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

---

[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.

---

[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]

---

[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.

---

[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.

---

[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

---

[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

---

[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.

---

[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.

---

[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.

---

[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.

---

[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.

---

[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

---

[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

---

[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]

---

[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.

---

[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

---

[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.

---

[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.

---

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.

---

[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).

---

[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.

---

[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.

---

[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.

---

[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

---

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.

---

[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

---

[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]

---

[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:

---

[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]

---

[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]

---

[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]

---

[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

---

[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."

---

[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]

---

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.

---

[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.

---

[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

---

[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.

---

[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]

---

[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]

---

[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.

---

[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

---

[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.

References

Barber NW (2005) The limited modesty of subsidiarity. ELJ 11:308–325

Barnard C (2008) Unravelling the services directive. CMLRev 45:323–394

Beukel E (1994) Reconstructing integration theory: the case of educational theory in the EC. Cooperation Confl: Nordic Stud Int Politics 29:33–54

Brinkhorst LJ (1991) Subsidiarity and the European environmental policy. In: Delors J (ed) Subsidiarity: the challenge of change. European Institute of Public Administration, Maastricht

Buchan J (2007) Health worker migration in Europe: assessing the policy options. Eurohealth 13

Cabral P (2004) The internal market and the right to cross border medical care. ELRev 29(5): 673–686

Cass D (1992) The word that saves Maastricht? the principle of subsidiarity and the division of powers within the European community. CMLRev 29:1107–1136

Chalmers D, Lodge M (2003) The open method of co-ordination and the European welfare state, LSE ESRC centre for analysis of risk and regulation, Discussion paper No.11

Commission proposal for a directive on services in the internal market, COM (2004)/2 final

Commission staff working paper, Report on the public consultation on the green paper on services of general interest. SEC (2004) 326

Commissioner byrne's reflection process "enabling good health for all" preparing the ground for the future strategy report. In responses received, accessed 15 July 2004. http://ec.europa.eu/health/ph_overview/Documents/byrne_reflection_en.pdf

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

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

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

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

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

Conclusions of the health council, 26 June 2002

Conclusions of working group I on the principle of subsidiarity, Brussels, 23 September 2002, CONV 286/02 WGI 1

Constantinesco V (1991) La subsidiarite comme principe constitutionnel de l'intégration Européenne. Swiss Review of International Economic Relations, pp 439–459

Corbett A (2006) higher education as a form of European integration: how novel? the dynamics of EU higher education policy-making, arena working papers 06/15, Oslo: Arena

Craig P (1999) The nature of the community: integration, democracy, and legitimacy. In: Craig P, De Búrca G (eds) The evolution of EU law. Oxford, OUP

Craig P, De Búrca G (2003) EU law—text, cases and materials, 3rd edn. OUP, Oxford

Crosby S (2002) The new tobacco control directive: an illiberal and illegal disdain for law. ELRev 27(2):177–193

Dashwood A (1996) The limits of European community powers. ELRev 21:113

Dashwood A (2004) The Relationship between the Member States and the European Union/ European Community. CMLRev 41:355

Davies G (2003) The post-laeken division of competences. ELRev 28(5):689

Davies G (2006) Subsidiarity: the wrong idea, in the wrong place, at the wrong time. CMLRev 43(5):63–84

Davies G (2007) Services, citizenship and the country of origin principle', Mitchel Working paper series, 2/2007

Davies G (2007b) The services directive: extending the country of origin principle, and reforming public administration. ELRev 32(2):232–245

Dawes A (2006) 'Bonjour herr doctor': national healthcare systems, the internal market and cross-border medical care within the European union. LIEI 33(2):167–182

De Búrca and Scott J (2006a) Law and new governance in the EU and the US. Hart Publishing, Oxford and Portland

De Búrca G (1998) The principle of subsidiarity and the court of justice as an institutional actor. J Common Mark Stud 36:214

De Búrca G (1999) Re-appraising subsidiarity's significance after Amsterdam, Harvard jean monnet working paper, no. 7/1999

De Búrca G (2000) Proportionality and subsidiarity as general principles of law. In: Nergelius J, Bernitz U (eds) The general principles of EC law. Kluwer Law International, The Hague

De Búrca G (2003) The constitutional challenge of new governance in the European union. ELRev 28(6):814–839

De Búrca G, Scott J (2006b) New governance, law and constitutionalism. In: De Búrca G, Scott J (eds) Law and new governance in the EU and US. Hart Publishing, Oxford and Portland

De Búrca G, De Witte B (2002) The delimitation of powers between the EU and its member states. In: Arnull A, Wincott D (eds) Accountability and legitimacy in the European union. OUP, Oxford

De la Rosa S (2005) The OMC in the new member states—the perspectives for its use as a tool of soft law. ELJ 11:618

De Wit K, Verhoeven JC (2001) Higher education policy of the European union: with or against the member states? In: Huisman J et al (eds) Higher education and the nation state. Pergamon Press, Amsterdam, pp 175–231

De Witte B (1992) The influence of European community law on national systems of higher education. In: Pertek J (ed) General recognition of diplomas and free movement of professionals. Pergamon Press, Maastricht, p 81

De Witte B (2007) Setting the scene: how did services get to bolkestein and why? Europa institute—mitchell working paper series

Dehousse R (2002) Misfits: EU law and the transformation of european governance, Jean monnet working paper 2/02

Dehousse R (ed) (2004) L'Europe sans Brussels? Une analyse de la methode ouverte de coordination, L'Harmattan

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

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

Emiliou N (1992) Subsidiarity: an effective barrier against the enterprises of ambition. ELRev 17:383–407

European hospital and healthcare employer's association patients' rights directive proposal: further clarity needed, press release, 2 July 2008, at http://www.hospeem.eu/

European parliament resolution on the commission communication "services of general interest in europe", (2001) OJ C 140E/153

European parliament resolution on the green paper on services of general interest, (2004) OJ C 92E/294

Favret (1997) Le Traite d'Amsterdam: Une revision a Minima de la 'charte constitutionelle' de l'union Europeenne. Cahiers de Droit Europeen, 33(577)

Featherstone K (1994) Jean monnet and the 'democratic deficit' in european union. J Common Mark Stud 32(2), 149(22):154–155

Featherstone K (2005) Soft co-ordination meets "hard" politics: the EU and pension reform in Greece, JEPP 733. Cited in Hatzopoulos V (2007) Why the open method of coordination is bad for you: a letter to the EU. ELJ 13:309–342

Flynn P (1998) 'The Future of EU Public Health Policy', Speech delivered at UK Pres idency conference on developing EU public health policy, London, 19 May 1998, in Elias Mossialos and Martin McKee, The Theoretical Basis and Historical Evolution of Health Policy in the European Union, in Elias Mossialos and Martin McKee, Willy Palm, Beatrix Karl and Franz Marhold, EU Law and the Social Character of Health Care, (P.I.E – Peter Lang, Brussels 2002, Work and Society No. 38), p. 67

Flynn L (1999) Competition policy and public services in the EC law after the Maastricht and amsterdam treaties. In: O'Keeffe D, Twomey PM (eds) Legal issues of the Amsterdam treaty. Hart, Oxford

George S (1996) Politics and policy in the European union. OUP, Oxford

Gornitzka A (2006) The open method of coordination as practice—a watershed in European education policy?, Working paper No. 16, December 2006, at http://www.arena.uio.no

Green paper on services of general interest, COM(2003) 270 final, paras 37–42

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

Haas E (1964) Beyond the nation state. Stanford University Press, Stanford

Haas E (1968) The uniting of Europe: political, social, and economic forces 1950–1957, 2nd edn. Stanford university press, Stanford

Hancher L (1999) Community, state and market. In: Craig P, De Búrca G (eds) The evolution of EU law. OUP, Oxford, pp 1–10
Handbook on the implementation of the services directive
Hatzopoulos V (2007a) Why the open method of coordination isbad for you: a letter to the EU. ELJ 13:309–342
Hervey T (2001a) Community and national competence in health care after tobacco advertising. CMLRev 38:1421–1446
Hervey T (2002a) Mapping the contours of European union health policy. European Public Law 8:69–105
Hervey T (2001b) Up in smoke? community (anti)Tobacco law and policy. EURLR 26(2): 101–125
Hervey T (2002b) The legal basis of European community public health policy. In: McKee M et al (eds) The impact of EU law on health care systems. PIE-Peter Lang, Brussels
Hervey T, McHale J (2004) Health law and the European union. CUP, Cambridge, p 206
High level process of reflection on patient mobility and healthcare developments in the European union, HLPR/2003/16, 9 December 2003
Hodson D, Maher I (2004) Soft law and sanctions: economic policy coordination and reform of the stability and growth pact. JEPP 11:798
Implementation of 'education and training 2010' work programme, July 2003
Kapteyn JG, Verloren van Themaat P (1998) Introduction to the law of the European communitites. In: Gormley LW (ed) From Maastricht to Amsterdam, 3rd edn. Kluwer Law International, The Hague
Koopmans T (1986) The role of law in the next stage of european integration. Int Comp Law Q 35:925–931
Krajewski M et al (eds) (2009) The changing legal framework for services of general interest in Europe: between competition and solidarity. Asser Press, The Hague
Lenaerts K (1994) Education in European community law after "Maastricht". CMLRev 31:7–41
Lindberg L (1963) The political dynamics of European integration. Stanford University Press, Stanford
Lindberg N, Scheingold SA (1970) Europe's would-be polity: patterns of change in the European community. Prentice-Hall, Englewood Cliffs
Lonbay J (1989) Education, law: the community context'. ELRev 14(6):365
López-Santana M (2006) The domestic implications of European soft law: framing and transmitting change in employment policy, JEPP 481
Ludwigs M (2007) Case C-380/03, Federal republic of Germany v. European parliament and council of the European union (Tobacco Advertising II). Judgment of the Court (Grand Chamber) of 12 December 2006, (2006) ECR I-11573. CMLRev 1159–1176
Maher I (2004) Law and the OMC: towards a new flexibility in european policy-making? J Comp Gov European Policy 2(2)
McKee M et al (1996) The influence of European law on national health policy. J Eur Soc Policy 6(263):286
McMahon JA (1995) Education and culture in European community law. The Athlone Press, London
Mitrany D (1946) A working peace system. Royal Institute of International Affairs, London
Moravcsik A (1993) Preferences and power in the european community: a liberal intergovernmentalist approach. J Common Mark Stud 31:485
Mossialos E, McKee M (2002) The theoretical basis and historical evolution of health policy in the European union. In: Mossialos E et al (eds) EU law and the social character of health care., 2002 Work and SocietyPIE-Peter Lang, Brussels
Palm W (2003) Voluntary health insurance and EU insurance directives: between solidarity and the market'. In: McKee M et al (eds) The impact of EU law on health care systems. PIE -Peter Lang, Brussels

Palm W et al. (2000) Implications of recent jurisprudence on the co-ordination of health care protection systems—general report produced for the directorate-general for employment and social affairs of the European commission, May 2000, www.aim-mutual.org
Pertek J (ed) (1992) General recognition of diplomas and free movement of professionals. European Institute of Public Administration, Maastricht
Pertek J (1999) Free movement of professionals and recognition of higher education diplomas. YEL 12:293
Peterson J (1994) Subsidiarity: a definition to suit any vision? Parliam Affair 47(1):132
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
Proposal for a directive of the European parliament and the council on the recognition of professional qualifications, COM (2002), 119 final
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
Regent S (2003) The OMC: a new supranational form of governance? ELJ 9:190
Report on the public consultation on the green paper on services of general interest, SEC(2004) 326, 15.3.2004
Rodrigues S (2009) Towards a general EC framework instrument related to SGEI? political considerations and legal constraints, paper presented at international conference—the changing framework of public services in Europe, Potsdam, 7–9 April, 6
Rodrigues S (2009) Towards a general EC framework instrument related to SGEI? political considerations and legal constraints', Paper presented at international conference—The changing framework of public services in Europe, Potsdam, 7–9 April 2009
Ross M (2000) Article 16 EC and services of general interest: from derogation to obligation. ELRev 25(1):22–38
Santer J (1991) Some reflection on the principle of subsidiarity. In: Delors J (ed) Subsidiarity: the challenge of change. European Institute of Public Administration, Maastricht
Sauter W (1998) Universal service obligations and the emergence of citizens' rights in European telecommunications liberalization. In: Freeland M, Sciarra S (eds) Public services and citizenship in European law. OUP, Oxford
Sbragia A (2002) The dilemma of governance with government, Jean monnet working paper 3/02
Scharpf F (2002) The European social model: coping with the challenges of legitimate diversity. JCMS 40:645
Schilling T (1994) A new dimension of subsidiarity: subsidiarity as a rule and a principle. Yearb Eur Law 14:203–255
Schütze R (2003) Dynamic integration—article 308 EC and legislation in the course of the operation of the common market: a review essay. Oxf J Leg Stud 23:333
Scott J, Trubek D (2002) Mind the gap: law and new approaches to governance in the EU. ELJ 7:1
Senden L (2004) Soft law in European community law. Hart Publishing, Oxford
Services of general interest in Europe (1996) OJ C281/3
Shaw J (1999) From the margins to the centre: education and training law and policy. In: Craig P, De Búrca G (eds) The evolution of EU law. OUP, Oxford
Snyder F (ed) (2003) The EU and governance—L'UE et la gouvernance, Bruylant
Steiner J (1994) Subsidiarity under the Maastricht treaty. In: O'Keeffe D, Twomey PM (eds) Legal issues of the Maastricht treaty. Chancery, London
Szyszczak E (2006) Experimental governance: the open method of coordination. ELJ 12(4):486
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

Thomson S, Mossialos E (2004) Regulating private health insurance in the European union: the implications of single market legislation and competition policy, Draft paper presented to the European ohealth policy group, September 2004, LSE health and social care
Toth AG (1992) The principle of subsidiarity in the Maastricht treaty. CMLRev 29:1079–1106
Toth AG (1994) A legal analysis of subsidiarity. In: O'Keeffe D, Twomey PM (eds) Legal issues of the Maastricht treaty. Chancery, London, p 39
Trubek D, Mosher JS (2003) New governance, employment policy and the. european social market. In: Zeitlin J, Trubek D (eds) Governing work and welfare in a new economy: European and American experiments. OUP, Oxford
Trubek D, Trubek L (2005) Hard and soft law in the construction of social Europe: the role of the OMC. ELJ 11:343–364
Van Der Mei AP (1998) Crossborder access to medical care in the European union—some reflections on the judgements in Decker and Kohll. Maastricht J Eur and Comparative Law 5
Van Der Mei AP, Waddington L (1998) Public health and the treaty of Amsterdam. Eur J Health Law 5:129–154
Van der Mei AP (2002) Regulation 1408/71 and coordination of special non-contributory benefit schemes. ELRev 27(5):551–566
Vandenbroucke F (2002) The EU and social protection: what should the European convention propose? Max planck institute for the study of societies, Köln. Cited in De Búrca G (2003) The Constitutional challenge of new governance in the European union. ELRev 28(6):12
Verwers (1992) Towards a new EC health policy? Uniting public health care in Europe. European public health association
Von Bogdandy A, Bast J (2002) The European union's vertical order of competences: the current law and proposals for its reform. CMLRev 39:227
Wallace H (1993) European governance in turbulent times. J Common Mark Stud 31(3):293
Weatherill S (2007) Promoting the consumer interest in an integrated services market, Europa institute—Mitchell working paper series
Weiler JHH (1991) The transformation of Europe. Yale LJ 100(240):263
White paper on services of general interest, COM(2004) 324, 11
White paper, Together for health: a strategic approach for the EU 2008-2013, COM(2007) 630 final
Zeitlin J, Pochet P (eds) (2005) The open method of coordination in action: the European employment and social inclusion strategies. PIE-Peter Lang, Brussels
Zilioli C (1989) The recognition of diplomas and its impact on educational policies. In: De Witte B (ed) European community law of education. Nomis Verlagsgesellschaft, Baden–Baden