associated with inefficiencies and the profits associated with efficiencies since a certain adjustment factor—'zero sum adjustment factor' was included. However, on this point the applicants acknowledged that the variations were negligible.

The Court concluded that the compensation provided by RES was neutral by reference to the costs associated with inefficiency incurred by certain PMI insurers.[481]

The assessment of the Court bears criticism. The Court was wrong in stating that the compensation provided by the RES was neutral by reference to the costs associated with inefficiency incurred by certain PMI insurers. When setting the compensation the claim costs are taken into account. The fact that BUPA's daily costs were lower than the market average costs may be related to the fact that they insured "good risks" but it may be as well related to the fact that they obtained better contracts with hospitals and healthcare providers. To be more efficient implies also finding the better deals on the market. Once there is such a structure on the healthcare market where there are three parties, the health insurers, the health providers and the consumers a system of balances and checks between these three actors ensures a better functioning of the market.

The decision in this case is a controversial decision which gave new interpretations to the notions of Services of general economic interest, universal services and the *Altmark* conditions. The CFI had a deferential attitude towards Member States. In this judgement there is nothing from the incisive attitude of the Court of Justice, ready to challenge the inefficiencies of the public services indirectly by making the costs more transparent.

In applying the first condition the CFI gave a broad interpretation of the SGEI allowing Member States to include more than basic services among the SGEI. This is not a bad point because it is up to a Member State to decide how much welfare it wants to offer to its citizens. What can be criticised is the strange approach taken in defining the universal service which in the CFI's view does not cover the whole population and allows the exclusion of those who are the neediest. In applying the second condition the CFI allows Member States a great degree of discretion,

[480] Ibid., para 251.

[481] Ibid., para 256.

ignoring the fact that the condition referring to the parameters for compensation actually is aimed at avoiding discretionary powers. In applying the third condition the CFI ruled that RES is a different system than the compensation granted in *Altmark*. The aim of the RES is not to pay for additional costs incurred by the discharge of the SGEI mission imposed on operators, but to equalise additional burdens. The receipts and the profit of the insurer were not taken into account. The difference between *Altmark* compensation system and the one at stake require a different approach in determining whether there was no overcompensation. Thus, the CFI does not proceed to calculate the costs incurred by the fulfillment of SGEI obligations and the benefits and the profit obtained in order to determine whether there is overcompensation. It considered that those additional costs which were compensated were those incurred by the existence of the bad risks which an operator had just because it had to discharge its SGEI obligations. The fourth condition which was aimed at increasing efficiency and was aimed at avoiding spending money on inefficiency was also strangely interpreted.

Sauter rightly notices that such an ex-post compensation scheme such as the one at stake cuts all "incentives for efficient contracting and purchasing, investing in quality, in multi-agency and multi-professional care and prevention."[482] […] Compensation ex-ante forces the operators on the market "to make ends meet with the means available […] rather than an open-ended commitment that costs once incurred will be dully compensated."

The *Altmark* judgement managed to reach a compromise between the protection of SGEI mission and the competition goals. The rules of state aid when there were SGEI involved, however under strict conditions which were aimed at avoiding the discretionary powers, the disproportional compensation and the compensation of inefficiency. It was aimed at bringing also more transparency with regard to the financing of these services. The BUPA case loosened all these conditions and consequently poses a threat to efficiency.

4.5.3 General Rules Regarding State Aid Applicable to SGEI/SSGI

As noted above, the Court of Justice has favoured the compensation approach and refined its test by including conditions intended to tackle the transparency of state aid and the reduction of costs. The rule is that where the *Altmark* criteria are met, then the measure does not constitute state aid but compensation for the public service provided.

If one of the criteria set in *Altmark* is not met, then the measure is qualified as state aid. However, this does not mean that compensation is always forbidden. Compensation which does not fulfill the *Altmark* criteria is governed by Decision

[482] Sauter 2008, p. 11.

2005/842[483] or the Community framework for State aid in the form of public service compensation.[484] The Decision and the Framework constitute exemptions from the state aid rules. The difference between the Decision and the Framework is that compensations covered by the Decision do not need to be notified to the Commission.

In the case of overcompensation, when the *Altmark* conditions are not met, the aid must be notified according to Article 88(3) EC and Council Regulation 659/99. However, the exceptions contained in Article 107(3) TFEU (ex Article 87(3) EC) and Article 106(2) TFEU (ex Article 86(2) EC) EC still apply.

Decision 2005/842[485] deals with the application of Article 106(2) TFEU (ex Article 86(2) EC) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest. This Decision sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is to be regarded as compatible with the common market and exempted from the notification requirement laid down in Article 108(3) TFEU (Ex Article 88(3) EC).[486]

However, the compensation must not exceed the costs incurred for the operation of the public service obligation plus reasonable profit, otherwise distortions of competition can appear. Anything in excess of what is necessary to operate the service of general economic interest constitutes state aid and must be repaid. Also, any compensation granted for the operation of the service of general economic interest and used by the undertaking to operate on another market also constitutes state aid and must be repaid.[487] Member States must check that compensation does not lead to overcompensation. However, the Decision grants some flexibility, allowing for overcompensation which does not exceed 10% of the amount of the annual compensation to be carried forward to the next period and to be deducted from the amount which would have to be paid for the next period. In the social housing field, the amount allowed to be carried forward is 20% of the annual compensation.[488]

When the conditions of the Decision are met, there is no need for notification of small amounts of compensation granted to undertakings entrusted with services of general interest that have limited turnover. Also, hospitals providing medical care, including, where applicable, emergency services and ancillary services directly related to the main activities, notably in the field of research, and undertakings in charge of social housing which are entrusted with services of general economic

[483] Decision 2005/842/EC [2005] OJ l312/67.

[484] Community framework for State aid in the form of public service compensation OJ C297/4.

[485] Decision 2005/842/EC, [2005] OJ l312/67.

[486] Ibid., Art. 1.

[487] Ibid., recital 12 of the Preamble.

[488] Ibid., recital 13 of the Preamble, and Art. 6.

interest, benefit from exemption from notification, even if the amount of compensation exceeds the thresholds laid down in the Decision.[489]

Article 2 of the Decision clarifies the scope of this decision:

> 1. This Decision applies to State aid in the form of public service compensation granted to undertakings in connection with services of general economic interest as referred to in Article 86(2) of the Treaty which falls within one of the following categories:
>
> a. public service compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million;
> b. public service compensation granted to hospitals and social housing undertakings carrying out activities qualified as services of general economic interest by the Member State concerned;
> c. public service compensation for air or maritime links to islands on which average annual traffic during the two financial years preceding that in which the service of general economic interest was assigned does not exceed 300,000 passengers;
> d. public service compensation for airports and ports for which average annual traffic during the two financial years preceding that in which the service of general economic interest was assigned does not exceed 1,000,000 passengers, in the case of airports, and 300,000 passengers, in the case of ports.

The threshold of EUR 30 million in point (a) of the first subpara can be determined by calculating an annual average of the value of compensation granted during the contract period or over a period of five years. For credit institutions, the threshold of EUR 100 million of turnover is replaced by a threshold of EUR 800 million in terms of the balance sheet total.

The problems that appear are always connected with the calculation of costs. Article 5 states that the compensation should not exceed the costs incurred in discharging the public service obligation but also takes into consideration a reasonable profit. 'The reasonable profit shall take account of all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without reducing the level of quality of the services entrusted to the undertaking by the State.'[490]

The costs to be taken into consideration are only costs determined by the operation of the service of general economic interest, even if the undertaking is engaged in other activities which fall outside the service of general economic interest. The costs incurred by the operation of the service of general interest can cover all variable costs incurred by performance of services of general interest, a proportionate contribution to fixed costs, common to both the service of general economic interest and other activities and a reasonable profit. Costs linked with

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[489] Ibid., recital 16 of the Preamble.

[490] Decision 2005/842/EC [2005] OJ l312/67, Article 5(1).

investments, mainly infrastructure, are also included in the costs incurred for the operation of services of general economic interest.[491]

The revenue to be taken into account includes the revenue produced by the operation of the service of general economic interest. 'If the undertaking in question holds special or exclusive rights linked to another service of general economic interest that generates profit in excess of the reasonable profit, or benefits from other advantages granted by the State, these shall be included in its revenue, irrespective of their classification for the purposes of Article 87.'[492] Member State can decide that profits generated by other activities of the undertaking entrusted with a service of general economic interest may be assigned to finance the service of general economic interest.

The Decision gives guidance with regard to what represents 'reasonable profit':

> For the purposes of this Decision "reasonable profit" means a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State, particularly if the latter grants exclusive or special rights. This rate shall not normally exceed the average rate for the sector concerned in recent years. In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, a comparison may be made with undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector are taken into account. In determining what constitutes a reasonable profit, the Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency.[493]

Where the undertaking operates other activities besides the service of general economic interest, it is important that separate accounts are kept. However, in practice the calculation of costs and the separation of costs are more difficult to achieve.

Thus this Decision lays down the conditions under which certain types of public services compensation constituted state aid compatible with Article 106(2) TFEU (ex Article 86(2) EC) and is exempted from the notification requirement. The Framework[494] covers public service compensation which do not fall within the scope of Decision 2005/842/EC and lays down the conditions under which state aid is found to be compatible with the common market pursuant to Article 106(2) TFEU (ex Article 86(2) EC).

In analysing the application of state aid rules it has to be considered first whether there is an undertaking with the scope of the competition rules. Once we have determined that we have an undertaking, in order to have state aid four conditions need to be satisfied: an advantage must be conferred on the recipient; the aid should be granted through State resources; the aid should distort or threaten to distort competition; the aid should have an effect on inter-state trade. However,

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[491] Ibid., Article 5(2).

[492] Ibid., Article 5(3).

[493] Ibid., Article 5(4).

[494] Framework for State aid in the form of public service compensation, OJ C297/4.

whenever the undertaking in question is entrusted with public service obligations, there is no state aid if the *Altmark* conditions are met. If one of the conditions is not met, the aid can still be found to be compatible with the common market according to Article 106(2) TFEU (ex Article 86(2) EC) if the conditions laid down in the Directive are met. Furthermore, if those public service compensations do not fall within the scope of the Directive, they can be still exempted according to the Community Framework.

To conclude, there are more escapes from the competition rules. The *Altmark* criteria permit the setting aside of the state aid rules. If those criteria are not met, there is still the exemption contained in Article 106(2) TFEU (ex Article 86(2) EC), which is meant to ensure the effective provision of services of general economic interest. The exclusion from the application of state aid rules if the *Altmark* criteria are met is important from a procedural perspective. Thus, there is no need to notify and there is no stand-still obligation, which allows the proper financing of those services. Moreover, the exemption from the notification procedure under the Decision is also a means of ensuring better protection for these services, by ensuring that administrative burdens do not delay the effective provision of services of general interest.

4.5.4 The Economics of the Court's Rulings

One of the problems with state aids, and especially when the Court applies the compensation approach, is the risk that the aid granted could conceal the inefficiency of the undertaking. Nicolaides[495] states that if the concept of aid is objective, the concept of advantage is not independent of the context in which the aid is granted.

In *La Poste*[496] The Court states that:

> In order to determine whether a state measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions. In examining that question, it is for the national court to determine what is the normal remuneration of the services in question. Such determination presupposes an economic analysis taking into account all the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration of the services provided.

For this it would be necessary to determine what normal market conditions are and what the behaviour of the undertaking is in such market conditions.

Drawing a parallel with Article 86, where distortions of competition are accepted to the extent that they are absolutely necessary for the performance of services of general interest and of course respecting the proportionality principle,

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[495] Nicolaides 2002, pp. 313–319.

[496] Case C-39/94 *Syndicat francais de l'express international* v. *La Poste* [1996] E.C.R. I-3547.

we ask whether the distortions of competition caused by the aid are necessary for the performance of the services of general interest. When aid is granted to compensate for public-interest tasks, it is interesting to see whether without the aid that service would not have been provided under good conditions.

Nicolaides considers that aid produces distortive effects. In his analysis of the *Ferring* case he addresses the question of whether the wholesalers would withdraw from the market if they received no state aid. Since wholesalers are subject to obligations imposed by national authorities (maintaining a permanent stock of medicines comprising at least nine-tenths of all forms of medicines sold in France; satisfying the needs of regular customers for at least two weeks; guaranteeing delivery of medicines within 24 h of receipt of an order) it is normal that their costs are higher. Without these obligations they would be providing medicines on the market under the same conditions as their competitors. However, they still engage in competition with pharmaceutical laboratories. Some authors[497] find that aid has a distortive effect on competition because when it comes to distributing the fixed costs it is hard to determine the exact costs. In analysing the application of the Ramsey rule for calculating fixed costs according to which fixed costs of a multi-product firm should be allocated in proportion to the inverse of the elasticity of demand for each product, Nicolaides underlines the possibility of shifting fixed costs, thus transferring a higher amount of costs to the operations benefiting from exemptions. He concludes that less efficient undertakings would benefit as a result of tax exemptions and considers that one of the drawbacks of the Court's ruling is that it did not address the question of whether the laboratories would have provided those services or whether the wholesalers would have provided those services without benefiting from tax exemptions. The conclusion that he reaches is that the best solution would be if the services were entrusted to an undertaking as a result of a tender procedure. This is the solution which was put forward by the Court in its next judgement in *Altmark*.

> The fact that the inefficiency of an undertaking can be covered by the granting of aid leads to greater distortions of competition when the compensation approach is followed.[498] Therefore, many threats to the competitive environment come from the danger of cross-subsidisation.

4.5.5 Cross-Subsidisation

Cross-subsidisation occurs in multi-market companies. Usually, the monopolistic position of the company in one market is used to expand on another market. 'Cross subsidisation means that an undertaking allocates all or part of the costs of its activity in one product or geographic market to another product or geographic

[497] Nicolaides 2002, pp. 313–319.

[498] Nicolaides 2003, pp. 561–573.

market.'[499] Another definition of cross-subsidisation is where an 'undertaking provides financial support in whatever form to one of its activities or a segment of activity from internal resources generated by another activity or segment.'[500]

Cross-subsidisation is a serious problem that creates distortions of competition. If an undertaking provides services of general economic interest and services on a market opened to competition, there is a risk of using the subsidies received for the financing of services of general interest to subsidise the ones provided on the open market. In the case of cross-subsidisation two types of rules can be applied: Article 82 and the state aid rules. In its 1991 Guidelines on Competition in the Telecommunications Sector[501] the Commission considers that cross-subsidisation is not harmful when it does not lead to predatory pricing or to distortions of competition when the reserved activities are those which are subsidised from the other activities.

Cross-subsidisation is assessed under the rules of Article 82 in conjunction with Article 86 when the existence of dominance and abuse of a dominant position is established. The cross-subsidisation is assessed under the Article 107 TFEU (ex Article 87 EC) rules when the undertaking is state-owned or state-controlled if all the Article 107 TFEU (ex Article 87 EC) conditions are met.

Hancher and Buendia[502] state that in certain situations, Articles 107(1) and Articles 102 and 106(1) TFEU (ex Articles 92(1) and Articles 86 and 90(1) EEC) could be applied simultaneously to control cross-subsidisation. However, when there is no charge on the public account the assessment of cross-subsidisation should only be done using Article 102 TFEU (ex Article 82 EC) in conjunction with Article 106 TFEU (ex Article 86 EC).[503]

In the case of services of general economic interest cross-subsidisation is used to achieve different political objectives. The proper provision of the services of general interest sometimes requires compensation between different markets. This type of cross-subsidisation is accepted in so far as it is necessary to ensure the proper provision of these services. However, there is the risk that the undertaking entrusted with an exclusive right for the provision of services of general economic interest uses the resources from the reserved market to compete on another market which is opened to competition. As we have seen, there are situations where the resources from additional markets are used to finance the reserved markets, and sometimes it is accepted that exclusivity should also be given on the ancillary markets. However, what is not desired is when the resources on reserved markets are used to finance additional markets. This calls for the application of Article 82 in conjunction with Article 86. Sometimes, cross-subsidies between two markets can occur, without determining the existence of an abuse. Under these

[499] Guidelines for the Telecommunications Sector, O.J. 1991, C-233/2.

[500] Abbamonte 1998.

[501] Guidelines for the Telecommunications Sector, O.J. 1991, C-233/2.

[502] Hancher and Buendia Sierra 1998.

[503] See Slotboom 1995, pp. 289–301.

circumstances, since there is still a transfer of funds, the cross-subsidisation problem can be assessed under the state aid rules. However, the conditions required for an aid to be qualified as state aid must be fulfilled. One important aspect is that the transfer should be the decision of the state: this is because sometimes the transfer can simply be an internal decision of the undertaking. Sometimes, even if the state is in a position to control a public undertaking and exercise a dominant influence, the actual exercise cannot be presumed.[504]

One question that can be addressed in the case of cross-subsidisation is whether the notion of state aid encompasses the cost or the profit allocation of a public undertaking. Furthermore, even if the cost or profit allocation qualifies as state aid, this allocation can still be a result of the internal decision of the undertaking.

The complicated nature of financing the health and education systems may present numerous problems. For example, in the case of the education system, when universities provide consultancy or research services contracted by private parties and receive a certain remuneration, does the cost paid cover all the costs? Since the infrastructure used (laboratories, university buildings) is provided by the university and is funded through public funding, the prices that the universities offer for these services could distort competition and undercut the prices on the market. In the case of hospitals, for example in Belgium, part of the costs for infrastructure comes from the Federal Ministry of Health and part from the Communities. However, when contracting with Dutch health insurance funds, the tariffs charged are the same as those charged to the Belgian health insurance system. This can be regarded as a distortion of competition, since the Belgian hospitals offer prices that do not cover all the costs. This can be regarded as state aid.[505]

In *Stardust Marine*[506] the Court brought further clarification to the question of the definition and scope of state aid, a question which was left opened in its previous case in *Preussen Electra*.[507] This case is important, especially because it clarifies what is meant by state resources and the role that the state must play to determine whether there is state aid or not.

The French Republic brought a case requiring the annulment of the Commission's decision of state aid granted by France to Stardust Marine. Stardust Marine was a company doing business in the pleasure-boat market. It was financed by loans and guarantees by SBT-Batif, a subsidiary of Altus Finance (Altus), which was itself part of the Crédit Lyonnais group. Crédit Lyonnais itself made losses in 1992 and 1993 and the French authorities supported it financially through an increase in capital and by assuming the risks and costs connected with its commitments, which were transferred to a separate structure, the Consortium de Réalisations (CDR), a 100% subsidiary of Crédit Lyonnais, which was created in 1995 as part of a hiving-off operation.

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504 See Case C-482/99, *French Republic* v. *Commission* ('Stardust Marine'), [2002] ECR I-4397.

505 Glinos et al. 2005, p. 66.

506 Case C-482/99 *French Republic* v. *Commission* ('Stardust Marine') [2002] ECR I-4397.

507 Case C-379/98 *PreussenElektra* [2000] ECR I-2099; See Kuhn 2001.

Stardust Marine was controlled from 1994 by Crédit Lyonnais through Altus following an increase in capital of FRF 44.3 million. It was transferred to CDR under the 1995 hiving plan, thus becoming a subsidiary of CDR which in its turn was a subsidiary of Crédit Lyonnais between 1995 and end of 1998. The Crédit Lyonnais management, however, ceased to play any direct part in the management of Stardust Marine after its transfer to CDR because of the total separation of management between CDR and Crédit Lyonnais. CDR increased Stardust Marine's capital in three stages, in 1995–1997. The Commission decided that the increase of capital in 1994–1997 was state aid.

One of the pleas put forward by the French authorities was that the funds used by Altus and SBT, subsidiaries of Crédit Lyonnais, cannot be classified as State resources within the meaning of Article 107(1) TFEU (ex Article 87(1) EC) and that the support measures taken in favour of Stardust Marine were not imputable to the French State.

In answering the first part of the first plea the Court stated that it is not necessary to establish in every case that there was a transfer of State resources in order to determine whether the advantage granted to an undertaking is state aid or not. Moreover, as stated in its previous case-law, it is not necessary that the financial means used to support the undertaking be permanent asset of the public sector. Therefore, even if those sums are not permanently held by the Treasury, the fact that they are under public control, which makes them available to the competent national authorities, qualifies them as State resources.[508]

In answering the second part of the first plea, the Court stated that even if the state were in a position to control a public undertaking and to exercise a dominant influence, actual exercise cannot automatically be presumed.

Advocate General Jacobs stated that:

> The wording of Article 87(1) EC seems to distinguish between aid granted by a Member State and aid granted through State resources. However it is now clearly established that 'aid granted by a Member State' must also be granted through State resources. The second alternative in Article 87(1) EC (aid granted through State resources) thus serves only to preclude circumvention of the State aid rules through decentralised or 'privatized' distribution of aid. This means however that where aid is granted under the second alternative 'through State resources' the measures must be the result of action of the Member State concerned. That is confirmed by the title of the relevant section 'Aids granted by States' which suggests that in all cases the measure must be ultimately imputable to public authorities.[509]

The Court considered that it was necessary to examine whether the public authorities were involved in one way or another in adopting those measures. This was because a public undertaking can act with more or less independence.

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[508] Case C-482/99 *French Republic* v. *Commission* ("Stardust Marine") [2002] ECR I-4397, para 37; See also case annotation Leigh Hancher, 'Case C-482/99, *French Republic* v. *Commission* ("Stardust Marine") '2003 C.M.L.R. 40, 739–751.

[509] Opinion of Advocate General Jacobs delivered in Case C-482/99 *French Republic* v. *Commission* ('Stardust Marine') [2002] ECR I-4397, para 54.

It considered that the imputability to the State should be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken. In *Van der Kooy*[510] the Court stated that whether the measure would not have been taken without accounting for the requirements of the public authorities should be considered. In *Italy* v. *Commission*[511] the Court stated that apart from factors of an organic nature which linked the public undertakings to the State, those undertakings to which aid had been granted through an intermediary had to take account of directives issued by the State.

The Court decided that other indicators arising from the circumstances of the case should be looked into to determine whether a measure is imputable to the state:

> Its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.'[512]

Thus the involvement of the state has to be shown.

Even if the measure is imputable to the state, it can still escape state aid rules if it is proved that the aid is just part of a prudent line of conduct. This is what the French authorities managed to prove in their second plea. It was necessary to assess whether in similar circumstances a private investor of a dimension comparable with that of the bodies managing the public sector would have made the same capital contributions. This assessment has to be based on the period when the financial support measures were taken.

This decision was important in determining that whenever public undertakings or an undertaking controlled by the state in question the measures they take should not be automatically regarded as state aid. Other conditions must be fulfilled to qualify.

In order to determine whether there is cross-subsidisation, the market-economy investor test is used. It is normal that a company tries to balance its losses on one market with the resources from another more profitable market. This can be considered as normal behaviour in the market. However, cross-subsidisation, which is caught by state aid rules, occurs when under the existing market conditions, a normal market actor would not make the same move. In order to determine whether there is state aid it is necessary to compare what terms of transaction a private investor would find acceptable and the terms under which the State granted

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[510] Joined Cases 67/85 R, 68/85 R and 70/85 R, *Kwekerij Gebroeders van der Kooy BV and others* v. *Commission of the European Communities* [1985] ECR 01315, para 37.

[511] Case C-303/88 *Italian Republic* v. *Commission of the European Communities* [1991] ECR I-1433 paras 11, 12.

[512] Case C-482/99 *French Republic* v. *Commission* ('Stardust Marine') [2002] ECR I-4397, para 56.

the aid. If the financing was granted by the State under more favourable terms than a private investor would have, then there is state aid. In other words, would the undertaking have obtained the funds on the private capital market?[513]

In *Alfa/Fiat*[514] and *ENI-Lanerossi*[515] the Court refined the market investor principle and distinguished private investors who invest for the short term and have speculative objectives and private investors with a longer-term perspective.

> It should be added that although the conduct of a private investor with which the intervention of the public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy—whether general or sectorial—and guided by prospects of profitability in the longer term.[516]

In making entrepreneurial investment decisions a wide margin of judgement is required. The market investor test applies when there is no other explanation for the provision of public funds other than by considering them State aid. This approach will apply to any cross-subsidisation from a profitable part of a public group of undertakings to the unprofitable part. 'This happens in private undertakings when either the undertaking in question has a strategic plan with good hopes of long-term gain, or that the cross-subsidy has a net benefit to the group as a whole. In cases where there is cross-subsidisation in public holding companies the Commission will take account of similar strategic goals.'[517]

In *SFEI*[518] the Court stated that in order to determine whether there is a state aid it has to be determined whether the recipient undertaking receives an advantage which it would not have obtained under normal market conditions, leaving it to the national courts to determine what the normal remuneration for the services in question is. For this, an economic analysis is necessary, taking into account all the factors that an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided.[519]

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[513] See Commission Decisions in ENI-Lanerossi [1989] OJ L 16/52; Leeuwarden [1982] OJ L 277/15; Intermills I [1982] OJ L 280/30; Boch/Noviboch [1985] OJ No L 59/21; Alfa-Fiat (C) [1989] OJ L 394/9.

[514] Case C-305/89 *Italian Republic* v. *Commission of the European Communities* [1991] ECR I-01603.

[515] Case 303/88 *Italy* v. *Commission* (*ENI-Lanerossi*) [1991] ECR I-1433.

[516] C-305/89 *Italian Republic* v. *Commission of the European Communities* [1991] ECR I-01603, para 20.

[517] Communication on the Application of Articles 92 and 93 of the EEC Treaty and Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector [1993] O.J. C307/3, para 29.

[518] Case C-39/94 *Syndicat Français de l'Express International and Others* v. *La Poste and Others* [1996] ECR I-3547.

[519] Ibid., para 61.

In the Commission Decision[520] that followed the Court's ruling in *SFEI* the Commission investigated whether the logistical and commercial assistance offered by the post office to its subsidiaries constituted state aid. It discovered that regarding logistic assistance, the revenues did not cover the costs of the subsidiaries entirely only for the period 1986 and 1987.

The complainant in its pleadings argued that the Commission should disregard the group's strategic interests and economies of scale arising from the privileged access of SFMI-Chronopost to the post office's network and infrastructure because the post office has a monopoly. The Commission replied that this is a misinterpretation of the Court's ruling because strategic considerations such as the wish to penetrate a new market play an important role in the investment decision-making process of a company. There is no need to take a different approach because one of the parties to a transaction has a monopoly. The test that has to be applied is whether the terms of transaction are comparable to those of an equivalent transaction between a private parent company and its subsidiary.[521]

The Commission adopted the approach that there is no financial advantage as long as the internal prices at which the services are transacted between the undertakings belonging to the same group are at full-cost prices. The fact that for the first two years the total costs were not covered was not considered to be something abnormal because this usually happens in the start-up period. After this initial period the remuneration paid by Chronopost covered all costs incurred by the post office plus a return on the equity capital invested. The Commission had to determine whether the market-economy investor test was passed and had to examine whether the undertaking would have obtained its funding on the private capital markets. The conclusion reached was that La Poste provided logistic and commercial assistance to its subsidiary under normal business conditions and therefore did not grant state aid.

This decision was challenged in front of CFI in *Ufex*[522] case which is an application for the annulment of Commission Decision 98/365/EC, Chronopost, the defendant argued that in order to determine whether there is state aid it is not right to use the normal market conditions test and to determine what would the public undertaking have charged in normal market conditions. Instead it proposed that a different test should have been used. This test would imply to look at what a company incorporated under private law and competing with the public undertaking would have charged its subsidiary. CFI considered that the Commission should have checked whether the payment received by La Poste was comparable to that demanded by a private holding company or a private group of undertakings operating not in a reserved sector, pursuing a structural policy and guided by long-term prospects.[523]

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[520] Decision 98/365/EC of 1 October 1997 concerning alleged State aid granted by France to SFMI- Chronopost [1998] OJ L164/37.

[521] Ibid.

[522] Case T-613/97 *UFEX and Others* v. *Commission* [2000] ECR II 4055.

[523] Ibid., para 75.

One of the problems that can arise with the application of the private investor test is the impossibility of comparison in the absence of similar circumstances. It would thus not be possible to compare a situation in question with the behaviour of a private investor in similar circumstances. This problem is dealt with in *Chronopost*[524] which is an appeal against the CFI decision in *Ufex*. La Poste had a monopoly in the mail sector and no private investor could have had network infrastructure and resources comparable to La Poste. Thus it was impossible to compare this situation with that of a private investor in similar circumstances. The Court decided that in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, normal market conditions, which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements available.[525] Such objective elements in this case were considered to be the costs borne by La Poste in providing logistic and commercial assistance to its subsidiary. The Court found that the price charged covered all variable costs incurred in providing logistic and commercial assistance, an appropriate contribution to the fixed costs for the use of the postal network and an adequate return on the capital investment in so far as it was used for SFMI-Chronopost's competitive activity.[526]

This case went further with a second procedure before the CFI where it was decided that the contested decision was annulled in so far as it found that the logistical and commercial assistance provided by La Poste to its subsidiary did not constitute state aid. This was again appealed in front of the Court of Justice.[527] With regard to the test that needs to be adopted the Court stated:

> Furthermore, as the Court has already observed in para 38 of the judgment in *Chronopost and Others v Ufex and Others*, in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, 'normal market conditions', which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements available.
>
> In those circumstances, the Commission should not, at first sight, be criticised for having based the contested decision on the only data available at the time, deriving in particular from the Deloitte report and supplied by the French Government, from which it was possible to reconstruct the costs incurred by La Poste. The use of those data could be open to criticism only if it was established that they were based on manifestly incorrect considerations.[528]

Thus, in the absence of a possibility of comparing with a private group of vundertakings the Court accepts the use of any existing available data. It is

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[524] Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, *Chronopost SA, La Poste and French Republic* v. *Union française de l'express* (*Ufex*) *and Others* [2003] ECR I-6993.

[525] Ibid., para 38.

[526] Ibid., para 40.

[527] Joined cases C-341/06 P and C-342/06 P *Chronopost SA, La Poste and French Republic* v. *Union française de l'express* (*Ufex*) *and Others* [2008] I-4777.

[528] Ibid., paras 148, 149.

interesting that even the Court points out that the use of the available data could be opened to criticism.

It is interesting to observe that the Commission accepted that the prices did not cover all fixed costs in the initial period. It was considered that this would be a normal approach that a private investor would take at the beginning of his business. Hancher and Buendia suggest that a proper test to determine whether there is subsidisation is to consider whether a private investor, in the absence of a reserved market to which the common costs could be allocated, would have been prepared to accept those losses in the non-reserved market.[529]

Nicolaides proposes another solution:

> The solution I would propose is that undertakings that enjoy exclusive rights and operate in reserved areas should be obliged to offer access to their networks to any competitor who so requests on the same conditions that access or services are offered to their own subsidiaries. This would equalise the conditions of competition and remove the possibilities of either state aid or predatory pricing.[530]

The Commission considered however that passing part of the fixed costs to another part of the market to be normal for a private undertaking in the start-up period.

This saga of cases shows the difficulties in determining whether there is state aid or not. These cases are relevant also with application to welfare services where the advantage could come from the using of the existing infrastructure. While the market for health services opens to competition more and more cases are liable to emerge.

The private investor test is defined by Parish[531] as a political valve, created by the Commission and sanctioned by the Court of Justice, designed to alleviate the contradiction created by the simultaneous existence of Articles 107 and 345 TFEU (ex Articles 87 and 295 EC). Each Member State is free to choose the system they want in organising their economic relations. The private investor test is meant to ensure equality between public and private undertakings. The fact that an undertaking is under public control should not make its situation worse than that of a private undertaking.

The danger of cross-subsidisation is permanent when an undertaking is engaged in two different markets and there is the possibility of using the resources from the reserved market. To avoid distortion of competition and state protectionism, the state aid rules are applied. However, in applying the state aids rules the Court aims on the one hand to ensure that there are no undertakings benefiting from advantages financed by the state but also on the other hand that equal treatment is ensured. That is why the market investor test, with its drawbacks, is necessary in applying state aids rules.

However, for a better solution to the problem, whenever there are undertakings acting on the reserved and on the competitive markets, it is necessary to have

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529 Hancher and Buendia Sierra 1998.

530 Nicolaides 2001, pp. 390–393.

531 Parish 2003, pp. 70–89.

separate accounts; that is why the Commission adopted a directive on the transparency of financial relations between Member States and public undertakings.

4.5.6 Transparency Directive

The problems caused by the fact that some undertakings provide services of general economic interest and service for the free market demand a better differentiation of these activities. For the sake of the transparency of the financial relations between public authorities and public undertakings and within certain undertakings, the Commission adopted Directive 80/723 on the transparency of financial relations between Member States and public undertakings[532] (Transparency Directive). The original Directive was amended several times to extend its scope. Through Directive 85/413,[533] undertakings carrying on activities in the water, energy, post, telecommunications, transport and public credit sectors were included into the scope of the Directive. The amendment of 2000[534] acknowledged that the previous national, regional or local monopolies had been opened to competition fully or partly. These undertakings that are granted special or exclusive rights often enter into competition with other undertakings. In order not to complicate the application of the competition rules, the Transparency Directive extended its scope to cover undertaking entrusted with special or exclusive rights or undertakings entrusted with the operation of services of general economic interest for which they receive subsidies. The importance of having 'detailed data about the internal financial and organisational structure of such undertakings, in particular separate and reliable accounts relating to different activities carried on by the same undertaking' was underlined in the preamble to the Directive.[535] Separate accounts for services or products in respect of which Member States granted special or exclusive rights or where the undertaking is entrusted with the operation of services of general interest, and for other products or services in respect of which the undertaking is active is required.[536]

However, if the undertaking is engaged only in the provision of services of general interest the obligation to account separately does not apply.

Directive 2005/81[537] amended the Transparency Directive; furthermore, Article 2(1)(d) was modified to apply to undertakings which enjoy a special or exclusive right granted by a Member State pursuant to Article 86(1) of the Treaty or are

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[532] Directive 80/723 [1980] OJ L195/35; this Directive has been amended several times, the latest amendment being Directive 2006/111, [2006], OJ L318/17.

[533] Directive 85/413 [1985] OJ L 229/20.

[534] Directive 2000/52 [2000] OJ L193/75.

[535] Para 14 of the Preamble to the Directive 2006/111, [2006], OJ L318/17.

[536] Directive 2000/52 [2000] OJ L193/75.

[537] Directive 2005/81 [2005] O.J. L312/47.

entrusted with the operation of a service of general economic interest pursuant to Article 106(2) TFEU (ex Article 86(2) EC) EC that receive public service compensation in any form whatsoever in relation to such service and that carry on other activities.[538]

According to the amendment introduced by Directive 2005/81, undertakings entrusted with special or exclusive rights granted by Member States or undertakings entrusted with the operation of services of general economic interest and which receive aids should maintain separate accounts. When these undertakings receive compensation for the operation of the service of general interest that aid should not be used to finance other activities which do not fall within the scope of the service of general interest.

4.5.7 Conclusion

Public procurement rules apply when an undertaking has the specific purpose of meeting needs of general interest that does not have a commercial or industrial character but does have legal personality and is financed by the State, regional or local authorities or other bodies governed by public law, or is subject to management supervision by those bodies, or has an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.[539] Whenever there is an undertaking that pursues an economic activity, competition rules apply. Whenever there is an undertaking having an economic character which pursues a general interest, a mixture of rules applies.

For that part of aid which is meant to compensate for the provision of a public service, it is desirable that public procurement procedures are followed since this is the best means to reduce costs and increase transparency. State aids rules apply to the part of aid which exceeds the amount of compensation necessary for the provision of the service of general interest, to ensure that competition is not distorted by the aid.

In applying state aid rules it has been shown that there are special rules for services of general economic interest, which offer enough safeguards for the proper protection of these services. The first level of protection is granted when, on condition that the *Altmark* criteria are met, state aid rules no longer apply. These criteria are well designed to provide more transparency of financial relations and more efficiency for those services of general economic interest. The second level of protection is offered when, even if the *Altmark* criteria are not met, the exceptions of Article 106(2) TFEU (ex Article 86(2) EC) still apply and there are some rules concerning procedural aspects that exempt certain undertakings from

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[538] See Directive 2005/81 [2005] OJ L312/47.

[539] Article 1(b), second subpara, of Directives 92/50, 93/36 and 93/37 [2001] OJ L 285/1.

the notification procedure. Another protection offered to undertakings entrusted with the provision of services of general economic interest is equal treatment, which allows these undertakings to act in a businesslike manner on the market.

Accordingly, competition rules act both ways: to avoid distortions of competition that could be caused by state aid granted to undertakings entrusted with the provision of services of general economic interest and to also safeguard these services.

4.6 Conclusion

When it comes to the application of competition rules to welfare services a conflict between economic and social issues takes shape. To avoid such an antagonistic discussion, the dialogue should be built around a common denominator: the consumer.

It is accepted in the field of welfare services that State intervention in the market is necessary. The conflict between economic and social aspects is identified in the conflict between the EC policy of having open borders and the national policy of intervening in the markets to protect the consumer. Since the European Union and national policies aim at maximising consumer welfare, why is there a conflict? Are these two policies addressed at two types of consumer? In welfare services, solidarity is a defining feature. The concept of citizenship plays an important role because it is the main element around which solidarity is constructed. There are authors that consider that the application of internal market and competition rules opens the road for a new form of solidarity: European solidarity. These welfare services—which are characterised by market failure and qualify as services of general economic interest—are those which ensure economic, social and territorial cohesion throughout the Union. This thus leads to a paradox: it is contended that these services are endangered by the application of European Union law but at the same time these services are the key to European cohesion. Perhaps this paradox will disappear if the equation is put differently: instead of starting from the premise that there is a conflict between national and European Union interests, a different approach should be adopted by looking at these two policies as complementary.

Taking this complementarity approach the following questions arise: do the competition rules endanger welfare services? Are economic concepts a threat to national social values?

Economic integration improves consumer welfare. Increased competition leads to more efficiency, the resources on the market are better allocated, the competitive process leads to better innovative products, better quality, more choice of products, lower prices and all these to the benefit of the consumer. The aim of competition rules is to achieve social and overall welfare. This is the beneficial contribution of the competitive process to the welfare of the consumer. On the other hand, the State has the task of correcting market failures and intervening in the market. State

intervention in the market is accepted. The need for efficiency has required changes to the organisation of the welfare services. Since more economic elements have been introduced it is understandable that the market rules have reached these welfare services. National and European Union rules encroached upon each other.

The status of these two policies is that on the one hand, State intervention is necessary and cannot be eliminated from the provision of welfare services, while on the other hand, once economic elements have been introduced in a certain field, the competition rules are absolutely necessary because they provide the rules of the game. Since these two policies can be seen as complementary and in the service of the consumer, a certain balance has to be found in applying national and European Union rules. Therefore, both the competition and the national rules have to be limited to a certain extent. The main problem is to what extent and how to maintain this equilibrium in order to reap the benefits of having both good social protection and a competitive environment.

The existence of other values than the economic ones can lead to the non-application of competition rules where they prevail or they can lead to justifying existing restrictions to competition.

It has been seen that non-economic values are taken into consideration in the process of justifying restrictions to trade; however, when applying Article 101(3) TFEU (ex Article 81(3) EC) the non-economic interests are considered only if the four conditions provided by Article 101(3) TFEU (ex Article 81(3) EC) have been considered.

The fact that some services are characterised by market failure triggers the necessity for protection from the part of the Member States through the granting of special or exclusive rights or through the granting of subsidies. The existence of social and solidarity elements are liable to justify the exclusive rights or the subsidies. Whenever there is a service of general economic interest, Article 106(2) TFEU (ex Article 86(2) EC) is used to justify restrictions of competition. However, the mix of services of general economic interest with services which are purely economic and are provided in a competitive environment complicates things even more. In such circumstances it is necessary to ensure that the exclusive rights or the subsidies do not affect the competitive process in the ancillary markets. The proportionality principle is the principle used to determine to what extent competition can be restricted. In answering to the Member States' fears that the application of the competition rules endangers the proper functioning of the welfare services it can be argued that Member States have different safeguards. First of all they have a sufficient degree of discretion in determining what a service of general economic interest is. Thus every Member State can follow its own policy with regard to the regime applied to different services. Furthermore, it is a useful instrument in Member States' hand to safeguard those services which contain social elements. The Court has shown deference for welfare services by the intensity of review in applying the proportionality principle. A more flexible test was applied to cases in this field. The Court sometimes showed that is ready to make a step back from a pure economic analysis and to give protection to social issues; in the case of *BUPA* it did not show a consistent application of the *Altmark*

conditions, this revealing the fact that the thumb rule when consideration is given to social issues is preferred to a difficult and costly economic analysis.

By applying competition rules, efficiency is increased and consequently consumer welfare as well. Consumer welfare is at stake when applying Article 106(2) TFEU (ex Article 86(2) EC). However, Member States tend to be protectionist. The dangers of cross-subsidisation, of extending the economical advantage on the exclusive market in order to eliminate competition on an ancillary market are present. For these reasons, the theory according to which welfare services should be outside the scope of competition rules cannot be supported.

Even if it is argued that the case-by-case approach brings legal uncertainty, at this point, the proportionality principle is the only instrument that can balance different values. The resistance of the Member States to the application of competition rules can hide protectionism or the refusal to innovate and adapt to the new market rules. For example, the fact that an undertaking provides services on a reserved market as well as services in a competitive market can have beneficial effects for the efficiency of the undertaking. Complying with the transparency Directive would mean that undertakings would become more transparent that the costs on the reserved market would be transparent and thus easier to spot inefficiencies. All these trigger a process of modernisation that would ultimately benefit the consumer.

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Chapter 5
Positive and Soft Law

5.1 Introduction

European politics may make no progress, but the courts cannot by themselves achieve European integration. The case law of the European Court is gradually beginning to bear witness to this awareness. […] the Europeans first discovered the importance of law and legal institutions, and then found out how many interesting things you could do with the law.

> […] In the past, the Commission often thought it could rely on the Court's help when its case was likely to strengthen European integration. In the future, perhaps it will only be able to do so when it can show a solid legal basis, as the Court's willingness to construct such a basis on its own initiative may diminish. There is nothing outrageous in the idea of going back to a minimal conception of things. […] The next stage of European integration will therefore need legal craftsmen more than anything else. However, as the older conceptions of the law will continue to exercise their influence concurrently, it may need some social engineers as well.[1]

Negative integration and its deregulatory force create a legislative lacuna. At this stage, positive action is required to be taken. The mutual recognition principle imposes the recognition of other Member State standards. However, there are fears that this will lead to a race to the bottom and this is not desired especially in a field that involves social issues. The removal of the national law creates a need for new action to be taken at European Union level. For example, doctors moving from one Member State to another were confronted with the problem that there was no recognition of qualifications.[2] By applying the mutual recognition principle the obstacles were removed, however, the Court was not well suited to compare the equivalence of diplomas. That is why legislation was adopted to deal with these issues. The movement from one Member State to

[1] Koopmans 1986, 925–931.

[2] See Case 136/78 *Auer* [1970] ECR 437.

L. Nistor, *Public Services and the European Union*,
Legal Issues of Services of General Interest, DOI: 10.1007/978-90-6704-805-7_5,

another raised issues related to the coordination of social security schemes, to the recognition of qualifications, or in the case of travelling with the purpose of receiving medical care issues related to certainty regarding patients' rights appeared. Thus, the Court removed the Member States' regulatory barriers. However this was not sufficient. The political forces had to convene and to pave the way for new legislation at European Union level. The Court just opens horizons; the exploration has to come from the Member States.

However, at this point a lack of political consensus can be seen. The diversity of the welfare systems existent and the reticence to undergo changes makes the task of positive harmonisation more difficult. Sometimes the failure to take positive action leads to the use of governance. One method of governance is the open method of coordination which is used to achieve coordination at European level. Even if the results coming from the process of soft law are not always consistent, the fact that the involved parties gather and discuss the existent problems, compare different solutions in different Member States, this can be an useful tool to make the Member States and the stakeholders be more aware of the changes and to accept them.

Because of the troubled relationship between welfare and negative harmonisation this chapter addresses the question whether positive and soft co-ordination offer alternative or complementary solutions. The discussion regarding positive harmonisation focuses on the constitutional debate related to the limits of European Union powers. Since the internal market and social issues are intertwined, the harmonisation of internal market aspects may encompass welfare aspects as well; thus, the lack of express powers to harmonise can be by-passed by using the so-called 'functional' competences. However, Member States would prefer to have the welfare aspects regulated closer to the citizens; that is why subsidiarity is seen as a tool meant to stop the creeping expansion of European Union powers. An analysis of the principle of subsidiarity as a potential limit to the European Union powers is carried out. Furthermore, there is secondary legislation which has an impact on welfare services. They illustrate the fact that positive law is necessary. The developments caused by negative harmonisation triggered the necessity to have those principles and rules written in positive law.

Due to the political sensitivity of the problems related to welfare, sometimes it is hard to have Member States agree. Since Member States are not ready to accept some changes, the co-ordination alternative can be regarded as the process where Member States become aware of the existence of common pressures, where they learn through dialogue, exchange of best practices, peer review. Soft law derives from subsidiarity. By using governance methods, Member States have more autonomy and have the feeling that it is them who decide upon welfare issues. It is doubtful that the use of soft law is a very successful method. However, it is important in the sense that it makes Member States and the different stakeholders more aware about the changes that need to be done and prepares them to accept those changes. It would be interesting to address the question whether the Proposal for a Directive on the application of patients' rights in cross-border healthcare is the result of the use of soft-law measures in the field of health care or whether it is

a failure of it. However, the limited scope of the book cannot answer this question. Nevertheless, the question and the answer to the question show how the integration process uses all possible means to adapt to the changes on the market.

The chapter on soft law also addresses the subject of services of general interest. It deals with the relationship between services of general interest, services of general economic interest and welfare services. Until now, clarification on the subject of services of general interest came from the Commission who used communications-a soft-law method to bring certain clarity in the field. Do these communications bring enough clarity or is it necessary to have a framework directive on services of general interest? It is interesting to see that here also there is an evolution towards positive law and Article 16 EC and the new proposals in the Lisbon Treaty underlie this.

This chapter is meant to show the relationship between negative and positive and soft law and to answer the question whether these methods are alternative or complementary to each other.

5.2 Positive Harmonisation

5.2.1 Introduction

A. Difficulties in Harmonising Welfare

The creation of a "level playing field" where free movement of goods, persons, services, capital is ensured and where competition is not distorted was vital for the functioning of the common market, and positive harmonisation was seen by some as the most appropriate instrument to achieve that. However, although it removes obstacles to trade, positive harmonisation is regarded as destructive of diversity, as an instrument of equalising, of creating uniformity. The existing law is replaced by new law. The removal of national law and its replacement by European Union law have been seen by Member States as a threat to their sovereignty.

The harmonisation in the field of health, health insurance and education proves to be even more problematic than the harmonisation of purely economical aspects because first of all it raises political problems and secondly it raises problems related to the legal basis necessary for harmonisation, since welfare aspects were introduced only later in the Treaty.

Harmonisation is in general contested because it brings all to the same standards but it raises even more political problems when it comes to health, health insurance and education because they encompass human aspects. Education is a sensitive field because it is an expression of national identity. It deals with the education of future generations and it is very important for Member States to be in charge of their education system and to preserve national identity. Health is considered to be the second-largest sector in the EU countries

in economic terms.[3] The health sector displays great complexity: the health system that aims at protection and promotion of public health involves an intricate system of financing and distributing of benefits, where the state plays an important role in answering market failures (it ensures access to health care for all, at a reasonable price, throughout the whole territory); it involves the provision of health services, provision of goods (medical products). Health sector is strongly regulated (all medical professions are regulated, starting with the regulation of the training requirements to the regulation of market access; the state is the one who designs the structure of health insurance system) and all of these regulatory measures potentially conflict with European Union provisions regarding free movement and competition rules. Also the different organisation of health systems implies different methods of financing and consequently different types of health insurance.

Moreover, the harmonisation of these sectors poses problems with regard to the legal basis used for harmonising. Designed initially to promote economic interests, the original Treaty does not contain any reference regarding health and education and the developments without the existence of a specific legal basis make these sectors special cases of integration.

B. Need for Harmonising

In spite of political and legal difficulties that impede a positive action to be taken in these fields, still, the need for harmonisation exercised pressures for finding solution to these problems. Positive action in the field of health and education is the result of three types of pressures: pressures coming from the internal market, pressures coming from international level, as the result of globalisation and the active role of European Union institutions pushing towards further integration.

The organisation of these systems around the concept of citizenship became outdated and the reforming of the systems was necessary as a result of changes determined by the creation of the internal market. A new organisation corresponding to the new realities was required.

The initial design of the European Union was aimed at promoting economic interests (create a common market to promote harmonious development of economic activities, continuous and balanced expansion, an increase in stability, accelerated rising of standards of living, closer relations between Member States). The removal of the national regulatory barriers, corroborated with technological development that made great distances become insignificant, stimulated increasing mobility, making the European Union area equivalent to the area of an internal market. Since economic sector is tightly connected with other sectors, the impact of the common market was not limited only to economical aspects. Thus, though initially the European Union was conceived only to deal with economical aspects,

[3] See Palm et al. 2000, www.aim-mutual.org.

the development of other policies occurred as a "spill-over effect"[4] from the common market. As every sector had to organise and to respond to new realities, health and education sector also suffered a process of adaptation to the new changes brought by the common market.

The increasing mobility of students or of patients, the introduction of market elements in the health and educational systems determined that these problems be dealt at European Union level because the problems exceeded national borders and only action at European Union level could effectively deal with these problems.

European Union's positive involvement in the field of health and education was determined not only by the "spill-over" from internal market but also by the pressures coming from an international level. In order to be able to respond the challenges of globalisation, the European Union position regarding education has changed. Human resources are regarded as important factors in becoming more competitive at international level.

> Human resources are the European Union's main asset. They are central to the creation and transmission of knowledge and a determining factor in each society's potential for innovation. Investment in education and training is a key factor of the Union's competitiveness, sustainable growth and employment and therefore a pre-requisite for achieving the economic, social and environmental goals set in Lisbon for the European Union. Equally, it is essential to strengthen synergies and complementarities between education and other policy areas, such as employment, research and innovation and macroeconomic policy.[5]

The European Union acknowledged "the important role of education as an integral part of economic and social policies, as an instrument for strengthening Europe's competitive power worldwide, and as a guarantee for ensuring the cohesion of our societies and the full development of its citizen."[6] Education policy is placed not only in a Community context, but in a broader one, underlining the challenges that globalisation brings. Lisbon Strategy aiming at making Europe "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion" is meant to meet challenges brought by globalisation, and achieving these objectives require not only "radical transformation of economy," but also a "challenging programme for modernising social welfare and education systems."[7]

The importance of education appears to exceed national borders, education being part of the objective of making Europe the most dynamic knowledge-based

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[4] In defining the concept of spill-over, Stephen George explains: "If states integrated one sector of their economies, technical pressures would push them to integrate other sectors," George 1996.

[5] Education and Training 2010 "The success of the Lisbon strategy hinges on urgent reforms"—*Joint interim report of the Council and the Commission on the implementation of the detailed work programme on the follow-up of the objectives of education and training systems in Europe* [2004] OJ *C* 104/01.

[6] Declaration of the European Ministers of Vocational Education and Training, and the European Commission, convened in Copenhagen on 29 and 30 November 2002, on enhanced European cooperation in vocational education and training "The Copenhagen Declaration."

[7] Education and Training 2010.

economy. The economic integration and economic development cannot ignore educational aspect, which became a pre-requisite for economic growth.

Among the positive measures taken at European Union level, positive action taken in the field of health and education in order to respond to the problems created by the internal market or to respond to increasing competition on international level was not the only means of influencing the national organisation of these sectors. Positive action taken especially with regard to the common market strongly impacted health and education fields. For example, in the field of health, in a Report[8] issued in 2001 it was acknowledged that 233 regulations, directives, decisions, recommendations and rulings of the ECJ related to the internal market issued between 1957 and June 1998 had the potential to affect Member States' health systems.

The establishment and functioning of the internal market requiring the removal of all obstacles to trade brought with it complex changes. Economic aspects contaminated activities that displayed social and human aspects, like health and education. The division between economic and non-economic blurred and thus, the European Union competences extended to the discontent of Member States who felt their sovereignty threatened. The European Union appears to have the competence to harmonise almost anything that represents an obstacle to trade or presents the potential of restricting competition even if the result of such measure would impact welfare sectors.

C. Role of the Chapter in the Book

In the study of the impact that the internal market has on national welfare systems, an analysis of positive harmonisation is required for several reasons. First of all positive harmonisation has the most important impact on national systems, because it actually replaces the national law with European Union law. Secondly, an analysis of positive harmonisation with regard to health, health insurance and education is important because it reveals an atypical case of integration that shows how health and education policies evolved from an initial stage, where the original Treaty of Rome contained no mention of health or education, to the present stage where health and education have an European dimension. It is important to see how the problems related to the non-existence of a legal basis for harmonisation were solved by the European Union and how the European Union responded to the need for harmonisation. The case of health and education is an illustrative case of how European Union powers extended and it is important to see what exactly the causes of this expansion are. Moreover, the study of positive harmonisation reveals the constitutional problems related to the division of powers between the Member States and European Union; it reveals the divergences related to whether action

[8] The internal market and health services, Report of the High level Committee on Health, 17.12.2001, European Commission Health and Consumer Protection Directorate General, Health and Consumer Protection Directorate General, Directorate G-Public Health, at http://ec.europa.eu/health/ph_overview/Documents/key06_en.pdf.

should be taken at national or supranational level. Thirdly, besides the interesting problems related to the competence of legislating and the conflict of powers between Member States and European Union, the analysis of positive harmonisation is important through the effects that the law adopted has on national education and health systems. It is interesting to see that the effect of the positive law in some cases is to introduce more market elements; once something is contaminated by market elements, then free movement and competition rules will apply and the process of integration will continue through the deregulatory power of negative integration.

An overview of the whole forces that trigger the integration of the welfare field is important to see how different harmonising methods complement each other and how the problems that have been raised and have remained unsolved by one method triggered the use of another method. Illustrative for this are the issues related to patient mobility where the negative integration created a need for legal certainty. The answer to these legislative needs came first from the part of soft law. However, a written binding law was desired and one of the solutions found was to include health services within the framework of services directives.[9] Lobbying from different actors succeeded in removing the health services from the scope of services directive. However, the need for positive law remained and it was crystallised under the form of a proposal for a Directive on the application of patients' rights in cross-border healthcare.[10]

D. Structure of the Chapter

The need for more compatibility between different welfare systems is the driving force behind the changes in welfare fields. Because the Treaty articles or any text of secondary law cannot offer a complete picture of the expansion of European Union powers in the field welfare services, this chapter will look first at welfare as being a "spill over effect" from the internal market. A short overview of the theories of integration, reveal the particularity of the health and education field. For a better understanding of the European Union expansion of powers and of developments in the field of health and education it is important to place the integration of health and education in a larger context that of the development of the European Union. A short overview of the integration of welfare is useful for clarifying past developments, but also to predict the possible future evolution of the welfare aspects.

Within the European Union, individuals are subject to two types of legislation: national legislation and European Union legislation. Since the European Union can act only if it was granted the powers to act, the analysis of positive harmonisation is interesting especially from the point of view of legal basis used for harmonising.

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[9] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L 376/36.

[10] See Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, COM (2008) 414 final.

A section will be dedicated to the analysis of the legal basis, thus determining how far the European Union powers can go. A distinction between specific legal basis and functional legal basis is made for the purpose of illustrating the fact that health and education sectors are greatly influenced by the internal market and by the laws issued for the purpose of harmonising internal market matters.

Since health and education sectors involve social and human aspects and were built around the concept of citizenship, Member States still consider them as sensitive areas and refuse any European Union interference. However, the impact of the internal market has affected seriously these services and the increasing presence of cross-border aspects in health and education systems requires more and more the intervention of European Union, thus its competences expand continuously. The conflict of powers between the European Union and Member States is obvious. A section will analyse whether there is an instrument capable of limiting the European Union's expansion of powers. Since the European Union's powers of harmonising tend to be very broad, a question whether the subsidiarity principle can be used by Member States as a justification to prevent further harmonisation of health and education aspects is raised. A section will deal with this topic.

Moreover, there are important pieces of secondary legislation which have their legal basis in the internal market articles and which influence welfare services. It is interesting to cover the main ones and also to look at the debate related to the disputed services directive.

5.2.2 Welfare Harmonisation as a "Spill-Over Effect"

Post war Europe, shaken by unprecedented human and economical loss was faced with the difficult task of reconstruction. Maybe the biggest challenge was to find a formula for peace and to make a decision regarding Europe's future. Lindberg and Scheingold identified four approaches to post-war problems; there were controversies over the goals-to rebuild the nation-state (nation-state was perceived as a cause of war, 'nation-states could aggregate terrifying amounts of power, but they could no longer protect their citizens'[11]) or to transcend the nation-state (a new order was required so as to avoid further destructions); and there were different approaches regarding the strategies to be followed (political determinism or economic determinism). The four approaches proposed by Lindberg and Scheingold are: the federalist approach aiming to transcend the nation-state and choosing as strategy the political determinism; the nationalist approach (confederation) choosing as goal the rebuilding of the nation-state and as strategy political determinism; the neo-functionalist approach (economic integration), choosing as goal to transcend nation-state and as strategy economic determinism; and the

[11] Lindberg and Scheingold 1970, 6.

functionalist approach (free trade), choosing as goal the rebuilding of the nation-state and as strategy the economic determinism.

It was considered that economic determinism could bring peace and could promote co-operation in non-controversial areas like humanitarian, social and economic matters.[12] Cooperation in order to find solutions to economic and social problems that the states had in common was considered to be the best way of creating social interaction between states.[13] This is the functionalist approach, a doctrine originally worked out by David Mitrany.[14] A free-trade area and a co-operation mechanism were meant to ensure solutions for common problems, while the nation-state continued to exist.

More than just having a free-trade area and co-operative solutions for common problems, the neo-functionalists provided a theory meant to undermine nationalism.[15] The theory of neo-functionalism was first elaborated by Ernst Haas. The central idea of this theory is the "spill-over effect"[16] theory-according to which integration in one sector will lead inevitably to the integration of other sectors because of the close relationship between these sectors. For the sake of the effectiveness of solving the common problems, it was considered that decision-making authority should be delegated to a supranational agency. It was considered that interest-groups would turn their attention and pressures to the supranational organisation and thus, nationalism would be undermined.[17]

"Both the functionalists and the neo-functionalists felt that peace must be anchored in a stable and prosperous economic order."[18] The functionalists opted for a free-trade area that aimed at the elimination of tariff barriers but permitted states to maintain their political and economic integrity while the neo-functionalists opted for economic integration, for the creation of the single market.

"Monnet's strategy (of integration) was thus for what has been termed elite-led gradualism […]."[19] The institutional structure of ECSC, with a central role granted to the High Authority "was an expression of technocratic approach"[20]; a corporatist style involving interests groups was meant to create close relations that would support European policy.[21]

According to George, important roles in the neo-functionalist theory are played by multi-national corporations and by the European Commission "which was believed to be in an unique position to manipulate the facts of domestic pluralism

[12] Ibid.

[13] Ibid., 6–7.

[14] Mitrany 1946; See also Haas 1964.

[15] Lindberg and Scheingold 1970.

[16] George 1996; Haas 1968; Lindberg 1963.

[17] Lindberg and Scheingold 1970.

[18] Ibid., 8.

[19] Craig 1999, p. 6.

[20] Featherstone 1994, 154–155.

[21] Wallace 1993, 293.

and international interdependence so as to push forward the process of European integration even against the resistance of national governments."[22]

The European Union appeared in a period of decline of the nation-state. Economic regeneration was seen as the first vital step to re-establishing political stability, military security and diplomatic efficacy.[23] The European Union has chosen the neo-functionalist method, the economic approach to integration. However, the scope of the European Union broadened and to the initial economic objectives other objectives were added. Throughout its development the European Union expanded its powers and, while initially the integration process was visualised as 'a kind of symbiosis between the Community and national systems',[24] later, the conflict of powers between the Community and Member States started to take shape. Health and education are two of the European Union policies introduced later in the Treaty. Though their insertion in the Treaty is made rather late, in 1992 in the Maastricht Treaty, integration in the field of education and health has started earlier and education and health are illustrative examples of how economic integration succeeded in incorporating almost all aspects of society in the integrationist process.

The developments in the field of health and education are examples of atypical models of integration. The neo-functionalist theory (not without criticism) may prove useful in the attempt to explain the expansion of European Union competences in these fields through its central idea of "spill-over effect." Integration in one sector may prove to be ineffective without integration of other sectors.[25] For example, in the field of education, without the existence of a legal basis, action taken by the European Union was motivated on the grounds that it was necessary for the completion of the internal market. Many other European Union policies influenced education such as the completion of the single market for goods and services, employability, the labour market. It is worth mentioning the impact that free movement provisions had on education: the aim of removing all obstacles to mobility of people has lead to mutual recognition of qualifications and diplomas; a number of programmes were initiated at European level with the aim of encouraging mobility; the application of principle of non-discrimination regarding students, providers of education services (individuals—involving free movement of persons and free movement of services, or institutions-involving free movement of establishment and free movement of services). Health field also suffered influence coming from free movement provisions, agriculture, environment, industry.

However, the case of education is special, and other factors must be taken into account in order to explain the integration that occurred in this field. Making

[22] George 1996, 37.

[23] Lindberg and Scheingold 1970, 22.

[24] Ibid., 32.

[25] George 1996, 39.

a distinction between three "spill-over" concepts,[26] Beukel[27] considers that functional 'spill-over' cannot explain forms and levels of positive integration in the educational field. He considers that 'it is not possible to explain the growth of general education as an EC issue during the first half of the 1970s, or the later development of common policies concerning aspects of the general educational field since the mid-1980s, by pointing to the dynamics of the common market'.[28] Pertek[29] considers that the common policies concerning vocational training and mutual recognition of qualifications are the result of the common market integration, thus a "spill-over" of market integration, but Beukel considers that this explanation cannot be accepted due to the time-lag between the 'cause' and 'effect'. For him a "cultivated spill-over" is more plausible in explaining integration theory in education field (institutions of the Community have an independent role in creating linkages between different sectors[30]). It is considered that Commission played an important role in placing education on the Community agenda. But also, this theory of cultivated spill-over cannot be used to explain the increased level of integration in mid-1980s. Also pluralistic spill-over (where interest groups and governmental and non-governmental elites would have an important role) does not seem to be useful in explaining the high level of integration. Furthermore, Beukel underlines the importance of environmental factors, the fact that the society is a knowledge-based society; international economic trends after 1980s are considered to have played an important role in opening the educational systems. The conclusion reached by Beukel was that Community's institutions are the forces that determined increased educational integration (for example positive integration in the educational field happened even if education was not mentioned in the Treaty of Rome). Changes "beyond the Community institutions and their original economic-political aims" may be used also to explain the increased degree of integration after 1980s that is why he considers that spill-over theory should not be used as the critical theory.

Many aspects of health and education integration cannot be explained using the doctrine of "spill-over effect." Certainly 'spill-over effect' has occurred and it had an influence on the developments regarding European Union's health or education

[26] He distinguishes between three "spill-over' concepts: *functional 'spill-over'*—"it denotes the idea that there is an inherent economic-technical linkage or interdependence between issue areas which give rise to pressures to integrate other sectors as well"; *cultivated 'spill-over'*—it denotes political pressures in favour of further integration, "the central institutions within the Community have an independent role in deliberately creating, cultivating or over-stating linkages between different sectors"; *pluralistic 'spill-over'*—"integration is one sector brings about political pressures from various interest groups and elites, governmental or non-governmental, for further integration."

[27] Beukel 1994, 33–54.

[28] Ibid., 44.

[29] Pertek 1992.

[30] Beukel 1994, 44; Pertek 1992, 43.

competences, but still, Member States retain the powers in these fields. Mossialos and McKee identify the existence of two types of politics in the field of health: "low" politics-Community health care competences exist where economic priorities are concerned and "high" politics—there are no European Union competences with regard to executive powers, "with respect to developing a comprehensive health policy framework at EU-level."[31]

Here the liberal-intergovernmentalist doctrine enters the scene. "The central message (of intergovernmental model) is that states are the driving forces behind integration, the supranational actors are there largely at their behest and that such actors as such have little independent impact on the pace of integration."[32] The main cause for coordinating policies according to Moravcsik[33] is the existence of 'international policy externalities' (coming from trans-border flows of goods, services, pollutants).

In the case of health it can be argued that Community competences with regard to some aspects of health policy (especially those that overlap internal market aspects) have evolved as a result of spill-over effect, while competences with regard to other aspects (sensitive aspects relating to health care financing, organisation) have retained by Member States. "While it is clear that the provision and financing of health care is a matter for Member States, a Community policy on public health which ignored the development and effectiveness of health systems would be wholly inadequate."[34]

The initial design of the European Union with accent on economic aspects had to be changed as a result of various factors that determined the expansion of European Union powers. The role of presenting a short overview of the integrationist theories is not only to highlight the particular case of integration with regard to health and education, but also to offer an explanation about what forces determined the insertion into positive law of these fields. This may be useful to better understand the conflicts of interests between European Union and Member States and to find solutions to solve these conflicts. Establishing whether integration is caused by 'spill-over' effect, or is determined by the active role of the European Union institutions or is determined through inter-governmental agreement may be useful to explain why in some areas the Member States are reluctant to accept any European Union interference (high politics). Economics have proved to be a powerful integrationist instrument and sometimes Member States' resistance is futile.

[31] Mossialos and Mossialos and McKee 2002, 49.

[32] Craig 1999, 10.

[33] Moravcsik 1993, 485.

[34] Flynn 1998, 67.

5.2.3 The Competence of the European Union with Regard to Health and Education

5.2.3.1 Introduction

Dedicated to positive harmonisation, this section is aimed at exposing the impact that the positive law has on national health and education systems and to reveal the conflicts of powers between European Union and Member States. Since the positive law represents the highest degree of influencing national health and education systems by replacing the existent national law with European Union legislation, it remains to see whether and to what extent the European Union has the competence to act.

The principle of legality of European Union action laid down in Article 5 TEU (ex Article 5 EC) states that "The Community shall act within the limits of powers conferred upon it by this Treaty and of the objectives assigned to it herein."[35] European Union legislation should be based on a Treaty article that confers the power to act. Any piece of legislation must have a proper legal basis. The case of health and education is more interesting since the original Treaty of Rome does not mention anything with regard to health and education. The case of health and education is a good example of how European Union competence expanded. Just by looking at the Treaty articles and at the existent positive legislation we cannot have a complete picture of the impact that European Union law had on health and education. That is why this chapter alongside the central analysis of the legal basis used for harmonisation presents also a short historical survey of developments in these two fields. The developments in these sectors had to be studied in close connection with the impacts coming from other sectors (especially internal market aspects). It is interesting to see how the powerful market forces determined further integration of health and education and it is interesting to see how the Treaty has been modified so as to include health and education among its provisions.

The analysis of the legal basis is important because first of all it reveals the European Union's ability to respond to legislative requirements even if it lacks a specific legal basis. Moreover, there are laws adopted using an internal market article as legal basis but which have great impact on health and education systems. It is interesting to see how the Treaty responded to these problems (meaning the indirect impact coming from harmonisation occurred in other fields) and what are the Treaty safeguards that Member States can use to protect their national health and education policies from European Union's interference. Since more and more economic aspects affected health and education fields, and since these two sectors

[35] This principle of attribution of powers exists since the beginning of the Community: Article 4 EEC: "Each institution shall act within the limits of powers conferred upon it by this Treaty"; now Article 5(2) TEC "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality."

are strongly regulated and thus potential obstacles to trade or potential distortions of competition, more national measures related to health and education become subject to the harmonising power of internal market. The conflict between Member States and European Union interests is obvious. The question is whether the principle of subsidiarity can be used to protect Member States' interests.

This section, analysing the legal basis used for harmonising, is divided into two parts: one deals with the specific legal basis, analysing the importance of the newly introduced Treaty articles referring to health and education; the second part deals with the functional legal basis, giving a few examples of Articles that can be used as legal basis for issuing binding laws and that influence to a great extent health and education sectors.

5.2.3.2 Specific Legal Basis: The Development of the Treaty with Regard to Health and Education

The original Treaty of Rome does not contain any reference to health or education. We do not find these areas mentioned either among the objectives of the European Union or in other Treaty articles. The harmonising of economic aspects, the creation and establishment of the internal market were the main targets of the EEC Treaty. According to the principle of legality, European Union cannot issue binding laws in an area if the necessary powers to act have not been granted to it. The lack of a specific legal basis within the Treaty, corroborated to the principle of legality lead to the conclusion that the field of health or education could continue to develop without any interference from European Union policy. However, the interdependence between all sectors of the society could not leave these fields unchanged. The developments occurred in health and education fields are either the results of the influence exerted by other European Union policies (especially internal market) or the results of the action taken by the European Union in the field of health or education (this being done with the help of the Court who played an important role in interpreting the Treaty in such a manner as to give a wide interpretation to the existent Treaty provisions, and broadening Community powers, sometimes "playing a role in the Community's policy-making process").[36]

For the first time, health and education were mentioned as such in the Treaty of Maastricht. Among the activities meant to "promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life and economic and social cohesion and solidarity among Member States"[37]were included in Article 3 of

[36] De Búrca 1998. De Búrca considers that the Court "is an institutional actor with a considerable degree of autonomy and normative influence."

[37] Article 2 Treaty of Maastricht**,** Treaty on European Union, [1992] OJ C 191.

Maastricht Treaty, health [Article 3(o)] and education and vocational training [Article 3(p)]. Also, among the common policies distinct articles referring to education,[38] vocational training[39] and health[40] were inserted. The significance of the inclusion of health and education in the Treaty must be regarded in correlation with what was happening in these fields: European Union was expanding in these fields even if there was no specific legal basis that would legitimise such action. Using as a legal basis the internal market articles, the non-discrimination principle, or the different articles belonging to different areas, in correlation with Article 235 Treaty of Rome (Article 308 EC Treaty; now Article 352 TFEU) that grants powers in order to attain European Union objectives if the Treaty has not provided for the necessary powers and action is necessary for the attainment of the objectives, the ECJ through its interpretative powers has permitted action to be taken at European Union level with regard of health and education field. Thus, for some authors the presence of these fields within the Treaty was only a "formalization of what was already taking place."[41] According to Lenaerts, (who refers to education and vocational training, but it can as well be applied to health) the inclusion of education in the Treaty constitutes not only the introduction of a constitutional basis but also the "taken out of its one-sided, economically-oriented perspective."[42] However, a closer look at the content of these provisions, might lead to a contrary opinion that these articles represent actually a limitation of Community expansion of powers.[43] The introduction of these policies in the Treaty can be correlated with what was happening in these fields and with the introduction by the Single European Act of the majority voting procedure. The inclusion of Article 100 (a) by the SEA (now Article 114 TFEU) allowed measures for the approximation of laws which have as object the establishment and functioning of the internal market to be adopted by qualified majority. Before the introduction of qualified majority voting, even if actions taken for the well functioning of the internal market interfered actually with the education or health field, still, Member States could oppose them. But qualified majority procedure was seen as a means intended to avoid Member States sovereign powers. Therefore, the Maastricht Treaty provisions constitute a compromise. While acknowledging the importance of these fields and admitting that it is necessary an action at European Union level, still, Member States reserved the power in these fields by introducing the provision that states that harmonisation of laws is excluded.[44]

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[38] Article 126 EEC.

[39] Article 127 EEC.

[40] Article 129 EEC.

[41] Hervey 2002a, b, 69–105; McKee et al. 1996, 263–286.

[42] Lenaerts 1994, 7–41.

[43] Jo Shaw 1999 expresses a very trenchant position: "The Member States could hardly have written a more trenchant defense of their national sovereignty in this field without an explicit refutation of any Community competence to act at all."

[44] Article 126(4) EEC, Article 127 (4) EEC, Article 128(4) EEC.

Article 126 EEC[45] states:

> The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

In the field of vocational training the provision is slightly similar, Article 127 EEC stating:

> The Community shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.

Reference is made also to vocational training because of the link between education and vocational training.[46] The European Union acknowledges and respects Member States responsibility for the content and organisation of education and vocational training. The European Union role will be only supplementing the Member States' action. Moreover, since the harmonisation of laws is excluded,[47] soft-law mechanisms are chosen as instruments for further action in these fields. Ambitious objectives have been inserted in Article 126(2)EEC: developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States; encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study promoting cooperation between educational establishments; promoting cooperation between educational establishments; developing exchanges of information and experience on issues common to the education systems of the Member States; encouraging the development of youth exchanges and of exchanges of socio-educational instructors; encouraging the development of distance education. However, European Union has been left with no instruments to achieve these objectives—only incentive measures and actions supplementing Member States' action. What are exactly the European Union powers? What are incentive measures exactly and how exactly can the European Union exercise its obligation to co-operate? Does the text leave any room of interpretation that could be used by the Court in order to permit some action at European Union level?

In the field of health we find a similar provision that ensures Member States' control over the policy. Article 129 EEC states that:

> The Community shall contribute towards ensuring a high level of human health protection by encouraging cooperation between the Member States and, if necessary, lending support to their action.

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[45] Now Article 165 TFEU.

[46] A more detailed explanation will be provided in the next section.

[47] Article 126(4) and Article 127(4) EEC.

This article also provides that other European Union policies must take into account health protection requirements. Thus, the European dimension of health is acknowledged but still, due to the high sensitivity of the subject, Member States are in charge of this field, leaving to the European Union a role of co-operation. The fact that harmonisation of laws was excluded[48] can be seen as a victory for the Member States, but the fact that Member States are required to co-operate and the European Union is involved in this co-operation process, with the Commission having the possibility of taking any useful initiative to promote coordination of policies and programmes in areas referred in para 1 Article 129 EEC, this signifies that it is accepted that health has an European dimension but for the moment the "soft law" harmonisation is preferred.

Though the Article referring to health appears to be restrictive, the Maastricht Treaty contains a number of articles capable of having an influence on health.[49]

Treaty of Amsterdam brought changes with regard to health policy. Article 129 EEC was modified and the new Article 152 EC is formulated as follows:

> A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.
>
> Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education.
>
> The Community shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

First of all the first para underlines the obligation that health protection must be 'ensured' in the implementation and definition of all community policies. European Union has an obligation to take into consideration health problems whenever it deals with other policies and not only to 'contribute' to ensuring a high level of health protection.

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[48] Article 129(4) EEC.

[49] Article 3(o) which stipulates that the Community will contribute to the attainment of a high level of health protection, Article 3(s) which provides that the Community shall contribute to the strengthening of consumer protection, Articles 30 and 34 that prohibit quantitative restrictions to trade, respectively import and export, Article 36 which contains justifications to trade obstacles and restrictions to trade are allowed on grounds of the protection of health and life of humans, animals or plants; Article 43 referring to agriculture, Articles 48–51 referring to free movement of workers; Articles 52–58 referring to the right to establishment; Articles-59–66 referring to free movement of services; Article 75(1) referring to the need to introduce measures to improve transport safety; Articles 100–102 referring to the approximation of laws related to the single market; Article 118 referring to prevention of occupational accidents and diseases and occupational hygiene; Article 129(a) referring to consumer protection; Article 130 (f)–130(q) referring to research, Article 130(r) referring to environment; Article 117–125 referring to social provisions and the setting of a Social Fund; Article 130(a)–130(e) referring to economic and social cohesion; the Protocol on social policy; and the Agreement on social policy concluded between the Member States with the exemption of the United Kingdom Article 130(u) referring to fostering economic and social development of the developing countries.

The scope of activities has been enlarged by including the 'improving of public health',[50] which is a larger objective than those contained in Article 129 EEC.

The European Union role has remained the same—to complement national policies and encourage co-operation between Member States and if necessary lend support to their action.

Another significant difference is found in para 4. If harmonisation of laws is excluded, still there are accepted acts that include also harmonisation measures in regard of certain measures "setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives" [Article 152(4)(a)] EC and "measures in the veterinary and phytosanitary fields"[Article 152(4)(b)] EC. However, "these provisions, especially those in Article 152(4) (b) EC, are not an extension of Community competence, as they refer to areas of well-established EU Community policy."[51] Article 152(4)(b) is regarded as a 'derogation'[52] from the powers contained in Article 37 EC referring to the implementation of Common Agricultural Policy.

According to the Lisbon Treaty, Article 152 EC became Article 168 TFEU. Mainly, the article remained the same; however, few changes have been made: in addition to the previous article, complementary actions of the Union shall include actions such as early warning of and combating serious cross-border threats to health [168(1) TFEU]; provisions related to encouraging cooperation between Member States to improve the complementarity of their services in cross-border areas [Article 168 (2) TFEU]; the Parliament shall be fully informed about the coordinating measures of the Commission [Article 168(2) TFEU]; by way of derogation from articles setting the division of competences between the Union and Member States [Article 2(5) and Article 6(a) TFEU], measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives, measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health and measures setting high standards of quality and safety for medicinal products and devices for medical use can be taken [Article 168(4) TFEU]; provisions referring to the adoption of measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States [Article 168(5) TFEU] can be taken; and finally, in order to underline the Member States' responsibilities in organising healthcare, Article 168(7) TFEU added that the Union shall respect the responsibilities of the Member States not only for the organisation and delivery of healthcare services

[50] Hervey 2001a, b, 1421–1446; Hervey 2002a; Hervey 2002a, b, 69–105, McKee et al. 1996, 263–286.

[51] Hervey 2002a.

[52] Ibid.

and medical care as it was provided in the EC Treaty, but also for the definition of their health policy; it also explicitly stated that the responsibilities of the the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. These last provisions are meant to make clearer what falls within the national competences.

Article 168 TFEU (ex Article 152 EC)and 149 EC (now Article 165 TFEU) contain what Von Bogdandy and Bast[53] call negative competence which means that Member States are the ones in charge of the policies in this field. Thus, the articles on health and education specifically exclude harmonisation. Still, harmonisation is happening and this thanks to the use of functional competences.

5.2.3.3 Functional Competences

Sometimes, instead of having a Treaty article which confers powers for a particular sector, there are articles that contain functional competences. De Burca and de Witte[54] define the functional competences and state that:

> The functional character of these powers implies that measures based on them will often impinge on policy fields that have not, as such, been entrusted to the EC or in which the Treaty gives the EC only a minor role.

The aim of this section is only to illustrate how health and education have been influenced through legislation issued using another legal basis than a specific one. It is interesting to see how the European Union policy in the field of education has developed through the vocational training sector, or how the internal market articles can be used as legal basis for measures that directly affect the education and health systems. Moreover, it is interesting to see how the articles containing functional competences (Article 95 and 308 EC) were used to meet the legislative needs in these fields. However, the problem with these articles is how to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union and the encroachment upon the exclusive areas of competence of Member States while, at the same time, ensuring that European dynamic does not stop.

5.2.3.3.1 Article 128 EEC

Article 128 EEC referring to vocational training played an important role in the developments occurred in the field of education. It is significant from a historical point of view because it shows the European Union's ability to respond to the legislative challenges and in the same time its ability to expand its powers beyond

[53] Von Bogdandy and Bast 2002, 227.

[54] De Búrca and De Witte 2002, 214.

the given ones. Though the initial Treaty of Rome does not contain any reference to education, positive integration that occurred in this field presents its own peculiarities. Initially, education policy evolved in close connection with the vocational training field. The broad interpretations given by the Court to what constitutes vocational training allowed educational aspects to be tackled and allowed the Commission to speculate and use any opportunity opened by the Court.

Article 128 Treaty of Rome states that:

> The Council, acting on a proposal from the Commission and after consulting Economic and Social Committee, lay down principles for implementing a common vocational training policy capable of contributing to harmonious development of both of the national economies and of the common market.

The presence of an article referring to vocational training in the Treaty can be explained by the fact that vocational training is more related to common market aspects; vocational training can contribute to increasing the geographical and occupational mobility. The voting procedure—simple majority—and the fact that European Parliament is not involved in the legislative procedure reflects the idea that vocational training was seen as ancillary to the common market policy. Moreover, this article was included in the chapter referring to the European Social Fund[55] which was aimed at improving employment opportunities for workers and increasing the standard of living.

Decision 63/266/EEC was adopted using as legal basis Article 128 EEC. It laid down the principles for implementing a common vocational training.[56] The recital of the decision illustrates the close relation of vocational training with other sectors which exercise a pressure on vocational training field.

> Whereas against the background of the rapid implementation of the common market and in conjunction with the coordination of regional policies and the progressive achievement of a common agricultural policy, the structural changes which are at present taking place in certain economic sectors raise urgent problems of vocational training and retraining.[57]

Vocational training is related to the employment sector and the Decision underlines the necessity that Member Sates take action "to adapt the skills of their labour forces to changes in the general economic situation and to changes in production technology." The developing of a common vocational training is seen as necessity for ensuring free movement of workers.

The decision lays down only general principles, broad goals and it is for Members States and competent European Union institutions to apply these principles within the framework of the Treaty. The aim of these principles was "to enable every person to receive adequate training, with due regard for freedom of

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[55] Chapter 2, Title III (Social Policy) Treaty of Rome.

[56] Council Decision 63/266/EEC laying down general principles for implementing a common vocational training policy [1963] OJ L63/1338.

[57] Ibid.

choice of occupation, place of training and place of work"[58]—the starting point for gradual implementation of common vocational training.

Initially Article 128 EEC was used only for implementing vocational policy. However, later, some changes at European level led to the adoption of a new orientation with regard to education. There have been some Resolutions of the Ministers of Education, meeting within the Council that determined a new direction for education.

A non-binding action was taken in 1971 when ministers of education of Member States met within the Council where it was acknowledged that the existent powers with regard to the right to establishment and vocational training should be supplemented by greater cooperation in the field of education as such.[59] The framework for a Community Education Action Programme was drawn in a Report elaborated by Professor Henri Janne who was entrusted by the Commission to formulate the first principles of an education policy at European Union level. The Janne Report underlined the need for an overall concept of education that should replace the existent "bit-by-bit" approach that is the result of the impact of provisions from other sectors.

In a Communication from the Commission to the Council on Education in the European Community following the Janne Report, the common policy advocated by the Commission regarding education is not as extensive as the policy laid down in Janne Report. However, the policy would cover three broad areas: one area regarding problems for student exchanges—limits on admission, equivalence of qualifications, with the aim of extending exchanges of students and staff so as to involve not only higher education but also primary and secondary level; the second area would refer to education of the children of migrant workers and the third area refers to creating an European dimension in education which includes in its turn four areas of action: first area refers to the promotion of foreign languages; the second area refers to encouraging study regarding Community; the third area refers to co-operation between institutions of higher education and the last area refers to the establishment of European schools.

A further important moment in the development of education policy is represented by the Resolution of the Ministers of Education, meeting within the Council,[60] in 1974 which underlined the need for cooperation in the field of education. The Resolution lays down the principles for cooperation in education:

- The programme of cooperation initiated in the field of education, whilst reflecting the progressive harmonisation of the economic and social policies in the Community, must be adapted to the specific objectives and requirements of this field,
- On no account must education be regarded merely as a component of economic life,

[58] Ibid.

[59] See McMahon 1995.

[60] Resolution of the Ministers of Education, meeting within the Council, of 6 June 1974 on cooperation in the field of education, [1974] OJ C98/2.

- Educational cooperation must make allowance for the traditions of each country and the diversity of their respective educational policies and systems.

Harmonisation of these systems or policies cannot, therefore, be considered an end in itself.[61]

The actions that are part of the cooperation programme included "the creation of better facilities for the education and training of nationals and the children of nationals of other Member States of the Communities and of non-member countries, the promotion of closer relations between educational systems in Europe, compilation of up-to-date documentation and statistics on education, increased cooperation between institutions of higher education, improved possibilities for academic recognition of diplomas and periods of study, encouragement of the freedom of movement and mobility of teachers, students and research workers, in particular by the removal of administrative and social obstacles to the free movement of such persons and by the improved teaching of foreign languages, achievement of equal opportunity for free access to all forms of education."[62] Thus the action programme included cooperation, admission, academic recognition, funding.

The new orientation of the Community is mirrored in The Resolution of the Council and Ministers of Education, meeting within the Council, of 9 February 1976,[63] where the action programme in the field of education enabled Commission to implement initial measures for the promotion of university cooperation in the Community.

All these resolutions showed a change within the European Union policy and several action programmes of cooperation were adopted. It is interesting to see that the legislative lacuna was filled in by the Court, using its interpretative powers. Article 128 EEC was used as a legal basis for the adoption of programmes regarding education and sometimes, Article 128 corroborated with Article 235 EEC (now Article 308 EC) were used as legal basis.

Article 128 EEC and Article 235 EEC were used as legal bases for the adoption of the Commet Programme,[64] meant to give a European dimension to cooperation between universities and enterprises in training relating to innovation and the development and application of new technologies, to develop training programmes, to set up a European network of university-enterprise training partnerships meant to ensure transnational cooperation, to ensure exchange of staff, trainees, training officers, development of cooperation projects. It was followed by the Commet II Programme,[65] using only Article 128 EEC as legal basis for adoption.

What is the scope of Article 128 EEC? Is it possible to base a Community action with regard to education on Article 128 EEC? What is the relation between education

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[61] Ibid.

[62] Ibid.

[63] Resolution of the Council and of the Ministers of Education, meeting within the Council, of 9 February 1976 comprising an action programme in the field of education, [1976] OJ C 38/1.

[64] Council Decision 86/365/EEC adopting the programme on cooperation between universities and enterprises regarding training in the field of technology (Comett) [1986] OJ L 222/17.

[65] OJ [1989] L13/28.

and vocational training? All these questions are answered by the Court in *Erasmus*[66] case. This case was brought in front of the Court by the Commission who contested the legal basis used for the adoption by the Council of the Erasmus Programme,[67] a programme that promotes greater cooperation between universities and aims at increasing significantly student mobility in the Community. The Preamble of the Decision states that Article 128 EEC and Article 235 EEC are chosen as the legal basis for the adoption of the decision. The motivation for choosing not only Article 128 but also Article 235 EEC was determined by the fact that the programme included aspects relating to education which "at the present stage of development of Community law, may be regarded as falling outside the scope of the common vocational training policy as provided for in Article 128 of the Treaty."

The decision is important firstly from the point of view of the interpretation given by the Court to the scope of Article 128 EEC and secondly from the point of view of the interpretation given by the Court to the relation between education and vocational training.

The Scope of Article 128 EEC

ERASMUS programme set up an European Union action scheme which comprised concrete operations that were supposed to be implemented by the Commission cooperating directly with universities and teachers. The question raised in front of the Court was whether Article 128 EEC that gave the Council the power to lay down only "general principles for implementing a common vocational training policy" could be used to grant Council power to adopt concrete actions as those comprised in Erasmus.

In para 9 and 11 of the judgement given in this case it can be found a broad interpretation of European Union powers in the field of vocational training. The doctrine of implied powers was used to explain why Article 128 EEC was sufficient to be used as a legal basis and why Article 128 EEC could be used to impose obligations of cooperation on the Member State. The Commission considered that "the fact that the implementation of a common vocational training policy is provided for precludes any interpretation of that provision which would mean denying the Community the means of action needed to carry out that common policy effectively".[68]

Paragraph 11 made it even clearer that the Council could impose obligation of co-operation on Member States:

> From an interpretation of Article 128 based on that conception it follows that the Council is entitled to adopt legal measures providing for Community action in the sphere of vocational training and imposing corresponding obligations of cooperation on the Member

[66] Case 242/87 *Commission of the European Communities* v. *Council of the European Communities. (Erasmus)* [1989] ECR 1425.

[67] Council Decision 87/327/EEC adopting the European Community Action Scheme for the Mobility of University Students (Erasmus) [1987] L 166/20.

[68] Case 242/87 *Commission of the European Communities* v. *Council of the European Communities. (Erasmus)* [1989] ECR 1425.

States. Such an interpretation is in accordance with the wording of Article 128 and also ensures the effectiveness of that provision.[69]

However, Advocate General Mischo[70] reached a different conclusion than that of the Court. He agreed with the Commission's interpretation which was based on the 'effet utile' principle (the need to give full effect to a legislative provision) that Article 128 EEC should not be interpreted in such a way that the Community was denied the practical means necessary to conduct a policy effectively. He considered however that laying down general principles as stated in Article 128 EEC should not be interpreted as meaning that harmonisation of national provisions concerning vocational training was required or that Community institutions were responsible for the implementation of the common policy, even by using the "effet utile" principle.[71] In sustaining this, he brought as arguments the definition given to the common vocational training by the Council, in Decision 63/266/EEC, where, in the first principle it was stated that "a common vocational training policy means a coherent and progressive common action which entails that each Member State shall draw up programmes and shall ensure that these are put into effect in accordance with the general principles. and with the resulting measures taken to apply them".

The interpretation of this provision given by Advocate General Mischo is that "not only the "putting into effect" but also the programmes are the responsibility of the Member States alone."[72] Even if the last para of the first principle laid down in Decision 63/266/EEC stated that "it shall be the responsibility of the Member States and the competent institutions of the Community to apply such general principles within the framework of the Treaty" the mentioning of the sentence "within the framework of the Treaty" was interpreted by the AG as having a certain purpose; he considered that if Article 128 had permitted the Community to take all implementing measures considered necessary, than the addition of these words would have been unnecessary; "Those words must be interpreted as meaning that the institutions may apply the general principles in so far as other provisions of the Treaty confer the necessary powers on them."[73]

However, the Court did not follow AG' s opinion and it stated clearly that Article 128 EEC could be used to issue binding legislation to promote European Union action in the vocational training field.

Vocational training and education-relationship

In determining which article should have been used as a legal basis, the Court had the task of determining the scope of vocational training. The occasion given to the Court to

[69] Ibid.

[70] Opinion of Advocate General Mischo delivered in Case 242/87 *Commission of the European Communities v. Council of the European Communities. (Erasmus)* [1989] ECR 1425.

[71] Ibid., para 32.

[72] Ibid., para 36.

[73] Ibid., para 37.

interpret what constituted vocational training was used to tackle the area of education. Since there was no mention in the Treaty with regard to education and there was no definition of what constitutes vocational training, it was up to the Court to decide. The broad interpretation given by the Court to the vocational training revealed how much of the field of education was actually covered by vocational training, and consequently Article 128 EEC could have been used to issue binding decisions.

In defining the area of vocational training, the Court refers to its decisions in previous cases (*Gravier, Blaizot and Humbel*).[74]

In *Gravier*, the Court had to decide whether an enrolment fee for strip cartoon courses applied only to foreign students was discrimination on grounds of nationality within the meaning of article 7 on the Treaty. The Court could have chosen to consider students as persons to whom services were provided and apply Article 59 EEC of the Treaty (as argued by the Commission[75]), but it decided to use Article 128 EEC corroborated with Article 7 EEC to solve the problem. Since it was decided that the charge imposed only on students who were nationals of other Member States as a condition to access to vocational training, the Court had to show that strip cartoon courses constituted vocational training. Thus the Court gave a definition to what constitutes vocational training: "any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, even if the training programme includes an element of general education."[76]

In *Blaizot*[77] it was decided that university studies fall within vocational training because they fulfilled those criteria, however, admitting exceptions for those university studies that were intended to improve general knowledge rather than prepare people for an occupation.

In *Humbel*[78] the Court went further and in deciding what fall within the area of vocational training it broadened the field even more. It stated that even if the studies did not provide the required qualification for a specific profession, it was still vocational training if it provided specific training skills. Moreover, in the case of university education, if there were different stages (one stage may constitute vocational training and the other may not), then these stages were supposed be regarded as a single unit, if it was not possible to make a distinction between stages.

Thus in *Erasmus* the Court decided that the studies to which the contested programme applies fall within the sphere of vocational training, and only in exceptional cases will the action planned under the programme be found to be applicable to university studies which because of their particular character, are

[74] Case 293/83 *Gravier* v. *City of Liege* [1985] ECR 593; Case 24/86 Blaizot [1988] ECR 37; Case 236/86 Humbel [1988] ECR 5365.

[75] Case 293/83 *Gravier* v. *City of Liege* [1985] ECR 593, para 17.

[76] Ibid., para 30.

[77] In Case 24/86 *Blaizot* [1988] ECR 37, para 20.

[78] Case 263/86 *Belgian State* v. *René Humbel and Marie-Thérèse Edel* [1988] ECR 5365.

outside that sphere. The mere possibility of the latter cannot justify the conclusion that the contested programme goes beyond the scope of vocational training and that therefore the Council was not empowered to adopt it pursuant to Article 128 of the Treaty[79]

The only reason why the Court decided that the Decision should have been based on Article 235 EEC and not only on Article 128 EEC was the fact that the decision concerned scientific research and this exceeded the area of vocational training. Otherwise, the interpretation given to vocational training was very broad.

Even if the wording of Article 128 EEC did not appear to have significant importance, the Court played a great role in extending European Union competences first of all by interpreting the article as allowing binding measures to be taken and secondly by largely interpreting the field of vocational training as to include educational aspects.

Lingua Programme[80] was aimed at promoting foreign language competence as it is stated in Article 4 of the Decision: The principal objective of the Lingua programme shall be to promote a quantitative and qualitative improvement in foreign language competence with a view to developing communication skills within the Community. To that end, it shall, by means of Community-wide measures, provide opportunities for supporting and complementing Member States' policies and schemes aimed at achieving that objective. It is also based on Article 128 and Article 235 as it included aspects relating to education and training policy which might be regarded as falling outside the establishment of general principles for implementing a common vocational training policy as provided for in Article 128 of the Treaty.

All these programmes were promoted using as a legal basis either Article 128 EEC, thus largely extending the scope of vocational training competence so as to include education, or using Article 235 EEC, thus using the doctrine of implied power to extend the scope of internal market.

Article 128 EEC was important for ensuring a development in the education area, however, after the Maastricht Treaty it lost any importance and the article referring to vocational training introduced by the Maastricht Treaty gives the European Union the same reduced powers as the article on education.

5.2.3.3.2 Article 53 TFEU (ex Article 47 EC)

Article 53 TFEU (ex Article 57 EEC and 47 EC) found in the chapter related to the right for establishment, thus an article referring to internal market is analysed here first with regard to the impact it had on education systems and secondly on health systems.

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[79] Case 242/87 *Commission of the European Communities* v. *Council of the European Communities. (Erasmus)* [1989] ECR 1425, para 27.

[80] Council Decision 89/489/EEC establishing an action programme to promote foreign language competence in the European Community (Lingua) [1989] OJ L 239/24.

As different qualifications constitute an obvious obstacle to the free movement of persons, this problem was tackled in Article 57 EEC, article included in the title referring to free movement of persons, services and capital, thus issues related to internal market. According to this article the Council may adopt directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.

The diversity of diplomas, certificates and qualifications had at their base the diversity of studies and different standards of the studies that lead to obtaining such diplomas. The initial approach to the harmonisation of diplomas was aimed at harmonising the studies leading to those degrees; the action was taken in different sectors[81] aiming at mutual recognition of diplomas, certificates and other evidence of the formal qualifications. This type of sectoral approach posed problems. These directives laid down specific training requirements regarding the period of study and the subjects that the programme of studies leading to a diploma, certificate or other evidence of formal qualifications must include and this had a great impact on the content of study of national curricula that come under pressure to be changed and adapted in order to meet the requirements of the directives. An example of the great influence that this type of directives had on the structure of national courses can be found in the case of Italy who had to create a new course in order to comply with the requirements laid down in the Directive concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of dental practitioners.[82] Moreover, Member States had discretion in implementing the directives and this could jeopardise the harmonisation process.[83]

This type of harmonisation was problematic because it influenced to a large extent the national educational systems and it was a slow process because educational matters were very sensitive and it was difficult to decide what standards should be chosen when laying down the requirements for a directive.

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[81] In veterinary sector-Directive 78/1027/EEC, concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of veterinary surgeons, in the field of pharmacy-Directive 85/432/EEC, concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of certain activities in the field of pharmacy, for nurses-Directive 77/453/EEC, concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of nurses responsible for general care, for midwives-Directive 80/155/EEC, concerning the coordination of provisions laid down by Law, Regulation or Administrative Action relating to the taking up and pursuit of the activities of midwives, for dentists-Directive 78/687/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of dental practitioners, for doctors-Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors.

[82] The laws implementing the EEC Directive regarding dental practitioners had different requirements for the recognition of the same diploma in different Member States-see Zilioli 1989.

[83] See Zilioli 1989.

There was an obvious conflict between national education systems (aiming at preserving national identity) and free movement of persons provisions. In order to exercise a regulated profession, a person must possess a qualification which is defined through reference to the national education system of the host Member State, this being an obvious obstacle to free movement of persons, since they are subject to a double burden: even if they followed courses and all the training requested for obtaining the qualification in their country of origin, they still have to comply with the requirements regarding that qualification in the host Member State.

The sectoral approach was slow and problematic. Where there was no directive for the recognition of qualifications the Court through its rulings made possible the recognition, thus as in all the cases where positive law did not provide solutions, negative integration ensured the well functioning of free movement rules.

The existence of the single market forced things to change and the Council Directive 89/48/EEC[84] introduced into positive law a principle used by the Court in its rulings, a principle which has a deregulatory effect: the principle of mutual recognition. The old sectoral approach where Member States granted automatic recognition to diplomas from other Member States only for a limited number of clearly defined diplomas was abandoned. The new general system for the recognition of higher education diplomas provide a simplified mechanism: a person who is entitled to exercise a profession in the Member State of origin is entitled to recognition of his or her diploma for the purpose of taking up the same profession in the host Member State. However, since there are differences between the education systems and because there is no harmonisation of the content of the education systems, the Directive contains a solution to this problem: a method for compensation for the fundamental differences between the education and training attested by diploma and the education and training required in the host State, namely an adaptation period or an aptitude test.

Some consider this system of recognition of diplomas without the harmonisation of the content of education as a retreat of the European Union from the higher education scene.[85] However, the new general system of recognition of diplomas does not impose Member States the changing of the structure of national education, but asks Member States to recognise qualifications issued in other Member states, thus having to admit that foreign qualifications are as good as their own qualifications. The old excuse that their standards are higher is solved by the introduction of a compensation mechanism. Through this new system, free movement is improved and the more movement within European Union (of students, workers, teaching staff), the more European Union elements will contaminate national education systems.

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[84] Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, [1989] OJ *L* 19/16.

[85] De Witte 1992, 81.

The Report on the state of application of the general system for recognition of higher education diplomas[86] reaches the conclusion that "Directive 89/48/EEC embodies the subsidiarity principle but it demonstrates that, whilst respecting this principle, Community measures can bring about far-reaching changes in national legislation, administrative structures and administrative practice."

The old approach for the mutual recognition of diplomas, certificates and other evidence of formal qualifications as well as the new approach has had a great influence on the education systems.

The great impact that these directives had on the education systems, even modifying their organisation is illustrative for the great potential that the laws issued using as legal basis the internal market articles may have on national systems.

Article 57 (2) EEC is used as legal basis for the adoption of the third Non-Life Insurance Directive[87] which is aimed at facilitating the provision of insurance services between Member States. Once an insurance undertaking has been granted authorisation in one Member State, the authorisation is valid throughout the Community and it shall permit an undertaking to carry on a business there, under either the right of establishment or the freedom to provide services.[88] Through this Directive the Community aimed at ensuring a legal framework for the provision of health insurance at Community level.

This Directive covers the voluntary health insurance market,[89] a small segment of the insurance market. It is importance first of all because European Union rules apply and secondly it presents importance from the perspective of the developments that may occur in health care field. The size of the market for voluntary health insurance depends on the Member States' policy.

This Directive applies the principle of country of origin meaning that the Member State of origin will ensure the financial supervision of the insurer. It requires governments to abolish product and price controls, and it requires governments to

[86] Report to the European Parliament and the Council on the state of application of the general system for recognition of higher education diplomas, made in accordance with Article 13 of the Directive 89/48/EEC, COM(96) 46 final.

[87] Council Directive 92/49/EEC on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) [1992] OJ L228/1.

[88] Article 7 of the Council Directive 92/49/EEC on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) [1992] OJ L228/1.

[89] There are three types of voluntary health insurance: substitutive cover—private voluntary health insurance to cover medical expenses for persons excluded or exempted from statutory protection; complementary cover—private voluntary health insurance to cover out-pocket payments charged to patients for medical services and goods not or only partially covered under statutory protection; alternative or supplementary—private voluntary health insurance to cover health care services delivered by private health care providers outside the scope of the statutory protection. The classification is found in Palm 2003.

liberalise markets for private and health insurance, it prevents governments from discrimination among insurers on the basis of legal status.[90]

Though the Directive aims at achieving free movement of health insurance services within European Union and free competition by the removal of national regulatory barriers, still, Member States are entitled to intervene if insurance conflicts with legal provisions protecting the general good in the Member State in which the risk is situated (Article 28 third Non-Life Insurance). Article 54 allows Member States in the case where voluntary health insurance serves as partial or complete alternative to health cover, to impose specific measures, in the form of restrictions on insurance contracts, in the interest of the 'general good'.

This Directive is important because it facilitates the free movement within Europe of an area of services that contain little cross-border elements. The Directive is not clear with regard to what constitutes 'general good', so it is not clear when the exception in Article 54 can apply. Moreover, the lack of clarity regarding what private health insurance services constitute a 'partial alternative' to statutory health insurance makes it difficult to identify to whom the exception applies. Moreover, this Directive may influence the reforms planned for national health insurance systems where more privatisation of health care funding is proposed.[91]

5.2.3.3.3 Article 352 TFEU (ex Article 308 EC)

The education field has developed in close connection with vocational training. However, in spite of the broad interpretation given by the Court to what constitutes vocational training, some programmes of collaboration between universities were considered to exceed the sphere of vocational training. The lack of a legal basis for issuing laws necessary for the adoption of cooperation programmes that included educational aspects was solved by using as legal basis Article 235 EEC (Article 308 EC, now Article 352 TFEU), an article that confer the European Union some sort of residual competence.[92]

Article 352 TFEU (ex Article 308 EC) states:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

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[90] Thomson and Mossialos 2004.

[91] Thomson and Mossialos 2004 stated that "If risk equalisation schemes and the provision of benefits in kind are found to contravene these rules, the implications could be significant, not just for regulation of private health insurance, but also for statutory arrangements, particularly in the light of recent proposals to increase privatisation of health care funding."

[92] De Búrca and De Witte 2002.

The role of Article 352 TFEU (ex Article 308 EC)[93] is to supplement European Union powers in the course of the operation of the common market whenever action at European Union level is required and in the Treaty there is no article to provide a legal basis for action. This article can be used as a legal basis for European Union legislation intended to attain one of the European Union objectives (in the course of the operation of the common market). The extent of powers of the European Union depends on what constitutes Community's objectives. For example, Article 2 EEC referring to "raising the standard of living" was interpreted by some[94] as meaning that this objective included also health protection and consequently, Article 235 EEC could have been used for taking action in the field of health.

Article 352 TFEU (ex Article 308 EC) can be considered as an important instrument in answering the Community's need for legislation. In an incipient phase, when there was little free movement this article has played an important role in ensuring further integration. It was this article that was seen as the answer to the lack of Treaty powers.

Article 308 EC (ex Article235 EEC and now Article 352 TFEU) has played however an important role in the expansion of the European Union competence, to the great discontent of the Member States. Since European Union objectives extended, this article was seen as a possible legal basis for almost anything. However, the Court draws the limits in Opinion 2/94 referring to the legality of EC' accession to ECHR. It decided that Article 235 EEC could not be used as a legal basis for the accession of EC to the European Human Rights Convention, since such an accession would require a change of the Treaty. Article 235 could not be used to amend the Treaty, thus avoiding the amendment procedures.

Article 235 EEC has played an important role in the education sector ensuring a continuous development. A series of programmes were adopted using as legal basis Article 235 EEC: Regulation 337/75 establishing an European Centre for the Development of Vocational Training,[95] "Youth for Europe" Programme,[96] a programme meant to promote youth exchanges in the European Union; the Council Directive on the right of residence for students,[97] Lingua Programme,[98] aimed at promoting foreign language competence (it was based on Article 128 and Article 235 EEC because it included educational aspects that were outside the

[93] See Von Bogdandy and Bast 2002, 227; Dashwood 1996.

[94] See Hervey 2003; Verwers 1992; Van Der Mei 1998; Van Der Mei and Waddington 1998, 129–154.

[95] Regulation EEC/337/75 of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training, [1975] OJ L39/1.

[96] Council Decision 88/348/EEC adopting an action programme for the promotion of youth exchanges in the Community-"Youth for Europe" programme, [1988] OJ L158/42.

[97] Council Directive 90/366/EEC on the right of residence for students, [1990] OJ L180/30.

[98] Council Decision 89/489/EEC establishing an action programme to promote foreign language competence in the European Community (Lingua), [1989] OJ L239/24.

scope of vocational training), the Commet Programme,[99] using as well as legal basis Article 128 and 235 EEC.

An important Decision, the so-called Erasmus Decision[100] establishing the European Community Action Scheme for the Mobility of University Students was adopted using as a legal basis Article 235 EEC. Erasmus Programme had as objectives to promote broad and intensive cooperation between universities in all Member States, to increase the mobility of students, to strengthen the interaction between citizens in different Member States with a view to consolidating the concept of a People's Europe and to ensure the development of a pool of graduates with direct experience of intra-Community cooperation, thereby creating the basis upon which intensified cooperation in the economic and social sectors can develop at Community level. In the case brought in front of the Court on grounds that the legal basis used for the adoption of the Decision was wrong, the Court explained why Article 235 could be used as legal basis for the adoption of legislation even if it covered educational aspects. The European Union's competence is extended in the field of education by applying the implied power doctrine. The Court referred to *Casagrande,*[101] an earlier case, where it found that: "Although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such nature to affect the measures taken in the execution of a policy such as that of education and training."[102]

The Court stated that the exercise of the expressed powers granted to the European Union in the field of internal market should not be restrained even if the educational policy and educational grants were within the competence of Member States and even if national educational policy was affected. If measures in the field of education would ensure the effectiveness of free movement provisions, then they should be taken, even if there were no express powers granted in that field. The existence of an express power implies the existence of any other power which is necessary for the exercise of the former.[103]

Article 308 EC has played an important role in areas where the European Union did not have competences as such. However, the Maastricht Treaty brought a change with regard to the balance of powers. Indeed, the objectives of the European Union were extended, this leading consequently to the potential

[99] Council Decision 86/365/EEC adopting the programme on cooperation between universities and enterprises regarding training in the field of technology (Comett), [1986] OJ L222/17.

[100] Council Decision 87/327/EEC adopting the European Community Action Scheme for the Mobility of University Students (Erasmus), [1987] OJ L166/20.

[101] Case 9/74 *Donato Casagrande* v. *Landeshauptstadt München* [1974] ECR 773.

[102] Ibid., para 12.

[103] Hartley, as cited in Craig and De Búrca (eds) (2003).

expansion of the application of Article 308 EC. However, the function of Article 308 EC was rather reduced by the introduction of the flanking policies, including specific articles referring to education and health, and by the introduction of the principle of subsidiarity, requiring a better division of powers between European Union and Member States.

If before the Maastricht Treaty Article 308 EC was used for the initiation of the cooperation programmes between universities, after the Maastricht Treaty, the new specific articles were used as legal basis for the adoption of such programmes. For example the "Socrates" action programme,[104] intended to contribute to the development of quality education and training and the creation of an open European area for cooperation in education was adopted using as legal basis Articles 126 and 127 EEC (Articles 149 EC and 150 EC; now Articles 165 and 166 TFEU); the same legal basis was used for the adoption of the second phase of the Community action programme in the field of education "Socrates."[105]

Even if "due to its subsidiary character" Article 352 TFEU (ex Article 308 EC) is "increasingly superseded by the multitude of fresh legal basis"[106] it still plays an important role. If the Court in the *Erasmus*[107] decided that the exercise of the expressed powers granted to the European Union in the field of internal market could not be restrained even if educational policy and educational grants were within the competence of Member States, *a fortiori,* when the European Union was entrusted with the task of contributing to the development of quality education, if action is considered necessary in the course of the operation of the common market in order to attain one of the objectives of the European Union, and the Treaty has not provided the necessary powers, then Article 352 TFEU (ex Article 308 EC) can be used as legal basis, no matter if educational aspects were involved. The problem of using Article 352 TFEU (ex Article 308 EC) as legal basis is caused only by the fresh legal basis that takes precedence because of the subsidiary character of Article 352 TFEU (ex Article 308 EC). Since the Treaty does not provide the express competence to act as such in the health and education sectors, and since these two fields contain more and more economic aspects, further harmonisation may occur using Article 114 TFEU (ex Article 95 EC) which was introduced by Single European Act and which requires qualified majority voting. The use of Article 352 TFEU (ex Article 308 EC) as legal basis gave Member

[104] Decision 819/95/EC of the European Parliament and of the Council establishing the Community action programme 'Socrates' [1995] OJ L87/10.

[105] Decision 253/2000/EC of the European Parliament and of the Council establishing the second phase of the Community action programme in the field of education 'Socrates', [2000] OJ 28/1.

[106] Schütze 2003, 333.

[107] Case 242/87 *Commission of the European Communities* v. *Council of the European Communities. (Erasmus)* [1989] ECR 1425.

States a certain guarantee that any undesired law was not passed, since unanimity was required for the adoption of the measures using Article 308 as legal basis.[108]

Article 308 has played an important role for the developments in the education sector. The use of Article 308 EC, as stated by the Court in many cases, is justified only where no other provision of the Treaty gives the European Union institutions the necessary power to adopt the measure in question. In a time where the Treaty did not refer to education, Article 308 EC was largely used to adopt binding decisions establishing different programmes of co-operation between Member States. The impact of the measures issued using Article 352 TFEU (ex Article 308 EC) as legal basis is great. In the *Erasmus* case it was contested that the decision affected the organisation of education by the setting up of a European network for university cooperation. The Court rejected these allegations by stating that the European university network, even if it set up by the European Union, still, it is composed of universities which have chosen freely to participate on the basis of the provisions governing their status and organisation and which have chosen to conclude certain agreements for exchanges of students and teachers.[109]Even if universities are free to decide whether they participate in such programmes, however, the financial aspects are powerful incentives in determining universities to join such programmes, thus the European Union is using the "funding carrot"[110] to influence the educational sphere.

The setting up of action programmes for collaboration between universities determined increasing mobility of students and of the teaching staff, thus introducing European Union elements in the educational sector which till then displayed only national characteristics. This led to further European Union involvement and further integration through different methods because once European Union elements are involved, then future problems require a European Union solution.

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[108] Even if Member States could oppose any piece of undesired legislation, still unanimity cannot be seen as a guarantee against the expansion of the Community powers. According to Weiler 1991, 23 "The general assumption that unanimity sufficiently guarantees the Member States against abusive expansion is patently erroneous. First, it is built on the false assumption that conflates the government of a state with the state. Constitutional guarantees are designed, in part, to defend against the political wishes of this or that government, which government after all, in a democratic society, is contingent in time and often of limited representativeness. Additionally, even where there is wall-to-wall political support, there will not necessarily be a recognition that constitutional guarantees are intended to protect, in part, individuals against majorities, even big ones. It is quite understandable why, for example, political powers might have a stake in expansion. One of the rationales, trite yet no less persuasive, of enumeration and divided powers is to anticipate that stake to prevent concentration of power in one body and at one level. When that body and that level operate in an environment of reduced public accountability (as is the case of the Commission and the Council in the Community environment) the importance of the constitutional guarantee even increases."

[109] Case 242/87 *Commission of the European Communities* v. *Council of the European Communities (Erasmus)*, [1989] ECR 1425, paras 30–*32.*

[110] Lonbay 1989, 365.

5.2.3.3.4 Article 114 TFEU (ex Article 95 EC)

Introduced by the Single European Act, Article 95 EC permits the adoption of measures using qualified majority voting. This means that a Member State who opposes a piece of legislation can be overruled and cannot veto anymore. It can be used "to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and the functioning of the internal market."

Can this article be a potential legal basis for the harmonising of measures in the field of health and education? If the answer to this question is yes, then the interference of European Union in the field of health and education is great, first of all because of the qualified majority procedure that permits some Member States' interests to be set aside and secondly because the economic aspects targeted by Article 114 TFEU (ex Article 95 EC) would be put on a hierarchical scale above other objectives.

Since the removal of the obstacles to trade and the elimination of distortions of competition are the main targets of Article 114 TFEU (ex Article 95 EC), and since the internal market has a strong impact on other policies (including education and health) it is interesting to see if and how, while harmonising, internal market aspects can be separated from other policies. What happens if the laws that are supposed to be harmonised are of direct concern to health or education? Can Article 114 TFEU (ex Article 95 EC) still be used as a legal basis for issuing harmonising laws when we know that legislation in the health and education sector prohibits this? Do Member States have any safeguards that would protect their national policies from European Union's intrusion?

An answer to these questions will be given by analysing the Court's judgements issued in several cases that were challenged in front of the Court on grounds that Article 114 TFEU (ex Article 95 EC) is an illegal basis chosen for the adoption of several Directives whose objective was primarily the protection of public health. There were a series of directives[111] meant to deal with tobacco products and the

[111] Council Directive 90/239/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the maximum tar yield of cigarettes, [1990] OJ L137/36; Council Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labeling of tobacco products, [1989] OJ L359/1; Council Directive 92/41/EEC amending Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labeling of tobacco products, [1992] OJ L158/30; Directive 98/43/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, [1998] OJ L47/23; Directive 2001/37/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products-Commission statement, [2001] OJ L194/26; Directive 2003/33/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (Text with EEA relevance) [2003] OJ L 152/16.

legal basis used for their adoption was Article 95 EC (ex Article 100a EEC; now Article 114 TFEU). The European Union initiated a comprehensive tobacco control policy, this being part of the "Europe against Cancer"[112] programmes and these directives were issued as part of the European Union public health programmes meant to combat the tobacco consumption.

Some of these directives dealing with tobacco products were challenged in Court on grounds that the legal basis used is incorrect. One of these cases is *Tobacco Advertising*[113] and the ruling given in this case brings more light to the extent of the powers that the European Union has under Article 114 TFEU (ex Article 95 EC).

The case dealt with the request for annulment of Directive 98/43/EC[114] on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products because the use of Article 95 (ex Article 100a; now Article 114 TFEU) as a legal basis was incorrect. The challenged Directive deals with the approximation of laws, regulations and administrative provisions of the Member States relating to advertising and sponsorship of tobacco products and prohibits all forms of advertising and sponsorship of tobacco products. The national measures affected were to a large extent inspired by public health policy, the Directive in article 5 even mentioning that Member States could lay down stricter requirements concerning the advertising or sponsorship of tobacco products as they considered necessary to guarantee the health protection of individuals.

In the Preamble of the Directive it was stated the reasons why the directive was issued:

> […] there are differences between the Member States' laws, regulations and administrative provisions on the advertising and sponsorship of tobacco products; whereas such advertising and sponsorship transcend the borders of the Member States and the differences in question are likely to give rise to barriers to the movement between Member States of the products which serve as the media for such advertising and sponsorship and to freedom to provide services in this area, as well as distort competition, thereby impeding the functioning of the internal market.

The necessity for approximating the rules relating to the advertising and sponsorship of tobacco products were motivated on grounds that those obstacles should be removed.

However, in the case brought in front of the Court it was alleged that the Directive was motivated by public health objectives and thus tried to circumvent

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[112] For further information see Hervey 2001a, b, 101–125.

[113] Case C-376/98 *Federal Republic of Germany* v. *European Parliament and Council of the European Union* [2000] ECR 8419; See also 'Better competence monitoring', (2005) 30 *EL Rev*. 23, 27; Dashwood, 'The Relationship between the Member States and the European Union/ European Community' (2004) *41 CML Rev*., 355 to Dashwood (2004).

[114] Directive 98/43/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L 213/9.

Article 129 (4)(c) EEC (now Article 168(7) TFEU and ex Article 152 (4)(c) EC), which excludes the harmonisation of laws and regulations of the Member States designed to protect and improve human health.

The Court starts its analysis by stating that Article 129 (4) EEC of the Treaty excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health, but it continues by stating that the provision does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health. This can be sustained by the third para of Article 129(1) EEC that provides that health requirements are to form a constituent part of the Community' other policies.[115]

In its assessment the Court had to decide whether the measure whose validity is at stake pursues in fact the objectives stated by the Community legislature. The Court ruled that a measure in order to be adopted on the basis of Article 100a must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.[116] And furthermore, the Court introduces a *de minimis* threshold, ruling that a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefore are not sufficient to justify the use of Article 100a as a legal basis.[117]

The Court had to determine whether the obstacles to free movement and distortions to competition do exist or may arise in future, thus impeding the functioning of internal market and furthermore, it had to determine whether the measure had actually the effect of eliminating of obstacles to the free movement of goods and the free movement to provide services or had the effect of eliminating distortion of competition. Crosby[118] identifies three conditions which must be met for justifying the use of Article 114 TFEU (ex Article 95 EC):

1. A real need to harmonise,
2. A favourable internal market purpose, and
3. A favourable internal market effect.[119]

Once these conditions have been fulfilled, then the measure that used as legal basis Article 114 TFEU (ex Article 95 EC) is legal, no matter if other aspects (in our case health aspects) were included among the objectives of that measure. Article 95(3) EC lays down an obligation for the Commission to take as a base a high level of protection in its proposals envisaged in Article 95(1) EC concerning health, safety, environmental and consumer protection. This should be corroborated

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[115] Case C-376/98 *Federal Republic of Germany* v. *European Parliament and Council of the European Union,* [2000] ECR 8419, paras 77, 78.

[116] Ibid., para 84 "genuine improvement of internal market conditions" according to Crosby implies a positive contribution-a measure should be constructive in purpose and/or effect.

[117] Ibid., para 84.

[118] Crosby 2002, 177–193.

[119] Ibid., 3.

with what the Court stated in para 78 that the exclusion of the possibility for the harmonisation of measures in the field of health in Article 129 EEC does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health.

Advocate General Fennelly states in his opinion that, in the absence of a distinct Community harmonising competence in respect of health protection, and being given the fact that health protection must be taken into account by the Community when exercising its competence with regard to the internal market objectives, in deciding whether Community has acted within its powers, the solution should not be found in discovering the centre of gravity of the measure—whether internal market objectives or health objectives weight more—but the solution should be found in assessing whether the Directive complies with the objective requirements of the internal market. The fact that the Directive imposed a total ban and did not harmonise national rules governing advertising and sponsorship led to the conclusion that the Directive did not facilitate the free movement of goods and services and did not remove distortions of competition.[120]

Thus, harmonising health matters is possible using Article 100a EEC (Article 95 EC; now Article 114 TFEU), only if the measure at stake aims at improvement of the conditions for the establishment and functioning of the internal market.

The Court does not particularly deal with health aspects in its ruling. However, the Court in its assessment aims at verifying whether there are obstacles to free movement and competition and whether the Directive has the effect of eliminating those obstacles. Moreover, para 88 of the judgment does not contradict the fact that health requirements can be harmonised:

> Furthermore, provided that the conditions for recourse to Articles 100a, 57(2) and 66 as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made. On the contrary, the third para of Article 129(1) provides that health requirements are to form a constituent part of the Community's other policies and Article 100a(3) expressly requires that, in the process of harmonisation, a high level of human health protection is to be ensured.

The applicants argue that the centre of gravity of the Directive lies in the field of public health. Advocate General Fennelly in his Opinion argues that in determining the lawfulness of the Directive, deciding whether the centre of gravity lies within the pursuit of health protection rather than internal market objectives is important only where there is a conflict between two legal bases. Since there is no alternative legal basis, the Community is competent by virtue of Article 100a to adopt measures which serve the internal market and in parallel another public interest aim.[121]

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[120] See Opinion of Advocate General Fennelly delivered in Case C-376/98, *Federal Republic of Germany* v. *European Parliament and Council of the European Union* [2000] ECR 8419.

[121] Case C-376/98 *Federal Republic of Germany* v. *European Parliament and Council of the European Union* [2000] ECR 8419, para 69.

The Directive was annulled on grounds that its objectives were not ensuring the attainment of the single market; it failed to show that it fulfilled the objective of establishing and functioning of the internal market and not because it pursued health objectives. However, as the Court stated in para 117 of the judgement that a directive prohibiting certain forms of advertising and sponsorship of tobacco products could have been adopted on the basis of Article 100a of the Treaty, but partial annulment was not possible because it would entail the amendment by the Court of the provisions of the Directive. The jurisprudence set in this case was found in a series of subsequent cases.[122]

Later, another Directive regarding the advertising and sponsorship of tobacco products was adopted[123] using as a legal base Articles 47(2), 55 and 95 EC Treaty (now Articles 53(2), 62 and 114 TFEU). In the Preamble of the new Directive it is stated that there are differences between Member States' laws, regulation and administrative provisions on the advertising of tobacco products and related to sponsorship and that these differences lead to barriers to the free movement between Member States or distortion of competition. It is stated that these barriers should be eliminated and the rules relating to the advertising of tobacco products and related sponsorship should in specific cases be approximated. In particular, there is a need to specify the extent to which tobacco advertising in certain categories of publications is allowed. And reference is made to Article 95(3) EC of the Treaty which requires the Commission, in its proposals for the establishment and functioning of the internal market, to take as a base a high level of health protection. It is stated clearly that the legislation of the Member States that is going to be approximated is intended to protect public health by regulating the promotion of tobacco, which is an addictive

[122] Case C-377/98 *Netherlands* v. *Parliament and Council* [2001] ECR I-7079; Case C-491/01 *British American Tobacco* [2002] ECR I-11453; Joined Cases C-465/00, C-138/01 & C-139/01, *Österreichischer Rundfunk* [2003] ECR I-4989; Case C-101/01 *Bodil Lindqvist*, [2003] ECR I-12971; Case C-434/02 *Arnold André* [2004] ECR I-11825; Case C-210/03 *Swedish Match* [2004] ECR I-11893; Joined Cases C-154 & 155/04 *Alliance for Natural Health* [2005] ECR I-6451; Case C-66/04 *United Kingdom* v. *Parliament and Council* [2005] ECR I-10553; Case C-436/03, *Parliament* v. *Council* [2006] ECR I-3733; Case C-217/04 *United Kingdom* v. *Parliament and Council* [2006] ECR I-3771.

[123] Directive 2003/33/EC of the European Parliament and of the Council 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (Text with EEA relevance), [2003] OJ L152/16. The advertising of tobacco products is prohibited in: the print media (newspapers and other publications); information society services; radio broadcasting. It remains limited to publications intended exclusively for professionals in the tobacco trade and publications which are published and printed in third countries and are not principally intended for the Community market. Sponsorship of radio programmes or international events by companies with the aim of promoting tobacco products is prohibited. The free distribution of tobacco products as sponsorship of such events is also prohibited. However, the sponsorship of events or activities with no cross-border effect is not covered by this Directive.

product responsible for over half a million deaths in the Community annually, thereby avoiding a situation where young people begin smoking at an early age as a result of promotion and become addicted.[124] It did not contain a total ban on advertising. It contained only prohibitions on advertising in the press, on radio and in information society services, prohibitions of sponsorship of radio programmes and sponsorship of events or activities involving or taking place in several Member States or otherwise having cross-border effects.

This rule was challenged by Germany and one of the arguments put forward was that the choice of Article 114 TFEU (ex Article 95 EC) as a legal basis for this Directive was not correct.[125]

The Court observed that there were disparities between national rules on advertising and sponsorship in respect of tobacco products which justified the intervention through the Directive. In order to achieve free movement of newspapers, periodicals and magazines it was important to deal with the disparities existent in different Member States.

With regard to the press products the Court found that firstly, the measures prohibiting or restricting the advertising of tobacco products were liable to impede access to the market of the products coming from another Member State.[126] Secondly, the undertakings established in one Member State were restricted from offering advertising space in their publications to advertisers established in another Member State.[127] Thirdly, the divergent rules on advertising the tobacco products were liable to create obstacles to trade.[128]

With regard to the advertising of tobacco products in radio broadcasts and information society services, the Court stated that because of the increasing public awareness of the harm caused by the tobacco, it was likely that new barriers to freedom to provide services would arise.[129]

With regard to the sponsorship of radio programmes by tobacco companies, the differences between national rules were liable to impede the freedom to provide services because a company established in a Member State where there was a prohibition on sponsorship could not benefit from sponsorship from tobacco companies established in another member State.[130] This was also found to lead to distortions of competition.

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[124] Preamble of Directive 2003/33/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (Text with EEA relevance), [2006] OJ L152/16, para 3.

[125] Case C-380/03 *Federal Republic of Germany* v. *European Parliament and Council of the European Union* [2006] ECR I-11573.

[126] Ibid., para 56.

[127] Ibid., para 57.

[128] Ibid., para 58.

[129] Ibid., para 61.

[130] Ibid., para 65.

The Court analysed whether those measures contained by the Directive aimed at eliminating obstacles to free movement provisions. The Court looked to see whether there was a genuine internal market objective. It reached the conclusion that Articles 3 and 4 of the Directive were designed to eliminate obstacles to free movement of goods and services. The Court ruled that Article 3 of the Directive containing a prohibition on the advertising of tobacco products in periodicals, magazines and newspapers aimed to ensure free movement of goods could be based on Article 114 TFEU (ex Article 95 EC) EC. The Directive allowed advertising of tobacco products in certain publications, thus it was not a total ban. Furthermore, Article 8 of the Directive included an obligation imposed on Member States not to prohibit or restrict the free movement of products which comply with the Directive. This provision was intended to give expression to the objective of improving the conditions for the functioning of the internal market. The same Article 8 contained such obligation imposed on Member States with regard to services, meaning that Member States could not prohibit or restrict freedom to provide services where services complied with the Directive.[131] As regards the advertising of tobacco products in information society services and in radio broadcasting, it reached the conclusion that Articles 13, 3(2), 4(1) of the Directive sought to promote freedom to broadcast by radio and the free movement of communications which fall within information society services.

The Court concluded that Articles 3, 4 of the Directive had as their object the improvement of the conditions for the functioning of the internal market, thus it was found that there was a genuine internal market objective which could justify the use of Article 114 TFEU (ex Article 95 EC) EC.

As Ludwigs[132] notices, due to the wide-community prohibition on tobacco advertising, national restrictions will extend to all Member States. He calls this as destructive effects. However, he noticed that the Directive had as well constructive effects. In his analysis of these positive and negative effects he did not find what positive effects the prohibition on sponsorship of radio programmes could have had with regard to free movement of services. He considered that in this case the focus should have been on competition. In spite of the criticism that can be brought to some of the Court's assessments, the conclusion is that this Directive, unlike the previous one had a genuine internal market objective.

As regards the plea that Article 152(4)(c) EC was circumvented, the Court stated that if the conditions contained in Article 114 TFEU (ex Article 95 EC) were fulfilled, then, the fact that there were also public health concerns in that piece of legislation could not lead to the conclusion that Article 114 TFEU (ex Article 95 EC) could not be used as a legal basis. It continued by stating that Article 95(3) EC required that a high level of protection of human health should be guaranteed while harmonising. Furthermore, even Article 152 (1) EC provided that

[131] Ibid. paras 69–73.

[132] Ludwigs 2007, pp. 1159–1176.

a high level of human health protection should be ensured in the definition and implementation of all European Union policies and activities.

The answer to the question whether a measure which is also intended to safeguard public health can be based on Article 114 TFEU (ex Article 95 EC) is a positive one. The question whether a measure which is intended to safeguard education can be based on Article 114 TFEU (ex Article 95 EC) can be raised. The Treaty article referring to health provides that health protection shall be ensured in the definition and implementation of all European Union policies and activities and Article 95(3) EC states that a high level of health must be ensured by the Commission when issuing harmonising laws for the establishment and functioning of the common market. Does it make a difference the fact that education is not mentioned in Article 114 TFEU (ex Article 95 EC)?

In answering this question I would refer to the *Biotechnology*[133] case where the Court construed broadly the possibility of using Article 95 EC, stating that even if the measure that was adopted by using Article 95 EC as legal basis pursues an objective that falls within the scope of other articles (in the case at stake-Articles 130 (Article 157 EC) and 130f (Article 163 EC), this does not make the use of Article 95 EC inappropriate.

> Approximation of the legislation of the Member States is therefore not an incidental or subsidiary objective of the Directive but is its essential purpose. The fact that it also pursues an objective falling within Articles 130 and 130f of the Treaty is not, therefore, such as to make it inappropriate to use Article 100a of the Treaty as the legal basis of the Directive (see, by analogy, Case C-62/88 Greece v Council [1990] ECR I-1527, para 18–20).[134]

In examining the powers which Article 114 TFEU (ex Article 95 EC) confers on the European Union legislature, Advocate General Geelhoed in his Opinion delivered in Case C-491/01[135] stated that if there was a (potential) barrier to trade, then the European Union must be in position to act and Article 114 TFEU (ex Article 95 EC) created the power to do so. "No conclusive significance attaches in this connection to the issue whether the barrier to trade also constitutes the principal reason for action on the part of the Community legislature. The fact that there are specific powers under the Treaty for the Community legislature to act within defined areas of policy, as in the area of public health under Article 152 EC, also has no bearing on this finding."[136] He considers that "Article 152 complements the already existing EC Treaty powers such as Article 95. The exception in Article 152(4)(c) means simply that Article 152 EC cannot provide a legal basis for harmonisation, but it makes no reference to legal bases included elsewhere in

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[133] Case C-377/98 *Kingdom of the Netherlands* v. *European Parliament and Council of the European Union* [2001] ECR 7079.

[134] Ibid., para 28.

[135] Opinion of Advocate General Geelhoed delivered on 10 September 2002 in Case C-491/01 *The Queen* v. *Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453.

[136] Ibid., para 100.

the Treaty. Article 152(4)(c) does not limit, ratione materiae, the power to harmonise national measures within the area of public health."[137]

He considers that justified national measures of public health protection create obstacles to trade and if it was not possible to use the power under Article 114 TFEU (ex Article 95 EC) in order to harmonise standards in the area of public health, then an important instrument in the realisation of internal market would be rendered ineffective.[138]

The conclusion that can be drawn is that Article 114 TFEU (ex Article 95 EC) can be used whenever there are obstacles and restrictions to trade, no matter if other aspects are involved. Article 114 TFEU (ex Article 95 EC) appears to grant the Community unlimited powers. However, as Advocate General Fenelly said, Article 95 EC does not give 'carte blanche' to the European Union institutions to harmonise everything. There are limits to Article 114 TFEU (ex Article 95 EC).

First of all, as stated in *Tobacco Advertising* case a measure adopted on basis of Article 114 TFEU (ex Article 95 EC) must genuinely have as object the improvement of the conditions for the establishment and functioning of the internal market. Secondly, as Advocate General Geelhoed[139] stated, the fact that some measures pursue a matter of public interest and this public interest matter is thus removed from the powers of national legislatives bodies, the European Union should not give a lower level of protection on ground that the European Union legislature had regard only for market-related interests. European Union legislature should be faced with the same evaluation as the national legislatures which it replaced. Thirdly, Article 5 EC (ex Article 3(b) EEC; now Article 5 TEU) brings a limit to Article 114 TFEU (ex Article 95 EC). All three principles contained in Article 5 limits the power of Article 114 TFEU (ex Article 95 EC). The principle of attribution of powers underlines the fact that Article 114 TFEU (ex Article 95 EC) does not give European Union a general power to regulate the internal market. The principles of subsidiarity may prove to have importance in deciding whether action should be taken at European Union or national level. If the centre of gravity of the measure (whether internal market objectives or health objectives weight more) is not important in deciding whether the European Union has the power to act under Article 114 TFEU (ex Article 95 EC), then maybe the centre of gravity is important when exercising that power, in deciding at what level action is more suitable (the principle of subsidiarity will be discussed in the next chapter). Finally, the principle of proportionality may be decisive in deciding whether the European Union legislature went beyond the scope intended to be achieved. "In exercising its powers the Community legislature is faced with the same evaluation as the national legislature when it intends, for the protection of a matter

[137] Ibid., para 114.

[138] Ibid., para 113.

[139] Opinion of Advocate General Geelhoed delivered in Case C-491/01 *The Queen* v. *Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453.

of public interest, to impose prior conditions on the economic freedom of market participants."[140]

Since Article 114 TFEU (ex Article 95 EC) can be used to harmonise national measure even if there are health aspects included (or public interest matters), the text of the Article provides for Member States the possibility of satisfying their need for more protection. Thus, para 5 and 6 of Article 95 EC allows Member States to maintain a national provision on grounds of major needs referred to in Article 30, or relating to the environment or the working environment, or to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment, but they have to notify these measures.

5.2.4 Limits to the European Union Powers: The Principle of Subsidiarity

Health and education are two sectors that initially were organised on a nationalistic basis, with no European Union dimension and no European Union competence as such. However, as a result of spill-over effect from the internal market, or as a result of the action of the European Union institutions, lots of changes happened in these two sectors. If, in an initial phase there was no reference within the Treaty of Rome to health or education, later, the Treaty evolved so as to include specific articles dedicated to these fields, thus ensuring an European Union framework for the future developments in education and health. These specific Treaty articles do not permit the harmonisation of laws and consequently, Member States are in control of their health and education policies. However, as was seen above, the European Union has the competence to harmonise these fields by using the so-called 'functional powers'. The possibility of using 352 TFEU (ex Article 308 EC) or Article 114 TFEU (ex Article 95 EC) to harmonise health or educational aspects may be regarded by Member States as a loss of their sovereignty. Health and education involve social and human aspects and the use of Articles 114 and 352 TFEU (ex Articles 95 EC and 308 EC) raise problems related to the deficit of legitimacy [Article 114 TFEU (ex Article 95 EC] uses the majority voting procedure for the adoption of laws-thus Member States' will may be overruled-and the co-decision procedure, thus involving the Parliament in the highest possible degree; Article 352 TFEU (ex Article 308 EC) uses unanimity voting procedure, and only consulting the Parliament).

The European Union powers appear to be almost unlimited. It was necessary to create an instrument capable of ensuring a balance between Member States and

[140] Opinion of Advocate General Geelhoed delivered in Case C-491/01 *The Queen* v. *Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR *I*-11453, para 122.

European Union interests. The subsidiarity principle[141] introduced by the Treaty of Maastricht can be considered a limitation to the powers of the European Union.

Subsidiarity is defined by Jaques Delors as "a way of reconciling what for many appears to be irreconcilable: the emergence of a united Europe and loyalty to one's homeland; the need for a European power capable of tackling the problems of our age and the absolute necessity to preserve our roots in the shape of our nations and regions."[142]

The inclusion of the principle of subsidiarity must be put in a larger context: the changing of the voting procedure, the inclusion of majority voting and thus the elimination of Member States' veto power. From the moment of the Single European Act, Member States have lost their full control over the legislative process; the introduction of majority voting was necessary for the good-functioning of the legislative process. Initially the legislative process was guided according to the principle of sharing of powers and supremacy of European Union law. Depending on the scope of European Union action, Member States areas of action could be expanded. This can be seen as a constant threat that Member States will be stripped of their powers. But Member States had this "safeguard" that they could veto any piece of legislation. Once they lost the veto power they felt that their powers were slipping away. Thus a political instrument for controlling the continuous expansion of European Union powers was introduced.[143]

Toth referring to the subsidiarity principle states that it is "not only not part of pre-Maastricht European Union law but that it is totally alien to and contradicts the logic, structure and wording of the founding Treaties and the jurisprudence of the European Court of Justice."[144] However, the initial Treaty was concerned mainly with economical issues and did not pose as many problems regarding sovereignty as the new flanking policies.

The inclusion at the same time of health, education and vocational training within the Maastricht Treaty and also the inclusion of the subsidiarity principle is not a coincidence. Among the new-introduced policies, the so-called flanking policies it must be recalled that environmental policy was introduced by the SEA.[145] However, the wording of this article included the principle of subsidiarity. This reflects the Member States' intention to retain a substantial degree of control over some sensitive policies.

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[141] On the subsidiarity see Toth 1992, 1079–1106; Steiner 1994; Santer 1991; Cass 1992, 1107–1136; Davies 2006; Davies 2003; Constantinesco 1991, 439–459; De Búrca 1999; Barber 2005, 308–325; Emiliou 1992, 383–407; Dashwood 1996, 113; De Búrca 2000; Schilling 1994, 203–255.

[142] Jaques Delors, October 1989, at the opening of the academic year of the College of Europe in Bruges, as cited by Santer (1991).

[143] Constantinesco considers that "L'article 3B a ainsi la function d' un signal politique adresse aux opinions publiques nationals, hostiles a l'image d'en exces d'interventionnisme et redoutant l'apparition d'un centralisme communautaire" in Constantinesco et al. 1992.

[144] Toth 1992.

[145] Article 130(r) SEA.

The subsidiarity principle is meant to ensure that decisions must be taken at a level as close as possible to the citizens. The Preamble of Maastricht Treaty states that the Union aims at continuing "the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity." The ultimate aim of having the power to decide at national level is to ensure the citizens' welfare. In the Laeken Declaration,[146] in 2001 fears were expressed that citizens have the impression that the Union takes on too much in areas where its involvement is not always essential.

The subsidiarity principle is closely linked to decentralisation,[147] however, there is criticism that the principle deals mainly with relations between the Sate and non-statal actors and that, according to Gormley has 'no relevance to relationships between the different territorial administrative layers of a State."[148]

A. The Structure of Article 3b Maastricht Treaty and "Positive" Guarantees for Safeguarding MS Powers

Article 3b of the Maastricht Treaty referring to subsidiarity actually includes three principles meant to ensure that Member States' powers are not undermined. The first para lays down the principle of legality, guaranteeing that "the Community shall act within the limits of powers conferred upon by this Treaty and the objectives assigned to it herein." Once it was decided that the Community has the power to act, then the second para of Article 3b is applied. The principle of subsidiarity is meant to determine whether, in the field of shared competence, action should be taken at Community or at national level.

The second para of Article 3b states that:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Furthermore, para three introduces the principle of proportionality stating that Community action should not go beyond what is necessary to attain its objectives. Even if Community has the competence to act, even if action taken at Community level may prove to be more efficient than action taken at national level, still, the principle of proportionality ensures that no abuse is made.

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146 The Laeken European Council, 14–15 December 2001.

147 Kapteyn Pand Verloren van Themaat 1998, p. 135.

148 Ibid., 135–144.

B. Domain of Application

Subsidiarity is a double-edged weapon: it may lead towards decentralisation but it could as well lead to centralisation, depending on how it is read—the European Union should not intervene, unless it was necessary, or the European Union should intervene when it is necessary.[149] As Steiner sharply noticed, efficiency pulls towards centralisation, while social responsibility against. It is important to see whether and how important this principle is when it comes to legislation adopted using as legal basis an article with functional competence (for example Article 95) since in this case the harmonising measure has as its effect the establishment and functioning of the internal market, but also includes some public interest matters.

As stated in Article 3 b EEC Treaty, subsidiarity applies in areas that do not fall within the exclusive competence of the European Union. One of the first problems raised by subsidiarity is the difficulty in deciding what falls within the exclusive competence of the European Union.

The subsidiarity principle is specific to federalist systems, where it is clear what constitutes shared competences and what constitutes exclusive competences. The subsidiarity principle ensures that measures are taken at the lowest level; the central government may acquire competences in so far as the same task cannot be better achieved by the local government. It ensures a vertical separation of powers.

Unlike a federal system, the division of competences between European Union and Member States is not clear. The European Union is a different type of construction, it is in continuous evolution. There are some objectives set to be achieved and it functions according to the principle of attribution of powers. But this is not all, as the Court has developed the doctrine of implied powers, ensuring thus the achievement of some objectives for which specific powers were not inserted within the Treaty. Moreover, the existence of Article 235 EEC (Article 308 EC; now Article 352 TFEU) was meant to fill the lacunae of power.

For a better picture of the difficulties in drawing a line between exclusive and shared competences it is worth mentioning two different interpretations given by two eminent scholars.

Toth[150] considers that European Union has exclusivity in all matters that have been transferred from the Member States to European Union and even if European Union have failed to exercise the powers in the areas attributed to it, the Member States still do not have concurrent competence. He supports his theory with the ECJ ruling in the *ERTA*[151] where the Court ruled that "The existence of Community powers excludes the possibility of concurrent powers on the part of the Member States." Even if the Community has failed to act, this does not mean that Member States have concurrent competences; he relates this to the principle of supremacy of European Union law.

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[149] See Cass 1992, 1107–1136.

[150] Toth 1994, p. 39.

[151] Case 22/70 *Commission* v. *Council* (ERTA Case) [1971] ECR 263 at 276.

On the contrary, Steiner[152] has a different opinion considering that Community has exclusive competence to act only in areas where it has exercised its powers.[153]

Education and health do not fall within the area of exclusive competence and thus, subsidiarity principle is applied. The question is whether internal market policy falls within the exclusive competence of the Community. Toth considers that internal market policy falls within the exclusive competence of Community and he thinks that if the Community legislation that includes public interest matters (such as health) "facilitates the completion of the internal market," then these matters are outside the remit of subsidiarity. The Treaty of Lisbon introduced a clearer division of competences and Article 4 TFEU provides that internal market falls within the shared competences while Article 6 TFEU provides that the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. Internal market matters "cut across and interact with Member State categorical competences–health, education."[154]

> One problem is that many of these so-called "flanking policies" are inextricably linked with the internal market and also with one another. Thus, Article 100a of the EEC Treaty envisages that the Community will pursue health, safety, environmental and consumer protection objectives through harmonisation measures relating to the establishment and functioning of the internal market. Since, as we have just seen, the development of the internal market is within exclusive Community competence, at least those aspects of health, safety, environmental and consumer protection policies which are connected with the internal market must fall within the Community's exclusive competence and therefore outside the scope of application of subsidiarity.[155]

Toth considers that legislation (implementing flanking policies) that imposes heavy financial burdens and raises obstacles to free movement, even if it is meant to implement flanking policies should be taken at European Union level, as it should be the same for all Member States. However, he also underlines the dangers that are created by the difficulty of separating internal market policies from the policies aimed at achieving flanking policies. There may be the danger of damaging those policies.

How can this conflict between the need to harmonise for the sake of the internal market and the need to safeguard Member States competences in the field of welfare services be solved? A solution would be that internal market matters should not be the exclusive competence of the European Union because of the reason that internal market measures interfere with welfare matters and if European Union had exclusive competence to act, than it would evade application of principle of subsidiarity. The Lisbon Treaty provides that internal market falls within the shared competences (Article 5 TFEU).

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[152] Steiner 1994, p. 57.

[153] In drawing the borders of the areas where Community has exercised its powers, according to Craig and De Búrca attention should be also paid to ECJ decisions. In Craig and De Búrca 2003, p. 135.

[154] Davies 2003, p. 689.

[155] Toth 1994, 41.

However, even if internal market matters fall within the shared competences, the problems do not cease to exist. If we accept the idea that harmonisation of internal market matters may include sometimes health or education aspects, a question may appear: when applying the principle of subsidiarity which aspects are to be weighted in order to decide whether action is more appropriate at European Union level: internal market aspects or health aspects?

C. Applicability of Subsidiarity Principle

As stated above, the subsidiarity principle is a double-edge weapon, it can lead to action being taken at European Union level, or it can lead to action being taken at national level. The wording of Article 3b EEC indicates two opposite directions as possible ways, but only one direction is the right one. In order to determine whether action is more appropriate at national or European Union level, Article 3b has provided that: "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

There are two tests laid down for determining at what level action should be taken: a qualitative which is aimed at determining whether action is more effective at European Union level and a quantitative test which is aimed at determining whether European Union action is better, considering the scale or effects of the proposed action.

The first problem raised by these criteria refers to the use of the term "cannot be sufficiently achieved by Member States." The difficulty in determining whose action would be more effective is caused by the different standards existent in different Member States. This problem is underlined by Brinkhorst[156] referring to environmental policy, where three Member States have developed a coherent and sustained environmental policy (Denmark, Netherlands, Germany), where Greece, Italy, Spain, Portugal and Ireland have low environment protection and other Member States (France, UK, Belgium, Luxemburg) lie somewhere between the two categories. Having this situation, for countries with low level of environment protection, action at European Union level is required, but for countries with high level of protection, national action is more effective. A solution for this problem would be minimum standards adopted at European level, thus ensuring that there is a minimum level of protection throughout the European Union and also Member States who want higher protection are allowed to do so.

Another problem raised by the two criteria is that sometimes the two tests lead to different results,[157] one criteria indicating Member States to be the one who should act, the other criteria indicating that European Union is more fit to act.

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[156] Brinkhorst 1991.

[157] For this topic see Toth 1992, p. 1099.

In the Protocol on the application of the principles of subsidiarity and proportionality[158] there are some guidelines how these criteria should be applied. European Union action is deemed to be necessary where the issue under consideration has a transnational aspect which cannot be satisfactorily regulated by Member States. It must be mentioned that health and education tend to have more and more transnational implications. European Union programmes in the field of education aim at increasing mobility throughout the European Union. Free movement provisions lead to the situation where health and education services are provided throughout the European Union and not only at the restrictive space of national frontiers. And a logical reasoning will tend to show that problems with transnational aspects are better addressed at a supra-national level, thus Member States are meant to be deprived of more competences.

In the same Protocol it is stated that anything that creates obstacles to trade or restriction of competition should be dealt at European Union level. However, the next para of the guideline states that action at European Union level should produce clear benefits by reason of its scale or effects compared with action at national level. The big problem is the difficulty of measuring the benefits and of determining at what level action would be more efficient; the lack of an objective test makes the subsidiarity principle a political one.

Article 5 with all three principles that are included may provide Member States certain guarantees against the expansion of European Union powers by using articles with functional competence (especially Article 308 and 95). The principle of attribution of powers makes sure that the European Union powers do not extend to areas which were not entrusted (though we have the case of Article 308 which is an express recognition of implied powers).

The principle of subsidiarity may also play an important role when harmonising internal market matters under Article 95 EC, where other objectives than the establishment and functioning of the internal market are pursued (for example health matters). We have seen that Article 114 TFEU (ex Article 95 EC) is a valid legal basis even if health matters form the objective of the measure; the principle of subsidiarity may prove useful when it comes to issuing measures under Article 114 TFEU (ex Article 95 EC) and in this case whether the centre of gravity of the measure may prove to have an importance. When issuing the measure and ensuring that it complies with the subsidiarity principle (to assess whether action should be taken at Community or at national level), regard should be given to the aspects that represent the main objective of the measure.

The principle of proportionality is also important because it decides whether the measure in question is necessary at all. Sometimes, the Community legislation,

[158] Protocol on the application of the principles of subsidiarity and proportionality 1997 *Selected Instruments taken from the Treaties*, book I, volume I, 1999 edition, published by the Office for Official Publications of the European Communities, ISBN 92-824-1661-5.

instead of assessing whether the measure at stake complies with the subsidiarity principle, makes reference only to the proportionality principle.[159]

D. Conclusion

Initially there was no division of powers at European Union level between exclusive and non-exclusive competences. The European Union was functioning according to the principle of attribution of powers. However, the interdependence between internal market issues and social welfare matters, and consequently the market offensive in areas strictly controlled by Member States, the introduction of majority voting procedure and the expansion of European Union common activities lead to the introduction of the subsidiarity principle, meant to meet the Member States' desire to have their competences protected and to impede any unnecessary expansion of European Union powers. The problems raised by subsidiarity are related to the inexistence of a clear demarcation of powers between European Union and Member States and to the difficulty of applying a test which does not contain objective criteria.

Article 5 EC[160] with the three principles appears for Member States to be a safeguard against the continuous extension of European Union powers. The existence of the functional competences ensures the dynamism of the European Union and the existence of the subsidiarity ensures that the expansion of powers is not unnecessarily exceeded.

5.2.5 Secondary Legislation

5.2.5.1 Regulation 1408/71 on Social Security Schemes

Regulation 1408/71[161] deals with the coordination of social security schemes of the Member States. Its aim is to facilitate free movement of workers and of self-employed persons. Due to the variety of the social security schemes in

[159] See Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (Text with EEA relevance) [2003] OJ L 152/16, para 17.

[160] Article 5 EC repealed and replaced in substance by Article 13(2) TFEU.

[161] Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, 1971 OJ L 149 Consolidated version [1997] OJ L 28; modified by Regulation 883/2004/EC on the coordination of social security systems [2004] OJ L166/2 which is not in force yet. See also Van der Mei 2002, pp. 551–566; Dawes 2006, pp. 167–182.

different Member States it is not possible to harmonise. However, it was found a solution that allowed the coordination of these schemes. The following categories of persons fall within the scope of the Regulation: "employed or self-employed persons and to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors."[162] It also applies to "the survivors of employed or self-employed persons and of students who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States."[163]

The material scope of the Regulation covers sickness and maternity benefits; invalidity benefits, including those intended for the maintenance or improvement of earning capacity; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; family benefits.

The Regulation applies to general and special social security schemes, whether contributory or non-contributory.[164] The Regulation applies with regard to special non-contributory benefits when such benefits are intended to provide supplementary, substitute or ancillary cover against the risks covered against the risks covered by the branches of social security or as specific protection for disabled.[165]

Article 4(2)(b) refers to special non-contributory benefits which have been included in the Annex II of the Regulation and to whom the provisions of the Regulation do not apply.

Member States are entitled to impose residence requirements as a condition for entitlement to such benefits when they have included the benefit in question in Annex II a of the Regulation.

Article 4(4) excludes "social and medical assistance, benefit schemes for victims of war or its consequences" from the scope of this Regulation.

For the scope of this book it is important to look at the provisions referring to sickness benefits.

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[162] Regulation 1408/71 [1997] OJ L 28, Article 3(1).

[163] Ibid., Article 3(2).

[164] Ibid., Article 4.

[165] Ibid., Article 4(2)(a).

According to Article 19, when an employed or self-employed person resides in the territory of a Member State, other than the competent State he shall receive benefits in kind from the institution of the place of residence as if he was insured there or he shall receive cash benefits provided by the competent institution. However, there is the possibility that an agreement between the competent institution and the institution in the place of residence be concluded so that the benefits would be provided by the institution of the place of residence.

According to Article 20, in the case of frontier workers, the benefits may be obtained in the territory of the competent state and he would be treated as if he was a resident in the competent state.

Article 21 deals with employed and self-employed person who is residing in the territory of a Member State, other than the competent State and who is staying on the territory of the competent State. He shall receive benefits in accordance with the provisions of the legislation of that State as though he was resident there, even if he has already received benefits for the same case of sickness or maternity before his stay.

An employed and self-employed person who is residing in the territory of a Member State, other than the competent State and who transfer their residence to the territory of the competent State, shall receive benefits in accordance with the provisions of the legislation of that State even if they have received benefits for the same case of sickness or maternity before transferring their residence.

Article 22(1)(a) deals with the situation of emergency care when an employed or self-employed person requires benefits in kind during his stay in another Member State.

Article 22(1)(b) deals with the situation where an employed or self-employed person who having become entitled to benefits chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State.

Article 22(1)(c) deals with the situation of authorised treatment, where an employed or self-employed person is authorised by the competent institution to go and receive treatment in another Member State.

In all these 3 situations he is entitled to benefits in kind on behalf of the competent institution by the institution of the place of stay or residence or to cash benefits provided by the competent institution. However, there is the possibility that an agreement between the competent institution and the institution in the place of residence be concluded so that the benefits would be provided by the institution of the place of residence.

The authorisation required in Article 22(1)(b) may be refused if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment.

The authorisation required in Article 22(1)(c) may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resided and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease.

This Regulation was modified by Regulation 883/2,004/EC[166] which entered in force in 2010[167] and which has as its legal basis Articles 42 and 308 EC. The following categories of persons fall within the scope of the Regulation 883/2004/EC "nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors. It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States."[168]

For the scope of this book it is important to look at the provisions referring to sickness benefits.

According to Article 17 an insured person or Members of his family residing in a Member State, other than the competent Member State shall receive benefits in kind in the state of residence. He shall receive the same treatment as if he was insured in the state of residence.

Article 18 covers the situation where the insured person and the members of his family stay in the competent state when residence is in another Member State. The equal treatment shall apply and they are going to receive benefits in kind in the competent Member State and they are going to be treated as if they resided in that Member State.

Article 19 covers the situation where the insured person or the members of her family stay in another Member State than the competent Member State. The equality treatment applies also in this situation and they are going to be entitled to benefits in kind which become necessary during their stay, taking into

[166] Regulation 883/2004/EC on the coordination of social security systems [2004] OJ L166/2; amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 amending Regulation (EC) No 883/2004 on the coordination of social security systems, and determining the content of its Annexes [2009] OJ L 284/43.

[167] The Implementing rules have been adopted through Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284/1.

[168] Regulation 883/2004/EC on the coordination of social security systems [2004] OJ L166/2.

account the nature of the benefits and the expected length of stay. The treatment shall be offered by the institution of the place of stay on the behalf of the competent institution and they shall be treated as if they were insured in the State of stay.

Article 20 deals with medical care offered to people that travel with the purpose of receiving benefits in kind. The Regulation provides that in the case of an insured person travelling to another Member State with the purpose of receiving benefits in kind, an authorisation is required. An insured person holding an authorisation who goes to another Member State with the purpose to receive treatment appropriate to his condition shall receive benefits in kind from the institution of the place of stay as if he was insured under the legislation from the place of stay.

There are conditions for granting the authorisation. Such an authorisation shall be issued where the treatment is among the benefits provided by the legislation in the Member State where the person concerned resides and where he cannot be given such treatment within a time-limit which is medically justifiable, taking into account his current state of health and the probable course of his illness.[169]

Article 21 covers the situation when an insured person and members of his family reside or stay in another Member State than the competent Member State. In such circumstances they shall be entitled to cash benefits provided by the competent institution. There can also be an agreement between the competent institution and the institution of the place of residence or stay and these benefits could be provided by the institution of the place of residence or stay at the expense of the competent institution.

The Constitutional Position of the Regulation

Article 22 of Regulation 1408/71 makes the reimbursement of the health care treatment incurred in another Member State conditional upon an authorisation issued by the competent authority in the home Member State. This sketch a conflict with primary law: is this authorisation system contrary to free movement provisions?[170] This question was answered by the Court in *Inzian*[171] where the Court ruled that Article 22 was not intended to regulate the reimbursement of the costs of the treatment provided in another Member State. The purpose of this Article was only to offer to the insured person benefits in kind in the State of

[169] Ibid., Article 20(2).

[170] For related conflicts between Regulation 1,408/71 and primary law see Cabral 2004, pp. 673–686.

[171] Case C-56/01 *Patricia Inizan* v. *Caisse primaire d'assurance maladie des Hauts-de-Seine* [2003] ECR I-12403.

treatment as if that person was insured in that State on behalf of the competent institution. The competent institution has to reimburse the institution that offered the treatment. This should be understood as an advantage granted in order to ensure free movement. However, "it cannot be complained that the European Union legislature made entitlement to the abovementioned rights subject to obtaining prior authorisation from the competent institution."[172]

Cabral considers that the Court would have been more coherent if it declared this authorisation system as a prima facie restriction and then to proceed to justify it.

This authorisation cannot be refused where the treatment in question is among the benefits provided by the home Member State and where such a treatment cannot be given "within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease." In case of refusal, the person refused must have the possibility to contest such decision.

Thus the authorisation procedure found in Article 22 of the Regulation 1408/71 should be regarded as complementary and as an added right given to patients, since treatment abroad using Article 22 procedure allows the patient to have all cover of the costs of health care incurred abroad.

When treatment abroad is done according to the procedure found in Article 22 of the Regulation 1408/71, the reimbursement of the costs incurred is done according to the tariffs of the Member State where the treatment is received. However, when health care is received using Article 56 TFEU (ex Article 49 EC), the reimbursement of the costs is done according to the tariffs in the home Member State.

5.2.5.2 Professional Qualifications

Travelling from one Member State to another as a self-employed person or as a student faced highly regulatory barriers related to the recognition of qualifications. The training for becoming a doctor differs from one Member State to another; also Member States may regulate access to the market; there might be limitations to the number of patients a doctor might have which differs from one Member State to another; doctors have a duty of confidentiality and there are different national rules related to the organisation of profession which must be respected; there are different rules related to the professional liability, there are different codes of conduct to which doctors are subject to. Since the

[172] Ibid., para 24.

patients need to be protected, there are different regulations in place meant to ensure that protection. However, all these come in a variety of regulations that differ from one Member State to another and it makes it difficult the mobility of doctors as service providers.

Also a student who travels to another State for the purpose of studying needs to have certainty that when he comes back home the diploma or the qualifications obtained abroad is recognised. Also in order to study abroad the diplomas and the qualifications obtained in his Member State need to be recognised. All these problems required a regulatory approach.

Countries with shortage of doctors and nurses make use of the migration of the medical providers. This is a fast solution that replaces the long years of preparation that a medical provider needs to pursue.[173]

A doctor moving from one Member State to another might encounter the situation where his title is not recognised and might be required to have a qualification from the host Member State. In this case the double burden imposed on the person moving from one Member State to another is a restriction to free movement provisions. We have a series of cases dealing with the recognition of professional qualifications.[174] The Court applied the mutual recognition principle and required Member States to take account of the knowledge and qualifications acquired in another Member State.

> It must be stated in this regard that, even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article 52 of the EEC Treaty. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.[175]

However, the qualifications and the training in another Member State might differ and issues related to the quality of the education in another Member State are raised. This is a point where positive harmonisation appears to be the solution to bring the different standards closer.

The approach chosen at the beginning was a sectoral one. These sectoral Directives aimed at facilitating the free movement of medical practitioners and applied to medical providers working as self-employed or in an employed capacity.

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[173] The training for a nurse could take between three and five years and for a doctor between 15 and 20. See Buchan 2007.

[174] Case 2/74 *Reyners* v. *Belgium* [1974] ECR 631; Case 71/76 *Thieffry* [1977] ECR 765; Case C-340/89 *Vlassopoulou* [1991] I-2357.

[175] Case C-340/89 *Vlassopoulou* [1991] I-2357, para 15.

There were issued directives concerning doctors,[176] dentists,[177] pharmacists,[178] for nurses,[179] midwives.[180]

Directive 93/16 aimed to facilitate the free movement of doctors provided for the recognition of diplomas, certificates and other formal qualifications awarded in another Member State. This Directive is no longer in force, being repealed by Directive 2005/36.[181] The old Directive 93/16 provided that the host Member State

[176] Council Directive 75/363/EEC concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors, [1975] OJ L167/14; The Directive was consolidated by Directive 93/16/EEC to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, [1993] OJ L 165/1; The Directive with regard to doctors is repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L 255/22.

[177] Directive 78/686/EEC on the mutual recognition of diplomas, certificates and other evidence of formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, [1978] OJ L233/1; Directive 78/687/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of dental practitioners, [1978] OJ L233/10, amended by Directive 2001/19/EC. [2001] L206/1; repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L 255/22.

[178] Directive 85/432/EEC, concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of certain activities in the field of pharmacy, [1985] OJ L253/34; Council Directive 85/433/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy, [1985]] OJ 253/37, amended by Directive 2001/19/EC, [2001] OJ L 206/1; repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L 255/22.

[179] Directive 77/452/EEC on the mutual recognition of diplomas, certificates and other evidence of formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of this right of establishment and freedom to provide services, [1977] OJ L176/1; Directive 77/453/EEC, concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of nurses responsible for general care, [1977] OJ L176/8; amended by Directive 2001/19/EC. [2001] L206/1; repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L 255/22.

[180] Directive 80/154/EEC on the mutual recognition of diplomas, certificates and other evidence of formal qualifications of practitioners of midwifery, [1980] OJ L33/1; Directive 80/155/EEC, concerning the coordination of provisions laid down by Law, Regulation or Administrative Action relating to the taking up and pursuit of the activities of midwives, [1980] OJ L33/8; amended by Directive 2001/19/EC. [2001] L206/1; repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L 255/22.

[181] Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L 255/22.

had to recognise those diplomas as if they were issued on its territory.[182] There was a similar wording with regard to qualifications in specialised medicine.[183]

The host Member State had to ensure the right to use the lawful academic title of the Member State of origin or of the Member State from which they come. The host Member State might have required the title to be followed by the name and location of the establishment or examining board which awarded it.[184]

The host Member State had to accept a certificate issued by a competent authority in the Member State of origin as sufficient evidence for a good character or good repute.[185]

In the case of the provision of health services in another Member State, the host State could not require, in order to pursue any activity as a doctor, an authorisation of membership of, or registration with a professional organisation or body. That person providing services would have been subject to the rules of conduct of the host Member State. The host Member State could have required the person providing services to make a prior declaration concerning the provision of his services where they involved a temporary stay. The host Member State could have required the service provider to provide the declaration that he was providing services on a temporary basis, a certificate that states that he was lawfully pursuing the activities in question in the Member State where he was established, a certificate that the person concerned held one or other of the diplomas, certificates or other evidence of formal qualification appropriate for the provision of the services in question.[186]

> Furthermore, for the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors it was provided that:
>
> 1. The Member States shall require persons wishing to take up and pursue a medical profession to hold a diploma, certificate or other evidence of formal qualifications in medicine referred to in Article 3 which guarantees that during his complete training period the person concerned has acquired:
>   (a) adequate knowledge of the sciences on which medicine is based and a good understanding of the scientific methods including the principles of measuring biological functions, the evaluation of scientifically established facts and the analysis of data;
>   (b) sufficient understanding of the structure, functions and behaviour of healthy and sick persons, as well as relations between the state of health and physical and social surroundings of the human being;

[182] Directive 93/16/EEC to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, [1993] OJ L 165/1, Article 2.

[183] Ibid., Article 4.

[184] Ibid., Article 10.

[185] Ibid., Article 11.

[186] Ibid., Article 17.

(c) adequate knowledge of clinical disciplines and practices, providing him with a coherent picture of mental and physical diseases, of medicine from the points of view of prophylaxis, diagnosis and therapy and of human reproduction;
(d) suitable clinical experience in hospitals under appropriate supervision.

A complete period of medical training of this kind shall comprise at least a six-year course or 5 500 h of theoretical and practical instruction given in a university or under the supervision of a university.[187]

The Directive laid down minimum requirements that had to be fulfilled regarding the training that leaded to a diploma, certificate or other evidence of formal qualifications in specialised medicine.[188]

Thus the aim of the Directive 93/16/EEC was to ensure the automatic recognition of diplomas. The principle of mutual recognition is accompanied by minimum requirements that are meant to make the training and the diplomas more compatible.

The sectoral Directives' aim was to adjust the national rules related to entry to a profession and to the training to be followed. They set down minimum requirements that Member States must comply with. Different changes have occurred as a result of the sectoral approach. In UK the "specialist medical training" was recognised. The UK system contained general practitioners and consultants. The UK High Court admitted that there was an infringement of the sectoral directive aimed to facilitate the free movement of doctors.[189]

In Italy the State's requirements to have a basic training in medicine plus a specialisation on the field of dentistry in order to enter the profession of dental practitioner was found to infringe Directive 78/687 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of dental practitioners.[190] The training prescribed in the Directive was limited to the dental training which implies a course specially prepared for the training of dental practitioners

Thus, some Member States had to make some changes in order to harmonise the training systems. This was necessary for the automatic recognition of professional qualifications.

Besides the sectoral Directives there was also a general system of recognition of qualifications. It comprises the following Directives: a directive on the recognition of diplomas, certificates and titles other than those obtained by higher education of

[187] Ibid., Article 23.

[188] Ibid. Article 24.

[189] See Hervey and McHale 2004, p. 206.

[190] Case C-202/99 *Commission of the European Communities* v. *Italian Republic* [2001] ECR I-9319.

at least three years duration[191]; a directive on the recognition of diplomas, certificates and titles other than those obtained by higher education of at least three years' duration[192]; a directive establishing a mechanism for the recognition of diplomas in craft trades, commerce and certain services.[193] Because the sectoral directives covered only a limited number of professions, "the general system obliges each Member State to put in place, across a broad range of professional activities, structures providing for the case-by-case examination of requests for recognition, accompanied by the appropriate procedural guarantees, and, where appropriate, for the compensation mechanisms laid down in the directive, namely, the adaptation period and the aptitude test."[194]

The roots of the Directive can be found in the European Council of 25 and 26 June 1984 in Fontainebleu, where it was underlined the need to have a "general system for ensuring the equivalence of university diplomas in order to bring about the effective freedom of establishment within the Community."[195]

The general system is built around the mutual recognition principle. If one is qualified to exercise a profession in one Member State he should be entitled to exercise that profession throughout the Union. Thus the diploma should be

[191] Council Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, [1989] OJ L19/16, amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor, [2001] OJ L 206/1; repealed by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L255/22.

[192] Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, [1992] OJ L 209/25; amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor, [2001] OJ L 206/1; repealed by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L255/22.

[193] Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications, [1999] OJ L 201/77; repealed by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L255/22.

[194] Report to the European Parliament and the Council on the State of Application of the General System for the Recognition of Higher Education Diplomas, [1996] COM(96) 46 final.

[195] Ibid.

recognised in any Member State. The Directive contains provisions that take into consideration the differences in education between Member States. Where there are fundamental differences, the host State can ask the migrant to "compensate" for the differences and not to follow the whole national course in education for that profession. Member State has a choice between adaptation periods and aptitude tests. Pertek[196] considers that Member States prefer aptitude tests.

In the Report on the State of Application of the General System for the Recognition of Higher Education Diplomas[197] it is stated that the general system met the expectations. There were problems related to the implementation and application of the Directive 89/48/EEC which were solved withers by discussions with the Member States or in front of the Court.

Since 2007 there is a new system, reforming the old one and aimed at making labour markets more flexible and to further liberalise the provision of services, at encouraging more automatic recognition of qualifications and at simplifying administrative procedures. Directive 2005/36/EC[198] is the act aimed at reforming the recognition of qualifications system. It consolidates fifteen directives in one piece of legislation. It includes twelve sectoral directives-covering the professions of doctor, nurse responsible for general care, dentist, veterinary surgeon, midwife, pharmacist and architect-and three directives which have set up a general system for the recognition of professional qualifications and cover most other regulated professions.[199]

Directive 2005/36/EC[200] is aimed at facilitating the provision of services in the context of strict respect for public health and safety and consumer protection. That is why in the Preamble it is underlined that there should be specific provisions for the regulated professions which have public health or safety implications which are provided across border on a temporary basis.

This Directive replaces Council Directives 89/48/EEC and 92/51/EEC, as well as Directive 1999/42/EC of the European Parliament and of the Council on the general system for the recognition of professional qualifications, and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC, concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor, by combining them in a single text.

The aim of the Directive is to allow the holder of a professional qualification to have access in the host Member State to the profession for which he is qualified and

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196 Pertek 1999, p. 293.

197 Ibid.

198 Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications [2005] OJ L255/22.

199 See http://europa.eu/scadplus/leg/en/s19005.htm.

200 Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications [2005] OJ L255/22.

to practice that profession under the same conditions as nationals of that Member State. The Directive differentiates between the freedom to provide services and freedom of establishment. The distinction is made according to the Court's jurisprudence, assessing on a case-by case basis, taking into consideration in particular the duration, the frequency, the regularity and the continuity of the service.

A service provider who is legally established in a Member State may provide services in another Member State on a temporary basis using its original professional title, without having to apply for the recognition of his qualifications. If the service provider moves outside the Member State of establishment, if the profession in question is not regulated in that Member State he must show that he has pursued that profession for at least two years during the 10 years preceding the provision of services.

Article 5(3) of the Directive states that the rules of the host Member State apply to the service provider who moves to another Member State:

> Where a service provider moves, he shall be subject to professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications, such as the definition of the profession, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety, as well as disciplinary provisions which are applicable in the host Member State to professionals who pursue the same profession in that Member State.

In the proposal for the Directive on recognition of professional qualifications, in its initial form it was that a service provider was a professional who provided a service for not more than 16 weeks per year in the host Member State.[201] There were fears that doctors would offer health service for 16 weeks per year without being subject to the regulatory system of the host state and then they would move to another Member State for the next 16 weeks.[202] The provisions of Article 5(3) of the Directive on recognition of professional qualifications however alleviate such fears since it allows for the rules of the host Member State to apply to service provider and since the definition of what is a service provider is the one used in the practice of the European Court of Justice.

There are also exceptions from this rule of complying with the requirements of the host Member State with regard to the authorisation, registration or membership of a professional organisation or body and with regard to the registration with a public social security body:

> Pursuant to Article 5(1), the host Member State shall exempt service providers established in another Member State from the requirements which it places on professionals established in its territory relating to:
>
> a. Authorisation by, registration with or membership of a professional organisation or body. In order to facilitate the application of disciplinary provisions in force on their territory according to Article 5(3), Member States may provide either for automatic

[201] Proposal for a Directive of the European Parliament and the Council on the recognition of professional qualifications, COM (2002) 119 final.

[202] See Hervey and McHale, 2004, p. 198.

temporary registration with or for pro forma membership of such a professional organisation or body, provided that such registration or membership does not delay or complicate in any way the provision of services and does not entail any additional costs for the service provider. A copy of the declaration and, where applicable, of the renewal referred to in Article 7(1), accompanied, for professions which have implications for public health and safety referred to in Article 7(4) or which benefit from automatic recognition under Title III Chap. 3, by a copy of the documents referred to in Article 7(2) shall be sent by the competent authority to the relevant professional organisation or body, and this shall constitute automatic temporary registration or pro forma membership for this purpose;

b. Registration with a public social security body for the purpose of settling accounts with an insurer relating to activities pursued for the benefit of insured persons.

The service provider shall, however, inform in advance or, in an urgent case, afterwards, the body referred to in point (b) of the services which he has provided.[203]

There is a requirement for the service provider to make a declaration to the host Member State in advance when he decides to provide services in another Member State and renew it annually. This should include also the details of any insurance cover or other means of personal or collective protection with regard to professional liability. The host Member State may require that the first declaration be accompanied by certain documents that are listed in the Directive such as a proof of the nationality of the service provider, a proof of establishment, evidence of professional qualifications, for professions in the security sector, where the Member State so requires for its own nationals, evidence of no criminal convictions.[204]

According to Article 7(4) in the case of services which are regulated professions which do not benefit from automatic recognition and which have health or safety implications, the host Member State may check the professional qualifications. Where there is a substantial difference between the professional qualifications and the training provided in the host Member State, if the difference can be harmful to the public health or safety, the host Member State can require the service provider to show by means of aptitude test that he has acquired the knowledge or competence lacking. This should be done respecting the principle of proportionality.

If the service is provided under the professional title of the Member State of establishment, the authorities of the host Member State can require additional information in particular information related to the register in which he is registered, his registration number, or equivalent means of identification contained in that register, the name and address of the competent supervisory authority, insurance coverage against financial risks.[205]

With regard to establishment, the Directive contains three systems: the general system for the recognition of professional qualifications (Chap. 1), the system of

[203] Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L255/22, Article 6.

[204] Ibid., Article 7.

[205] Ibid., Article 9.

automatic recognition of qualifications attested by professional experience (Chap. 2) and the system of automatic recognition of qualifications for specific professions (Chap. 3). The general system for the recognition of professional qualifications applies to the professions which are not covered by specific rules of recognition and when the migrant provider does not meet the conditions set in the other schemes. This system is based on the principle of mutual recognition. However, if there are differences between the training of the migrant provider and the training required in the host Member State, the host Member State is entitled to ask for an adaptation period of an aptitude test. According to the system of automatic recognition of qualifications attested by professional experience the industrial, craft and commercial activities which are listed in the Directive are subject to the automatic recognition of the qualifications attested by professional experience. The system of automatic recognition of qualifications for specific professions refers to the automatic recognition of qualifications of doctors, nurses responsible for general care, dental practitioners, specialised dental practitioners, veterinary surgeons, midwives, pharmacists and as architects. The Directive sets however minimum training conditions for these professions, thus the automatic recognition is accompanied by measures that aim at bringing the diverse systems to a certain level of compatibility.

With regard to doctors, the Directive distinguishes between basic medical training, specialist medical training and training of general practitioners. For the basic medical training admission is done on the basis of the diploma or certificate that provides access to universities. The Directive lays down the minimum number of years (six years) or the minimum number of hours of theoretical and practical training (5,500 h) that a basic medical training should comprise. It also sets the skills which the basic medical training should ensure that a person has acquired.[206] For the specialist medical training the Directive provides that admission shall be contingent upon the completion of six years of study in basic medical training. It shall comprise theoretical and practical training at a university or medical teaching hospital or a medical care establishment approved by competent authorities. The Directive lays down the minimum duration of medical specialist training which should be pursued.[207]

For the training of general practitioners, the admission shall be contingent upon the completion of six years of study in basic medical training. For the qualifications issued before 1 January 2006 the practical training necessary for the award of evidence of formal qualification should be at least two years. For the qualifications issued after this date the training should be at least three years.[208]

With regard to nurses, the admission to training for nurses responsible for general care requires the completion of general education of 10 years as attested by a diploma, certificate or other evidence issued by the competent authorities.

[206] Ibid., Article 24.

[207] Ibid., Article 25.

[208] Ibid., Article 28.

The training comprises at least three years of study or 4,600 h of theoretical and clinical training on a full-time basis. The training shall include at least the programme described in Annex V, point 5.2.1. of the Directive.[209]

With regard to dental practitioners the admission to training requires the possession of a diploma or certificate giving access, for the studies in question, to universities or higher institutes of an equivalent level. The training shall comprise at least five years of a full time theoretical and practical study, comprising at least the programme described in Annex 5.3.2.[210]

With regard to midwives, access to training is conditional upon two routes: the completion of at least the first 10 years of general school education or possession of evidence of formal qualifications as a nurse responsible for general care referred to in Annex V, point 5.2.2. In the first case, the training comprises at least three years of theoretical and practical study covering at least the programme described in Annex V, point 5.5.1. In the second case, the training entails specific full-time training as a midwife of 18 months' duration, comprising at least the study programme described in Annex V, point 5.5.1, which was not the subject of equivalent training of nurses responsible for general care.[211]

With regard to pharmacists, the access to training shall be contingent upon possession of a diploma or certificate giving access, for the studies in question, to universities or higher institutes of an equivalent level. The training includes at least five years' duration, including at least four years of full-time theoretical and practical training at a university and a six-month traineeship in a pharmacy which is open to the public or in a hospital.[212]

While at the beginning the Member States were regulating the entry requirements, now the EU rules are laying down the minimum requirements for entry to a profession.

There is criticism brought to the general and sectoral directives.[213] Hervey identifies lack of trust in professional qualifications from other Member States and difficulties in enforcement of the directives. Furthermore, she considers that the automatic recognition of qualifications lacks flexibility because Member States have to accept the equivalence of qualifications between different Member States and she considers that the reality is different that there is no equivalence. Hervey also expresses concerns related to the quality in health care and professional training, considering that the sectoral directives focus on the establishment of the internal market and less on patient protection. The provisions of the directives are criticised not to be formulated as to give rights to patients.[214] There are fears that differences in training may affect the quality of the medical act. Also

[209] Ibid., Article 31.
[210] Ibid., Article 34.
[211] Ibid., Article 40.
[212] Ibid., Article 44.
[213] Hervey and McHale 2004, p. 220.
[214] Ibid., 223.

there are fears that doctors with poor professional records would travel from one Member State to another. According to the old sectoral directives in case of serious professional misconduct and criminal offences, the home Member State had to share with the host Member State the information.[215] However, the information to be shared was limited to those cases where disciplinary action was taken. There was no requirement for the host Member State to share the information. The provisions referring to good repute[216] and the provisions referring to disciplinary actions[217] were formulated in soft language indicated by the use of "may."

> If the host Member State has detailed knowledge of a serious matter which has occurred, prior to the establishment of the person concerned in that State, outside its territory and which is likely to affect the taking up within its territory of the activity concerned, it may inform the Member State of origin or the Member State from which the foreign national comes.[218]

The new Directive 2005/36/EC reforming the qualification system uses a mandatory provision since the competent authorities of the host and home Member State "shall" work in collaboration and provide mutual assistance.[219]

> The competent authorities of the host Member State may ask the competent authorities of the Member State of establishment, for each provision of services, to provide any information relevant to the legality of the service provider's establishment and his good conduct, as well as the absence of any disciplinary or criminal sanctions of a professional nature. The competent authorities of the Member State of establishment *shall* provide this information in accordance with the provisions of Article 56.
>
> The competent authorities shall ensure the exchange of all information necessary for complaints by a recipient of a service against a service provider to be correctly pursued. Recipients shall be informed of the outcome of the complaint.[220]

The criticism brought to the general directives is in the same line with the criticism for the sectoral directives, meaning that there is the assumption that there are the same standards across Europe, which is not always true. Moreover, in the case of the general directives there are no minimum standards as in the case of the sectoral directives. It is up to the Member States to check the qualifications and decide whether they are equivalent, this meaning that Member States are left with lots of discretion on their hands.

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[215] Directive 93/16/EC, Article 12.

[216] Ibid., Article 11.

[217] Ibid., Article 12.

[218] Ibid., Article 11(3); Emphasis added.

[219] Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications [2005] OJ L255/22, Articles, 8, 56.

[220] Ibid., Article 8; Emphasis added.

5.2.5.3 Services Directive

Authorisations, professional qualifications, restrictions on the use of a certain legal form for the service provider, partnership between different providers, the number of authorisations required, the length and complexity of the procedures, discretionary powers of local authorities and duplication of conditions already fulfilled in the Member State of origin of the service provider, bans on advertising, requirements to be established in order to provide o a service, requirements related to the paying and reimbursement of VAT, after-sale-services, divergences between MS related to professional liability and insurance, financial liability and insurance, lack of transparency, lack of confidence, divergent rules between Member State, lack of information and cultural and language barriers, all these were among the obstacles to free movement of services.[221]

There were improvements in goods' market; however, the internal market for services had to be improved as well. Internal market barriers to services were harder than barriers to goods. The Lisbon Summit in 2,000 asked for a strategy to remove cross-border barriers to services. The approach taken by the Commission was to identify first the obstacles to trade in the field of services and then to undertake a horizontal approach to deal with the barriers to free movement of services.[222]

In 2002 the Commission issued a Report on the internal market for services[223] and in January 2004 there was the draft directive on services in the internal market, the so-called Bolkestein Directive.[224]

This was one of the most discussed piece of legislation, "the legislative hot potato of the early twenty-first century."[225] The Directive aimed at eliminating obstacles to the freedom of establishment and obstacles to temporary services provision, this being the controversial part. It also set detailed rules on the mutual assistance between Member States as well as establishing Points of Single Contact. The great controversy of the Directive was the introduction of the country of origin principle (CoOP) which means that service providers are subject to the law of the country in which they are established.

It is easy to notice that this principle raises big problems since the national standards in the Member States are different. Moreover, the fact that the country of origin laws apply poses problems when it comes to supervising the service. Would

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[221] Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services, COM/2002/0,441 final.

[222] See An Internal market Strategy for Services, COM (2000) 888.

[223] Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services, COM/2002/0,441 final.

[224] Commission proposal for a Directive on services in the internal market, COM (2004)/2 final; for more information about the road to the present Services Directive see De Witte 2007.

[225] Barnard 2008, 323–394.

the authorities in the home Member State have any incentive to check the quality of the service provided on the territory of another Member State? This principle is considered to endanger the regulatory authority of Member States.[226] There were fears that this principle leads to social dumping. Since the laws of the home State apply, a service provider established in a country with lower standards regulations can offer the service for a cheaper price, since the costs are not as high as those met by a service provider established in a country with high and costly standard regulations. The application of this principle brings distortions of competition as well as not all service providers are subject to the same set of rules. According to the country of origin principle the home state law applied, there is the presumption of legality of the host State measures; the host State could not impose additional requirements unless very good reasons; the supervision of the services provided in another Member State was the responsibility of the host State; the draft Directive contained several exceptions.[227]

There were fears expressed concerning the danger of dismantling public services. The country of origin principle was used by the Commission in other directives such as television without frontiers in 1989 and Electronic Communications Directive in 2000. However, those directives contained harmonising measures which brought different standards closer. This draft Directive contained no such measures that would reduce the gap between national standards. "Was the EU about deregulation and letting the market decide (the so-called Anglo-Saxon model) or was it about interventionism by central government intended to protect consumers and workers (the stereotype of the Continental approach)?"[228]

The Bolkestein Directive appeared to be economic oriented and to have no concern for social aspects. Health care services were included initially into the scope of the draft Directive; however, fierce opposition to their inclusion in the Directive was raised. After long debates the Services Directive was adopted, however, it suffered lots of changes. The main one was that the principle of the country of origin was excluded and it was replaced by a free movement approach.

The Services Directive[229] in the form that it was adopted reveals how sensitive the subject of services is. Its Preamble containing 118 recitals was considered to be "a consolation prize"[230] because it included the concerns of those states that did not succeed to introduce certain provisions into the text of the Directive. As Barnard rightly notices, the "the final version of the Directive suffers from some poor drafting and translation."[231]

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[226] Davies 2007a, pp. 232–245; Davies 2007a, b.

[227] Barnard 2008, pp. 323–394.

[228] Ibid.

[229] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

[230] Barnard 2008, p. 324.

[231] Ibid.

The Directive contains important measures regarding administrative simplification. It is considered that the Directive calls for "significant harmonisation of public administration."[232]

The controversial debates related to this Directive are reflected in the derogations included in its text. Thus there are exclusions from the scope of the Directive which are formulated in the text as: "This Directives *shall not apply* to the following activities."[233] Moreover, there are also limitations which are found in Article 1 and are formulated as "this Directive *does not deal with*" or "this Directive *does not affect.*"[234] The most controversial chapter, the one concerning services contains further derogations. The original version contained the country of origin principle, plus general derogations, transitional derogations and case-by-case derogations. The Directive does not contain the country of origin principle, but additional derogations and case-by-case derogations remained. This shows how sensitive the issues debated were.

Do the provisions of the Directive apply to health, health insurance and education services? We can see from Article 2(2)(a) that non-economic services of general interest are excluded from the scope of the Directive. Further, Article 2(2)(f) excludes healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private. Barnard asks the question whether this exclusion applies to all those working in healthcare sector, meaning medical staff, accountants, cleaning staff, consultants or just to those delivering healthcare.[235] In the Handbook on the implementation of the Services Directive, the Commission explains that those services which are not provided to the patient but to the health professional or to the hospital such as accounting services, cleaning services, secretarial and administration services, the provision and maintenance of medical equipment as well as the services of medical research centres, are not covered by the exclusion. In order to be covered by exclusion the activities are required to maintain, assess or restore patients' state of health. Activities that enhance wellness or provide relaxation to the patient such as fitness or sports clubs are covered by exclusion. The exclusion refers only to regulated health care profession.[236] This can be found in Recital 22 of the Directive that states:

> The exclusion of healthcare from the scope of this Directive should cover healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or

[232] Davies 2007a, pp. 232–245.

[233] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Article 2; Emphasis added.

[234] Ibid., Article 1; Emphasis added.

[235] Barnard 2008, pp. 323–394.

[236] Handbook on the implementation of the Services Directive.

> restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided.

Furthermore, among other limitations Article 1 provides that the Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services, with the abolition of monopolies providing services nor with aids granted by Member States which are covered by European Union rules on competition; it does not affect the freedom of Member States to define, in conformity with European Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.[237]

The controversial part of the Directive was the chapter referring to freedom to provide services. Since the country of origin was removed, what was left was a free movement approach which defines the law that cannot be applied (the host law), where the host State can impose its own restrictions, provided that there are good reasons and it takes into account the existent protection in the home State. It contains limited exceptions and the responsibility of control of these services is shared between the host State and the home State.

Article 16 provides that:

> 1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.
>
> The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.
>
> Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:
>
> (a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;
> (b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;
> (c) proportionality: the requirement must be suitable for attaining the objective pursued must not go beyond what is necessary to attain that objective.

As we can easily notice this is a departure from the approach taken by the Court. The reasons that can be used to justify a restrictive measure are limited to public policy, public security, public health or the protection of the environment.

There are exceptions from Article 16 and among the derogations from the freedom to provide services we find services of general economic interest which are provided in another Member State. Recital 70 defines what is meant by services of general economic interest:

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[237] Articles 1(2), 1(3).

> [f]or the purposes of this Directive without prejudice to Article 16 of the Treaty, services may be considered to be services of general economic interest only if they are provided in application of a special task in the public interest entrusted to the provider by the Member State concerned. This assignment should be made by way of one or more acts, the form of which is determined by the Member State concerned should specify the precise nature of the special task

The assessment whether there is a service of general economic interest is assessed case-by-case.

In conclusion, health services are excluded from the scope of the Directive. As regards education, if it is a service for the scope of the Treaty, then the provisions of the Directive apply. However, if it qualifies as a service of general economic interest then it is excluded from the application of Article 16 of the Directive. The same thing is applicable also to health insurance services. Thus as long as they are qualified as services of general economic interest they are not subject to the more restrictive measures contained in the chapter referring to freedom of services. The Treaty provisions continue to apply to these situations.

The Services Directive is highly criticised. Weatherill considers that the "gains are to be less than claimed because the Directive is largely as abstract as the case law."[238] Davies finds the country of origin principle and the administrative provisions to be highly intrusive because they "take away national autonomy to a significant extent. Social, cultural and political freedom is removed in the name of economic freedom. The Directive is disproportionate."[239] Leaving aside all the deficiencies the Directive plays a significant role in removing administrative bureaucracies. By introducing points of single contact and by requiring Member States to make electronic procedures available the Directives simplifies the bureaucratic regulations existent. The fact that the Directive does not apply to healthcare services or to health insurance and education services does not mean that Member States cannot use the infrastructure put in place in order to comply with Services Directive in order to facilitate administrative procedures that need to be followed for these services as well.

The heated debate related to healthcare services led to their removal from the scope of the Directive. The Commission promised a distinct directive that would deal with these services and in the end it came with a proposal.

"If the Directive does manage to eliminate some obstacles to free movement of services, particularly through screening process, then this, followed by hope of reform in the future, is at least a very good start."[240]

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[238] Weatherill 2007.

[239] Davies 2007a, pp. 232–245.

[240] Barnard 2008, pp. 323–394.

5.2.5.4 Proposal for a Directive on the Application of Patients' Rights in Cross-Border Healthcare

The Court brought in its case-law more light over the rights the patients benefit when they avail themselves of their right to move freely. However, the need for more legal certainty required a different approach. The inclusion of health services in the Commission's proposal for a Directive on services in the internal market in 2004 was highly criticised. The Commission considered that health services should be dealt as a separate issue.

Thus it was submitted a Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare. As it is explained in its explanatory memorandum, the release of this draft proposal had in its back a series of actions. In June 2006 the Council adopted Common values and principles in EU Health Systems enshrine where it was stated that a legal framework with regard to health services would increase legal certainty with regard to citizens' rights and entitlements to health services.

The Parliament was involved in the discussions regarding cross-border health care, also stakeholders were involved through the High Level Reflection Process, the Open Forum and the High Level Group on Health Services and Medical care.[241]

In the Explanatory Memorandum it is stated that this initiative aims at offering a "clear and transparent framework for the provision of cross-border healthcare within the EU." In all the intentions it is clear that the aim was to tackle the problems related to cross-border health care, the situation where patients go to another Member State to receive health care. The scope of the Directive, however, appears to be larger: the Directive applies to provision of healthcare regardless of how it is organised, delivered and financed or whether it is public or private. How can we interpret the scope of the Directive? There is no discrimination between different types of organisation and it is explained in the memorandum that it is hard to know whether a health provider will supply health services to a patient coming from another Member State. The approach taken to subject all health systems to the scope of the Directive is a correct one, since the aim of the Directive is to target those services which contain a cross-border element.

Regarding its relation with Regulation 1408/71, it is stated that when a patient travels to another Member State to receive medical care according to Article 22 of the Directive, then the provisions of Articles 6,7,8 and 9 of the Directive do not apply and conversely, if an insured person travels to receive medical care in another Member State in other circumstances, then Articles 6, 7, 8 and 9 of the Directive apply and Article 22 of the Regulation 1408/71 does not apply. These provisions are thus exclusory.

The responsibility for the organisation and the delivery of health care falls on the Member State of treatment. According to Article 5, Member States have to

[241] See Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, COM(2008) 414 final, 2.

define "clear quality and safety standards for healthcare provided on their territory," while taking into account principles of universality, access to good quality care, equality and solidarity. Member States have to make sure that there are mechanisms that would ensure that healthcare providers are able to meet such standards; that health care providers are monitored in order to ensure that the standards are respected and that corrective action would be taken when standards are not met. Moreover, healthcare providers have a duty to provide information to the patients in particular on the availability, prices, outcomes of the healthcare provided and details of their insurance cover or other means regarding professional liability. In case of harm, patients should have access to remedies and compensation. There must be a system of professional liability insurance or similar arrangements. There are provisions referring to the right to privacy and protection of personal data. Patients should receive equal treatment with the nationals of the Member State of treatment. The Commission in cooperation with Member States shall develop guidelines to implement all these provisions.

From a quick reading of these provisions it can be determined that there are some beneficial outcomes as a result of the Directive for the patients in their own Member States if there is an obligation for healthcare providers to have professional liability insurance, taking into consideration that the liability insurance is not present in all Member States.

The problem of the use of healthcare in another Member State is dealt with in Chap. 3. A patient travelling to another Member State to receive health care will not be prevented by the State of affiliation[242] where that treatment is among the benefits provided by the legislation of the Member State of affiliation. The reimbursement of the costs of the treatment abroad would be done according to the amount which would have been paid by the statutory social security system if the similar treatment had been provided in the State of affiliation, without exceeding the actual costs of the treatment. It is the Member State of affiliation who decides that healthcare that is paid, regardless of the place where it is provided.

On the patients travelling in another Member State to receive treatment could be imposed conditions, criteria of eligibility, regulatory and administrative formalities for receiving healthcare and reimbursement of healthcare but these have to be the same as those which are imposed if the treatment is received in the Member State of affiliation, in so far as "they are neither discriminatory nor an obstacle to free movement of persons."

With regard to the reimbursement of the costs, Member States are obliged to have a mechanism for calculation of the costs that are to be reimbursed; this should be based on "objective, non-discriminatory criteria known in advance and the costs reimbursed according to this mechanism shall be not less than what would have been assumed had the same or similar healthcare been provided in the territory of the Member State of affiliation."

[242] The Member State of affiliation is the State where the person is insured.

This provision is very interesting. First of all it obliges Member States with an NHS system to establish a mechanism for determining the costs of the treatment. This could be a useful tool to make costs in healthcare more transparent and to spot inefficiencies. This is indeed a necessary measure for facilitating free movement and even if it seems an interference with Member States' rights to organise their health systems, this is a measure that they have to introduce just to keep up with the situation created by having an internal market. What is interesting here is that it is stipulated that the costs to be reimbursed shall be not less than what would have been assumed had the same or similar healthcare been provided in the territory of the Member State of affiliation. This looks like an insertion meant to avoid competition between different health systems. If a Member State has an NHS system, this measure tries to avoid the possibility of cross-subsidising and of using predatory pricing to attract patients from other Member States.

Patients shall be guaranteed access to their medical records.

The Directive makes a difference between hospital and non-hospital care. In the case of non-hospital treatment, the Member State of affiliation cannot subject the receiving of healthcare to an authorisation condition.

In the case of hospital treatment, a system of prior authorisation is allowed where some conditions are met:

1. Had the healthcare been provided in its territory, it would have been assumed by the Member State's social security system; and
2. The purpose of the system is to address the consequent outflow of patients due to the implementation of the present Article and to prevent it from seriously undermining, or being likely to seriously undermine:

   (a) The financial balance of the Member State's social security system; and/or
   (b) The planning and rationalisation carried out in the hospital sector to avoid hospital overcapacity, imbalance in the supply of hospital care and logistical and financial wastage, the maintenance of a balanced medical and hospital service open to all, or the maintenance of treatment capacity or medical competence on the territory of the concerned Member State.

This kind of system is however subject to the proportionality principle, since it is stated that it "shall be limited to what is necessary and proportionate to avoid such impact, and shall not constitute a means of arbitrary discrimination."

In Article 8(1) of the Directive it is defined what represents a hospital treatment, since every Member State has different regulations referring to what is a hospital treatment.

The Directive institutes procedural guarantees for patients who go abroad to receive medical care requiring that the administrative procedures, the reimbursement of costs, different conditions and formalities should be based on objective, non-discriminatory criteria which are published in advance and which should be proportional. Also the Directive states that when Member States are obliged to take into consideration the specific medical condition, the patient's degree of pain, the nature of the patient's disability and the patient's ability to carry out a

professional activity when setting the limits within which requests for the use of healthcare in another Member State is dealt with.

Also the patients are being granted access to administrative review and judicial proceedings.

All these provisions can be found in the case-law of the Court. Putting them in a written form brings more clarity for the patients, since they have a legal text where they can find their rights.

Furthermore, for the good information of the patients, Member States have to ensure mechanisms to provide patients information about their rights. The Directive establishes national contact points for cross-border healthcare and these contact points have to be communicated to the Commission. Their scope is to provide information to patients, regarding their entitlement to cross-border health care, guarantees of quality and safety, protection of personal data, procedures for complaints and means of redress; in the event of harm, they should help patients protect their rights—these points should give information about the options available to settle the dispute, and to help them identify out-of-court settlement schemes.

A duty of cooperation is imposed on Member States. Furthermore, for facilitating healthcare provision, European reference networks are established. They are open to all healthcare providers who fulfill certain criteria. The Directive deals also with e-health, with the cooperation on management of new technologies and data collection for statistical and monitoring purposes.

The Directive was welcomed as a piece of legislation meant to strengthen patients' rights. However, there was also criticism stating that it creates health inequalities since only informed and mobile people will benefit from it.[243] Other opinions state that *travelling to another member state might be an option open to some individuals, increased mobility is not a panacea that will ensure quality treatment for all patients.*[244] The Greens Group continues by stating that labels like choice and mobility actually mask a potential liberalisation of healthcare services. All this criticism show that the main aim of the Directive was not understood. It is not about finding a panacea that will ensure quality treatment for all patients. It is just about dealing with the cross-border movement of patients; those who travel and receive medical care, no matter if they travel with the scope of receiving medical care or they receive medical care in an emergency regime while being abroad need to know what are their rights and need to benefit from a system facilitating their mobility. With regard to the criticism that only mobile and informed people will benefit from this system, it can be pointed out the fact that the Directive is aimed exactly at granting rights to mobile people, and it is addressed to this category of people. The words mobility and choice do not mask the potential liberalisation of healthcare services. Whether a Member State

[243] See European Hospital and Healthcare Employer's Association, Patients' Rights Directive Proposal: Further Clarity Needed, Press Release, 2 July 2008, at http://www.hospeem.eu/.

[244] Group of the Greens/European Free Alliance press release, Cross-border healthcare: Universal healthcare must come before mobility, 2 July 2008, at http://www.greens-efa.org/cms/pressreleases/dok/241/241086.crossborder_healthcare@en.htm.

chooses to introduce market elements into their systems it is their choice and sometimes due to efficiency reason Member States opt for a mix of public–private provision of healthcare. To suggest that this Directive that aims of making more clear patients rights triggers privatisation is misleading and is just a political speech meant to misinform the electorate.

5.2.5.5 Proposal for a Directive on Services of General Interest

The question whether services of general interest should be addressed by using a horizontal approach came more often into debate. In the Green paper on Services of General Interest[245] the question whether a common European framework should be developed was raised. In the Laeken European Council in 2001[246] the Commission stated that it would find 'the best instrument' to ensure high-quality services of general interest.

The new provisions inserted in the Lisbon Treaty would make easier the adoption of such a legal framework.

According to Rodrigues[247] open debates regarding a framework for services of general interest took place several times within the European Parliament. The Commission was called "to define the scope and nature of services of general interest, together with the principles underlying them, and to specify more closely both the level of services necessary for accomplishing EU objectives and the regulatory framework needed to ensure success, and to consider subsequently drawing up an action plan, accompanied by a timetable, for translating Treaty objectives into policy and implementing measures."[248]

The adoption of a horizontal approach is seen as necessary in order to safeguard SGI in conformity with the principle of subsidiarity and to bring more legal certainty; moreover, it would bring an important message to citizens that the EU is concerned with services of general interest.[249]

The Parliament required a framework directive on services of general interest[250] which should have been based on Article 114 TFEU (ex Article 95 EC) EC. In its resolution on the Green Paper on services of general interest[251]

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[245] Green Paper on Services of General Interest, COM (2003) 270 final, para 37.

[246] Report to the Laeken European Council-Services of General Interest, COM (2001) 598 final.

[247] Rodrigues 2009a, b; Also see this paper for the evolution of the debate related to the general EC framework related to SGI; this has been published in Krajewski et al. (eds) 2009.

[248] Resolution PE 222.618/final, [1998] OJ C 14, para 5.

[249] For the evolution of the debate related to the general EC framework related to SGI see Rodrigues 2009a, b, p. 6; published in Krajewski et al. (eds) 2009.

[250] European Parliament resolution on the Commission communication "Services of General Interest in Europe," [2001], OJ C 140E/153.

[251] European Parliament resolution on the Green Paper on services of general interest, [2004] OJ C 92E/294.

the Parliament asked for a framework directive "to be drawn up under the co-decision procedure and respecting the subsidiarity principle, when the internal market and competition rules are being implemented."

The Commission also took part in the debate referring to the framework directive on services of general interest. In the Report to Laeken Council[252] the Commission mentioned a single framework Directive to be adopted on an appropriate legal basis. However, it produced a Green Paper[253] where it stated that up to that point legislation in the field of services of general interest was adopted on a sectoral basis and it raised the question whether a European framework should be developed. The Commission acknowledged the importance of such instrument:

> A general instrument could set out, clarify and consolidate the objectives and principles common to all or several types of services of general interest in fields of Community competence. Such an instrument could provide the basis for further sectoral legislation, which could implement the objectives set out in the framework instrument, thus simplifying and consolidating the internal market in this field.[254]

However, it also acknowledged the limitations of such a framework. The common objectives and principles would be general and still it would be necessary for further sector-specific legislation laying down more detailed rules. Furthermore, the Commission spotted problems related to the legal basis. Article14 TFEU (ex Article 16 EC) could not provide a legal basis and Article 114 TFEU (ex Article 95 EC) EC could have been used, however, in this case the framework should have been limited to services of general economic interest having an effect on intra-Community trade. The Commission opened few question for discussion:

> Is a general Community framework for services of general interest desirable? What would be its added value compared to existing sectoral legislation? Which sectors and which issues and rights should be covered? Which instrument should be used (e.g. directive, regulation, recommendation, communication, guidelines, inter-institutional agreement)?[255]

Opinions related to the necessity for having a framework directive are divided.[256] While there was a consensus regarding the importance of services of general interest for European societies and that the consumer should be the first concern, it was hard to agree on the relationship between services of general interest and market principles.[257]

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[252] Report to the Laeken Council, Services of General Interest, COM(2001) 598 final, paras 51–53.

[253] Green Paper on services of general interest, COM(2003) 270 final, paras 37–42.

[254] Ibid., para 38.

[255] Ibid., para 42.

[256] Commission Staff Working Paper, Report on the Public Consultation on the Green Paper on Services of General Interest, SEC(2004) 326, 12–13.

[257] Ibid., 9.

In its White Paper[258] the Commission stated that there were different opinions regarding the framework directive of services of general interest and that a number of Member States and the European parliament were sceptical on this issue.

> As a result, it remained doubtful whether a framework directive would be the most appropriate way forward at this stage. Furthermore, in the consultation, the added value of a horizontal framework as compared to the sector-specific approach followed so far has not been demonstrated. The Commission therefore considers appropriate not to proceed to submitting a proposal at this point in time but to re-examine the issue at a later stage. As part of this examination, the Commission would subject any legislative proposals to a prior extended impact assessment of its economic, social and environmental implications.[259]

The Commission proposed that this issue be re-examined once the Constitutional Treaty would have been in force, since it provided an appropriate legal basis for such measure. The soft law was chosen to be the form to bring more clarification to different problems raised by services of general interest.

There have been proposals for a Directive on services of general interest. One of the proposals belongs to ETUC (European Trade Union Confederation).[260] According to this proposal, services of general interest are seen as essential for the economic, social and territorial cohesion in the European Union. The scope of the directive should be limited to services of general economic interest. It is underlined the shared responsibility of Member States and Community: "The definition of public service obligations and missions as well as the organisation, the financing and the monitoring of services of general economic interest are a task for the relevant European, national, regional and local authorities each within their respective powers and within the scope of application of the EC Treaty."[261] According to this proposal the European Union has a complementary role to that of the Member States: "The Community shall, on basis of Articles 16 and 86 (2) of the Treaty, support the national, regional and local authorities to fulfill their missions and take care that the services of general economic interest are operated on the basis of the principles and conditions laid down in this directive. Thereby the Community shall respect the diversity of traditions, structures and situations that exist in the Member States as well as the responsibilities of the national, regional and local authorities."[262]

The European Union must ensure that the rules of competition and the internal market do not obstruct in law or in fact the accomplishment of the missions and tasks assigned to SGEI; furthermore, the European Union is responsible for the establishment of European services of general economic interest. When drafting

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[258] White Paper on services of general interest, COM(2004) 324, 11.

[259] Ibid., 12.

[260] Draft European Framework to Guarantee and Develop Services of General Economic Interest, annex to the Resolution "Towards a framework directive on services of general (economic) interest," 06-07/06/2006, at http://www.etuc.org/IMG/pdf/4-ETUC_framework_directive__annex_8aEC__EN_SC_RES.pdf.

[261] Ibid., Article 4.

[262] Ibid., Article 5(1).

legislation in the field of services of general economic interest, the Commission must apply strictly the principle of subsidiarity and must consult besides the Member States, the national parliaments, the European social partners as well as the Committee of the Regions and the Economic and Social Committee.[263] The proposal lays down the fundamental principles that must be taken into consideration by the service providers and the responsible authorities as well: accessibility; availability; continuity; solidarity; affordability; universality; sustainability; transparency; accountability; democratic control; non-discrimination and equality of treatment. The proposal contains rules on the organisation of these services, on the financing and on the competition rules. The provisions related to the regulation of services of general economic interest gives rights to different stakeholders to be informed and consulted; good governance and social dialogue are to be considered when implementing the directive; there are also rules on corporate social responsibility and on the principles of employee participation. It also contains rules on the evaluation of services of general economic interest.

Another proposal belongs to CELSIG[264] which contains rules referring to the scope of the directive, definitions, the role of public authorities, the levels of regulation, the operating principles, the rights and protection of users, economic and financial provisions, quality and evaluation and rules related to external trade.

Another proposal belongs to the Socialist Group in the European Parliament: "Proposal for a Framework Directive on Services of General Economic Interest."[265]

Going back to the questions raised by the Commission it is reasonable to ask what would be the added value of such a framework directive.

The proposals for the framework directive on services of general interest state that such a framework should be limited to services of general economic interest. Furthermore, they aim to clarify the relationship of such a horizontal directive with sectoral directives. These proposals for a framework directive tackle the allocation of powers and the division of responsibilities between Member States and the European Union, the common principles to the provision of services of general economic interest, the common principles regarding public obligations, public management and contracts, principles regarding financing, the protection of users and their rights, the quality of the services and the evaluation of performances.

Would such a framework directive bring added value? Those in favour of a framework directive consider it as a tool to promote consistency and clarity and to consolidate the rules applicable to services of general interest and the respective responsibilities of the European Union and Member States. It is considered that

[263] Ibid. Article 6.

[264] Comite Europeen de Liaison sue les Services d'interet general (European Liaison Committee on Services of General Interest).

[265] www.socialistgroup.org

such a directive would strengthen the principle of subsidiarity. Moreover, it is considered that it has a political value since it would represent a key element of European social model and it would give EU a pro-active role in the area of services of general interest. Such a directive is seen as an instrument to restrict the application of competition and internal market rules to the SGI.[266]

Those against the adoption of a framework directive consider that it is not necessary to adopt a horizontal directive since the sector-specific approach was quite successful. They regard Articles 16 and 86(2) EC as sufficient. A directive in their view would be too abstract and too philosophical. Moreover, the relationship between a horizontal directive and sectoral directives would lead to uncertainty. Since the sectoral directives contain detailed rules, even if the framework directive would be adopted, still, further sectoral directives are necessary to complement the legislative needs. There have been expressed worries with regard to the costs of the adoption of such directive. Also, it was considered that the framework directive would be a step backwards in the most liberalised sectors because the political compromises reached would be endangered. Moreover, it would undermine the flexibility provided by the present sectoral directives.[267]

Indeed such a framework directive would be too abstract and from analysing the proposals made by different parties it is noticed that the principle of subsidiarity plays an important role. As it was demonstrated above, subsidiarity does not bring much clarity and acts as a double-edge sward. At this moment Article14 TFEU (ex Article 16 EC) and 86(2) EC [now Article 106(2) TFEU] are sufficient in dealing with the sensitive social issues. It would underline the importance of social issues and it would indeed give EU a pro-active role in the field of SGI. However, the relationships with sectoral directives might create problems.

However, once the Lisbon Treaty has been adopted, a framework directive is not needed anymore. As stipulated in the Communication from the Commission—Accompanying the Communication on "A single market for twenty-first century Europe" Services of general interest, including social services of general interest: a new European commitment,[268] the Protocol on services of General Interest annexed to the Treaty of Lisbon "provides for a coherent framework that will guide EU action and serves as a reference for all levels of governance."

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[266] Commission Staff Working Paper, Report on the Public Consultation on the Green Paper on Services of General Interest, SEC(2004) 326, 10.

[267] Ibid., 13.

[268] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions-Accompanying the Communication on "A single market for Twentyfirst century Europe"-Services of general interest, including social services of general interest: a new European commitment COM (2007) 725 final.

5.3 Soft Law

5.3.1 Introduction

The EU constitutional system created initially with the aim to establish and accomplish the common market evolved so as to comprise a large range of varied policies. The tension between its limited competences and the necessity to deal with the new policies determined the development of the EU government. The expansion of European Union influence in different policy areas through its economic constitution raised problems related to the legitimacy of its actions.

So far negative integration was the tool that ensured integration in fields which were perceived as sensitive. This had a de-regulatory effect. Re-regulation at European Union level by using the means of positive harmonisation would look like a normal following step. However, problems related to limited European Union competences require a different solution. The societal complexity and the failure of the old European Union method to deal with new policy areas led to the use of governance. We now talk about multi-level governance. Scott and de Burca define governance as a "wide range of processes and practices that have a normative dimension but do not operate primarily or at all through the formal mechanism of traditional command-and-control-type legal institutions."[269] "Developments over the last decade also suggest that elements of a new model of European constitutionalism may be emerging which is less top-down in nature than before, and which is premised on a more participatory and contestatory conception of democracy."[270] These new forms of governance try to find solutions for the social and economic problems, however, the dominance of economic values remains a concern.[271]

"The Union must renew the Community method by following a less top-down approach and complementing the EU's policy tools more effectively with non-legislative instruments."[272]

The sensitivity of certain fields triggered a more intergovernmental approach. The failure of the Community method and the necessity for a Community approach with regard to sensitive fields led to the adoption of alternative methods, such as new governance.

There was a need for more flexible instruments to deal with social issues, and OMC was one of them. This section which is dedicated to soft law is aimed at looking at alternatives to positive and negative integration. It is not intended to be an analysis of soft-law measures or to determine whether soft law is a viable alternative for positive and negative harmonisation. This would require a large

[269] De Búrca and Scott 2006a, b.

[270] De Búrca 2003, 814–839.

[271] Ibid., 816.

[272] COM(2001) 428 final, European Governance—A White Paper, 4.

empirical study which falls out the scope of the book. It is intended to point out that soft law is important to open the path for positive harmonisation. Soft law is important not from the point of view of the outcome but from the point of view of the process that determines Member States to accept some changes. The debate hard law versus soft law starts from a wrong premise that hard- and soft-law are antagonic. Trubek and Trubek talk instead about hard/soft hybrids.[273]

This section looks into the developments in the field of health and education which are seen as alternatives to the lack of express competences in these fields or as an answer to the developments triggered by the Court's rulings. Further, since the position occupied by services of general interest is important with regard to the protection that is given to welfare services this section will look at the status of services of general interest. It is interesting to see how these services are dealt with by the Commission in its Communications and how the trend is to incorporate them into the Treaty. There are also voices that require a Directive that would deal with services of general interest. What is interesting here is that soft law is seen as insufficient and stronger positive action is required. This confirms the hypobook that soft law is paving the way for positive integration and is adjusting Member States' policies to accept the necessary changes.

Soft coordination[274] takes different forms such as opinions, recommendations, resolutions, notices, communications, action programmes, declarations, guidelines, codes, frameworks, acts of the Member States in different capacities.

5.3.2 Pro and Cons of Soft Law

The Treaty of Amsterdam talks about coordination when it comes to the flanking policies which include fields like health and education. According to Scott and Trubek the new forms of governance present characteristics such as participation, power-sharing, multi-level integration, diversity, decentralisation, deliberation, flexibility, experimentation and knowledge-creation.[275] The new governance however continues to coexist with old regulatory methods.

The open Method of Coordination[276] received this name at the Lisbon European Council in 2000. By using coordination, Member States are left with more autonomy. There are guidelines at EU level for achieving certain objectives, further, benchmarks are set in order to compare best practices. These guidelines

[273] Trubek and Trubek 2005, 343–364.

[274] For an extensive study of soft law see Senden 2004.

[275] Scot and Trubek 2002.

[276] For further literature see Zeitlin and Pochet (eds) 2005; Dehousse (ed) 2004; Snyder(ed) 2003; De Búrca and Scott 2006a, b; Szyszczak 2006; De la Rosa 2005, p. 618; Trubek and Trubek 2005, p. 343; Maher 2004, p. 2; Hodson and Maher 2004, p. 798; De Búrca 2003, p. 814; Regent 2003, p. 190; Sbragia 2002; Dehousse 2002.

are transposed into national policies and after that there is an evaluation and peer review of the results.

Member States' reluctance to concede their competences led to the use of governance methods. OMC is one of them. Fritz Scharpf[277] underlined the constraints imposed on States by the Economic and Monetary Union and by the growth and stability pact. Lacking important tools that were used to correct the social inequalities, it was felt the need for having a common policy at European Union level to deal with social issues.[278] The lack of exclusive competences had to be substituted by new instruments and OMC was one of them. "The objections to "EU intervention" in sensitive domestic spheres do not apply in the same way to these softer and voluntaristic forms of policy-making."[279]

New governance and OMC in particular were seen as better instruments for solving problems in highly sensitive fields. According to de Burca, new governance and OMC "form part of a new social vision for Europe" and "are capable of combining the needs of a competitive modern economy with a commitment to social justice."[280]

However, soft law poses problems as well. De Burca underlines one problem which persists in the use of OMC which is the dominance of economic over social. She considers that OMC should be "a challenge to and a disruption of this hierarchy." She proposes the introduction of an "integration clause" into the Treaty which would mean a requirement that social concerns should be taken into account when pursuing other European Union objectives. The Belgian Prime minister proposed to give constitutional status to the principle for social protection which would have meant that EC institutions and OMC actors would have given consideration to social protection when dealing with other policies.[281] These were proposals for the Constitutional Treaty. However, the Constitutional Treaty failed.

New modes of governance are characterised by the involvement of civil society in policy making. Different stakeholders from government and private sectors are taking part in the law-making process. New governance is characterised also by a multi-level integration since actors from different levels of government and actors from the private sectors are involved. Actors from European, national, regional, local level are brought together for dialogue. The advantage of using OMC is that the action is taken at the lowest possible level. The aim of OMC is to coordinate policies and not to harmonise. OMC is also characterised by flexibility; diversity is better tackled by using soft measures. Exchanging results, benchmarking performance, sharing best practices is aimed at the creation of new knowledge.[282]

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277 Scharpf 2002, p. 645.

278 See De Búrca 2003, p. 10.

279 Ibid.

280 Ibid., 12.

281 Vandenbroucke 2002. Cited in De Búrca 2003, 12.

282 See Scott and Trubek 2002.

According to Scott and Trubek, new governance emerged through experimentation and seeks "to provide new approaches both to efficiency and legitimacy."[283]

Chalmers and Lodge state that OMC is "concerned with providing a constitutional architecture for the Welfare State."[284] The success of the OMC as Chalmers and Lodge state depends largely on the Member States cooperation. They are expected to modify their behaviour and to support the gathering of information, comparing and adjustment.[285]

The OMC is expected to work through the incorporation in the national legislation of MS of the necessary changes. However, without the existence of an obligation the result is imprecise. This is one main drawback of the OMC. Chalmers and Lodge talk about the risks of the OM that could actually jeopardise the existing achievements or that could lead to opposite results than those intended.[286]

Moreover, there are opinions that peer review and benchmarking are not able to bring policy changes.[287] The difficulties in setting benchmarks and the vagueness of the benchmarks are likely to deter the achievement of the pursued objectives. Trubek and Mosher reached the conclusion that in the employment field Member States were more likely to make changes in uncontroversial issues such as preventive and active unemployment policy, while they were more reluctant when it came to sensitive fields such as taxation.[288]

While it was hard to reach an agreement in an organised institutional framework which would have produced hard law it is unlikely that the results would be better when this is done using soft law. The reaction of the Member States is unpredictable and it is not excluded that instead of more homogeneity diverse reactions will occur. Different Member States may take different actions in relation to the objectives set and in the absence of a hard law this leads to increased diversity.

The existence of the OMC is viewed by Chalmers and Lodge as jeopardising the "continued development of supranational decision-making modes in other policy domains" and is seen as a "threat to the acquis itself."

Hatzopoulos[289] considers that in the short term the open method of coordination does not have immediate effects and this is due to the lack of precision, lack of sufficient temporal discipline and low costs of non-compliance.[290] On medium and long term it is believed that the open method of coordination affects the policy process. In analysing the open method of coordination in the field of employment Lopez-Santana[291] states that there are no changes in the legal framework as the

[283] Ibid., 18.
[284] Chalmers and Lodge 2003.
[285] Ibid., 11.
[286] Ibid., 12.
[287] Ibid., 13.
[288] Trubek and Mosher 2003.
[289] Hatzopoulos 2007, pp. 309–342.
[290] Featherstone 2005, as quoted by Hatzopoulos 2007, pp. 309–342.
[291] López-Santana 2006, p. 481.

result of the use of the open method of coordination but the changes are to be found in the policy process framework:

> […] by acting as a framer of employment policy, the supra-national level has restrained several dimensions of employment policy and labour market policies in the member states, mainly by: (a) defining (and reinforcing) what problems domestic policy-makers should attack to increase member state competitiveness, and to deal with internal and external challenges, (b) pointing out and/or reinforcing the idea that a policy line is good or bad and necessary, (c) restricting and limiting the policy options and courses of action that domestic policy-makers should develop, and (d) providing potential courses of action that allow policy-makers to "draw lessons" and to "learn" about ways to solve or diminish the problem in question.

In analysing the problems raised by OMC, Hatzopoulos talks about the fact that there are issues related to political, administrative and legal reasons why the open method of coordination is not a good option. Among the political reasons he mentions the fact that there are no enforcement mechanisms; that there are no time constraints; that the changes come from the Member States and not from the EU, thus it is possible to talk about the political appropriation at the national level; the open method of coordination leads to a reverse competence creep and damages the legitimacy of the EU; the institutional balance is altered since the Parliament and the Court of Justice are not involved; the foundations of the EU legal order are affected since the principles of binding effect and supremacy are challenged; things are complicated by the fact that different OMC policies overlap and different indicators and different procedures are used; there are problems related to who can participate to the OMC.[292]

Beyond the criticism that can be brought to OMC, setting aside the fact that it can be characterised as having "many 'naked emperor' attributes,"[293] overlooking the fact that its results may be ineffective or even its results could be contrary to the set objectives it is important to underline one major contribution that this method brings. It gathers the involved parties and sets the basis for dialogue; this in its turn lays down the existent problems and the process of identifying the problems is already a big achievement. This implies that actors at all levels become aware of the implications of European Union law and are made aware that it is necessary to have a common effort in order to solve the problems. This can be interpreted as acknowledgement from the part of Member States and from the part of all actors involved that there is a need for a change that the change is happening and that they have to adapt to it.

[292] Hatzopoulos 2007, pp. 309–342.

[293] Chalmers D and Lodge 2003, p. 19.

5.3.3 Coordination in Healthcare

Szyszczak[294] considers that in the field of health the OMC is used to encourage Member States to coordinate their policies that have been eroded by the Court's rulings.

In the field of healthcare, the fact that the legislative action failed, led to a more intense use of the open method of coordination. There were an informal OMC coordinated by the Social Protection Committee and other coordination process where the High Level Reflexion Group on Health Services and Medical Care plays an important role. The question that is asked is whether the OMC in this field replaced the lack of hard harmonisation or whether it is an instrument meant to prepare Member States to accept that positive action is required and further to take such action.

A Health Strategy was developed in the last years. In 2000 a Communication on health strategy[295] was adopted. It set a broad health strategy aimed at achieving a coherent approach to health issues in all different policy areas. The new public health framework aimed at achieving a more effective response from the European Union to its obligations set out clear objectives and policy instruments. A more ambitious European Union health strategy was required. The public health programme focussed on three priorities: improving health information and knowledge, responding rapidly to health threats, addressing health determinants. The European Union was supposed to add value to the actions taken by Member States.

In 2002 in the Health Council it was decided that the Commission should pursue in close cooperation with the Council and the Member States (health ministers and other key stakeholders) a high level process of reflection which aimed at developing timely conclusions for possible further actions.[296]

This high level process of reflection convened was intended to provide "a forum for developing a shared European vision."[297] In the Report of the high level process of Reflection it was underlined the EU potential for improving the lives of citizens. The Report has as its focus five themes: European cooperation to enable better use of resources; information requirements for patients, professionals and policy-makers; access to and quality of care; reconciling national health policy with European obligations and health-related issues and the Union's cohesion and structural funds.[298] With regard to the impact of other European Union policies on health the Report talks about reconciling national policies with European interests.

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[294] Szyszczak 2006, p. 486.

[295] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions on the health strategy of the European Community, COM 2000 285 final.

[296] Conclusions of the Health Council, 26 June 2002.

[297] High Level Process of Reflection on Patient Mobility and Healthcare Developments in the European Union, HLPR/2003/16, 9 December 2003.

[298] Ibid., 4.

The responsibility of Member States to organise and finance their health and social security systems is underlined while respecting European Union law. The responsibilities include: the organisation and financing of health and social insurance systems, the allocation of internal resources through central or devolved mechanisms, the setting of priorities for health expenditure and the right of determining the scope of publicly funded care, the setting of priorities regarding individuals' access to the system, the management strategies and the responsibilities for the quality, effectiveness and efficiency of health.

Since in the EC Treaty the interaction between internal market rules and national competences in regulating healthcare services were not clearly defined, in order to improve legal certainty, the report provided different solutions such as: changing the Treaty, the secondary legislation; European co-operation, including communications from the Commission; improving the decision-making process, including assessing the impact of proposals on health; initiatives by Member States and bilateral cooperation.[299]

The Commission issued a Communication[300] as a follow-up to the high level reflection process on patient mobility and healthcare developments in the European Union. In this Communication it is stated that whenever a patient seeks healthcare abroad it is necessary that the well-being and safety of the patient is properly protected. It is also necessary that the patient has access to healthcare and that there is clarity over the procedures to be followed. Patient mobility poses challenges for the healthcare systems in the home as well as in the host Member State. Furthermore, all Member State have to face the same challenges: the need to adapt to new developments in the field of healthcare, the aging of the population and the increase of the medical costs. Having all these problems as a background, it is underlined that cooperation at European level can bring benefits to patients as well as to the health systems. A European strategy is needed to ensure that citizens can exercise their rights to seek healthcare abroad.

In this Communication it is stated that the citizens need to have a clear overview of the existing EU legal framework regarding access to healthcare and reimbursement. The Commission in this Communication requires the simplification and modernising Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the European Union.[301] Furthermore, in this Communication it was proposed that a clarification of the authorisation regime for reimbursement of medical care incurred in another Member State should be included in the Proposal for a Directive on Services in the

[299] Ibid., 10.

[300] Communication from the Commission-Follow-up to the high level reflection process on patient mobility and healthcare developments in the European Union, COM 2004 301 final.

[301] Regulation 1408/71, 1997 OJ L 28.

Internal Market.[302] The Commission considered that European collaboration could bring benefits to the effectiveness and efficiency of health services across Europe. It considered that collaboration at European level could lead to a better use of resources and this could be done by better understanding of the rights and duties of patients, by sharing spare capacity between systems, through the mobility of health professionals, by identifying and networking European centres of reference, and by coordinating assessment of new health technologies.[303] The cooperation would lead to improving information and knowledge about the health systems, to offer a basis for identifying best practice and ensuring universal access to high-quality services. The High Level Group on Health Services and Medical Care was supposed to help in the process of making the health systems work together.

The Communication was structured on four themes: European cooperation to enable better use of resources; information requirements for patients, professionals and policy-makers; the European contribution to health objectives; responding to enlargement through investment in health and health infrastructure.

With regard to European cooperation to enable better use of resources the Commission underlined the importance of using the open method of coordination to healthcare and long-term care. The Commission discusses the rights and duties of patients, the sharing of the spare capacity and trans-national care, health professionals, European centres of reference and health technology assessment.

For the better understanding of the patients' rights, entitlements and duties, the reflection process recommended to bring the information from different Member States and see how these issues are addressed within the Member States. The Commission proposed that the High Level Group on Health Services and Medical Care could continue this work and could start by identifying common elements across the EU which "might include providing timely and appropriate healthcare, providing patients with sufficient information for them to make informed choices about the different treatment options, respecting confidentiality of health data, respecting human dignity in health research and compensation for harm from negligence in healthcare, and should also take into consideration the rights and duties of health professionals."[304]

With regard to sharing the spare capacity and trans-national care, the reflection process underlined the importance of cooperation between healthcare systems for the overall functioning of the system. There were already projects on cross-border health—the Euregio projects and the Commission stated its intention to support a project to evaluate these projects.

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[302] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36; It excludes healthcare services from its scope and the Commission came with a separate Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, COM(2008) 414 final.

[303] Communication from the Commission-Follow-up to the high level reflection process on patient mobility and healthcare developments in the European Union, COM 2004 301 final, 3.

[304] Ibid., 6.

Since the reflection process asked the Commission to draw, if it is possible, a clear and transparent framework for healthcare purchasing, the Commission considered that the open method of coordination could be used. Thus Member States were invited to provide information through the High Level Group on Health Services and Medical Care and further, together with Member States, the Commission would consider to include a common objective on this topic as part of the open method of coordination on healthcare and long-term health care.

With regard to health professionals, the reflection process asked for clear, simple and transparent recognition procedures including a high degree of automatic recognition. "A concerted European strategy covering issues such as monitoring, training, recruitment and working conditions of health professionals could ensure that Member States would see a return on their investment in health professionals and that the Union as a whole will be able to meet its objectives of providing high-quality healthcare. The Commission invites the Member States to consider this issue, in collaboration with the health professions."[305]

The European centres for reference were found to be a good solution to provide high-quality and cost-effective care, in particular for rare disease. Collaboration in this area was found to be important for the patients who would have access to highly specialised care.

The Communication tackled the problems related to information and underlined the importance of information for citisens to use health systems, for the professionals to diagnose, treat and refer, for health authorities to plan and manage the health systems.[306] The reflection process asked for a strategy for developing information on health and for a framework for health information. The Commission stated that an expert group—health systems working party-was set up and would have to deal with the information needs in the field of healthcare. A health monitoring programme was already in place through twelve projects that were covering hospital data, primary care, pharmaceuticals, efforts in prevention and health promotion, health care professionals and an umbrella project providing descriptive information on health care provision actors and activities.[307] This work was coordinated with the European Union statistical programme.[308]

The concept of European Public Health portal was developed. This would be a single point of access to thelematically arranged health information produced with European Union funding. Moreover, a Europharm database would contain a harmonised set of information on licensed medicines in EU.

[305] Ibid., 10.

[306] Ibid., 12.

[307] Ibid.

[308] Council Regulation 322/97 of February 1997 on Community Statistics.

The Communication set up a research project "Europe for Patients" that had to examine the benefits and challenges of enhanced patient mobility in Europe.[309] Issues referring to data protection and E-health were also dealt with.

With regard to European contribution to health objectives the Commission addressed the problems of improving integration of health objectives into all European policies and activities and of establishing a mechanism to support cooperation on health services and medical care.

As a response to enlargement the Commission identified investment in health and health infrastructure as a possible solution.

The Commission concluded in acknowledging the great potential of European cooperation in helping Member States in achieving their health objectives. This communication together with the communication on extending the open method of coordination to health and long-term care and the communication on the European e-Health Area (and its associated action plan on e-Health) were considered a long-term project whose efforts would be repaid with better health, with better use of the resources invested, with greater economic growth and sustainable development.

'Modernising social protection for the development of high-quality, accessible and sustainable health care and long-term care: support for the national strategies using the "open method of coordination"' is a communication[310] that complements the high level process of reflection on Patient Mobility and Healthcare Developments in the European Union.[311]

This Communication places the social protection systems which aim to ensure access for all to quality care as a part of the European social model. Its aim is to "to define a common framework to support Member States in the reform and development of health care and long-term care,"[312] and the open method of coordination is the tool used to achieve that. The Commission underlines the fact that the social protection systems including health care need to be reformed and the Lisbon and Gothenburg European Councils highlighted that. The principles that were to serve as a basis for reform were approved by the Barcelona European Council in March 2002 and these principles are: accessibility of care, high-quality care and financial sustainability. This Communication sets joint objectives meant

[309] Communication from the Commission-Follow-up to the high level reflection process on patient mobility and healthcare developments in the European Union, COM 2004 301 final, 13.

[310] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Modernising social protection for the development of high-quality, accessible and sustainable health care and long-term care: support for the national strategies using the "open method of coordination," COM (2004) 304 final.

[311] High level process of reflection on Patient Mobility and Healthcare Developments in the European Union, HLPR/2003/16, 9 December 2003.

[312] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Modernising social protection for the development of high-quality, accessible and sustainable health care and long-term care: support for the national strategies using the "open method of coordination," COM (2004) 304 final, 2.

to support the development of social protection systems: ensuring access to care: universal access, fairness, solidarity; promoting high-quality care; guaranteeing the financial sustainability of accessible, high-quality care.

The open method of coordination is seen as an important tool in identifying common challenges and in supporting the reform of the Member States' social protection systems. As for a good working of the open method of coordination it is necessary to agree on the objectives, Member States are invited to submit 'preliminary reports' with the challenges that their health system face. Since it is difficult to compare the national health systems, the defining of the objectives and indicators is a difficult task. The Commission invited Member States to submit national data that would allow comparison. The indicators are to be based on the work which was done in the context of action programme on health monitoring[313] and the action programme on health, to create a prototype for a future European Union health monitoring system.

In order to review the May 2000 Health Strategy, in 2004 the Commission launched a reflection process on enabling good health for all, whose results contributed to the development of new health strategy. Public bodies, interest groups and individual citizens were involved in the reflection process.

The Reflection paper[314] outlined the key principles to guide the health strategy in the coming years. It was underlined the role of good health as the key to economic growth and sustainable development; health was seen as a shared responsibility between EU and Member States who have to cooperate; health was regarded as wealth generator because health was intertwined with economic growth and sustainable development; the paper proposed a shift from the treatment of ill people to the prevention of disease and to the promotion of good health; health was put at the centre of EU policy-making; different actors were mobilised and the civil society participation in EU health policy-making was welcomed.

A new Health Strategy, "Together for health: A Strategic Approach for the EU 2008–2013'" was adopted in 2007 through the issue of a White Paper.[315] It is the first EC Health Strategy that sets out a coherent framework to give direction to European Union activities in health.

The Strategy sets four fundamental principles for EC action on health: a strategy based on shared health values; "health is the greatest wealth"; health in all policies and strengthening the EU's voice in global health. It also sets clear objectives as well as mechanisms for the implementation of the strategy. The objectives that would constitute the key areas for the coming years refer to: fostering good health in an

[313] Decision No 1400/97/EC of the European Parliament and of the Council of 30 June 1997 adopting a programme of Community action on health monitoring within the framework for action in the field of public health (1997–2001) OJ L 193, 22.07.1997.

[314] Commissioner Byrne's reflection Process "Enabling Good Health for all" Preparing the Ground for the Future Strategy Report in Responses Received, 15 July 2004, at http://ec.europa.eu/health/ph_overview/Documents/byrne_reflection_en.pdf.

[315] White Paper, Together for Health: A Strategic Approach for the EU 2008–2013, COM(2007)630 final.

aging Europe; protecting citizens from health threats; supporting dynamic health systems and new technologies.

In this White Paper it is acknowledged that Member States have the main responsibility for health, however, it is underlined that there are areas where cooperative action at European Union level is necessary in order to deal with major health threats, with issues that have cross-border or international impact, with issues related to free movement of goods, services and people.

With regard to the principle according to which health should be founded on shared values, the Commission and the Member States worked together to define these values. In 2006 the Council adopted a statement on common values which included: universality, access to good quality care, equity and solidarity. Health-care is becoming increasingly patient-centred. Among the actions undertaken and that are supposed to be undertaken related to this principle the Health Strategy mentions the adoption of a Statement on fundamental values, the adoption of a System of European European Union Health Indicators with common mechanisms for collection of comparable health data at all levels, including a Communication on an exchange of health-related information, the necessity to take action in order to reduce health inequalities, the necessity to promote health literacy programmes for different age groups.

With regard to the principle "Health is the greatest wealth," the White paper stresses the importance between health and economic prosperity. The money that is spent for health is considered to be not just a cost but also an investment. Improving health would bring benefits to the whole economy. Moreover, the health sector is the major provider of employment and training and was a key driver in the expansion of the services sector. It is underlined the necessity to develop a programme of analytical studies of economic relationships between health status, health investment and economic growth and development.

With regard to the principle that health should be integrated in all policies it is underlined that health interests are found in a diversity of European Union policies: regional and environment policy, tobacco taxation, regulating pharmaceuticals and food products, animal health, health research and innovation, coordinating social security schemes, health in development policy, health and safety at work, ICT and radiation protection, as well as coordination of agencies and services regulating imports. It is stressed the necessity of cooperation between different sectors in order to achieve the aims and actions of this Strategy. Furthermore, the fact that health is the concern of different policies implies the necessity of involving different new partners in health policy. As an action proposed to fulfill this principle it is required that the integration of health concerns into all policies at European Union, Member State and regional levels should be strengthened and this should include the use of Impact Assessment and evaluation tools.

With regard to the principle referring to the strengthening the EU's voice in global health, the Strategy proposes that the European Union's status is international organisations should be enhanced and cooperation with strategic partners and countries should be strengthened. The European Union should also play a role in offering external assistance to third countries.

In order to pursue this Strategy the Commission has to put forward a Structured Cooperation implementation mechanism. Thus soft law was chosen as the solution for the achievement of this Strategy and the cooperation between European Union, Member States and stakeholders is required. The financial support for this Strategy should come from the current financial framework without an appeal to additional budgetary sources.

The necessity for a coordination of action in the health filed led thus to the creation of an informal OMC coordinated by the Social Protection Committee and to the creation of different coordination processes, where the High Level Reflection Group on Health Services and Medical Care plays an important role. Different health strategies were developed at European Union level meant to achieve a coherent approach to health policy and soft law was chosen as the method used to achieve the set objectives. Different communications issued by the Commission were meant to clarify problems related to access to healthcare, patients' rights, better use of resources, quality of services, information requirements. The High Level Group on Health Services and Medical Care was the mechanism set up to fulfill the objectives set as part of the Reflection process meant to enhance European cooperation and help Member States to achieve their health objectives. Experts from all Member States were gathered in order to work in areas such as: cross-border healthcare purchasing and provision, health professionals, centres of reference, health technology assessment, information and e-health, health impact assessment and health systems, patient safety.

Thus it is noticed that a series of soft instruments are used to create a European health strategy and to fulfill its objectives. Soft law is used to set the path and to draw the policy lines for further cooperation. The Commission proved to be very active in such initiatives.

5.3.4 Coordination in the Education Field

Education is considered to be a national policy and Member States tried to maintain their control over the education field.[316] Important developments in this field have been done through negative integration as it was illustrated above. 'For a long time education was an area where the question was not "*can* policies be coordinated"—but "*should* they be."'[317] Education was included in the Lisbon Strategy (2000) that stated that by 2010 the Union shall become "[…] the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion." In order to achieve this it was asked for "not only a radical transformation

[316] See De Wit and Verhoeven 2001, 175–231; Corbett 2006.

[317] Gornitzka 2006, at http://www.arena.uio.no.

of the European economy, but also a challenging programme for the modernisation of social welfare and education systems."

The open method of coordination was chosen as the new instrument to achieve this. This was considered to be a core instrument to achieve the objectives in the area of education and training. The use of OMC was supposed to lead towards compatibility, consistency and convergence of the Member States' policies.

Following the mandate given by the European Council in Lisbon, in 2001 the Education Council adopted a Report on the future objectives of education and training systems. They agreed on the objectives to be achieved by the year 2010 and this constituted the strategic framework of co-operation in the fields of education and training. These strategic goals included: improving the quality and effectiveness of EU education and training systems; ensuring that they are accessible to all; opening up education and training to the wider world. In 2002 the Education Council set a detailed work programme on the follow-up of the objectives of Education and training systems in Europe. This was supposed to be implemented through the open method of coordination. "The open method of coordination will draw on tools such as indicators and *benchmarks* as well as on comparing best practice, periodic monitoring, evaluation and peer review etc. organised as mutual learning processes."[318] The three objectives were broken down into 13 objectives and 42 key issues covering a wide spectrum of areas related to education and training. There were created working groups gathering experts from 31 European countries, stakeholders and EU and international organisations. Each working group was working on one or more objectives of the programme. In 2002 the Commission set up the Standing Group on Indicators and Benchmarks where indicators and benchmarks were created to monitor the progress. Every year there have been reports recoding the progress made.

The Bologna process and the Copenhagen process are integrated in "Education and Training 2010" and contribute to the achievement of the Lisbon objectives. The Bologna process was initiated in 1999 and aims at creating a European Higher Education Area by 2010. The objectives of the Bologna process were to adopt a system of easily readable and comparable degrees; to adopt a system essentially based on two main cycles, undergraduate and graduate (the undergraduate cycle lasting 3 years and the graduate cycle leading to the master and/or doctorate degree); to establish a system of credits; to promote student and teacher mobility by removing obstacles to free movement; to promote European co-operation in quality assurance with a view to develop comparable criteria and methodologies; to promote an European dimension in higher education particularly with regards to curricular development, inter-institutional co-operation, mobility schemes and integrated programmes of study, training and research. The Copenhagen process had as main priorities the creation of an European dimension in vocational education and training, to increase transparency through the use of instruments

[318] Detailed work programme on the follow-up of the objectives of Education and training systems in Europe [2002] C 142/01.

such as the European CV, certificate and diploma supplements, the Common European framework of reference for languages and the EUROPAS, to ensure recognition of competences and qualifications, to promote cooperation in quality assurance.

In order to achieve the objectives set at Bologna and Copengagen, the European Qualifications Framework for lifelong learning (EQF) was established.[319] Member States were recommended to use the European Qualifications Framework as a reference to compare the qualification levels. Also a system of credit transfer (ECTS) was introduced in 1989 within the framework of Erasmus and now part of Socrates programme. This system enhances mobility by facilitating the recognition of periods of study abroad. In order to facilitate the recognition of studies abroad Diploma Supplemet and the The National Academic Recognition Information Centres[320] (NARIC) network were also established. Initiatives in the field of quality assurance led to the establishment of the European Network for Quality Assurance in Higher Education in 2000. In 2004 it was transformed into the European Association for Quality Assurance in Higher Education. The European Research Area[321] was created through the Communication from the Commission since concerted action was necessary in order to revive research in Europe.

Bologna and Copenhagen processes were parallel to the OMC in education and the programmes initiated under these two contributed to the convergence and compatibility of the education systems.

In order to contribute to the Bologna process and part of the Education and Training 2010 programme, the Commission and Member States have initiated different policies such as: developing lifelong learning strategies, higher education reform, European institute of technology, developing school education policies, enhanced cooperation in vocational education and training and adult education, removing obstacles to mobility, promoting multilingualism, information and communication technology for innovation and lifelong learning, measuring progress in education and training, expert networks in economic and social sciences.

The European Commission has integrated its various educational and training initiatives under a single umbrella, the Lifelong Learning Programme 2007. It comprises different programmes: Comenius for schools, Erasmus for higher education, Leonardo da Vinci for vocational education and training, Grundtvig for adult education, Jean Monnet which addresses to teaching. All these programmes cover all dimensions and levels of education and training.

As education is very important for the development of the society, we have seen that different actions and programmes have been set. Member States are supposed

[319] Recommendation of the European Parliament and of the Council on the establishment of the European Qualifications Framework for lifelong learning [2008] C 111/01.

[320] It is a contact point for information on the academic recognition of diplomas and periods of study abroad.

[321] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Towards a European Research Area, COM(2000) 6 final.

to work together, to cooperate in order to make their education systems more compatible, more convergent. They are supposed to learn from each other and their progress is monitored. The Commission publishes annually a detailed report analysing the progress made to an agreed set of statistical indicators and benchmarks.

Speaking about the OMC in education Gornitzka states that:

> The OMC in education is one of the most institutionalised of all the OMC processes that have been set in motion after the Lisbon European Council (Cf. Laffan and Shaw 2005). But all elements of the OMC template for European coordination were not equally well received and institutionalised through the "objectives process" and E&T 2010. The thematic working group structure prior to 2005 did not run according to well established routines. Several of the interviewees say that there was a sense of unpredictability to the processes. Especially in the beginning of the process, the participants were searching for a definition of what this process should be about. In some groups there was uncertainty as to whether the work of the groups should be different from other expert groups the participants had prior experience with. The experimental character of the work is also found in other OMC processes.[322]

Thus the OMC in education is an institutionalised one since the Standing Group on Indicators and Benchmarks was created in 2002 by the Commission. It was supposed to give advice on the use of indicators as tools for measuring progress towards the common objectives set within the framework of the work programme on the future objectives of the education and training systems.[323] The unpredictable and the experimental character of the OMC are underlined by Gornitzka. A more extensive study is required to assess the effectiveness of the OMC.

It is important to underline however that the mobility of students was boosted through negative integration. Obvious obstacles to free movement required further cooperation and this was set up in a field where there were great doubts whether such cooperation should be instituted in the first place. The Bologna and Copenhagen Process which were integrated in the Education and Training Programme 2010 determined Member States to cooperate.

> The political space organised under the label of OMC has opened up for the participation of non-governmental actors in the education sector—notably the social partners and associations that organise students, parents and various other stakeholder interests. These types of actors are not unfamiliar with participation at the European level, yet their participation under the OMC has intensified. The way the OMC has been practiced in this sector seems to have strengthened DG EAC as a hub for policy networks in European education.[324]

The Commission proved to be very active in the field of education through the initiation of different programmes and also regarding the OMC. Soft measures must be regarded as born out of the necessity to cover the problems raised by the

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[322] Gornitzka 2006, at http://www.arena.uio.no.

[323] Implementation of 'Education and Training 2010' Work Programme, July 2003.

[324] Gornitzka 2006, at http://www.arena.uio.no.

mobility which was in its turn enhanced through negative integration. All these policies complement each other.

5.3.5 Services of General Interest

5.3.5.1 Relationship Between Services of General Interest and Welfare

In the previous chapters it has been seen that exemption from competition rules was granted to services of general economic interest on account of the public interest obligation that is imposed by the State. Articles 16 and 86(2) EC talk about services of general economic interest. In the Communications from the Commission we find the term services of general economic interest and services of general interest. The Lisbon Treaty and the Protocol on services of general interest annexed to the Treaty of Lisbon talk about services of general economic interest and services of general interest.

The Commission Communication on services of general interest 1996 contains definitions of services of general interest—"This term covers market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations"[325]—and services of general economic interest—"This is the term used in Article 90 of the Treaty (Article 86 EC; now Article 106 TFEU) and refers to market services which the Member States subject to specific public service obligations by virtue of a general interest criterion."[326] Energy, communications, education, healthcare, social sectors are services of general interest. Because the market fails to provide such services, there is a public service obligation imposed on the providers of these services in order to facilitate the performance of the general interest role.

These services serve the public, they ensure economic and social cohesion and they promote consumer interests. Principles such as continuity, equal access, universality and openness must be respected. In order to provide welfare services, the State imposes a public service obligation on the provider.

There are different organisational set-ups for the provision of services of general interest. They can be provided either in a monopoly situation or on a market where competitive elements have been introduced; the providers can be public companies, private companies or public–private partnerships. They are in constant change and the present trend is characterised by the 'marketization' of these services. All these differences pose challenges for the European integration.

European Union rules apply only with regard to services of general economic interest, however, as we have already mentioned it is not easy to distinguish between economic and non-economic.

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[325] Services of General Interest in Europe [1996] OJ C281/3, para 4.

[326] Ibid.

Member States are free to define what general interest services are. "There is no clear and precise regulatory definition of the concept of an SGEI mission and no established legal concept definitively fixing the conditions that must be satisfied before a Member State can properly invoke the existence and protection of an SGEI mission, either within the meaning of the first *Altmark* condition or within the meaning of Article 86(2) EC."[327] The European Union can carry out only controls of manifest error. Thus Member States have a large discretion with regard to defining what is a service of general economic interest and this was proved in BUPA judgement.[328]

5.3.5.2 The Status of Services of General Interest

As we have seen so far, the protection given to the welfare services is done through derogations from economic rules and there are different intensities of review. Member States are unhappy with negative harmonisation process and complained about the fact that these services are given protection by means of exceptions. They required that these services should be treated on the same position as the economic issues. How does the Treaty deal with these social issues? Some of the welfare services are provided within a market environment, some are provided outside the market. The line between market and non-market elements is hard to draw.

Treating such important issues by means of exceptions was highly criticised. Problems related to legal certainty have been raised. Different questions have been asked such as what type of protection should be given to these services; should services of general interest be included in the objectives of the European Union; should the powers of the European Union be expanded; do Member States still enjoy autonomy in organising their welfare state; how much margin of discretion is left to the Member States; should it be a regulatory framework for services of general interest that would provide some guiding principles; what criteria would be used to make a difference between economic and non-economic services; should the European Union have any role regarding services of general interest. These are some of the questions that can be raised.

Services of general economic interest have found protection first in Article 106(2) TFEU (ex Article 86(2) EC) EC. When applying competition rules it can be observed that the protection given to services of general interests has undergone an evolution. The safeguard of services of general economic interest was secured through the exemptions contained in Article 106(2) TFEU (ex Article 86(2) EC). Even in the application of the exemptions we can distinguish a change "from economic measurement to value judgement in the application of derogation."[329]

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[327] Case T-289/03 *British United Provident Association Ltd (BUPA) and Others* v. *Commission of the European Communities* [2008] ECR II-00081, para 165.

[328] Ibid.

[329] Ross 2000, pp. 22–38.

The switch from a strict assessment of derogations to a more flexible test allowed a higher protection to be given to services of general economic interest. Ross[330] underlines the existence of a"limited sovereignty/limited competition dichotomy." Notwithstanding this dichotomy, he concludes that the Court of Justice has the task to choose between market and other values. Until the insertion of Article 16, it can be said that other values were treated as exceptions from competition rules.

In the Commission Communication on services of general interest in 1996[331] it is considered that services of general interest are at the heart of the European model of society. It is also acknowledged that "there are differences between one Member State and another, between one sector and another, in the design, scope and organisational approaches of general interest services, owing to different traditions and practices."[332] The increasing importance given to services of general interest led to the inclusion in the Treaty of Amsterdam of Article 16. Furthermore, the Charter of fundamental rights[333] contains Article 36 that states: "The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European European Union, in order to promote the social and territorial cohesion of the Union." Moreover, the Commission tried to shed more light on the subject of services of general interest and issued a series of communications.

In the Green Paper on Services of General Interest[334] the Commission considers that these new provisions are important in the process of integration because they constitute a step forward from the economic sphere towards a European model of society, towards a concept of European citizenship. The constitutional importance given to services of general interest can be considered as a normal evolution. The liberalisation of services of general interest brings more cohesion between Union citizens. It led to more cross-frontier provision of these services and to a new meaning of the concept of solidarity that includes solidarity between Member States. The recognition of services of general interest as one of the shared values of the European Union comes from the necessity of having at European Union level a special protection given to these services.

The Commission underlines in the Green Paper on Services of General Interest[335] that the principles of non-discrimination and free movement of persons provisions apply to all kind of services, while public procurement rules apply to goods, services or works acquired by public entities with a view to providing both services of economic and non-economic nature and the provisions referring to free movement of services, establishment, competition and state aid apply only to economic activities. It is acknowledged in the same Green Paper that economic

[330] See Ross 2000, pp. 22–38; Hancher 1999, p. 728.

[331] Services of General Interest in Europe, [1996] OJ C281/3.

[332] Ibid., para 3.

[333] Charter of fundamental rights.

[334] Green Paper on Services of General Interest, COM (2003) 270 final.

[335] Ibid.

and non-economic exist in the same sector and sometimes in the same organisation.

One important step in protecting services of general economic interest was Article 16 EC. In interpreting the role of the introduction of Article 16 Ross[336] discusses different possible interpretations that can be used. The first states that the introduction of Article 16 brings nothing new since Article 16 is applied without any prejudice to the existing Treaty rules and since it is supposed to be implemented in respect of the jurisprudence of the Court. Favret[337] considers Article 16 to be a cautious provision but in the same time one without any real scope. The second interpretation that is given by Ross is that Article 16 enhanced the powers of Member States, but this is hardly acceptable. The third interpretation states that Article 16 aims at promoting cohesion and shared values. He depicts Article 16 as resembling to the mythological Janus, thus having 2 faces and looking in opposite directions. By mentioning that Treaty articles apply (especially the competition ones) and that services of general economic interest are among the shared values of the European Union, it is implied that these services are not removed from the remit of competition rules, but are however, being given special protection, underlying that European Union and Member States, each within their powers shall take care that such services operate under conditions that would allow them to fulfill their mission. This acknowledges the importance of services of general interest and constitutes "a nudge"[338] towards policy.

Flynn[339] considers that Article 14 TFEU (ex Article 16 EC) is a defensive response to the Court's rulings questioning the organisation and functioning of the undertakings entrusted with exclusive rights.

The introduction of Article 16 EC was important because it recognised the value of services of general economic interest; however, there were voices which considered that the rules of competition and state aid should not provide the conditions for their functioning and that certain services of general interest should not be covered by competition law and market rules.[340] The Committee of Regions proposed that the services of general interest should be included among the EU's basic objectives on an equal footing with the implementation of the internal market and observance of the subsidiarity principle.[341] It proposed that Article 16 EC should incorporate provisions such as: "all citisens shall have equal access to services, insofar as this is economically viable; there shall be a high degree of security of supply, if it is economically viable; market suppliers shall ensure adequate capacity in the case of market deficiency; services shall be of a high

[336] Ross 2000, pp. 22–38.

[337] Favret 1997, p. 577.

[338] Ross 2000, p. 32.

[339] Flynn 1999.

[340] Opinion of the Committee of the Regions on the Green Paper of services of general interest, 2004/C 73/02.

[341] Ibid., 9.

standard; the subsidiarity principle has an essential role to play in this area, *inter alia* with regard to with regard to which services are classed as SGIs, who is to provide them and how are to be organised and funded."[342] The Committee underlines the need for a balance between competition provisions, general social provisions and those concerning individual citisens.

The added-value of Article 16 is that services of general interest are not treated anymore as exemptions and impose on the European Union an obligation to take into consideration these services.

The question that is asked with regard to services of general interest is posed now in a different way, as Sauter notes. The approach that is taken is not from the economic perspective but from a perspective that grants consideration to other values.[343]

In the White Paper on Services of General Interest[344] the Commission lays down the guiding principles adopted in dealing with services of general economic interest. It was thus underlined that services of general economic interest should be organised and regulated close to the citizens; that competitive markets and a good provision of services of general interest having regard to high quality, accessibility, affordability are compatible; that citizens should have universal access to these services as it leads to social and territorial cohesion; that a high level of quality, security and safety should be maintained; that consumer and user rights should be protected; that monitoring and evaluating services of general economic interest is important for securing that services are provided at a high- quality standards, are affordable and accessible; that there are differences given by social, economic, geographical, cultural conditions and that these lead to the diversity of services of general economic interest which should be respected; that more transparency in the provision of services of general economic interest is required; that more legal certainty is required.

With regard to social and health services the decision of the providers to engage in modernisation in order to better respond to the needs of citizens is welcomed. However the need for more clarity and certainty is emphasised. The Commission makes a distinction between missions and instruments and states that the definition of missions and objectives of social and health services fall within Member States' competence, however, European Union rules may have an impact on the instruments for their delivery and financing.[345]

The Commission promises some progress in the field of social and health services, it promises that it will take a "systematic approach in order to identify and recognise the specific characteristics of social and health services of general interest and to clarify the framework in which they operate and can be modernised."[346]

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[342] Ibid.

[343] Sauter 1998.

[344] COM (2004) 374, 12.5.2004.

[345] Ibid., 16.

[346] Ibid., 17.

Though the primary law contains reference only to services of general economic interest, the Commission refers in its Communications to services of general interest. They are defined as a term covering "market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations."[347]

It is commonly acknowledged the importance of services of general interest, by all parties involved in the provision of these services.[348] However, the opinion regarding the protection that should be given to these services differs: some consider that they should not be subject to market mechanisms, the others underlie the importance of the market mechanisms for the provision of these services.

With regard to the role of the Union in what concerns services of general interests there have been opinions that wider exemptions from internal market and competition rules should be included. There have been proposals requesting the introduction of a legal base to legislate in the field of services of general interest. Some, on the contrary, find the existent provisions sufficient and consider that the legal basis introduced in the proposals for the reforming of the Treaty should be deleted.

With regard to the distinction between economic and non-economic services, more clarity was requested. However, there have been voices that considered the distinction to be unnecessary.

The difficulty in drawing such distinction is also given by the fact that the borderline is dynamic. In order to clarify better this distinction and to provide more legal certainty, it was underlined that a list of examples, or a list of abstract criteria would be welcomed. Some requested this distinction to be made in communications, others requested this thing to be clarified in an framework directive and others considered that the distinction should be left to the Court of Justice. Some requested also a negative list, where some services should be considered outside the scope of the Treaty and among the services that are supposed to be classified as excluded from Treaty rules social, health, education services were included.

Since the distinction between economic and non-economic is considered to be dynamic, in Commission Communication in 2000,[349] there were inserted examples of non-economic activities such as national education, compulsory basic social security schemes and a number of activities conducted by organisations performing largely social functions, however, in the Green Paper 2003, it is underlined that this distinction is not static in time and as was stated in the Commission report to the Laeken European Council[350] a definitive a priori list of services of general interest which are considered non-economic is not desired. However, the impossibility of drawing a concrete line between what is economic and what is non-economic brings much legal uncertainty.

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[347] Services of general interest in Europe, 1996, C281/03.

[348] See Report on the Public Consultation on the green Paper on Services of general Interest, SEC(2004) 326, 15.3.2004.

[349] OJ C 17, 19.1.2001, 4.

[350] COM (2001) 598, 17.10.2001.

The distinction between economic and non-economic is crucial, especially when Member States are faced with the reforming of their welfare systems; they need to know whether some rules are going to be challenged by European Union law. However, as demonstrated in the previous chapters, even if the internal market rules would apply, still there are safeguards. Moreover, the internal market rules are aimed at protecting the consumer, thus both national and European Union interest converge. Maybe the problem of making a distinction between what is economic and non-economic does not have such relevance. Maybe the focus should be directed on the safeguards granted to these welfare services. Since, taking into consideration the dynamism of these services, a service can be non-economic today but economic tomorrow, or a service provided by the same undertaking can be characterised as economic for some aspects and non-economic for other aspects, then it is clear that the protection given to these welfare services cannot be given anymore by means of exclusion from the Treaty rules.

In its Communication on "A single market for 21st century Europe"[351] the Commission tried to bring more light with regard to its policy towards services of general interest, underlying the importance of the Protocol on services of general interest annexed to the Treaty of Lisbon and of Article 14 of the new Treaty on the Functioning of the European Union. It emphasised the importance of the Protocol in "establishing a transparent and reliable EU framework." Moreover, the new Article 14 establishes a legal basis for EU action and in the same time stresses the "joint responsibility of the Union and the Member States."

The Protocol lays down the principles that would guide the European Union in its actions concerning services of general interest: the principles of subsidiarity and proportionality should be respected; the diversity of services, situations, needs and preferences of users should be respected; a high level of quality, affordability and safety should be achieved; equal treatment and universal access should be ensured; user rights should be respected; the competences of Member States with regard to non-economic services should be respected and non-economic services are not subject to Treaty rules.

As we can see the protection given to services of general interest is done through principles. Not only that some services were not removed from the scope of the Treaty, but services of general interest have entered under the protection given by the primary law. The accent is mainly placed on the subsidiarity and proportionality principles. The subsidiarity principle, as we are going to see in the next chapter, works as a double-edged sword. The proportionality principle is the one that actually offers protection when it comes to sensitive issues.

The Commission talks about the importance of these services, about the diversity produced by differences with regard to the state intervention in the provision of these services, about the division of services of general interest in economic and non-economic services. Given the fact that they have an EU dimension, EC Treaty rules and secondary legislation should be respected. Moreover, in some sector-industries

[351] COM (2007) 724 final, 20.11.2007.

the involvement of European Union is higher through sector-specific EU directives. However, the European Union intervention should be done in accordance with the principle of subsidiarity and proportionality.

In addressing the problem of social services, the Commission drew conclusions from the consultation which it initiated in April 2006.[352] The Commission reached the conclusion that social services, even if they are characterised by great variety, still are important for the "fulfilment of basic EU objectives such as the achievement of social, economic and territorial cohesion, a high level of employment, social inclusion and economic growth, as well as their close interconnection with local realities."[353] This is very important in understanding why services of general interest have been given recognition in primary law. The process of modernisation that these social services undergo in order to better respond new challenges and citizens' needs was also acknowledged. However, as a result of the modernisation process, some of these services might fall under the scope of EC law since the modernisation process aims of making these services more effective and more and more these services are liberalised. The Commission recognises its role to clarify what rules apply and to assist the modernisation process, but "fully respecting the principle of subsidiarity and the responsibilities of national, regional and local authorities."[354]

With regard to health services an attempt to identify the problems related to the application of EC law has been made by means of an open consultation.[355] Since there is a European Union dimension for these services, it appeared necessary to set out a framework for "safe, high-quality and efficient cross-border health-care services."[356]

As a proposal for future it was stated: "With progress made, attention should increasingly concentrate on the good transposition and application of EU rules, with greater emphasis on monitoring outcomes for the users and consumers, dissemination of information and exchange of practices, monitoring of enforcement and evaluation of performance."[357]

The new Article 14 TFEU and the Protocol to the Lisbon Treaty however, represent a step forward. After the introduction by the Treaty of Amsterdam of Article 16 which has claimed that services of general economic interests are among the shared values of the European Union, now the Lisbon Treaty goes further than services of general economic interest by mentioning services of general interest.

At this moment the protection for welfare services is done in the process of justifying limitations to free movement or restrictions to competition rules. We have seen that the proportionality principle is the one that ensures a balance between

[352] COM (2006) 177, 26.4.2006.

[353] COM (2007) 725 final, 20.11.2007, 7.

[354] COM (2007) 725 final, 20.11.2007, 8.

[355] SEC (2006) 1195, 26.9.2006.

[356] COM (2007) 725 final, 20.11.2007, 9.

[357] Ibid., 11.

economic and social issues and that there are varies degrees of flexibility meant to take into consideration sensitive aspects of welfare services. However, no one is happy with the unpredictable results of negative integration. Treating social issues as exceptions raised criticisms and the European Union tried to respond to it. The introduction of Article 16 EC was the first step in raising services of general economic interest "from derogation to obligation."[358] It stated the shared responsibility of Member States and Community for services of general economic interest.

In the Green Paper on Services of General Interest[359] the Commission states:

> A general instrument could set out, clarify and consolidate the objectives and principles common to all or several types of services of general interest in fields of Community competence. Such an instrument could provide the basis for further sectoral legislation, which could implement the objectives set out in the framework instrument, thus simplifying and consolidating the internal market in this field.

There are voices that require a framework directive covering services of general economic interests. The Treaty of Lisbon brings some changes: Article 14 offers a legal basis for setting principles and conditions for a good-functioning of services of general economic interest.

> Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

However, we have seen that Community rules through the non-discrimination principles challenge social services which are not economic. With regard to services of general interest, the Protocol to Lisbon Treaty introduces for the first time in the primary law the notion of services of general interest. There has been lot of discussion concerning whether this should have been included in primary law or not. The fact that services of general interest include non-economic services could have been seen as a problem, since intrusion of the European Union into these is not desired. However, the need for more clarity, for a "transparent and reliable EU framework" determined their inclusion in primary law. In practice, the non-discrimination principle applies also to non-economic services and the inclusion of services of general interest in primary law was necessary to ensure protection of these essential services.

So far, negative integration was the technique that ensured integration in the field of welfare services, opening the road for further positive action. At this

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[358] Ross 2000, 22–38.

[359] Green Paper on Services of General Interest, COM (2003) 270 final, para 38.

moment, still, the negative integration and the proportionality principle ensure a balance between economic and social issues, but as we have seen it was the positive law that offered social issues equal status with economic issues.

5.4 Conclusions

The legislative lacuna left by the deregulatory power of the Court required different solutions. The Court appears to be in charge of policy-making; the Court is the one that points out the existent conflicts, the problems related to the lack of coordination of social issues. The national governments are slow in acknowledging the impact of EU on the welfare policies and so far the economic considerations have been the ones influencing the welfare sectors. The lack of specific competences and the lack of a defined European Union policy in the field of healthcare and education determined the integration process in these fields to be done through the "spill over effect" from economic integration. The unpredictability of the negative integration and the dominance of the economic brought criticism regarding to the subordination of social issues to economic ones. The need for the equal treatment of the economic and social led to a progressive evolution of these aspects in positive law.

The removal of the regulatory barriers made place for positive action. However, problems related to the existence of European Union powers in the field of health and education raised even more problems. Does the European Union have the competences to harmonise in these fields? Is harmonisation desired?

The Court proved again to be inventive in constructing a legal basis for such action. The principle of attribution of powers does not allow positive action to be taken in the field of healthcare and education. However, in the field of education the Court gave a broad interpretation to what constitutes educational training so as to include education issues as well. Since the article referring to health and education introduced by the Maastricht Treaty contain what is called negative competence, the developments in these fields have been done by using as a legal basis the functional competences. Since these welfare aspects were intertwined with economic ones, internal market articles were used to tackle health and education issues as well. However, the main aim of the measure was supposed to be an internal market aim and other issues were ancillary to the main measure. It was proved that if the main aim of the measure was the achievement of health objectives or any other objective for which the Treaty excludes harmonisation, then the measure can be annulled because of the lack of a legal basis. Any measure which is adopted using as a legal basis a functional competence and which contains both internal market and other aims must checked whether the centre of the gravity of the measure falls on the internal market aspects.

The debate related to competences to harmonise in this field is heated. As long as the economic and social issues are intertwined, at any time, it can be found a reason to harmonise in the field of the internal market and touching also other fields. The European Union powers regarding internal market issues appeared to be unlimited

and they are often characterised as creeping competences because they tend to include other aspects which are the exclusive competence of the Member States. The principle of subsidiarity is considered to be a limitation to the continuing expansion of the powers of the European Union. Being a double-edged weapon, the subsidiarity principle can lead to decentralisation but as well to centralisation.

> …subsidiarity was of an essentially political nature, implementation of which involved a considerable margin of discretion for the institutions (considering whether shared objectives could 'better' be achieved at European level or at another level), monitoring compliance … should be of an essentially political nature and take place before the entry into force of the act in question…[360]

Subsidiarity is a concept "moulded to suit virtually any political agenda."[361] Thus, depending on the interests involved it is decided whether the action should be taken at national or at European Union level. Whenever a measure is adopted it has to comply with the principles of attribution of powers, subsidiarity and proportionality. These principles are considered to be the limits to the creeping competences of the European Union.

The need for positive action was concretised in the issuing of different Regulations and Directives meant to coordinate the European Union action, to make the systems more compatible. The regulation on social security schemes was meant to provide a solution for the coordination of the social security schemes at European Union level. However, this did not solve the problem entirely and issues related to its constitutional position were raised. The clarification came from the part of the Court who determined that this Regulation is merely complementary to the provisions regarding free movement.

The barriers raised by the differences in qualifications which have initially been solved by the Court were tackled initially by sectoral directives. Later, the political consensus led to the adoption of a horizontal Directive on the recognition of professional qualifications.

The existence of different standards in different Member States makes it difficult to reach a compromise. Even the Directive on the recognition of professional qualifications is criticised because it starts from the presumption that there is equivalence between different qualifications in different Member States which sometimes may not be the case. However, compensation mechanisms have been put in place in order to deal with this problem. The different standards existent in different Member States makes difficult the adoption of positive law which could have filled in the gaps left by the negative harmonisation.

The heated debate regarding the Services Directive revealed another problem: the subordination of the social issues to the economic ones. The fact that the legal basis used for harmonising is found in one of the internal market articles, leads to a positive law which is more economic oriented. The inclusion of healthcare

[360] Conclusions of Working Group I on the Principle of Subsidiarity, Brussels, 23 September 2002, CONV 286/02 WGI 1.

[361] Peterson 1994, p. 132.

services into the initial draft of the Services Directive raised lot of criticism and opposition. The result was that a separate proposal for a Directive on the application of patients' rights in cross-border healthcare was issued where more attention was given to the consumer than to the economic issues. The Services Directive was a piece of legislation economically oriented that gave little protection to social issues. However, the patients' needs for more legal certainty were considered and the promised proposal for the Directive dealing with healthcare issues was put forward.

The main concerns of Member States and of the European Union build around the citizen, the consumer, the one that needs to have access to healthcare and to education. Negative harmonisation is criticised by different scholars that it puts economic interests on the first plan. At national level, the social rights have a constitutional importance and Member States express their fears that at European Union level it is the economic aspect the one that counts. The evolution of the services of general economic interest reveal the fact that increased consideration was given to the social issues. The approach taken with regard to the services of general economic interest evolves from their treatment as exemptions from economic issues to that of equal treatment. Initially the services of general economic interest were treated as exemptions as it is provided in Article 106(2) TFEU (ex Article 86(2) EC) EC. However, the introduction of Article 16 EC allows other interests to be considered and the approach is not anymore a purely economic one. Moreover, besides the inclusion of Article 16 EC the constitutional importance of these rights is given by Article 36 of the Charter of fundamental rights which recognise the services of general economic interest as promoting the social and territorial cohesion. Article 14 of the Lisbon Treaty represents a step forward since grants a legal basis in order to adopt principles and set conditions in order to provide, commission and fund services of general economic interest. This is a reaction to the process of negative integration and it underlines that it is important that these services of general economic interest be treated as obligations and not as exceptions.

If the functional competences gave a legal basis for further action, this being linked to economic issues, when it comes to strategies and development of guidelines in these fields the soft law appears to offer the solution. The increased need for cooperation between Member States and the difficulty in reaching a consensus with regard to positive action made way for the use of soft law. The lack of specific competences, the need for more flexible instruments meant to deal with social issues, the need for more openness, participation, accountability, effectiveness and coherence led to the use of governance methods to address these sensitive issues. The open method of coordination is one of the soft instruments used to coordinate Member States' actions. Certain guidelines and objectives are set at European Union level and then benchmarks are set in order to compare best practices, further, Member States transpose those guidelines into national policies and a process of evaluation and peer review of the results follows. There has been criticism to OMC because of the difficulties in setting the benchmarks, because of the participants involved in the process and because of the dangers of obtaining different results than those intended. The low costs of non-compliance, the lack of

precision, the lack of temporal discipline, the alteration of the institutional balance, the appropriation of politics at the national level, the danger of overlapping of different OMC policies, the danger of reverse competence creep, the negative effects of the principle of supremacy and direct effect are few of the drawbacks of the use of OMC. However, the main benefit of the use of OMC is that Member States, different stakeholders are brought together and become aware that some changes are needed.

Different coordination actions have been taken in the field of health and education and OMC was one of the instruments aimed at achieving the set objectives.

Soft-law instruments were born as a reaction to the deregulatory force of the internal market and as a response to the lack of powers to regulate and fill in the gap left by the negative harmonisation. Positive and soft law should be regarded as complementary to the process of negative harmonisation. All of them are interrelated and the failure of one method determines the use of another. The need for more legal certainty would require the issue of positive law; however, the lack of specific competences and the difficulty in reaching a consensus between Member States turn towards soft law. All these efforts to coordinate Member States' actions reveal the need for a change. The negative harmonisation process was the one opening the path and all other methods are used to build the road, all these efforts being made for the sake of integration.

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Chapter 6
Conclusions

The double function, social and economic, of the welfare services raises interesting questions, such as whether economic law applies to these services. Politically sensitive but also economically important, welfare services have opened a heated debate. The focus of this book is on health, health insurance and education because these fields have aundergone important developments.

The peculiarities of the developments in these fields result from the fact that they are not the result of positive law-making at the European level, but rather the result of negative integration. The high level of regulation of these services at the national level causes them to be confined within national borders, thus conflicting with European Union law, which aims at ensuring the freedom of movement. However, negative integration leads to deregulation. Consequently, the conflict between regulation and deregulation, and centralisation and decentralisation takes shape.

Difficult questions related to governance are posed by the developments in these fields. National reforms of the welfare systems need to take the new European Union dimension into consideration. This book has looked at the negative integration process and answered the questions related to the extent to which European Union law applies to welfare services and what kind of safeguards the Court offers for these services. The proportionality principle distinguishes itself as the central element, important in balancing the national and European Union interests. Being part of the broader integration process, negative harmonisation leaves legislative lacunae and this book also looks at alternative solutions to the negative harmonisation process: positive and soft law.

Integration Led by Court's Case-Law

The evolution of the health and education fields indicates that they are atypical in the domain of integration. The close interrelations between social and economic elements underline the fact that the social aspect cannot be ignored and that action

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needs to be taken to deal with the new problems that have emerged. Azs was said in the early days of the European Union, and which remains true:

> There has been a failure to take Community action where action is required…The result, so far as the Court is concerned, is that, from time to time, it has had to resolve problems in the absence of important guidelines or, indeed, even of adequate rules of law relevant to the matter in hand. In the extreme case…it has been known for those who sought to negotiate a text, and who have been unable to agree, to settle for an ambiguous expression in the hope that the Court would one day be able to resolve the ambiguity.[1]

The failure of the political process to deal with the complicated problems raised by welfare services and the continuous development of the internal market integration leading to a spill-over into other fields has left the Court with the difficult task of answering questions on the relationship between welfare and economic integration. The most significant developments in the field of welfare have come from the Court.

These questions have largely resulted from the interplay of two factors. On the one hand, freedom of movement saw patients, students and service providers moving from one Member State to another. This new European Union dimension created a new problem that had to be considered. On the other hand, the diversity of the systems existing in the Member States carries with it problematic implications: the difficulty of coordinating these systems and adapting them to free movement.

The fact that the harmonisation of health and education was excluded in the Treaty did not help to deal with the wave of problems that were to come. Citizens challenging national legislation put the Court of Justice in a position where it had to tackle these issues. The decisions it took were received by the Member States as interference with their sovereign rights to decide on the organisation of their national welfare systems. The conflicts between the national social interests and European Union economic interests took shape. Moreover, there were conflicts between individual interests represented by the challenges brought by European Union citizens and general national interests. There were also fears that the stability of the welfare systems would be jeopardised, and that the application of economic law would have a detrimental effect on the provision of these services.

It is true that economic rules and competition law aim at achieving efficiency and this in turn leads to an increase in total welfare. This is one issue that the competitive mechanisms cannot address. State intervention is therefore necessary to ensure that everybody has access to quality services at affordable prices on a continuous basis. However, it is also true that once a Member State has chosen to introduce competition in the provision of a service then competition rules are absolutely necessary to ensure a fair competitive process. Therefore, the conflict between economic and social issues needs careful balancing.

From the analysis performed on how the Court handles the balancing process, it is apparent that there are sufficient safeguards in the Treaty to ensure protection for

[1] Lord Mackenzie Stuart 1997, p. 81.

the social aspects. In dealing with the sensitive issues that have been addressed, the Court has opened a dialogue between the European Union and the Member States. The cases draw the Member States' attention to the existence of the European Union dimension, which needs to be taken into consideration and has to be included in national legislation. Some authors consider that the court's role, both at national and EU level, should be to review and supervise the adequacy of procedural rights, rather than to adjudicate over substantive access to care.[2] While it might appear that the Court's decisions are directed towards national regulatory powers, a closer analysis shows that it is protectionism which is challenged, and that the Court carries out this challenge in a way which respects social values".

Safeguards for Non-Economic Interests

It is true that the Court has taken a bold approach and removed regulatory barriers, but it is also true that in its judgements it offered sufficient safeguards for the protection of social interests. The safeguards arise first from the fact that non-economic services are not subjected to European Union rules and secondly from the balancing process during which the Court takes social aspects into consideration. At this stage, the conflict of interest is solved by applying the proportionality principle.

The application of the internal market and competition rules in the first place is done only in the presence of economic elements. Issues related to what is economic and what is not have triggered fierce debates. Criticism was voiced by Member States who felt that there are insufficient elements to draw the demarcation between the two distinctly. It was argued that for the sake of legal certainty a clear demarcation should be set. The economic activity question is crucial in determining the extent to which European Union law applies. In answering this question, the Court took a functional approach. A clear distinction is impossible to draw, especially due to the dynamism of these services.

The Court decided that the special characteristics of welfare services could not remove them from the ambit of the Treaty. To the discontent of the Member States, even social security systems providing benefits-in-kind and NHS systems have been affected by the impact of internal market rules. In the case of education, however, the Court took a different approach to that taken in the health field. If the Court had used the same reasoning as in the healthcare cases, it would have reached the same conclusions. However, it ruled that when a student went abroad to receive education services, there was a service for Treaty purposes only if the establishment where he/she received education was essentially privately financed. This dichotomy shows a certain deference on the part of the Court to the Member

[2] Newdick 2006, p.1667.

States when dealing with certain types of welfare services. The Court apparently took a step back from its previous bold attitude towards welfare services.

The fact that welfare services constitute a politically sensitive field is apparent in the competition field and in the Court's rulings, such as *FENIN*[3] and *AOK*,[4] where competitive elements were present but the Court chose to declare the Spanish system as 'exclusively social' and the competition in the German insurance market as 'sound management'.

In the case of the internal market rules, the reach is more extensive since the principle of non-discrimination applies even if the service is not an economic one. If the free movement and competition fields are compared, it is striking that the results are different. A service can be declared as economic and within the ambit of the free movement rules while falling outside the reach of the competition rules. The scope of the competition and free movement rules is different. Krajewski[5] remarks that competition law concerns a 'general' principle which 'can accommodate structured exceptions to its application, without its effectiveness being undermined' while the free movement of services 'is a fundamental individual right, a basic freedom, which would be affected to a greater degree by such structural exceptions'.

There are no clear rules on how to distinguish between economic and non-economic and the Court considers various aspects and corroborates them in arriving at a decision. As it was stated in a number of Communications from the Commission on services of general interest, the delimitation of the economic and non-economic cannot be further clarified. It is up to the Member States to decide to introduce more economic elements into their systems, and they should bear in mind that the more economic elements they introduce, the more European Union law applies.

Member States resist the application of economic law for many reasons but partly because of a perception that market law and processes conflict with other values. Resisting the application of the law is sometimes seen a as part of protecting those values. This book suggests that this is largely unjustified. European Union law is not damaging for welfare systems but it does in fact provide adequate balancing mechanisms to ensure that all interests are protected—the conflict between welfare and free movement and competition is a false one. Once a Member State has chosen to permit economic elements and has introduced

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[3] Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN)* v. *Commission of the European Communities*, (2006) ECR I-6295.

[4] Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse* v. *Ichthyol-Gesellschaft Cordes, Hermani and Co*. (C-264/01), *Mundipharma GmbH* (C-306/01), *Gödecke GmbH* (C-354/01) and *Intersan, Institut für pharmazeutische und klinische Forschung GmbH* (C-355/01 [2004] ECR I-2493.

[5] Krajewski and Farley 2007.

competitive elements, it is then important to apply competition rules in order to maintain a functional market.

There are certainly risks in applying economic law to welfare, but there seems no reason on the basis of what has occurred so far to think that the European Union or the Court would strike unreasonable or welfare-unfriendly balances. On the contrary, the balancing process offers sufficient safeguards to the Member States and the Court has proved to be cautious when dealing with welfare services.

The Court allows Member States to put forward various reasons for why a restrictive measure should be preserved. The approach taken by the Court is that as long as the Member State can come up with a good story, it is allowed, on the condition that it passes the proportionality test. Hence the large number of justifications is put forward by the States. The ECJ may accept the reasons put forward, however, in applying the proportionality test the Court decides how much discretion it should leave to the Member States.

The proportionality principle including the necessity test becomes the crucial element in balancing the national and European Union interests. The dynamic character of the proportionality principle allows the Court to take a different approach depending on the interests involved. It could be argued that this causes legal uncertainty. However, it can also be viewed as the Court applying a usefully flexible test when dealing with welfare services.

The Centrality of Proportionality

The removal of national regulatory measures as a result of the application of European Union principles by the Court addresses a number of conflicts: the conflict between national social interests and the European Union economic interests, the conflict between individual and general interests and the conflict between national and European Union solidarity. The key element in solving these conflicts is the proportionality principle. It is the principle that ensures a balance between different interests.

In going beyond the internal market rules and entering the field of competition, we can identify the conflict between the search for efficiency and the need for redistribution, the conflict between the need for competition and the need for having exclusive rights and monopolies and the conflict between social and economic interests. The proportionality principle is again the instrument used by the Court to accommodate these interests.

There is nevertheless a difference in the application of the proportionality principle in internal market and competition cases. This is due to different interests pursued by the internal market and competition rules. While free movement provisions protect fundamental individual rights, competition rules deal more with economic general interests. Stricter rules are thus encountered in the internal market cases. While in the case of the internal market the Member States have to

prove that the financial stability of the system is endangered, in competition cases it is sufficient to be proved that it will no longer be possible to provide the services in question under favourable economic conditions. Through the prism of the different aims pursued by the internal market and competition rules, the proportionality principle applies differently.

Differences in the Application of the Proportionality Test

Internal Market Cases

When applying the proportionality principle, the normal course would be to pursue all three tests it contains. However, the Court does not follow this approach, preferring to apply only some of the tests, depending on the interests involved. The Court shows a preference for the necessity test when dealing with welfare services in the internal market cases.

When applying the proportionality test it is the policy of the State that is under challenge; however, when applying the necessity test the Court does not challenge the policy in itself but the intrusive means chosen to achieve that policy. 'Balancing under proportionality can be seen broader and more discretionary than balancing under necessity'.[6] Maduro considers that by showing preference for a necessity test the Court aims at preventing protectionism and not at controlling the degree of public intervention. This is important since this argument can be used in the debate concerning the Court's interference with national policies. The main accusation made by Member States is that the Court intrudes on their policy-making. In all these cases the Court recites the formula which holds that the European Union does not interfere with the Member States' rights to organise their welfare systems as they desire. This dialogue of statements underlines the conflict. However, any solution must see this debate progress beyond the stage of statements and arrive at clear principles.

What the Court is actually balancing is not the benefits of a measure against the costs caused by the restriction of movement, but relative restrictiveness of different possible national regulations in search of the least restrictive capable of achieving the aim pursued.

It can be argued that by asking the Member State to opt for alternative options, there is interference with their powers of organisation. However, it is important to view this from both positions: from the perspective of the European Union, obliged to respect the subsidiarity principle, and from the perspective of Member States, obliged to comply with European Union law. The subsidiarity principle requires the European Union to allow Member States to set their objectives while the respect for European Union law requires Member States to choose for the least

[6] Maduro 1998, p. 55.

restrictive measure to achieve the same aim. This is the balancing solution found by the Court to accommodate national and European Union interests.

Competition Cases

In competition cases the situation is different, since for example the exception in Article 106(2) TFEU (ex Article 86(2) EC) is aimed at fulfilling certain objectives of a general economic interest. The objectives of Article 106(2) TFEU (ex Article 86(2) EC) are economic, while the objectives contained in Article 30 or in the mandatory requirements are non-economic. This allows a different proportionality test to be applied.

The exclusion of competition under Article 106(2) TFEU (ex Article 86(2) EC) is accepted 'in order to allow the holder of the exclusive rights to perform its task of general interest and in particular to have the benefit of economically acceptable conditions'.[7] It is not necessary to prove that the economic equilibrium is endangered as it is in the internal market cases. This in itself is a more relaxed test, since the burden of proof is more relaxed.

Because the objectives pursued in competition cases are economic, it is easier to balance the objectives involved. For example, the Court did not usually ask for less restrictive means in competition cases, since this would have implied considering whether the alternative to state aid would have been a better option, which in turn would have meant challenging the national regulatory choices. In competition cases the Court could balance the advantages and the disadvantages through economic analysis. The costs incurred by entrusting the performance of a service of general interest to a given organisation and the benefits that result from the granting of exclusive rights can be quantified. A cost/benefit analysis is easier in competition cases than in internal market cases due to the values that need to be weighed.

The proportionality principle is a dynamic concept and is applied differently in different sectors depending on the sensitivity of the sector. Moreover, in the same sector, depending on the interest pursued, the intensity of review differs over time. The application of proportionality in the healthcare sector differs from the application of proportionality in the network sectors, once there was the intent and the policy to liberalise. In the case of welfare services the application of competition rules comes as a result of the introduction of economic elements. The safeguards for the non-economic interests pursued are granted through the large margin of discretion granted to the Member States in defining services of general economic interest and through the flexible application of the proportionality principle.

[7] Case C-320/91 *Corbeau* [1993] ECR I-2533, para 16.

Due to the sensitivity of the interests involved, the Court took a less bold stance in several cases. Cases like *FENIN*,[8] *AOK*,[9] and *BUPA*[10] are examples where the Court took a step back and did not fully follow the competition approach. It allowed Member States a large margin of discretion and the analysis undertaken by the Court is not a thorough economic analysis. It appears that the Court took the competition rules more as a rule of the thumb than as a strictly defined set of tests in dealing with some cases. It is hard to identify in these cases an economic analysis but is easy to identify the respect showed by the Court for the intentions of the national regulators.

The opinion has been voiced that the jurisprudence of the Court created legal uncertainty.[11] Rather than accepting this legal uncertainty appraisal, it can be argued that the Court's case-by-case approach in welfare cases actually yielded some workable solutions to existing problems. The Court identified the problems existent in the field of welfare services and offered different safeguards for the protection of social interests.

In determining whether the Court's aims are to remove protectionism or to control the State intervention in the market,[12] an analysis of case-law reveals that the Court sought to strike down the Member States' protectionist rules. The balance between economic and social elements conducted by the Court allowed Member States to put forward various justifications. They were thus allowed to derogate from the internal market and competition rules in order to pursue different policies. However, the Court did not allow the Member States to use the justification process to continue their protectionist policies. The Member States' failure to meet the proportionality test reveals exactly the protectionist intentions of the Member States.

Possible Solutions

All these cases of negative integration show the imperative need to address the problems caused by the spill-over from the economic sphere. The Court has tried to balance different interests and to offer sufficient safeguards for the

[8] Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN)* v. *Commission of the European Communities*, [2006] ECR I-6295.

[9] Joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse* v. *Ichthyol-Gesellschaft Cordes, Hermani & Co.* (C-264/01), *Mundipharma GmbH* (C-306/01), *Gödecke GmbH* (C-354/01) and *Intersan, Institut für pharmazeutische und klinische Forschung GmbH* (C-355/01, (2004) *ECR* I-2493.

[10] Case T-289/03 *British United Provident Association Ltd (BUPA) and Others* v. *Commission of the European Communities* (2008) ECR II-00081.

[11] Lear et al. 2008.

[12] Maduro speaks of protectionism versus 'economic due process'. While tackling protectionism the Court constantly refines the criteria used to review national measures, when it applies an 'economic due process' approach, the Court tackles State intervention in the market. Maduro 1998, p. 59.

protection of non-economic interests. However, the problems are far from being solved.

The solution has to come from both sides: from the European Union in laying down clear criteria that would help Member States estimate how far European Union law applies, and from the Member States in including European Union interests in their national policies and bringing national laws in line with European Union law.

Instead of blaming legal uncertainty, Member States should be aware that if they choose to introduce economic elements into their systems, they are subject to the internal market and competition rules and therefore need to comply with European Union rules. Safeguards are granted, but protectionist measures are not allowed.

Suggestions for the Proportionality Test

Proportionality appears to be at the heart of the integration process. It is at the heart of negative integration when the Court balances different interests, and it is at the heart of positive integration when an adopted measure is required not to go beyond what is necessary.

Since negative integration is currently the main means used to ensure development in the welfare field, in addition to all the safeguards offered by the Court for the protection of social issues, a few suggestions could be made to better balance social and economic interests. In the case of internal market rules, since the main fears of the Member States are that their regulatory choices are under challenge, some lighter measures could be brought by the European Union institutions. Since it is clear that the Court applies the necessity test in order to avoid a direct challenge of the national regulatory choices, the Court could provide some guidelines as to the level of flexibility the proportionality test can have. Accordingly, guidelines for the application of the proportionality test by the national Courts could contain a recommendation that the necessity test should be central and that a certain level of deference should be shown for the discretion left to the Member States in making their regulatory choices.

Since it is easier to balance the interests at stake in the competition cases, a more extensive economic analysis should be pursued. Even if there are politically sensitive issues, the proper application of competition rules is required; otherwise the whole point of introducing competition in the respective area would be undermined. It has been shown that in some cases the Court makes a step back and does not proceed with the complete application of the tests it usually applies.

Further Suggestions

Welfare harmonisation is part of a broader integration process: it can be seen not only as a step in the progress from economic to social integration, but also as a part of economic integration. The Court established landmark cases that answered the

problems raised in practice, thus ensuring further integration in a field where politics had failed. However, the negative integration practiced by the Court is not sufficient and needs to be corroborated by positive action. The positive action could come either from the part of the Member States or from the European Union.

At Member State level, it is necessary that Member States take a more proactive approach and integrate free movement and competition law into their welfare systems. So far they have been defensive and often reactive. Complying with European Union law requires more than just waiting for the next judgement.

At the European Union level it has been shown that the Court has found solutions to the problems related to the lack of an exclusive legal basis for harmonisation in the fields of health and education.[13] The close relationship between social and economic aspects allows measures to be taken using the internal market articles as legal basis. However, it is necessary that the main aim of the measure is to benefit the internal market.

The need for positive law has been concretised in different regulations and directives meant to coordinate European Union action. The Regulation on social security schemes[14]was meant to coordinate national social security schemes, the sectoral directives regarding the recognition of different professional qualifications,[15] and the horizontal Directive on the recognition of professional

[13] Due to their overlapping with economic elements, some health aspects have been covered by internal market legislation. As it has also been seen, in the field of education the Court used its interpretative methods to ensure integration in this field.

[14] Regulation 1408/71 on the application of social security schemes to employed persons, to self employed persons and to members of their families moving with in the Community (1971) OJ l 149.

[15] Council Directive 75/363/EEC concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors, [1975] OJ L167/14; The Directive was consolidated by Directive 93/16/EEC to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, [1993] OJ L 165/1; The Directive with regard to doctors is repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L 255/22; Directive 78/686/EEC on the mutual recognition of diplomas, certificates and other evidence of formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, [1978] OJ L233/1; Directive 78/687/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of dental practitioners, [1978] OJ L233/10, amended by Directive 2001/19/EC. [2001] L206/1; repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L 255/22; Directive 85/432/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of certain activities in the field of pharmacy, [1985] OJ L253/34; Council Directive 85/433/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy, [1985] OJ 253/37, amended by Directive 2001/19/EC, [2001] OJ L 206/1; repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L 255/22.

qualifications[16] can be cited as examples of laws intended to simplify and facilitate free movement between Member States. However, it is difficult to reach a consensus between Member States in formulating such laws. The Services Directive is one piece of legislation that shows the difficulties of the legislative process. The criticism inspired by the inclusion of healthcare services into the initial draft of the Services Directive shows that Member States do not accept the subordination of social issues to economic ones. Due to the sensitive interests involved, the legislative proposals should also be drafted to better tackle the possible national sensitivities. The Services Directive was a piece of economically-oriented legislation that offered little protection for social issues. A new Proposal for a Directive on the application of patients' rights in cross-border healthcare was issued where more attention was paid to the consumer than to the economic issues. This is a better approach than including measures related to patients' rights in an economically-oriented horizontal law.

While the integration of free movement law into positive law seems to be theoretically redundant, in practice it would be very helpful. It would be easier for patients to know their rights if these could be found in a piece of legislation rather than being derived from the principles contained in the case-law of the Court.

Alternative solutions for the need to harmonise social issues have been found in soft-law measures. The difficulty of reaching a consensus with regard to positive law but also the fear that positive law would lead to undesirable solutions have led Member States to use soft law methods. Soft-law methods offer certain advantages such as more flexible instruments, openness and participation; however, soft-law also has its drawbacks: it lacks enforceability and accountability, there are difficulties with benchmarking in the case of open method of coordination, the low costs of non-compliance, the lack of precision, the lack of temporal discipline, the alteration of the institutional balance, the appropriation of politics at the national level, the danger of overlapping OMC policies, the danger of reverse competence creep and the negative effects of the principle of supremacy and direct effect. Various coordination actions have been taken in the fields of health and education; however, they are purely related to health or education and do not deal with the complicated aspects of health or education being interwined with economic issues. The main role of the soft-law measures is to bring Member States and stakeholders together and make them aware of the need for change. It is more a process of acquainting the parties involved with the problems and determining them to look for common solutions.

[16] Directive 93/16/EEC to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, [1993] OJ L 165/1; Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, [2005] OJ L255/22.

A Role for Citizenship

The negative harmonisation process blazed the trail, and all other methods (positive and soft law) are used to build the road and to ensure further integration.

A different approach to the existing obstacles encountered between the Member States and the European Union could be found through a reliance on citizenship, and which could amount to a step change in progress. Both European Union and national policies have at their hearts the citizen. Internal market rules grant European Union citizens the right to move freely. Competition rules have consumer welfare as their ultimate goal.[17] Since both national and European Union rules aim to procure citizen welfare, a compromise between national and European Union interests should be found. People availing themselves of the freedom of movement should not be ignored, but rather be encouraged and protected, because they are the group which creates greater cohesion between different Member States.

It can be argued that all the developments that have occurred as a result of negative integration are important for the social cohesion of the European citizens. The protection of individuals is achieved by both national and European Union rules. The concept of citizenship is meant to bring equality between European citizens. The cases brought before the Court required a certain degree of solidarity between Member States. Since welfare has at its heart the concept of citizenship, solidarity between people having the same citizenship creates tighter social bounds.

The solidarity concept plays double role. On the one hand, solidarity is used to defend national welfare states and on the other hand it is used to ensure equality between European citizens.[18]

The way the concept of citizenship was used by the Court was to give social rights to EU citizens, even if they were not workers, and even if those rights were not connected to an economic activity. The status of EU citizenship is 'destined to be the fundamental status of nationals of the Member States'.[19]As Advocate General Colomer rightly pointed out, the creation of the citizenship is a qualitative progress as long as it dissociates the freedom of movement from its functional and instrumental elements (as long as it is not linked with the exercise of an economic activity or with the creation of the internal market) and as long as it is raised to the rank of an independent right.[20]

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[17] See Vedder 2006.

[18] See Barnard 2005, where she finds a use for the solidarity principle in two ways, defensively and positively.

[19] Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

[20] Opinion of Advocate General Damaso Ruiz-Jarabo Colomer in Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan* v. *Bezirksregierung Köln and Iris Bucher* v. *Landrat des Kreises Düren* [2007] ECR I-9161, paras 89–96.

Katrougalos[21] notes that initially a 'market citizenship' emerged. According to him, European citizenship 'has been developed more as a function of economic efficiency for the optimal allocation of labour in the internal market than as an individual human right'. However, since the Court came to interpret the concept of citizenship by dissociating it from the economic elements, this has led to more cohesion and solidarity at the European level.

Siofra O'Leary notes that the 'Court has read into the Treaty provision of the free movement and residence of EU citizens and the secondary legislation which implements it a degree of "financial solidarity" (whose extent is yet untested) which the Member States when adopting that secondary legislation would no doubt have regarded as unthinkable'.[22] The application of the principle of equality between European citizens requires a degree of solidarity between Member States. The concept of citizenship aims at deepening the solidarity between European citizens. The new forms of solidarity promulgated by the Court are 'detached from Member State nationality and even from the individual's economic contribution to society'.[23]

The movement of the European citizen should be facilitated, even if this implies the breaking of bureaucratic restrictions. The concept of citizenship requires that all European citizens be treated equally; however, the Court does not go so far as to dismantle the welfare states. The Court acknowledges the importance of the existence of a link between the individual and the State granting a welfare benefit.[24] The entitlement to welfare is stronger the closer the link between an individual and the State granting welfare.

The concept of citizenship and the interpretation of cross-border health and education services provided by the Court led to the 'de-territorialization'of welfare.[25] The concept of citizenship granted more social rights to individuals, and to the detriment of the national general interest. This can be seen as a change from the 'economic-driven dynamic of European Law'.[26] The European social interests which bring about European cohesion are now being affected by national economic interests and the proportionality principle is the instrument used to reach a consensus between the two.

The Court showed in *Chamier-Glisczinski*[27] that the use of Article 18 EC referring to citizenship does not affect the national organisation of the social security schemes. Moving across the border using the citizenship rights does not

[21] Katrougalos 2007, p. 39.

[22] O'Leary 2005, p. 70.

[23] Ibid., 71.

[24] Case C-138/02 *Collins* [2004] I-2703; Case C-456/02 *Trojani* [2004] I-7573; Case C-224/98 *D'Hoop* [2002] ECR I-6191.

[25] Katrougalos 2007.

[26] Katrougalos 2007, p. 29.

[27] Case C-208/07 Petra von Chamier-Glisczinski v Deutsche Angestellten-Krankenkasse [2009] ECR I-6095.

mean only to take advantages of benefits. Such a move across the border may be advantageous or disadvantageous for the person who moves, depending on the national systems in place.

Final Reflections

The private–public mix found in welfare raises questions on the fundamental principles of the market and of competition: it is important to correct market failures; however, it is also important to ensure that Member States do not pursue protectionist agendas under the umbrella of protecting services of general interest.

The application of competition rules destabilises State practices in this area in many ways, often seeming to have effects beyond the market itself. For example, where there is a mix of the services provided, part economic, and part non-economic, undertakings are required to have separate accounts in order to avoid cross-subsidisation. Moreover, by forcing Member States to introduce reimbursement mechanisms, it is necessary to identify and calculate the costs. These actions can show how efficient or wasteful Member States can be, and the resulting transparency can have political consequences.

However, it would not be entirely true to say that the changes to the welfare systems come only or even mainly from European Union impact. The changes come first from inside, when Member States decide to make the system more efficient and involve private parties in the provision of welfare services. In addition, in the field of education Member States see opportunities that come from opening their education systems and from exchange of students and professionals. When making these changes it is important that the European Union rules are considered. For example in the reform of the Dutch health insurance system the European Union rules have been included. Before the reform the Dutch system was exposed to European Union law through the Court's rulings in several cases.

Social system reform is complicated enough without the European Union aspect. Political agreement on how to organise the system is difficult to reach. Moreover, the changing of the State's role from providing services to providing only the legal framework and supervising the provision of services represents an apparent loss of powers for the Member States. With this as a background, the fact that European Union law applies gives the Member States the impression that they have lost control over these services.

The Court has brought these existing problems into the open. Litigation provides the occasion for Member States to be forced to stop ignoring the existence of anything beyond the national dimension. This is the moment when Member States start to change to address their problems, or even to be active through soft-law mechanisms. The outcome of this process is uncertain. It is even possible that European convergence towards common regulatory patterns may emerge, since the identical pressures on Member States can result in parallel behaviour, leading to conforming and compatible policies.

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