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Who is afraid of SGEI?

Services of General Economic Interest in EU law with a Case Study on Social Services in Swedish Systems of Choice

Caroline Wehlander

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Department of law - Umeå University
Supervisor: Tom Madell
Co-Supervisor: Ulla Neergaard

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À nous

Preface and acknowledgments

I once left the frivolous and sunny French Riveria and wandered to the less frivolous and less sunny Sweden. This wandering, made of love, gave me the incredible "Blixten", magnificent children, skies to die for, the sweet kindergartens, ice, a chance to study again (with state financial support), lilies of the valley everywhere in May, IKEA Sundays, cherished friends, chanterelles, folk music, the freedom to say "du" and not "ni", Faluröd, roe deer and many other creatures in my garden, E.S.T., dreamy lakes, "påtår" (a free second cup of coffee in coffee places), snow, and surprise surprise, a chance to write a book. Much has happened, but I realise I am still the same, I talk too much, I write too long, and I still have those French words and rhymes dancing in my head. Some of my favourite are "bonne chance" often said by my daughter Lila, and "ça vaut mieux que rien" sometimes said by my son César, but I would lie if I did not confess that during this long time of thinking and writing "who is afraid of SGEI", I also had inspiration of three old French words that I did not know I was so fond of: liberté, égalité, fraternité. They are perhaps, after all, the normative bias of this legal research.

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Merci à vous ma famille, mes amis. Quant à toi maman, pince-toi, c'est bien ta fille qui a écrit ce livre.

Now let's go fishing.

Caroline Wehlander

Stockholm, 3 March 2015

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List of Abbreviations

AC	Swedish Competition Act (Sw: Konkurrenslagen (2008:579)
AG	Advocate General
BUPA	British United Provident Association
CJEU	Court of Justice of the European Union
CSR	Conflict Solving Rule
EAGCP	Economic Advisory Group for Competition Policy
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EFTA	European Free Trade Association
EP	European Parliament
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
FAQ	Frequent Asked Question
GC	General Court (of the EU), formerly Court of First Instance
IG	The Instrument of Government (Regeringsformen 1974:152), one of the four Fundamental laws comprised in the Swedish Constitution
LGA	Swedish Local Government Act (Sw: Kommunallagen (1991:900))
LOV	Act on System of Choice in the Public Sector (Sw: Lag om Valfrihetssystem (2008:962))
LRAs	Local and Regional Authorities in Sweden
NESGI	Non Economic Services of General Interest
Nyr	Not yet reported
OECD	Organization for Economic Co-operation and Development
OJ	Offical Journal
ORGI	Overriding Reasons related to the General Interest
PISA	Programme for International Student Assessment
PSO	Public Service Obligation
SALAR	Swedish Association of Local Authorities and Regions
SCA	Swedish Competition Authority
SEA	Single European Act
SGEI	Services of General Economic Interest
SGI	Services of General Interest
SPC	Social Protection Committee
SSGI	Social Services of General Interest
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
USO	Universal Service Obligation

Part I

SGEI a story of exit, voice and loyalty for public services in EU law

1 Introduction

1.1 Subject-matter of this study

In a letter addressed to the Swedish State, the European Commission (hereinafter "the Commission") explains that it does not prioritize complaints alleging illegal state aid following from financial transactions between Swedish municipalities and undertakings starting up independent schools and primary healthcare centres in the place of municipal schools and primary healthcare entities, in other words, in the frame of a partial privatization of these entities.[1] The motive invoked by the Commission to close the case is that "the described measures, their beneficiaries and the markets involved seemed to be purely local".[2] Strikingly the Commission's letter does not question the economic character of the activity conducted by independent schools, although these schools are part of the Swedish school education system according to Swedish national law. The Commission's motive not to intervene further in the case on the basis of EU state aid rules is not that the activities at issue are non-economic. To any lawyer following EU law on public services, this could appear as a small revolution, as national school systems have been regarded not only by the Member States but also by the Commission as a national "chasse gardée", consisting wholly of non-economic activities. This letter – not registered in its public database by the Commission – signals discreetly a major turn in EU law on public services: not only healthcare services but also other social services as politically sensitive as education in a national school system are in all the more cases found covered by EU rules on state aid and, more broadly, on competition.

Although specific to Sweden in the field of school education, these liberalization trends are representative of the development of public services in many Member States. As a matter of fact, in a Working Paper drafted in 2011, the Commission evokes complaints it has received from private competitors in Germany and the Netherlands about the financing of public long-term care providers. It indicates that it has found the public financings in question to be in line with the requirements of EU state aid rules, without reference to the decisions' numbers.[3] Another visible part of this "legal iceberg" is the *IRIS-H* case, were the Commission found that the publicly funded public hospitals in the Brussels region constituted undertakings in competition with publicly funded private hospitals, and that the funding of their public service tasks was therefore subject to the Treaty rules on state aid.[4] This evolution owes much to the fact that such "mixed

[1] The term "partial privatization" is used here as these entities, although private owned, continue to be for the most part financed by public resources.

[2] See letter of the Head Section for Market and Competition Division at the Swedish Ministry of Enterprise, Energy and Communication, registered under reference COMP/H-2/BC – (2012)33624, dated 29.03.2012.

[3] Commission, "The Application of EU State Aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation", SEC (2011) 397, p. 30.

[4] Commission Decision of 28 October 2009 on the public financing of Brussels public IRIS hospitals (Belgium) **in case** SA.19864 (ex NN54/2009) – 2014/C. The first decision not to raise objections against the aid measures, annulled by the GC, is only available in Dutch and in French.

systems" for the supply of welfare services are today common in the Member States. However, the applicability of EU market rules to social services would have been impossible without the CJEU's "functional" definition of "undertaking"for the purpose of EU competition rules, i.e. "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".[5] And it would hardly have been possible for the Belgian authorities to justify this public funding without relying on Article 106(2) TFEU, which provides that the Treaty rules apply to undertakings entrusted with services of general economic interest (hereinafter "SGEIs"), but "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".

1.1.1 EU law's applicability to public services, including social services: the market turn

The "close encounter" between Member States measures in the field of social services and EU law does not only take place in the field of state aid, where we find EU secondary law rules specifically designed for SGEIs (and even more specifically for social services), but today in all fields of EU market law[6]: in the field of EU free movement law (the Patients Rights Directive[7]), and now in the field of EU procurement law, as a new chapter on social services has been introduced in the newly revised procurement directives.[8] Such a profound transformation of the legal framework applying to social services is striking, because it takes place in a field where the Member States have not conferred competence to the Union. The Commission often emphasizes the role of the Member States' policy choices in this transformation that partly takes place under the pressure of what Krajewski calls "autonomous domestic regulatory reforms and policy changes".[9] Yet it is undeniable that, in all Member States including Sweden, EU market law "put[s] traditional models of supplying [public services] in particular on the basis of regional and local monopolies under enormous pressure"[10], and that this legal "state of the art" is largely due to the CJEU's approach in case law.

The CJEU has namely played a major role in building the foundations allowing to integrate the internal market of public services, and now also of social services, and its approach is generally characterised by a very broad interpretation of Treaty notions such as "service", "good", "capital", "undertaking", and not least "non-discrimination". This

[5] Case C-41/90 *Höfner* [1991] ECR I-1979, para.21. In this study, the expression "competition rules" is meant "in a broad sense", in other words both EU competition rules (often improperly called "antitrust rules"), and EU state aid rules.

[6] By "EU market law" is meant here EU law on free movement, procurement, competition and state aid.

[7] Directive 2011/24/EU of the European Parliament andof the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (the Patients' rights Directive) [2011] OJ L88/45.

[8] In this study, the EU procurement directives adopted in February 2014 are referred to as "the 2014 procurement directives", while the EU procurement directive in force until April 2016 are referred to as "the EU procurement directives".

[9] Krajeswski M., 2008, p. 503.

[10] Ibid.

approach is certainly one of market integration, but as observed by van de Gronden, also of market opening.[11] The Court's creativity has namely multiplied free movement and competition based arguments which may be relied on to challenge Member States' statutory and administrative measures in the field of public services. Thus, the case law of the CJEU, but also the decision practice of the Commission, have constituted the first stage in the Europeanisation of social services, even if these judgments and decisions do not immediately have an impact on the Member States' systems. As noted by Sauter, the liberalizing pressure induced by the CJEU's broad interpretation of the notion of "economic activity" – inherent to the notions of "services", "goods" and "undertaking" in the Treaties – largely explains the growing importance of the notion of SGEI in the case law of the CJEU and in the European legal-political debate.[12] It is important to be aware that this liberalising pressure has not been exercised by the CJEU in a political vacuum, but has accompanied the "public turn" of EU competition law launched by the 1992 Programme, reinforced politically by the adoption in 1986 of the Single European Act (SEA).[13] A major element of the 1992 Programme was the integration of the Single Market through the elaboration of EU public procurement rules.

1.1.2 Use of Article 106(2) TFEU in the CJEU's response to Member States' concerns on EU law's expansion in their fields of competence

According to Weiler, the Member States may have perceive the step they took with the SEA as being of limited significance.[14] However, a few years after its adoption, it had become clear that the SEA constituted "an eruption of significant proportions", and that a "Single European market" was not simply a technocratic program to remove barriers to free movement, but at the same time "a highly politicized choice of ethos, ideology, and political culture: the culture of 'the market'".[15] Under the pressure of several Member States, increasingly sensitive to the demarcation of competences after the adoption of the SEA, the principle of subsidiarity was introduced in EU primary law in

[11] Van de Gronden holds that "the analysis of the CJEU's case law demonstrates that EU free movement law may force Member States to introduce elements of competition in their national schemes governing [social services of general interest (SSGI)]. Although it is for the Member States to regulate these services, the stance of EU law is not neutral in this respect; rather it is based on the view that competition should play some role in the national organization and provision of SSGI." See Van de Gronden, 2013, p. 156.

[12] Sauter W., 2008, p. 3.

[13] Commission, "Completing the Internal Market" (White Paper to the European Council, Milan: 28-29 June 1985) COM (85) 310 final. The SEA introduced Article 100a EEC (now Article 114 TFEU) allowing all measures for the establishment and functioning of the internal market to be adopted by a qualified majority through Article 100a, which was described as "the most important of the Act's internal market provisions, being probably more far-reaching in its implications than any other provision in the entire Act", see Ehlerman C.D, 1987, p. 381.

[14] Weiler has explained that, for different reasons, the European Parliament and the Commission were "far from thrilled" with the SEA, which in particular led Margaret Thatcher to characterize it as "a modest step forward". See Weiler J. H. H., 1991, p. 2455 and 2459.

[15] Weiler J. H. H., 1991, p. 2477.

1992 through the Treaty of Maastricht.[16] Also, many Member States expressed growing concerns that the *negative* integration of the internal market – driven judicially on the basis of proportionality assessments – restricted the exercise of their powers under the EU principle of conferral.[17] Relying inadequately on the argument of "subsidiarity" – a principle which is hardly helpful in relation to *negative* integration – they used their "voice" against the CJEU's expansive interpretation of EU primary and secondary law on free movement, procurement and competition.

Faced with the worries caused by its expansion of EU market law's scope in the field of public services, the CJEU has shown loyalty to the "masters of the Treaties" in several ways. Firstly, the Court has built up from the 1990s onwards, a case law applying the exemption rule for "services of general economic interest" (SGEI) in Article 106(2) TFEU. In a series of seminal rulings, including *Corbeau*[18], *Almelo*[19], the so called "electricity cases"[20], *Altmark*[21] and more recently *BUPA*[22], the Court has established that the SGEI-character of an activity constitutes a legitimate ground for state (or EU) intervention in the public sector, and developed a specific "soft test" to assess under Article 106(2) TFEU, measures such as authorization schemes, exclusive rights, public financing, and cross-subsidization of services in the public sector. By relaxing the tensions between market interests and other general interests, this case law has facilitated the adoption of EU law in the sectors of energy, telecommunications, postal services and transport, aimed at market harmonisation and therefore based on Article 114 TFEU, but at the same allowing the imposition of public service obligations justified explicitly or implicitly on Article 106(2) TFEU.[23]

Although Article 106(2) TFEU has also been found applicable outside the field of competition law, in particular to justify statutory exclusive rights, its relevance in the field of public procurement is both legally uncertain and politically controversial. However, the CJEU has found appropriate to restrict the scope of EU procurement rules (which it had contributed to expand), by formulating conditions allowing public authorities to provide themselves services and goods through in-house contracts (the *Teckal* doctrine),

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[16] As noted by Weiler, the Member States' urge for a clearer demarcation of competences was already clear from the Resolution of Parliament of July 12, 1990 (PE 143.504). See Weiler J. H. H., 1991, p. 2463 not 173.

[17] Integration theories distinguish between positive and negative integration. Positive integration implies that common rules are adopted by a higher authority to remove regional differences, while negative integration refers to the removal of barriers between countries. Weiler J. H.H., 2005.

[18] Case C-320/91 *Corbeau*, [1993] ECR 1-2563.

[19] Case C-393/92 *Almelo* [1994] ECR I-1477.

[20] Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699; Case C-158/94 *Commission v Italy* [1997] ECR I-5789; Case C-159/94 *Commission v France* [1997] ECR I-5815.

[21] Case C-280/00, *Altmark* [2003] ECR I –7747.

[22] Case T-289/03 *BUPA* [2008] ECR II-81.

[23] By contrast, large areas of the public sector in the Member States, although clearly or increasingly economic in character, are not subject to EU *sector* law clarifying the principles and conditions of public intervention – justified by objectives of general interest – in the *economy* of these sectors. This is for instance the case concerning waste and water management, covered by EU sector law of administrative nature not primarily aiming at harmonizing the internal market and/or ensuring undistorted competition.

and more recently, conditions allowing public authorities to cooperate, even on the basis of contracts, in the achievement of common "*public service tasks*", a term which has also been used by the CJEU as synonym of SGEI tasks.[24]

There are today many judgments where EU free movement and/or competition rules have been found applicable to social services. In particular, the CJEU's very extensive interpretation of the notion of "remuneration" in Article 57 TFEU has led it to find that EU free movement rules apply to cross-border healthcare provision, para-medical services and university courses. However, in those fields, the Court has considered appropriate to examine measures motivated by certain types of "overriding reasons of general interest" (hereinafter "ORGI" or in relevant cases "ORGIs") under a relaxed test which departs from its standard proportionality test in the field of free movement, and seems to transpose the test it commonly applies under Article 106(2) TFEU. This case law has allowed the adoption the Patients' Rights Directive, a very rare example of sector-specific EU legislation in the field of social services.[25]

For Member States' worryies about the expanding applicability of EU law, it was important that the Court formulated in *Humbel* a doctrine exempting courses in national education systems from the scope of EU law.[26] Also, it could be comforting that the Court has developed a doctrine based on its *Poucet and Pistre* ruling, exempting the operation of social security services based exclusively on the principle of solidarity from the scope of EU competition rules.[27] Nevertheless, in many cases, the latter doctrine has not kept the Court from finding EU competition rules applicable to measures related to social security schemes despite the fact that they included many solidarity elements.

Cases on other social services than social security services are scarce in the field of competition, but as the notion of undertaking must be interpreted functionally in EU competition law, it must be expected that their provision will be seen as economic in national systems of supply "where there is an interplay between public and private", and in such mixed market systems, the SGEI character of the service constitutes an important ground to justify State intervention.[28] With the growth of markets in the sector of social services, the tension between internal market interest and social interests must be resolved in a special manner, which explains the importance of the Treaty rules on SGEIs in the development of EU procurement and state aid law applying to such services.

[24] Case C-480/06 *Commission v. Germany* [2009] ECR I-4747.

[25] One exception is the Patients' rights Directive.

[26] Case 263/86 *Humbel* [1988] ECR I-5365.

[27] Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-00637.

[28] De Vries S., 2011b, p. 462.

1.1.3 The CJEU' progressive and (too?) subtle approach: two important legal questions

On that background, it seems clear that Member States using market mechanisms to ensure the supply of public services must in all the more sectors explicitly or implicitly rely on the EU framework on SGEIs to motivate measures allowing them to conduct social and environmental policies in the frame of their powers. This picture emerges not only from the case-law of the CJEU evoked above but also from EU market law.[29] To secure the legality of their horizontal or sector-specific public service regulation, the Member States should be able to answer the two following questions:

a. What criteria determine that an activity in their public sector is covered by EU free movement rules and/or by EU competition rules?

b. Which margins of discretion does EU market law give them as legislators, and their public authorities as regulators and administrators, to secure the achievement of public service tasks defined statutory or administratively in the frame of their national legal system? In other words, is the fact that SGEI missions exist in national law relevant only to enable *market operators* to achieve public service tasks on the market, or is it also relevant to enable *public authorities* to achieve public service tasks on the market?

Regarding question (a), Davies has observed that, "for *convenience*, services falling within free movement and competition law are conventionally referred to as 'economic' services, while 'non-economic' services fall without". [30] The existence of this "convention" is undeniable, but is very problematical to understand the scope of the Treaty market rules. The problem is that in the Treaties, neither the free movement rules nor the competition rules contain the word "economic", as their scope is instead delineated by the notions of goods, service, capital, and undertaking. Indeed, the CJEU has established that an undertaking is any entity conducting an "economic activity", but the Court does not use the notion of "economic activity" (and not either the notion of "market") as an element in the definition of services or goods for the purpose of EU free movement and procurement rules. In fact, the Court seems to *avoid* the notion of "economic activity" to assess the applicability of the internal market rules to public services.

Thus, in evaluating the national legislators or administrators' freedom to intervene on general interest grounds in certain fields of activity, the "conventional question" is generally "whether it is an economic activity", although it seems clear that free movement rules can apply to activities which are non-economic in a Member State.

[29] Thus, healthcare and other social services are excluded from the scope of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (the "Services Directive") [2006] OJ L 376/36 , while all SGEIs – regardless of the sector at issue – are excluded from Article 16 in the Services Directive.

[30] Davies G., 2006, p. 16.

Consequently, this convention may feel convenient in some ways, but in a democratic perspective it is quite problematic because it blurs the legal political grounds for the applicability of EU principles of free movement to activities which are not – or cannot be – offered on the market in a Member State. In other words, this "convention" may conceal a mechanism which is welcome by the masters of the Treaties, but which reflects an *inconvenient* truth on the limits of Member States' policy prerogatives in relation to "market powers" in the field of social services. In a rule of law perspective, the use of this convention is also problematical, because if an "economic service" can be two things (one in the field of competition and another in the field of free movement), then the same goes for a "non-economic service" (which can be one thing in the field of competition and another thing in the field of free movement). Under such circumstances, the Member States may certainly wonder what sense they can make of the following EU rules:

- Article 2 of the SGI Protocol providing that "[t]he provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest"

- The assertions made in the new procurement directives that Member States "are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof", and the clarification (!) that "non-economic services of general interest should not fall within the scope of this Directive".

Thus, it appears that question (a) above ("what does "economic activity" mean in EU law") is profoundly related to the notion of SGEI in two ways. First, because the economic character of the activity may trigger a necessity to rely on the SGEI tasks attached to this activity in order to justify state intervention. Second, because depending on the relation of the word "economic" in SG(E)I to the notion of "economic activity", the answer to question (b) above ("what is the meaning of the concept of SGEI") may differ. In other words, clarifying what an "economic activity" is, may have an impact on the meaning that the concept of SGEI should have, and on the derogations from a strict application of the Treaty-based rules which SGEIs should be able to motivate. As a result, a clarification of the meaning of the EU notion of "economic activity" is simply crucial for Member States' wish to obtain a broad public service exception, allowing them to retain more powers in the organisation of public services, and more particularly of publicly financed social services. Their wish that SGEI obtains a broad understanding is confronted to the Commission's determination "to avoid opening a Pandora's Box that could threaten the application of the market freedoms".[31]

The persistence of this uncertainty, and of a scholarly debate, is made possible by the CJEU's subtle use of the notion of "economic activity", never spelling clearly which precise "generic" criteria make an activity "economic" (regardless of the type of activity

[31] Sauter W., 2008, p.1.

considered) and what relevance (if any) the economic character of an activity has for the applicability of the different Treaty market rules. The Court tends instead to focus on the "economic relevance" of the specific measures or transactions brought to its jurisdiction, in particular in the fields of free movement and procurement. By this approach, the Court has given itself a legal-technical space to expand the scope of the free movement, competition and procurement rules in accordance with the signals of political acceptance – or lack of acceptance – sent by the "masters of the Treaties" for letting EU market rules constrain public intervention in public services.[32] Likewise, the Court's tests in allowing exemptions from Treaty provisions and Treaty-based rules on free movement and procurement have so far been formulated in a manner that renders very difficult to discern how it understands the EU concept of SGEI, although it is difficult to deny that SGEI is a concept of EU law.

The casuistic character and the "subtlety" of the CJEU's approach are arguably related to the Court's awareness of the *political* implications of having expanded the scope of EU market law, and of spelling too clearly how the concept of SGEI may be understood. When deciding if and how the Treaty market rules apply to public services, in particular social services, the Court must clarify essential questions left unsolved by the Member States, and does probably not always find appropriate to say what it does. As a result, what the Court means by "economic activity" and how it understands the EU concept of SGEI is still difficult to put in intelligible words.

1.1.4 EU political debate on SGEIs

Acknowledging the existence of "worries about the future of [general interest services] accompanied by concerns over employment and economic and social cohesion", the Commission published in 1996 its first Communication on the European future of what it chose to call "services of general interest" (SGIs), and defined as "market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations".[33] This debate was punctuated by halv a dozen other Communications, whereby the Commission added to its conceptual arsenal the term of "non-economic services of general interest" (NESGIs). In this conceptual architecture, services of general interest (SGIs) seemed to constitute the sum of SGEIs and NESGIs.

During the consultation exercise for the Green Paper on SGIs, the actors of the social sector (local public authorities, service providers, representatives of the providers) expressed concerns about the lack of legal certainty as to whether social services were to be seen as economic or non-economic, which could imply the applicability of a different body of EU rules. In response, the Commission assured it its White Paper of 2004 that

[32] Such signals could be found in Treaty modifications, in the Commission's "public turn" in the field of competition, but also in EU legislation, for instance the procurement directives adopted on the basis of the White paper of 1985 (as an example of acceptance) – or the Services Directive (as an example of non acceptance).

[33] Commission, "Services of General Interest in Europe" (Communication) 96/C 281/03.

it would clarify the framework in which they operated, but could only come in 2006 with a shallow Communication on "Social Services of General Interest" (SSGI).[34] This Communication did not bring much of a legal clarification, but launched the neutral and non-legal notion concept of SSGIs, which has been and still is a political key in the process of Europeanization of social services, as it builds on the neutral and generic concept of SGIs that overall has been a useful vehicle to develop a soft law discourse on the controversial concept of the European Social Model.[35] Also, given the complexity of the case law and given the considerable lack of certainty on what makes an SSGI "economic" (SGEI) or non-economic (NESGI), the notion of SSGI has served as a powerful support of communication on the issue of how the Member States can shield social services in their welfare systems from the full impact of EU market law.

This succession of communications has allowed the Commission to orchestrate a debate underpinned by the "big questions", in particular the welfare state v smaller state, and the national state's relevance in a European social model that for reasons not developed here must arguably be market-based. Although this debate was embedded in the neutral project to "clarify EU rules applying to SGEIs", its political dimension has been evident at several occasions. Very simplified, the debate is related to the confrontation between two socio-economic "models" for public services: a more liberal-oriented model, and a more solidarity-based model. The political dimension of the debate on SGEIs became fully visible when some Member States exercised pressure to introduce through the Treaty of Amsterdam, "a general, rather than legally specific" Treaty objective for SGEIs, under Article 16 EC.[36] It was reaffirmed during the legislative process for the adoption of the Services Directive, when SGEIs were partly left out and NESGIs wholly left out from its scope, a change of direction from the Commission's proposal which according to Neergaard was initiated by the Member States but supported at an early stage by the European Parliament.[37]

It is important to underline that the Commission Communications had also the aim to clarify the CJEU's case law, and could have been expected to lead to more pedagogic systematisation. This is not really the case, as the three consecutive "SGEI Guides" published by the Commission since 2007 have instead taken the form of "Frequently

[34] Bauby P., 2013, p. 26.

[35] This is the convincing explanation of Szyszczak who has shown how, in spite of the fact that policy competence has mostly not been conferred onto the EU in the field of social services, the Commission has since the 2000s, and very rapidly since the 2006 Communication on Social Services of General Interest in the European Union (COM 2006) 177 final), developed a new governance competence and capacity in the form of soft law and soft governance processes in that field of activities. Launching the term "social services of general interest" has been a very important step. See Szyszczak E., 2012, p. 317-345.

[36] Bauby P., 2011, p. 27.

[37] See Neergaard U., 2008, p. 97-98, where the author gives a detailed account of the approach to SGEIs in the context of the Services Directive, and explains the carving out of SGEIs and NESGIs by "tensions between what /…/could be referred to as a more liberal point of view, situated mainly at the Commission, against a more protectionist point of view, situated at some of the Member States" which in her view have existed ever since the birth of the Community".

asked questions".[38] Regarding the criteria determining that an activity is covered by EU free movement and/or EU competition rules, these guides are as casuistic as the case law they report on. The "convenient" convention is upheld that only "economic activities" can be covered by the Treaties' market rules.[39]

1.1.5 The concept of SGEI constitutionalised through the Lisbon Treaty

The EU debate on SGEIs had begun maturing when the draft Constitutional Treaty was rejected by French and Dutch voters in 2005. The political re-negotiation which followed led to the adoption of several new provisions on SGEIs through the Lisbon Treaty:

- Article 14 TFEU modifying Article 16 EC, imposing on the Union and the Member States to take care that SGEIs operate under principles and rules which enable them to achieve their missions, and introducing a legal ground for the adoption of such principles and rules
- Protocol Nr 26 on Services of general interest (hereinafter the "SGI Protocol"), adopted under the pressure of the Netherlands and France.[40]
- Article 36 of the EU Charter on Fundamental Rights (EUCFR) which became binding on the Union through Article 6(1) TEU

It seems clear that the introduction of these provisions was wished, in Neergaard's words, "almost desperately" by some Member States, and only consented to by others,

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[38] The first Guide issued in 2007 was replaced by the Commission "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest "SEC(2010) 1545 final (hereinafter the "2010 SGEI Guide"), itself replaced in 2013 by the Commission "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest SWD(2013) 53 final/2 (hereinafter the "2013 SGEI Guide").

[39] The Commission issued two FAQs documents in 2007, see Commission, "Frequently asked questions in relation with Commission Decision of 28 November on the application of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, and of the Community Framework for State aid in the form of public service compensation" COM (2007) 1516; and Commission, "Frequently asked questions concerning the application of public procurement rules to social services of general interest" COM (2007) 1514. The second guide (hereinafter the "2010 SGEI Guide) was issued in 2010, see Commission, "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest" SEC(2010) 1545 final. The third guide (hereinafter "2013 SGEI Guide) was issued in 2013, see Commission, "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest" SWD(2013) 53 final/2. In the "2013 SGEI Guide" it is explained that "[g]enerally speaking, only services constituting 'economic activities' are covered by the Treaty rules on the internal market (Articles 49 and 56 TFEU) and the Services Directive", see point 223. Also, wishing to clarify the concepts of undertaking and economic activity, the Commission recalled in its 2011 Communication that "[b]ased on Article 107(1) of the Treaty, the State aid rules generally only apply where the recipient is an 'undertaking'" and that "[t]he only relevant criterion in this respect is whether it carries out an economic activity", see point 8 and point 9 paragraph 2 of the 2013 SGEI Guide.

[40] On that path, see Sauter W., 2014, p. 68.

who perhaps saw possibilities to relativize the effect of these new provisions on the market integration of public services, including social services.

A number of scholars have argued that the new provisions did not imply anything new.[41] One of them is Vedder who considered that, on such premises, and in the light of what he called "political fireworks", the question was "when and to what extent legal rules and judicial bodies become captured by politics".[42] However, the evolutive character of the Treaties is proof of the legitimacy of politics at the very heart of EU law, and this reality must constantly be faced by the CJEU, entrusted with the exclusive prerogative to interpret the Treaties. In the nuclear core of the Treaty negotiation, we find some Member States' concern that access to public services based on solidarity models constructed at national level may not be rendered unmanageable and thus "deconstructed" by the integration of the markets for public services – and social services. The legitimacy of this concern is highlighted by Dougan's observation, with reference to the *Commission v Austria* ruling which concerned Union citizens' equal access to higher education in Austrian establishments, that once Community welfare policies that are "largely the resulting of elite choices" are superimposed on the national solidarity systems, they are "almost impossible to remove by any Member State unilaterally".[43]

Seen in that context, the introduction of a new legal ground for SGEIs in Article 14 TFEU can certainly not have been interpreted by the CJEU as "business as usual", but rather as "the promise of a shift in focus" of EU law. Why this "promise" had to be made, what it implies for the understanding of the EU concept of SGEI, and how EU institutions, in particular the Commission, integrate the signals sent by the CJEU on its understanding of the evolutive Treaty framework related to public services, are the questions essentially addressed by the present study. In this enterprise, a challenge is to analyse a legal transformation that takes place here and now, and is far from ended. A premise is however that the CJEU has many reasons not to address Article 14 TFEU as "nothing new". The main reason is perhaps that of all EU institutions, it should be the most aware that asking to introduce in the Treaties a welfare concept, apt to carry the "idea of the State" in the European construction, was certainly not welcome by some States *member*s of the Union, but not an illegitimate request from other States that are also *Members* of this Union. The CJEU knows that its interpretation of the Treaty rules has essentially contributed to place public services in a legal paradigm which is miles away from what Member States and their peoples could imagine in 1957, or even in 1986 when the SEA was adopted.

If the CJEU takes responsibility for the political cohesion of the Union, it should arguably be expected to read the compromise enshrined in the Treaties, and in

[41] Jääskinen wrote: "[i]t is true that these changes in the treaty texts do not suggest in any way a revolution or even a significant modification to the approach to SGEIs under European law. See Jääskinen N., 2011, p. 599. On the same path, Vedder's view was that, "from a strictly legal perspective nothing has changed", and like Article 16 EC "[t]he Protocol on Services of General Interest attached to the Treaty of Lisbon has a similar political character without actually changing the legal framework". See Vedder H., 2008, p. 25.

[42] See Vedder H., 2008, p. 25.

[43] Case C-147/03 *Commission v Austria* [2005] ECR I-5969.

Weatherill's words, "breathe life" in the new provisions on SGEIs.[44] In such an approach, the CJEU must in relevant cases be expected to give – be it implicitly – its understanding on the normative meaning of Article 14 TFEU, which may contribute to clarify the shape of the EU concept of SGEI. In relevant cases, the Court may also have to clarify the role of Article 106(2) TFEU in the post-Lisbon configuration. Indeed, while it may evidently follow from Article 14 TFEU that SGEIs have gone "from derogation to obligation", it may be questioned whether the principle of proportionality, present in Article 106(2) TFEU but not in Article 14 TFEU, has a role to play in liberalised public services.[45] Finally, with the emergence of SGEI as an important constitutional EU concept, the question of the definition of non-economic services of general interest (NESGIs) will probably sooner or later have to be clarified by the Court.[46] The clearer and the more explicit the CJEU delivers its interpretation of the Treaty SGEI provisions, the more it will constrain the EU legislator in its approach of public services' harmonisation, which is now "en marche" in the field of social services.

1.1.6 Quality framework for SGIs: emergence of EU's governance of social services in EU procurement and state aid rules

Although SGEIs are considered as being so "important" that they deserve a specific legislative basis, the Commission considers that legislation on the basis of Article 14 TFEU is not an immediate priority, and has instead embraced what it characterizes as a sector approach, framed in the 2011 Communication "A Quality Framework for Services of General Interest".[47] In substance, the Quality Framework builds mainly on the reform of the state aid rules for SGEIs (a new package adopted in 2011/2012) and on new procurement directives adopted in 2014 and including a Directive on concessions.[48] Importantly, the document refers to the voluntary "European Quality Framework for social services".[49] Also, the Commission connects the Quality Framework to its "Social Business Initiative", adopted under the Europe 2020 strategy, and supporting the development of "new and socially innovative ways of doing business

[44] Weatherill S., 1995, p. 185.

[45] Ross M., 2000.

[46] Van de Gronden, 2013b, p. 283.

[47] Commission, "A Quality Framework for Services of General Interest in Europe" (Communication) COM (2011) 900 final, hereinafter called "the SGI Quality Framework".

[48] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (hereinafter called "the 2014 Concessions Directive") [2014] OJ L94/1, and Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (hereinafter called "the 2014 Public Sector Directive") [2014] OJ L94/65 and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243 (hereinafter called "the 2014 Utilities Directive").

[49] Social Protection Committee, "A Voluntary European Quality Framework for Social Services" SPC/2010/10/8 final.

and providing services".[50] The Quality Framework addresses SGIs in general but it has a particular focus on social services of general interest (SSGIs), thereby addressing both economic and non-economic SSGIs. In sum, this is a first policy for public services in Europe, presented as helpful in a time of financial and economic crisis, in particular because in the Commission's view, budget constraints in the Member States "make it necessary to ensure that high-quality services are provided as efficiently and cost-effectively as possible".[51]

These initiatives are a clear signal that the Commission has launched a new phase in the Europeanisation of public services, but it is unclear how the path taken is related to the constitutional framework on SGEIs, in particular regarding social services. Thus, in the Decision on state aid in the form of public service to undertakings entrusted with SGEIs, adopted by the Commission in 2011, Member States are relieved from the duty to notify aid not only in the field of social housing and hospitals, but also of a number of other social services, on the argument that these services are local and that their public financing does not affect trade.[52] As a consequence, the *ex-ante* compliance control is decentralized to the Member States. In practice, Member States funding social services should perhaps not feel strong pressure to clearly and transparently characterize them as SGEIs, even if the exemption from notification is precisely the SGEI-character of the tasks funded. More generally, and surprisingly, the Commission has introduced the notion of "genuine SGEIs" in the latest package on state aid rules applying to SGEIs, adopted in 2011.

Regarding the new procurement directives, a novelty is that above certain thresholds, social services contracts and social services concessions must be opened to foreign competition, and therefore are subject to a prior notice obligation. At the same time, Member States are required to adopt procurement rules allowing their public authorities to respect the "special needs of social services". Although these "special needs" remind of Article 1 in the SGI Protocol, and although Article 14 TFEU is mentioned in the Directives' recitals, the connection between the Article 14 and the Directives is unclear. More generally, it is underlined that the Directives do not apply to non-economic services of general interest, but this notion is left undefined. Importantly, the notion of procurement is defined and excludes systems of choice and voucher systems.

On this background, it appears that the EU legislator, and the Commission, wish to show that social services may indeed be covered by EU state aid rules, that their public funding may indeed be compatible with the Treaties on the basis of their SGEI character, but clearly avoid to connect too explicitly their "particular treatment" in these frameworks to their SGEI character. Does this indicate that certain principles related to SGEIs are not welcome on board?

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[50] Ibid, p. 14. See Commission Communication "Social Business Initiative – Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation" COM (2011) 682 final of 25 October 2011, {SEC (2011) 1278 final}.

[51] Ibid, p. 2.

[52] Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, [2005] OJ L 312/67, hereinafter the "2005 SGEI Decision".

1.1.7 Free choice systems for social services in Sweden: showing the way?

In the decentralized model designed by the Commission for state aid control in the field of social services, including health care and housing, it must be expected that – under a certain conception of the rule of law – public authorities in the Member States can answer correctly the following questions:

- Is the activity pursued by the operator economic?
- Is the funding justified by "genuine SGEI tasks"?
- Are those tasks designed, funded and entrusted in a manner that excludes state aid?

It is however highly questionable whether it is "expectable" that Member States can answer these questions correctly, and in this respect, the case of Sweden is illustrative. As already evoked, a quiet revolution has taken place in that Member State, known for its generous welfare services, and often cited as a good example for their modernisation.[53] Underpinned by policies of decentralisation and of "consumer empowerment", welfare services have been considerably liberalised. Although still broadly regulated and largely financed by public resources, the supply of all welfare services, including school education, is nowadays open to private operators for-profit, for a good part in systems of choice. In this model, inspired by the concept of New Public Management (hereinafter NPM), local and regional authorities are essential actors, as they fund, commission and coordinate these systems.

In this phase of liberalisation, the focus of the Swedish autonomous competition rules is rather on competition neutrality – by which is meant that on the quasi-markets created by mixed systems of supply, the public operators should not receive selective advantages – than on undistorted competition between all operators. Thus, competition rules applying to public authorities acting as providers of services and goods have been introduced in sector laws and in the Swedish Competition Act.[54] However, the Swedish legislator appears reluctant to address on a broad cross-sector basis the issue of the

[53] Former President of the European Commission J-M. Barroso stated 21 November 2011: "Sweden has very much shown the lead. In Sweden we are clearly seeing the fruits of previous ambitious reforms, both in terms of fiscal and structural reforms." Statement by President Barroso ahead of the meeting with Swedish Prime Minister Fredrik Reinfeldt, Speech 11/781. See also economist Jean Tirole's views addressed to Members of the French Senate: "The French public services must be quality services. We are all very fond of it, but it must be rendered sustainable, and to that purpose reforms must be conducted. I will take the example of four countries, Germany, Sweden, Australia and Canada. /…/they have all maintained their social models, while conducting reforms, and downsizing the State. Sweden did it after the crisis of 1991, as Canada and Australia./…/all the reforms have been conducted by socialists, and the right has retained them when it returned to power." It is interesting to notice that Tirole's view of "who did what" in Sweden is somewhat mistaken, hopefully unintentionally. Own translation of the French version of the Minutes of the audition of Jean Tirole (winner of The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel for 2014) by the Commission of Economic Affairs at the French Senate, 19 November 2014, available at http://www.senat.fr/compte-rendu-commissions/20141117/afeco.html#toc10.

[54] These rules are autonomous from EU law, the first ones constituting a "competence restriction" rule introduced in a number of sectors to radically avoid the risk of municipal undertakings being conducted in "anti-competitive" ways, the second one – in the Swedish Competition Act - being a horizontal "balancing rule", commonly called the "conflict-solving rule" and aimed at securing competition neutrality between public and private undertakings in sectors within the competence of local and regional authorities.

applicability of EU market rules to social services under LRAs' competence and there are strikingly few explicit SGEI-characterizations of services in Swedish national law.

Where the question of the de facto existence of SGEIs in Swedish law or the possibility to define SGEI tasks has arisen, several arguments have been put forward in documents reflecting the views of the Swedish State or of the Swedish legislator. A first argument invoked is that *tax-financed services cannot be regarded as economic for the purpose of EU law* and therefore not covered by EU economic law.[55] However, since *Höfner*, it seems difficult to argue that services, social or not, are excluded from the scope of EU competition law on the sole ground that they are tax-financed.[56] As evoked at the beginning of this chapter, it must be reckoned that many private but also public operators of social services in Sweden may be regarded as covered by EU competition rules[57], and the legality of public intervention in those sectors may therefore require that they be justified by the services' SGEI-character.

A second argument invoked is that *there is no need for SGEI in sectors where the use of procurement excludes the occurrence of state aid*[58]. This argument relates to the criteria laid down by the CJEU in *Altmark* and which must be fulfilled to exclude over-compensation of public service obligations and illegal state aid in the meaning of Article 107(1) TFEU.[59] In Sweden, publicly funded social services of general interest are often externalized on the basis of the Swedish procurement rules implementing EU procurement rules[60], but increasingly also on the basis of the Swedish Act on Systems of Choice in the Public

[55] See Sweden's report to the European Commission on the application of Commission's decision of 28 December 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, C(2005) 2673, N2008/5126 p. 2. See also the report of the commission of inquiry on LRAs' competence "Kommunal kompetens i utveckling" SOU 2007:72, p. 113 and 116.

[56] Case C-41/90 *Höfner* [1991] ECR I-1979. In *Höfner*, the CJEU considered the tax-financed activities of the German Federal Office of Employment to be economic. This aspect of the *Höfner* ruling is underlined by Buendia Sierra, see Buendia Sierra J. L., 1999, p. 59.

[57] Van de Gronden holds that "the ECJ almost automatically regards health care providers as undertakings within the meaning of European competition law. In other words, these providers cannot escape from the competition rules." See van de Gronden J.W, 2009b, p. 10.

[58] This argument has been raised in the frame of the reform of national rules on rental housing, liberalized since 2011. The Commission of inquiry on municipal housing companies stressed that neither housing supply in general nor LRAs' responsibility for housing supply to any part ought to be characterized as SGEI, as local authorities willing to entrust tasks that are not economically profitable would apply the procurement rules. See the report of the ministry publication on municipal housing companies "Allmännyttiga kommunala bostadsaktiebolag - övervägande och förslag" Ds 2009:60, p. 90 ff.

[59] It was raised in general terms in the Swedish report on the application of the 2005 SGEI Decision. See the Swedish report to the European Commission on the application of Commission's decision of 28 December 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, C(2005) 2673, N2008/5126 p. 2.

[60] Thus LRAs must comply with national provisions imposing procurement procedures for so-called B-services and contracts under EU-threshold values which go beyond the directives it builds on.

Sector adopted in 2008 (Sw: *Lag (2008:962) om valfrihetssystem*, hereinafter "LOV")[61], in which there is no competition on price. As to the system of free choice of school education, it builds on authorizations delivered by state authorities to entities financed by local authorities. In such systems, it may be questioned whether the risks of over-compensation are excluded. If such over-compensation may have an effect on trade, the occurrence of state aid does not seem excluded and may have to be justified on the basis of the rules in the Almunia package on state aid to SGEI.

A third argument put forward in certain cases is that there are *no clear SGEI missions or tasks in the sector at issue*. Outside the area of social services, this argument was put forward in the sector of household waste management. Indeed, neither Swedish law nor EU law explicitly name SGEI in their respective regulation of this activity, but EU secondary law does impose public service tasks on waste and water management.[62] The reality of these public service tasks explains the *Commission v Germany* ruling and suggests that the CJEU is open to a broader understanding of the SGEI concept, connecting environmental obligations imposed on the Member States by *EU* law, to exemptions from EU procurement rules.

The argument that SGEIs are not needed has also been raised in the sector of housing. In the government bill which led to an extensive liberalizing of rental housing in 2011[63], it is stressed that neither housing supply in general nor LRAs' responsibility for housing supply to any part ought to be characterized as SGEIs[64], as local authorities willing to entrust tasks that are not economically profitable would apply the procurement rules, a view apparently not shared by the Swedish National Board of Housing, Building and Planning.[65] Several experts, inside and outside Sweden, contested the view of the

[61] At present, the Act on Systems of Choice is mandatory only for the procurement of primary healthcare and voluntary for the other services covered by the Act.

[62] EU secondary law on waste management is mostly based on Article 192 TFEU and has environmental protection (not market harmonization) as primary objective. The legislation adopted on this basis leaves to judicial interpretation crucial issues on the legal instruments which the Member States – and public authorities in the Member States in charge with the environmental protection at issue – may rely on to fulfill their obligations without illegally breaching against the Treaty imperatives of free movement and competition. Although the Commission has underlined that SGEIs exist in those areas, there is much controversy in Sweden as to whether local authorities may invoke environmental principles governing waste management as justifying exemptions from EU market rules.

[63] The reform process was pushed forward by two complaints filed to the Commission in 2002 and 2005 by the Swedish Property Federation, arguing that municipal housing companies were granted illegal state aid from the State respectively from their owning municipalities. The first complaint concerned a government bill proposing a temporary scheme of aid to restructuring of municipal housing companies and was filed 1 July 2002. The second complaint concerning aid to municipal housing companies was filed 30 May 2005. Both complaints have been filed under the number CP115/02. These object and arguments of these complaints will be presented at more length in chapter 6.

[64] See government bill on municipal housing companies, *Allmännyttiga kommunala bostadsaktiebolag och reformerade hyressättningsregler*, proposition 2009/10:185, p. 27.

[65] In a report commissioned by the Swedish Social Ministry, the Swedish National Board of Housing, Building and Planning has taken the view that it is necessary to strengthen local authorities' capacity to fulfil their missions, in particular on markets where demand is weak (which is the case in many parts of Sweden), or when LRAs try to achieve social and/or environmental objectives through housing measures. The Board proposes that LRAs' missions concerning housing supply be specified and that certain objectives may be invoked to entrust SGEI tasks

Commission of inquiry preparing this bill that the Swedish regulation in force at the time did not include SGEI missions, and that public intervention on the Swedish rental housing market through municipal housing companies therefore was incompatible with EU state aid rules.

A fourth argument, difficult to deny, is that the SGEI concept and rules are subject to legal uncertainty.[66] As a whole, these arguments shed an interesting light on the Commission's supposition that authorities in the Member States know what is an economic activity in EU law, know what the EU concept of SGEI means, and can correctly construct, supervise and report their funding of social services, an assumption underpinning the 2011 state aid package.

Another problem is that, as Swedish systems of choice do not include a competition on price, and as the performance of many different operators is difficult to specify and supervise, the risk of over-compensation is not excluded. One way to try excluding it can be to *under-compensate* provision, which is another expression of non-proportionality evidently capable to affect the quality of the services, but which does not seem clearly addressed by EU law. EU constitutional principles related to SGEI may be relevant at normative level, in particular the Union and the Member States' duty, according to Article 14 TFEU, to take care that SGEIs operate under principles and conditions, in particular economic and financial conditions, enabling them to achieve their missions, and the Union's duty to respect the right of access to SGEIs protected by Article 36 EUCFR. However, the scope and meaning of these principles are not yet clarified by the CJEU, which so far leaves a wide space of policy freedom to the EU legislator.

On this background, this study questions whether the legal acts adopted in the frame of the Quality Framework on SGIs under the motto of simplification and flexibility, provide reliable guidance on the two important questions "what is an economic activity" and "what is SGEI". It must be remembered that the Commission is both a legislative and a political actor in the EU, and makes no secret of its policy vision on services of general interest. In "Europe 2020", the Commission reconfirmed the need to develop new services, delivered both physically and on-line, that generate growth and create jobs, which can include innovative services of general interest".[67] In this vision, it seems that social services are seen as potential growth sectors, but the Commission is certainly aware that in the EU, this growth still depends on public financing, which can constitute a threat to the EU objective of undistorted competition.

To let the market for social services grow, two ways seem possible. The first option is to liberalize social services "bottom-down" through regulations based on Article 14

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to housing companies – municipal or not. See the report of the Swedish National Board of Housing, Building and Planning *Boverkets översyn av bostadsförsörjningslagen*, rapport 2012:12, p. 26.

[66] See the report of the commission of inquiry on municipal housing companies "EU, allmännyttan och hyrorna" SOU 2008:38, p. 36 and 419-421.

[67] Commission, "A Quality Framework for Services of General Interest in Europe" (Communication) COM (2011) 900 final, p. 2, referring to Commission, "Europe 2020: A Strategy for smart, sustainable and inclusive growth" (Communication) COM (2010) 2020).

TFEU. But as Sauter underlines, the Member States have so far been unable to agree on "what it is they want from SGEI" and thus the Commission has not been able to propose regulations on social services based on Article 14 TFEU. The second option – a slower but possibly surer way – is to allow markets to grow in the Member States. This may be the option favoured by the Commission as it explains (1) that the Commission has not opened any public discussion on a process of market integration of social services and (2) the ambiguity of the Quality Framework on SGIs.

Given the poor record of application of the first state aid package on SGEIs adopted by the Commission in 2005 (the "Monti package"), transferring the up-front *ex-ante* control of SGEI-compensation to the Member States may seem to give in practice much leeway to the Member States. Meanwhile, the new EU procurement directives introduce an obligation to publish *ex-ante* notice of contracts for social services over a certain threshold.[68] Thus, *some* competition is introduced for the market to grow. Given the ambiguity of the Commission' approach, what emerges from this background is that justifying the funding of tasks by explicitly relying on their SGEI-character may not only be perceived as problematic by Sweden, but also by the Commission itself.

1.2 Aims of study and research questions

On this background, this study has its point of departure in a view that the introduction of the new provisions on SGEIs in the Treaties cannot anymore be perceived as a superficial political "deal" without constitutional significance, but certainly not either as a triumph for Member States' sovereignty. Also, signs of reluctance to use the concept, observable in a Member State as Sweden engaged in the liberalisation of its SSGIs, but also in the Commission's decision to harmonise market rules applying to social services without relying on the new legal ground in Article 14 TFEU, motivate that the main research question addressed by this study is the following

> *Is it possible to understand SGEI as a constitutional EU concept relevant throughout the EU Treaties, and can a transparent and loyal enforcement of the Treaty principles attached to SGEIs be feared to restrict the Member States' discretion to liberalize social services and the expansion of a European market for social services?*

In a legal-political perspective, answering this research question aims at shedding light on how the introduction of new SGEI related provisions in the Treaties implies a constitutionalisation of the concept of SGEI, and contributes to transform Europe into a polity level in the governance of social services. In a legal-theoretical perspective, answering the main question aims at identifying the constitutional meaning of the concept of SGEI, and at shedding light on the complex relationship between the EU

[68] Regarding social services, the threshold is at present set at EUR 750 000 for public service contracts and at EUR 5 186 000 for service concession.

legislator's use of this concept and its open intention to integrate public services, in particular social services, in the dominating EU paradigm of the internal market.

In order to address the main research question, three sub-questions have been formulated:

1. Can the CJEU's case law on the definition and the relevance of the notion of "economic activity" explain the necessity of a constitutional public service concept in the post-Lisbon Treaties?
2. Can SGEI be regarded as an EU constitutional concept imposing public service principles in all fields of EU market law?
3. What place does the EU legislator give to the Treaty principles on SGEIs in EU legislation harmonizing the market for social services and how can it affect the liberalization of these services in the Member States?

The relations between the sub-questions and also, between each sub-question and the main research question are explained in the following

Sub-question 1: *Can the CJEU's case law on the definition and the relevance of the notion of "economic activity" explain the necessity of a constitutional public service concept in the post-Lisbon Treaties?*

Answering sub-question (1) has a double function in this study. At a legal political level, it can explain that it may have been *politically* necessary to transform the Treaties, by introducing horizontal provisions and a legal ground specifically devoted to public services. At a legal theoretical level, analysing the Court's approach of the notion of "economic activity" and of its relevance for the applicability of the Treaty market rules, paves the way for answering sub-question (2), centred on the meaning of the concept of SGEI in the new Treaty framework, as it will allow reasoning on how the word "economic" in SG(E)I may be understood. Indeed, the "convenient convention" to characterize as "economic" an activity, as soon as it is covered either by EU free movement rules or by EU competition rules, cannot be used in an in-depth analysis of the SGEI concept and its relevance in EU market law.

Besides, there is a debate among scholars as to whether the notion of "economic activity" is unitary, i.e. whether it has the same meaning in the different fields of EU market law. Therefore, this research question necessitates to go back to the CJEU's case law and analyse broadly and in detail the meaning of the notion of "economic activity" in EU law, and its relevance for the applicability of the Treaty rules securing the fundamental freedoms, the Treaty rules on competition and the Treaty principles applicable to public procurement. If the notion is unitary, the fact that a given measure taken by public authorities or providers is not necessarily caught by all the Treaty market rules may not simply follow from the fact that these rules have different primary addressees (the Member States under free movement rules, undertakings under competition rules), but perhaps also from the fact that the notions of services and goods in the field of free movement in fact go beyond the notion of "economic activity".

This part of the study may in particular allow answering the following questions:

- Which essential criteria determine the economic character of an activity in different fields of EU market law and do these criteria converge or diverge?
- Are there one or several sets of criteria, depending on the field of activity?
- What is, if any, the difference between on the one side the notions of "services" and "goods", which trigger the applicability of the Treaty rules on free movement, and on the other side the notion of "economic activity"?
- Is the scope of EU competition law really determined by the existence of an "undertaking"?

Sub-question 2: *Can SGEI be regarded as an EU constitutional concept imposing public service principles in all fields of EU market law?*

The uncertainty on the scope of Article 106(2) TFEU outside the field of competition law, in particular on its applicability to EU procurement rules, has been mentioned. However, there seems to be a horizontal dimension in the "balancing test" developed by the CJEU under Article 106(2) TFEU, which in particular allows consideration for financial and economic conditions allowing public service missions to be achieved. Sub-question (2) is aimed at analysing the relevance of the EU concept of SGEI for the "horizontal dimension" of this balancing test, by which is meant its use by the CJEU in the fields of EU free movement and procurement law. Indeed, whilst overriding reasons in the general interest may in principle not be economic, the Court has recognized the risk of seriously undermining the *financial* balance of a social security system to constitute an overriding reason in the general interest (hereafter ORGI) capable of justifying an obstacle to the freedom to provide services.[69] The aim is also to analyse the relevance of the EU concept of SGEI for the Court's exemptions from procurement rules related to in-house provision or public-public cooperation based explicitly or implicitly on the existence of "public service tasks".

The Court's relatively deferential approach of Member States' measures to define, regulate and organise public service tasks cannot simply be categorized as a move to achieve the *Union's* general social and environmental objectives. It seems more plausible that the introduction of the principle of subsidiarity and progressively of new provisions on SGEIs has forced the Court, in sectors where the Member States have retained competence, to give a higher dignity to their political and economic powers in the balance with market powers. Therefore, the aim of sub-question 2 is firstly to analyse how the Treaty provisions on SGEIs relate to the Union's "foundational principles" in the post-Lisbon Treaties, and second whether the CJEU seems to take the Treaty provisions on SGEIs "seriously". More to the point, answering this question may provide some answers to the following questions:

- Does the CJEU's case law give convincing signs that the first sentence of Article 14 TFEU – and the SGI Protocol interpreting it – is not declaratory but spells a principle which is normative for all EU market law?
- Does this lead to the emergence of a "horizontal" understanding of the EU concept of SGEI overarching Article 14 TFEU and Article 106(2) TFEU?

[69] Case C-372/04 *Watts*, para.103, *Kohll*, para.41; *Smits and Peerbooms*, para.72; and *Müller-Fauré and van Riet*, para. 73.

- Is the notion of "entrustment" part of the core elements of the EU concept of SGEI?
- Does the CJEU's case law indicate that the transparency and proportionality principles embedded in Article 106(2) TFEU still have autonomous relevance for the application of the Treaty competition rules, in particular for the application of the Treaty rules on state aid to SSGIs?

Sub-question 3: *What place does the EU legislator give to the Treaty principles on SGEIs in EU legislation harmonizing the market for social services and how can it affect the liberalization of these services in the Member States?*

In the Quality framework on SGIs, already evoked in section 1.1.6 above, the Commission explains that it found "a sector-based approach, where tailor-made solutions can be found to concrete and specific problems in different sectors" more appropriate.[70] Accordingly, the procurement and state aid rules applying to social services adopted in the frame of this policy should be understood as a sector-based response to the Union and the Member States' duty, under Article 14 TFEU, to take care that SGEIs operate under conditions, in particular economic and financial, enabling them to achieve their missions. It should also be understood as being without prejudice of the Treaty state aid rules applicable to SGEIs. With that point of departure, several features specifically related to social services are worth noting.

In the field of social services, Member States are required to ensure that contracting authorities *may* take into account the need to ensure quality, continuity, etc. In this approach, the EU legislator disregards from the fact that, in certain national legal systems, contracting authorities may not have a choice but an obligation, based on law, to ensure quality, continuity, etc., in other words a *compulsory public service task*. One is under the impression that the EU legislator does not wish to acknowledge the existence of *public authorities*' public service tasks. Also, social service contracts above a certain threshold are opened for competition by the publication of *ex-ante* notice, but although this type of requirement does not exclude state aid, control of proportionality of public service compensation required by the state aid rules is delegated to the Member States. Given the feeble pressure exercised so far on the Member States to enforce the state aid rules, the impression is that, at this stage of the development of markets for social services, the proportionality of public service compensation is not its priority concern, which is at odds with Article 106(2) TFEU (and with the Commission's statement that what must be achieved in times of budget constraints is "quality services/…/provided as efficiently and cost-effectively as possible").

More generally, one of the tailor-made solutions seems to consist in giving systems of choice particular leeway in the EU procurement directives, as they are regarded as authorization systems exempted from their scope, although authorization may involve that providers are remunerated by public resources on the basis of contracts with public

[70] Commission, "A Quality Framework for Services of General Interest in Europe" (Communication) COM (2011) 900, p. 5.

authorities. This may suggest that the EU legislator, including the Commission, wishes to preserve this model of supply from the rigors of EU procurement and state aid law, and indicate that it is regarded as appropriate from an EU policy perspective.

On that background, the aim of sub-question 3 is therefore to examine how these rules relate to the understanding of the EU concept of SGEI and the Treaty principles on SGEIs following from Article 14 TFEU and Article 106(2) TFEU, *as understood by the CJEU* (an understanding which sub-question 2 is meant to shed light on). More to the point, sub-question 3 should in particular allow to answer the following questions:

- Are there signs that the EU legislator, including the Commission, avoids forcing the Member States to formulate clearly and precisely the SGEIs existing in their legal systems?
- If EU rules on SGEIs had not been tailor-made, would social services in systems of choice have been able to develop as they have done so far in Sweden?
- Does the tailor-made sector-based approach in the field of social services give some indication on the European Social Model favoured by the Commission, probably with some support from the governments of the Member States?
- Does the Commission's approach of the notion of "economic activity" fit with the answers found to sub-question 1?

Anwering these questions should allow to draw some conclusions on the sybilline theme of "who is afraid of SGEIs", which is related to whether the transparent and precise definition of SGEI missions in national legislation can affect the liberalisation of social services in the Member States and the development of trade in that sector.

1.3 Scope

The present study has its main focus on the EU notion of economic activity, the EU concept of SGEI, and on Swedish national law applying to social services under local and regional authorities. The CJEU's case law is taken into account until the end of December 2014.

Regarding the notion of economic activity, the three main fields of EU primary market law are addressed, i.e. the Treaty rules on free movement (with a particular emphasis on the notion of service), on competition in a wide meaning – including state aid – and the Treaty-based rules on procurement. Individual rights to bring social benefits from the state of origin to another, i.e. union citizenship and free movement of workers, are excluded from direct focus. Importantly, secondary EU law is left outside the scope of part II, with the important exception of chapter 5 on procurement. This involves that in particular tax law of relevance for the notion of economic activity, in particular the notions of "supply of goods" and "supply of services" in the VAT Directive, is not

included in this study.[71] It seems clear that the economic character of social services can be interesting to study in the frame of international commercial law. Indeed, Swedish companies providing education have a discreet foot in England and begin showing interest in establishing outside Europe.[72] However, international trade agreements which may be relevant for studying the notions of "economic activity" and "non-economic activity" in the field of public services are also outside the frame of this study.

Certain elements of EU secondary law related to SGEI are important for this study and therefore considered. In the 2011 state aid package for SGEIs, a key element is that many more social services are exempted from the duty to notify aid measures to the Commission, which implies that many measures, statutory or administrative, cannot be claimed to be illegal on the mere argument that they have been implemented without being first subject to a positive decision (a decision not to object against the aid) from the Commission. Also, the process of revision of the EU procurement directives ended up in January-February 2014. Although the Member States will have until March 2016 to implement them in their national systems, certain elements of the new directives are taken into consideration in this study, because they are deeply related to the Commission's policy on state aid in the field of social services and are likely to soon affect the Member States' freedom to organize the supply of social services.

In the study of the notion of SGEI (in part III), the focus is also on EU primary law and on the CJEU's case law related to this notion. Horizontal legislation covering SGEIs, such as the 2011 state aid package and the Services Directive, are thus evoked where relevant but their effects on social services not in direct focus. Sector legislation related to SGEIs is outside the frame, in particular because it hardly exists in the field of social services.

Lastly, regarding the relationship between the Quality Framework and the Treaty principles on SGEIs, studied in part IV, together with the Swedish case, it is important to mention that Article 36 EUCFR is not particularly in focus. The purpose of the "Swedish case" studied in part IV being to illustrate the particular treatment of systems of choice in the frame of the Quality Framework on SGIs, and a large majority of social services being decentralized in Sweden, this part concentrates only on Swedish public law and competition law applicable to social services within local and regional authorities' competence, and takes a closer look at two specific services, elderly care and school education.

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[71] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347/1.

[72] The Learning Schools Trust, a non-profit organisation, operates several academies in England, sponsored by the Swedish company Kunskapsskolan. On the interest for investment in third-country, see Erik Esbjörnsson, "Afrikas medelklass öppnar för ny skolmarknad", *Dagens Nyheter* (Stockholm, 17 January 2013). Another sign of Sweden's interest for the development of trade with welfare services is the report of the commission of inquiry on the development of trade for welfare services, "Tjänster utan gränser? Internationalisering av offentliga sektorns tjänster", Bilaga 5 till långtidsutredningen 2008, SOU 2007:95.

1.4 Normative ground

Let us first acknowledge a normative ground of this study.

By expanding the scope of EU law, the CJEU has largely contributed to accelerate the encounter of national legal cultures anchored in the paradigm of welfare solidarity which has dominated the second half of the 20th century and "the culture of 'the market'".[73] EU's integration through law implies that the process of integration takes place primarily in the legal language of EU law principles and rules, which for elected representatives of the peoples of the Union are difficult to apprehend and introduce in democratic debates. This is particularly the case when the relevant EU concepts divert from the concepts of national law, and even more so when these concepts are unclear and uncertain. At a moment when the Europeanisation of social services is clearly engaged, certain concepts of EU law, in particular the notions of "service", "undertaking" or "economic activity", should be clear enough to ease a democratic conversation between EU institutions and the Member States.

It is often said that these concepts, in particular the concept of "undertaking", are interpreted *functionally* by the CJEU. It is however clear that, under the apparent neutrality of the term "functional", the Court's interpretation of these terms, motivated by a teleology of market integration, is of no less *legal-political* importance for the future of public services in Europe than the concept of SGEI. Therefore, if the CJEU understands the concepts of "service", "undertaking" and "economic activity" clearly, it should explain them readily, unless *political* reasons, for instance a certain mistrust of open democratic debates, hold it from doing so.[74] A normative ground of this study is that the "particular cultural fact" of the conceptual discrepancy between EU law and national laws is detrimental to democracy and may not be entertained by EU institutions without raising serious legitimacy issues. It is submitted that the CJEU's crucial role in the European integration implies that it has a responsibility for European democracy, and that its legitimacy gains in exposing as clearly, simply and pedagogically as possible the settled meaning it gives to Treaty concepts.

In the frame of a conference at the College of Europe, where the Commission presented the reform proposal of its state aid rules applying to SGEIs, Merola expressed the view that, in spite of "insistent requests" during the consultation, the Commission should not overestimate the usefulness of clarifying the notion of "economic activity", because clarifying the distinction between an economic and non-economic "would amount to a

[73] In Weiler's view, the completion of the internal market embraced "a highly politicized choice of ethos, ideology and political culture: the culture of "the market"", see Weiler J. H. H., 1991, p. 2478. It must be said here that this cultural fact has very probably, be it unconsciously, importance in this study, as "[j]ust as without the investigator's conviction regarding the significance of particular facts, every attempt to analyse concrete reality is absolutely meaningless, so the direction of his personal belief, the reflection of values in the prism of his mind, gives direction to his work." Weber M., 1949, p. 82.

[74] Nicolas Boileau-Despréaux (1636 – 1711), known as Boileau, was a French poet and critic, who wrote "an idea well conceived presents itself clearly, and words to express it come readily" (Fr: "ce qui se conçoit bien s'énonce clairement").

mere repetition/interpretation of already known notions in the light of the Commission's practice and without the certitude that the EU Courts would accept the Commission's interpretations". He also held that "this distinction, irrespective of its degree of elaboration, is unsuitable to resolve the problems arising from the application of a uniform regulation to the much diversified reality of public services".[75] If understood correctly, Merola's concern was that, in clarifying an unclear case-law, the Commission would over-simplify the criteria developed by the Court, and probably restrict the scope of what may be "non-economic".[76] His reasoning sheds light on how the CJEU's gradual and subtle approach of certain key concepts creates an uncertainty which some fear that the Commission may use to push forward its policy goals, when pressed to "clarify" the meaning of a concept such as "economic activity". It is particularly interesting to see that Merola reckons with the possibility that "the Court would not accept the Commission's interpretation". This is a very convincing – although perhaps unintentional – demonstration that the Court's interpretation of that concept could follow a different *political* path.

The CJEU's unwillingness to delineate more explicitly and precisely the inevitably *legal-political* notions such as "service", and "economic activity", may certainly depend on the fact that the CJEU, as argued by Neergaard and Nielsen, primarily follows a "consensus model" rather than a "rights models".[77] These authors observe that, while the Court has adopted a less hierarchical and more interactive approach to the relationship between elements of the EU legal order originating from the EU level and elements originating from the national level, the Court still uses, as in the early "classic cases", the teleological method to justify its interpretation. They also find that the "integration" element may still be seen as the CJEU's "guiding star", although at a more implicit level than before. To be sure, the "not so Dworkinian CJEU" is also aware that its understanding of the EU concept of SGEI must find political acceptance to the left and to the right to be accepted as valid law in the Member States. This understanding must be coherent with the Treaty provisions on SGEIs, but it may have to be in "subtle coherence" with those principles.

Thus, even if the CJEU has a clear understanding of the meaning of the concepts of "economic activity" and of SGEI, the Court is not open on what it exactly is. In line with Lasser's observation, the Court's reasoning on those notions display a magisterial and deductive fashion which "den[ies] admission to the finer points of their interpretive and normative decisions"[78]. To identify the coherence of the Court's case law on the relevance and interpretation of the notion of "economic activity" for the applicability of the Treaty rules on free movement and on competition, one has arguably to distinguish

[75] Merola M., 2011, points 62-63.

[76] Ibid, point 65.

[77] Their view is based on Groussot's distinction between a rights and a consensus model, see Groussot X., 2005, p. 186ff. Neergaard and Nielsen summarize this distinction as follows: "[A] judge following a rights model is inspired by Dworkin's theory of law and focuses on securing individual's rights in accordance with justice and fairness. A judge following a consensus model focuses on delivering judgments that can be expected to be accepted by the community he/she functions in as representing its values."

[78] Lasser M., de S. –O. –L'E, 2004, p. 319.

between what Weiler calls "the surface language" and the "deep structure" of its decisions.[79] The problem is that, even if convincing interpretation of the "deep structure" of the CJEU's understanding of certain key notions is provided by academics, the rules of the game imply that no one will really be sure unless the Court confirms it itself. And thus, the CJEU's power to influence the political elaboration of the European Union through the very complexity of its reasoning is not infinite, but it is very large.

It is on this background that this study's considerable – hopefully not too irritant – effort to analyse and interpret the CJEU's case law relative to the notion of "economic activity" in relation to the Treaty notions of "service" and "undertaking" should primarily be understood. It is driven by an obstinate hope that legal words used to integrate the Union must "make sense", as a condition for a democratic debate on the future of Europe. Habermas, warning that "postponing democracy is a dangerous move", says it best:

> [C]onceptions of the European Union and ideas of its future development have remained diffuse among the general population. Informed opinions and articulated positions are for the most part the monopoly of professional politicians, economic elites, and scholars with relevant interests; not even public intellectuals who generally participate in debates on burning issues have made this issue their own.[80]

1.5 Theory and Method

Having clarified this normative ground, it must also be made clear that asserting how the CJEU understands the notion of "economic activity" is not an aim *per se* of this study. Instead, asking which explicit and implicit use of this notion the Court has made of this notion to delineate the scope of the Treaty market rules is meant to shed light on the rationale of its relatively lenient approach in the application of these rules in the field of public services, even in fields where some academics did not expect it to. The relation between this lenient approach and the Treaty rules on SGEIs is in turn ambiguous, which may seem to serve democracy by giving much leeway to EU institutions in arbitrating "what they want from SGEIs".

However, it is quite unsure whether this leeway will be used to engage democratic processes on the integration of public services, in particular to discuss which role solidarity should play in this integration. Paradoxically, the Court's nuanced approach

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[79] Evoking *Stauder* (Case C-29/79 *Erich Stauder v. City of Ulm - Sozialamt.* 1969 ECR 419), Weiler writes: "The "surface language" of the Court in *Stauder* and its progeny is the language of human rights. The "deep structure" is all about supremacy." If understood rightly, he meant that the CJEU held a "surface language" emphasizing a concern – the language of human rights – while the "deep structure" was about another concern – the doctrine of supremacy of EU law.

[80] See Habermas J., 2013.

can create a conceptual indecision allowing the EU institutions to postpone democracy. In other words, the main argument of this study is that EU institutions, in particular the Member States' governments in the Council, will not be forced to debate democratically on what they want from SGEIs in the process of Europeanisation of social services, unless it becomes clear what *market powers* the (E) word in the EU concept of SGEI stands for. To help clarifying this argument, which is central in the present study, Hirschmann's economic theory on "exit, voice and loyalty" is brought in.

The particular focus of Hirschmann's economic theory is on *repairable lapses* of economic actors, which he held that economists had neglected because they typically assumed that a firm that falls behind does so "*for a good reason*", and also because "[i]n the traditional model of the competitive economy, recovery from any lapse is not really essential. As one firm loses out in the struggle, its market share is taken up and its factors are hired by others..." and so "the economist can afford to watch lapses of any one of *his* patients... with far greater equanimity than either the moralist who is convinced of the intrinsic worth of every one of his patients (individuals) or the political scientist whose patient (the state) is unique and irreplaceable." Observing that firms and organizations are "permanently and randomly subject to decline and decay, that is, to a gradual loss of rationality, efficiency", Hirschman identifies two "countervailing forces" that can reverse such decline: "exit", which refers to the fact that the customers of a firm (or members of an organization) leave and go to a competing firm or organization, and "voice", which refers to the expression of complain or protest.

However, when "loyalty" is present, exit loses its character of rational behaviour and becomes desertion and treason. By raising the price of exit, loyalty to an organization can neutralize the tendency of certain members to exit, but too much loyalty stifles voice because "the effectiveness of the voice mechanism is strengthened by the possibility of exit". According to Hirschmann, an organization strongly promoting loyalty can deprive itself from both exit and voice as "recuperation mechanisms" and decline as

> "[Loyalty] promoting institutions and devices are not only uninterested in stimulating voice at the expense of exit: indeed they are often meant to *repress* voice alongside exit. While feedback through exit or voice is in the long-run interest of organization managers, their short run interest is to entrench themselves and to enhance their freedom to act as they wish, unmolested as far as possible by either desertions *or* complaints of members."

Hirschmann's powerful analytical tool seems able to give good support in structuring an analysis of the transformation of the legal framework for social services taking place here and now in Europe. It is used, in a non-expert but hopefully convincing manner, to articulate the study of the three research sub-questions, which are therefore addressed in three parts, parts II for the first sub-question, part III for the second sub-question and part IV for the third sub-question. In this manner, the *legal* answers proposed to each sub-question constitute an element in the analysis of the *political* process of exit, voice and loyalty which is argued to take place through EU law at the moment.

As the three parts, and the chapters they include, address different problems and legal fields, it has felt appropriate not to write a classical "method section" in this introduction chapter, but instead to give an account of the approach and the method chosen at the beginning of each part and, when relevant, with some more precision also at the beginning of each chapter. Nevertheless, some general elements related to the theoretical anchorage of the study should be signalled here.

First, while this study is fundamentally based on the legal method, the approach in parts II and III may perhaps also be characterised as "constructivist", by which is meant the following. The stronger the CJEU lets EU fundamental freedoms exercise pressure on public service systems to be open for competition, the stronger the pressure to give to the EU concept of SGEI a broad interpretation should expected to be, especially from Member States desiring to retain their powers of economic policy in the field of social services. The post-Lisbon provisions on SGEIs are open for interpretation, but their constitutional and institutional relevance, in other words their relation to foundational principles of the Treaties, seems today obvious and exercises pressure on EU institutions to respect each Member State's powers in fields where it has retained competence.

The constitutional and institutional pressure embedded in the SGEI provisions constrains the executive and legislative EU institutions, but it constrains of course also the CJEU. The CJEU's response to this constrain must be expected to be subtle, one important reason being that its contribution to market integration is at stake. Hence, to evaluate how broad the CJEU may be forced to understand the EU concept of SGEI, the meaning of the (E) word (which stands for market powers secured by EU law) has to be assessed. Even if only implicit, the Court's interpretation of the concept of SGEI is bound to reflect the balance it makes between on the one side market powers embedded in the Treaty market rules and on the other side the foundational principles embedded in the EU concept of SGEI. To understand how the Court strikes this balance requires that the relationship between the Treaty provisions on SGEIs and EU foundational principles is considered "per se". This is where the constructivist proposition takes place (in chapter 7), opening for a certain manner of reading of the Court's case law as not only explicitly but also implicitly related to the concept of SGEI (chapter 8), which in turn allows to put forward a proposition on the essential elements of the concept of SGEI, as implicit in the CJEU's case law.

Second, it must be mentioned here that the case of free choice systems in Sweden was initially meant to illustrate the difficulties which EU procurement and state aid rules on the public funding of SGEIs could involve for this model of supply, which is promoted in Sweden since 2008 in the field of social services. This difficulty could explain Sweden's avoidance of the SGEI concept (and thus a "fear of SGEI"). Meanwhile, when the Commission adopted the 2011 package on state aid rules applying to SGEIs and launched its proposal for new procurement directives, it was clear that the new legislative packages tended to accommodate free choice systems, such as those introduced in Sweden. The Swedish case became pertinent in another, perhaps even more interesting manner, as illustrating how EU procurement and state aid rules applicable to SGEIs would probably have been fatal for systems of choice in the frame of Swedish law, had

it not been for the particular regime which these systems enjoy in the recently adopted (and regarding public procurement, not yet implemented) EU legislation. This suggests that the EU legislator, in particular the Commission, is favourable to the development of such systems, and for *that* reason may have no "Union interest" in actively forcing the Member States to explicitly define SGEIs in the field of social services (and thus an EU legislator's "fear of SGEIs").

Third, in spite of the central interest of this research on a process of transformation of EU law in the field of public services, and in particular concerning social services, the research questions have their focus on finding what is valid EU law and Swedish national law, and to that purpose two legal methods, the EU legal method and the Scandinavian legal method are used. This implies that the legal sources and principles of interpretation traditionally admitted in the EU legal method respectively the Swedish (Scandinavian) legal method are used in the different parts of the study. These methods present some important differences. In the Scandinavian legal method, in particular under the influence of the school of Scandinavian Legal Realism, the traditional hierarchy of valid legal sources includes legislative preparatory works, just after legal text, and before precedent, doctrine and custom. Preparatory works play an important role in guiding legal practice to determine the meaning of legal text that may be too general or vague in terms.[81] This particular role of preparatory works in the Scandinavian doctrine of legal sources has been a challenge for the EU legal method.[82] Nevertheless, although she notes that preparatory works play today a lesser role both in fields where Swedish law implements EU law and in other fields, Reichel underlines that they are still relied on to "fill out" statutory provisions.[83]

Conversely, the EU legal method is also a challenge in Nordic countries governed by EU law. Thus, Nielsen notes that the growing role of fundamental rights, case law from supranational courts and soft law brought about by EU membership, has constituted a big change in the Nordic doctrine of the sources of law, which has been characterized by much less emphasis on the constitutional dimension, fundamental rights and general principles of law.[84] The CJEU's use of a teleological interpretative method and of general principles of EU law, constitutes also a challenge in the perspective of the Scandinavian legal method.[85] In particular, Hettne evokes the importance of the Court's elaboration of an "administrative law dimension of free movement", based on principles which in the field of healthcare services for instance imply the imposition of requirements on

[81] According to Sandgren, this normative hierarchy corresponds to what the Swedish legal doctrine (in particular Aleksander Peczenik and Stig Strömholm) regards as valid sources of law in Sweden. In his view, there may be other perceptions in the Swedish legal practice of what constitutes traditional sources of law, see Sandgren C., 2009, *Vad är rättsvetenskap?* Jure, p. 120.

[82] To that purpose, see Nielsen on two infringement cases directly related to the importance given in Nordic law to preparatory works in connection with the implementation of EU directives. Nielsen R., 2012, referring to Case 143/83 *Commission v Denmark* [1985] ECR 427 and Case C-478/99 *Commission v Sweden* [2002] ECR I-4147.

[83] According to Reichel, this is due to the Europeanization of Swedish law, see Reichel. J., 2011, p. 252.

[84] Nielsen R., 2010, p. 238.

[85] Hettne J., 2008, p. 57. Nowadays, EU legislation, in particular directives, generally include a preamble informing on their aims.

national licensing systems. This study illustrates the necessity to superpose the legal methods in analysing the legal frame governing social services covered by EU market law, as both the Swedish legal method and the EU legal method have to be used in analysing the administrative principles and rules applying to the Swedish systems of choice studied.

The EU legal sources examined in this study are

- Primary EU law, the EU Treaties, the Protocols attached to the Treaties and the EU Charter of Fundamental Rights (EUCFR)
- The general principles of EU law
- EU secondary legislation
- The CJEU's case law, although the latter is not universally acknowledged as a formal source of law, which may seem surprising since some of the most important general principles of EU law have been introduced in EU law by the Court.[86] Thus, Neergaard and Nielsen hold that the case law of the CJEU is valid EU law only inasmuch as the Court's judicial method is an acceptable legal method, as "[s]een from the perspective of legal positivism, nothing is law just because the CJEU says so/…./The highest courts in the Member States only accept the case law of the CJEU as valid as long as it applies an *acceptable* legal method (judicial method) (emphasis added)".[87] In this study the CJEU's case law is in principle addressed as a source of law, although a difficulty is certainly that the Court's reasoning can be particularly elliptic even in cases which are of particular legal-political importance, for instance *Smits and Peerbooms*.[88] This calls for caution, which hopefully is sufficient in the analyses proposed.

Both doctrinal writings and Opinions of Advocate Generals are used, not as sources of law, but of important legal observations and arguments.[89] EU soft law, very abundant in the field of SGEIs, is not either used as a source of law, but instead as policy material, although it seems clear that it has played a role in the CJEU's case law on SGEIs. Judgments of the EFTA-court and decisions of the Commission and of the High Authority are also considered, not as sources of law, but as important legal practice illustrating certain legal issues addressed by the study.

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[86] Foster N., 2008, p. 115. Semmelmann observed that "[i]t is not only often unclear what constitutes a source of EU law and what distinguishes law from other social norms, but also how the different sources of EU law operate, how they are related to one another, and what their function is in judicial reasoning. See Semmelmann C, 2014, p. 2.

[87] Neergaard U. and Nielsen R., 2011, *Where Did the Spirit and Its Friends Go?* In European Legal Method – Paradoxes and Revitalisation, DJØF Publishing, p. 102. The authors add: "A judgment from CJEU is primarily a statement of the legal ideology of the CJEU and lacks the factual dimension of law that from a positivist perspective is necessary in order for a normative system to be valid law, unless a national legal/state system chooses to add a factual dimension to the statements of the CJEU." What they exactly mean by "the factual dimension of law" is perhaps not so clear.

[88] Case C-157/99 *Smits and Peerbooms* [2001] ECR I-05473.

[89] Compared to the CJEU's judgments, Lasser observes that Advocate Generals tend to propose "a decidedly more lengthy, socially-responsive, signed, and personal argument produced by a professional "in the know". See Lasser M., de S. –O. –L'E, 2004, p. 315.

1.6 Existing Research and interest of this study

The amount of international research on services of general interest is simply too considerable to be cited here. Buendia Sierra's now somewhat old study on exclusive rights is still very useful.[90] The important series "Legal issues of services of General Interest" must be mentioned here: it has its focus on particular types of services (social services of general interest), issues (financing of SGEIs for instance) or sectors (health-care). Most of the general studies on state aid law include sections on state aid rules for SGEIs and many academics touch on SGEIs when analysing the post-Lisbon constitutional framework, for instance Fiedziuk's thesis (Tillburg University) on SGEIs published of 2013. In Swedish legal literature, there are very few contributions on SGEIs. It seems that Edwardsson was first in drawing attention to Article 86(2) EC (now Article 106(2) TFEU)[91], while more recently an antology ("Den Nordiska Välfärden och Marknaden")[92] and a report by Madell[93] have been published on the subject. In spite of the plethora of books and articles on SGIs, SGEIs, SSGIs, it is interesting to note that they generally take the form of anthologies and that there are very few monographs (and thus by a single author) on SGEIs. The subject is arguably like a forest, so big that it may seem preferable, or simply manageable, to divide it in lots, and let different authors explore a well-circumscribed field. This is a "wise gardener approach", where the burning issues, "what is an "economic activity" in EU law" and "what is (or can be) the meaning of the EU concept of SGEI" are often evoked, but rarely studied in-depth.

The present study takes rather an opposite approach. Its contribution is to apprehend the EU concept of SGEI both in its legal and its political nature, in order to explain the process of transformation on social services *in real time*, and perhaps in time for this transformation to take more democratic forms. Thus, the notion of SGEI is studied in its most legal nature – trying to identify what is the meaning of an "economic" in SGEI and what the core elements of the concept in EU law can be in the present Treaty frame. At the same time, and through the prism of Hirschmann's theory, it is studied in its *political* nature, as a constitutional concept grown out of the spectacular expansion of EU law into the sphere of public services designed and often financed by Member States, and on its way to be "dissolved" in EU secondary law.

The core of the argument is that, for institutional reasons, the scope of the SGEI principles probably depends on the meaning of the (e) word "economic" in SGEI, and that this meaning can only be apprehended EU institutions acknowledge the important difference between "economic activity" and "economic rule/measure" for the applicability of EU market rules. By keeping this fundamental difference unclear, the scope of Article 14 TFEU is kept unclear, and a democratic process for the Europeanisation of public services, including social services, is postponed. This lack of

[90] Buendia Sierra J. L., 1999.

[91] Edwardsson E., 2003.

[92] 2010.

[93] Madell T., 2011.

clarity allows public services, and importantly also social services, to be harmonized through EU law on procurement and state aid, in an ambiguous relation to the Treaty principles specifically related to SGEIs, evoking a "pick and choose" approach rather than an approach where these principles are integrated openly, coherently and loyally into EU legislation.

1.7 Plan of study

The study consists of three parts, each part being devoted to one of the research sub-questions.

Part II consists of five chapters. Chapter 2 recapitulates that neither the nature of an activity nor the Member States' retained powers can *per se* capable to exempt social services from the application of the Treaty market rules, but its focus is on testing the evidence usually brought forward to support the view that the notion of "economic activity" is dual in EU market law. Chapters 3 and 4 analyse, on the basis of the CJEU's case law, the relevance of the notion of "economic activity" for the applicability of the Treaty rules of free movement and on competition and the substantive criteria determining that an activity is *in casu* economic. Chapter 5 looks at those questions in the field of EU procurement law, where "free movement meets competition", and where the Court has been led to decide on the meaning of secondary procurement law and of the Treaty principles applicable to procurement, which allows principles related to market competition to enter the field of administrative law, and transform its focus. Chapter 6 draws general conclusions of part II in relation to the first research sub-question.

Part III consists of four chapters. Chapter 7 scrutinises the political outcome of the expansion of EU law in the field of public services, as reflected in the post-Lisbon framework. It analyses how this framework links SGEIs to foundational EU values and missions, acknowledges the multilevel governance of public services in the Union, and puts EU institutions face to face with the principle and the legal ground on SGEIs formulated in Article 14 TFEU, which in particular suggests that the EU concept of SGEIs should be understood broadly. Chapter 8 examines how the principles and conditions of the application of EU market rules to SGEIs have been to a certain extent shaped by the CJEU in its case law directly related to Article 106(2) TFEU, and how the broad scope of these principles and rules, which now seems consolidated in Article 14 TFEU, is "accommodated" by the Court by a transposition of its "Article 106(2) TFEU balancing test" in free movement and procurement cases, which implicitly leads to a broad understanding of the EU concept of SGEI. Chapter 9 elaborates on the results of chapters 8 and 9 and proposes an understanding of the EU concept of SGEI. General conclusions of part III related to the second research sub-question are drawn in chapter 10.

Part IV consists of three chapters. Chapter 11 examines the new procurement directives adopted in 2014 and the Commission package on state aid rules for SGEIs adopted in

2011. As these two legislative frameworks build primarily on the aims of market integration and well-functioning competition as a way to pursue economic and non-economic objectives, it is examined how they relate to the EU concept of SGEI and to the Treaty rules on SGEIs as interpreted by the CJEU. As the state aid package for SGEIs provides that Member States must control themselves the funding of (a number of) social services, chapter 12 examines whether Swedish law governing local and regional authorities' competence is conceptually apt to "receive" the state aid rules and provides an introduction allowing to understand the cases studied in chapter 13 in their broader legal context. Chapter 13 looks into the regulation, organisation and funding of elderly home care and school education in systems of free choice. These publicly funded systems build on non-price competition to pursue objectives of general interest, and the focus of the analysis is on how the schemes underpinning these systems relate to the concept of SGEI and to the EU procurement and state aid rules on social services of general interest.

Chapter 14 draws conclusions on part IV in relation to the third research sub-question, pulls together these strands with the results of parts II and III in chapters 6 and 10 in order to propose answers to the main research question of this study, and includes a short final reflection on the Europeanisation of social services in a democracy perspective.

Part II

Criteria of applicability of the Treaty market rules: no "exit" for public services, including social services?

The purpose of part II is to provide an answer to the first sub-question of this study, which should be recalled here:

> *Can the CJEU's case law on the definition and the relevance of the notion of "economic activity" explain the necessity of a constitutional public service concept in the post-Lisbon Treaties?*

The overall purpose of part II is to examine whether the CJEU's case law on the criteria of applicability of the Treaty market rules, supporting of the Commission's public turn, may be seen as a major *cause* of the development of the Treaty framework on public services.

At a general level, the approach consists in identifying with precision "what is an economic activity" for the purpose of the Treaty rules on free movement rules and on competition, which legal parameters other than the notion of "economic activity" determine that these rules apply to public services, whether they relate to the notion of "economic activity", and if so how. This implies obviously that the approach consisting in using "economic activity" as a convenient expression to express that the Treaty rules on free movement and on competition are applicable to an activity is refused here. Another point of departure is that procurement law should be included in the analysis, because in that field of EU law, free movement and competition meet, which may help understanding the relationship between "economic activity" and "services". Also, it seemed appropriate to scrutinize the arguments of legal scholars arguing that the notion of "economic activity" has a dual meaning in EU law, in order to test how persuasive these arguments can be.

As the study in part II is aims at determining and systematising valid law, a legal method is used in all chapters. The material studied is mostly the European courts' rulings, although in chapter 5 the Public Sector Directive (Directive 2004/18/EC) is also in focus. Opinions of the Advocate Generals are referred too, first because they have been used by certain scholars to support interpretations which part II assesses critically, and second, together with academic literature, as an intellectual support in the interpretative reasoning, and in order to facilitate future scholarly discussions. As the sets of criteria *actually* used by the Court to assess the applicability or the Treaty rules on free movement, competition and procurement have been developed over a long period of time, with different approaches depending on the sector at issue, and more often than not in subtle

and implicit reasoning, many cases have been selected, and several of them are analysed in detail. Although the cases considered in part II cover many different activities, special attention is given to the CJEU's case law of directly related to, or of direct relevance for social services.

This – in terms of time-span and of legal fields – broad and in-depth analysis, has been considered necessary to propose a convincing systematization of the Court's criteria in the fields of free movement, competition and procurement. It is conducted under the following premises. First it is supposed that the CJEU, albeit not explicitly, seeks a certain degree of conceptual coherence and convergence between the different fields of EU market law and between the different activities considered. At the same time, as underlined by Roth, it must be expected that the Court's interpretation of EU law is necessarily influenced, more or less explicitly, by the role it plays in relation to the Member States as "masters of the Treaties".[94] To refer to a less explicit element in the Court's interpretative approach of the criteria of applicability of EU market rules in sensitive cases, the notion of "acceptance" is used several times in part II. A second important premise is that the word "normally" in the definition of services under Article 57 TFEU has a *specific* meaning in the provision, although this meaning has not yet been clearly spelled out by the CJEU.

If a systematic analysis of the CJEU's case law shows that, depending on the interpretative options taken by the CJEU, Member States cannot *by their own decision* (without positive harmonisation) escape, or at least control, the domino effects of liberalisation of activities within their competence (for instance that once social services – such as education – are liberalized in one Member State, other Member States may have to justify that their education regulation restricts the fundamental freedoms), it becomes arguably clear that the legitimacy of EU law applicable to public services was problematic in the pre-Lisbon constitutional frame. Politically, such a situation may be characterized, in accordance with Hirschman's theory, as precluding "exit" from the paradigm of the internal market in the realm of social services, provoking the enhanced need for, and the legitimacy of "voice".

[94] Roth W.-H, 2011, p. 77.

2 "Economic activity": "one basic test" determining the applicability of the Treaty market rules to activities in the public sector?

The purpose of this Chapter is to introduce the study of the notion of "economic activity" conducted in chapters 3 to 5 by (1) setting the notion in the broader legal context of the EU Treaties; (2) prune factors that do not *per se* determine the economic character of an activity and (3) examine the elements of case law invoked by some scholars to claim that there are two – and not one – sets of criteria defining the concept of "economic activity, for the purpose of free movement law respectively competition law.

First introductory remarks are made on the crucial importance of clear criteria determining the economic character of an activity for the purpose of Treaty market rules to services in the public sector, including social services. Second it is examined how certain characteristics of a public service, for instance the fact that it lies within the policy powers of the Member States or that it is related to social or environment objectives, cannot successfully be invoked by the Member States to claim the inapplicability of Treaty market rules to this service. Lastly, the judgment in *Meca-Medina*[95] and the Opinion of AG Poiares Maduro in *FENIN*[96], frequently invoked as supporting that the meaning of the concept of economic activity is dual, are studied in some detail as a preliminary step in questioning this thesis.

2.1 Economic activity: a "basic test" for the applicability of the Treaty market rules to Member States' measures related to public services?

In the Treaties, the notion of "economic activity" is like the elephant in the room: so huge it can hardly be seen. Indeed, the Treaty rules on free movement and competition, constituting the core of the "operative system" of EU law, aim at establishing an internal market and a system ensuring that competition is not distorted, and their rationale is evidently to promote a – hopefully sustainable – development of *economic* activities within the Union. Nevertheless, the Treaty Articles providing for these rules do not mention the notion of "economic activity" and the notion is nowadays also absent from the provision spelling the aims of the Union, Article 3 TEU. When the EU was still only – and later mostly – an economic community (EEC and later EC), the notion was central in Article 2 EEC and Article 2 EC, the "ancestors" of Article 3 TFEU, in terms that are worth quoting here.

[95] Case C-519/04 P *Meca-Medina* [2006] ECR I-6991.

[96] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN v. Commission* ECR [2006] I-6295.

Article 2 EEC read in French (there is no English version of this provision):

> La Communauté a pour mission, par l'établissement d'un marché commun et par le rapprochement progressif des politiques économiques des États membres, de promouvoir un développement harmonieux des activités économiques (in English: *economic activities*) dans l'ensemble de la Communauté, une expansion continue et équilibrée, une stabilité accrue, un relèvement accéléré du niveau de vie, et des relations plus étroites entre les États qu'elle réunit.[97]

Article 2 EC, which had modified Article 2 EEC through the Treaty of Maastricht, read:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, 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.

These provisions suggested that the "economic" character of an activity constituted a limit to the applicability of EU law and Hatzopoulos emphasizes that the distinction between economic and non-economic activity is fundamentally an issue for the Member States, "corresponding to fundamental political and societal choices". [98] In non-harmonized fields of their public sectors, it seems clear that the principle of conferral should give the Member States a discretion to withdraw an activity from market forces. Yet, while the CJEU has recognized the Member States' freedom to organize an activity as non-economic, it has done so under so restrictive conditions that, as strikingly concluded by van de Gronden, the Court has in fact expressed the view that "competition should play some role in the national organisation and provision of social services in the public sector".[99]

In fact, as will be seen in Chapters 3 and 4, the "basic test" determining whether a Member States' legislative or administrative measure is covered by the Treaty market rules does not seem possible to contain in the simple formula "economic activity". By contrast with essential services such as energy, telecommunications, postal and transport services, Member States' use of market mechanisms is sectors such as water services and social services is unequal among the Member States. Thus, cross-border provision, investment and establishment of social services of general interest (SSGIs) may develop, but SSGIs are not necessarily regarded as "market services" in all Member States. Therefore, even when the CJEU finds that the Treaty rules on free movement and/or on competition apply to a Member State measure challenged and brought to its

[97] Translation added.

[98] Hatzopoulos V., 2011, p. 7.

[99] Van de Gronden J. W., 2013a, p.156.

jurisdiction, because the activity affected has *in some sense* economic relevance at European level, it is quite problematic to characterize the activity *per se* as an "economic activity", because that would simply contradict the principle that a Member State can, if it decides to, make it non-economic.

On this background, it seems probable that the notion of "economic activities" disappeared in Article 3 TEU, not only because the reinforcement of a political Union implies that EU law covers certain activities regardless of their economic character, but also because EU *market* law may be relevant for an activity regardless of whether this activity *is* economic in all Member States. It seems that the Treaty founders had "not anticipated" the complexity of the CJEU's case law regarding the applicability of the Treaty market rules to public services. Hatzopoulos blames this complexity on the CJEU's "polyphonic" distinction between economic and non-economic activities.[100] In his view, the Court, partly guided by judicial economy, tends to avoid "the slippery slope" of deciding on the economic character of an activity by deciding to apply EU market rules to national regulatory or administrative measures cases on the basis of "technical criteria".[101]

Under the rule of law, national legislators should not apply the judicial strategy of the Court, as one of their democratic duties is arguably to avoid the risk that national provisions regulating services in the public sector be reviewed and found to breach against certain EU market rules. In the particularly sensitive field of social services, the Member States cannot rely on factors found by the CJEU *in casu* to exclude the application the Treaty market rules as appropriate and sustainable grounds for compliance of their national rules with EU market law, in particular as the institutional, cultural and economic structures of public activities evolve rapidly in the Union and outside the Union. The economic character of a social service of general interest can evolve, for instance in the sector of higher education.[102] It is not either "forever given" that the impact on trade of public intervention in the field of care to the person or education is negligible.

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[100] Hatzopoulos, 2011, p.10.

[101] Hatzopoulos V., 2011, p. 13. Subject to possible misunderstanding from the author of this study, Hatzopoulos has analyzed that the Court of Justice, in deciding on the applicability of the EU rules on free movement, procurement, competition and state aid, uses six questions, not necessarily all in the same case: (a) the nature of the body subject to the rules, (b) the economic/non-economic nature of the activity, (c) the object of the measure (regulating an economic activity/non-economic activity), (d) the existence of mitigating factors (morality, rule of reason, de minimis), (e) the applicability of exceptions (expressly provided by the Treaty or judge-made), and (f) the applicability of Article 106(2) TFEU. He categorizes these questions (a) and (b) as qualification criteria, (c) and (d) as disqualification criteria and (e) and (f) as general respectively special exceptions to the application of the Treaty rules.

[102] See to that purpose Gideon A., 2012, pp 169-184**.** Gideon recalls that this activity, carried on in public institutions in the public interest, was originally regarded as a non-economic service, which rendered the Treaty rules on free movement and competition inapplicable. She notes that this conception may evolve, as the increasing commodification of higher education and research carried on in public institutions can bring their activities into the ambit of those provisions, leading to tensions.

Hence the Member States need clear and reliable criteria from EU institutions on what makes an activity truly non-economic in their own national system, and whether, regardless of their own national choices, their national measures may come within the Treaty rules on free movement and competition as soon as the activity is economic in another Member State or "*can be* economic" in theory. In the absence of such criteria, the Member States deciding democratically on societal objectives, public missions and social rights, cannot evaluate how their regulation must be designed under EU law for these objectives, public missions and rights to be sustainably secured. This is certainly a good reason to scrutinize and systematize the "economic test" as developed by the CJEU.

2.2 Factors that do not *per se* determine the applicability of primary market law

The CJEU has taken the Union's mission to establish an internal market very seriously and established that certain arguments, such as the principle of subsidiarity or the social or environmental objectives of an activity – once systematically invoked by the Member States – do not *per se* determine the scope of EU market rules, although they may justify that, if a market rule is found applicable to a national measure, an exemption or a mitigation is possible.

2.2.1 The principle of conferral: no shield against the applicability of EU market rules when public services are "inexorably exposed to market forces"

The distribution of competences between the Union and the Member States according to the principle of conferral can never be invoked to exclude the applicability of the Treaty market rules apply to services in the public sector of the Member States. It was recalled in *Jundt* by AG Poiares Maduro that "it is trite law that even where a Member State is regulating an area that falls within its exclusive competence it must do so in a way that is consistent with the Treaty and, especially, with the fundamental freedoms.[103] However, in public sectors which are only partly or not at all the object of EU harmonization, the Member States retain an extensive discretion to intervene through regulation, provision and financing to pursue interests other than the integration of the internal market and the respect of a system preventing distortions of competition.

[103] Opinion of AG Poiares Maduro in Case C-281/06 *Jundt* [2007] ECR I-12231, para.28. AG Poiares Maduro noted that this principle had been reaffirmed by the CJEU in relation to the organisation of education in *Commission v Austria* (Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969) but had also been established in a social security case (Case C-55/00 *INPS* [2002] ECR I-413, para.32, in a direct taxation case (Case C-307/97 *Saint-Gobain* [1999] ECR I- 6161, para.58).

As the Treaties in no way prejudice the rules governing the system of property ownership in the Member States – a principle laid down in Article 345 TFEU – the existence of markets in the public sector is *initially* a question for each Member State. Indeed, regarding activities for which there is no market in any Member State, it is difficult to see how the Treaty rules on free movement and competition can apply. Also, although "the need to improve the quality and efficiency of public spending" in the Member States is evidently on the Commission's agenda[104], it is doubtful whether it is in the powers of the CJEU or the Commission to apply the Treaty market rules in order to *promote* competition as a tool of efficiency in sectors where the Union has very restricted powers, as in the field of social services.[105] However, one Member State cannot prevent another Member State from liberalizing activities in the public sector, and therefore cannot deny the existence of commercial interests in that Member State, commercial interests which may be protected by EU law.

2.2.2 Social or environmental objectives of an activity do not *per se* exclude the applicability of the Treaty market rules

Ever since *Smits and Peerbooms*, the Court has repeatedly made clear that "the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement"[106] and therefore does not exclude the application of Articles 56 and 57 TFEU.[107] To illustrate this point, let us look at the ruling in *Duphar*, a decision which seems to have been somewhat misunderstood. In 1984 the CJEU asserted in *Duphar* that "Community law does not detract from the powers of Member States to organize their social security systems".[108] This assertion was called "the Protected Area Doctrine" by Buendia Sierra, who argued that this reassuring standpoint was just "another technique to help the Court distinguish between economic and non-economic activities".[109]

It seems however that in *Duphar* the Court *did in fact apply the principles* expressed in Article 30 EEC (now Article 34 TFEU) to a national legislation restricting the amount of medicinal products reimbursed by the national social security system, albeit in a reasoning lacking pedagogical clarity. The Court formulated namely objective and non-discriminatory criteria on which the national rule had to build, as it otherwise would

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[104] See for instance the Commission Report on Public finances in EMU, 2013, European Economy 4|2013, prepared in the Directorate-General of Economic and Financial Affairs.

[105] On this path, Jääskinen held in 2011 that he had "doubts also as to whether the efficiency in public spending of the Member States is the Commission's concern, especially bearing in mind the notorious difficulties relating to this notion in the context of social services, health or education." See Jääskinen N., 2011, p. 600.

[106] Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, para.54. Case 279/80 *Webb* [1981] ECR 3305, para.10, Case C-158/96 *Kohll* [1998] ECR I-1931, para.20 and Case C-372/04 *Watts* [2006] ECR I-4325.

[107] Case C-157/99 *Smits and Peerbooms,* para.54*,* Case C-158/96 *Kohll,* para.21.

[108] Case 238/82 *Duphar* [1984] ECR I-00523, para.16.

[109] Buendia Sierra J.-L., 1999, p. 52-53.

infringe this provision on the free movement of *goods*.[110] The Court also précised that, in case these criteria were not met, the exemption rule in Article 36 EEC (now Article 36 TFEU) could not be invoked to justify such budgetary regulatory measures affecting trade in *goods*. In *Duphar* medicinal products were thus implicitly considered by the Court as goods. Given the definition of "goods" formulated by the Court itself in *Commission v Italy*, medicinal products were consequently regarded as able to be subject to *commercial* transactions, in other words to *economic activity* in the Community.[111] It is therefore argued that in recognizing the powers of Member States to organize their social security systems, the Court was not protecting any area on the basis on an economic criterion, but instead generally acknowledged that the principle of conferral limits the constraints which EU market law may impose on national schemes on social security systems.

In *Smits and Peerbooms* the CJEU characterized the standpoint in *Duphar* as "settled case law" and clarified its meaning. While the point of departure is certainly that the Member States retain regulatory powers in the absence of EU harmonization[112], the special nature of the activity at issue – in *Smits and Peerbooms*, health care – does not remove them from the ambit of the fundamental principle of freedom of movement".[113] This was recalled by the CJEU in several judgments, for instance *Hartlauer*[114] and more recently *Susisalo.*[115] Also, in *Commission v Greece*, the Court ruled that the freedom of establishment applies to national measures restricting the freedom to acquire shares in *undertakings* which operate networks considered to be necessary to the economic and social life of a country, in particular the country's necessary energy and water supply. This was the case in spite of the fact that these undertakings were considered as "strategic limited companies" in the Member State which had adopted the restricting rules, and in spite of the fact that these rules pursued the objective of ensuring continuity of certain basic services.[116]

On this background, it is easier to understand the scope of secondary EU law destined to achieve the internal market, in particular the internal market of services. Both healthcare and certain social services were exempted from the Services Directive. This *political* decision of the EU legislator could prevent such social services from the level of deregulation required by the Directive. It could however not prevent the Treaty rules on

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[110] Case 238/82 *Duphar* [1984] ECR I-00523, para.22.

[111] Case 7/68 *Commission v Italian Republic* [1968] ECR 423.

[112] Cases C-157/99 *Smits and Peerbooms* [2001] ECR I-05473, paras.44-45.

[113] Ibid, para.54, referring to Case 279/80 *Webb* [1981] ECR 3305, para.10 and Case C-158/96 *Kohll* [1998] ECR I-1931, para.20. This was also confirmed in case C-372/04 *Watts* [2006] ECR I-4325, para.92, and in C-355/00 *Freskot* [2003] ECR I-5263, para.53.

[114] See Case C-169/07 *Hartlauer* [2009] ECR I-1721, para.29, where the Court insisted that community law "does not detract from the power of the Member States to organise their social security systems and to adopt, in particular, provisions intended to govern the organisation and delivery of health services and medical care", but that "Member States must comply with Community law, in particular the provisions of the Treaty on the freedoms of movement, including freedom of establishment. Those provisions prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of those freedoms in the healthcare sector."

[115] Case C-84/11 *Susisalo* (CJEU 21 June 2012) paras.26-27.

[116] Case C-244/11 *Commission v Greece* (CJEU 8 November 2012).

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free movement of services to be applicable to healthcare and social services, if the criteria of application of these rules are fulfilled. Regardless of the "particular character" of healthcare, and in spite of the fierce opposition of some Member States to include healthcare and social services in the Services Directive, the liberalization and marketization of healthcare in certain Member States is a fact that triggers the applicability of internal market rules. This explains that the Patients' rights Directive could be adopted a few years later.

It is also easier to understand that the Public Sector Directive (both the procurement Directive in force until April 2016 and the 2014 Public Sector Directive) covers many social services, in spite of their "special nature". As is the case with the Services Directive, the specificity of certain "sensitive activities" does not make them immune from requirements of transparency and non-discrimination in procurement. The recognition of this specificity explains instead the *political* decision of the EU legislator to restrict the Directive's provisions governing them. On the basis of this political decision, certain public services, in particular healthcare and social services were until recently categorized as non-prioritized B-services in the EU procurement rules. In the new procurement directives (not yet implemented), and on the basis of a *new political decision*, the divide between A and B-services is abolished, but the "specificities" of social services is still taken to motivate lighter procurement rules, respecting their "sensitivity" and "the importance of the cultural context".[117] According to Arrowsmith, the Court has actually made clear in *Re Data Processing*[118] that the mere fact that the subject-matter of a contract is concerned with a general interest requirement does not imply that this contract is not covered by EU procurement rules.[119] The very definition of "contracting authorities" for the purpose of the Public Sector Directive as "bodies established for the specific purpose of meeting *needs in the general interest*, not having an industrial or commercial character" emphasizes that tasks compensated through procurement routinely have "a special social or environmental nature".

Regarding the applicability of competition rules, the Court has never expressed as explicitly as in free movement cases that the special nature of certain services does not *per se* exclude the application of competition rules. However, by establishing in *Höfner* and later *Pavlov* that the Treaty rules on Competition and State aid apply to any entity conducting an economic activity, i.e. offering goods or services on a market, the Court has made it possible for virtually any activity to be covered by these rules, depending on

[117] The divide between A and B services has been removed in the 2014 procurement directives.

[118] Case C-3/88 *Re Data Processing* [1989] ECR I-04035.

[119] Arrowsmith notes that in *Re Data Processing*, the Court rejected the argument of the Italian Republic that the exclusive rights had been awarded for the conduct of a public service and were therefore not covered by the Procurement Directive (see Case C-3/88 *Re Data Processing* [1989] ECR I-04035, paras.25- 26). Thus the public service nature of an activity could not per se exclude the application of the Directive, see Arrowsmith, 2011, p. 75. However, in paragraph 26, the Court actually declares: "The supply of the equipment required for the establishment of a data-processing system and the design and operation of the system enable the authorities to carry out their duties but do not in themselves constitute a public service." This statement may suggest that in case the service provided had constituted a public service, it might have escaped the application of the Directive. Is seems actually unclear what the Court referred to by suggesting the possibility of a "public service exemption".

the manner this activity is organized by the Member States. Indeed, regarding the possible conflicts between policy objectives enumerated in the Treaties (now in Article 3 TEU), AG Jacobs held that the fact that the Union pursues a certain policy does not imply that that area of the economy is thereby excluded from the competition rules and underlined that "the Court has already accepted in a series of important decisions the principle that the competition rules apply to the social field, and in particular to employment and to pensions".[120] In Buendia Sierra's view, a simple reading of Article 106(2) TFEU confirms that a public interest motive in no way precludes the existence of an economic activity[121] and thus competition rules have been found to apply to hiring of workers, ambulance transport, hospitals, second and third tiers social security systems. In *Glöckner*, the Court explained that while public service obligations certainly may render services provided by a given medical aid organization less competitive than comparable services rendered by other operators not bound by such obligations, that fact could not prevent the activities in question from being regarded as economic activities, and thus covered by the Treaty provisions on competition.[122] And thus, although it will be seen that the social objective of a scheme can, in combination with other elements, be a relevant factor in determining the economic character of the activity pursued by an entity, the Court of Justice could state in *AG2R* that "the social aim of an insurance scheme is not *in itself* sufficient to preclude the activity in question from being classified as an economic activity (emphasis added)".[123]

2.3 Economic activity: questioning evidence in favour of a dual concept

A prominent issue is nowadays whether the concept of economic activity has the same meaning in the fields of free movement law and of competition law, or instead two different meanings. It had long been a consensual view that the meaning of the notion of "economic activities" was unitary for the whole EC Treaty, as suggested by the wording of former Article 2 EC. Yet since a few years some authors defend the thesis that there are two different sets of criteria determining the economic character of an activity for the purpose of free movement respectively competition rules.[124] Other authors hold the view that the concept is unitary and has the same content under both internal market and competition law.[125] Among the latter, Hatzopoulos claims that, in analysing the casuistic case law of the Court, it is important to make a clear distinction

[120] Opinion of AG Jacobs in Case C-67/96 *Albany* [1999] ECR I-5751, paras.126-127.

[121] Buendia Sierra J.-L-, 1999, p. 51.

[122] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para.21.

[123] Case C-437/09 *AG2R* [2011] ECR I-973, para.45, where the Court refers to Case C-67/96, *Albany*, referred above, para.86; Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, para.118; Case C-218/00 *Cisal (INAIL)* [2002] ECR I-691, para.37; and Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, para.42.

[124] See in particular Odudu O., 2009, *Economic Activity as a Limit to EU Law*, in The Outer Limits of European Union Law, Barnard and Odudu (eds.), Hart Publishing, p. 226.

[125] See in particular Hatzopoulos V., 2011, p. 4-5.

between (a) the *concept of economic activity*, and (b) the *scope of application of the Treaty and secondary law market rules*.[126] His arguments in favour of a unitary approach are (1) pure logic: "an apple is an apple"; (2) Treaty logic and the principle of coherence in Article 7 TFEU; (3) his view that the competition objectives, relegated to Protocol 27 on the Internal Market and Competition, have thereby been subdued to the free movement rules and may therefore not command a different interpretation of the same terms; (4) the fact that the CJEU has used justifications to restrictions of the fundamental freedoms in the field of competition (*Wouters*[127]) and criteria for exempting an entity conducting an activity from competition rules in the field of free movement (*Freskot*[128]).

The Commission has touched on this issue ever since the Green Paper of 2003 on Services of General Interest, in which it clearly approached "economic activity" as *one* concept of EU law. [129] Later on, the Commission has handed out several communications in which it accounts for its understanding of the applicability of state aid, internal market and procurement rules to public services. In its 2013 SGEI Guide, the Commission the question "what qualifies an activity, in particular social services of general interest, as economic or non-economic" is answered separately for competition and internal market law. Regarding in particular the issue of when an activity qualifies as economic for the purpose of state aid rules, the Commission refers to its own Communication on the application of the EU state aid rules to compensation for the provision of SGEI[130], where it first gives its understanding of the case law of the CJEU on the concepts of undertaking and economic activity, and concludes that "[i]n the absence of a definition of economic activity in the Treaties, the case law appears to offer different criteria for the application of internal market rules and for the application of competition law". The Commission does not say whether it believes that this implies that there are two different concepts of "economic activity" for the purpose of the internal market and competition rules, respectively, or one concept common to both fields of law. In the 2013 SGEI Guide, the Commission does not say either whether its separate approach – a competition or a free movement approach, simply reflects the casuistic approach of the CJEU or whether it has changed view since 2003 and now believes that there are two definitions of an economic activity in EU law, instead of one.

Odudu holds that the Commission's careful approach supports the view that there are two definitions of the notion of "economic activity".[131] Both Odudu and Piernas Lopez, hold this to follow from the appeal ruling in *Meca-Medina*, and from views held by AG Poiares Maduro in *FENIN*.[132] Hatzopoulos contests this view and argues that the Court

[126] Ibid, p. 6.

[127] Case C-309/99 *Wouters* [2002] ECR I-1577, I-1583.

[128] Case C-355/00 *Freskot* [2003] ECR I-05263.

[129] This was observed by Odudu, who refers to point 29 in the Green Paper on Services of General Interest COM(2003)270 final; in fact it seems that the Commission exposed this view in points 43-44. See Odudu O., 2009, p. 227-228.

[130] Commission, Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, 2012/C 8/02, points 9-15 and .

[131] Odudu O., 2009, p. 228.

[132] Case C-519/04 P *Meca-Medina* [2006] ECR I-6991. See Piernas Lopez J. J., 2010, p. 173-201.

reasons about the difference in scope between internal market and competition rules, but not in terms of a differential concept of economic activity itself. This debate on a dual/unitary meaning of the concept seems able to postpone any consensus on the crucial question of what makes an activity economic for the purpose of EU market law. Given the significance of the *Meca-Medina* ruling and the Opinion in *FENIN* in this debate, and the radically different understandings of their reasoning, it seems appropriate to go back to their reasoning and draw own conclusions.

2.3.1 *Meca-Medina*: two definitions of "economic activity"?

At issue in *Meca-Medina* were anti-doping rules decided by the International Olympic Committee (IOC). Two athletes had turned to the Commission with a claim that these rules infringed the Community rules on competition and their freedom to provide services. The Commission had dismissed the athletes' claim, and seized with the case, the CFI (now GC) had done so too. In the appeal case, the Court of Justice found that the Court of First Instance (now GC) had erred in law, by "holding that rules could thus be excluded straightaway from the scope of [the Treaty provisions on competition] solely on the ground that they were regarded as purely sporting rules with regard to the application of [the rules on freedom of establishment and freedom to provide services], without any need to determine whether the rules fulfilled the specific requirements of [the Treaty provisions on competition]".[133] By reference to this view, Odudu holds that the ruling in *Meca Medina* confirms that "the Treaty does not contain a single set of criteria used to determine whether an activity is economic".[134] However, it is firmly argued here that neither the wording of this paragraph nor the rest of the judgment support Odudu's hypothesis, and that the Court in *Meca-Medina* neither establishes nor even suggests that there are two different definitions of the concept of economic activity.

It must firstly be noted that the Court recalled its view in *Walrave* that "having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC". [135] Thus the Court based its reasoning on the "general" concept of economic activity in former Article 2 EC, which, as named in the introduction of this chapter, did not seem linked to any particular provision of the EC Treaty. This suggests that the Court, at least in the double

[133] Case C-519/04 P *Meca-Medina*, [2006] ECR I-6991, para.33. In paragraph 42 of its judgment, referred above, the CFI (now GC) had namely held that "[t]he fact that purely sporting rules may have nothing to do with economic activity, with the result, according to the Court, that they do not fall within the scope of Articles 39 EC and 49 EC, means, also, that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC. Conversely, rules which, although adopted in the field of sport, are not purely sporting but concern the economic activity which sport may represent fall within the scope of the provisions both of Articles 39 EC and 49 EC and of Articles 81 EC and 82 EC and are capable, in an appropriate case, of constituting an infringement of the liberties guaranteed by those provisions."

[134] Odudu O., 2009, p. 228.

[135] Case C-519/04 P *Meca-Medina*, [2006] ECR I-6991, para.22, with reference to Case 36/74 *Walrave* [1974] ECR 1405*,* para.8 confirmed in Case C-415/93 *Bosman* [1995] ECR I-4921, para.73; and Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para.4.

context of free movement and competition law of the case, envisaged the concept as unitary.[136] Interestingly, the Court explained that such a sporting acting is economic and thus falls within the scope of Article 39 EC et seq. or Article 49 EC et seq. (now Articles 49 et seq. and 56 et seq.), where it takes the form of gainful employment or the provision of services for remuneration, as for instance the activities of semi-professional or professional sportsmen. This suggests that the Court regarded as economic for the purpose of the free movement rules, an activity which in the specific case *de facto* – as opposed to "normally", but not necessarily in the specific case – constitutes gainful employment or the provision of services for remuneration. This supports the view, argued in Chapter 4, that the Court distinguishes the notion of economic activity for the purpose of Article 56 TFEU – a service provided "in the case at issue" for remuneration from the notion of service in the meaning of Article 56 TFEU – a service "normally" provided for remuneration.

Although it seems from the Commission's decision that the two athletes involved in the case did provide services for remuneration[137], and that this activity was protected by the Treaty provisions securing their right to free movement, the Court did not focus on this aspect. Lindholm has noted that in the field of sport the Court's focus is rather on whether sporting rules may be seen as infringing EU market law.[138] Indeed, in *Meca-Medina* the Court's point of departure was that IOC is an undertaking conducting an economic activity (although it is unclear in the case on which market exactly IOC competes, and which markets its decisions could affect), but the Court did not either deny that the athletes' activity could be economic for the purpose of both competition and free movement provisions. Instead the Court focused on whether IOC's regulatory decision, and considered that it had no economic significance for the free movement rights which could be relevant in the case, while it had economic significance for competition conditions which were relevant for the case.

Considering that IOC's anti-doping regulation had no significance for the athletes' economic rights protected by free movements rules, the Court found that it could not apply a proportionality test under these rules. By contrast, it submitted IOC's regulation to a proportionality test under the competition rules.[139] What makes the Court's already

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[136] Piernas Lopez also notes that the reference to Article 2 EC gives the impression that the notion of economic activity provided for in that provision applies to the Treaty as a whole. See Piernas Lopez J. J., 2010, p. 177.

[137] This is suggested by the fact that the two athletes appeared to practice high level amateur swimming and, according to point 8 in the Commission's decision, received economic advantages in the frame of their participation to sportive events, such as prize money, financial support from their clubs or federations, sponsoring etc.

[138] Lindholm J., 2008.

[139] Case C-519/04 P, *Meca-Medina*, [2006] ECR I-6991, para.42. This test involved the three following steps: first assess the specific context and objectives of the undertaking's decision to adopt anti-doping rules, second check that the restriction of competition which the rules entailed was inherent in the pursuit of those objectives and in that case third control that the restriction was proportionate to the objectives. This discreet transposition to the field of competition law of the classic justification ground "overriding reasons related to the general interest" applicable in the field of free movement law, has been abundantly commented in literature. Schweitzer sees this three-step assessment of self-regulatory rules as exactly similar to the criteria which the Court would apply to Member State regulation itself. In her view the Court transferred to the sphere of Article 81EC (now Article 101TFEU) the exceptions to the Free Movement Rules. See Schweitzer H. 2007, p.3. See also Hatzopoulos, 2011,

complex reasoning difficult to follow is in particular that it never explains *on which market IOC's regulatory decision could exercise competition distortions and what advantage it could draw from adopting disproportionately severe anti-doping rules*.[140] Nevertheless, according to Lindholm, the Court removed in *Meca-Medina* the confusion caused by its earlier rulings, by clarifying that "the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule".[141]

In fact the Court simply established that

- Certain rules (such as anti-doping rules) governing an activity such as sport, have an essentially non-economic dimension that is non-severable from the acitivity's in many cases economic character in the meaning of EU free movement law. They cannot be examined in the light of EU free movement law, although they affect persons (such as sportsmen) who may conduct the activity as an economic activity covered as such by EU free movement rules.[142] The reason is that their aim must be seen as *a priori* being to regulate the non-economic dimension of the activity escape the category "restriction in the meaning of Articles 49 and 56 TFEU".
- If these "a priori non-economic rules" have been adopted by an undertaking or association of undertakings, they must however be subject to a proportionality test under EU law on competition, because the undertaking can abuse its regulatory powers, for instance adopt rules that to their nature a priori pursue a non-economic purpose but go beyond this purpose in a manner that can distort competition and restrict trade in the economic part of the activity (for instance too strict anti-doping rules).[143]

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p. 5. Sauter and Schepel also comment the test in *Meca-Medina* as "a true "rule of reason" approach" but also set *Meca-Medina* in the larger perspective of the Court's case law after Maastricht. After the "November revolution" set off in *Keck*, returning to the Member States the power to decide on redistributive economic policies (as long as these did not interfere with the internal market), "the worst was to come" as the Court's deferred not only to state measures but also to "(private) corporatist restrictions of competition" as well, by constructing unwritten exceptions to the rule against anticompetitive agreements based on the coherence between the objectives of the Treaties in *Albany*, *Brentjens*, *Drijvende Bokken*, on the public interest involved in self-regulation of the legal profession in *Wouters* and on the interest of anti-doping in *Meca-Medina*. See Sauter W. and Schepel, p. 75 respectively p. 6-7. See Joined Cases C-267 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097; Case C-67/96 *Albany* [1999] ECR I5751; Joined Cases C-115/97, C-116/97, C-117/97 and C-219/97 *Brentjes* [1999]ECR I-6025; Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121; Case C-309/99 *Wouters* [2002] ECR I-1577, I-1583. Van de Gronden holds that the proportionality test in *Meca-Medina* was limited to a marginal review, see van de Gronden J. W., 2011, p. 278.

[140] A guessing is of course that the Court's admitted the appellants' argument that when adopting such rules, the IOC might have been concerned to safeguard the economic potential of the Olympic Games.

[141] Case C-519/04 P *Meca-Medina*, [2006] ECR I-6991, para.27. Lindholm observes that not only scholars but also several Advocate Generals had been misled by the way in which the Court had formulated its view in Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para.44 and in Case C-415/93 *Bosman* [1995] ECR I-4921, paras.75–76. Compare with Case 13/76 *Donà* [1976] ECR 1333, paras.14–15. See Lindholm J., 2008, p. 921-922.

[142] Ibid, paras.28 and 23. If *their* activity was economic, the athletes enjoyed fundamental freedoms protected by Articles 49 and 56 TFEU, regardless of the fact that certain purely sporting rules did not affect their economic activity and therefore could not be prohibited by Articles 49 and 56 TFEU.

[143] Ibid, paras.29-31.

Meca-Medina has the complexity and the compromise spirit of a ruling decided in a politically sensitive field, and its interpretation must be handled with care. In the background of the declaration of the Nice Council regarding sport[144], the Court upheld a stance that the essence of high level sport, even remunerated and subject to business, *must at the same time be seen as competition on genuine sportive merits*, and therefore that rules merely aiming at upholding the very essence of sportive competition may not directly and openly be balanced against "the interest of trade". However, the Court probably saw as incompatible with the Treaty objectives to disregard from the risk that a market actor, that is both an undertaking and an association of undertakings, can be tempted to abuse of its regulatory prerogatives to restrict *economic* competition by adopting rules of partly but not wholly non-economic (in that case sportive) character.

In sum, in *Meca-Medina*, having found that IOC's rules were subject to competition rules, the Court never said that these rules fell outside the free movement rules because the athletes' activity was not economic under EU free movement rules.[145] It did establish that the *economic relevance* of one and the same rule may vary in the two fields of law, but not the criteria determining the economic character of the activity affected. In *Meca-Medina* it was not a difference in the criteria qualifying an activity as economic which led the sporting rules to be caught by the competition rules and not by the free movement rules, but instead

- The heterogeneity of the activities conducted by different types of actors in the field of sport and in particular the substantial difference of the activities conducted by IOC and by the athletes,
- The high economic relevance of the regulatory decision in a competition context (the author of the rules is an undertaking) and its low relevance in a free movement context (the activity is to a large extent conducted against remuneration or as gainful employment, but the rule does a priori not touch the economic aspects of the activity).

2.3.2 The Opinion of AG Poiares Maduro in *FENIN*

In the debate on the meaning of the concept of "economic activity" in EU market law, an often cited view is a statement made by AG Poiares Maduro in his Opinion in *FENIN*.[146] Odudu and Pieras Lopez believe this statement supports the thesis of a dual concept of economic activity, while Hatzopoulos resolutely denies that this conclusion

[144] The socio-cultural dimension of sport was recognized and emphasized in the declaration of the Nice Council, 7-9 December 2000, Presidency conclusions p. 54 and Annex IV. On this subject, see Lindholm J., 2008.

[145] Indeed, the Court relayed the Commission's assessment that the IOC constitutes an undertaking conducting an economic activity, see Case C-519/04 P, *Meca-Medina*, [2006] ECR I-6991, para.38, referring to point 37 in the contested Commission's decision, which distinguished (1) IOC's activity as organizer of the Olympic Games and user of thereto connected rights from (2) IOC's activity in the Olympic movement as an association of international and national associations.

[146] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, para.51.

can be drawn from the position expressed by the Advocate General.[147] Therefore it is worth quoting in its entirety the debated paragraph 51 in the AG's Opinion, but in separate numbered parts omitting the footnotes and with added emphasis for the sake of further discussion:

1. "At first sight, it appears desirable to adopt the same solution in the field of the freedom to provide services and in that of freedom of competition, since those provisions of Community law seek to attain the common objective of the completion of the internal market. However, the scope of freedom of competition and that of the freedom to provide services are not identical.

2. There is nothing to prevent a transaction involving an exchange being classified as the provision of services, even where the parties to the exchange are not undertakings for the purposes of competition law [footnote referring to *Cisal* omitted here]. As stated above, the Member States may withdraw certain activities from the field of competition if they organise them in such a way that the principle of solidarity is predominant, with the result that competition law does not apply.

3. By contrast, the way in which an activity is organised at the national level has no bearing on the application of the principle of the freedom to provide services. Thus, although *there is no doubt that the provision of health care free of charge is an economic activity for the purposes of Article 49 EC* [footnote referring to *Smits and Peerbooms* omitted here], it does not necessarily follow from that that the organisations which carry on that activity are subject to competition law."

The question is whether by the statement above, the Advocate General *really* meant that an activity economic in the meaning of the competition rules is not necessarily economic in the meaning of the free movement rules, and that an activity regarded as economic for the purpose of the free movement rules is not necessarily economic for the purpose of the competition rules?

In part (1) of his statement, AG Poiares Maduro underlines that the different *scopes* of EU internal market rules and EU competition rules explains that different solutions may occur in applying them to the same type of activity. As the notion of "economic activity" is not present in the wording of these provisions, the fact that they have different scopes can certainly not be taken as a "proof" that they are founded on two concepts of economic activity.

In part (2) the Advocate General emphasizes that the Member States enjoy a margin of freedom to withdraw an activity from the field of competition by organizing it on the basis of the principle of solidarity (he does not precise that this is true only of non-harmonized sectors of activity). Therefore it is possible that two entities which are not undertakings are parties to an exchange classified as the provision of services. It is not

[147] On the Opinion of AG Poiares Maduro, see the comments of Hatzopoulos V., 2011, p. 6; Odudu O., 2009. p. 228 and Piernas Lopez J. J., 2010, p. 178.

questioned here that such a situation is possible, but instead whether the example chosen by the Advocate General was a good and clear illustration of the point he wanted to make. AG Poiares Maduro refers in a footnote to point (2) above that "[b]odies responsible for managing health insurance, as in *Cisal* are not undertakings for the purposes of competition law, but the rules governing them may none the less not prohibit the insurance of employees from other Member States without being inconsistent with the principle of the freedom of movement of workers." [148] In *Cisal*, the public law body INAIL operated a national system of compulsory insurance against accidents at work and occupational diseases. At issue was the national legislation forcing self-employed craft workers to insure themselves with the INAIL even where they were already insured with a private company. The Court found that INAIL fulfilled an exclusively social function as the scheme it managed involved a high degree of solidarity between contributors and benefiters of the service and as the essential elements of this scheme were subject to supervision by the State. Therefore INAIL did not conduct an economic activity in the meaning of competition law. As INAIL conducted a non-economic insurance activity, it was not an undertaking for the purpose of EU competition law, and thus measures it took to force workers to pay insurance contribution on the basis of INAIL's exclusive right could not be examined under Article 82 EC combined with Article 86(1) EC (now Articles 102 and 106(1) TFEU). The other party to the insurance transaction was self-employed craft workers, whose status as workers implies that they are not regarded as undertakings in the meaning of EU competition law, according to the Court's view in *Becu*.[149]

Meanwhile, AG Poiares Maduro puts forward his view that the Italian legislation granting INAIL a legal monopoly and authorizing it to impose the payment of contribution from any worker covered by the scheme, could breach against the free movement of workers, in case they authorized INAIL to force workers from other Member States, already insured against accidents at work and occupational diseases, to pay a contribution to INAIL. In this footnote, AG Poiares Maduro leaves to the reader the task to figure out how he reasoned exactly. Indeed, the Italian rule forcing workers from other Member States to pay twice for insurance against accidents at work and occupational diseases could discriminate them and probably breach against Article 45 TFEU, a provision that protects *the workers*' right to free movement.[150] But did AG Poiares Maduro mean that a rule infringing Article 45 TFEU would, by an interesting "billiard effect", automatically imply a right for these workers' insurer – even if it were a non-economic operator, governed by a solidarity scheme similar to INAIL's – to rely on Article 56 TFEU to claim that the Italian rules discriminate their activity? The answer to that question is arguably "no", as in *Jundt* the Court stated that "the decisive factor which brings an activity within the ambit of the Treaty provisions on the freedom to provide

[148] See Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN*, referred above, para.51, and footnote 55.

[149] See Case C-22/98 *Becu and Others* [1999] ECR I-5665, para.26.

[150] Indeed, the fact that Article 45 TFEU is infringed does obviously not *per se* imply that the insurance protecting the worker in his/her Member State of origin is an economic activity, as it could also be governed by a solidarity-based legal scheme. That the right to free movement of workers from other Member States could be infringed does not imply that *their* social insurance, if it is also non-economic as governed by rules dominated by the principle of solidarity, would enjoy the right to free movement of services. This would make very little sense.

services is its economic character, that is to say, the activity must not be provided for nothing."[151] To rely on Article 56 TFEU, it seems clear that an operator must provide a service for remuneration, be an "economic provider". All in all, this discreet footnote reference to INAIL seems confusing, rather than illustrative.

In part (3) of his statement, AG Poiares Maduro states that "*there is no doubt* that the provision of healthcare *free of charge* is an *economic activity* in the meaning of Article 49 EC (now Article 56 TFEU)". To support this blunt assessment, the Advocate General refers to *Smits and Peerbooms* in an unspecified manner, although most probably it is paragraph 58 he has in mind, where the Court of Justice held that "[i]n the present case, the payments made by the sickness insurance funds under the contractual arrangements provided for by the [Dutch Law on Sickness Funds], albeit at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character".

As will be seen in more detail under chapter 3, the CJEU has firmly and repeatedly held that healthcare services constitute a service in the meaning of Article 57 TFEU, which implies that the national regulation of these activities may not unjustifiably restrict cross-border transactions. However, in *Smits and Peerbooms* the Court of Justice is more nuanced than the Advocate General in his Opinion in *FENIN*. First the Court circumscribes its statement to the circumstances "in the present case" and second it does not state that *any* system where the activity is provided to recipients free of charge constitutes an economic activity in the meaning of Article 49 TFEU. In fact, the Court explains that the activity conducted by hospitals paid *under contractual arrangements* by the funds is economic, not that health care free of charge is generally an economic activity. In other words, it seems that in his interpretation of this part of the *Smits and Peerbooms* ruling, Advocate General Poiares Maduro went beyond the meaning of the Court of Justice. In particular, there is no indication that, in *Smits and Peerbooms*, the Court regarded the activity conducted by the Dutch hospitals as non-economic for the purpose of competition law. This was simply not at issue in the case, and totally uncommented by the Court. Also, while in point (3) AG Poiares Maduro states that "the way in which an activity is organised at the national level has no bearing on the application of the principle of the freedom to provide services", AG Geelhoed held one month later in *Watts* a far less radical view: "At any rate /…/the manner in which the NHS is organised does not affect the applicability of Article 49 EC in the present case, as it is not services provided by the NHS which are at issue."[152]

Thus, the scopes of the free movement rules and the competition differ undeniably. However, in light of the above, AG Poiares Maduro' argumentation does not seem to make a good case for the existence of two different meanings of the notion of economic activity. It is possible that AG Poiares Maduro meant that Dutch hospitals "engaged in an activity of an economic character" in the meaning of free movement law, did not

[151] Case C-281/06 *Jundt* [2007] ECR I-12231, para.32.

[152] Opinion of AG Geelhoed in Case C-372/04 *Watts* [2006] ECR I-4325, para.60.

necessarily conduct an economic activity in the meaning of competition law. This is apparently the understanding of Odudu and Piernas Lopez. Yet, it may well be that his statement must be understood as meaning that

- INAIL's activity, found non-economic for the purpose of the competition rules, would not either be considered as an economic activity in the meaning of free movement law, but as a service in the meaning of free movement law, in the sense that it covered social insurance that *can* be subject to commercial transactions in the internal market and *can* be conducted as an economic activity. As will be seen in chapter 3, such a situation was found in *Freskot*.
- Any national rule related to healthcare services is regarded by the CJEU as covered by Article 56 TFEU, which does no mean that the activity in the Member State upholding such a rule *is* economic.

2.4 Conclusion

The case law generally invoked in legal doctrine as evidence that the notion of economic activity has two different meanings, one in the purpose of the Treaty rules on free movement and the other for the purpose of the Treaty rules on competition does not seem convincing at all. It is simply not what the Court means in *Meca-Medina*, and AG Poiares Maduro's Opinion in *FENIN* does not make a good case for such a thesis. The difference in scopes between the free movement and the competition rules may have another explanation. It seems possible to submit the hypothesis:

- That the meaning of "economic activity" does not vary throughout the Treaties
- That the notion of "economic activity" is fundamentally related but not equivalent to the notions of "goods", as defined in the CJEU's case law, or "services", as defined in Article 57 TFEU and interpreted by the CJEU.

While this understanding does not seem improbable, it certainly needs be tested in the light of the case law of the CJEU, which is done in the following chapters.

3 "Economic activity" in the field of internal market law: relevance and criteria

The purpose of this chapter is to analyse what relevance the notion of "economic activity" has for the applicability of EU free movement rules, and to identify the criteria which determine that an activity may be seen as "economic in the meaning of EU free movement law".

The general approach is to focus on the "concepts of entry" for the application of the Treaty provisions on free movement of "goods", "services", "establishment", and "capital", and to decouple these concepts – goods, services, establishment and capital – from the notion of "economic activity".[153] This distantiation is indispensable to study if there is anything as a notion of "economic activity"which may be relevant in that field of EU law, and what it means in substance. The point of departure consists therefore in refusing the convenience of characterising the fact that the fundamental freedoms are applicable to the regulation of an activity by saying that it is an "economic activity". Also, as the CJEU has notoriously expanded the scope of free movement law by interpreting the "concepts of entry" and, regarding the concept of services, their definition in the Treaty, the study concentrates wholly on this case law with in mind the following questions:

- Does the Court use the notion of "economic activity" to characterise the applicability of the fundamental freedoms?
- What does the Court appear to mean by "economic activity" in that field of law?
- How does this meaning relate to the concepts of entry (goods, services, etc.)?
- What are the substantial criteria which seem to determine that an activity may be regarded as "economic in the meaning of EU free movement law"?

It has appeared rather early in the analysis that in the field of public services for which the question of whether the activity is or not covered by the fundamental freedoms is uncertain, the CJEU in fact avoids the notion of "economic activity" and rather questions whether "the product at issue" may be subject to "economic transactions" in order to determine the existence of a service in the meaning of Article 57 TFEU and of Article 56 TFEU. As will be shown in this chapter, the Court's subtle definition of the "entry concepts" allows to maximize the contribution of EU law on free movement to their liberalization, without having to characterize the whole activity as economic.

In the first section, the Court's definition of the "concepts of entry" is examined in the four fields of goods, services, establishment and capital, in order to identify the common features in these definitions, whether they are related to the notion of economic activity and how. The section's title anticipates on the result of the study it contains, which serves the aim of systematisation and clarity. The second section looks closer at the notion of

[153] The free movement of workers and of EU-citizens is not treated in this study, which is motivated in the introduction to Part II.

"economic activity in the meaning of free movement law" emerging from the first section, and proceeds to analyse the criteria which the Court uses to determine its existence and how it interprets these criteria. The method used in this chapter is wholly in line with what has been described in the introduction to part II, and therefore needs not be described again here.

3.1 Relevance of the fact that an activity *can be* economic for the applicability of the free movement rules to public services

The purpose of this first section is to analyse the CJEU's case law showing how the "basic test" for which national rules affecting public services, including social services, are caught by the fundamental freedoms may be that the activity *can be* economic, and not that the activity *is* economic. This analysis is undertaken for the free movement of goods in 3.1.1, the free movement of services under 3.1.2, the freedom of establishment under 3.1.3 and the free movement of capital under 3.1.4. Section 3.1.5 is devoted to the concept of "exercise of official authority". Preliminary conclusions are drawn under 3.1.6.

3.1.1 Free movement of goods

The concept of goods is not defined in the Treaties. For certain merchandises and utilities, the CJEU has simply underlined the *de facto* "acceptance" of legal system of the Member States or of EU law for regarding them as goods for the purpose of the Treaties. Thus, in *Costa v ENEL*, the Court *accepted* that electricity may fall within the scope of Article 37 EEC (now Article 37 TFEU).[154] In *Almelo*, the Court pointed at the *acceptance*, in both Community law and the national laws of the Member States, that electricity constitutes a good within the meaning of Article 30 EEC (now Article 34 TFEU).[155]

In *Commission v Italy*, the Court declared that by goods for the purpose of the Treaties "must be understood products which *can be valued in money* and which are *capable*, as such, *of forming the subject of commercial transactions*"[156] (emphasis added). This "definition" required that the product (1) is valuable in money and (2) potentially subject to commercial transactions, and led to find that rules restricting the exportation of articles of historic, artistic, archaeological or ethnographic nature, were covered by the Treaty provisions on free movement of goods.

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[154] See Case 6/64 *Costa v ENEL* [1964] ECR 1141. This was a time when the Italian Government could believe that it was worth arguing that "[t]he rules of the Treaty safeguarding a free market cannot be concerned with the system of public services".

[155] Case C-393/92 *Almelo* [1994] ECR I-01477, para.28.

[156] Case 7/68 *Commission v Italy* [1968] ECR 423.

The approach in *Commission v Italy* has been used in *Walloon Waste*, where the Court established that waste, recyclable/reusable or not, constitutes goods in the meaning of Article 30 EEC and seq. (now Article 34 TFEU and seq.) as objects which are shipped across a frontier for the *purposes of commercial transactions, whatever the nature of those transactions.*[157] The Court stated that, while recyclable and reusable waste have an intrinsic commercial value, it may be difficult to once and for all determine which waste is recyclable or reusable, as this can vary with technical progress and recycling costs.[158] In *Walloon waste*, the Court did not mention requirement (1) in *Commission v Italy*, namely that goods must be valuable in money, and did not confront itself with the fact that waste can be a good with positive value and, in particular hazardous waste, a "bad" with negative value. It is enough that the *result* of waste treatment, making it reusable or recycling it, may be valuable in money, at that point waste should in fact have ceased to be waste.[159] As a result of the reasoning of the Court in *Walloon Waste*, which is settled law but arguably does not clearly fit in the definition of "goods" in *Commission v Italy*, cross-border waste movements are subject to Article 34 TFEU and national regulatory or administrative measures may only restrict such movement where expressly permitted by secondary EU legislation.[160]

The Court has had several occasions to apply free movement provisions to measures affecting the operators or the operation of water supply or water treatment or the construction and maintenance of water infrastructures.[161] That water supply may in certain circumstances be regarded as subject to commercial transactions gets support from the fact that water supply is regarded as an economic activity for the purpose of the VAT Directive,[162] even when the service is rendered by a public body, as underlined in *Finanzamt Oschatz*.[163] However, the case law of the Court has never gone as far as

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[157] Case C-2/90 *Walloon Waste* [1992] ECR I-4431, para.26.

[158] Case C-2/90, *Walloon Waste*, paras.23 and 27. The Court emphasized the difficulty in applying such a distinction in practice, especially with respect to controls at frontiers.

[159] See Article 6 of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [2008] OJ L 312/3.

[160] Case C-2/90 *Walloon Waste* [1992] ECR I-4431, para.28. This point of departure has never been questioned by the Court since then. See confirmations in Case C-155/91 *Commission v Council* [1993] ECR I-939, and more recently in Case C-221/06 *Stadtgemeinde Frohnleiten, Gemeindebetriebe Frohnleiten GmbH v Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* [2007] ECR I-9643, paras.37-38.

[161] In *Commission v Ireland*, the Court examined discriminatory contract specifications in the frame of the procurement of construction of a water- transport infrastructure, transport pipes being required to fulfill an Irish standard. As the contract concerned works, not covered by the Procurement Directive in force at the time of the procedure, the Court focused instead on the *commercial* transaction regarding pipes – undeniably goods in the meaning of EU law – and was able to examine the disputed requirements in the light of Article 30, thus maximizing the *effet utile* of the fundamental freedoms. See Case 45/87 *Commission v Ireland* [1988] ECR I-4929, paras.15-17. In his opinion on this case, AG Darmon considered that "the interpretation of the rules of the Treaty relating to the free movement of goods and the freedom to provide services, as regards the relation between their respective fields of application, must not entail the *ineffectiveness, with regard to major areas of trade*, of a fundamental provision which has been recognized by the Court as having direct effect 14 or the invalidity of a set of Community rules". See Opinion of AG Darmon in Case 45/87 *Commission v Ireland*, para.27.

[162] Point 2 in Annex D of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2009] OJ L 292/5.

[163] Case C-442/05 *Finanzamt Oschatz* [2008] ECR I-01817, para.35.

stating that water may be considered as a good in the meaning of the Treaties with regard to the fact that it can be subject to commercial transactions.

It may be noted that under Article 37 TFEU, it is only State monopolies *of a commercial character* – which are becoming rare but are typically motivated by objectives of general interest, which must be adapted to EU law. Article 37 TFEU does as a general rule not apply to monopolies in the provision of services, but is relevant for certain public service constructions.[164]

The above shows that national measures affecting public services in sectors such as waste management and management and electricity supply can be covered by the free movement of *goods*, even though the object of the service makes them difficult to conceive of it as goods. This is because the Court has interpreted the applicability of provisions governing the free movement of goods as requiring that there is some "material" which *possibly or de facto* is subject to *economic/commercial transactions* having cross-border interest. On this background, it seems that water would constitute a candidate to the status of goods in the meaning of the Treaties. However, it is proposed that the criterion of "acceptance" has been subtly evoked and used by the Court, arguably because a substance cannot be differentiated as constituting goods in certain situations and not goods in others, in other words "once goods, always and everywhere in the Union goods". This acceptance may be objectified by the fact that the substance has a price in the Member States. This has long been the case with electricity and gas, but not as clearly with waste. Thus, while EU law clearly treats waste as by default potential subject of trade, many waste fractions do not have a market value in the Member States. This reflects the ambivalence at State and sub-state level – and lack of profound political acceptance – for considering waste generally as "goods". As to water, its potential money value is a hyper sensitive issue, and there is clearly no acceptance in many States for treating it as marketable goods.

3.1.2 Free movement of services

Both Article 56 TFEU and Article 57 TFEU, which includes the definition of "service" are interpreted by the Court in a manner that exercises high pressure on the Member States' legislation in the field of public services. This section evokes firstly two key factors in the wide *effet utile* of the free movement of services – the term "normally" in the definition of service in Article 57 TFEU and the notion of passive freedom to provide service following from Article 56 TFEU. Second, it examines how the CJEU determines the applicability of Article 56 TFEU with a focus on the economic *transaction* and economic *rule*, and not on economic *activity*. Third, it develops the view that the Court's basic test to determine whether national rules are caught by Article 56 TFEU is

[164] Article 37 TFEU can also apply to state monopolies in the provision of services if such monopolies can have a direct influence on trade in goods between Member States, see opinion of AG in Case C-438/02 *Hanner* para.34, referring to Case 271/81 *Société coopérative d'amélioration de l'élevage et d'insémination artificielle du Béarn* [1983] ECR 2057, paras.8-13, and Case C-17/94 *Gervais and Others* [1995] ECU I-4353, paras.35 and 37.

whether the activity *can be* economic. And fourth, it is examined whether the Court's axiom in *Humbel* fits with the Court's "basic test" determining that a national rule is covered by the fundamental freedoms.

3.1.2.1 Wide interpretation of "service" and of "freedom" in the basic test determining that a national rule is caught by Article 56 TFEU

In the field of social services, it is typically national authorization schemes and rules concerned with compulsory affiliation to a body in charge of managing the supply of social services which have been reviewed by the CJEU in the light of Article 56 TFEU.[165] The applicability of Article 56 TFEU to such measures requires that the service at issue constitutes a "service" in the meaning of the Treaties, which according to Article 57 TFEU is the case where a service is (1) normally provided for remuneration (hereinafter called "the remuneration criterion"), and in so far as the measures are (2) not governed by the provisions relating to freedom of movement of goods, capital and persons (hereinafter "the service criterion").[166] The service criterion is said to be "residual".[167] Accordingly, depending on the facts at issue, the Court may find it possible to examine a national public service regulation in the light of the free movement of goods, persons or capital, which can exclude that a regulation is at the same time examined in the light of the free movement of services.[168] This "residuality" is often relevant in the field of public service regulation and allows to apply the fundamental freedom having the strongest effet utile.[169]

The remuneration criterion is generally described as meaning that the "activity must be economic in the meaning of internal market law".[170] Indeed, the Court has used the

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[165] For an account of this case law, see Van de Gronden, J. W., 2013, p. 239 ff.

[166] As examples of services, Article 57 TFEU names activities of an industrial character, of a commercial character, of craftsmen and of the professions.

[167] See Opinion of AG Jacobs in Case C-2/90 *Walloon Waste* [1992] ECR I-4431, para.7. The AG held that this residual character was demonstrated by Case C-239/90 *Boscher* [1991] ECR 1-2023, where the Court found a provision restricting the sale of goods by public auction, precluded by the free movement of goods, and therefore found the freedom to provide services not applicable, alsthough the rule restricted also auction services.

[168] For a precise and detailed account of the rules governing the choice of fundamental freedom to be examined in cases where more than one freedom is relevant, see the Opinion of AG Trstenjak in Case C-31/11 *Marianne Scheunemann v Finanzamt Bremerhaven*, (CJEU 19 July 2012), para.32.

[169] See Opinion of AG Jacobs in Case C-2/90 *Walloon Waste* [1992] ECR I-4431, para.8: "Indeed, the [freedom to provide services] will only apply if the transaction in question is not covered by those concerning the free movement of goods. /…/where, as in the present case, the whole point of the transaction is permanently to remove the object from one Member State to another in order that it can be stored, tipped or destroyed, the movement of goods cannot be regarded as merely incidental to the provision of services, even if the operations of storage, tipping or destruction are regarded as "services" within the meaning of the Treaty".

[170] For instance, the German Government expressed in *Commission v Germany* its view that "[t]he freedom to provide services presupposes the existence of an economic activity, as is apparent from the words "for remuneration" used in Article 50 EC [now Article 57 TFEU]", see Case C-318/05 *Commission v Germany* [2007] ECR I-6957, para.51. As already mentioned, it is explained in the 2013 SGEI Guide, p. 223, that "[g]enerally speaking, only services

expression "economic activity" in early free movement cases related to sport activities,[171] but very rarely when examining whether a service in the public sector constitutes a "service" in the meaning of Article 57 TFEU.[172] This is arguably a deliberate terminology choice, because, as already pointed out, allowing a service to be subject to market economy is a *political* decision, belonging to the competence of the Member States, *at least initially*. The Court will certainly not characterize a given activity as economic unless there is a sufficient and clear degree of political "acceptance" *throughout the Union* for such a general characterization. In the field of social services, this acceptance is either weak or uneven among the Member States.

Faced with this "acceptance issue", the Court chose to maximize the *effet utile* of Article 56 TFEU by interpreting the notion of "free movement of services" broadly, as including both a "passive" and an "active" freedom to provide services. This was established in *Luisi and Carbone*[173] and it is now settled law that Article 56 TFEU includes both a right for persons established in one Member State to go to another Member State and offer services there, and a right for persons established in a Member State to go to another Member State and receive a service there.[174] In *Demirkan*, AG Cruz-Villalón explains that the active freedom to provide services and the passive freedom to provide services are in fact part of a "now common three-fold typology in relation to the cross-border provision of services", which apart from active and passive freedom to provide services even includes a third freedom for the service itself to cross the border without any movement on the part of the service provider or service recipient.[175]

Odudu has interpreted *Luisi and Carbone* as meaning that "[p]ersons are engaged in economic activity not only when they supply services but also when they demand

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constituting 'economic activities' are covered by the Treaty rules on the internal market (Articles 49 and 56 TFEU) and the Services Directive".

[171] Thus in *Walrave* the Court held that "Having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty."

[172] This assertion is based on the results of a search in the Curia-database for judgments of the Court including the terms "economic" "free movement of services" and "remuneration". In the fifteen judgments published in the ECR and containing these terms, the Court never uses the expression "economic activity".

[173] See Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paras.10 and 16. Under paragraph 10, the Court exposed clearly the legal-political basis of its interpretation and explained that "[i]n order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided, is established or else the latter may go to the State in which the person providing the service is established/…/ the latter case [being] the necessary corollary [of the former case], which fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital".

[174] See Craig P. and De Búrca G., 2008, p. 818. For instance, regarding education provided by schools which do not belong to a public educational system and which are essentially financed by private funds, see Case C-318/05 *Commission v Germany* [2007] ECR I-6957, para.65.

[175] According to AG Cruz-Villalón this third form of the freedom to supply services is also known as 'services by correspondence'. See Opinion of AG Cruz Villalón in Case C-221/11 *Leyla Ecem Demirkan v Federal Republic of Germany* (CJEU 24 September 2013), para. 47. Advocate General Cruz Villalón underlines that this topology also follows from the GATS Agreement within the framework of which States may choose which forms of service provision they liberalise.

services".[176] This is however not quite what the Court said in the referred part of this judgment, where the Court explains: "Whilst the former case is expressly mentioned in the third paragraph of Article 60 [EC], which permits the person providing the service to pursue his activity temporarily in the Member State where the service is provided, the latter case (the recipient goes to the State in which the person providing the service is established, precision added) is the necessary corollary thereof, which fulfils the *objective of liberalizing all gainful activity* not covered by the free movement of goods, persons and capital" (emphasis added). Thus the Court does not say that the recipient going to the State where the provider is established conducts an economic activity. What it says is that the free movement of services must be interpreted as also giving a right of free movement to this recipient, in order to enhance the *effet utile* of the freedom to provide services.

Hence, in contradiction with Odudu's view, it is submitted that, while the passive freedom to provide services implies a right for service recipients, this right does not require that *the service recipients* are engaged in an economic activity (although this is not excluded), it only requires that the provider conducts the service as an economic activity, "a service for remuneration". This view seems shared by AG Cruz-Villalón who held in *Demirkan* that the passive freedom to provide services gives consumers a wide protection barely distinguishable from the right to free movement, and that, from the perspective of consumers, a service does not have to constitute an economic activity, as the Court has established that the remuneration for a service does not necessarily have to be paid by the recipient of the service."[177]

3.1.2.2 The applicability of Article 56 TFEU is triggered by the economic character of a *transaction* or of a *rule*

Faced with the "acceptance issue", the Court has also gradually dissociated the status – as economic or not – of a service activity in the Member State of the provider and in the Member State of the recipient. Thus, the applicability of Article 56 TFEU to national regulation does not require that the service activity *is* economic in both the provider's Member State and the recipient's Member State. As early as in *Luisi and Carbone* and more assertively in *The Society for the Protection of Unborn Children*, the Court of Justice spelled out that medical activities fall within the scope of Article 56 TFEU, the reason being that medical activity, including termination of pregnancy which is lawfully practised in several Member States, is *normally* provided for remuneration and may be carried out as part of a professional activity.[178]

Also, the Court of Justice expressed in *Smits and Peerbooms* the view that "it must be *accepted*" that a medical service provided in one Member State and paid for by the patient

[176] Odudu O., 2009, p. 229.

[177] Case C-221/11 *Demirkan* (CJEU 24 September 2013), para.50.

[178] See Case C-159/90 Society for the Protection of Unborn Children [1991] ECR I-4685, para.18, referring to Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, para.16.

should not cease to fall within the scope of the freedom to provide services guaranteed by the Treaty *merely because* the patient then applied for reimbursement under the sickness insurance scheme of his Member State which essentially provided for benefits in kind.[179] In *Watts*[180], the Court made all the clearer that for the applicability of Article 49 EC (now Article 56 TFEU) to the legislation a Member State in the field of healthcare services, "all that matters" was that a patient who was in need of hospital treatment had gone to another Member State to receive treatment there (the cross-border criterion) and had received it there for remuneration (the remuneration criterion). This made clear that, in assessing the applicability of Article 56 TFEU to a national rule in the field of health care, a distinction must be made between

a. Healthcare in the Member State having adopted this rule – which may not be remunerated and thus not constitute an economic activity and

b. Healthcare *de facto* provided for remuneration by operators from other Member States and possibly restricted by the rule at issue.

It became also clear that regardless of (a) and (b), healthcare is a service in the meaning of the Treaty and therefore cross-border economic provision of that service (a provision for remuneration) is protected by the freedom to provide services.[181]

In both *Smits and Peerbooms* and *Watts* it was the *passive* freedom to provide services which was applicable, as the cross-border economic transaction had been initiated by individuals who had gone to a service provider in the latter's Member State. The national non-economic system can thus be "opened" or "challenged" by its own beneficiaries, allowed to purchase better or more rapidly available commercial services in other Member States on the basis of their right to benefit from a similar service substance in their own Member State. Importantly, the Court made in *Smits and Peerbooms* clear and in *Watts* even clearer that the issue of determining whether a cross-border service transaction between a person of Member State A and a provider in Member State B may be regarded as *economic*, as provided for remuneration by the provider in Member State B, must be separated from another issue, namely whether this kind of service is provided for remuneration in Member State A.[182] In both cases, the Court left open the issue of whether a social service (for instance health care), considered as a service in the meaning of Article 57 TFEU because it *can be* subject to cross-border economic transactions, can *as defined and regulated in a Member State* be considered as no service in the meaning of Articles 56 and 57 TFEU. This issue was tackled by the Court in the *Freskot* ruling.[183]

In *Freskot*, the Greek rule challenged was a quasi-fiscal charge applied uniformly to Greek agricultural products intended for the domestic market or for export, and used to fund

[179] Case C-157/99 *Smits and Peerbooms* [2001] ECR I-05473, para.55, emphasis added.

[180] Case C-372/04 *Watts* [2006] ECR I-4325, para.90, concerning the provision of medical services.

[181] Ibid, para.90.

[182] Case C-157/99 *Smits and Peerbooms*, referred above, para.55 and C-372/04 *Watts* [2006] ECR I-4325, para.91.

[183] Case C-355/00 *Freskot* [2003] ECR I-05263.

a public body in charge of preventing and compensating damage caused by natural risks. What makes the *Freskot* ruling important is that the preliminary questions forced the Court to determine whether a social service as organized in a Member State constituted an *economic activity* for the purpose of EU competition law *and* EU free movement law. The Court found that:

- The insurance activity carried out by the body in charge of managing the benefits provided for by the national scheme did not constitute an economic activity in the meaning of competition law. This body was not an undertaking, because not only the nature and the level of the benefits, but also the characteristics and the rate of the contribution were set by law.[184]
- The insurance provided under the national scheme did not constitute a service in the meaning of Articles 56 and 57 TFEU, and thus, *the service as defined and regulated in that Member State did not constitute an economic activity in the meaning of free movement law*.
- The service provided under the national scheme could include benefits provided for remuneration by insurance undertakings in other Member States, and therefore the scheme itself was covered by Article 56 TFEU, because it affected economic activities in other Member States.

As illustrated below, the benefits provided by the Greek body did not constitute services in the meaning of Article 57 TFEU[185], but the regulatory scheme could restrict the freedom of insurance companies from other Member States to provide for remuneration in Greece[186], and was prohibited by Article 56 TFEU unless it was proportional to an overriding public interest related to the social objective, which the national court would have to examine.[187] Thus, the Court spelled clearly that the criteria determining that an activity as regulated in a Member State *is* economic for the purpose of free movement are not decisive for the applicability of the freedom of movement to the national regulation. What is decisive is that this regulation – even if it defines and regulates a service as non-economic at national level – covers services which in other Member States are provided for remuneration, and affects *their* freedom to cross borders.

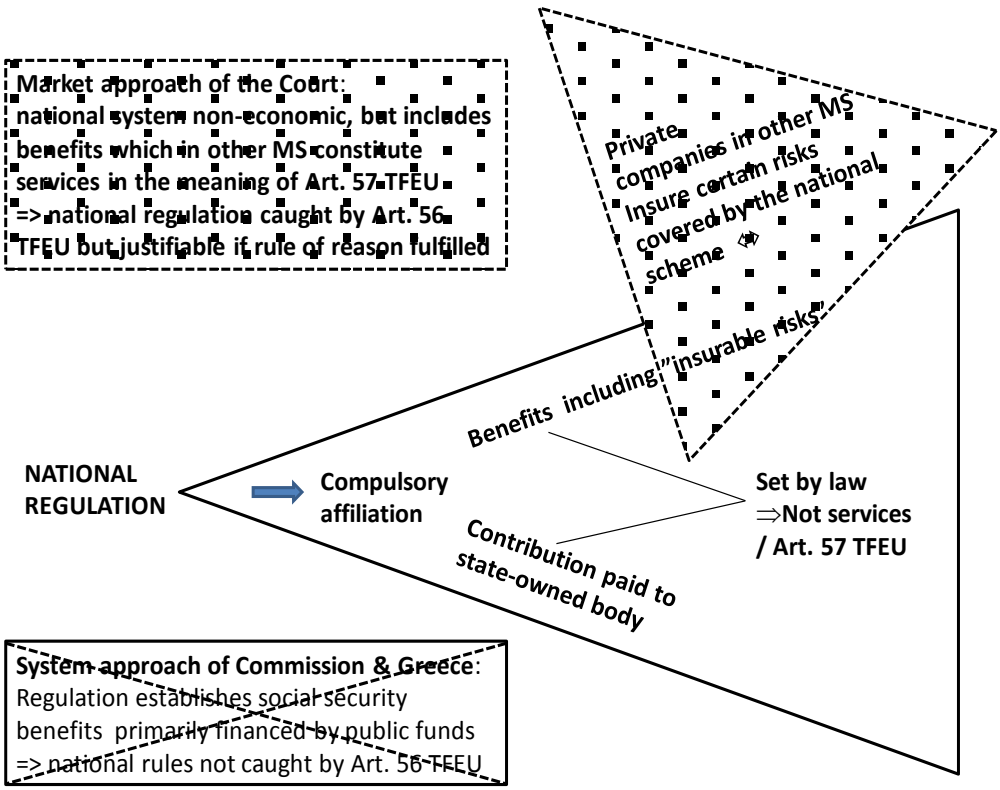
[184] Ibid, para.79.

[185] Paras.52-59.

[186] See para. 63

[187] See para. 65-69. The liberalization in question consisting in Greek farmers being allowed to take out insurance policies with private insurers in respect of certain risks covered by the compulsory insurance scheme and made exempt from paying the contribution to a corresponding extent.

The CJEU's approach in *Freskot*



The approach in *Freskot* is also found in *Kattner Stahlbau*, where the Court had to assess German rules imposing employers in Germany compulsory affiliation to the employers' liability insurance association, a body providing insurance against accidents at work and occupational diseases.[188] The contested rules were not caught by the Treaty provisions on competition, as the body providing insurance did so under a national scheme pursuing a social aim, applying the principle of solidarity and supervised by the State, and thus could not be regarded as an entity conducting an economic activity, an undertaking. By contrast the disputed rules were caught by the freedom to provide services, because the insurance scheme could cover "insurable risks", i.e. risks insured in the frame of economic activity in other Member States. By contrast with *Freskot*, in *Kattner Stahlbau* the Court did not assert that the benefits provided under the national

[188] Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513.

scheme at issue could not be classified as a service against remuneration, a service in the meaning of Article 56 and 57 TFEU.[189]

Van de Gronden comments these rulings as implying that "[t]he market dimension of a service is not dependent on the way its provision is framed in the welfare regulations of a Member State. Rather, the market dimension is derived from the theoretical point of view whether "in an ideal world" the service concerned can be provided in a market environment."[190] In his view, this capacity of a service in the meaning of Article 57 to be made subject to market forces is expressed by the word "normally" in the definition of a service in Article 57 TFEU. The Court's interpretation of the term "normally" in Article 57 TFEU is discussed in the next section.

3.1.2.3 The Court's basic test to determine whether national rules are caught by Article 56 TFEU is whether the activity *can be* economic

The CJEU has never given a precise interpretation of the word "normally" in the definition of services in the meaning of the Treaties as "services *normally* provided for remuneration" in Article 57 TFEU. However, in light of the case law evoked above, it is submitted that this word essentially founds the test used by the Court to assess whether a national rule is covered by Article 56 TFEU. This test is not that the activity regulated by this rule *is* economic (actually provided for remuneration) but that it affects an activity that *can be* economic (*normally* provided for remuneration). Thus Article 56 TFEU not only prohibits rules hindering, without justification, *existing* cross-border specific economic service transactions but also hindering, without justification, *potential* cross-border economic service transactions.

Regarding social services for instance, this possibility of economic service transactions is at hand as soon as the service *can be* provided cross-border for remuneration, which does not require that the service is under any circumstances and in every Member State provided as an economic activity. As soon as it is clear that the potential exists (for instance because nationals go to another Member State to receive in that state services against remuneration, or because operators offer the service as an economic activity in certain Member States), the activity is regarded as a service in the meaning of Article 57 TFEU and any national rule capable to affect cross-border trade in that service is an "economic rule" for the purpose of the freedom to provide services.

If a national rule is identified as economic for the purpose of the freedom to provide services, it must be assessed (either judicially case by case of by the legislator *in abstracto*) whether it restricts or can restricts rights to actively or passively provide services. This

[189] The Court simply stated that "[i]n the present case, it may well be doubted /…/ whether, the risks covered by the statutory insurance scheme at issue in the main proceedings, or at least some of them, could be insured with private insurance companies, given that those do not, as a rule, operate in accordance with a system that incorporates the elements of solidarity set out in /…/this judgment". See Case C-350/07 *Kattner Stahlbau*, referred above, para.80.

[190] Van de Gronden, J. W., 2013, p. 127.

test must be distinguished from a second test delineating the scope of the right *ratione personae* and *ratione materiae* to provide a service which may be claimed judicially, but must be respected *ex-ante* by the national legislator. The "second test" is whether a specific activity considered *in casu* is provided for remuneration not *normally* but *actually*. Whereas the first "basic" test delineates the scope of the rules which must adapt to the freedom to provide services, the second test determines that the activity as conducted under a certain scheme or in a certain transaction *is* (as opposed to *can be*) economic.

As a result, while the right protected by Article 56 TFEU is "only" a freedom to engage in cross-border *economic* service transactions (i.e. services *actually* provided for remuneration), the pressure of Article 56 TFEU on the legislation of a Member State is broader, as it applies to any rule which *can* affect the rights of economic operators in other Member States, which is the case as soon as the service is possible to consider as *normally* provided for remuneration in cross-border transactions. "Normally" enhances the effect of Article 56 TFEU as it allows requiring that the regulation of national systems where service provision may be non-economic does not *unjustifiably and unproportionately* restrict the economic activity of providers of similar services in other Member States.

What cases such as *Smits and Peerbooms*, *Watts*, *Freskot* and *Kattner Stahlbau* tell us is that, while the Member States have been recognized under competition law a power to withdraw a social service from market operation, in exercising this power they must respect the fundamental freedoms of economic operators emerging from the liberalization of this social service in other Member States. EU free movement law forces them to justify the regulation underpinning their non-economic system and to adapt it in order to comply with the fundamental freedoms enjoyed by operators in other Member State but also by their own nationals.

The *Freskot* ruling is interesting because it demonstrates that, while trying to uphold coherence between its case law on free movement and its case law on the scope of competition law, the CJEU carefully uses a terminology that does not jeopardizes its expansion of the scope of EU free movement law. Indeed, one may wonder why the Court in *Freskot* focused on the Greek insurance body's product (found not to be a service) instead of simply stating that the insurance body's activity was not economic in the meaning of free movement.[191] The reason is argued to be that using that terminology had been extremely difficult to reconcile with the case law establishing that non-economic service provision is not only possible but also compatible with EU competition under the *Poucet and Pistre* line of case law, outlined under chapter 4. This would highlight that free movement law may do what competition law cannot achieve, i.e. impose marketing rights into an activity which a Member State believed it had powers to shield it from. There are limits to how clear the Court of Justice dare be.

The *Freskot* ruling is also important because it suggests strongly that "an apple is an apple" and that the criteria determining that a specific activity *is* economic may be the

[191] Case C-355/00 *Freskot* [2003] ECR I-5263, para.60.

same in the field of free movement and of competition, which makes it worth testing in detail this equivalence.

3.1.2.4 Does the *Humbel* formula fit with the basic test of the "economic rule"?

In light of the above, the economic character of the service as provided in the frame of a Member State's system appears to have no relevance on whether the rules of that State must be seen as economic for the purpose of the freedom to provide this kind of service. It may be questioned whether the *Humbel* ruling fits with that stance.[192] In *Humbel*, the Belgian State had brought an action against French citizens working and residing in Luxemburg, who refused to pay a fee for the courses taught to their son in a State educational establishment in Belgium, these courses being free for the Belgian nationals while fees were charged to nationals of other Member States. The CJEU had to assess whether such courses were to be regarded as services for the purpose of the freedom to provide services. Having first defined the concept of remuneration[193], the Court found that the fees charged could not be seen as remuneration in case they were related to courses provided under the national education system as

a. The State, in establishing and maintaining the system, is not seeking to engage in gainful activity but fulfils social, cultural, educational duties towards population and
b. The system is as a general rule funded by public purse and not by parents/pupils

It seems clear that the Court meant "the state in general" and not specifically Belgium.[194] The Court made the state's intention is to fulfil its duties towards its population a central element of the test, although in *Humbel* it is interesting to note that the Belgian State was not fulfilling its duties towards its population, but rather supplying education to a person outside its population. Compared with the approach in *Watts*, one may wonder why the transaction in *Humbel* could not be seen as a service for remuneration. In *Humbel*, there is no focus on the transaction between the student and the establishment. The providing entity's perception of the fees and of its funding is not given any relevance, as this perception is wholly contained in the state's intention in defining, organizing and funding the courses within the national system. In *Humbel*, the public or private character of the establishment does not play any role for the relevance of the establishment's own

[192] Case 263/86 *Humbel* [1988] ECR I-5365.

[193] The concept is exposed and discussed supra in this chapter.

[194] This seems also to be the way most observers, in particular the Commission, have interpreted this view of the Court. Given the very concise character of this ruling, and the ambiguous word "the State" (the Belgium State or any Member State?), the Opinion of AG Slynn sheds some welcome light on how the Court's arguments may be understood. According to AG Slynn, courses provided under the national education system could not be regarded as services in the meaning of the Treaties because they were provided by the state and *therefore* not "for remuneration". The Advocate General held that "[t]he State is not a commercial organization seeking a profit or indeed to recover its costs and break even. If an organization which does not seek profit cannot take advantage of the freedom to establish and to provide services in other Member States conferred by the Treaty (as is clear from Articles 58 and 66), it seems to follow that would-be recipients of services provided by such an organization cannot rely on the Treaty either.". See Opinion of AG Slynn in Case 263/86 *Humbel* [1988] ECR I-5365, p. 5379.

perception of the fees. Each establishment part of the system represents the state and is therefore supposed to share its intention with supplying courses in the system. Obviously, this can only hold as long as no private establishment in the system may provide for-profit.

In fact, even if the transaction at issue in *Humbel* had been *per se* regarded as an economic transaction, it is submitted that the Court was not ready to detach it from what was "normally" the activity of secondary education establishments, in Belgium or in other Member States. In many Member States, elementary and secondary education in national systems was – and still is – difficult to envisage as an economic activity, provided for remuneration, and this for a number of reasons. Firstly those systems constituted the basic and dominating model in all Member States. Private alternatives, where they existed, were either funded privately or subsidized by the State but "outside or at the periphery of the system". Funding education through tax made arguably education in national education systems what Buendia Sierra calls a "diffuse" service, by which he meant "activities which benefit the community as a whole and where the benefit received by each individual is difficult to evaluate".[195] Besides, and perhaps as a corollary of this diffuse character, individuals paying fees for education received in other Member States could normally not expect reimbursement from their own State, a circumstance which the Advocate General Slynn underlined and deplored.[196]

In circumstances where the State was both the dominating provider and the regulator everywhere in the Community, no market activity at all could develop as long as the system of public funding (tax-funding) did not equally cover provision outside the system. By stating that courses in national systems of education did not constitute a service in the meaning of the Treaties because they were not be provided as an economic activity anywhere in the Community, the Court arguably deemed that such courses were as a whole never provided for remuneration, could normally never be subject to economic activity in the Community. In this sense the Court's approach in *Humbel* is not incompatible with the approach it has developed later, consisting in examining firstly whether the activity *can be* economic (not necessarily in all Member States but at least in some Member State(s) and therefore in some cross-border transactions), and examining in relevant cases whether specific persons or entities, as economic operators, benefit from the freedom to provide services. However, education is now also subject to liberal trends, as clear in Sweden where for private entities may to provide primary and secondary education in the tax-funded national system. Under such circumstances, the *Humbel* doctrine may be very difficult to uphold.

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[195] Buendia Sierra J. L., 1999, p. 48.

[196] See Opinion of AG Slynn in Case 263/86 *Humbel* [1988] ECR I-5365, p. 5380, where the AG made the following comment: "The analogy with health care is striking since, although Community nationals by and large are entitled to medical care throughout the Community, that entitlement is underpinned by a complex system designed to determine which State should ultimately bear the cost of the treatment. It is to my mind unfortunate that no such system for education throughout the Community yet exists.

3.1.3 Freedom of establishment

Regarding the scope of this fundamental freedom, one is faced not only with complex Treaty rules delineating the substance of the rights created and the addressees of these rights, but also with a complex, evolutive and politically very sensitive case law. This section outlines first the scope of the freedom of establishment, and second examines how the CJEU has defined the notion of "economic activity" regarding establishment in the field of services. The third part of this section has its focus on the Court's case law connecting the applicability of the freedom of establishment to national rules in the field of public services on the fact that the activity at issue is a service in the meaning of the Treaties. Conclusions are drawn in particular on the limited relevance of the notion of "economic activity" for the applicability of the freedom of establishment to national rules governing social services,

3.1.3.1 Particular visibility of the notion of "economic activity" in finding the scope of the freedom of establishment

The beneficiaries of the freedom of establishment are (1) natural persons who are nationals of Member States and (2) *for profit* companies or firms constituted in accordance with the civil or commercial law of a Member State – including cooperative societies and other legal persons governed by public or private law – and having their registered office, central administration or principle place of business in the Union.[197] It is clear from Article 54 TFEU, and underlined by AG Fennelly in *Sodemare*, that not-for-profit companies, firms and other legal persons do not benefit from freedom of establishment guaranteed by the Treaty.[198]

The material scope consists in a right of establishment in two main forms, self-employment and undertaking.[199] It is specified in the second paragraph of Article 49 TFEU that such undertakings are *in particular* such companies and firms in the meaning of the second paragraph of Article 54 TFEU, i.e. *for-profit undertakings*. The right of establishment includes "primary establishment" in another Member State, and "secondary establishment" (i.e. the setting-up of agencies, branches or subsidiaries) in any Member State, for nationals and companies already established in any Member State.[200]

The Court has established that the freedom of establishment, as the other Treaty freedoms, prohibits not only discriminatory measures but also any measure liable to

[197] This follows from Article 49 first paragraph TFEU and Article 54 TFEU.

[198] See second paragraph of Article 54 TFEU. On this point the Treaty has been clear ever since 1957, as the second paragraph of Article 58 in the Treaty of Rome had exactly the same wording as the second paragraph of Article 54 TFEU.

[199] See Article 49 second paragraph TFEU.

[200] See Article 49 first paragraph TFEU.

prohibit, hamper or render less attractive cross-border establishment.[201] As a consequence, a very large spectrum of national measures can be caught by Article 49 TFEU, but comply with this provision if they satisfy to the four-part test formulated in *Gebhard*, i.e. (1) non-discriminatory and (2) justified by overriding reasons as (3) suitable and (4) necessary. In the field of social services, the Court has found many types of national measures to restrict the freedom of establishment: limiting to non-profit operators the right to provide social services funded by public authorities in *Sodemare*[202] (elderly care), submitting establishment to a duty of prior authorization as in *Hartlauer*[203] (dental care) or in *Sint Servatius*[204] (social housing), submitting establishment to licensing schemes as in *Webb*[205] (provision of manpower) or *Susisalo*[206] and *Asturias*[207] (pharmacies), submitting providers to systems of prior approval of pricing as in *DKV*[208] (health insurance) and *Commission v Italy*[209] (car accident insurance), 'social obligations' as in *Libert*[210] (housing projects) and in *Commission v Italy*[211] (obligation to contract third-party liability motor insurance).

The freedom of establishment is unambiguously an "economic right" and the notion of "economic activity" is explicitly used by the CJEU in assessing the applicability of the freedom of establishment.[212] In *Commission v Greece*, the Court stated that this

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[201] See Case C-19/92 *Kraus* [1993] ECR I-1663, para.32, confirmed many times by the Court, *inter alia* in and Case C-55/94 *Gebhard* [1995] ECR I-4165, para.37; Case C-108/96 Mac Quen [2001] ECR I-837, para.26; Case C-424/97 *Haim* [2000] ECR I-5123, para.57; Case C-169/07 *Hartlauer* [2009] ECR I-1721, para.33. In some cases, such as Case C-442/02 *CaixaBank France* [2004] ECR I-8961, para.11, the Court includes in that formula measures which *prohibit* the exercise of that freedom. Therefore, the term "prohibit" has been added here.

[202] Case C-70/95 *Sodemare* [1997] ECR I-3495.

[203] Case C-169/07 *Hartlauer* [2009] ECR I-1721, para.34. In *Hartlauer* the Court recalled that a national rule under which the establishment of an undertaking from another Member State, and providing dental care, is subject to the issue of a prior authorization, constitutes a restriction within the meaning of Article 43 EC, since that undertaking is prevented from carrying on its activities through a fixed place of business. The requirement of authorization involved additional administrative and financial costs. The national legislation also reserved the pursuit of the self-employed activity to economic operators satisfying criteria as a condition to obtain an authorization. Lastly the Court related the situation in the case to its case law establishing that submitting the pursuit of an activity to a condition that there is an economic or social need for that activity constitutes a restriction in that it tends to limit the number or providers of services, see paras.35-36.

[204] At issue in *Sint Servatius* were national measures making investments in immovable property conditional upon a prior authorisation procedure. These measures were also found to restrict, by their very purpose, the free movement of capital, see Case C-567/07 *Woningstichting Sint Servatius*, [2009] ECR I-9021, para.22.

[205] Case 279/80 *Webb* [1981] ECR 3305, on Dutch legislation making the provision of manpower subject to a system of licensing.

[206] At issue in *Susisalo* were particularly favorable conditions for the number and conditions of the operating licenses of pharmacies entrusted with specific tasks, compared to the licensing scheme of private pharmacies, see Case C-84/11 *Susisalo* (Court of Justice 21 June 2012).

[207] Joined Cases C-570/07 and C-571/07 *Asturias* [2010] ECR I-4629.

[208] Case C-577/11 *DKV* (CJEU 7 March 2013).

[209] Case C-518/06 *Commission v Italy* [2009] ECR I-3491.

[210] Joined Cases C-197/11 and C-203/11 *Libert* (CJEU (CJEU 8 May 2013).

[211] Case C-518/06 *Commission v Italy* [2009] ECR I-3491.

[212] See Case C-314/08 *Filipiak* [2009] ECR I-11049, para.52. Also, see Case C-55/94 *Gebhard* [1995] ECR I-4165, para.25, and Case C-470/04 *N* [2006] ECR I-7409, para.26.

fundamental freedom precludes measures which might place nationals of a Member State at a disadvantage "when they wish to pursue an economic activity" in the territory of another Member State.[213] In *Factortame II* the Court held that the concept of establishment involves (1) *the actual* pursuit of an *economic activity* (2) through a fixed establishment in another Member State for an indefinite period.[214]

The Court has refused allowing nationals to rely upon the freedom of establishment to challenge anti-competitive rules that could be challenged by nationals from other Member States (*internal* situations), and *Doulamis* is a case in point.[215] At issue was a criminal prosecution brought in Belgium against Mr Doulamis, who operated a dental laboratory and dental clinic in that Member State and was accused of having placed advertisements for that laboratory and that clinic in the Belgacom telephone directory. The national court wondered whether the prosecution, based on national provisions prohibiting dental care providers from advertising their services to the general public, infringed Article 101 TFEU, read in combination with the conjunction with Article 4(5) TFEU (state action doctrine).

Neither AG Bot nor the Court doubted that Mr. Doulamis pursued an economic activity for the purpose of the Treaty rule on competition and both came to the conclusion that the Belgian legislation at issue did not breach against these Treaty provisions in combination.[216] However, AG Bot considered that, although there was no cross-border element in the case, the Belgian rule should be examined in the light of the fundamental freedoms, invoking Article 47(3) EC (now in Article 53(2) TFEU)[217] and the Court's statement in *Mac Quen,* that while the Member States remain, in principle, competent to define the exercise of those activities, they must none the less, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaty.

That the Court did not follow AG Bot's proposal is interesting because it had by then shown a willingness to assess possible infringements of Article 49 TFEU to situations confined within a single Member State, for instance in *Mauri*[218], in *Servizi*[219] and in *Cipolla*.[220] However, in *Doulamis* the referred questions did not address, not even

[213] Case C-155/09 *European Commission v Hellenic Republic* [2011] ECR I-65, para.43.

[214] Case C-221/89 R. v Secretary of State for Transport, ex parte Factortame (Factortame II) [1991] ECR I-3905, para.20.

[215] Case C-446/05 Procureur du Roi v Ioannis Doulamis (Doulamis) [2008] ECR I-1377.

[216] Opinion of AG Bot in Case C-446/05 *Doulamis* [2008] ECR I-1377, para. 71, confirmed by the Court, see paragraph 22 of the judgment. The national provisions neither encouraged, reinforced nor codified concerted practices or decisions by undertakings, and did not either delegate to private economic operators the responsibility for taking decisions affecting the economic sphere

[217] Ibid, para.76. This provision, envisages a progressive abolition of restrictions of the right of establishment in the case of medical and allied and pharmaceutical professions. However, it must be noted here that Article 53(2) TFEU evokes a process of legal-political coordination between the Member States, and not a process of liberalization driven by the Court of Justice. Case C-108/96 *Mac Quen* [2001] ECR I-837, para.24.

[218] Case C-250/03 *Mauri* [2005] ECR I-1267.

[219] Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, para.29.

[220] Case C-94/04 *Cipolla* [2006] ECR I-11421, para.30. In *Cipolla*, decided by the full Court a few months after Servizi Ausiliari, the Court stated that: "although /…/all aspects of the main proceedings before the national court are

implicitly, the applicability of the freedom of establishment, and thus AG Bot's approach was to raise *ex officio* the issue of this applicability in a case where no cross-border element was invoked, which arguably denotes legal activism.[221]

3.1.3.2 Meaning of "economic activity" for the purpose of establishment in service sectors: "a service provided for remuneration"

In cases questioning the applicability of the freedom of establishment to national measures affecting service activities, the Court has been forced to be clearer on what it means by an "economic activity" in the definition of establishment. Thus, in *Jany*[222], a Dutch court wondered whether Dutch immigration rules which made possible for Dutch authorities' to refuse Polish and Czech nationals residence permits and made impossible for them to work as self-employed prostitutes in the Netherlands, was compatible with the right ofestablishment. The Association Agreements which bound EU to Poland and the Czech Republic at the time of the decision, provided for a right of establishment for "*economic* activities as self-employed persons", whereas the Treaty provided for a right of establishment for "activities as self-employed persons".[223] The Court acknowledged the difference in wording but found nevertheless no difference in meaning between that the Agreements' and the Treaty provisions, which confirmed nicely the requirement in element (1) of *Factortame II* that establishment in the meaning of the Treaty supposes the actual pursuit of an economic activity.

However, the applicability of the freedom of establishment in the *Jany* case *also* supposed that the prostitutes really could be regarded as pursuing *an economic activity as self-employed*, and not as workers in disguised employments, for instance by a pimp.[224] In order to establish whether prostitution could be an economic activity as *self-employed person*, the Court referred to provisions of the Association Agreements defining economic activity as "activities of an industrial character, activities of a commercial character, activities of

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confined within a single Member State, a reply might none the less be useful to the national court, in particular if its national law were to require, in proceedings such as those in this case, that an Italian national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation (emphasis added)". The fact that the Court used the term "in particular" suggests other reasons may lead to answer referred questions in the absence of any cross-border element in the main proceedings.

[221] In this regard, Gerard evokes a debate within the CJEU between some Advocate Generals – including obviously AG Bot – and the Court of Justice, as to whether public restraints limiting the freedom to compete should be addressed by the judge-made state action doctrine (applying the EU rules on competition – Articles 101 and 102 TFEU to Member States' measures, by combining them with the principle of loyal cooperation in Article 4(3) TFEU), or by means of the freedom of establishment. Gerard D., 2010, p. 10.

[222] Case C-268/99 *Jany* [2001] ECR I-8615.

[223] See Article 52 EC (now Article 49 TFEU).

[224] This was important in the case, because the Association Agreements expressly stipulated that they did not confer any right to the labor market of another party to the Agreements.By contrast, the Treaty conferred a freedom to work in both an employed and a self-employed capacity, and thus it was less important for the public authorities of the host Member State to control whether migrants really intended to engage in self-employed activity in the host Member State.

craftsmen and activities of the professions".[225] As this list was preceded by the words "in particular"[226], the Court considered that even activities not covered by the list could be economic, and had therefore to spell out what made an activity outside the list, such as prostitution, economic and as such covered by the freedom of establishment.

To the Court, what made prostitution an "economic activity" was that it may be regarded as *a service provided for remuneration*.[227] This criterion is obviously very similar to the definition of a service in Article 57 TFEU "service normally provide for remuneration", which involves that in the field of services the applicability of the two freedoms – of establishment and to provide services – is triggered by a common basic criterion, element (1) in the *Factortame II*'s definition of establishment. Hence, in the field of social services, the only criterion distinguishing the applicability of the freedom of establishment compared to the applicability of the freedom to provide services may be criterion (2) in the Factortame definition, i.e. "a fixed establishment in another Member State for an indefinite period".[228] Also, in line with criterion (1) in the definition of establishment in *Factortame* – the activity protected by the right of establishment must *actually* be an economic activity – the ruling in *Jany* shows that only operators *actually* providing services for remuneration enjoy the right of establishment. However, it will be seen that the Court seems to connect the applicability of the freedom of establishment to national rules organizing the supply of social services, to the fact that these rules govern "services in the meaning of the Treaties", which according to Article 57 TFEU are "services *normally* provided for remuneration".

3.1.3.3 "Service in the meaning of Article 57 TFEU" as a criterion for the applicability of the freedom of establishment to Member States' legislative and administrative rules in the field of services, including social services

[225] Para.64.

[226] The only exceptions were the Spanish and the French versions.

[227] Case C-268/99 *Jany* [2001] ECR I-8615, para.48.

[228] For the purpose of deciding on the infringement of the fundamental freedoms of a specific operator in a concrete case, the Court explained in *Gebhard* that Article 56 TFEU is "subordinate" to Article 49 TFEU, firstly because the wording of the first paragraph of Article 56 TFEU assumes that the provider and the recipient of the service concerned are 'established' in two different Member States[228] and, secondly, because the first paragraph of Article 57 TFEU specifies that the provisions relating to services apply only if those relating to the right of establishment do not apply. See Case C-55/94 *Gebhard* [1995] ECR I-4165, para.22. Also, the Court explained in *Commission v Portugal* that "the key element is whether or not the economic operator *is established* in the Member State in which it offers the services in question (emphasis added)." See Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, para.24. This does however not mean that the freedom of establishment only applies once a natural or legal person has in fact established in another Member State, as the CJEU's settled view is that any national measure which *is liable* to hinder or restrict establishment is caught by Article 49 TFEU. Thus, from the perspective of a Member State or public authorities in that State, there is an obligation for national measures to respect the freedom of establishment *in abstracto*, for *any operator* wishing to establish itself for an indefinite period on its territory. In this perspective, a national measure can be found to restrict *both* the freedom of establishment and the freedom to provide services of operators established in other Member States.

In *Doulamis*, AG Bot declared that "[m]edical or paramedical work such as the provision of dental care is an *economic activity* subject to the rules of the internal market."[229] To support this view, repeated at paragraph 76 of his Opinion, the Advocate General invoked the provision in Article 53(2), *MacQuen* (freedom of establishment) and *Kohll* (freedom to provide services).[230]

Indeed the Court established for the first time in *Kohll* that the freedom to provide services can be applicable to health care services, as dental treatment, provided by an orthodontist outside any hospital infrastructure, constituted a service in the meaning of Article 57 TFEU.[231] And in *Kohll* the Court evoked the public health sector "as a sector of economic activity".[232] Obviously, this formulation suggests that the Court considered the possibility of such economic activity in the sector of public health as decisive for the applicability of the freedom to provide services to the national rule at issue. However, the Court did not say in *Kohll* that health care *is* – everywhere in the EU and always – an economic activity, and most importantly, in *Kohll* the freedom to provide services was found applicable by the Court, not because health care was an "economic activity", but because the rule of a Member State could restrict a *cross-border economic transaction*.

Since *Kohll*, the CJEU has in several healthcare cases assessed the applicability of the freedom of establishment by reference to case law establishing the applicability of the freedom to provide services. Thus, in *Apothekerkammer des Saarlandes* the Court simply declares that "the freedoms of movement, including freedom of establishment /…/ prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of those freedoms in the healthcare sector".[233] To support this flat declaration, the Court does not explain why the freedom of establishment is at all applicable, but merely refers to a similar flat declaration in *Hartlauer*, which itself refers to a similar flat declaration in *Watts*. In *Watts* the Court found the freedom to provide services applicable to national rules in the UK regardless of whether healthcare was an economic activity in the UK.[234] Indeed, the Court has not (yet) stated that the Member States' legislative and administrative measures must justify any restriction of establishment for the provision of services in the meaning of Article 57 TFEU, i.e.

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[229] Case C-446/05 *Doulamis* [2008] ECR I-1377, para.58.

[230] Case C-108/96 *MacQuen* [2001] ECR I-837 and Case C-158/96 *Kohll* [1998] ECR I-1931.

[231] Ibid, para.29.

[232] Case C-158/96 *Kohll*, para.46.

[233] Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes* [2009] ECR I-4171, para.18. In this paragraph, the Court refers to Case C-372/04 *Watts* [2006] ECR I-4325, paras. 92 and 146 and to Case C-169/07 *Hartlauer* [2009] ECR I-1721, para.29.

[234] See Case C-372/04 *Watts*, referred above, para.90. Interestingly, the Court in *Apothekerkammer des Saarlandes* does not refer to these latter elements of the *Watts* ruling, as if the fact that healthcare services constitute services in the meaning of the Treaties is now well known, accepted and therefore not any more worth mentioning. The same goes in *Susisalo*, where the applicability of the freedom of establishment to the management of pharmacies, seen as healthcare services in a broad meaning, seems taken as *factum notorium*, and needless to comment. In *Susisalo*, the Court of Justice simply notes – as it always does – that EU law does not detract the Member States from the power to organize their social security systems and to adopt provisions to govern the organization of health services such as pharmacies, goes directly over to assert that in exercising this power, the Member States must comply with EU law, including freedom of establishment. See Case C-84/11 *Susisalo* (Court of Justice 21 June 2012), paras.26-27.

services *normally* provided for remuneration. However, the reference to *Watts* suggests that, as is the case for the freedom to provide services, the freedom of establishment constrains a Member State's legislation and administrative regulation of a service as soon as this service *can be* provided for remuneration. It is not sure, but clearly arguable in view of the Court's ruling in *Hartlauer*.

In *Hartlauer*, there was a cross-border situation, at least formally, as Hartlauer – a company established in Germany – had been refused the authorization to set up and operate independent outpatient dental clinics in the Austrian regions of Vienna and Oberösterreich. Austrian law provided for a "mixed" system of supply of dental services. The social security institutions had an obligation to supply a system of benefits in kind, either themselves or through contracts with establishments or independent practitioners (contractual practitioners). In addition, the social security institutions were obliged to reimburse the fee paid by persons having recourse to non-contractual practitioners, up to 80% of the costs incurred if the service had been entrusted to a contractual practitioner. While both group practices and outpatient dental clinics were allowed to provide dental services in Austria, only the latter had to be authorized as "health institutions", subject to whether there was a need and taking into account dentists already established in the region and under contract with sickness funds.

In his Opinion in *Hartlauer*, the AG Bot reiterated his view that "[a] hospital, medical or paramedical action, such as the provision of dental care, constitutes an economic activity which must be subject as such to the rules of the internal market."[235] Thus, as he had done in *Doulamis*, AG Bot motivated the applicability of the freedom of establishment *by the fact that the activity was a service in the meaning of the Treaties and as an economic activity subject to all the fundamental freedoms*.[236] The Court did follow the AG's proposal to examine the national legislation in the light of the freedom of establishment, but unlike AG Bot, the Court did not justify the applicability of Article 49 TFEU by stating that health care services constitute an "economic activity".

Thus, as is the case with the free movement of services, the Court avoids generally qualifying healthcare as an "economic activity" for the purpose of the freedom of establishment. In *Hartlauer*, the Court did not either declare that the freedom of establishment applies to national rules on healthcare services, *because such services constitute services in the meaning of the Treaties*. As in *Apothekerkammer des Saarlandes*, *Watts*, and *Commission v Germany*, the Court simply asserted that the fundamental freedoms, including the freedom of establishment, "prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of those freedoms in the healthcare sector".[237] What emerges from these health care cases is that the Court systematically justifies the applicability of the freedom of establishment by reference to the case law on

[235] Opinion of AG Bot in Case C-169/07 *Hartlauer*, referred above, para.59.

[236] Ibid, para.61.

[237] As in *Apothekerkammer des Saarlandes* and *Susisalo*, Case 238/82 *Duphar* [1984] ECR 523, para.16; Case C-372/04 *Watts* [2006] ECR I-4325, paras. 92 and 146; and Case C-141/07 *Commission v Germany* [2008] ECR I-6935, paras.22-23.

the free movement of health care services. This suggests that the Court implicitly considers that, once a service *can be* subject to economic activity (it is "*normally*" provided for remuneration), it is a service in the meaning of the Treaties, which triggers the freedom of establishment.

If this observation is correct, it implies that, as soon as a service *can in another Member State* be conducted as an economic activity, the national rules affecting this activity become *a priori* economic and caught by the freedom of establishment. However, and importantly, the fact that the rule is economic does not mean that this rule automatically constitutes a restriction of the right of establishment infringing Article 49 TFEU, as this right may be limited in substance.

3.1.3.4 *Sodemare*: "not-for-profit" a limit to the applicability of the freedom of establishment?

At issue in *Sodemare* was a profit-making company established in Luxemburg which had set up for-profit companies in Italy, and alleged that the Italian regulation imposing a not-for-profit condition to admit operators in the public-funded welfare system for old peoples' homes in Italy was incompatible with their right of establishment secured by the Treaty. Although the Court did not follow AG Fennelly's Opinion, it is important to recapitulate the Advocate General's reasoning here, because it sheds light on the Court's legal reasoning and on the political importance of its approach, which is less obvious from merely reading the ruling itself.

AG Fennelly held firstly that the not-for-profit rule was covered by the fundamental freedoms, in particular the freedom of establishment, based on the following arguments. Acknowledging that the Court's ruling in *Poucet and Pistre* was explicitly concerned with competition rules, he found clear that its analysis applied more broadly.[238] In his view, the fact that a system is solidarity-based does not shield it from the applicability of the fundamental freedoms[239], because social solidarity aims at the "uncommercial act of involuntary subsidization of one social group by another". If the AG's meaning is correctly understood here, social solidarity is *only* the act of funding together, solidarity is *only* on the recipient and funding side, and a solidarity-based system cannot be seen as implying solidarity on the supply side, there is *no social solidarity on the providers' side of a solidarity-based system, as soon as these providers are private*.

In AG Fennelly's view, this implied that two types of national rules must be distinguished:

a. Rules which are *closely connected with the solidarity funding* of a system for the supply of a social service. The AG held that such rules are not *likely to be* caught by the fundamental freedoms, in particular the freedom of establishment, which may lead to that Member States pursuing social objectives on the basis of solidarity

[238] Opinion of AG Fennelly in Case C-70/95 *Sodemare* [1997] ECR I-3395, para. 25.

[239] Ibid, para.28.

withdraw all or part of the operations of social security schemes from access by private economic operators.[240] If rightly understood, the AG meant that rules aiming at securing solidarity *funding* may render unattractive for-profit activity, and therefore may be seen as non-economic rules for the purpose of the fundamental freedoms, including the freedom of establishment. AG Fennelly did not consider that rules (a) were absolutely not caught by the fundamental freedoms, only "likely not to be caught".

b. Rules which do neither *affect* the financing of the service nor the formal standard of provision. Such rules may be caught by the fundamental freedoms, in particular the freedom of establishment, if they instead *affect* the economic relation between other persons, as providers of goods and services, and the system for the supply of the social service, a relation which can be economic in nature, even though the system is based on solidarity. In other words, and if correctly understood, rules which are part of the solidarity-based legal scheme may be characterized as economic for the purpose of the freedom of establishment if they affect an economic relation between the system and providers outside the system.

The divide between (a) and (b) is presented by AG Fennelly as allowing the principle of solidarity to safeguard some core of supremacy of national regulation over free movement rights. However, after having in general terms referred to the Court's formula in *Duphar*[241], AG Fennelly proposed the following formula:

> Community law requires that such systems comply with Treaty rules in so far as they affect the economic activities of others in ways which are not essential to the achievement of their social objectives.[242]

On the basis of this formula, AG Fennelly held that the not-for-profit rule at issue in *Sodemare* was a "(b) rule", affecting the economic relation between the system and "the economic activity of others", and therefore caught by the fundamental freedoms, and constrained by them under the terms of his formula. The Advocate General was careful neither to qualify the *economic relation* affected by the rule between providers and the system as the existence of competition on a market, nor to characterize the elderly homes operated by private entities in the not-for-profit system as an economic activity. Instead, by emphasizing the generic similarity between the service in the solidarity-based system on the one side and the elderly homes service authorized to operate commercially in Italy on the other side, the AG implicitly stated that the activity could be seen as *one and the same* service, which *can be* subject to economic activity.[243]

From AG Fennelly's formula quoted above, it seems that he envisaged the "economic relation" as the capacity of the national system's regulation to affect similar economic

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[240] Ibid, para.29.

[241] The well-known statement of the Court in *Duphar* reads: "Community law does not detract from the powers of Member States to organize their social security systems".

[242] Ibid, para.30.

[243] Ibid, para.31.

activity, not the capacity of EU law to affect the economic choices of a Member State. In his approach, it is submitted that for the purpose of the freedom of establishment, the economic character of a rule is relevant only from the point of view of its effect on possible economic activity, not its effect on the economy of the Member State imposing the rule. The only effect which the Member State may claim under the fundamental freedoms is that the rule is *essential to the achievement of its social objectives*, and consequently not the Member State's appreciation of whether market-based supply can contribute to get "value for money".

Thus, in this first part of his reasoning AG Fennelly considered the not-for-profit rule as an economic rule as not indispensable to the *existence* of the solidarity-scheme and therefore outside the regulatory powers of the Member State, and capable to affect fundamental freedoms, and therefore subject to free movement law.

The second building-block in AG Fennelly's reasoning was to find that the not-for-profit rule was *indirectly discriminating* providers from other Member States. Indeed, the Court has established that the fundamental freedoms constitute a specific expression of the principle of equal treatment, implying that any criteria of differentiation between different categories of operators or recipients, which in fact lead to discrimination on the basis of nationality, are prohibited.[244] To the AG, the delineation between for-profit and not-for-profit providers was irrelevant. He held as relevant instead that the not-for-profit providers, favoured by the rule, were predominantly domestic. [245] In this perspective, AG Fennelly found that there was no justification to the unequal treatment between the domestic and foreign providers, operated indirectly through the not-for-profit condition for public funding. Referring again to the similarity between the service defined in the solidarity-based system and the service standard required to operate on the Italian market and available on the market, the Advocate General gave his view that they could perform the same function. The standard discrepancy was maintained by the regulation itself. And it had not been claimed that the public funding was particularly related to additional costs for operators under the higher standard of the solidarity-based system.[246] At this point, it becomes apparent that the entitlement to conclude a contract in the frame of the solidarity-based system is conceived by the Advocate General as a right to public service compensation, which should be subject to the economic imperatives of transparency and proportionality. This reveals the profound ambiguity of the AG's reasoning, asserting firstly that the system is *per se* non-economic, calling anyway the private operators in the solidarity-based system "private economic operators"[247] and finally suggesting that there is an issue of over-compensation of *economic* tasks.

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[244] Ibid, para.32.

[245] Ibid, para.34.

[246] Ibid, para.37.

[247] Ibid, para.30: "Thus, to the extent that Member States co-opt *private economic operators* into their social security systems, or contract out the provision of certain benefits to such operators, or subsidize the activities of a social character of such operators, they must, in principle, observe the Treaty rules on, *inter alia,* freedom of establishment (emphasis added)."

In *Sodemare* the Court of Justice did not endorse the Advocate General's reasoning and took instead a clear deferential approach to the economic "not-for-profit" rule.[248] It recalled first its own stance that EU law does not detract the Member States from their powers to organize their social security systems[249] and, thereby rejecting AG Fennelly's formula on the relation between EU powers and national powers, the Court enunciated its own "formula on retained powers",

> *"In that regard, it must be stated that, as Community law stands at present, a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system of the kind at issue in this case necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making."*[250]

Thus, in the absence of harmonization, the Court considers that the Member States retain their power to consider a not-for-profit condition as a necessary element in attaining the objectives of a social security scheme such as the system at issue in the case, which was largely funded on the basis of solidarity and in principle entrusted to the public authorities.[251] By contrast with AG Fennelly, the Court underlined that the rule did not place profit-making companies from other Member States in a less favourable factual or legal situation than profit-making companies from the Member State in which they are established.[252] It seems clear that the Court did not deny that a not-for-profit rule is an economic rule, but instead denied that not-for-profit and for-profit operators had to be seen as providing the same service. In *Sodemare*, the Court made clear that the not-for-profit entities permitted to enter contracts with the public authorities constituted undertakings in the meaning of EU competition law,[253] which allows two conclusions to be proposed:

- the Court regarded the not-for-profit condition as a market condition rather than as a condition excluding the existence of a market
- the circumstance that not-for-profit operators provided old peoples' homes in the frame of *contractual arrangements* with the public authorities in Italy could involve that the compensation received by the not-for-profit entities constituted for those operators remuneration for the service provided. This circumstance was also present and explicitly relevant in *Smits and Peerbooms*.

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[248] Hancher and Sauter seem to share the view that the *Duphar* formula expresses the Court's respect of the principle of subsidiarity, see Hancher L. snd Sauter W., 2009, p. 6. They consider that the Court's assumption that a not-for-profit status enables operators to pursue social services as a matter of priority is "perhaps naïve", as probably based on the idea that market mechansims are not appropriate for "essential purposes". Let us point out that the calculus behind not-for-profit conditions may be characterized as naïve but legitimate enough to underpin the in-house exception in EU procurement rules. It is up to tax-payers to decide if they wish to pay for kings and markets.

[249] Case C-70/95 *Sodemare* [1997] ECR I-3395, para.27.

[250] Ibid, para.32. The term "formula of retained powers" is borrowed from Azoulai, see Azoulai L., 2011, p. 192-219.

[251] Case C-70/95 *Sodemare*, referred above, para.29.

[252] Ibid, para.33.

[253] Ibid, paras.43 and 47.

Contrary to the assertion of some scholars, it is underlined here that the CJEU never assumed in *Sodemare* that a not-for profit status enabled operators to pursue social services as a matter of priority.[254] The Court merely outlined the motives underpinning the Italian legislator's rule (finding application of the non-profit condition to represent the most logical approach, given the exclusively social aims of the system at issue, and believing that non-profit-making private operators can pursue social aims as a matter of priority), and did not give its own view on that matter. Therefore it is argued here that the Court was not naive but simply deferent, adopting an approach of "judicial subsidiarity", and acknowledged that in the field of non-harmonized social services under their competence, the peoples of the Member States retain political powers to structure their own market for a service, by defining a service standard which they commit to fund, on the basis of social objectives, and by imposing solidarity not only for funding this service (solidarity on the "demand side") but also for providing it (solidarity on the "supply side"). The decision in *Sodemare* can be, and has been, criticised, for its political and economic implications, but it can be seen as a manifestation of the Court's choice to show loyalty to the Treaties and let democracy withhold substantive economic power in areas where the Court knows that its case law had abolished any Member States' claim to a nucleus of national sovereignty.

Comparing Article 49 TFEU to Article 56 TFEU, Hancher and Sauter have emphasized that "Article 43 EC (now Article 49 TFEU, precision added) can be relied upon to challenge the very existence of regulatory measures, even if these same measures lack any specific cross-border element. Its scope also extends beyond market access measures to all regulations governing the exercise of health care activity. These include (territorial) planning, quota systems as well as rules on advertising and on reimbursement, as well as (presumably) national choices concerning profit versus non-profit forms of health care delivery." They believe that what they regard as a "trend in the case law" implies a departure from, if not a reversal of *Sodemare*.[255]

However, should the Court reverse *Sodemare*, it would risk endorsing the view that the profit aim *cannot* be held to have legitimate relevance for the governance of regulated and publicly funded services. Imposing the view that there is no risk in allowing for-profit in the provision of social services and that "good" regulation of profit-based provision of social services is easy to establish, may rightly be perceived as an activist move by the Court, promoting the solution of good regulation but not in charge of its design and implementation. At this stage in the process of liberalization, by which is meant here an increase in the scope of free choice allowed to providers and recipients, the public opinion in certain Member States may be concerned with the pressure of market interests on the cohesion objectives of the welfare systems as they have known

[254] Hancher L. snd Sauter W., 2009, p. 20: "The Court's assumption that a non-for profit status enables operators to pursue social services as a matter of priority is perhaps naive. Its approach may be based on the implicit idea that is all very well to have a market mechanism for less essential purposes, but where issues of social importance are at stake other unspecified orderings that somehow produce superior results (which are conveniently not measured but achieved by definition) deserve priority."

[255] Hancher L. snd Sauter W., 2009, p.32.

them. The risk of change, for example letting for-profit entities participate in education in the national school system, is on them.

In sum, the Court's judgment in *Sodemare* appears to be in line with the findings of the precedent sections: the freedom of establishment is applicable to any national *economic* rule, i.e. any national rule which affects an activity that *can be* economic. For the purpose of the freedom of establishment as of the other freedoms studied, an economic rule is a rule that affects the marketing of goods/services that can be subject to economic activity, but are not necessarily in fact or in law, subject to economic activity in the Member State of the rule. One may wonder whether the Court would follow the subsidiarity path taken by in *Sodemare* if it was faced with a similar issue again. Davies wrote in 2006 that not-for-profit requirements are likely to be challenged again and believed they would not always be considered proportionate.[256] However, although difficult to nail, it seems that the Court has drawn *some* base-line in *Sodemare*, which is submitted to be that the right to free establishment may not be used to impose judicially on the Member States considerable deregulatory risks which they have not decided themselves to assume.

3.1.4 Free movement of capital

The CJEU has examined a number of national measures related to social policy in the light of Article 63(1) TFEU, which generally prohibits restrictions on movements of capital between the Member States[257], in particular in the fields of housing and of social security.[258] The Court seems to distinguish the concept of "capital" triggering the applicability of the principle of free movement of capital to national rules, from the concept of "economic activity" conditioning the claim to free movement in a specific case. A case in point is *Commission v Poland*. where the Commission alleged that Polish rules restricting the amount and the nature of possible foreign investments in open pension funds (OPFs) could deter those funds from investing their assets outside Poland, and thereby constitute obstacles to the free movement of capital within the

[256] Concerning possible developments of *Sodemare*, Davies argues that the pressure to save and accumulate money found in non-profit making organizations has the same effect on behaviour as the pressure to make it found in profit-making ones: "The commercial sector has no monopoly of self-interest. It will be at least arguable that the interests concerned can be protected by regulation, and given the powerfully exclusionary effect of a non-profit requirement the outcome of subsequent cases may be different." See Davies G., 2006b, p. 24.

[257] In *Commission v Poland* AG Jääskinen underlines that this follows of consistent case law, and refers to Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141, para.18 and the case law cited, and to Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, para.17. See Opinion of AG Jääskinen in Case C-271/09 *Commission v Poland* [2011] ECR I-13613, para.39. Case law may have been needed to assert this, but the wording of Article 63 TFEU, compared to the other Treaty provisions on fundamental freedoms, is quite clear on the fact that *restrictions* are prohibited.

[258] Thus, in *Sint Servatius*, the CJEU found that Dutch rules requiring prior authorisation for an institution active in the housing sector to invest in construction projects in another Member State, constituted a restriction on the free movement of capital. The Court reminded that national measures making investments in immovable property conditional upon a prior authorisation procedure have been found to restrict, by their very purpose, the free movement of capital. See Case C-567/07 *Woningstichting Sint Servatius*, [2009] ECR I-9021, para.22 and the case law cited.

meaning of Article 56 EC (now Article 63 TFEU).[259] The Republic of Poland motivated this restriction by the operating costs incurred by OPFs for such investments, and argued that the freedom of movement for capital does not apply to activities which are not economic in nature. In Poland's view, the investment of OPFs' assets was not an economic activity, due to the funds' legal status and the fact that their activity came under the compulsory retirement pension regime.

The Court's following statement suggests arguably that it considered Article 63 TFEU to constrain *a priori* national rules affecting such funds, and distinguished this legal question from the issue of the *economic character* of the OPFs' activity:

> *Since it is common ground that the investment transactions open to the OPFs constitute 'movements of capital' within the meaning of Article 56 EC*, it is necessary to examine the arguments put forward by the Republic of Poland with a view to demonstrating that *those transactions* do not, *however*, come within the scope of that provision.[260]

It seems also clear that the Court regarded Article 63 TFEU as *in principle* applicable to cross-border movements of the kind of assets which OPFs managed, which constituted capital in the meaning of that provision, regardless of whether they could at the same time be regarded as public resources.[261] Indeed, in the absence of any Treaty definition of the concept of "capital", the Capital Movements Directive[262] provides that the concept of "capital movements" covers *inter alia*, "operations in respect of the assets or liabilities of Member States or of other public administrations and agencies".[263] And thus, the EU legislator has decided that the *kind of assets* OPFs managed *can be* subject to economic transactions, which obliges Member States legislating on such assets to

[259] Case C-271/09 *Commission v Poland* [2011] ECR I-13613.

[260] Ibid, para.39, emphasis added.

[261] In his Opinion to the case, AG Jääskinen gave more explanation on this point. The AG underlined first the absence of a Treaty definition of 'movements of capital' for the purposes of Article 56(1) EC (now Article 63(1) TFEU), and recalled then its case law recognizing the nomenclature of the Directive for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (as having indicative value[261]. The AG reminded also that the Court has ruled that movements of capital for the purposes of Article 56(1) EC include 'portfolio' investments[261] such as those made by the open pension funds at issue in the case. See Opinion AG Jääskinen in Case C-271/09 *Commission v Poland*, [2011] ECR I-13613.

[262] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (the Capital Movements Directive) [1988] OJ L178/5.

[263] Case C-271/09 *Commission v Poland* [2011] ECR I- 13613, para.41, where the Court refers to Annex I of the Capital movements Directive. In his Opinion to the case, AG Jääskinen gave more explanation on this point. The AG underlined first the absence of a Treaty definition of 'movements of capital' for the purposes of Article 56(1) EC, and recalled then the CJEU's case law recognizing the nomenclature of the Directive for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) as having indicative value. The AG reminded also that the Court has ruled that movements of capital for the purposes of Article 56(1) EC include 'portfolio' investments such as those made by the open pension funds at issue in the case. See Opinion AG Jääskinen in *Commission v Poland*, paras. 41 and 43.

envisage that cross-border investments on this kind of assets *can be* economic transactions which they may not restrict without a justification framed by EU law.[264]

The Court continued by examining whether the OPFs' investments were or not covered by the free movement of capital, in other words whether the funds engaged in capital transactions as economic actors. Interestingly, the Court decided to address this issue on the basis of the criteria laid down in *Albany*[265], where the question was whether a specific pension fund constituted an undertaking covered by EU competition rules. In *Commission v Poland*, although public authorities supervised the OPF's activity and could rescue them financially, the Court found that OPFs pursued an economic activity, because in accordance with Polish law they were based on the capitalization principle and their assets were managed by a company operating exclusively in the form of a joint-stock company and for a fee. Thus, by applying the criteria of *Albany*, the Court established that OPFs constituted undertakings and *therefore conducted an economic activity for the purpose of the free movement of capital* (and interestingly also found that they performed "a task of general economic interest").[266]

From the legislation at issue in *Commission v Poland* it appears that the interest of Poland for letting OPFs invest in other Member States was moderate. However, as OPFs' transactions were economic, any restriction of their right to benefit from the choice of investment which the free movement of capital secures, had to be justified by one of the reasons mentioned in Article 58 EC (now Article 65 TFEU), or by overriding reasons in the public interest, or even on the basis of Article 86(2) EC (now Article 106(2) TFEU).[267] Importantly, the Court pointed to the fact that the Polish rule, while limiting OPFs' possibility to invest in other Member States, also restricted the possibility for companies established in other Member States to raise capital in Poland, since the acquisition of shares in joint investment bodies was restricted.[268] This element in the Court's reasoning suggests that Article 63 TFEU also secures a right of free movement of capital for companies trading investment products, allowing them to access the capital markets of other Member States. In other words, Article 63 TFEU includes a right for entities managing investment capital in as much as their investments may be regarded as economic transactions, and regarding such economic transactions, for companies in other Member States proposing investments for this capital.

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[264] In *Commission v Poland* the Commission explains that the aim of the free movement of capital is to liberalize capital transactions to the benefit of investors such as pension funds, which get access to more investment possibilities. As we know, notwithstanding their social importance and political sensitivity, pension funds are nowadays routinely subject to speculative transactions for value-growth.

[265] In *Albany*, the Court took the view that occupational pension funds operating in accordance with the principle of capitalisation engage in economic activity, notwithstanding their social objective and the compulsory affiliation to the second pillar for the retirement scheme to which they belong. See Case C-67/96 *Albany* [1999] ECR I-5751, paras.81-87.

[266] Case C-271/09 *Commission v Poland* [2011] ECR I-13613, para.71. Under paragraphs 60 and 71, the Court addressed Poland's arguments based on Article 106(2) TFEU.

[267] Ibid, para.55.

[268] Ibid, para.52, where the Court refers, by analogy, to Case C-242/03 *Weidert and Paulus* [2004] ECR I-7379, para.14.

The fact that the assets of pension funds constitute capital in the meaning of Article 63 TFEU triggers the obligation for the national legislator to respect that these *two* rights may not be restricted without justification admissible under EU law, because at EU level, there is a market for this type of capital. In *Commission v Poland*, the Court makes first clear that the OPFs' assets, classified as capital in the meaning of the Treaties, *could "in principle" be subject to commercial transactions*, which implies that the Member States must respect the principle of their free movement. At this stage of the development of the case law, it is unsure whether the free movement of capital creates an obligation for a Member State to justify that its national pension funds are regulated in a way that does not allow them to engage in economic transactions. What seems sure is that if they are allowed to do so (if they may act on the market for capital), this triggers an *economic* right based on Article 63 TFEU for them and for bodies domiciled in other Member States to trade on this capital, which may be subject to judicial review.

3.1.5 No free movement for the exercise of official authority

It follows from Articles 51 and 62 TFEU that activities which in a Member State are connected even occasionally with the exercise of official authority are not caught by the fundamental freedoms. The concept of 'official authority' is a concept of EU law and was defined by Advocate General Mayras in *Reyners* in the following terms:

> Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens.[269]

Unsurprisingly, the CJEU has declared that while objectives of general interest pursued by certain activities – such as notaries' verification of certain documents in the public interest to guarantee the lawfulness and legal certainty of documents entered into by individuals – can constitute an overriding reason justifying restrictions of the fundamental freedoms, the existence of such objectives is not, in itself, sufficient for a particular activity to be regarded as directly and specifically connected with the exercise of official authority.[270]

The Court has repeatedly emphasized that, as a true exception to a fundamental rule of the Treaty, Article 51 TFEU must be construed very narrowly.[271] Thus in *Servizi Ausiliari Dottori Commercialisti* the Court emphasized that this derogation must be interpreted in a manner which limits its scope to what is strictly necessary to safeguard the interests

[269] Opinion of AG Mayras in Case 2/74 *Reyners* v *Belgium* [1974] ECR 631, p. 664.

[270] Ibid, paras.96-97.

[271] See in this regard *inter alia* Case 2/74 *Reyners* v *Belgium*, para.43. The General Advocates underline and perpetuate this approach, see Opinion AG Jacobs in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, para.22 and Opinion of AG Villalón in Case C-327/12 *Soa Nazionale Costruttori* (CJEU 12 December 2013), para.45.

which it allows the Member States to protect.[272] Also, it is settled law that the derogation in Article 51 TFEU must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority.[273] The Court of Justice found for instance no "direct and specific connection" with the exercise of official authority in activities consisting in design, programming and operation of data-processing systems[274], private security services[275], private courses in special schools or at home[276], and even the activity of notaries[277]. AG Villalón observed in his Opinion in *Soa Nazionale Costruttori* that the Court so far has never found the provision in Article 51 TFEU applicable to any economic activity.[278]

A high degree of decisional autonomy seems to be required for an activity to be characterized as exercise of official authority as understood by the CJEU. In several rulings, the Court has found that non-state bodies entrusted by law with activities of certification did not exercise official authority as they carried out their activities under the *active supervision of the competent public authority* which, in the final analysis, was responsible for the tasks and decisions of those bodies. The fact that they were supervised by public authorities was also decisive to disqualify certain activities of technical certification[279], of inspection of organically-farmed products by approved private bodies[280]as well as certain activities carried on by notaries[281], and certain private teaching activities.[282]

In delineating the notion of "exercise of official authority", it is important to point at the existence in EU law of other concepts such as the notion of "public administrative functions", present in EU secondary law, for instance Directive 2003/4/EC[283], but also

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[272] See to that effect Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, para.45 and the case law cited.

[273] See to that effect Case 2/74 *Reyners*, referred above, para.45, and Case C-114/97 *Commission v Spain* [1998] ECR I-6717, para.35.

[274] See Case C-3/88 *Commission v Italy* [1989] ECR I-4035, para.13.

[275] See Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, para.26; Case C-283/99 *Commission* v *Italy* [2001] ECR I-4363, para.20; and Case C-465/05 *Commission v Italy* [2007] ECR I-11091, para.33.

[276] See Case C-147/86 *Commission v Greece* [1988] ECR I-1637, para.9.

[277] See Case C-47/08 *Commission v Belgium* [2011] ECR I-4105, para.123.

[278] AG Villalón observed in his Opinion in C-327/12 *Soa Nazionale Costruttori*, referred above, para.45.

[279] Case C-438/08 *Commission v Portugal* [2009] ECR I-10219, para.41; and Case C-404/05 *Commission v Germany* [2007] ECR I-10239, para.44.

[280] Case C-393/05 *Commission v Austria* [2007] ECR I-10195, para.42ff.

[281] Case C-47/08 *Commission v Belgium* [2011] ECR I-4105, para.107.

[282] In *Commission v Greece* the Court of Justice examined in particular courses to consolidate instruction in primary, secondary or higher education or to teach foreign languages or music, for not less than three hours a day per group consisting of the same persons. The Court rejected the view that certain private courses could constitute an exercise of official authority, and explained: "[t]hose private activities remain subject to supervision by the official authorities which have at their disposal appropriate means for ensuring, in any event, the protection of the interests entrusted to them, without there being any need to restrict freedom of establishment for that purpose." See Case C-147/86 *Commission v Greece*, referred above, para.10.

[283] See Article 2(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (2003] OJ L41/26.

in international law[284] and in the legal system of many Member States. In his Opinion in *Fish Legal and Shirley*, AG Villalón holds that the concept of "public administrative functions" should be defined less restrictively than the notion of "exercise of official authority" and understood as "functions by virtue of which individuals have imposed on them a will the immediate effectiveness of which, albeit subject to review, does not require their consent".[285] While this will not be analysed here, it is worth underlining that defining the notions "exercise of official authority", "public administrative functions" and, to add another thorny one, "public authority", is complex and controversial.

In the field of competition law, the CJEU has developed the concept of activity related to the exercise of public authority. The case law related to this concept is studied in chapter 4.2.2.

3.1.6 Preliminary conclusions

Concerning all the fundamental freedoms studied, the CJEU appears to distinguish between an activity which *is* economic and an activity which *can be* economic.

1. That an activity *can be* economic is the criterion determining that "things", services or assets which the activity is related to are goods, services or capital in the meaning of the Treaties. The CJEU's case law shows that the *potential* to be subject to economic transactions is the only and decisive criterion characterizing goods, services and capital in the meaning of the Treaties. The relevance of the fact that an activity *can be* economic is that any national rule affecting it is regarded as an *economic rule*, and as such covered by the Treaty provisions protecting the rights to free movement.
2. That an activity *is* economic means that it is *actually* (not only *can be*) conducted as an economic activity in the frame of a scheme or of a transaction. The relevance of the fact that an activity is economic in a specific case is that it determines the scope of the *right* to free movement which may be claimed. Also, as clear from the early health care cases[286], the fact that an activity is found economic in a judicial process may play the role of "evidence" that an activity (even if not necessarily in every Member State) *can be* economic, and allow the Court to classify – irreversibly as it seems – its object as goods, services or capital. Nevertheless, a natural or legal person who conducts an activity which *can be* economic but who does not *actually* conduct the activity as an economic activity may not claim a right to free movement.

Regarding services, it is submitted that the basic test determining that an activity *can be* economic is expressed by the term "normally" in Article 57 TFEU. That an activity *can be* economic is nothing that a specific Member State has any power to decide by itself,

[284] See Article 2(2)(b) of the Arhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

[285] Ibid, para.83.

[286] By which is meant here cases such as *Kohll* and *Smits and Peerbooms*, already and abundantly referred to above.

as it emerges as soon as there are economic providers in that field of activity in some Member State.

By contrast, it is admitted on the basis of the CJEU's case law in the field of competition, that a Member State has some power to decide that an activity *is* economic on its territory. This supposes that the activity lies within the competence of the Member States, and that it is not harmonized. In *Freskot* the Court has clearly acknowledged that, *even for the purpose of the fundamental freedoms*, an activity which *can be* economic, can be non-economic as defined and organized by a Member State in order to attain policy objectives under the regulation of a Member State. In other words, the definition of an economic activity in the field of services is close to the definition of services in Article 57 TFEU but does importantly not contain the word "normally". Thus, it seems clear that a service is economic in the meaning of the fundamental freedoms if the service is provided for remuneration. This *second test* determines the material scope of the rights to provide cross-border services and to establish in another Member State to provide services.

In organizing the supply of social services, the national legislators are forced to respect the fact that an activity can be subject to economic activity in other Member States, but may wish to withdraw a service from market operation. It is held that they may regulate an activity in a manner that makes it non-economic for the purpose of EU competition rules. In the next section 3.2, the CJEU's criteria determining that an activity is economic for the purpose of the free movement rules are examined. This will allow to draw conclusions on the convergence between these criteria and the criteria determining that an activity is economic in the meaning of competition law. It will also allow to shed light on the enhanced need for the Member States to secure that they can withhold their economic powers on welfare markets, and on whether and how the CJEU acknowledges the legitimacy of that need.

3.2 Economic activity for the purpose of the free movement rules, with a particular focus on services

The purpose of this section is to study the CJEU's interpretation of the criteria determining that activities, in particular service activities in the public sector, can be identified as *economic or non-economic* for the purpose of EU law on free movement. This has often been done in the frame of judicial processes where one issue was the very existence of *economic* rights based on Articles 49 and/or 56 TFEU existed and could motivate a proportionality assessment of national rules claimed to restrict free movement, typically when the recipient of one Member State has claimed that his/her freedom to go to *another Member State* to purchase services there (passive freedom to provide services) is restricted by national rules, or when a provider from a Member State has claimed that its active freedom to provide services or to establish in *another Member State* is restricted by national rules. Beyond this analysis of how the Court delineates the *right* to free movement in specific cases, the purpose is to systematize the CJEU's criteria

determining that an activity is not only "normally" but "actually" economic, as it will allow assessing the convergence with the criteria used in the field of competition law and draw the frame of the economic rights which the national legislators must adapt their national rules to.

Such a systematization is not easy because in the absence of cross-border elements it is rarely possible to challenge national rules restricting trade on the basis of Articles 49 or 56 TFEU and thus the CJEU has so far had limited occasions to examine what makes a transaction economic in such a way that national rules may not restrict them without justification. As a result, while it becomes all the clearer which services can be economic in the meaning of Article 57 TFEU – as *normally* provided against remuneration – the CJEU' case law gives still very little guidance on what makes the "everyday operation" of a service – as defined and regulated by a Member State – an economic activity in the meaning of free movement law, which makes it difficult to assess which market access may be claimed.[287]

The case law of the CJEU on the criteria determining the existence of an economic activity for the purpose of free movement law is analyzed in section 3.2.1. In section 3.2.2, the *Humbel* doctrine is examined, as it is often invoked to claim that an activity cannot be economic for the purpose of EU free movement law, and sometimes, interestingly, invoked to claim that it is not economic for the purpose of the competition rules.

3.2.1 Criteria defining an economic activity in the meaning of free movement law, with a focus on service activity

The focus of this section is on identifying the criteria defining an activity as economic regarding service activities – a service provided *actually* for remuneration – a premise being that the results found should be transposable to the other fundamental freedoms. To say that an activity is provided for remuneration (and arguably, by analogy, "supplied for money" in the field of goods, and "invested for return" in the field of capital), seems logically to imply that:

1. the activity consists in *providing* the service
2. The activity is conducted *with the aim of receiving* remuneration for the service provided
3. The activity must be subject to *remuneration in the meaning of article 57 TFEU*.

[287] These terms are borrowed from AG Geelhoed in his Opinion to Case C-372/04 *Watts* [2006] ECR I-4325, para.56: "It might be added that in the course of its everyday operation, in which the NHS provides medical services to residents in the United Kingdom, there will be no question of these activities falling within the scope of Article 49 EC."

3.2.1.1 The economic *provider*'s perspective

The very wording of Articles 56 and 57 TFEU suggests that the Treaty is primarily concerned with protecting the interest of service *provision.*[288] By analogy, the rights protected by the free freedom of establishment are also clearly the rights of market operators on the supply side (self-employed persons, companies or firms). It appears that the CJEU's case law reflects this "economic provider's perspective" in the Treaty. A service does not necessarily have to be paid by the recipient to be an economic activity, and therefore a cross-border transaction may be economic – a service provided for remuneration – without constituting an economic activity for its recipient.[289] It has been argued in section 3.1.2.1 that for a right to passive freedom to provide services to exist, the activity in the transaction must be economic but not the necessarily in the recipient's perspective.

As already emphasized, the Court' approach has precisely been, for most social services and now even in the sector of education, to assess in each specific situation the possible impact of national rules and measures regulating and organizing the supply of a service on existing or possible cross-border economic activity in the field of that service. It emerges from the CJEU's case law that Article 56 TFEU is applicable to economic activity even where this activity is integrated to a public service system regulated, organized, administrated and financed by the State. Thus in *Jundt* the Court had to examine whether German national rules precluding a German lawyer, living and working in Germany, from deducting from his taxable income expense allowances received for a punctual teaching work at a French university, was compatible with Article 49 EC (now Article 56 TFEU), as he would have enjoyed this benefit if he had been teaching on that basis in Germany.

The Court recalled its doctrine in *Humbel* that courses in national systems of eduction do not constitute services. However, to determine whether the German teacher's courses constituted covered by Article 56 TFEU – a service actually provided for remuneration – the Court gave no relevance to the universities' intention to serve the population or to the fact that they were publicly financed.[290] For the teacher's allowance to constitute the remuneration of a service, the relevant transaction was the transaction university-teacher, and in that frame, the allowance was paid by the French university for "services *provided on a secondary basis* by natural persons called upon by universities to help them fulfil their mission".[291] The university was generally supplying courses to students, but in outsourcing that course, the university was a commissioner, and the provider an *external* resource. Thus, the teaching provided by the German provider was an economic

[288] The emphasis in Article 56 TFEU is on the freedom to *provide* services, and in Article 57 TFEU on the fact that a service in the meaning of the Treaties is normally *provided for* remuneration, a wording clearly signaling that the Treaty's concern is primarily the business of providing services, not purchasing them.

[289] As underlined in section 3.1.2, the CJEU has itself explained that the passive freedom to provide services aims at liberalizing all *gainful* activity not covered by the free movement of goods, persons and capital, and thus to facilitate (and promote some would say) economic service *provision*.

[290] Case C-281/06 *Jundt* [2007] ECR I-12231, para.31.

[291] Ibid, emphasis added.

activity covered by Article 56 TFEU, even though it was "carried out on behalf of a university, a legal person established under public law".[292]

In this "economic provider's perspective", the CJEU assesses whether the service is provided for remuneration *from the provider's point of view*. In *Jundt* the allowance paid by the French university was analysed from the German provider's point of view, as the amount for which he accepted to provide courses. As will be seen, the Court found that the allowance constituted remuneration and that the German lawyer's teaching activity was an economic activity for the purpose of Article 56 TFEU. Several years before this ruling, Buendia Sierra had evoked the possibility for the State to substitute its own management services with others acquired in the market, and to establish a commercial relationship with the entity managing the service.[293] This was precisely the case in *Jundt*, and in that case the Court chose to focus on this relationship, thereby coming to the conclusion that the secondary activity of the German lawyer's teaching was economic, albeit in a restricted sense, as the only commercial relationship was not between the teacher and its students, but between the teacher and the university.

In this "economic provider's approach" used by the CJEU in the healthcare cases, the social insurance cases, and now increasingly in education cases, the economic character of an activity is evaluated at the level of *service provision* and not at system level.

3.2.1.2 Activity *de facto for* remuneration but not necessarily for-profit

To establish whether an activity is economic in the meaning of free movement (whether its provider or recipient may claim a right to free movement), the Court's question, in the field of services, is whether some operator(s) in the Member States de facto provide the service for remuneration, which raises the question as to whether the service must be provided for profit for the activity conducted to be economic and therefore covered by Article 56 TFEU.

In *Jundt*, the Court of Justice emphasized that there was no need for a "person providing a service to be seeking to make a profit" for the activity conducted to be economic.[294] According to the Court, the decisive factor bringing an activity within the scope of the Treaty provisions on the freedom to provide services is its economic character, that is to say, "the activity must not be provided for nothing".[295] For this radical stance that an activity is economic as soon as it is not provided for nothing, the Court of Justice found support in the *Smits and Peerbooms* ruling.[296] Indeed, in *Smits and Peerbooms*, the Court had rejected the view of some governments interpreting *Gravier* and *Wirth* as meaning that

[292] Ibid, para.35.

[293] Buendia Sierra J. L., 1999, p. 61.

[294] Case C-281/06 *Jundt* [2007] ECR I-12231, para.33.

[295] Ibid, para.32.

[296] Case C-157/99 *Smits and Peerbooms* [2001] ECR I-05473.

an activity cannot be economic in the meaning of Article 57 TFEU unless the person providing the service does so with a view to making a profit.[297]

In *Wirth*, the Court had namely asserted that, while courses given in an institute of higher education financed essentially by public funds could not be regarded as provided for remuneration – in line with the *Humbel* doctrine –, courses provided by establishments of higher education financed essentially out of private funds, in particular by students or their parents, and *which seek to make an economic profit*, constitute services in the meaning of the Treaty, *as their aim was to offer a service for remuneration*.[298] This view in *Wirth* must arguably be understood in the light of the Court's approach in *Jundt*, and therefore as follows. For the CJEU, what is relevant for the economic character of an activity is to objectify that the provider does not provide "for nothing", and *engages in service provision with an intention to get consideration for it*. In the field of education, where the *Humbel* doctrine has introduced a presumption that the activity is "for nothing" if publicly funded and part of the state system, a for-profit aim is crucial to *prove* that, even if the provider is part of the system, its intention is not to provide "for nothing".

This confirms that the Court regards only provision *de facto* for remuneration as an economic activity in the meaning of free movement law. Indeed, the Court makes a cautious use of the notion of "economic activity" in the field of social services, it has used the locution in free movement cases in two important instances: in *Jundt* to emphasize that the activity is not *economic* unless it is provided not for nothing, and in *Smits and Peerbooms*, to emphasize that when payments to public hospitals are perceived *by them* as remuneration, they are engaged in an *economic* activity.

3.2.1.3 What is remuneration?

The essential characteristics of the concept of "remuneration" were formulated by the Court of Justice in *Humbel* as follows:

a. Remuneration constitutes consideration for the service in question
b. This consideration is normally agreed upon between the provider and the recipient of the service[299]

In the light of the CJEU's case law applying these criteria, it is submitted that (a) and (b) are in fact interdependent, and that the Court tends to assess their fulfilment implicitly, or through discreet formulations. Hence, interpretation is necessary but tricky.

The CJEU has seldom expressed in clear terms what can exclude that an activity, in its intra-State operation, is seen as economic in the meaning of free movement law. Nevertheless, there is some case law on that issue. Thus in *Freskot* the activity of providing insurance against agricultural risks was found not economic in the frame of

[297] Ibid, paras.50 and 52. The governments holding this view referred to Case 293/83 *Gravier* [1985] ECR 593 and Case C-109/92 *Wirth* [1993] ECR 1-6447, para.17.

[298] Case C-109/92 *Wirth* [1993] ECR 1-6447, paras.16-17.

[299] Case 263/86 *Humbel* [1988] ECR I-5365, para.17.

the Greek scheme.[300] The Court, having referred to the *Humbel* criteria, found that the payment of the contribution by Greek farmers did not constitute "economic consideration" for the benefits provided by the State-owned private legal person (ELGA) insuring them against agricultural risks. Hence the benefits provided did not constitute services in the meaning of Articles 59 and 60 EC (now Articles 56 and 57 TFEU).

This conclusion was based on two facts. First the contribution was essentially in the nature of a charge imposed by law and levied by the tax-authority; the characteristics of the charge, including its rate, were determined by law, and any variation of this rate was decided by the competent ministers. Second, the rate and rules governing the benefits provided by the State-owned body under the compulsory scheme were set by law in such a way that they applied equally to all operators.[301] To conclude that the farmers' contribution did not constitute remuneration as characterized in *Humbel*, the Court referred dryly to these facts, and did not elaborate on them. It may therefore be wondered whether the contribution could not "correspond" to the service in question (insurance benefits) because of the redistributive elements of the scheme, or whether the simple fact that both contributions and benefits were set by law excluded that the activity could be seen to any degree as economic, as neither the provider nor the recipient had any margin of agreement.

As a matter of fact, the Court of Justice had also to examine whether ELGA constituted an undertaking for the purpose of the Treaty rules on state aid, and thus whether it conducted an economic activity. In this assessment, the Court pointed at exactly the same facts as in the free movement assessment, and formulated slightly more clearly which relevance they could have for the economic character of the activity. The "problem" was that both the nature and level of insurance benefits (in market terms, the "service") and of the charge to be paid by farmers to have access to these benefits (in market terms, the "price") being decided by the State, there was simply impossible to discern market conditions in the relationship between the provider and the recipients as commercial.

Importantly, the delicate issue of the economic character of the intra-State service provision ("everyday operation") of health care, for the purpose of free movement rules, was also tackled *obiter dictum* in *Smits and Peerbooms*. The Court of Justice held namely that

> *In the present cases*, the payments made by the sickness insurance funds under the *contractual arrangements* provided for by the ZFW, albeit set at a flat rate, are indeed the consideration for the hospital services and *unquestionably represent*

[300] See section 3.1.2.

[301] C-355/00 *Freskot* [2003] ECR I-5263, paras.55-58.

remuneration for the hospital which receives them and which is engaged in an activity of an economic character.[302]

In this approach, it is clearly irrelevant for the economic character of the social services provided (hospital care) whether the State intends or not to engage in gainful activity by maintaining the system through regulation and public funding. The Court looked instead at the activity of entities contributing to a national system of supply, but in that case, doing so under contractual arrangements such as those provided by the ZWF. Under such arrangements, they were engaged in an *economic* activity in the meaning of free movement law, because they *actually* provided services for remuneration.

The healthcare services provided under these arrangements were free of charge for the patients insured. The compensation for the provision of services covered by the arrangements were at flat rates, but all the factors which influenced the level of costs and hospital budgets could form the subject of an agreement between the sickness funds and care providers. [303] The Court considered consequently that they constituted remuneration *in the present cases* and *under the contractual arrangements provided for by Dutch law*. This shows that the requirement of "consideration for the service" in the *Humbel* definition of remuneration does not mean that payment must correspond to the costs for providing each specific care service unit. Under the agreements the payment rate was namely flat, while the cost of healthcare services to different patients and for different treatments obviously varies. Hence the Court seems to consider that "consideration for the service in question" can be consideration for the total service provision, for instance over a year, through contractual arrangements and with the possibility of yearly adjustments.

By specifying that public hospitals provided for remuneration "under the contractual arrangements provided for by Dutch law", the Court suggested arguably that this particular circumstance had relevance in finding that payments from sickness funds constituted remuneration in accordance with the *Humbel* definition.

- The contractual agreements were open to any public and private establishments duly authorised to provide the care in question or to persons lawfully authorised to do so, and patients could choose among them (system of choice)
- The contractual agreements allowed hospitals to negotiate the economic conditions of their service provision (economic autonomy and competition).[304]

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[302] Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, para.58, emphasis added. Also in *Skandia*, the Court underlines that "the premiums unquestionably represent remuneration *for the insurance companies which receive them* (emphasis added)", se Case C-422/01 *Skandia* [2003] ECR I-6817, para.24.

[303] Ibid, para.16.

[304] Under the Dutch scheme, any sickness fund was required to enter into an agreement with any establishment in the area in which it operated or which the population of that area regularly attended: also, the insured person were allowed to choose from among these establishments and persons, see Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paras.17 and 20.

Providers in the system were thus in *economic* competition with each other, because there was *a margin of discretion* regarding the economic terms of the contractual arrangements with the sickness funds. At any rate, in the system at issue in *Smits and Peerbooms*, amounts paid under the contractual arrangements constituted remuneration, although consideration was not agreed between the provider and the recipient of the service, but between the provider and the financer of the service. Thus, in the definition of "remuneration" in *Humbel*, as "consideration for the service in question, *normally* agreed on between the provider and the recipient", it seems that the word "normally" must be understood as indicating that the provider's agreement on consideration does not have to be concluded with the recipient of the service but may also exist between the provider and the service financer, for instance public authorities.

In fact, it is settled law that consideration for the service in question can exist even when the service is not paid for by those for whom it is performed.[305] Thus, in the field of retirement pensions, the Court explained that premiums paid by the employer were to be seen as the consideration for the pension which would be paid to its employee when he retired, as the service does not have to be paid by those for whom it is performed.[306] This is of uttermost importance in the field of social services as it means that subsidized service provision can be an economic activity in the meaning of free movement law, in other words that quasi-markets for social services are regarded by the CJEU as markets *a priori* possible to "Europeanise", through negative or positive legal harmonization.

In cross-border cases, this approach, implying that a social service can be received, paid for, and then reimbursed from a national health system in one single complex transaction, has been qualified of "hermeneutic trick" by Spaventa[307], and described by Baquero-Cruz as somewhat simplistic.[308] In fact, it is all but simple. In *Smits and Peerbooms*, patients insured in the Netherlands had applied for reimbursement of the costs for medical treatment received in Germany respectively Austria. The Dutch sickness funds denied them reimbursement and justified its decision *inter alia* on the argument that there was satisfactory and adequate treatment for their diseases in the Netherlands. The question at issue was therefore whether the medical treatment provided by establishments in Germany and Austria could be regarded as services enjoying the passive freedom to provide services following from Article 56 TFEU.

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[305] This was first established by the Court of Justice in Case 352/85 *Bond van Adverteerders* [1988] ECR I-2085, para.16; confirmed in Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para.56 and reasserted several times, notably in the field of healthcare services, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paras.56-57, and Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, para.103.

[306] Case C-422/01 *Skandia* [2003] ECR I-6817, para.24. It may be noted that this is also true regarding certain essential goods subject to public service activities, such as medical products. The particular character of the purchasing and marketing conditions for medical products goods in the Member States, in particular the fact that they may be paid for by public bodies and not by consumers, does not preclude that the procurement and retail transactions may be deemed commercial and subject to the Treaty provisions on the free movement of goods. This was implicit in *Duphar*, where the Court of Justice established that provisions within a national system of mandatory sick insurance which exclude certain pharmaceutical products from reimbursement by social security were compatible with Article 30 EEC (now Article 34 TFEU).

[307] Spaventa E., 2007, p. 56-58.

[308] Baquero-Cruz J., 2011, p. 88.

The Court's treatment of the remuneration issue is complex. Having once more asserted that

> the fact that hospital medical treatment is financed directly by the sickness insurance funds on the basis of agreements and pre-set scales of fees is not in any event such as to remove such treatment from the sphere of services within the meaning of Article 60 (now Article 57 TFEU, precision added) of the Treaty[309],

The Court underlined namely first that

> far from falling under [a scheme providing medical benefits in kind], the medical treatment at issue in the main proceedings, which was provided in Member States other than those in which the persons concerned were insure, did lead to the establishments providing the treatment *being paid directly by the patients*.[310]

Obviously, in determining whether the service provided in the cross-border situation was provided for remuneration, the Court found relevant that the healthcare establishment in Germany and Austria had been directly paid up-front by the patients. But if the services provided in Germany and Austria could be economic without being paid by their recipient, what role did the patients' direct payment play? Some answer to that question may be found in the Court's obiter dictum on intra-State operation, where the Court asserted that "the payments made by the sickness insurance funds under the contractual arrangements provided for by [Dutch law], albeit set at a flat rate, are indeed the consideration for the hospital services and *unquestionably represent remuneration for the hospital which receives them*".[311]

In finding that payments made by the sickness funds under Dutch law constituted remuneration for the hospitals receiving them, the Court seemed to require

1. That the hospitals received payments in consideration for the service provided

2. That their agreement on the payments must be "unquestionable" and therefore must be objectified. Although the payments were set at flat rate, they were made "under contractual arrangements", which indicates that the hospitals had a possibility to influence the financial terms of their activity. The Court had also found worth underlining that the medical treatment in the Netherlands was

[309] Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paras.56-57. To the same purpose, see Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, para.103.

[310] Case C-157/99 *Smits and Peerbooms*, [2001] ECR I-5473, para.55, emphasis added.

[311] Ibid, para.58, precision and emphasis added. Also in *Skandia*, the Court underlines that "the premiums unquestionably represent remuneration *for the insurance companies which receive them*", se Case C-422/01 *Skandia* [2003] ECR I-6817, para.24, emphasis added.

financed directly by the sickness funds on the basis of *agreement* and pre-set scales of fees.[312]

These elements may suggest that the Court sees (1) "contractual arrangements" between hospitals and funds in intra-State hospital care and arguably (2) the up-front payment of patients to hospital in other Member States, as necessary to objectify the agreement of the service provider in the intra-State respectively the inter-State situation, allowing to conclude that in the provider's perspective, the amount received constituted undeniably "consideration for the service in question". Although not, as "normally" in a pure market context, "agreed upon between the provider and the recipient of the service", this consideration is agreed upon by the provider. In intra-State provision, the sickness funds part to the contractual arrangements on payment act on behalf of the patients. In inter-State provision, the patient is "empowered" by EU law to conclude a commercial transaction funded or reimbursed by its State of residence.

Regarding the role played by the up-front payment by patients in cross-border transactions, another, possibly complementary, interpretation is possible. In his Opinion in *Watts*, AG Geelhoed held that the freedom to provide services had applied in *Smits and Peerbooms* in view of the fact that the service had been paid for directly by the patients concerned in the case.[313] This view seemed to be shared by the Court as indeed, for the applicability of the passive freedom to provide services to the cross-border transaction at issue in *Watts*, the Court emphasized the significance of the patient affiliated in UK's *paying* for the treatment received in an establishment in France[314], and the irrelevance of the fact that provision of hospital treatment could constitute remuneration in the context of UK's national system.[315] It is thus arguable that the Court regarded this direct payment in the specific case at hand as necessary evidence of a commercial transaction concluded by the provider, triggering a duty for the Member State of the patient to subsidize the service as it had subsidized the intra-State provision of a similar service, or also as an element of risk corollary of the recipient's contractual autonomy.[316]

In AG Geelhoed's view, there was no question of the National Health Service (NHS) in UK providing a service to Mrs. Watts within the meaning of Article 56 EC.[317] His

[312] Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, para.56. It transpires from the exposé of facts and legislation that the sickness funds in the Netherlands had a relative freedom to enter into an agreement with care providers, and that care providers in the Netherlands had a possibility to negotiate in on factors influencing the level of costs and hospital budgets, see paras.13-17.

[313] Opinion of AG Geelhoed in Case C-372/04 *Watts* [2006] ECR I-4325, para.54-55.

[314] Case C-372/04 *Watts*, para.88.

[315] Ibid, paras.90-91.

[316] This element of risk is reflected in Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] L88/45. Inasmuch as a patient is entitled to seek treatment in another Member State, even subject to a condition of prior authorization, it is underlined under Recital 46 that "the costs of such care provided in another Member State should also be reimbursed by the Member State of affiliation up to the level of costs that would have been assumed by the Member State of affiliation". It is possible, but not mandatory, for the Member State to compensate the whole costs of healthcare provided in other Member States, see Article 7(4) second paragraph of the Directive.

[317] Opinion of AG Geelhoed in *Watts*, [2006] ECR I-4325, para.55.

understanding of the transaction was that "[i]ts role is restricted to the aspect of the *possible* reimbursement of the costs of the treatment which Mrs Watts received in another Member State. Its *possible* involvement is ancillary to a transaction which does come within the ambit of Article 49 EC (now Article 56 TFEU, precision and emphasis added)".[318]

In sum, the CJEU gives a broad interpretation of the notion of economic activity in the field of EU free movement law by considering as remuneration a compensation paid by another part than the recipient of the service, both in the contexts of inter-State and intra-State service provision. Thus, the CJEU has deemed the *Humbel* criterion of remuneration fulfilled:

- In an intra-State context, when public entities provide a social service free of charge but in the frame of *contractual arrangements* with public authorities
- In a cross-border context, when a person of one Member State receives a social service from the provider of another Member State, the compensation being possibly reimbursed by the recipient's state of residence but paid up-front to the provider by him/her.

The fact that the provider eventually gets economic compensation, albeit from another part than the recipient, does not seem sufficient for the provision of a public-funded service to be economic. The case law shows discreetly but surely, that the Court requires compensation to the service provider is not remuneration, unless it is functionally comparable to a "price" in a free market economy, i.e. the result of an interplay between demand and supply of a product. Regarding publicly funded social services, compensation for the service is normally not decided by agreement provider-recipient. In situations where the service is a benefit in kind, or when a public entity provides occasionally a social service to a recipient from another Member State eventually financed by the Member State of the recipient, it can be difficult to objectify that the compensation eventually received by the provider constitutes the condition *sine qua non* for the provider to deliver the service and comparable to a market price.

In such difficult cases, it seems that the CJEU looks for *some* objective sign that compensation may be seen as accepted as a remuneration "for the service in question" by the provider. This involves that both public and private providers in a welfare system or transaction must enjoy a degree of autonomy allowing them to adapt *ex-ante* their service production to the rates proposed per service unit, and control their financial risk. This may explain the Court's emphasis on the fact that in the Dutch system, public hospitals were providing under specific contractual arrangements, and in *Smits and Peerbooms* and in *Watts* on the fact that patients had paid up-front. In the latter cases, the rate was imposed by the service provider, leaving very limited much of "market negotiation" to the demand side in the transaction, represented by the patients, who could only agree or go back home. As the service was not commissioned by the public financer in the recipient's state, there was no *ex-ante compensation arrangement* to fall back on. It is submitted that in the situations at issue in *Smits and Peerbooms* and in *Watts*, up-

[318] Ibid.

front payments allowed the provider to control its financial risk for providing the service. This interpretation of the relevance of the up-front payment as objectifying the provider's *ex-ante* knowledge of the economic conditions of providing a specific service, seems coherent with the Court's mention in *Smits and Peerbooms* of contractual arrangements for hospitals' provision of healthcare in the Dutch health care system at issue in that case.[319]

There is so far too little case law to be sure, and there is absolutely room for clarification from the CJEU on that issue, but at this stage of development of the Court's case law, it seems reasonable to submit that a service may be regarded as remunerated in the meaning of the *Humbel* definition when:

- the provider receives compensation for a specific service (compensation criterion)
- this compensation may be comparable to a market price, in the sense that it is known and accepted *ex-ante* by the provider as a condition to provide this specific service ("agreement criterion")

3.2.2 Remuneration excluded in public service systems? The *Humbel* doctrine

In *Humbel* the CJEU did not only formulate, as already mentioned, the essential characteristic of remuneration. In the circumstances at issue and already outlined, the Court found that this characteristic was "absent in the case of courses provided under *the* national education system as "[f]irst of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields and secondly, *the system in question* is, as a general rule, funded from the public purse and not by pupils or their parents".[320]

In this doctrine, the notion of "system established and maintained by the State" is vague. In particular, in comparison with the approach of the Court studied in the previous section, the provider's perspective is strikingly absent, which has "historical" reasons explained above in section 3.1.2.4. Besides, although it is not clearly visible in the judgment, it seems that the Court's conclusion – in line with the proposal of AG Sir Slynn – was not unrelated to the fact that the State in fact *was* the provider of the courses in the establishment attended by Frederic Humbel. In this respect it is worth stating the following statement of the Advocate General: "[m]y view, with the benefit of the

[319] In certain cases, it seems that the Court includes the criterion of agreement in the term "consideration". This would explain why in *Danner* AG Jacobs apparently gives importance to the fact that the insurance contributions at issue are paid "on a voluntary basis", although the Court simply states that the contributions paid by a person constitute "consideration" for pensions which will be payable when this person stops working. See Opinion of AG Jacobs in Case C-136/00 *Rolf Dieter Danner* [2002] ECR I-8147, paras. 27-28, and the Court of Justice's judgment in the case, at para. 27.

[320] Case 263/86 *Humbel* [1988] ECR 5365, para.18, emphasis added.

arguments advanced in this case, remains that education *provided by* the State is not *provided* "for remuneration". The State is not a commercial organization seeking a profit or indeed to recover its costs and break even."[321]

Yet, as some Member States rely to a considerable extent on private provision of school education, for profit in at least one Member State, it may be doubted whether the notion of "system established and maintained by the State" gives enough guidance to delineate economic activity. The system may include private provision regulated by public authorities and largely or wholly funded with public resources. In Sweden, private entities regarded by law as part of the national system may offer school education for-profit, and thus are engaged in gainful activity. The absence of a service provision perspective in the notion of "system maintained by the system" can lead to a serious logical bug. This explains arguably that AG Geelhoed questioned in *Watts* "whether *Humbel* may still be regarded as being good law".[322]

The *Humbel* doctrine was formulated in such general terms that it could seem transposable to any national education system, and more generally to systems of public services in other fields such as healthcare.[323] This led a number of the governments to believe that they could invoke the "*Humbel* doctrine" to claim that hospital services could not be subject to the freedom to provide services, on the argument that they operated in the frame of a national system with public funding.[324] However, in the field of healthcare and of other social services such as social security, we know that the Court has rejected this approach. Outside the field of education, it seems clear that the *Humbel* doctrine has to a large extent been "neutralized" by the CJEU. The Court acknowledges a freedom for the Member States to construct a non-economic social service system, for instance in *Watts* or in *Freskot*, and at the same time demands that this system takes due account of the interests of economic actors in other Member States. The Court's approach may be criticised for overlooking many realities, but that is the way valid law looks like.

Also in the field of education services, the *Humbel* doctrine has, at least to a certain extent, been "neutralized". In *Jundt* we have seen that the Court considered that the freedom to provide services (this time the active freedom) applied to courses given by a person of one Member State in the establishment of another Member State.[325] The German legislation was successfully challenged.

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[321] See the Opinion of AG Sir Slynn in Case 263/86 *Humbel*, referred above, p. 5379, emphasis added.

[322] Opinion AG Geelhoed in Case C-372/04 *Watts* [2006] ECR I-4325, para.60.

[323] Indeed, in his Opinion to the case, AG Sir Slynn thought the analogy with health care was striking. The Advocate General's vision was that "although Community nationals by and large are entitled to medical care throughout the Community, that entitlement is underpinned by a complex system designed to determine which State should ultimately bear the cost of the treatment". See Opinion of AG Sir Slynn in Case 263/86 *Humbel* [1988] ECR 5365, p. 5379-5380..

[324] Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paras.48-49.

[325] C-281/06 *Jundt* [2007] ECR I-12231.

On that background, the *Schwarz* ruling is particularly interesting, as it both diverges from and at the same time upholds the *Humbel* doctrine. In *Schwarz*, AG Stix-Hackl admitted that the cross-border transaction in the field of education at issue in the case, confronted the Court of Justice with a legal question similar to the question at issue in the field of health care in *Watts*. She believed that "the consequences of that case law should be reconsidered" and also underlined that the view taken by the Grand Chamber in *Watts* was not "without problems as far as its logical consequences are concerned". A first consequence she saw, worth quoting here, is that

> [i]t leads to a far-reaching liberalisation requirement which is difficult to reconcile with the sovereignty of the Member States in that the fundamental freedoms laid down in the Treaty are applicable even where a benefit is provided *in only one other Member State* according to free market principles. It does not necessarily follow from the applicability of the fundamental freedoms that certain national legislation would not be compatible with Community law; however, the Member State in question must justify such legislation if necessary, which restricts considerably its margin of discretion in making policies falling outside Community competences.[326]

We are here in presence of the acceptance issue evoked earlier in this chapter.[327] AG Stix-Hackl's view above shows that the "spirit" of the CJEU in interpreting EU market law has not only crystallized tensions in the Member States' policy related to social services, but has not either been easily accepted by all members of this institution. Be it as it may, AG Stix-Hackl held that the approach in *Watts* had to be applied to the situation in *Schwarz*, and so did the Court. In that case the Schwarzes who resided in Germany and had sent their children to a private school in Scotland, challenged the German rules allowing German tax payers to deduce from tax school fees paid to private schools in Germany but not private schools established in other Member States.

The Court (Grand Chamber) reminded first the *Humbel* doctrine.[328] It also reminded its position in *Wirth*. However, there is an important difference between the Court's view in *Wirth* and the Grand Chamber's view in *Schwarz*. In *Wirth* the Court had retained two criteria, financing of the activity essentially by private funds *and* for-profit activity, as it stated that

> [w]hilst most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit. When courses are given in such establishments, they become services within the meaning of Article 60 of the Treaty. Their aim is to offer a service for remuneration.[329]

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[326] Opinion of AG Stix-Hackl in Case C-76/05 *Schwarz* [2007] ECR I- 6849, para.39, emphasis added.

[327] See sections 3.11, 3.1.2 and 3.1.6.

[328] Case C-76/05 *Schwarz* [2007] ECR I- 6849, para.39.

[329] Case C-109/92 *Wirth* [1993] ECR 1-6447.

In *Schwarz*, while AG Stix-Hackl proposed to retain these two criteria[330], the Court of Justice referred to this caveat in *Wirth* but decided to modify its meaning, by suppressing the profit criterion and stated instead that

> However, the Court has held that courses given by educational establishments essentially financed by private funds, notably by students and their parents, constitute services within the meaning of Article 50 EC, since the aim of those establishments is to offer a service for remuneration.[331]

Thus profit-seeking is not regarded *per se* as decisive to determine that a private school provides a service for remuneration, an approach which seems in line with the healthcare cases and, as already mentioned in the previous section, was confirmed in *Jundt*. What is decisive is that it is possible to objectify that the establishment's *aim* is to offer a service for remuneration. If it is clear that it does, then its aim is not to fulfil the State's duty towards its population, even if the establishment indirectly contributes to the State's mission. One may wonder what the CJEU's requirement – specific to the field of education – that the establishment is essentially financed by private funds has to do with this aim, as in other sectors the CJEU does not question that the aim of many private entities financed by public funds can be remuneration, in particular for-profit private entities. The explanation may be that in the sector of public education, public funds may not be expected to constitute "consideration for the service in question", because education wholly or largely funded by the state is organized in a manner which makes it difficult to measure the cost of the service per unit, and to see funding as remuneration.

This may explain that the Court of Justice still relies on the fact that an establishment is *essentially* financed by private funds to objectify its aim to be remunerated for what it produces. Although this criterion does not exclude that an establishment is subsidized by the State, it implies that the establishment is forced to analyse its activity in such a way that it covers its costs for each student it serves. Under such circumstances, the fact that students pay fees does not *per se* render the activity economic. The proportion of these fees – and of additional private funding – in the financing of the establishment is instead an indication that the school has to calculate fees which cover its costs, so that it gets, as a whole, year after year, "consideration for the service in question".

If the school in Scotland fitted in this category, "was essentially financed by private funds", which the Court deemed probable but let to the national court assess on the basis of more detailed information, it conducted an economic activity, and the Schwarz were entitled to rely on Article 56 TFEU to challenge the German tax rule. To justify that it did not envisage the German rule in the light of the German education system, the Court referred to the approach in *Watts*, considering that "all that matters is that the private school established in another Member State may be regarded as supplying

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330 AG Stix-Hackl held that"[t]he decisive criteria for assuming that the service is for remuneration and thus that Article 49 EC et seq. is applicable *ratione materiae* in the present case are therefore the private financing of a school, to cover a large proportion of its costs, and its intention to make an economic profit." See Opinion of AG Stix-Hackl in Case C-76/05 *Schwarz* [2007] ECR I- 6849, para.35.

331 Case C-76/05 *Schwarz* [2007] ECR I- 6849, para.40, referring to Case C-109/92 *Wirth* [1993] ECR 1-6447, para.17.

services for remuneration".[332] Also by analogy with *Watts*, the Court applied to school education the formula introduced in *Duphar* assuring that "Community law does not detract from the power of the Member States" but demanding that ", when exercising that power, Member States must comply with Community law, in particular the provisions on the freedom to provide services".[333] The German rule, excluding on the basis of nationality private schools offering services for remuneration, was found incompatible with Article 49 EC (now Article 56 TFEU).[334]

Through the *Schwarz* ruling the CJEU gives EU law "the upper hand" in the field of school education as it has done in the fields of health care and social insurance.[335] As a result, the *Humbel* doctrine may not anymore be seen as shielding national rules from being reviewable under Article 56 TFEU on the ground that they are related to a system "maintained and mostly funded by the State". Also, the discreet but important shift between *Wirth* and *Schwarz* suggests that an increasing cross-sector homogeneity of the CJEU's criteria determining that an activity is economic. However, the Court's criterion of private funding in *Schwarz* perpetuates the specificity of the criteria used by the Court for school education, as private funding is not a relevant criterion in the field of healthcare, and not either in the field of university courses which are externalised.

In *Schwarz* the CJEU had at least two reasons not to leave the system approach in *Humbel* behind, one being specific to education, and another being related to system coherence in EU market law. First education constitutes still a "special case" in the European trend of public service liberalization. In contrast with for instance healthcare, services to the person and social insurance, the Member States – Sweden excepted – do not "normally" fund the provision of school education by non-state actors for-profit. Second, the *Humbel* doctrine constitutes the only explicit manifestation that EU law admits at least a theoretical possibility for Member States to uphold systems in which the activity cannot be conducted as an economic activity, for redistributive, but possibly also for cultural reasons. This was implicitly the subject of the following statement of AG Stix Hackl in *Schwarz* in an openly critical assessment of the approach in the healthcare cases:

> Secondly, and above all, such a liberalisation requirement is difficult to reconcile with the Court's case law on the notion of undertaking in Community competition law, in so far as in that case law the Court takes the view that systems based on the principle of national solidarity do not as a rule fall within the scope of the notion of undertaking. It is not denied that the approach for the notion of undertaking is different from the approach for the notion of services, in so far as classification as an undertaking requires only consideration of national legislation, without any cross-border perspective and therefore without any risk of conflict. However, the creation of a way out' of closed systems of national solidarity, accompanying the possibility of exercising the

[332] Ibid, para.44.

[333] Ibid, para.70.

[334] Case C-76/05 *Schwarz* [2007] ECR I- 6849, para.73.

[335] This image of "upper hand" is borrowed from Baquero Cruz, in Baquero Cruz J., 2011, p. 87.

> fundamental freedoms laid down in the EC Treaty – whether in branches of social security or, for example, compensation funds for non-insurable risks – is in itself detrimental at least to the idea of national solidarity, because the spreading of risk is restricted.[336]

The *Humbel* doctrine is very difficult to reverse, in particular due to its political significance. However, the doctrine is clearly weakened. The case law in *Wirth*, *Schwarz* and *Jundt* shows the CJEU's readiness to look away from system arguments and instead apply the free movement rules – in the field of education as in other social fields – with a focus on economic provision, a notion which the Court defines very broadly. Therefore, interpreting *Humbel* as meaning that activities are non-economic for the purpose of free movement law as soon as they are part of a national system which is financed wholly or mostly by tax is arguably incorrect. If privately-owned schools may provide for-profit, it seems untenable to claim that that they do not provide for remuneration and do not conduct an economic activity in the meaning of free movement law, simply because *the State which* regulates and funds them does not itself seek to engage in gainful activity.[337]

3.3 Conclusions

The study conducted in this chapter leads to submit that the CJEU makes *in fact* a distinction between an activity which *is* economic in the meaning of free movement law and therefore benefits from the free movement rights on the one side, and on the other side an activity which *can be* economic in the meaning of free movement law and therefore is seen as related to goods, services, capital. This distinction appears to underpin all freedoms studied, but is clearest regarding activities related to services, where it emerges from the CJEU's case law that

(a) A service activity *is* economic if it is *actually* provided for remuneration in the frame of a specific transaction or in the frame of a specific regulation. This test defines the scope of the fundamental freedoms which may be claimed, based on the direct effect of the Treaty provisions securing these rights.

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[336] Opinion of AG Stix-Hackl in Case C-76/05 *Schwarz* [2007] ECR I- 6849, para.39, footnotes omitted.

[337] The Services Directive upholds the picture that any provision of educational courses, be it for-profit, on behalf of the State does not constitute a service in the meaning of the Treaty, see Recital 34 asserting that: "The Court of Justice has held that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the services in question and has recognised that the characteristic of remuneration is absent in the case of activities performed, for no consideration, by the State or on behalf of the State in the context of its duties in the social, cultural, educational and judicial fields, such as courses provided under the national education system, or the management of social security schemes which do not engage in economic activity. The payment of a fee by recipients, for example, a tuition or enrolment fee paid by students in order to make a certain contribution to the operating expenses of a system, does not in itself constitute remuneration because the service is still essentially financed by public funds. These activities are, therefore, not covered by the definition of service in Article 50 of the Treaty and do not therefore fall within the scope of this Directive."

(b) A service activity *can be* economic if it is *normally* provided for remuneration. It is namely submitted that the CJEU interprets the word "normally" in the definition of services in Article 57 TFEU, as meaning that the service *can be* provided for remuneration. This "basic test" determines that a national rule which can affect such a service is an "economic rule" covered by the Treaty rules on free movement, even if the service can *actually* be pursued as an economic activity only in other Member States than the Member State of the rule at issue.

This finding has several legal implications. Firstly it explains why the CJEU avoids relying on the notion of "economic activity" in the field of EU free movement law. By playing on the ambiguity of the definition of service in the meaning of EU law (either "normally provided for remuneration" in Article 57 TFEU or "provided for remuneration" in *Jany*), the CJEU spares many feelings. It does not have to spell out in plain words that whereas Member State A may organize a service through rules that render the activity non-economic in its territory, fundamental freedoms may anyway challenge these national rules as soon as the activity is economic in some other Member State, and possibly impose reforms which lead the activity to become economic in Member State A. It does not either have to clearly state what a "non-economic activity in the meaning of free movement law" is, which would entertain the perception that there can be some possibility for Member States to withdraw a service from both EU competition rules *and* EU free movement rules. The drawback of the Court's ambiguous use of the term "service in the meaning of Article 57 TFEU" – both to express that the service *in casu* is provided for remuneration and to express that the service "normally" *can be* provided for remuneration – is that many scholars and Advocate Generals feel obliged to declare that the concept of "economic activity" has two different meanings in EU free movement law and in EU competition law, which defies common sense and maintains confusion.

Second, it explains the different scopes of EU free movement rules and EU competition rules. While a Member State's rules rendering non-economic the activity of the provider in that Member State cannot be challenged by economic rights based on EU competition law, they can be challenged on the basis of the fundamental freedoms if the activity (for instance a social service) is economic in at least one other Member State.

Third, although it does not demonstrate that the criteria for an activity to be economic are the same in the fields of competition and free movement, it supports the thesis that there is these criteria can be identical. The criteria for an activity to be economic in the field of competition are studied in chapter 4 and the sets of criteria are compared in chapter 6, which will allow to submit final conclusions on that issue.

And fourth, it sheds new light on the word "economic" in the concept of service of general economic interest and on the CJEU's approach of this notion and of its relevance for the application of free movement law to welfare services, in particular social services. This issue is also developed in chapter 6.

In order to determine that an activity *is* economic in the frame of a specific type of transaction or of a regulatory scheme – that the service *is* provided for remuneration, test (a) above – it has been shown that the CJEU normally rejects the "system approach" of *Humbel* and instead privileges a case by case "economic provider's approach", reflected in the CJEU's interpretation of the concept of "remuneration". In that approach, remuneration can exist even when the service is not paid for by those for whom it is performed, as what is relevant is *whether payments received by the specific service operator may be regarded as remuneration in this provider's perspective*, which supposes that two basic conditions are fulfilled:

1. The provider receives a compensation amount, which exists as soon as the service is "not for nothing", does not even have to cover all costs and does not have to be for-profit (the "compensation criterion").
2. The economic compensation received can be seen as a market price for the service, in the sense that the operator can agree *ex-ante* to provide the service in question for this compensation amount (the "agreement criterion").

The Court's wide interpretation of the "compensation criterion" and the "agreement criterion" involves that remuneration is easily found and that test (a) determining whether an activity *is* economic in a specific transaction or scheme – a service actually provided for remuneration – is very easily fulfilled. However, to understand the extent of the liberalization of welfare services, in particular social services, which the Court's case law can lead to, it is essential to be aware of the relation between tests (a) and (b). As soon as the Court finds in the frame of a dispute brought to its jurisdiction that a cross-border transaction on social services fulfils test (a), the Court does not merely establish that this specific type of transaction may not be restricted by national rules without being justified under the principle of proportionality. It also demonstrates that the service fulfils test (b) and *can be* provided for remuneration, that it is "a service *normally* provided for remuneration".

While test (a) has to be made case by case, the basic test (b) is made once and for all. Once it is established that a service is "normally" provided for remuneration, national rules related to this service are *a priori* an "economic rule", which implies that they must by principle and *ex-ante* be adapted to the fundamental freedoms, *both the freedom to provide services and the freedom of establishment*. This does not mean that national rules related to that service would not be compatible with EU, but that they must be justified by the Member State as necessary. The CJEU has found that hospital, medical and paramedical services, elderly care, manpower, university courses, and education in schools essentially financed by private funds *in casu* fulfilled the (a) test. This implies that the (b) test is automatically fulfilled, and implies that the free movement of services and the freedom of establishment are already normative in national regulation on these social services.

Indeed, "normally" in Article 57 TFEU is a very broad notion, which implies that any claim that the activity is not provided for remuneration in a specific transaction or under a specific scheme, will be treated as an exemption, i.e. very restrictively. This is quite in line with the CJEU's very restrictive interpretation of the Treaty notion of "activities connected, even occasionally, with the exercise of official authority", and requiring that

the activity is conducted by entities with a high degree of decisional autonomy in exercising this authority. Although even such services *in theory* could be provided for remuneration, it is submitted that the strong derogation in Article 52 TFEU allows a legally strong presumption that they are not. This is why such activities constitute arguably the "surest" form of non-economic services of general interest.

Apart from the notion of "activities connected with the exercise of official authority", there is no constitutional limit for which services may be deemed to be "normally" provided for remuneration. In fact, it is seriously doubted here that courses in national systems of education may be seen as non-economic services of general interest in the sense that they cannot be subject to economic transactions. The "economic provider's approach" has not only excluded the *Humbel* formula in the sector of healthcare, but also considerably weakened the *Humbel* formula. *Schwarz* and *Jundt* involve namely that national rules governing the national education system may be challenged on the basis of both the passive and the active freedoms to provide services. Excluding the applicability of EU free movement rules to education provided in the frame of systems established, maintained and essentially funded by the State, looks increasingly as a vulnerable legal shield given the political and legal developments in the Member States.

At any rate, the study conducted in the present chapter not only confirms that there is "no nucleus of sovereignty that the Member States can invoke, as such, against the Community"[338], but also shows that there is *almost* no nucleus of sovereignty that the Member States can invoke to claim that their national rules organizing welfare services escape EU market law. The CJEU's case law may be argued by some to simply express what the Treaties, and their fathers, have always meant and wanted, but we all know that things are not that simple. AG Stix-Hackl's open questioning of the consequences of the Court's choice allowing "a way out of closed systems of national solidarity" shows that there has probably been a debate within the Court on the meaning of the principle of solidarity in national welfare systems and on whether other EU foundational principles do not exclude a judicially driven liberalization of social services.[339] Indeed, chapter 3 shows that the Court has discreetly but resolutely established a mechanism of tests with minimal criteria and broad effects, which closes the possibility for national rules to "exit" from EU market law.

This considerable expansion of the scope of the fundamental freedoms may easily lead to far-reaching liberalisation requirements on social services, not only on the demand side, but also on the supply side of social services. In particular, given the limited "bite" of the state action doctrine, it may be tempting for economic operators to rely on the freedom of establishment, which requires no effect on trade to apply, in order to challenge national rules affecting their opportunities of business in the field of social services. When such disputes are brought under its jurisdiction, Lenaerts has explained

[338] This radical statement was made 25 years ago by Koen Lenaerts, see Lenaerts K., 1990, *Constitutionalism and the many faces of federalism*, 38 American Journal of Comparative Law 205 (1990) at 220.

[339] Opinion of AG Stix-Hackl in C-76/05 *Schwarz* [2007] ECR I- 6849, paras.39-40: /…/ detrimental at least to the idea of national solidarity, because the spreading of risk is restricted".

that the Court takes a nuanced approach aimed at "striking a fair balance between the general interest pursued by such services and the effectiveness of the relevant Treaty provisions governing the internal market".[340] Indeed, in the absence of EU legislation in the sector of social welfare, the CJEU faces not only a risk of rejection from the Member States (a political issue), but also with a competence problem (a constitutional issue). This chapter has evidenced several key elements of this nuanced approach.

First, it must be underlined that the Court considers certain rules to be non-economic in nature, and for that reason not covered by the economic rights to free movement. As explained under chapter 2, the CJEU's doctrine in *Meca-Medina*[341] and *Keck*[342] implies that rules governing strictly non-economic aspects of an otherwise commercial activity may escape from the scope of the fundamental freedoms, even where the activity can be economic.

Second, the Court's *Humbel* doctrine may be understood so that a *theoretical* possibility for a service to be provided for remuneration does not suffice for a service to be seen as "normally" provided for remuneration in the meaning of Article 57 TFEU. In other words, "normally" requires that the service is actually provided for remuneration in at least one Member State. If this interpretation is correct, the Court requires economic rights to free movement to *actually* exist, which is excluded as long as no Member State allows that providers in a wefare system objectively have another aim than the State – an economic purpose – in providing the service.[343] Hence it is reasonable to expect that the CJEU will regard courses in national education systems as services *normally* provided for remuneration as soon as it is confronted with the fact that a Member State allows private providers in the national system to have an aim of profit instead of the State's aim to serve its population, as is now the case in Sweden. As found in this chapter, the thesis that "state education is special" finds still support in the CJEU's case law[344], but how long the *Humbel* doctrine can stand the test of reality and of legal coherence remains to be seen, in particular as there is pressure for "modernizing school" in several Member States.

Third, the Court's approach in *Sodemare* is submitted to mean that even when the provision of a service is externalized to private entities, a Member State withholds the power to deny solidarity funding of for-profit activity without infringing the freedom of establishment. *Sodemare* may be interpreted as acknowledging the Member States' retained powers not only as regulator but also as financer. Where neither the societal objectives nor the modes of supply are harmonized, the legislator of a Member State may – on the basis of a democratic mandate – define precisely the service it finds important to finance on the basis of solidarity and decide that solidarity funding may not

[340] Lenaerts K., 2012, p. 1249.

[341] Case C-519/04 P *Meca-Medina* [2006] ECR I-6991.

[342] Joined Cases C-267 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

[343] Another thing is of course that non-economic EU rights, such as the right to move and reside freely within the EU in accordance with Article 20(2) TFEU, may not unjustified be restricted by the national legislators.

[344] See Lenaerts K., 2012, p. 1251.

remunerate capital. It will be seen in chapter 13 that as a result of the Swedish policy on public education, the *Sodemare* approach may constitute the only manner for other Member States to claim their powers to impose a not-for-profit condition for subsidizing courses provided by private entities, which allows guessing that this ruling is difficult to overrule.

4 "Economic activity" in the field of competition: relevance and criteria

The purpose of this chapter is to analyse what relevance the notion of "economic activity" has for the applicability of EU free competition rules in a broad meaning, i.e. including state aid rules, and to identify the criteria which determine that an activity may be seen as "economic in the meaning of EU free competition law". Importantly, the analysis in this chapter should allow answering the question whether the notion of "service" has the same meaning for the purpose of EU competition rules and EU free movement rules. It should also shed some light on what the CJEU means with the notion "on a market".

By contrast with the concepts of entry of EU free movement rules, the concept of "undertaking" which triggers the applicability of EU competition rules has been defined by the CJEU in direct relation to the notion of "economic activity". This could render the analysis of what the Court means by "economic activity" in that field of EU law rather straightforward but in fact, the Court has developed a web of definitions, tests and criteria to determine the applicability of EU competitions rules which is so nebulous that its coherence has been questioned. This is largely due to the fact that in the field of public services, and particularly of social services, the Court has pursued through EU competition rules as well as through EU free movement rules "the same overarching goal, namely to abolish obstacles to cross-border trade".[345]

The point of departure in this part of the study is therefore that these definitions, tests and criteria cannot be understood without keeping in mind that they fulfil in the Court's interpretation of the Treaty competition rules, aimed at broadening their scope and *effet utile*. In the field of social services, where national regulation is generally extensive and easily hinders competition, the CJEU has decided to make a bold move in *Höfner* and launched the test that "the activity is not necessarily, and has not always been, conducted by public entities".[346] The meaning of this test is not explicit in the Court's case law, but what is clear is that since *Höfner* the CJEU has shown that it is not only interested in assessing whether the activity pursued by a specific entity *is* economic, but in case where this is difficult to show, to establish that the activity *can be* economic, which allows the Court to claim that there is a market and that the role a Member State's regulation in the absence of competition in the activity at issue should be questioned.

Therefore, the approach consists in this chapter in systematizing the CJEU's different tests and doctrines in accordance with this distinction between an activity which *is* economic and an activity which *can be* economic. By so doing, it may be easier to identify the criteria determining that an activity *is* economic for the purpose of EU competition law, and to compare them with the corresponding criteria in EU free movement law. It

[345] Semmelmann C., 2010, p. 521.

[346] Case C-41/90 *Höfner* [1991] ECR I-1979.

may also be easier to understand the role of the Court's tests and doctrines in justifying the applicability of EU competition principles to national welfare systems.

The CJEU's functional approach of the notion of "undertaking" is exposed first in section 4.1. In section 4.2, the tests and doctrines developed by the Court to show that the activity at issue can be economic are studied, in particular the so called "comparative test" in *Höfner* and the doctrine on activities related to the exercise of public authority. The "market participation test", which is arguably the true definition of an economic activity for the purpose of EU competition law, is studied in section 4.3, together with the exception for solidarity-based systems. Conclusions are drawn under section 4.4. The method used in this chapter is wholly in line with the description given at the beginning of part II, and need not being exposed again here.

4.1 The CJEU's functional approach to the concept of undertaking

The Treaty rules on competition apply only in the presence of undertakings and constrain the measures which they take (Articles 101-102 TFEU) and the freedom of Member States in their relationship with undertakings (Articles 106, 107 and 108 TFEU). AG Kokott observed in *Schindler* that "[f]or decades, [the notion of undertaking] has always been interpreted in the same way by the European Union courts".[347] Indeed, the Court's definition of an undertaking as "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed" has been axiomatically used by the Court of Justice as a point of departure when assessing the existence of an undertaking for the purpose of applying EU competition law to activities in the public sector, including hospital and non-hospital care, ambulance transport, old age and sickness pensions, employment, advocates and notaries.[348] The definition in *Höfner* is also the point of departure in the application of state aid cases, as clear from

[347] Case C-501/11 P *Schindler* (CJEU 18 July 2013), para.143.

[348] See Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-00637, para.17 ; Case C-364/92 *Eurocontrolt* [1994] ECR I-43, para.18 ; Case T-513/93 *Consiglio Nazionale degli Spdizionieri Doganali* v *Commission* [2000] ECR II-1807, para.36 ; Case C-244/94 *FFSA* [1995] ECR I-4013, para.14 ; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, para.36 ; Case C-55/96 *Job Centre* [1997] ECR I-7119, para.21 ; Case C-67/96 *Albany* [1999] ECR I-5751, para.77 ; Joined Cases C-115/97 to 117/97 *Brentjens'* [1999] ECR I-6025, para.7 ; Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121, para.67 ; Case T-128/98 *Aéroports de Paris* [2000] ECR II-3929, para.107 ; Joined Cases C-180/98 to 184/98 *Pavlov* [2000] ECR I-6451, para.74 ; Case C-309/99 *Wouters* [2002] ECR I-1577, para.46 ; Case T-319/99 *FENIN* [2003] ECR II-357, para.35 ; Case C-218/00 *Cisal INAIL* [2002] ECR I-691, para.22 ; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK* [2004] ECR I-2493, para.46 ; Case T-155/04 *SELEX* [2006] ECR II-4797, para.50.

cases such as *Maas v Commission*[349] and *CBI*. [350] The definition in *Höfner* has also been consolidated in the Communication from the Commission on the application of the EU state aid rules to compensation for the provision of SGEIs.[351]

This *Höfner* definition of an undertaking has considerably blurred the public/private divide in the Treaties, as it implies in particular that even entities in the public administration can be considered as undertakings depending on their activity.[352] The Court's view, formulated first in *Commission v Italy*, is namely that the State may act either by *exercising public powers* or by carrying on economic activities of an industrial or commercial nature by *offering goods and services on the market*.[353] In order to make such a distinction, the Court means that one must consider in each case the activities exercised by the State and determine the category to which those activities belong.[354] This "functional" approach evidently enhances the applicability of the Treaty market rules to activities in the public sector, as the focus is on the activity's relevance for the market and not on the entity conducting it or the resources financing its activity.

In this functional approach, the CJEU analyses each activity carried on by a given entity separately, and AG Poiares Maduro has underlined that "it is quite possible for an entity to be treated as an undertaking as regards some of its activities, while others fall outside the sphere of competition law".[355] Thus, in AOK, the Court found first that leading

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[349] The General Court examined an appeal against a decision by which the Commission had found that restructuring aid to publicly-owned companies providing employment services and services supporting the integration of people living with disabilities into the labour market, had involved state aid incompatible with the Treaties. The GC confirmed the Commission's view that the companies at issue constituted undertakings. See Joined Cases T-81/07 to T-83/07 *Maas* [2009] ECR II-2411, para.178.

[350] In its decision on the financing schemes of public hospitals in the Brussels region, the Commission took the definition in *Höfner* as a point of departure for its reasoning and found that these public hospitals constituted undertakings, as they provided healthcare services on the market, which was not questioned by the General Court in its review of the decision. See point 106 in Commission Decision of 28 October 2009 on the financing of public hospitals of the IRIS-network of the region Brussels-capitale (Belgium) in case SA.19864 (ex NN54/2009) – C (2009) 8120 final (only available in French and in Dutch); appealed in Case T-137/10 *Coordination bruxelloise d'institutions sociales et de santé (CBI) v European Commission*, nyr, para.91.

[351] Commission, "Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest" 2012/C 8/02, point 9. By contrast – and this is arguably a problem – the Court's definition is absent from the Transparency Directive, see Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (the Transparency Directive) [2006] OJ L 318/17.

[352] Case C-41/90 *Höfner* [1991] ECR I-1979, para.21. The challenging element in the ruling in *Höfner* was arguably the irrelevance of the form of the activity's financing, as the Court, in *Commission* v *Italy*, had established not only the irrelevance of the legal form for determining the existence of a public undertaking, but also, long before the ruling in Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, that the State may act either by exercising public powers or *by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market* (see Case C-118/85, *Commission* v *Italy* [1987] ECR 2599, paras. 10 and 7).

[353] Case 118/85 *Commission v Italy* [1987] ECR 2599, para.7.

[354] Ibid, para.7.

[355] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, para.10. In particular, if a public entity exercises an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that economic activity cannot be separated from

associations of statutory sickness funds did not constitute undertakings in the meaning of EU competition rules, since their activity of management of the German social security system was purely social and not economic in nature. However, the Court held as possible that the sickness funds and the fund associations representing them, besides their functions of an exclusively social nature, could engage in operations which had a purpose that was not social and was economic in nature, and in that frame adopt decisions to be regarded as decisions of undertakings or of associations of undertakings.[356]

In *Commission v Italy* the Court found that Italy's refusal to supply to the Commission financial information concerning the administrative body managing the State monopoly for tobacco, infringed the obligations of transparency imposed by the Transparency Directive.[357] This finding was based on a view that the public body, although integrated in the State administration and lacking legal personality distinct from the State, constituted a public undertaking for the purpose of the Treaty state aid rules. The fact that the public body was part of the State administration did not prevent the existence of financial relations between the State, through the mechanism of budgetary appropriations, disposed of the "power to influence the economic management of the undertaking, permitting it to grant compensation for operating losses and to make new funds available to the undertaking", which could constitute state aid incompatible with the internal market.[358]

In *Heiser*, the Court of Justice found – with implicit reference to the definition in *Höfner* – that a medical practitioner specialising in dentistry must be regarded as an undertaking within the meaning of Article 92 EC (now Article 107 TFEU).[359]

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the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers. See to that purpose Case C-138/11 *Compass* (CJEU 12 July 2012), para.38; Case C-113/07 P *SELEX* [2009] ECR I-2207, paras.72 et seq.

[356] See Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK* [2004] ECR I-2493, paras.57-65. Finally, the Court found that in determining together the fixed maximum amounts paid for medicinal products the associations did not act *with any economic purpose* but instead performed obligations integrally connected with the tasks imposed on them by legislation in the frame of their non-economic activity. Therefore this decision could not be regarded as an anti-competitive agreement in the meaning of Article 101(1) TFEU. In *Ferlini*, the question was wheter a Member State infringed Article 85 EEC in combination with Article 5 EEC (now Articles 101 TFEU and Article 4(3) TEU), when it permitted a group of hospitals to apply higher fees to persons outside the national social security scheme than to persons affiliated to that system. AG Cosmas explained: "it should be noted, as the Court has held, 'in competition law, the term "undertaking" must be understood as designating an economic unit for the purpose of the subject-matter of the agreement'. In other words, in each case, the term "undertaking" must be understood in a functional sense, having regard to the activity which is connected to the subject-matter of the specific agreement between undertakings, the decision by associations of undertakings or the concerted practice". See Opinion of AG Cosmas in Case C-411/98 *Ferlini* [2000] ECR I-8081, para.114, (footnote omitted).

[357] Case 118/85 *Commission v Italy* [1987] ECR 2599. More precisely, Italy was claimed to have infringed Article 5 (2) of the Transparency Directive. The essential purpose of this Directive was to promote the effective application to public undertakings of the provisions contained in Articles 92 and 93 of the Treaty concerning State aid.

[358] Case 118/85 *Commission v Italy* [1987] ECR 2599, para.13.

[359] See case C-172/03 *Heiser* [2005] ECR I-1627, para.26. Before applying the Treaty rules on state aid to national rules providing for the changeover for medical practitioners from taxable to exempt status for the purposes of VAT, the Court found that practitioners in dentistry in that Member State provided, in their capacity as self-employed

4.2 Relevance of the fact that an activity *can be* economic for the applicability of the Treaty rules on competition and state aid

In *Höfner*, the CJEU did not only define the notion of undertaking for the purpose of the Treaty competition rules, but also formulated its famous "comparative test", formulated as follows:

> The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.[360]

The Court's stance raised much controversy, as it was possible to perceive it as "the" test determining the economic character of an activity in the meaning of competition law. Buendia Sierra found for his part the comparative test "interesting and functional", as he heltd that its use involved a distinction between on the one hand state services of a "diffuse" nature, and on the other hand "specific" state services.[361]He doubted that the Court of Justice was conscious of how far this definition of economic activity went, but in fact the Court confirmed its approach by using the comparative test again a few years later, this time in *Ambulanz Glöckner*, in the following words:

> In the present case, the medical aid organisations provide services, for remuneration from users, on the market for emergency transport services and patient transport services. Such activities have not always been, and are not necessarily, carried on by such organisations or by public authorities.[362]

The turmoil caused by the comparative criterion has diminished, perhaps because "the Court has developed a more elaborate set of criteria to assist in the assessment" of the applicability of EU competition rules to public and private measures affecting activities in the public sector.[363] In particular, in what is often called the "market participation criterion", the Court stated in *Pavlov* that "any activity consisting in offering goods and

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economic operator, services on the market in specialist medical services in dentistry. The Court referred to Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, paras.76 and 77 and thus applied the approach of "participation in the market" formulated in the *Pavlov* ruling, an approach which itself builds on the definition in Case C-41/90 *Höfner* [1991] ECR I-1979.

[360] Case C-41/90 *Höfner* [1991] ECR I-1979, para.22.

[361] Buendia Sierra J. L., 1999, *Exclusive Rights*, p. 48. Indeed the simplicity of the comparative criterion makes it "workable" but it is argued here that, if used alone as determining for the economic character of an activity, perfectly inconsistent with the principle of conferral and with later declarations of the Court on the Member States' discretion to organize their systems. Ibid.

[362] The same test was used in Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para.20: "such activities have not always been, and are not necessarily, carried on by such organizations or by public authorities".

[363] Opinion of AG Jacobs in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK* [2004] ECR I-2493, para.28.

services on a given market is an economic activity".[364] In light of these developments, AG Jacobs underlined that the application of the comparative test in relation to certain fields of activity "is by no means straightforward". The Court itself has never clearly explained what the comparative test exactly means and how it "works" together with other criteria which it has developed to identify the economic character activity – cumulatively or alternatively.

Therefore it is interesting to look at some opinions put forward by Advocate Generals on this issue. In particular, AG Poiares Maduro proposed in *FENIN* a comprehensive analysis of the criteria used by the Court to determine whether an entity supplying services in the public sector constitutes an undertaking, and gave his understanding of the comparative criterion in relation to other criteria elaborated by the CJEU, in particular the condition of market participation, the exclusion from market participation for activity conducted with an exclusively social objective, and the non-economic character of an activity which by its nature, its aim and the rules to which it is subject, is connected with the exercise of state prerogatives.[365]

The views of AG Poiares Maduro and AG Jacobs in this matter deserve attention and will be discussed in the following sections. Nevertheless, the complexity of this case law is overwhelming, and it is argued that the Advocate Generals have made a confusing use of the terms "economic activity", "economic in nature" and "economic in character". As a result, it is easy to confuse

a. An activity which is "economic in nature" or "economic in character" and
b. An "economic activity"

Therefore some terminological solution will be proposed, but the main challenge is to understand the meaning and scope of the comparative criterion (the (a) above), and to translate it in terms clarifying its relationship to the CJEU's definition of an economic activity, which is to "offer services or goods on a market" (the (b) above). This is the subject of the following sections.

4.2.1 The comparative criterion in *Höfner*: meaning, scope and effects

In *Ambulanz Glöckner*, AG Jacobs recalled that "for the purposes of Community competition law the concept of undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way it is financed" and held that "[t]he basic test is whether the entity in question is engaged in an activity which consists in offering goods and services on a given market and which could, at least in principle, be carried out by a private actor in order to make profits".[366] Later in *AOK,*

[364] See Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, para.75.

[365] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, paras.11-22. The Advocate General went also into a short comparative study of the criteria used to interpret the concept of an undertaking in the national law of the Member States (UK, Finland, Sweden, Ireland), and held that these criteria were similar to those developed by the Court, see paras.23-25.

[366] Opinion of AG Jacobs in Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para.67.

AG Jacobs held that "[i]n assessing whether an activity is economic in character, the basic test appears to me to be whether it could, at least in principle, be carried on by a private undertaking in order to make profits." [367]

These quotings say two things. First, they reveal that AG Jacobs is not so sure himself of what constitutes the "basic test": (a) a market participation test in accordance with *Pavlov* combined with the comparative test in accordance with Höfner, or (b) the comparative test alone. Second, and importantly, it seems that finding out "whether an activity could, at least in principle, be carried on by a private undertaking in order to make profits" is AG Jacobs' translation of the comparative criterion in *Höfner*. It is on the basis of AG Jacobs' "translation" of the comparative criterion that AG Poiares Maduro gave the following view on the criterion's aim and meaning in *FENIN*:

> So that the absence of effective competition on a market does not lead to its automatic exclusion from the scope of competition law, the comparative criterion therefore extends the concept of an economic activity to include any activity capable of being carried on by a profit-making organisation.[368]

In their views, the comparative test is thus aimed at preventing that Member States claim that competition concerns are excluded, by pointing at an absence on their territory of an effective competition for the activity which is due to their own measures. AG Poiares Maduro insists that the criterion may not be applied literally, as otherwise it would enable any activity to be included in the scope of competition law, even for instance the defence of a State.[369] So his own view, just quoted, that the criterion "extends the concept of an economic activity to include any activity capable of being carried on by a profit-making organisation" may not either be understood "literally". If the comparative criterion had such a legal effect there would not be much use of a market participation criterion spelled in *Pavlov*. This understanding of the comparative criterion as widening the scope of the Treaty rules on competition seems reasonable, but to understand how the comparative criterion widens this scope it must arguably be translated into the terminology of the *Pavlov* definition, i.e. in terms of "services", and "offer on a market".

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[367] See Opinion of AG Jacobs in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK* [2004] ECR I-2493, para.28. It is clear that "whether an activity could, at least in principle, be carried on by a private undertaking in order to make profits" is the Advocate General's way to formulate the comparative criterion. In the point quoted above, he refers to Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paras.22-23 and to his own Opinion in Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, para.311. Note that these references are clear in the French version of the Opinion, while they have obviously been truncated in the English version available in the Curia-database. This understanding of the comparative criterion as a basic element in assessing the economic character of the activity conducted by a given entity seems shared by Advocate General Tesauro, as clear from the following view in his Opinion in *Poucet and Pistre*: "It is clear from the case law cited above that while the legal status of an organization, the method by which it is financed and whether or not it is profit-making are not in themselves relevant for the purposes of determining whether an organization is an undertaking, the organization in question must in all cases be engaged in an economic activity *which could, at least in principle, be carried on by a private undertaking in order to make a profit*. See Opinion of AG Tesauro in Joined Cases C-159/91, C-160/91 *Poucet and Pistre* [1993] ECR I-637, para.8.

[368] Opinion AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, para.12.

[369] Ibid.

The comparative criterion formulated in *Höfner* and in *Glöckner* invites to assess whether the activity of the entity considered is comparable to

- An activity which de facto has been conducted by private entities
- An activity which could be conducted by private entities

In economic terms, the point with such comparisons is arguably to establish whether there is "market potential". If the criterion is fulfilled, this does not *per se* involve that the activity provided by the entity considered in a given case is economic, and thus that the entity is an undertaking. It involves instead that a market can exist for the activity at issue *at EU level*, which is probably what AG Jacobs means by saying that the activity is "economic in character" and AG Poiares Maduro by saying that the activity is "economic in nature".

Unless these conditions are fulfilled, AG Jacobs and AG Poiares Maduro do not consider meaningful to impose competition concerns on the organization of services within the policy powers of the Member States. In this regard, AG Jacobs held that

> If there were no possibility of a private undertaking carrying on a given activity, there would be no purpose in applying the competition rules to it. If there were no possibility of a private undertaking carrying on a given activity, there would be no purpose in applying the competition rules to it.[370]

In other words, the minimum required by the comparative criterion is that the service *can be* subject to commercial transactions at EU level, even if it is not subject to market activity in a specific Member State, which, as argued in chapter 3, is precisely the meaning of services defined in Article 57 TFEU as services "normally provided for remuneration". The meaning of the comparative criterion seems therefore to be the following:

> Once the activity conducted by the entity examined fulfils the comparative criterion, it constitutes a service in the meaning of Article 57 TFEU, and there is a market for it at EU level.

Let us now look at the scope of the comparative criterion. As it has only been explicitly formulated in *Höfner* and in *Glöckner*, the question arises whether the criterion was only relevant in those cases, or whether it was implicitly relevant and applied by the Court in other cases where the Court had to determine the applicability of the Treaty rules on competition to services in the public sector. AG Poiares Maduro's view was that the criterion is always relevant as

> While the Court does not undertake that comparison as a matter of course, it refers in nearly all its judgments relating to the concept of an undertaking to *Höfner and Elser*, which remains the starting point for its analysis. However, that comparative criterion would, literally applied, enable any activity to be included

[370] Opinion AG Jacobs in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK* [2004] ECR I-2493, para.27. See, to the same purpose, Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, para.27, footnote omitted.

> within the scope of competition law. Almost all activities are capable of being carried on by private operators.[371]

AG Poiares Maduro appears to mean that, as the comparative criterion does not apply "literally" – as it does not alone determine that a given entity's activity is economic – it is not a problem that the Court systematically refers to the concept of an undertaking in *Höfner*.

The idea that the comparative criterion is always an implicit part of the assessment in cases where the point of departure is the *Höfner* definition, is illustrated by the CJEU's approach in *AOK*. The Court had to examine whether a national scheme complied with Article 101 TFEU when it provided for the leading associations of sickness funds in Germany to collectively determine the maximum amounts paid by the funds for medicinal products, and when patients had then to pay the difference between the price of any prescribed product and the amount paid by the funds. The Court had first to assess whether the sickness funds constituted undertakings, and in so doing it did not mention the comparative criterion. Nevertheless, having recalled its case law related to statutory social security systems, the Court assessed whether solidarity elements in the German regulatory scheme could exclude that the sickness funds conducted an economic activity. The Court's implicit presumption was that unless these solidarity elements were found, the sickness funds' activity would have been economic. This presumption was necessarily based on an implicit assessment that at least the comparative criterion was fulfilled (the activity has not always, and is not necessarily, conducted by public authorities and thus could be carried on profit organisations).

Regarding lastly the legal effects of applying the comparative criterion, AG Jacobs and AG Poiares Maduro insist that extending the scope of the Treaty rules on competition through the comparative test is legitimate in order to "avoid a situation where public bodies may act in competition with undertakings while at the same time claiming immunity from competition law".[372] The bottom-line of AG Poiares Maduro's reasoning is that the state acts primarily in its main roles which is to put in place systems of redistribution but may also act as an operator on a market.[373] As it may act in both manners, AG Poiares Maduro held that the state must be "consistent" in its regulatory and administrative measures related to activities which fulfil the comparative criterion,

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[371] See Opinion of Advocate General Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, para.12. The Advocate General suggests that the Court responded to the critics of some academics, notably L. Idot and J.Y. Chérot in their respective contributions to *L'ordre concurrentiel: mélanges en l'honneur d'A. Pirovano,* 2003, pages 528 respectively 569. Buendia Sierra found this criterion interesting as it would allow to distinguish State services of a diffuse nature from "specific" State services where the benefit for each individual is easily quantifiable (and therefore marketable), see Exclusive rights, p. 48.

[372] Ibid, para.28.

[373] As already mentioned, this was established by the CJEU in *Commission v Italy*. AG Poiares Maduro holds that "the State does not primarily act as an operator on the market, since one of its main roles is to put in place systems for redistribution. In that context, since action by the State is governed only by an objective of solidarity, it bears no relation to the market." See Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, para.27.

and therefore has two alternatives in order to achieve solidarity objectives related to its fundamental missions:

a. The state may withdraw certain activities fulfilling the comparative criterion from market forces on its territory, but the application of competition law is excluded only "if the exercise of the activity [within its national regulatory frame] does not involve the pursuit of an objective of capitalisation in any way, with the result that there can be no market".
b. The state may entrust bodies with the responsibility of achieving political objectives of solidarity, but if those must be regarded as undertakings, their measures and the public measures related to these bodies must comply with competition law, if necessary on the basis of Article 106(2) TFEU justifying exceptions for undertakings entrusted with services of general economic interest.[374]

In sum, it is submitted that the comparative test should not be understood as meaning that the activity considered in a specific case *is* economic, but instead that the activity *can be* economic for the purpose of EU competition law. If this basic test - the comparative test – is fulfilled, *there is a market for this activity at EU level* and *a potential market in the Member State*, and EU competition law is relevant for national rules affecting competition on *that* market. In AG Poiares Maduro's view, Member States have a "duty of consistency" in regulating and organizing the activity on their territory and they may in particular not "shelter behind the pretext of solidarity in order to avoid economic operators being subject to competition law".[375]

The principle of solidarity can be invoked by Member States to exclude operators from market participation, but not under a national definition, as its terms and limits are instead under the control of EU competition law (because the activity *can be* economic, because there is an EU market). Regarding public services, it is thus submitted that if a service activity fulfils the comparative test, it *can be* provided for-profit by private entities and it is *normally* (*at EU level*) provided for remuneration. EU competition law has "the upper hand", and the existence of a market for the service provided under the rules of a Member State is not determined by this Member State, but on the basis of autonomous EU criteria, developed by the CJEU in its competition case law and examined in section 4.3.1.[376]

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[374] Ibid.

[375] Ibid.

[376] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, para.12: "Where there is no competitive market on which a number of undertakings act in competition, the /.../application of the comparative criterion become more difficult. So that the absence of effective competition on a market does not lead to its automatic exclusion from the scope of competition law, the comparative criterion therefore extends the concept of an economic activity to include any activity capable of being carried on by a profit-making organization." Thus (a) the meaning of the comparative criterion is to allow applying the competition rules in the absence of effective competition and (b) the comparative criterion is difficult to apply in the absence of effective competition. Is this not a good example of circular reasoning?

4.2.2 Activities related to the exercise of public authority *cannot* be economic

Based on *Commission v Italy*, the CJEU has in a line of cases excluded activities from the scope EU competition law because they were related to the exercise of official powers typical of a public authority.[377] Thus, in *Eurocontrol*, the Court examined the activities of the European Organisation for the Safety of Air Navigation (Eurocontrol), an international organization established in the frame of a convention between European states.[378] Eurocontrol was entrusted with (1) establishing and collecting route charges levied on users of air space and (2) providing air navigation control for the Benelux countries and the northern part of Germany.[379] The airline company SAT refused to pay the charges imposed, claiming that Eurocontrol's use of different charge levels for the same service (of an amount varying in particular from State to State and from year to year) constituted an abuse of dominant position. The Court found that Eurocontrol's activity was not "of economic nature" justifying the application of the Treaty rules on competition as "[t]aken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority".[380]

The Court's arguments may be summarized as follows:

a. Eurocontrol carried out, in the general interest of its member states, air navigation control (in a limited geographic area) and the collection of route charges for the compulsory and exclusive use of the states' air navigation control services (for all the states members)
b. To carry out these tasks, Eurocontrol was vested with powers of coercion derogating from ordinary law. Eurocontrol's task to collect route charges could not be dissociated from the states' air navigation control mission.
c. Eurocontrol had no influence on the calculation of charges and had to provide air space control for the benefit of any aircraft travelling through its zone, even when the owner of the aircraft did not pay the route charges.

Buendia Sierra has criticized the Court's reasoning in *Eurocontrol* as "a confused state of affairs". The Court had namely first referred to *Höfner* and underlined the irrelevance of an entity's legal status (private or public) in assessing whether it constitutes an undertaking. Therefore he found surprising that the Court gave decisive relevance to the fact that Eurocontrol exercised powers which are typically those of a public authority.[381] If understood rightly, Buendia Sierra's view was that the exercise of powers typical of a public authority is not a functional criterion but instead a formal one (in other words a

[377] It is reminded here that in *Commission v Italy* distinguished between the state carrying on economic activities of an industrial or commercial nature by offering goods and services on the market and the State acting by exercising public powers, Case 118/85 *Commission v Italy* [1987] ECR 2599, para.7.

[378] Eurocontrol had 15 member states when the dispute arose, they are today 39.

[379] Case C-364/92 *Eurocontrol* [1994] ECR I-43, paras.23-24.

[380] Ibid, para.30.

[381] Buendia Sierra J. L., 1999, p. 51.

question of legal status). However it is argued here that the notion of "powers of public/official authority" is not a legal status but a *functional* instrument which happens to be an essential prerogative of the state. Envisaged in this manner, the Court's reasoning does thus not seem inconsistent.

Strikingly, the Court evoked in *Eurocontrol* the definition of an undertaking in *Höfner* but did not apply the comparative criterion. Buendia Sierra holds that it would probably have been possible to conclude that Eurocontrol's activity was non-economic simply by applying the comparative test (which he calls the criterion of "diffuse/specific activities" in *Höfner*). However, nothing seemed to exclude "in theory" that some of Eurocontrol's activities, for instance administrative parts, could be externalized. Actually, since the Court delivered its decision in *Eurocontrol*, there has been a fierce debate on this issue, evoked by researchers who also have participated in the policy debate.[382] Thus, while air navigation safety providers are still to a large majority public bodies, McDougall and Roberts observe, and promote, a trend towards more autonomy for providers and causing a reorientation from treating government as the primary "client" of air navigation control, a trend remarkably resisted in the US. The question seems not so much to be whether the activity can be incorporated (some states have done it) but instead whether it can be commercialized without diminishing safety (the activity's *raison d'être*).[383]

It is thus arguable that if the Court had explicitly applied the comparative test, it ran the risk of finding that Eurocontrol's activity *can be* economic but only in theory, as in practice no competition and no market existed at European level. The following statement of AG Tesauro in *Eurocontrol* reflects this difficulty to reconcile the radical stance in *Höfner* and the idea (probably shared by many air navigation safety experts) that certain types of activity simply cannot achieve general interests and be conducted in competition:

> This leads me to the conclusion that air control constitutes a natural monopoly in the air space where it is carried out, and in that respect, competition between two bodies not only is not desirable but would not even be possible in practice. In the final analysis it is a public service to which any idea of commercial exploitation with a view to profit is alien: which may not be incompatible, where

[382] See McDougall G. and Roberts A. S. 2009. In his address at the Opening Session of the Conference on the Economics of Airports and Air Navigation Services, the President of the International Civil Aviation Organization (ICAO), Mr. Roberto Kobeh González, declared: "Commercialization and privatization of airports and air navigation services are part of the on-going globalization process and the liberalization of the world's economies. Whether privatized or not, however, a significant number of service providers worldwide still do not fully recover their costs, according to studies undertaken by ICAO." See ICAO report of the Conference on the Economics of Airports and Air Navigation Services, Montréal 15-20 September 2008, Doc 9908 CEANS 2008 http://www.icao.int/Meetings/ceans/Documents/Doc9908_en.pdf, accessed 30 October 2013.

[383] McDougal and Roberts underline that the monopoly character of air navigation safety makes it very difficult to elaborate user charge systems which do not encourage users to engage in practices that diminish safety for the purpose of avoiding a charge. This explains that so far "[n]o country has chosen to make its [air navigation safety provider] a for-profit, private corporation". McDougall G. and Roberts A. S., 2009, p. 5 and 22.

> appropriate and given equal efficiency, with economic management of the activity in question.[384]

Contrary to AG Tesauro's approach, the Court did not evoke the natural monopoly features of the activity and its capability or not to be organized in competition and *did not apply the comparative criterion at all.* Acknowledging the limits of EU market law, the Court avoided the comparative criterion, and chose an approach excluding the application of EU competition law to activities connected with the exercise of public authority, thereby obviously establishing convergence with Articles 51 and 62 TFEU if the field of free movement, evoked above in section 3.1.5. In the field of free movement, this notion of "activity connected with exercise of public/official authority" is notoriously difficult to define and circumscribe. To use it as a ground of exemption from the Treaty rules on competition, the Court had to substantiate what makes an activity so "connected to the exercise of official authority" that Member States must have an exclusive competence to decide how they wish to organize and finance it. The Court's analysis is that the characteristics of an activity connected to the exercise of public/official authority lie in its aim, its nature and the rules it is subject to.

In *Eurocontrol* it was clear that the states members of Eurocontrol are imposed missions in the general interest through international conventions. States are namely responsible for aviation safety and security in their airspace according to the *Convention on International Civil Aviation*.[385] The *aim* of the activity entrusted to Eurocontrol is thus a mission of air navigation control in the general interest (point (a) above). Given the character of this aim the Court found legitimate that the states agreed to vest Eurocontrol "with rights and powers of coercion which derogate from ordinary law and which affect users of air space". Eurocontrol's task of route charge collection was inseparable from air navigation control and thus also connected to the exercise of official authority. The *nature* of Eurocontrol's activities implied a considerable amount of rules securing the coordination of states' air navigation providers and of coercive rules on users for the safety missions to be achieved (point (b) above).

Buendia Sierra held that the fact that the users paid a fee made it difficult to define the service as non-economic.[386] In fact, the Court in *Eurocontrol* never designated the route charges as "fees", which is arguably an open-ended term. Instead the Court highlighted facts related to the financial construction of the activity, in particular that

- The responsibility to cover the costs for air navigation safety infrastructure was borne by the states members of Eurocontrol.
- Navigation control was provided regardless of route charge payment (non-excludability characterizing what is known as "public goods").[387]

[384] Opinion of AG Tesauro in Case C-364/92 *Eurocontrol* [1994] ECR I-43, para.13.

[385] See Article 28 of the Chicago Convention on International Civil Aviation.

[386] Buendia Sierra J. L., 1999, p. 51.

[387] Case C-364/92 *Eurocontrol* [1994] ECR I-43, paras.25-29.

- Route charges collected by Eurocontrol covered only a part of the costs for navigation control, and were subject to standardized calculation models agreed by the states members of Eurocontrol, in accordance with guidelines laid down by the International Civil Aviation Organization.[388]
- The charges collected on behalf of the states which are members of Eurocontrol were paid over to them, after deduction of a proportion of the revenue corresponding to an 'administrative rate' intended to cover the costs for the "pooled" charge collection. Those charges seemed to totally cover administrative costs, but not the total costs incurred for the provision of air navigation safety.[389]

The Court regarded therefore route charges as "merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services" and recalled its previous finding in *LTU* that "Eurocontrol must, in collecting the charges, be regarded as a public authority acting in the exercise of its powers".[390] Hence it is most probable that the route charges were not seen as fees but as quasi-fiscal charges (point (c) above).

Given the wording of the Court's conclusion, it is submitted that "powers which are typical of the exercise of official authority" should not be regarded as a criterion to be weighed together with the activity's "aim, nature and the rules it is subject to", but instead as a characteristic of the activity which must be "measured" by looking at its aim, nature and the rules it is subject to. Hence, the formula established in *Eurocontrol* may be expressed as follows

> Activity's aim + nature + regulation => powers of coercion (control and supervision) which are typical prerogatives of public authorities

Where this situation is at hand, the CJEU holds that the normative stance in Articles 51 and 62 TFEU must be upheld even in the field of competition, in other words EU market law should not affect the activity.[391] The reason is not that one Member State has decided to withdraw the activity from the market, but that so many of them have done it together, any market for an activity connected to powers derogating from ordinary law for achieving missions of general interest. The activity *cannot* be economic for the purpose of EU competition law, because the States in charge of the safety of their peoples have so far a consensual view that there *should not* be a market for this activity.[392]

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[388] The International Civil Aviation Organization is a United Nations specialized agency.

[389] Case C-364/92 *Eurocontrol*, para.23.

[390] Ibid, para.28, referring to Case 29/76 *LTU* [1976] ECR 1541, para.4-5.

[391] In the words of AG Cosmas "the Court has looked at a number, or bundle, of indicators that on their own are not sufficient to rule out that an activity is of an economic nature and establish that it falls outside the scope of competition law." Opinion of AG Cosmas in Case C-343/95 *Diego Cali* [1997] ECR I-01547, para.42.

[392] By the way, would we like to fly otherwise?

In *Diego Cali*, the Court of Justice took a similar approach. A transport undertaking contested an invoice from the company (SEPG) entrusted by the Port of Genoa with pollution control and prevention tasks under an exclusive concession. It was claimed that the amount charged constituted an abuse of dominant position as it did not correspond to any intervention caused by loading or unloading operations. In fact the amount charged was intended to finance the port's pollution prevention surveillance activity. The Court reminded once more that a distinction must be made between the State exercising official authority and the State offering goods or services on the market.[393] In that regard, it underlined that the relevant element is not that the State is acting directly through a body forming part of the State administration or by way of a body on which it has conferred special or exclusive rights.[394] The relevant element is instead the character of the tasks entrusted.[395] By analogy with *Eurocontrol*, the Court emphasized that the anti-pollution surveillance was a task in the public interest forming part of the essential functions of the State as regards protection of the environment in maritime areas, that levying a charge for this surveillance was inseparable from the surveillance activity and that the tariffs applied had been approved by the public authorities.[396] Based on these elements, and although it was financed by charges from port users, anti-pollution surveillance activities were considered a non-economic activity in the public interest, as it was *connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority*.

It is revealing to compare the Court's summarily reasoning with the Opinion of AG Cosmas in the case. Referring to *Höfner*, AG Cosmas underlined that "the Court of Justice always gives the concept of undertaking a broad interpretation" and that it was therefore "*absolutely indispensable* to establish whether the activity of a body or an administrative authority constitutes the exercise of official authority or the pursuit of an economic activity of an industrial or commercial nature which is "capable of being carried on, at least in principle, by a private undertaking with a view to profit (emphasis added)".[397] This shows that AG Cosmas saw the comparative as an inherent part of the *Höfner* definition of an undertaking, but also considered this broad definition as leading to an *absolute need* to distinguish between

a. Activity "capable of being carried on, at least in principle, by a private undertaking with a view to profit"
b. Activity constituting the exercise of public authority

This reflects a view that the Member States cannot be accountable under EU market law when they make a legitimate use of their right to exercise public authority. AG Cosmas considered necessary to explain why the exercise of public authority was a legitimate option in *Diego Cali*, and gave his view that the activity of SEPG "cannot conceivably be

[393] Case C-343/95 *Diego Cali* [1997] ECR I-01547, para.16

[394] Ibid, para.17.

[395] Ibid, paras.16-18.

[396] Ibid, paras.22, 24

[397] Opinion of AG Cosmas in Case C-343/95 *Diego Cali* [1997] ECR I-01547, para.32.

carried out within a competitive system, since that would jeopardize, if not destroy, the effectiveness of the system of safeguards as regards both the port environment and the safety of port users and inhabitants of the surrounding areas." The AG underlined also that surveillance has to be exercised regardless of whether the fees owed by any particular vessel had been paid, and thus constituted "public goods".[398] By contrast with this economic reasoning, the Court delivered a very summary reasoning, which Buendia Sierra found "deplorable".[399] It is possible that the Court made a point of not conducting any economic reasoning. Indeed, the Court does not apply the comparative test when it applies the exemption for activities connected to the exercise of public authority, because its view is precisely that the Member States must be free to assess themselves, and not the Court, when needs of general interest necessitate the exercise of their public authority using powers derogating from ordinary law.

Regarding the notion of "official/public authority", AG Cosmas establishes a direct connection between its use in EU competition law and the meaning of this notion in the field of free movement law.[400] The equivalence of the term in both fields seems probable. In particular, the Court has found that exemption from EU competition rules must be made restrictively for activities connected with the *exercise of powers relating to activities which are typically those of a public authority*. As already mentioned, it is settled case

[398] Ibid, para.49. See Odudu's comments and explanation of the characteristics of this concept in Odudu O., *Economic Activity as a Limit to Community Law*, p.233. Interestingly, and although this was not at issue in the case, Odudu holds that activity of pollution control entrusted to a private entity through an exclusive concession, would have been regarded as economic under the Treaty rules on free movement, since in his view there was remuneration. Seen through the analytical framework proposed in this study, this would mean that an activity can, as typical of a public authority, be non commercial but at the same time, as entrusted to private entities through contractual agreements, possibly economic… It is worth naming here two state aid decisions of the Commission on subsidy schemes for acquisition of land for nature conservation (N 308/2010 and N376/2010). The schemes allowed persons to acquire land with important natural features if they could carry out sustainable nature management in accordance with nature management plans set by public authorities, and under the prohibition to sell the land except with the consent of these authorities. While the Dutch authorities contested the nature of the activities concerned as economic, the Commission held that Dutch nature managers eligible were undertakings in the meaning of state aid rules, see Commision Decision of 13 July 2011 on a subsidy scheme for the acquisition of land for nature conservation (Netherlands) in case SA.31243 (ex N308/2010) – C(2011)4945 final, point 17, referring to Commission Decision of 20 April 2011 on subsidies for nature management (Netherands) in case SA.31494 (ex N376/2010) – C(2011)2631 final. In the latter decision, the Commission pointed at the possibility for nature managers to conduct some economic activities on the land acquired (tourism, crops, etc.) but could not exclude that some of the conservation tasks would be purely non-economic in nature (point 27). The Commission noted that, regardless of the environmental objectives pursued, the nature managers, including conservation organisations, had an interest in generating sufficient revenue to cover the costs related to land ownership and/or those related to project implementation. Therefore, the environmental objective would always coexist with the economic objective (point 29) and nature managers relevant for the scheme were undertakings (point 31).

[399] Buendia Sierra J. L., 1999, p. 51-52.

[400] Regarding the notion of "official/public authority" AG Cosmas holds that "although the Court of Justice has not defined the concept of official authority, the interpretation provided by Advocate General Mayras in Case 2/74 *Keyners* v *Belgian State* [1974] ECR 631, 665, remains the *locus classicus* and is worded as follows: Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens. Connexion with the exercise of this authority can therefore arise only from the State itself, either directly or by delegation to certain persons who may even be unconnected with the public administration.' Opinon of AG Cosmas in Case C-343/95 *Diego Cali* [1997] ECR I-01547, footnote 24.

law that the concept of activities connected with the exercise of public authority under Article 51 TFEU must also be interpreted very restrictively, excluding functions that are merely auxiliary and preparatory vis-à-vis an entity which effectively exercises official authority by taking the final decision.[401]

In *Aéroports de Paris* the Court of Justice agreed with the GC that the company ADP conducted both supervision activities connected with powers which are typically those of a public authority not covered by EU competition rules, and activities consisting in the airport's commercial management remunerated by fees.[402] As it was possible for the body in charge of both administrative supervision and commercial management to separate the two activities, the provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by ADP, constituted an economic activity. More recently, the Court of Justice found in *Compass-Datenbank* that a Member State's data collection activity in order to establish a business register, on the basis of a statutory obligation on undertakings to disclose the data and of the State's coercive powers related to this obligation, falls within the exercise of public powers. As a result, neither that activity, nor the inseparable activity of maintaining a database and making it available to the public, may be regarded as economic activities.[403] This conclusion was not affected by the fact that the State charged fees to interested persons for accessing the data stored, as these payments were provided for by law and were regarded as inseparable from making data available. It was not either affected by the fact that billing agencies, entrusted through procurement with the task of connecting final customers and the business register, could charge customers fees as consideration for *their* service, in addition to what was charged by the State.[404]

In sum, the CJEU's case law exempting from the Treaty rules on competition activities connected to powers derogating from ordinary law and thus typical of public authority takes its point of departure in the interpretation of an undertaking in *Höfner*. However, it seems that the Court has seen a need to limit the reach of EU competition law and acknowledges that certain activities, essentially based on public/official authority, and regardless of whether the entity conducting it is private or public, should *not be tested under the comparative test* in *Höfner*. Such activities are regarded as non-commercial (not capable of being subject to economic activity), not as a result of the comparative test but instead based on the Member States' own assessment that the activity's aim and nature necessitate that the entity entrusted with its conduct relies on powers derogating from ordinary law and typical of the prerogatives of the State. Under such conditions, the Member State's choice of organization for the activity is affected by missions of general interest which it is accountable for at national and/or international level, but is not affected by EU market law.

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[401] See Case C-404/05 *Commission v. Germany* [2007] ECR I-10239, para.38; Case C-393/05 *Commission v. Austria* [2007] ECR I-10195, para.36.

[402] Case C-82/01 P *Aéroports de Paris* [2002] ECR I-09297, paras.76-78.

[403] Case C-138/11 *Compass* (CJEU 12 July 2012), paras.40-41.

[404] Ibid, paras.42-44.

Such activities may perhaps constitute non-economic services of general interest (NESGI), a notion which is examined section 7.1.3.2.2. Thus, it seems quite coherent with Article 2 in the SGI Protocol that the Court in *Eurocontrol* found that the Treaty provisions on competition do not affect the competence of the Member States to provide and organize air safety through the Eurocontrol organization. Given the evident analogy, if not identity, with the notion of "activity connected with the exercise of official authority in Articles 51 and 62 TFEU, it seems that the CJEU, through the *Eurocontrol* line of case law, has increased the coherence of EU market law. Another thing is that it is still uncertain how exactly the exercise of powers typical of public authority can be identified on the basis of an activity's aims, nature and rules it is subject to.

4.3 Criteria defining an *economic* activity for the purpose of competition law: the *Pavlov* definition

The comparative test is only a basic test. Even if the activity *can be economic* because it is related to the provision of goods or services in the meaning of the Treaties, it *is* economic in the meaning of competition law only inasmuch as it fulfils the criterion of market participation in *Pavlov*. The definition of an economic activity for the purpose of EU competition rules was first formulated in *Commission v Italy*, where the Court of Justice held that an entity exercises an economic activity "inasmuch as it offers goods and services on the market".[405] In *Pavlov* the Court of Justice established firmly that "any activity consisting in offering goods and services on a given market is an economic activity".[406] Rather than an approach, it is clear that "offering goods or services on a given market" may be regarded as *the pivotal definition of an "economic activity"* for the purpose of EU competition rules, and is therefore hereinafter called the *Pavlov* definition. This definition is now routinely used by the Court, together with a reference to *Höfner*, as a point of departure in determining whether an entity constitutes an undertaking and is thus settled law.[407]

4.3.1 The relationship between "service" in the *Pavlov* definition and Article 57 TFEU

In *Commission v Poland*, AG Jääskinen used the expression "services for the purposes of competition law", which raises the question of whether the notion of service has a

[405] See Case 118/85 *Commission v Italy* [1987] ECR 2599 para.3 and repeated by the Court of Justice in several cases, for instance Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, para.36, Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, para.75, Case C-309/99 *Wouters* [2002] ECR I-1577, para.47, Case T-23/09 *CNOP* [2010] ECR II-5291, para.70.

[406] See Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, para.75.

[407] See Case C-309/99 *Wouters* [2002] ECR I-1577, para.47; Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para.19; Case C-49/07 *MOTOE* [2008] ECR I-4863, para.22; Case T-23/09 *CNOP* [2010] ECR II-5291, para.70.

different meaning in EU free movement law (Article 57 TFEU) and in EU competition law.[408] As the Polish rules on pension funds restricted the possibility for these funds to invest in non-Polish funds/shares and thus restricted the free movement of capital, the Polish State invoked SGEI tasks entrusted to the Polish pension funds as a justification. To assess whether Article 106(2) TFEU could apply the AG examined whether he companies managing the funds constituted undertakings. In his view, this was the case if they *operated on the market.*[409] In that regard, he emphasized that each management company, although operating for-profit pursuant to Polish law, was allowed to administrate only *one* fund and had no open circle of customers, and therefore considered that "this would appear to rule out the possibility of regarding their activities as services for the purposes of competition law".[410] Thus, by "services in the meaning of competition law", it seems that AG Jääskinen simply means that the services are offered on a market, not that the term "service" in the *Pavlov* definition has another meaning than in Article 57 TFEU.

In the *Pavlov* definition, the "service" criterion is fulfilled as soon as the comparative test is fulfilled, as soon as the service is *normally* provided for remuneration and *can* be provided for-profit by private entities (in other words there is a market for this activity, even potentially in the Member State where the entity examined is established). The *Pavlov* definition of an economic activity requires however more than the existence of goods or services. It requires also that goods or services are *actually* provided under market conditions, a requirement contained in the words "offered on a market". It has been concluded in section 3.3 above that an economic service in the meaning of free movement law is a service actually provided for remuneration. The question is therefore whether the remuneration criterion, which is decisive for a service provision to be economic in the meaning of EU free movement law, is also decisive for an economic activity, and thus an undertaking, to exist in the meaning of EU competition law.

Odudu claims that an activity may be economic in the meaning of competition law even in the absence of remuneration[411], with reference to the following view of the General Court in *SELEX*

> Admittedly, when assessing whether a given activity is an economic activity, the absence of remuneration is only one indication among several others and cannot by itself exclude the possibility that the activity in question is *economic in nature*.[412]

It is however submitted that the GC did not mean that remuneration was irrelevant to determine whether the *Pavlov* definition is fulfilled and whether the service is "offered on the market"; rather, it is arguable that by "economic in nature", the GC meant simply

[408] See Opinion of AG Jääskinen in Case C-271/09 *Poland v. Commission* [2011] ECR I-13613, para.71.

[409] Ibid, para.70.

[410] Ibid, para.71.

[411] Odudu O., 2009, p. 231.

[412] Case T-155/04 *SELEX* [2006] ECR II-4797, para.77, emphasis added.

that remuneration is not relevant when examining whether a service activity fulfils the comparative criterion, whether it *can be* economic, possible to be provided by private entities for-profit. As already observed in section 4.2.1, the expressions "economic in nature" and "economic in character" have also been used AG Poiares Maduro and AG Jacobs, to qualify an activity fulfilling the comparative criterion. Again, the activity is not economic simply because it is "economic in nature", it must also fulfil the *Pavlov* definition.

Accordingly, the view that remuneration is not a decisive factor in establishing that an entity conducts an economic activity and therefore is an undertaking cannot be seen as supported by the view in *SELEX*. In the context of competition cases, the relevance of remuneration as a criterion determining whether a service is "offered on a market" – in other words "under market conditions" – is not systematically addressed by the CJEU in explicit and clear terms. This issue and more generally the criteria determining that a service is offered on a market are studied in the next section.

4.3.2 The service must be "offered on a market "

In this section the two elements of the *Pavlov* definition of an economic activity are analysed, first the offer criterion, second the market criterion.

4.3.2.1 Offer criterion

The definition of an undertaking in *Pavlov* makes very clear that the economic activity addressed by the Treaty rules on competition consists in offering and not purchasing goods or services, and it is seems now settled law that the concept of economic activity in competition law is connected with the offer and not the acquisition of such goods and services. The General Court was first to spell out in *FENIN* that "it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity".[413] It is worth quoting the clear statement of the GC that

> an organisation which purchases goods – even in great quantity – not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law

[413] Case T-319/99 *FENIN v Commission* [2003] ECR II-00357, para.36.

> and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC.[414]

In the *FENIN* appeal case, the Court of Justice confirmed the GC's view concerning activities consisting in *purchasing* goods or services on a market, and established that their character as economic or not must be determined according to whether or not the subsequent use to which they are put amounts to an economic activity. The Court emphasized that there is no need to dissociate the purchasing activity from the subsequent use to which the purchased products are put in order to determine the nature of that purchasing activity.[415]

Although noting that the *FENIN* cases are still leading authorities, Heide-Jørgensen criticizes these cases, which in her view introduce a partition of one and the same activity into separate parts, the purchasing activity and its subsequent use. She believes that the approach of the CJEU is problematic because it limits the possibility to subject the economic power of buyers to the limitations of EU competition law.[416] In contrast with this view, it is argued here that in *FENIN* the Court of Justice in fact *connected* (rather than dissociated) the purchasing activity of an entity providing social services to the provision activity of this activity. The Court did not deny that purchases could be part of a market activity subject to competition law, but affirmed that it could only be so if the activity which the purchases were *part of an offer* of services or goods on a market. The *FENIN* cases are not anymore the latest in this area, as they have been confirmed in the *SELEX* cases. In the *SELEX* appeal case, the Court of Justice took namely the view that the GC was right in referring to *FENIN* and in stating that it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put and that the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.[417]

As a result, in the field of EU competition law as in the field of free movement law, the concept of "economic activity" designates the supply side, the activity of *provision*.

4.3.2.2 The tenuous "on a market" criterion

This section examines, with a particular focus on the case law related to social services, the case law telling us what the CJEU means by "on a/the market" in the *Pavlov*

[414] Ibid, para.37.

[415] Case C-205/03 P *FENIN* [2006] ECR I-6295, para.26.

[416] See Heide-Jørgensen C., 2013, p. 273-276.

[417] Case C-113/07 P *SELEX* [2009] ECR I-2207, para.102. The Court of Justice also confirmed General Court's conclusion that the fact that technical standardisation is not an economic activity means that the acquisition of prototypes in connection with that standardisation is not an economic activity either.

definition, arguably corresponding to AG Poiares Maduro's expression "under market conditions".[418]

As well known, an entity which does not provide services for-profit may constitute an undertaking for the purpose of the Treaty rules on competition.[419] In *FFSA* the Court of Justice stated for instance that "the mere fact that the [organisation managing an old-age insurance scheme] is a non-profit-making body does not deprive the activity which it carries on of its economic character, since /…/ that activity may give rise to conduct which the competition rules are intended to penalize."[420] However, while the fact that in a specific case an activity is conducted not-for-profit does not exclude that it is economic (conducted on a market), it may be *relevant* to determine whether this activity is economic or not, in combination with other criteria such as the fact that the activity is under strong State supervision and dominated by the principle of solidarity, as will be seen in the next section.

Looking for the criteria determining that there is an "offer on a market" in accordance with the *Pavlov* definition, it seems appropriate to begin with "the easy cases", in which the CJEU had to establish whether self-employed persons constituted undertakings. In *Commission v Italy*, the Court of Justice found that Italian customs agents constituted undertakings, as "they *offer, for payment, services* consisting in the carrying out of customs formalities, relating in particular to the importation, exportation and transit of goods, as well as other complementary services such as services in monetary, commercial and fiscal areas".[421] In *Pavlov*, the Court had to establish whether the exclusive rights – granted to a body representing the medical specialists' profession – to supply insurance services, could constitute a breach of Article 102 TFEU in combination with Article 106(1) TFEU and thus had to establish whether this body constituted an association of undertakings in the meaning of Article 102. The Court found that medical specialists who were members of the body at issue provided, in their capacity as self-employed economic operators, services on a market, namely the market in specialist medical services. They were *paid by their patients* for the services they provided and assumed the financial risks attached to the pursuit of their activity.[422]

In *Wouters* the Court found that the members of the Bar in the Netherlands conducted an economic activity and therefore constituted undertakings as they offered, *for a fee*, services in the form of legal assistance in legal proceedings and carried the financial risks

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[418] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, para.13: "It is not the mere fact that the activity may, in theory, be carried on by private operators which is decisive, but the fact that the activity is carried on *under market conditions* (emphasis added)".

[419] This was expressed by the Court first in the Joined Cases 209/78, 215/78 and 218/79 *Van Landewyck* [1980] ECR 3125, para.88.

[420] Case C-244/94 *FFSA* [1995] ECR I-4013, para.21.

[421] Case C-35/96 *Commission* v *Italy* [1998] ECR 1-3851, para.37, emphasis added.

[422] Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-5481, para.76. According to the Court, the complexity and technical nature of the services they provided and the fact that the practice of their profession was regulated could not alter that conclusion, see para. 77.

attaching to the performance of those activities.[423] The same criteria led the GC to find in *Conseil national de l'Ordre des pharmaciens* that pharmacists, at least self-employed pharmacists, carried on an economic activity and were thus undertakings.[424] In such cases, where private providers are clearly in competition, it seems clear that consideration for the service and market autonomy –characterized in certain cases by the assuming of financial risks related to the pursuit of the activity – are two decisive factors determining whether self-employed persons constitute undertakings.

Likewise, the decisive character of these two criteria to determine whether an activity *is* economic for the purpose of EU competition law – (1) consideration for the service provided and (2) market autonomy – emerges also clearly from the appeal judgment *Aéroports de Paris*. The Court of Justice separated the airport management company's supervisory activity from its activity as provider of airport facilities to airlines and other service providers, and found the latter activity economic, because the facilities were provided for a fee at a rate which the airport management company fixed freely.[425] In other words, this company provided services for remuneration. This case, together with the Court's decisions on self-employed persons, indicate that there may be equivalence between "provision of services for remuneration" (the definition of an economic service activity for the purpose of the Treaty rules on free movement rules identified in chapter 3) and "offer services on a/the market" (the *Pavlov* definition of economic activity for the purpose of the Treaty rules on competition).

In "difficult cases" characterized by the absence of effective competition for the services or goods as provided by entities in a given Member State, the question is whether EU competition rules can apply to the national rules or public measures such as exclusive rights and compulsory affiliation (in the field of social security services), which strongly limit competition.[426] As already seen, the Court's approach, in difficult cases such as *Höfner* and *Glöckner*, has been to apply first the comparative test to determine whether there was a market at EU level. Once the Court had found that there was a *potential* market for the activity of the entity considered, it had to rely, at least implicitly, on some additional criterion to find that the services at issue in those cases, although provided not-for-profit in the frame of exclusive rights, were offered on a market. If there was no such additional criterion, the *Pavlov* definition would have no specific meaning compared to the comparative criterion in *Höfner*. Yet, concerning both *Höfner* and *Glöckner*, it is difficult to be sure of which criteria led the Court to find that the services were provided *on the market*.

The situation in *Höfner* was that private entities offered recruitment services for business executives, in spite of the fact that the German public employment agency had an

[423] Case C-309/99 *Wouters* [2002] ECR I-1577, para.48. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion, para.49.

[424] Case T-23/09 *CNOP* [2010] ECR II-5291, para.71.

[425] Case C-82/01 P *Aéroports de Paris* [2002] ECR I-9297, para.78. In that case the issue was rather that a distinction had to be made between the non-economic and economic activities conducted by the airport management company.

[426] Other so-called "anticompetitive measures" such as prior authorization systems or decisision to provide in-house, can in principle not be challenged on the basis of EU competition rules.

exclusive right to provide employment services. In practice, the public agency's exclusive right was not enforced by the State, and the Court regarded this fact as evidence of that the agency could not satisfy a market demand and that the German state *de facto* tolerated competition for *remunerated* recruitment services.[427] AG Poiares Maduro held that in *Höfner* the economic nature of the national employment agency's activity stemmed implicitly from participation in a market.[428] It seems that the situation at issue in *Höfner* constitutes an example of what the Advocate General called "partial competition". In the Advocate General's view, such partial competition is at hand as soon as a Member State allows private providers to provide the same service as the service provided by an entity which is protected from competition by national measures, and implies that, in spite of these measures, the service provided by that entity is necessarily to be regarded as offered on the market.[429]

It is easy to find cases where the CJEU has considered that partial competition in a Member State for the provision of a service is a decisive factor to determine that this service is an economic activity in that state. As clear from *Cassa di Risparmio di Firenze*, the fact that a non-profit entity offers the same service as for-profit operators in a Member State implies that it is in competition with the latter and conducts an economic activity. In that case, the Court of Justice held that a not-for-profit banking foundation, allowed to offer services in fields such as education, art, culture and health, was to be regarded as an undertaking engaged in an economic activity, *since its offer would be in competition with that of profit-making operators*.[430] In *MOTOE*, the Court of Justice (Grand Chamber) found that the organisation and commercial exploitation of motorcycling events, although conducted by a non- profit making association (ELPA), was an economic activity because (1) it was not *inconceivable* that, in Greece, there also existed entities engaged in the same activity for-profit and thus in competition with ELPA and (2) non-profit-making associations offering goods or services on a given market could find themselves in competition with one another.[431] In *Höfner*, decided several years before *Cassa di Risparmio di Firenze* and *MOTOE*, it is thus quite probable that the Court, although only implicitly, considered the fact that the national employment agency provided, free of charge, the same service provided *for remuneration* by private operators, as decisive to conclude that the employment agency provided its services on a market. Thus, in *Höfner* remuneration was not mentioned as a criterion to find that the entity at issue conducted an economic activity, but it seems that it was indirectly relevant.[432]

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[427] See Case C-41/90 *Höfner* [1991] ECR I-1979, para.25. The background elements of partial competition are exposed under paragraphs 8 to 10. Opinion of AG Jacobs in *Höfner,* para.20: "the service is also provided by private undertakings – both in other Member States and in Germany, in so far as the Bundesanstalt does not seek to enforce its monopoly – and /…/ those private undertakings are normally remunerated for their services."

[428] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, para.13.

[429] Ibid, para.13.

[430] Case C-222/04 *Cassa di Risparmio* [2006] ECR I-289, para.12.

[431] Case C-49/07 *MOTOE* [2008] ECR I-4863, para.28.

[432] The national employment agency's activity was fiannced by contributions from employers and workers, see Case C-41/90 *Höfner* [1991] ECR I-1979, para.6.

The relevance of remuneration was more straightforward in *Glöckner*, were "partial competition" (to use the words of AG Poiares Maduro) was possible in law but did not exist in fact. Non-profit medical aid organizations were entrusted by regional authorities in Germany with the non-profitable emergency transport service; they also had by legislation priority to the profitable provision of patient transport service. The German rules allowed private providers to apply for an authorization to provide ambulance transport services, but this application could be rejected if it was likely that the private provider's activity would have adverse effects on the operation and profitability of the public ambulance service entrusted to non-profit medical aid organisations. As authorizations were generally refused, the non-profit organizations had in practice a monopoly for the provision of ambulance services over a wide region of Germany. In order to assess whether the German rules could be caught by Articles 106(1) TFEU in combination with Articles 101 and 102 TFEU, the Court of Justice had to determine whether the organizations constituted undertakings. Having recalled the definition of an undertaking in *Höfner* and the *Pavlov* definition of an economic activity, the Court stated:

> In the present case, the medical aid organisations provide services, for remuneration from users, on the market for emergency transport services and patient transport services. Such activities have not always been, and are not necessarily, carried on by such organisations or by public authorities. According to the documents before the Court, in the past Ambulanz Glöckner has itself provided both types of service. The provision of such services therefore constitutes an economic activity for the purposes óf the application of the competition rules laid down by the Treaty.[433]

Thus, in a situation where regulation prevented genuine competition, the Court applied first the comparative test. Finding it fulfilled ("emergency transport services and patient transport services /…/ have not always been, and are not necessarily, carried on by such organisations or by public authorities"), introduced a *presumption* that the organizations acted *on a* market in Germany. Second, the Court underlined that the private applicant in the case had itself provided both types of services in the past, which reinforced the presumption of a market in Germany.[434]

Third, the Court saw a need to focus more specifically at the medical aid organizations' own activity and emphasized that they provided their services "for *remuneration* from users". This is interesting because the notion of remuneration is not specifically defined for the purpose of competition law, and thus we are forced to relate to the definition of

[433] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paras.19 and 20.

[434] According to van de Gronden and Sauter, the emergency and ambulance transport services at issue in *Glöckner* were held by the Court of Justice to constitute an economic activity "[b]ecause services *in the market* for emergency transport and (nonemergency) patient transport *are not always* provided by medical aid organisations or by public authorities (the Court (emphasis added)". This formulation deviates from the Court's comparative test: "Such activities *have not always been*, and are not necessarily, carried on by such organisations or by public authorities." This may indicate that in their view the medical aid organizations pursued an economic activity, because the facts highlighted by the Court implied "potential competition". See van de Gronden J. W. and Sauter W., 2010, p. 6.

remuneration made by the Court in *Humbel* as "consideration for the service in question, normally agreed between the provider and the recipient of the service."

From the facts considered in *Glöckner*, it emerges that the infrastructure costs of public ambulance services were financed by the Land or the districts and towns. The remaining costs, mostly operating costs, had to be financed through user fees which had to be calculated so as to cover all the costs of the public ambulance service which were not financed through other sources. It is therefore arguable that fees from users, in combination with public funding, constituted "consideration for the services" provided by medical aid organizations. Moreover, these fees (also referred to as "charges" in the ruling[435]) had to be approved by the competent minister and were identical in all the area of transport, but they had first to be agreed between the medical aid organizations and the associations representing insurance companies paying them.[436] The organizations had thus the possibility to influence the level of compensation of their public service obligations, and a margin of *autonomy* as they could agree to the consideration offered.

These characteristics of the scheme examined in *Glöckner* - consideration for the service and market autonomy – are strikingly similar to the factors found decisive in determining whether self-employed persons constitute undertakings. It is true that the two elements are underlined by AG Jacobs in his Opinion, while the Court only names the "remuneration from users". However, this short mention indicates that the Court considered that given the specificities of the system of charges – (1) consideration for the service provided and (2) market autonomy – the non-profit organizations provided *for remuneration*, *and thus on a market*.

Therefore, it is submitted here that in *Glöckner*, the fact that the activity *could be* economic and the existence of an authorization system open to private for-profit entities were not enough to establish the economic character of the activity as pursued by the medical aid organizations. In the absence of actual competition on the supply side, they were regarded as undertakings, offering services on a market, because the Court found that they provided services *for remuneration* (although not for profit). Compared to *Höfner*, it may be that the Court could not derive the compensatory character of the employment agency's funding from the fact that some (although few) private entities provided the same service *de facto* for remuneration. Indeed, whereas in *Höfner* private for-profit providers were allowed not in law but in practice to provide a service similar to the services provided by the employment agency, in *Glöckner* private operators were allowed in law but not in fact to provide the same service as the non-profit organizations. In the absence of *de facto* competition for the service in the market at issue, it may have been necessary for the Court to objectify remuneration seen in the non-profit provider itself.

In sum, it is submitted that even in the two difficult cases where the CJEU has launched the comparative criterion and thereby gone furthest in widening the applicability of the Treaty rules on competition, the Court has seen remuneration as a condition for the

[435] Case C-475/99 *Glöckner* [2001] ECR I-8089, para.13.

[436] Opinion of AG Jacobs in Case C-475/99 *Glöckner* [2001] ECR I-8089, paras.18-22.

activity to be economic *in casu*. The entity examined had to provide goods or services *for remuneration* to be seen as providing "on a market". If this understanding is correct, these difficult cases show that the only criterion determining that an operator conducts an economic activity in the meaning of EU competition laws, i.e. provides goods or services "on a market", is that there is a market for that service in the Member State at issue, as it is irrelevant whether the entity is for-profit (*Glöckner*), is financed by its recipient (*Höfner*) or is conducted by a body integrated into the State administration (*Commission v Italy*).[437]

When competition for certain services/goods in a Member State is restricted by national rules or measures organizing the activity (for instance exclusive rights), the basic comparative test allows identifying the *potential* for a market for the activity in a Member State. If it is fulfilled, i.e. if the activity *can be* economic, the Court may impose EU law criteria to assess whether there is a market for the activity in that Member State, to which the entity providing such services/goods in the frame of a specific regulatory scheme of that Member State participates and therefore is an undertaking. This second test – of "market participation" – allows assessing whether a publicly funded entity provides "on the market". It has been found to be the case in the following situations:

1. When no for-profit private operators providing the same services/goods may in practice provide under the scheme of the Member State at issue, as in *Glöckner*, if the entity has – some – market autonomy. There is no market price, but the entity's autonomy regarding the economic terms of provision imply that the entity gets consideration for the services/goods in question and that its funding may be seen as remuneration

2. When some private operators may in practice provide the same services/goods in the Member State at issue, as in *Höfner*. Public funding could be regarded as remuneration not because the public employment agency has agreed to provide for this funding but *indirectly*, because it would be regarded as remuneration by private entities if they had access to this funding when they covered the service demand not covered by the publicly funded entity. The only way to reconcile semantically the Court's approach in *Höfner* with the *Pavlov* requirement of market participation is to consider that market participation need not be active but can also be *passive*. However, "passive participation" may appear as a contradiction in terms, and *Höfner* truly a challenging ruling. It does not really fit with the criterion of market *participation*, and not either with the idea – clear from *Wouters* and *Glöckner* in the field of competition, but also from *AG2R* and *Kattner Stahlbau* in the field of free movement – that decisional risk/autonomy is an essential element of economic transactions.

[437] Case 118/85 *Commission v Italy* [1987] ECR 2599, paras.8 and 13.

4.3.3 State controlled solidarity-based system

Starting with *Poucet and Pistre*, the CJEU has developed a line of case law based on the doctrine that services provided in the frame of "state controlled solidarity-based systems" cannot be regarded as provided under market conditions; entities offering such services do not provide them on a market, they fulfil an exclusively social function and therefore do not constitute undertakings. This group of cases is principally related to social security, but touches also on hospital care services. Similar cases related to other social services are so far only subject to decisions by the High Surveillance Authority and the Commission. In the words of AG Tesauro, the spirit of this doctrine is that certain tasks "for the common good, a task of a social nature, on the basis of the principle of solidarity", can only be performed by or on behalf of a public body, and are not comparable to the business transacted by private undertakings.[438] In the following it is outlined how this doctrine has developed, in the fields of social security and of healthcare; a choice of cases has been made, as they seem sufficiently illustrative for the purpose of this chapter.

4.3.3.1 Solidarity in social security systems

In *Poucet and Pistre* the Court examined whether French rules providing for compulsory membership to specific entities operating sickness, maternity and old-age insurance schemes, applicable to all self-employed persons in non-agricultural occupations, were compatible with the Treaty rules on competition, in particular the prohibition in what is now Article 102 TFEU. The Court found that the activity of the funds and of the organizations involved in the management of the public social security system was not economic as

> [they] fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions.[439]

A central solidarity element was that the benefits were not proportionate to the amount of the contributions.[440] These benefits were defined in law and the funds were not allowed to influence the amount of the contributions, the use of assets and the fixing of the level of benefits.[441] Similarly, in *Cisal* the Court found that the body operating a social protection system providing pensions for accidents at work and occupational diseases fulfilled an exclusively social function and did not pursue an economic activity, on the following grounds.[442] The system was based on universal service and characterized by

[438] See Opinion of AG Tesauro in Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-00637, para.12.

[439] Joined Cases C-159/91 and C-160/91 *Poucet and Pistre*, paras.18-19.

[440] Ibid, para.18

[441] Ibid, para.16.

[442] Case C-218/00 *Cisal (INAIL)* [2002] ECR I-691, para.45.

the principle of solidarity, as there was no direct proportionality link between benefits paid to insured persons and the contributions paid by them.[443] The amount of benefits and contributions were subject to supervision by the State.[444] The compulsory affiliation characterizing this insurance scheme was essential for the financial balance of the scheme and thus for the application of the principle of solidarity.[445]

By contrast, in FFSA, the Court examined French rules for the operation of a supplementary old-age insurance scheme for self-employed farmers financed by voluntary contributions deductible from taxable earnings and found the principle of solidarity extremely limited in scope, as membership was optional, the scheme operated in accordance with the principle of capitalization, and the benefits depended solely on the amount of contributions paid by the recipients and on the financial results of the investments made by the managing organization.[446] The Court concluded that the body managing the scheme, although not-for-profit, conducted an economic activity in competition with life assurance companies.[447]

Requested in *Albany* to examine the decision of Dutch authorities to make affiliation to a sector pension fund compulsory for undertakings, on the request of organisations representing employers and workers in a given sector, the Court noted that the sector pension fund pursued a social objective, was not-for-profit and included manifestations of solidarity.[448] However the fund was not sufficiently governed by the principle of solidarity for its management to be regarded as a non-economic activity, as the fund itself determined the amount of the contributions and benefits, these amounts were set in accordance with the principle of capitalisation[449], and membership was not strictly compulsory.[450] As a consequence the body managing this kind of fund was engaged in an economic activity in competition with insurance companies.[451] It is mentioned in the ruling that the fund had, under statutory prudential principles and supervision of the Dutch Insurance Board, some discretion to administer and invest the capital collected themselves at its own risk.[452] This element of *autonomous* financial risk reinforces arguably the picture of the funds' administration as an "undertaking".

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[443] Ibid, para.42.

[444] Ibid, para.43: The amount of benefits is laid down by law and they may be paid regardless of the contributions paid and the financial results of the investments made by the INAIL. Second, the amount of contributions, upon which the INAIL deliberates, must be approved by ministerial decree, the competent minister having the power to reject the scales proposed and to invite the INAIL to submit to him a new proposal taking account of certain information.

[445] Case C-218/00 *Cisal (INAIL)* [2002] ECR I-691, para.44.

[446] Case T-106/95 *FFSA* [1997] ECR II-229.

[447] Ibid, paras.17-19.

[448] Case C-67/96 *Albany* [1999] ECR I-05751.

[449] Ibid, para.81. The principle of capitalization in the field of pension funds is essentially manifested by a link of proportionality between contributions and benefits.

[450] Ibid, para.83.

[451] Ibid, paras.84-85.

[452] Ibid, paras.23-24.

In *Pavlov and Others*, although it noted solidarity elements in the supplementary pension scheme for doctors in the Netherlands, the Court carried weight on the facts that membership to this pension fund was not compulsory, that the fund itself determined the amount of contributions and benefits, and that it operated on the basis of the principle of capitalization, in particular as the level of benefits provided depended on the performance of the investments which it made.[453] The Court underlined also that in respect of such investments the fund management was subject, like an insurance company, to supervision by the Insurance Board (autonomous financial risk, as in *Albany*). This led the Court to conclude that the fund carried on an economic activity in competition with insurance companies.[454]

In *AOK*, the Court of Justice had to examine whether the Treaty rules on competition applied to agreements on maximum amounts paid for medicinal products concluded by sickness funds operating the statutory health insurance scheme to which the majority of the German employees had to be affiliated.[455] The funds supplied obligatory benefits in kind and essentially identical; in particular, they paid pharmacies for medicinal products up to maximum amounts; the insured person paid the difference if the sale price exceeded this amount. AG Jacobs held that the competition rules should apply, because under the national scheme

- The sickness funds could offer complementary treatments in addition to the obligatory treatments they had to supply, thereby competing with one another in attracting insured persons.
- The funds could compete on the price of the goods and services which they had to provide at levels set by law.[456]
- The funds could compete with private undertakings in the provision of health insurance services to employees who were not obliged to take out statutory health insurance.[457]

The Court did not follow the Advocate General and found instead that the German sickness funds at issue managed a social security system, thereby fulfilling an exclusively social function, founded on the principle of national solidarity and entirely non-profit making.[458] The funds had no possibility to influence the obligatory benefits, identical for all insured persons, independently of their contributions. These benefits were financed through contributions from insured persons and their employers, based principally on the insured person's income and set by each sickness fund. Insured persons had a statutory right to choose their sickness fund as well as their doctor or the hospital in

[453] Joined Cases C-180/98 to C-184/98 Pavlov [2000] ECR I-6451.

[454] Ibid, paras.114-115.

[455] Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK* [2004] ECR I-2493, para.6. The exceptions essentially concern employees whose income exceeds a statutorily prescribed level and, employees subject to a specific statutory scheme, such as civil servants. The obligation to be insured enabled a mechanism providing for solidarity amongst insured persons to be applied (para.6).

[456] Ibid, para.40.

[457] Opinion of AG Jacobs in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK* [2004] ECR I-2493, paras.41-43.

[458] Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK* [2004] ECR I-2493, para.51.

which they have treatment. Thus the sickness funds were in competition with each other with regard to contribution rates, but the financial disparities resulting from differences in the degree of risk insured were equalized through contributions from the sickness funds insuring the least costly risks to those insuring more onerous risks. On these elements the Court reached the conclusion that the scheme was dominated by the concept of solidarity, as in particular *the nature of the competition* between the funds involved that market conditions could not be created.[459] The Court found also that, in determining the maximum amounts they paid for medicinal products, the fund associations merely performed an obligation imposed upon them by the rules governing the statutory health insurance scheme. They had to follow a statutory procedure in determining these amounts, and if they did not succeed, the decision had to be taken at ministerial level. They had some decisional discretion, but in an area where they were not in competition.[460] However, the Court did not exclude that the funds could act as undertakings when they engaged in operations without social purpose.[461]

Sauter and van de Gronden hold that the outcome of what they call the "*AOK* test" is hard to predict.[462] In *AOK* it seems however clear that competition was restricted to operators governed by a solidarity-based scheme under State control – and financially constructed as a "zero sum game". Hence *AOK* shows that if a service as provided under a national regulatory scheme is characterized by a high degree of solidarity, the autonomy of operators appointed to provide services under this scheme can be the decisive criterion to find the activity economic. However, this autonomy renders the activity economic only inasmuch as it allows the provider appointed to influence the economic conditions for providing the service in question. This may not the case when revenue from contributions must be equalized between providers.

In *Kattner Stahlbau*, the referred questions concerned the lawfulness of a German statutory scheme in respect of accidents at work and occupational diseases, providing for compulsory affiliation to employers' liability insurance associations in various sectors, more specifically whether this rule on compulsory affiliation was compatible on the one hand with the freedom to provide services and on the other hand with the Treaty provision prohibiting abuse of a dominant position. To this purpose the Court had to decide whether the German employers' liability insurance association in the engineering and metal sector (a public law body, hereinafter "MMB") constituted an undertaking in the meaning of Article 82 EC (now Article 102 TFEU). The Court considered from the outset that MMB fulfilled a social function, and was entirely non-profit making.[463] As affiliation was imposed by MMB on the basis of German law providing for compulsory affiliation, the Court then examined the scheme governing MMB's activity.

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[459] Ibid, paras.52-57.

[460] Ibid, paras.59-63.

[461] Ibid, para.58.

[462] In their view, "what seems to have mattered the most in the view of the ECJ was that no competition was possible on the benefits to which patients were entitled./…/ Apparently, as long as health insurers have no possibility of influencing the level of contributions, in the ECJ's view it is not of any interest that they do compete on price." Sauter W. and van de Gronden J. W., 2010, p. 8.

[463] Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, para.35.

Having once more reminded that EU law does not detract from the powers of the Member States to organize their social security systems[464], the Court emphasized firstly that a Member State may choose the degree of solidarity it wants in its system, provided that the scheme is compatible with EU market law. The Court conducted then a three-step test, as it had done in *Pavlov*. The Court considered first that the scheme pursued a social objective, contributing to the protection of all workers against the economic consequences of accidents at work by providing benefits even when the accident was related to a fault by the worker or the employer, and even when contributions due had not been paid.[465] The Court looked secondly at the solidarity elements in the scheme and found them predominant, as there was no direct link between the contributions paid and the benefits granted, entailing "solidarity between workers and those who, given their low earnings, would be deprived of proper social cover if such a link existed".[466] Importantly, the Court held also that a Member State choosing to divide the operation of the social security system among several bodies on a sectoral and/geographic basis effectively applies the principle of solidarity, even if it limits its scope of application, specially where these bodies equalise costs and risks between themselves at the level of the country as a whole.[467] Thirdly, the Court assessed the level of State supervision over MMB and found that its degree of latitude was strictly delimited, as both the parameters for calculating contributions and the list and granting arrangements of benefits were set by law.[468] The Court of Justice concluded that, subject to verification by the referring court, MMB did not conduct an economic activity and was not to be regarded as undertaking.

In *AG2R* the Court of Justice had to assess the compatibility with EU law of a national measure making compulsory, at the request of the organisations representing employers and employees within a given sector of activities, an agreement resulting from collective bargaining.[469] This agreement provided for compulsory affiliation to a scheme for supplementary reimbursement of healthcare costs managed by a designated body (AG2R), without possibility of exemption. As compulsory affiliation gave AG2R a monopoly for the supply of the healthcare insurance, the Court had to determine whether AG2R constituted an undertaking subject to Article 82 EC (now Article 102 TFEU). The Court noted first that AG2R was a non-profit-making legal person providing cover for physical injury caused by accident or sickness and covered by French social security law. The Court examined the scheme governing AG2R in the light of its now settled three-step test and found first that AG2R's activity pursued a social objective. Second, the Court found that it was characterized by a high degree of solidarity, as there was no proportionality between the amount of the contributions and the nature of the services supplied by AG2R and the scope of the cover granted, services

[464] Ibid, para.37.

[465] Ibid, paras.39-41.

[466] Ibid, paras.44-59: solidarity elements were in particular the link contribution/income and a risk equalization at the level of the whole insurance association.

[467] Ibid, para.53.

[468] Ibid, paras.60-65.

[469] Case C-437/09 *AG2R* [2011] ECR I-973.

are, in certain cases, supplied irrespective of whether the contributions due have been paid.[470]

As to the third element of state control, it seems that the Court regarded it as probably not fulfilled, as it also examined the issue of whether Article 102 TFEU could have been infringed.[471] On the one side the Court found namely elements of state control, as rules imposing a clause on the review of arrangements on supplementary reimbursement of health care costs in collective conventions agreements concluded by the social partners[472], and a ministerial decree to make the provisions of such agreements compulsory for all employees and employers to whom they are applicable.[473] On the other side, although the scheme devolved to representatives of the employers and employees the responsibility for monitoring the scheme, the Court found several circumstances showing that AG2R, appointed as manager of the scheme for supplementary reimbursement of healthcare costs, enjoyed a certain autonomy.[474]

Under French law, the social partners were free to appoint (or not) AG2R to manage a scheme for supplementary reimbursement of healthcare costs, and AG2R was free to assume (or not) the management of such a scheme. The social partners were free to agree on supplementary reimbursement of healthcare on the basis of collective agreement, and free to do so at the level of one undertaking instead of for an entire occupational sector.[475] Also, under French law, provident operations could be entrusted not only to provident societies and mutual insurance associations, but also to insurance companies.[476] It was also argued, and apparently seen as a relevant circumstance by the Court, that there were operators offering services substantially identical to those provided by that AG2R, when AG2R had been chosen by the social partners.[477] Consequently, the Court instructed the national court to examine whether the criterion of state control was fulfilled and AG2R's activity economic under the French rules, with regard to the two cumulative factors:

a. The circumstances in which AG2R had been designated by collective agreement, and

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[470] Ibid, paras.50-51.

[471] If the national court came to the conclusion that AG2R was an undertaking, the Court considered that it held exclusive rights within the meaning of Article 106(1) TFEU and owing to these rights enjoyed a dominant position in the meaning of Article 102 TFEU. The conferral of these exclusive rights could involve a breach of Articles 106(1) and 102 in combination by the Member State at issue only if AG2R, as undertaking, was led to abuse its dominant position or where such rights were liable to create a situation in which AG2R was led to commit such abuses, in accordance with the formula in *Albany* para.93. This could be the case in particular, if AG2R was found manifestly not in a position to satisfy the demand prevailing on the market for its activity. As observed by Neergaard, the Court continued to examine Article 106(2) although it seemed to hold that the scheme did not infringe Article 102 TFEU, see Neergaard U., 2013, p. 231.

[472] Case C-437/09 *AG2R*, [2011] ECR I-973, para.54.

[473] Ibid, paras.55-56.

[474] Ibid, paras.57-59.

[475] Ibid, para.60.

[476] Ibid, para.61.

[477] Ibid, para.63.

b. The margin of negotiation enjoyed by AG2R as to the details relating to its appointment.[478]

Although the Court did not itself qualify them so in the ruling, it seems arguable that (a) and (b) are meant to establish the existence of a market supply for the service and the possibility for AG2R to participate autonomously to this market. It seems that the Court is inclined to systematize its approach under the three-step test, but as underlined by Neergaard, the *AG2R* ruling demonstrates how difficult it still is to decide whether an entity constitutes an undertaking or not.[479]

In sum, it is now settled law – especially after *Kattner Stahlbau* – that social security services are not conducted as an economic activity for the purpose of EU competition rules if the activity fulfils an exclusively social function, which requires that the following three conditions are fulfilled:

- The activity must pursue a social aim in the Member State in question: this may imply that the service must be regarded as a service of general interest (SGI), the circumstance that providers are not-for-profit constituting only an indication in that regard
- The activity as governed by the law of that Member State is characterized by a high degree of solidarity (limiting the market-typical possibilities of capitalization)
- The activity is subject to extensive State control (excluding market-typical autonomy in terms of responsibility and risk for supplying the service)

The Court measures the degree of solidarity in social security schemes on the basis on factors such as universal service (for instance through compulsory affiliation), and the lack of proportionality of contribution/income and/or of contribution/benefit. Capitalization characterizing social insurance benefits offered under market conditions can be excluded only if the degree of solidarity implemented by a scheme is very high, which explains the Court's requirement of extensive state control.[480] As expressed by AG Mengozzi in *AG2R*, it emerges clearly from the CJEU's case law, that in order to determine the degree of solidarity implemented in a national system where both the designation of the body and the management of the essential elements of the scheme are subject to State control, "the crucial factor/…/appears to be the freedom enjoyed by the body in question to determine the level of contributions and the value of the benefits provided".[481] If economic autonomy is the crucial factor to determine that an

[478] Ibid, paras.64-65.

[479] Neergaard U., 2013, p. 229.

[480] Thus, AG Poiares Maduro explains that the definition of an economic activity in *Pavlov* (recalled in *Glöckner*) involves that "[i]t is not the mere fact that the activity may, in theory, be carried on by private operators which is decisive, but the fact that the activity is carried on under market conditions. Those conditions are distinguished by conduct which is undertaken with the objective of capitalisation, which is incompatible with the principle of solidarity." See Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN*, para.13.

[481] Opinion of AG Mengozzi in Case C-437/09 *AG2R* [2011] ECR I-973, para.68, referring to Case C-218/00 *Cisal* [2002] ECR I-691, para.43 and Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, para.65.

activity as governed by the scheme of a member State is non-economic, it may be argued that it is also the "crucial factor" determining that it is economic, and in accordance with the *Pavlov* definition, "offered on the market". On this outset, it is very important to gain certainty on exactly why and what kind of autonomy is decisive as a "positive" criterion characterizing an economic activity for the purpose of the Treaty rules on competition.

In that regard, the case law studied shows that autonomy does not involve that the activity is pursued "on the market" unless it is characterized by specific effects. Thus, in *Kattner Stahlbau*, competition was impossible, because the national scheme imposed compulsory affiliation to the insurance association MMB, and restricted strictly MMB's degree of latitude, both contributions and benefits being set by law. In *AOK*, benefits were set by law but the sickness funds a degree of autonomy in setting contribution rates. In spite of this autonomy and the competition it could lead to, the German scheme provided for compulsory affiliation to the funds and for cost/risk equalization between those, which implied that competition had no influence on the financial results of any entity allowed to provide sickness insurance in Germany. Under the rules of compulsory affiliation to the sickness funds, where no entity allowed to provide this specific service in Germany could compete on profitability, the scheme was a zero sum game, and the sickness funds' activity not economic. In *AG2R*, the Court considered that AG2R was in competition with private undertakings on the insurance market, this competition being objectified firstly by the similarity between the service offered by AG2R and by these undertakings, and secondly by the fact that AG2R provided the service on the basis of an agreement with the purchasers on the conditions or service provision.

It emerges from these cases that the autonomy characterizing "an offer on the market" must allow influencing the economic conditions for providing the service.

Lastly, it must be noted that in *Freskot* and in *Kattner Stahlbau*, the CJEU assessed social security schemes both in the light of EU competition rules and EU free movement rules. In *Freskot* the Court of Justice found that the agricultural insurance at issue, covered insurable risks normally provided for remuneration in other Member States, i.e. services in the meaning of Article 57 TFEU. However, as defined in Greek law, the activity covered insurable and non-insurable risks. As defined in national law, *and for the same reason* (benefits and contributions set by law), the activity was neither a service provided against remuneration nor a service offered on the market. The same criterion (providers' lack of economic autonomy) implied explicitly that the activity was economic neither for the purpose of the Treaty rules on competition, nor for the purpose of the Treaty rules on free movement. In *Kattner Stahlbau*, the same factor led the Court to find the activity of German sickness funds non-economic in the meaning of competition law, and arguably but less explicitly, non-economic in the meaning of free movement law (the service, as defined in German law, was arguably not provided for remuneration).

In both cases, the Court admitted that the Member States could define and organize social benefits which they regarded as social services of general interest (SSGI) in a manner which rendered the activity non-economic. While this implied that the Treaty rules on competition could not apply, the free movement rules could apply to the

national scheme, because the activity, although non-economic, could in other Member States at least partly be provided for remuneration, and thus was at EU level "normally" provided for remuneration.[482] In other words, an activity, although non-economic in both fields (free movement and competition), could be economic and as such only caught by free movement rules. In such a case, where the activity was found non-economic through the free movement analytical frame and the competition analytical frame, the different scopes of the two fields is very obvious.

4.3.3.2 Solidarity in health care systems

It is *prima facie* difficult to see why the derogation for solidarity-based systems should not be transposable to other sectors than social security. Indeed, in *FENIN*, a crucial issue was whether the GC and in appeal the Court of Justice would consider the activity of hospitals contributing to the Spanish national healthcare system as economic, and beyond, whether there could be what Winterstein calls a "solidarity-based immunity" for national healthcare services.[483] In *FENIN*, the GC did not take into consideration an overdue submission by the applicant that hospitals part to the Spanish national health system occasionally provided against charge – *for consideration* – private care to patients not covered by the system, such as foreign visitors.[484] On the facts it accepted to take into consideration, the GC held as not disputed that the organizations operating the Spanish national health system (SNS) did not conduct an economic activity, as

> the SNS, managed by the ministries and other organisations cited in the applicant's complaint, operates according to the principle of solidarity in that it is funded from social security contributions and other State funding and in that it provides services free of charge to its members on the basis of universal cover. In managing the SNS, these organisations do not, therefore, act as undertakings.[485]

The GC's decision was contested and brought in appeal to the Court of Justice. As already mentioned[486], the Court of Justice (Grand Chamber) confirmed the GC's view that the economic character of a purchasing activity depends on whether the purchased goods/services are subsequently used in the frame of an economic activity. Like the GC, the Grand Chamber found also that FENIN's submission that Spanish public hospitals

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[482] The parallel between free movement and competition solutions found in *Freskot* and less explicitly in *Kattner Stahlbau* cannot be observed in most other cases where the CJEU has evaluated the economic character of a social security scheme, because in the latter cases the Court has only assessed whether compulsory affiliation or the fact that public authorities had entrusted its operation to a specific entity was compatible with EU competition law, and did not touch on the economic character of the activity for the purpose of EU free movement rules.

[483] Winterstein A., 1999, p. 329.

[484] These elements had namely not been named in the applicants' complaint to the Commission and mentioned for the first time before the GC. Case T-319/99 *FENIN v Commission* [2003] ECR II-357, paras.41-45.

[485] Ibid, para.39.

[486] In section 4.3.2.

provided occasionally healthcare for fees, to patients not covered by the SNS such as foreign visitors, had come too late in the procedure and therefore could not be taken into consideration. Accordingly it did not follow the AG's proposal to return the case to the GC.[487] Unfortunately, the Court of Justice only recalled the GC's finding that organizations managing the Spanish national system were not acting as undertakings as the system operated according to the principle of solidarity, but did not clearly confirm this conclusion.[488] The Court did not either clarify which significance its *obiter dictum* in *Smits and Peerbooms*, where it found that public hospitals in the Dutch scheme at issue could be regarded as providing health care for remuneration, may have for the criteria determining that an activity of a given entity *is* economic for the purpose of EU competition rules.

Under such circumstances, it is of particular interest to examine and discuss here the reasoning of AG Poiares Maduro, who in FENIN considered a number of facts which the Court of Justice eventually found inadmissible and proposed an approach radically different from the GC's approach as to whether public hospitals in the Spanish system constituted undertakings. It is important to be aware of this Opinion, because it appears that it has influenced the Commission's reasoning in state aid cases related to social services, as will be seen in section 4.4. To begin with, AG Poiares Maduro acknowledged that EU free movement rules and EU competition rules have different scopes. In particular, he underlined that the Member States may withdraw an activity, even within the health sector, from the market forces, with the possible result that the entities conducting it are not submitted to EU competition rules. In that respect, the AG referred to the Court of Justice's view in *Smits and Peerbooms* that "the way in which an activity is organized at the national level has no bearing on the application of the principle of the freedom to provide services", while "it does not necessarily follow from that that the organizations which carry on that activity are subject to competition law".[489]

Let us open here a parenthesis. It is important to note that, in the view of AG Poiares Maduro, while provision of health care free of charge by bodies controlled by the State may not be submitted to EU competition rules, "there is no doubt that the provision of health care free of charge is an economic activity for the purposes of Article 49 EC (now Article 56 TFEU, precision added)"[490], a conclusion that the Advocate General drew from the following *obiter dictum*[491] in *Smits and Peerbooms*, where the Court had found that

[487] Case C-205/03 P *FENIN* [2006] ECR I-6295, para.21.

[488] Case T-319/99 *FENIN* [2003] ECR II-357, para.39, referring to Case C-205/03 P *FENIN* [2006] ECR I-6295, para.8.

[489] Ibid, para.51, referring to Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, para.58.

[490] Ibid, para.51, footnote reference to Case C-157/99 *Smits and Peerbooms*, para.58.

[491] This part of the judgment in *Smits and Peerbooms* must be regarded as an *obiter dictum*, a view that was not necessary for the Court's conclusion that the hospitals in Germany and Austria were remunerated for the service they had provided to persons affiliated in Belgium. The Court had, "two paragraphs before" (paragraph 55), taken the view that "a medical service provided in one Member State and paid for by the patient should not cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another Member State's sickness insurance legislation which is essentially of the type which provides for benefits in kind." Thus the organization of hospital care in Belgium and the question of whether hospitals in Belgium could be regarded as providing for remuneration or not did not seem relevant in

> *In the present cases*, the payments made by the sickness insurance funds under *the contractual arrangements* provided for by the ZFW, albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character.[492]

The extensive conclusion drawn by the Advocate General must be seriously questioned here. In this statement in paragraph 58 of *Smits and Peerbooms*, the Court does not draw our attention on the fact that, according to settled law, medical activities *can be* economic, and therefore healthcare is "*normally* provided for remuneration" in the meaning of Article 57 TFEU, which has repercussions on national rules affecting the activity; it had already stated that at paragraph 53. What is stated in paragraph 58 is instead that free of charge hospital services as provided by private or public entities constituted *an economic activity "in the present cases"* and "under the contractual arrangements" provided for by Dutch law in force when the case was brought to the CJEU. It is submitted here – in contrast with AG Poiares Maduro's view – that the Court's statement in paragraph 58 *did not* establish a general rule implying that "*under any circumstances*, providing health care free of charge is an *economic* activity in the meaning of free movement".

Rather, as already commented in chapter 3, it seems that in the statement quoted above, the Court of Justice discreetly delineated what made the care services *provided by the Dutch public hospitals* (and not the care services of any public hospital in the EU) economic in the meaning of EU free movement law.[493] It signalled that "consideration for the service in question" (the first part of the *Humbel* definition of remuneration) may cover the total volume of service provided under a period rather than per service unit, and that this consideration can be agreed upon between the provider and the financer of the service, rather than "as normally on a market" between the provider and the recipient. Also, the Court underlined that under the specific legal frame of the cases examined, hospitals were paid on the basis of contractual arrangements provided for by Dutch law, these contracts allowing them to decide "how much service" they would provide for a given consideration.[494] And thus, it seems that for the provider's activity to be regarded as economic in the field of free movement law, the Court considers as decisive that this provider has some discretion in negotiating the conditions for providing the service in question. In other words, contrary to what the view of AG Poiares Maduro, it is held here that the Court did neither state nor mean in *Smits and Peerbooms* that the provision of health care free of charge is an economic activity for the purposes of Article 49 EC, but instead found it to be the case if in such a scheme providers are in a position (for instance in the frame of contracts) to influence the conditions of provision. Therefore,

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examining the transaction between hospitals in Germany and Austria and patients from Belgium. What seemed relevant in this transaction was the fact that hospitals established in Germany and Austria were allowed by the legislation of these Member States to calculate and charge fees for providing care to foreign patients in a way that allowed them to cover their costs, typical "market conditions" some would say.

[492] Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, para.58, emphasis added.

[493] See section 3.2.1.3.

[494] Providers could negotiate on the level of costs, in other words on service capacity, which explains that there was a queuing system, as explained in

Smits and Peerbooms suggests arguably that the Court of Justice regards (1) the existence of consideration for the service at issue and (2) the operator's autonomy to influence this compensation amount for the service provided, as decisive elements in finding that the Dutch hospitals in question provided services for remuneration, and under these specific circumstances conducted an economic activity in the meaning of free movement law. Here ends the parenthesis.

Having underlined that the application of the comparative criterion is meant to prevent that Member States "shelter behind the pretext of solidarity in order to avoid economic operators being subject to competition law", AG Poiares Maduro explained that the public entities can act as operators on the market and competition law be relevant, even in case of "partial competition" (as in *Höfner* where the public entity had a statutory monopoly but private entities were in practice to provide the same service) or even of "no effective competition" (where private entities do not offer the same service as the state). In the health sector, where there was almost no case-law giving guidance on what constitutes an economic activity for the purpose of EU competition rules, AG Poiares Maduro held that the solidarity doctrine in *Poucet and Pistre* applied and that in the absence of effective competition, EU competition rules could apply only in so far as solidarity does not predominate in the service supply.[495] However, in his view, the activity of healthcare services to patients had to be distinguished from the activity of management of the healthcare system, in particular insurance elements.[496] In order to determine the degree of solidarity in a national system for the provision of services such as healthcare, the Advocate General considered that the criteria used by the CJEU in its case law related to social security schemes could not be used and proposed instead the three following levels of solidarity:

1. Universal access for users secured by uniform pricing constraint constitutes an element of solidarity but does not suffice to render the activity concerned non-economic.

2. If the service is available free of charge, the degree of solidarity is higher, as there is then no connection between the cost of providing the service and the price paid by the user.

3. The third and decisive element in determining that an activity is dominated by the principle of solidarity is that there is no partial competition in the Member State at issue.[497]

[495] Ibid, para.16.

[496] This is an essential difference compared to the approach of the General Court, which appears to have examined the Spanish healthcare system as a whole, and not only the activity of healthcare services. The AG held that "the activity which falls to be classified is not that of compulsory health insurance, which is also carried on by the SNS, but rather that of the provision of health care". Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN*, [2006] ECR I-6295, paras.32 and 47.

[497] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN*, para.31.

When a national system is open to "partial competition", AG Poiares Maduro argued that this system cannot be regarded as solely guided by the principle of solidarity, and as a result service provision in the frame of such a system constitutes an economic activity submitted to competition law. In case the high degree of solidarity in (3) is not fulfilled, the AG considered that any analysis of measures related to entities in the system having to be undertaken within the framework of Article 106(2) EC, whereas "[b]y contrast, if health care services may be delivered only by *bodies controlled by the State*, which are obliged to treat all patients coming to them free of charge, there can be no question of market forces being involved, and the activity will then be guided solely by the principle of solidarity (emphasis added)".[498] This statement, suggesting that the AG considered partial competition to be excluded, even when non-state bodies may provide the service, as long as solidarity dominates the system and state control excludes the economic autonomy of these bodies, contrasts with the following statement in the same Opinion, suggesting instead that partial competition can only be excluded if the activity is totally "in-house" at the level of a whole Member State, in other words not at all externalized:

> in order to determine whether that activity should be subject to competition law, it is necessary to establish whether the State, with a view to adopting a policy of redistribution *by entrusting that activity exclusively to State bodies which would be guided solely by considerations of solidarity*, intended to exclude it from all market considerations[499]

It is not discussed here that the expression of the principle of solidarity in the field of social security may differ from its expression in the field of health care services. However, it is interesting to note that the Advocate General seemed ambivalent as to what is required to find partial competition excluding market participation. If AG Poiares Maduro meant that to be non-economic under any national rules, health care activities must be totally in-house in a Member State – entrusted *exclusively to state bodies* guided solely by considerations of solidarity – this goes arguably further than the requirement of "state control", i.e. the third element of the three-step test used by the CJEU in the field of social security. Although the requirement of state control seems to be very restrictive and quite difficult to fulfil, it is namely a functional requirement and it has been found fulfilled by a non-state entity, as in *Kattner Stahlbau*.

If state control is a decisive criterion, and not that the entity is a state body, a highly probable identity, emerges between EU free movement and EU competition law regarding the meaning of the concept of "economic activity". In both fields it is required not only that private for-profit operators may supply substantially the same service as the activity conducted by an operator under the national scheme at issue, but also that under this scheme, operators enjoy a minimum degree of *economic* autonomy. It was quite clear from *AG2R*, where the economic character of AG2R's activity would have to be assessed with regard to competition circumstances and to the operator'decisional autonomy. It was also rather clear from the obiter dictum in *Smits and Peerbooms*, as

[498] Ibid, para.31.

[499] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, para.52, emphasis added.

concluded under 3.3. These two criteria – a market for the service in the Member State and a margin of autonomy of operators providing under the scheme at issue, seem also consistent with *Sodemare*, where the not-for-profit elderly homes were obviously regarded by the CJEU as economic operators. Not only was there a for-profit supply of equivalent services, but also the not-for-profit private entities provided under contractual arrangements with public authorities, and had a margin of autonomy to provide under the financing conditions offered.

For the Court's approach in *Höfner* to be coherent with these criteria, a very broad interpretation of the notion of "autonomy" is required. If the activity as conducted under a national scheme is deemed economic as soon as the State allows in fact private for-profit operators to provide a service which substantially is similar to the service provided under a regulatory scheme serving social objectives, it entails that entities providing under that scheme are in competition with private entities offering a similar service outside the scheme, but with no other economic autonomy than the possibility to limit their offer of the service. Even in the presence of a regulatory scheme extensively based on the principle of solidarity, the criterion of state control rendering the activity under this scheme non-economic cannot be fulfilled unless the state exercises an extensive control over all operators offering a similar service in its territory.

In *FENIN*, the Spanish healthcare system fulfilled criteria (1) and (2) above in the AG's "solidarity scale". As to degree (3), the GC lacked in the AG's view the "essential information for concluding that the activity of providing health care of the SNS is of a non-economic nature", as it had not stated whether private organizations for-profit could in law or in fact provide those services too. In particular, the AG referred to a Spanish law authorizing the Spanish national system to sub-contract the provision of health care to private entities. As his view was that partial competition could well be at hand, in which case the hospitals had offered services on a market[500], the AG proposed to collect more factual elements and refer the case back to the CFI (now GC) in order to determine whether the solidarity existing in the provision of free health care was truly predominant or whether public and private health sectors could coexist in Spain. It is argued here that, if degree of solidarity (3) of state control had been regarded as fulfilled in *FENIN*[501], the entities providing the service in that Member State would not have been regarded as offering healthcare services on a market, and would probably not either be regarded as providing those services for remuneration.

4.4 Conclusions

In the field of competition law, the CJEU's basic axiom, formulated in *Commission v Italy*, is that the State can either act by (1) exercising public powers or by (2) carrying on

[500] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, paras.53-54.

[501] So far this criterion formulated by AG Poiares Maduro in the field of healthcare neither been confirmed nor rejected by the CJEU.

economic activities. Through *Höfner* the Court has given (2) a maximal scope and thereby forced the principle of competition into the heart of the national systems of welfare, by defining the concept of an undertaking functionally but also by launching the comparative test, by which it is established whether the activity pursued by a given entity "has not always been, and is not necessarily, conducted by public entities". It has been found that the comparative test may be seen as an inherent part of the definition of an undertaking formulated in *Höfner*. As a basic test used in difficult cases, the comparative test is made, for a given activity, once for all and for all the Union, which explains that the test is not explicitly named each time the CJEU refers to *Höfner*. It has been found that the comparative test has the following meaning:

- It allows determining whether the activity *can be* economic. Thus, a service activity which fulfills the comparative test has "a potential market" in a Member State, as it can be conducted by private entities for-profit. It has been argued in chapter 3 that this capacity to be subject to commercial transactions is precisely what is meant by "service *normally* provided for remuneration" in Article 57 TFEU. Hence, a key finding of this chapter is that the comparative test in the field of competition law seems to correspond in substance to the notion of service in Article 57 TFEU.

- Where it is found that the activity *can be* economic, it allows presuming that the absence of effective competition for the activity as conducted by entities in a specific Member State is due to a Member State's own regulatory or administrative measures. That the activity *can be* economic does not mean that the activity as conducted under the scheme of a Member State *is* economic, but that EU competition law "may have a role to play".

Acknowledging that competition law may not have unlimited reach, the CJEU has in the *Eurocontrol* line of case law given substance to the notion of "exercise of public powers" (option (1) of the axiom in *Commission v Italy*). The Court's test is that the activity, by its nature, its aim and the rules it is subject to, involves powers which are typical of public authority. It is submitted that the relationship between this test and the comparative test is one of mutual exclusion. The comparative test is totally irrelevant to determine the applicability of EU competition law to such activities, as the Court considers that EU competition rules have no role to play at all, when the activity *cannot* be economic (if it is a service activity, it is not a "service normally provided for remuneration"), not as a result of the comparative test but instead based on the Member States' own assessment that the activity's aim and nature necessitate that the entity entrusted with its conduct relies on powers derogating from ordinary law and typical of the prerogatives of the State. Under such conditions, the Member State's choice of organization for the activity is affected by missions of general interest which it is accountable for at national and/or international level, but is not affected by EU market law. The correspondence between this derogation and Article 52 TFEU in the field of free movement is obvious and through this line of case law (including *Eurocontrol* and *Cali*), the CJEU has undeniably increased, in the field of services, the symmetry between the criteria of applicability of the Treaty rules on free movement rules and on competition. As the derogation in Article

52 TFEU, the derogation for the exercise of public powers in the field of competition is very potent and therefore interpreted very restrictively.

It is submitted that the relationship between the comparative test and the *Pavlov* definition of an economic activity ("an offer of *services* or goods on the market") is that the comparative criterion allows establishing that the activity examined is related to "goods or services" in the meaning of the *Pavlov* definition. When this is established, it remains to examine whether the activity examined consists in offering these goods or services on a market, which the comparative test cannot tell. Thus, in spite of the confusing terminology found in some parts the CJEU's case law[502], it seems clear that the comparative test alone cannot determine whether a specific activity *is* economic under national rules and that an activity fulfilling the comparative criterion is not economic unless it is "offered on the market", in accordance with the *Pavlov* definition. This is of particular importance in the field of social services, which the Member States retain powers to organize on their territories, a principle formulated by the CJEU in *Duphar*.[503] Finding that an activity fulfils the comparative criterion is thus related to the *Pavlov* definition but it also produces autonomous effects, which must be distinguished from the effects of finding that the activity fulfils or not the *Pavlov* definition.

Regarding non-harmonized services regulated by the Member States, finding that an activity fulfills the comparative test and thus consists in the provision of "goods" or "services" in the meaning of the Treaties seems to legitimate that the policy powers of the Member States are constrained by the objectives of the Treaties. By introducing the comparative test in *Höfner*, the CJEU gives EU competition law the upper hand:

- The CJEU applies a "principle of competition" from which it derives a "duty of consistency" on the Member States' regulation and organization of the activity on their territory. The Court means that national rules restricting or eliminating competition must be put "under EU competition law control" in order to prevent that Member States "shelter behind the pretext of solidarity in order to avoid economic operators being subject to competition law".[504] It must be noted that a duty of consistency has also emerged in the Court's case law on restrictions of the freedom of establishment.

- As the activity involves the provision of "services" or "goods" in the meaning of the Treaties, the interpretation of the notion of "offer on the market" in the *Pavlov* definition is made under EU law and not under national law.

It is obvious that the CJEU considers that most activities, unless they are characterized by the exercise of public powers, *can be* economic, either by reference to situations in the

[502] This refers to the AGs' use of the terms "commercial in nature" or "economic in nature", evoked above.

[503] This freedom, based on the consideration that cohesion and redistributive objectives being inherently a prerogative of the State, involves that the Member States must be free to define a service of general interest and to organize its provision and funding so that the social objectives which they have a democratic mandate for are achieved.

[504] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2003] ECR II-357, para.27.

past, or to their organization in some Member States. This implies, if the interpretation of the term "normally" in the definition of "services" in Article 57 TFEU made in the present study is correct, that the Court regards most services in the public sector, including social services, as services in the meaning of Article 57 TFEU, i.e. services in the meaning of the Treaties and in the meaning of the Court's definition of an economic activity in *Pavlov*. Under such circumstances, what the CJEU means by "offered on the market" in the *Pavlov* definition is entirely decisive to determine case by case whether activities constituting services in the meaning of the Treaties are conducted as an economic activity for the purpose of the Treaty rules on competition.

The Court's spirit is clearly to give a wide interpretation of "offered on the market", and its approach so far may be characterized as follows:

a. Discreetly pointing at legal or de facto circumstances in the specific cases at issue (for instance the payment of fees by patients or contractual arrangements between the provider and the financer of a service), thereby suggesting that they are relevant for determining the economic character of the activity, but often without clearly explaining why and more generally without characterizing and systematizing these circumstances.

b. Pointing out characteristics that are not decisive for a service to be conducted as an economic activity for the purpose of EU competition rules: that it pursues societal objectives, that it implements some elements of solidarity, that it is not-for-profit, that it is not financed by its recipient, or that it is provided by a body integrated into the State administration.

c. Elaborating, on the basis of the *Poucet and Pistre* doctrine, criteria under which an entity's activity may consist in the provision of services or goods in the meaning of the Treaties, but *is* not economic for the purpose of EU competition rules, because it conducted in the frame of a regulation involving that it is *wholly* subject to the principle of solidarity and therefore fulfilling an exclusively social function.

It appears that the Court's approach is binary: goods or services are either "offered on the market" or provided to fulfil an exclusively social function in accordance with the *Poucet and Pistre* doctrine. If it is correct to regard these two alternatives as mutually exclusive, the factor implying that the activity does not exclusively fulfil a social function should precisely be the factor determining that it consists in offering goods or services "on the market". Therefore, the results from (a) and (c) must arguably be conjugated.

From the Court's approach under (a), it has been found that the CJEU may well consider remuneration to be, *in some sense*, relevant in determining whether an activity is economic for the purpose of the Treaty rules on competition. Firstly, the criterion of remuneration, related to a risk for the service provider, must be fulfilled for self-employed persons to constitute undertakings (*Commission v Italy*, *Pavlov*, *Wouters*). Second, remuneration seemed also decisive when the Court of Justice found certain airport activities to be

economic in the meaning of EU competition law (*Aéroports de Paris*). Thirdly, even in the two cases where the CJEU has referred explicitly to the comparative criterion and thereby gone furthest in its spirit of widening the applicability of the Treaty rules on competition, it has not discarded the requirement that the entity examined must provide goods or services for remuneration. Fourthly, it has been argued here that *SELEX* gives no convincing support for the thesis that remuneration is not a relevant element to determine the economic character of an activity.

From the Court's approach under (c), the following has been found. The *Poucet and Pistre* doctrine, so far mostly applied by the CJEU in the field of social security, has in that field developed into a three-step test: the activity must pursue social objectives, be organized predominantly under the principle of solidarity and under state control. It appears that a crucial factor leading the Court to regard the provision of social security benefits as non-economic is that providers do not enjoy under national law a degree of autonomy allowing them to influence the economic conditions for providing the service. If they enjoy this kind of decisional autonomy, the activity is economic, which seems to be in line with the Court's finding that entities provide a service for remuneration, thereby conducting an economic activity in the meaning of free movement law.

Concerning other services than social security, and given the there are so far almost no "competition rulings" clarifying under which conditions a social service *is* (as opposed to *can be*) economic for the purpose of EU competition rules, and it is therefore tempting to get a squint at the *obiter dictum* in *Smits and Peerbooms* where the Court held that, in an *intrastate* perspective, public hospitals in the Dutch scheme at issue in the case *provided for remuneration* (which it has been argued in chapter 3 is the definition of an economic activity in the meaning of free movement law related to services). With reference to *Smits and Peerbooms*, AG Poiares Maduro has in his Opinion to *FENIN* argued that for the purpose of EU competition rules, the economic character of healthcare service provision in a specific case must be assessed separately from the other elements of a national healthcare system, and interpreted the *obiter dictum* in *Smits and Peerbooms* so that the provision of healthcare under a scheme characterized by a high degree of solidarity *is* economic if the State has not reserved the activity exclusively to State bodies which are guided solely by considerations of solidarity.

In this interpretation, it seems enough that the State allows, be it only in fact, that some entities provide a similar service for profit (and thus also for remuneration) to find that even the entities providing under a solidarity-based scheme offer it "on the market", even entities which do not individually enjoy an autonomy allowing them to influence the economic conditions of their own service provision. If this interpretation of *Smits and Peerbooms* is correct, it implies either that remuneration is not at all relevant for an activity to be economic in a Member State (let us exclude this nonsense!) or that remuneration is only indirectly relevant to find that a service provided in kind by a publicly funded not-for-profit public body is an economic activity for the purpose of EU competition rules: the fact that national law allows entities to provide a type of service for profit (and thus for remuneration) can be seen as implying that the service is *at national level*, "normally" provided for remuneration.

It may seem that his interpretation was followed by the Commission in the *H-IRIS* decision and validated by the GC in its review of the decision. However, in *H-IRIS*, as in *Smits and Peerbooms*, both private and public entities were allowed to provide similar hospitals services, but both private and public entities did so in the frame of contractual arrangements implying that they received payments from public authorities and giving them powers to influence the financial conditions of service provision. Thus the IRIS hospitals seemed to enjoy an economic autonomy allowing them to influence the risk of providing hospital services; it is thus arguable that both private and public hospitals in the Belgian scheme provided hospital services for remuneration. In *Glöckner*, it has been shown that the not-for-profit organizations providing ambulance services enjoyed some economic autonomy allowing them to cover their costs. *Höfner* emerges as the only instance so far where the activity of a publicly funded not-for-profit public body was found economic in the meaning of EU competition rules without this body's economic autonomy or lack of economic autonomy being at least evoked as a fact in the case. In the normative frame of the *Pavlov* definition, it stands out as a hybrid ruling, where market participation could be found without market autonomy. It may be interpreted as implying that the state cannot have control in the meaning of the *Poucet and Pistre* doctrine unless it allows only state bodies to provide a service, and prohibits effectively that any private operator provides a substantially similar service on its territory. Would such an interpretation be compatible with the CJEU's so called "functional approach" in delineating the scope of EU competition law, and would it be compatible with the principle of subsidiarity to restrict the Member States' powers to that extent?

In conclusion, this analysis of the CJEU's case law shows that the Court has in fact never spelled which "positive" criteria must be fulfilled for an activity conducted under a specific scheme to be regarded as "offered on the market" and as a result it is still not certain on which essential criteria the Court establishes that an activity *is* (as opposed to *can be*) economic for the purpose of EU competition rules.[505] The Court has not clarified what in substance distinguishes the *Pavlov* definition from the comparative test. This incertitude is mirrored in state aid decisions delivered by the Commission and the High Surveillance Authority in the fields of hospital services, tertiary education, school education and primary healthcare. Nevertheless, at this stage in the development of the CJEU's case law, it seems possible to argue that the requirement that services or goods are "offered on the market" by an entity implies that the two following criteria are fulfilled:

- The entity does not provide for nothing (compensation criterion)

- The entity can influence the economic conditions of its own service provision (agreement criterion).

[505] By "positive criterion" is meant here a criterion which specifically can be found in an economic activity, by contrast with an approach finding that an economic activity can be found even in the absence of certain criteria.

5 EU procurement law: where the concepts of "service" and "undertaking" meet

It has been submitted that the definition of "services" in Article 57 TFEU – as "services *normally* provided for remuneration" – corresponds to an activity which *can be* economic, while Article 56 TFEU protects the freedom for a service which *is* economic, to cross borders without discrimination or unmotivated restriction. Under such conditions, one may wonder why an activity which is non-economic in all Member States should be covered at all by EU procurement rules. And yet, Hatzopoulos holds as "indisputable" that at as soon as activities, even what he calls "genuinely non-economic activities", are to be awarded to some non-state actor, EU rules and principles on public procurement become applicable.[506] If his view is correct, something must happen *in the process of planning the award of a non-economic activity to a non-state actor*, which transforms the activity into an activity that at least *can be* economic, as otherwise Article 2 in the SGI Protocol, providing that the provisions of the Treaties *do not affect in any way the competence of the Member States to commission and organise non-economic services of general interest,* does not make any sense.

Thus, offering remuneration for the provision of a service which before this offer constituted a non-economic activity would undeniably involve the applicability of EU procurement rules. If it is so simple, why would for instance school education services not be subject to EU procurement directives when their provision is externalised, i.e. entrusted against remuneration to non-state actors? This very troublesome question could perhaps get a pragmatic answer: the CJEU has decided in *Humbel* that school education is not a service in the meaning of the Treaties, so the fundamental freedoms do not apply to activities in that sector, and therefore, as long as the Member States do not agree on "prioritizing" school education in procurement legislation (with the support of the EU parliament), nothing can constrain them to include school education in EU procurement legislation. The problem is that whether a social service is or not a service in the meaning of the Treaties is subject to the CJEU's appreciation on the basis of evolutive facts, and also that basic EU procurement rules follow also directly from the Treaty. In other words, EU legislative institutions do not control that issue, and in the fields of free movement law and procurement law, examples of sweeping stances from the Court are not rare.

On this background, the first purpose of this chapter is to shed light on the CJEU's considerable contribution to develop a body of primary EU on procurement capable to be a very powerful instrument of EU governance in the field of public services, on some decisive steps which have characterized this contribution, and on some salient examples of the Court's insight that its approach risked building what some authors have called "a

[506] Hatzopoulos, 2011, p. 2: "some authors strive to demonstrate that certain Treaty rules also apply in the absence of an economic activity". In a similarly pragmatic manner, van de Gronden states that "[i]f a public authority externalises the provision of SSGI, the Directive for the award of public works contracts, public supply contracts and public service contracts comes into play, see van de Gronden J. W., 2013a, p. 150-151.

bridge too far" and therefore called for limitations.[507] The second purpose is to gain some understanding on how the criteria of applicability of EU procurement rules relate to the notion of "economic activity" and "activity which *can be* economic" (regarding services, "a service *normally* provided for remuneration").

Elevating equal treatment from a principle of EU procurement directives to a principle derived from the fundamental freedoms has been a major move, whereby the Court has connected free movement and competition law principles at constitutional level. Another crucial move has been to interpret rather broadly and functionally the constitutive elements of the notion of "public contract". It will be shown that this approach is directly related to the fact that the notion of public contract, as an economic transaction, builds unsurprisingly on the same essential criteria as the notion of "economic activity". Therefore, in the interpretation of "public contract" by the CJEU, it is easy to see the coexistence of its approach of the notion of "economic activity" in free movement – services or goods provided for remuneration and in competition – the offer of services or goods on a *government* market (competition).

The analysis in this chapter is legal theoretical, and builds almost exclusively on the case law of the CJEU and the Public Sector Directive in force until April 2016, i.e. Directive 2004/18/EU.[508] The reason for confining the analysis to this Directive is mainly that the concepts analysed are defined similarly in the "Utilities Directive", i.e. Directive 2004/17/EC.[509] EU procurement law's sources are outlined as a point of departure for an analysis of the CJEU's development of EU primary law on procurement on the basis of two objectives, market integration and undistorted competition, and two sets of principles – the fundamental freedoms and the general principles of EU law. The analysis focuses second on the Court's functional interpretation of the concept of "public contract" in the Public Sector Directive, where its understanding of an "economic transaction" for the purpose of procurement law emerges. The third part of the chapter draws upon some important derogations from and mitigations to EU procurement rules, introduced by the CJEU itself to put certain limits to the effects of its approach. Lastly, conclusions are drawn, an issue being the lack of definition of the notion of procurement in EU primary law.

[507] These are the terms used by Hordjik and Meulenbelt to criticise the elevation of the objective of equal treatment to a principle of EU procurement law deriving directly from the fundamental freedoms and involving positive obligations on contracting authorities, see Horvijk P. and Meulenbelt M., 2005, p. 126. In these authors' view, "equal treatment in the context of competitive tendering requires transparency, but equal treatment does not as such require competitive tendering".

[508] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (hereinafter the 2004 Public Sector Directive) [2004] OJ L 134/114.

[509] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (hereinafter the 2004 Utilities Directive) [2004] OJ L 134/1.

5.1 EU Procurement Law: sources, objectives and scope

Ever since the 1992 Programme was launched in 1985, the Union has pointed to the regulation of national practices for public procurement as a key issue for "the achievement of a real internal market", given the part of public procurement in the GDP.[510] In a *policy* perspective, the Union's active engagement in the regulation of procurement practices is legitimated by the Union's mission to establish this internal market. The view has been that restrictions of trade cannot be removed only through negative obligations and that it is necessary to impose positive obligations on certain categories of procurement, such as *ex-ante* advertising of contracts, to open procurement markets for competition. In a *legal* perspective, EU regulation of procurement procedures is based on a view that procurement practices in the Member States potentially include measures restricting trade and capable of infringing the fundamental Treaty freedoms. This implies that the fundamental freedoms in Articles 34, 49 and 56 TFEU, prohibiting national measures that hinder the free movement of goods, services, persons and capital[511], can be invoked not only regarding national measures affecting the domestic market as a whole[512], but also regarding measures or conducts restricting the access of goods or services to what is usually called "government markets".

5.1.1 Dual sources of EU procurement law: secondary and primary law

Today, procurement procedures and regulation in the Member States are subject to constraints following from two sources of EU law. The currently applicable 2004 Utilities Directive and 2004 Public Sector Directive remain in force until 17 April 2016 provide for a detailed harmonization of award procedures for certain contracts. As their predecessors, the 2004 procurement directives aim at ensuring the respect of the fundamental freedoms of the Treaty, and "the principles *deriving there from*", such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.[513] Their aim is also to open public procurement contracts to competition, which requires that contract notices be advertised throughout the Community, giving "economic operators" in the Community information on the object and the conditions of the contract planned and allowing them to tender.[514] The procurement directives have thus a dual aim, first

[510] Commission, "Completing the Internal Market" (White Paper to the European Council Brussels, 14 June 1985) COM (85)310 final, points 81-87.

[511] Measure having equivalent effect, Dassonville.

[512] Article 34 TFEU prohibits quantitative restrictions on import of goods and all measures having equivalent effect and the Court of Justice has established in *Dassonville* that such measures include "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade", see Case 8/74 *Dassonville* [1974] ECR 837, para.5.

[513] See Recital 2 in the 2004 Public Sector Directive and Recital 9 in the 2004 Utilities Directive. Emphasis has been added to signal that the understanding of the relation between the fundamental freedoms and the principle of equal treatment seems to differ in EU procurement directives compared to the views of the CJEU, as will be seen supra.

[514] See Recital 9 in the 2004 Utilities Directive and Recital 36 in the 2004 Public Sector Directive.

to ensure free movement of goods and services, and second to ensure effective competition in the field of public contracts.

The 2004 procurement directives apply to all contracts for pecuniary interest concluded in writing between one or more contracting authorities/entities and one or more economic operators.[515] However they cover only contracts above certain thresholds and only to certain types of contracts. As its predecessors, the Public Sector Directive, which is the only one in focus in this chapter, does in particular not cover service concessions, and imposes only very marginal obligations in relation to service contracts for services in Annex II B to the Directive, such as healthcare and social services, under a long time not "prioritized" by the EU legislator. Nevertheless, the CJEU has taken the view that, in the context of a single internal market and effective competition, it is the concern of Community law to ensure "the widest possible participation" by tenderers in a call for tenders.[516] It has therefore established that the award contracts not or only partly covered by the Public Sector Directive may also be subject to positive obligations following directly from the Treaties.[517]

In *Telaustria*, although first noting that public service concession contracts were covered by the Utilities Directive, the Court found that they were excluded from its scope due to their specific mode of remuneration.[518] In awarding such contracts, the Court held that contracting entities nevertheless bound by the principle of non-discrimination, and to satisfy themselves that this principle was complied with implied an obligation of transparency, consisting in ensuring, for the *benefit of any potential tenderer*, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.[519] In *Vestergaard* the Court confirmed that in awarding contracts below certain threshold values and therefore not covered by the procurement directives, contracting authorities are bound to comply with the fundamental rules of the Treaty and the principle of non-discrimination on the ground of nationality in particular, and this approach is now settled law.[520]

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[515] See Article 1(2)(a) of the Public Sector Directive and Article 1(2)(a) of the Utilities Directive.

[516] Case C-538/07 *Assitur* [2009] ECR I-4219, para.25-26. See also Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, para.2

[517] The relation between these two sources of procurement law is intricate, as the Treaty principles motivate the Directives and therefore have normative effects on the Directives and on their interpretation by the Court of Justice, while the Directives tend to inspire developments in the interpretation of the principles which apply to procurement not covered by the Directives.

[518] C-324/98 *Telaustria AG* [2000] ECR I-10793, para.58. This ruling was confirmed by the Court (Grand Chamber) in the *Coname* ruling, see case C-231/03 *Coname* [2005] ECR I-7287.

[519] Ibid, paras.60-62.Arrowsmith underlines the creativity of this interpretation of Article 56 TFEU by the Court, was intended to better give effect to the objective of that provision in prohibiting discrimination. She recalls that this approach, drawing inspiration from solutions in secondary legislation to interpret the primary obligations of the TFEU themselves, has been called by Treumer and Werlauff the "leverage principle". Arrowsmith S., 2011, p. 37, referring to Treumer and Werlauff, 2003.

[520] Order C-59/00 *Vestergaard* [2001] ECR I-9505, paras.20-21, confirming Case C-324/98 *Telaustria* [2000] ECR I-10793, para.60. Case C-264/03 *Commission* v *France* [2005] ECR I-8831, para.32; and Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, para.33. Case C-231/03 *Coname* [2005] ECR I-7287, paras.16-19; Case C-458/03 *Parking Brixen*

Later in *Parking Brixen* and *ANAV* the Court stated that a complete lack of any call for competition in the award of public service concessions does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of *equal treatment*, non-discrimination and transparency.[521] Thus, contrary to what several legal authors thus far had held, the CJEU took the view that a general principle of equal treatment directly deriving from the Treaties, applies to contracts not covered by the procurement directives.[522] In both rulings, the Court also declared that Article 86(1) EC, now Article 106(1) TFEU, prohibits that the Member States maintain national *legislation* permitting the award of public service concessions without their being put out to competition, and thus in breach of the Treaty principles governing procurement.[523] Thus, not only contracts but also national rules are covered by obligations directly following from EU primary procurement law.

In *Germany v Commission* the General Court – contrary to the views of the German State and many interveners – deemed that the Commission's Interpretative Communication on certain contracts not or only partially covered by the procurement directives rightly transposed the case law of the CJEU on public service concessions, to contracts below the thresholds and to non-prioritized contracts.[524] Consequently the Communication did not go beyond the interpretation of the Treaties made by the Court of Justice by stating that such contracts are covered by the principles of non-discrimination and of equal treatment, and by the corollary duty of transparency.[525] The General Court held that the duty of transparency supposes a basic obligation for the Member States and their contracting authorities, to advertise all contracts before they are awarded.[526]

In light of the above, and if we disregard from the utilities sector for the sake of simplification, a legal situation emerges where both public contracts and national rules affecting such contracts, covered by the procurement directives or not, are subject to the fundamental freedoms and the general principles of the Treaty, in particular non-discrimination and equal treatment, and to a concomitant duty of transparency. The

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[2005] ECR I-8585, paras.46-49; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, para.25; and Case C-206/08 *Eurawasser* [2009] ECR I-8377, para.44.

[521] Case C-458/03 *Parking Brixen* [2005] ECR I-8585, para.50 and Case C-410/04 *ANAV* [2006] ECR I-3303, para.22. Such awards can however escape from the applicability of these Treaty principles, if the concession is to be regarded as a transaction internal to that authority, so called in-house transaction in the meaning of the ruling in *Teckal*, see Case C-107/98 *Teckal* [1999] ECR I-8121, paras.49-51.

[522] Arrowsmith, 2011, p. 79: "If this is correct, it seems to mean that even non-discriminatory procurement measures are caught by the TFEU in the area of public procurement, even to the extent that they are not caught in other fields of activity under the *Keck* principle".

[523] Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paras.51-52 and case C-410/04 *ANAV* [2006] ECR I-3303, paras.21-23.

[524] Commission, "Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives" 2006/C 179/02.

[525] Non-prioritized contracts is the term usually used to designate contracts for services listed in Annex II B to the Public Sector Directive and in Annex XVII B to Utilities Directive.

[526] Case T-258/06 *Germany v Commission* [2010] ECR II-2027, paras.74-84.

concrete requirements imposed on government procurement[527] lack clarity and certainty, but what seems sure is that, *on the basis of the Treaties*,

1. There is an obligation of prior, or *ex-ante*, publication for
   - All future contracts (including service concessions, service contracts for B-services and contracts under the thresholds) must be advertised *before* they are awarded
   - The degree of advertising must be
     - for the benefit of any potential tenderer
     - sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed

2. National legislation may not permit the award of public service concessions without their being put out to competition

As already mentioned, the 2004 procurement directives are now revised by the "new procurement directives", adopted in February 2014 and to be transposed by the Member States into their national law 17 April 2016.[528] These Directives consolidate several elements established by the CJEU'case law. In particular, the divide A/B services has been removed, and the award of social service contracts is now subject to prior notice requirements in the 2014 Public Sector Directive. Also, service concessions are now covered by procurement procedures laid down in the 2014 Concessions Directive, which also covers public works concessions.[529] As a result, what Bovis calls "the porosity of the public procurement directives" has evidently diminished.[530]

5.1.2 "Equal treatment" in primary EU law on procurement: a principle of free movement law or of competition law?

The two objectives to ensure free movement *and* effective competition on government markets are characteristic of EU procurement law, but they may not be pursued on the same premises in secondary and primary law. The procurement directives constitute a policy instrument based on economic views and programs, even though they are constrained by the principle of conferral and necessarily founded on Treaty rules and principles. By contrast, the Court lacks the EU legislator's policy powers and may not formulate primary law procurement rules unless the latter are "organically" justified by the rules of the Treaties and the general principles of EU law. Nevertheless, the CJEU

[527] The expression "government procurement" is borrowed from Arrowsmith, see for instance Arrowsmith S., 2005, p. 181. In the context of this study it means procurement of contracts not necessarily covered by the Public Sector Directive but having as their objects goods/services/works in sectors covered by the Public Sector Directive, and planned or concluded by bodies which are contracting authorities in the meaning of the Public Sector Directive.

[528] Except with regard to e-procurement, where the deadline is September 2018.

[529] The 2014 Concessions Directive; the 2014 Public Sector Directive and the 2014 Utilities Directive.

[530] Bovis C. H., 2012, p. 283.

has used its exclusive powers to interpret the Treaties, and made intensive use of the principle of equal treatment to push forward the aim to secure competition on procurement markets.[531]

In *Ruckdeschel,* the Court of Justice formulated that equality is one of the fundamental principles of Community law and requires that "similar situations shall not be treated differently unless differentiation is objectively justified".[532] This understanding was described as settled case law in *Uberschär.*[533] In *Commission v Italy*, the CJEU began referring to the principle of equal treatment as a principle underlying the aims of EU procurement law, Articles 43 EC and 49 EC being specific expressions of this principle.[534] In *Storebaelt*, the Court adopting the Commission's view and stated in that "although the directive [on the award of public works contracts[535]] makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble, to ensure in particular the development of effective competition in the field of public contracts".[536] Since then, the Court has often emphasized that EU procurement legislation had been adopted to establish an internal market, in which freedom of movement is ensured and restrictions on competition are eliminated[537], and that its own spirit is to serve the *dual* aim of EU procurement law by opting for interpretations opening up public contracts to *the widest possible competition.*[538]

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[531] The principle of equal treatment has namely been found to apply in different fields of EU law, but in Arrowsmith's words, "in specific contexts on specific grounds". Arrowsmith S., 2005, p. 425. Concerning what he called the "principle of equal treatment or non-discrimination", Tridimas held that it has constitutional status, is binding on the Community institutions and that a measure, whether legislative or administrative, which infringes it is illegal and may be annulled by the Court. It is also binding on Member States. Tridimas, 1999, p. 4.

[532] Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, para.7. The prohibition of discrimination in the Treaty provision at issue in the case, laying down the objectives of the common organization of agricultural markets (now Article 40(2) second indent TFEU) was according to the Court merely a specific enunciation of this general principle.

[533] Case 810/79 *Überschär* [1980] ECR I-2747, para.16. This ruling cannot be found in English, the French words are "jurisprudence constante de la Cour". In that case, the principle of equal treatment was applied to the obligation imposed by a Member State to its nationals, to pay pension fees for pension corresponding to periods when this person had been employed in other Member States and already paid pension fees for these periods there.

[534] Case 3/88 *Commission* v *Italy* [1989] ECR 4035, para.8. According to the Court, the prohibition on discrimination on grounds of nationality is also a specific expression of the general principle of equal treatment, see Case 810/79 *Überschär* [1980] ECR I-2747, para.16.

[535] Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, repealed by Directive 2004/18/EC [1971] OJ L185/5.

[536] See Case C-243/89 *Storebaelt* [1993] ECR I-3353, para.33. This was reiterated in the *Walloon Buses* ruling. See Case C-87/94 *Walloon Buses* [1996] ECR I-2043, para.51. In Case C-16/98 *Commission v France* [2000] ECR I-8315, paras.103-109, Arrowsmith argues that although the Court did not use the words "equal treatment", it was in fact referring in that ruling to the principle of equal treatment, as AG Jacobs had explicitly invoked the principle in reference to *Walloon Buses.* See Arrowsmith S., 2005, p. 425.

[537] Cases in point are for instance Case C-538/07 *Assitur* [2009] ECR I-4219, paras.25-26 and Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, para.2.

[538] See Case C-26/03 *Stadt Halle* [2005] ECR I-1, para.47.

The CJEU has presented the principle of equal treatment *as derived from internal market principles*, and in AG Trstenjak's view, a "competition intention" is embedded in the principle of equal treatment in the field of public procurement, and is intended to afford *equality of opportunity to all tenderers* when formulating their tenders, regardless of their nationality.[539] However, it is submitted that the Court has rather "grafted" the aim of competition onto the fundamental freedoms, which made it easier to impose advertisement obligations on public authorities, as it did in *Telaustria*, and was arguably less sensitive than a competition approach.[540] In fact, the view that the principle of undistorted competition underlying EU competition law has been grafted on free movement principles gets support from the terminology used by the Court.[541] Nowadays, the principle of equal treatment invoked as underpinning the aim of effective competition in EU procurement law is more or less constantly connected in the Court's case law to the aim of "*undistorted* competition", although this notion is actually absent from both procurement directives.[542] EU procurement rules are now routinely presented by the Court as underpinned by "undistorted" rather than just "enhanced" competition, thereby more openly connected to the principle that the internal market includes a system ensuring that competition is not distorted, now laid down in Protocol nr. 27 to the Treaties.

This reference to "undistorted" competition appears firstly in cases where the Court interprets the procurement directives. In *Stadt Halle*, the Court holds the principal objective of the Community rules on procurement of public service contracts to be "the free movement of services and the opening-up to the widest possible *undistorted* competition in all the Member States".[543] The Court has also used this terminology in

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[539] Opinion of AG Trstenjak in Case C-160/08 *Commission v Germany* [2010] ECR I-03713, para.101, referring to Case C-458/03 *Parking Brixen* [2005] ECR I-8585, para.48.

[540] Enchelmaier observed that the Court, since the early days of its jurisprudence, has emphasised that "the Treaty's rules on competition and on free movement are complementary" and "refined this position in the meantime, but never abandoned it". He cites the Court's view in Joined Cases C-56/64 and C-58/64 *Consten and Grundig v Commission* [1966] E.C.R. 299, para.340: "The Treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers." See Enchelmaier S., 2011, p. 616.

[541] Regarding this influence of the principle of competition on the interpretation of the fundamental freedoms, a parallel may perhaps be drawn with the principle of mutual recognition established by the CJEU regarding non-discriminatory restrictions of the fundamental freedoms. The principle of mutual recognition may arguably also be regarded as a specific expression of the principle of equal treatment, applying to the Member States in regulating goods or services supplied or provided on their territory, a principle from which the Member States may justify derogations on the basis of mandatory requirements or overriding reasons related to the general interest. For an overview of this line of case law, see Craig P. and De Búrca G., 2008, p. 677-684, 801-803 and 831-834.

[542] The concern that certain procurement measures may distort competition appears in the recitals of both directives, but not the general aim of "undistorted competition".

[543] Case C-26/03 *Stadt Halle* [2005] ECR I-1, paragraphs 44 and 47. In *SAG ELV*, the Court points out that "[w]ith regard to Article 2 of Directive 2004/18 /.../ the principal objectives of the European Union rules in the field of public procurement include that of ensuring the free movement of services and the opening-up to *undistorted* competition in all the Member States (emphasis added)", see Case C-599/10 *SAG ELV* (CJEU 29 March 2012), para.25. In *Mehiläinen* the Court recalls its case law establishing that the award of a public contract to a semi-public company without a call for tenders interferes with the objective of *free and undistorted* competition and the principle

connection with procurement not regulated by secondary law, but by primary procurement law. Thus in *Acoset*[544], which concerned the award of a service concession for the integrated management of water, the Court found that the award of a public contract to a semi-public company without a call for tenders would interfere with the objective of *free and undistorted* competition and the principle of equal treatment., "in that such a procedure would offer a private undertaking with a capital holding in that company *an advantage over its competitors*" (emphasis added).[545] The "widest possible and *undistorted* competition" approach is thus also seen as a way to avoid procurement procedures giving an unfair advantage – comparable to state aid – to one or some operators to the detriment of all others. This seems confirmed by the Court's view that the rationale of the review procedures imposed by Directive 89/665 is to ensure, "for traders in the Members States, the opening-up to competition which is *undistorted and as wide as possible*" (emphasis added).[546]

As to the General Court, it took the view, in *Commission v Germany*, that the principle of equal treatment covers an *aim of equal access for economic operators from all Member States*, as was assumed by the Commission in its communication on EC law applicable to contract awards not or not fully subject to the provisions of the public procurement directives.[547] That aim, stated the GC, "is designed to ensure that traders, of whatever origin, have equal access to contracts put out to tender" and "derives from compliance with the principles of freedom of establishment, freedom to provide services and *free competition* /.../ and, in particular, with the *principle of equal treatment*".[548] In this statement, the relation between the principles invoked is imprecise, but what is clear is that the GC includes the principle of free competition among the principles of EU procurement law – secondary and primary – governing the award of contracts by public entities.[549]

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of equal treatment, by giving a private undertaking with a capital holding in that company an advantage over its competitors, see Case C-215/09 *Mehiläinen Oy* [2010] ECR I-13749, para.41.

[544] Case C-196/08 *Acoset* [2009] ECR I-9913, para.56.

[545] Ibid, para.56 with reference to Case C-26/03 *Stadt Halle* [2005] ECR I-1, para.51, and to Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, para.48. Under paragraph 44 in *Stadt Halle* the Court "recalled" that the principal objective of the Community rules in the field of public procurement (applicable to public service contracts at issue in the case) is "the free movement of services and the opening-up to *undistorted* competition in all the Member States".

[546] Case C-570/08 *Symvoulio Apochetefseon Lefkosias mot Anatheoritiki Archi Prosforon* [2010] ECR I-10131, para.30; Case C-337/06 *Bayerischer Rundfunk* [2007] ECR I-11173, paras.37-39. In *Bayerischer Rundfunk*, the Court evoked the protection the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State as a consequence of the objective to eliminate barriers to the *freedom to provide services and goods*, see para.38.

[547] Commission, "Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives" 2006/C 179/02.

[548] Case T-258/06 *Germany v Commission* [2010] ECR II-2027, para.116, emphasis added.

[549] The GC referred in this respect to AG Léger in in Case C-44/96 *Mannesmann* [1998] ECR I-73, para.47, "[t]he Community public procurement legislation was developed to ensure, at Community level, respect for the principles of *free competition*, freedom of establishment and freedom to provide services" (emphasis added); this view was also taken up by AG Mischo in his Opinion in Case C-237/99 *Commission* v *France* [2001] ECR I-939, para.49.

According to Sanchez Graells, "the principle of undistorted competition or free competition has always formed a basic part of EU public procurement rules and that it constitutes one of its fundamentals".[550] Yet, in light of the foregoing overview, it appears that the Court has gradually reinforced the weight of competition concerns in primary law on procurement. Indeed, when the Court imposes a duty of prior publication for the award of public contracts not covered or only partially covered by the procurement directives, as a means to ensure "undistorted competition", it connects procurement rules in primary law to the competition objectives which essentially found the competence of the Union to regulate competition. This is also the case when the Court refers to Article 106(1) TFEU when it imposes on the national legislator obligations of prior publication for the award of public contracts not covered by the directives, as it did in *Parking Brixen*.

To elevate equal treatment from an objective to a principle of EU procurement law appears to have given the CJEU a judicial margin to contribute to liberalize certain activities of the public sector which it otherwise would have lacked, but the Court must arguably make careful use of a principle which brings it on the sensitive and policy-governed area of competition law.[551] The possibility to deduce positive obligations from free movement principles is limited whilst the Court has progressively established the *objective* of "undistorted competition" in EU primary procurement law, it may be controversial to refer explicitly to a "principle of competition" in sectors or forms of procurement where the EU legislator has not, at least implicitly, based its policy on it.

What seems sure is that the CJEU has actively pursued the task of "grafting" a principle of undistorted competition onto EU procurement law, through the overarching principle of equal treatment. The axiom is nowadays that primary law rules on procurement follow from *two sets of principles*, the fundamental freedoms *and* the "general principles of EU procurement law" including in particular equal treatment, which involves that "procurement" is a rather unique example of a concept at the centre of a field of primary EU law without being even named, let alone defined in the Treaties. This rampant "constitutionalisation" of the concept of procurement through its connection to a specific combination of Treaty and Treaty-derived principles may explain the interaction of public procurement with the State aid rules which, as observed by Szyszczak, became even closer after Altmark[552], and the considerable importance which EU procurement law has today for the funding of social services in the public sector. In the present state of EU law, evidence of the principle of competition in EU

[550] Sánchez Graells, A., 2011, p. 195.

[551] Bekkedal explains that if the obligation "not to" inherent to competition rules is redefined and redirected towards the State, the competition rules may establish some kind of right to free competition. However, from a constitutional point of view, Courts protect liberty through the principle of legality but do not consider how much freedom of competition is enough freedom. Thus, while the four freedoms are "taken seriously" by the CJEU, the notion of "free competition" is much more "blurred". See Bekkedal T., 2011, p. 69.

[552] See Szyszyczak E., 2013, p. 336. A variation on this theme is the view, put forward by Buendia Sierra and Smulders, that the "DNA" of state aid rules – the Treaty rules on competition addressed to the Member States — "shares more chromosomes with internal market rules than with antitrust rules", see Buendia Sierra J.-L. and Smulders B., 2008, p. 9.

procurement law seems easiest to find in the introduction, definition and use of the notion of "economic operator" in the current procurement directives and its interpretation in the more recent case law of the CJEU, examined in section 5.2.

5.2 Relevance of the transaction's economic character for the applicability of EU procurement law: the notion of "public contract" in the Public Sector Directive

Building up on the finding that primary EU law on procurement builds explicitly on the principle of equal treatment and more implicitly on a "principle" of undistorted competition, an attempt is made in this section to identify "what has to be economic" for primary EU law on procurement to be applicable to any activity, even in the field of social services. As "procurement" is not defined in the Treaties, and is not defined in EU procurement legislation in force until April 2016, what is essentially sought with procurement must arguably be found in the notion of "public contracts" as defined in the 2004 procurement directives. For that reason, the analysis in that section has its focus on (1) the notion of "contract" in the 2004 Public Sector Directive and (2) in the exemptions from EU law on procurement formulated by the CJEU. For the sake of simplicity, and given the similarities with the Public Sector Directive in relevant aspects, the Utilities Directive is not in focus at all in this section.

5.2.1 In which sense must an activity be economic to trigger the applicability of the Public Sector Directive?

The Public Sector Directive applies to the award of "public contracts", defined as

> [c]ontracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive

This involves that the Directive is applicable when what is planned is (1) a contract (2) for pecuniary interest (3) in writing (4) between one or more economic operators and one or more contracting authorities/entities and (5) having as its object the execution of works, the supply of products or the provision of services within the meaning of the Directive.[553] Criteria (2) and part of (4) economic include salient economic of "pecuniary interest" and "economic operators". However, all elements in this definition are given attention in the frame of the question addressed in the title of this section, alone or in

[553] "Supply, works and service contracts" are defined in Article 2(a) in the 2004 Utilities Directive as "contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers". "Contractors, suppliers or service providers" are "economic operators" in the meaning of the 2004 Utilities Directive, see Article 1(7) second paragraph.

combination. The CJEU's interpretation of these criteria is examined in the three following sections, first criteria 1/4/3, second 2/5, and lastly, the notion of "economic operators".

5.2.1.1 A contract, concluded by a contracting authority, in writing

The Public Sector Directive will not apply unless the arrangement is a contract and is formulated in writing (the two criteria of requirement (1) above, a combination of functional and formal conditions). Also, one part to this arrangement must act in the capacity of "contracting authority", and thus act on the basis of public powers (part of requirement (3) above).

The requirement that the transaction is a contract can be understood as implying a certain degree of autonomy for both parts to the agreement. Autonomy on the supplier's side is required as it is the very essence of the fundamental freedoms which it is the Directive's aim to ensure. Autonomy on the demand side is also required, because this autonomy is precisely what EU procedural rules aim at regulating, their "raison d'être".

The fact that one part acts on the basis of its public powers involves that certain essential conditions of the arrangement to be concluded, may legally be imposed by one part acting on the demand/purchasing side. This special capacity is related to the missions of general interest incumbent on this part, on the basis of democratic decisions. This is clear from the definition of "contracting authority", including what can be regarded as the "daughter concept" of "body governed by public law", which must have been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. Thus, although state bodies and bodies under their control may in many Member States act both as authorities and as market operators, the criterion of "contracting authority" lays emphasis on the fact that for the purpose of the Directive, they engage into the contract in the frame of their function as public authorities, and thus primarily not for commercial purposes. This is not any contract, but a "*public* contract". As already seen, this "public aim presumption" in contracting authorities' purchase on the market was established by the CJEU in *FENIN*.[554]

Indeed, certain limitations in the consensual nature of the arrangement do not affect its characterization as contract for the purpose of the procurement directives. This was the case in *La Scala*, where the Court examined whether national urban development legislation, under which the holder of a building permit or of an approved development plan was relieved from the duty to pay a building permit fee if this holder executed infrastructure works directly, was covered by the Public Sector Directive.[555] AG Léger held that the rule at issue did not amount to a public contract, as "the procedural

[554] See section 4.3.2.1, where it is explained that the Court of Justice the economic character of activities consisting in purchasing goods or services on a market, must be determined according to whether or not the subsequent use to which they are put amounts to an economic activity.

[555] Case C-399/98 *La Scala* [2001] ECR I-5409.

formalities of Community law on public contracts are justified only if the contracting authorities enjoy a degree of latitude in appointing economic operators. Otherwise, those constraints would be deprived of their justification, namely the risk that freedom of movement and freedom of competition might be undermined".[556] As the municipal administration had no freedom to intervene in the case at issue, regarding either the choice of contractor or relations with that contractor during the performance of the contract, the AG regarded the condition relating to the contractual nature of the legal relationship as not satisfied.[557]

The Court agreed that the municipal authorities were not free to choose the other party to the contract since by law that person had to be the owner of the land in question, but went against AG Léger and decided that there was a public contract when the authorities and the developer concluded a specific development *agreement* specifying terms and conditions for the developer's execution of infrastructure works, including a condition of approval by the municipality. Through that agreement the municipality acquired legal rights over use of the works and could make them available to the public.[558] The Court's argumentation shows that the element of autonomy in the contract can be found *even when it does not include the choice of the provider* and is limited to the object and terms of the works/services/goods for which the provider receives compensation. As underlined by Arrowsmith, the Court ruled briefly that the fact that a contract was governed by public law and involved the exercise of public powers, including unilateral powers of modification, did not preclude the existence of a contract.[559]

In line with the Court's approach in the field of competition law, it is submitted that the economic nature of the transaction does not seem to require strong elements of autonomy to be at hand, and that the Court's approach of the notion of public contract is in that respect "functional". However, a formal element is that the contract must be "in writing", which in the Public Sector Directive means "any expression consisting of words or figures which can be read, reproduced and subsequently communicated" including "information transmitted and stored by electronic means".[560] Arrowsmith believes that the Directive's requirement that the contract be in writing could give rise to difficulties of interpretation, and names as one example the case where a verbal contract refers to some standard written terms. She finds difficult to see any justification for limiting the procurement directives to written contracts.[561]

5.2.1.2 A pecuniary interest for the provision of supply goods, services or works

[556] Opinion AG Léger in Case C-399/98 *La Scala*, para.77. AG Léger insisted that "the freedom to choose is also the freedom to discriminate".

[557] Ibid, paras.79 and 85.

[558] Case C-399/98, *La Scala* [2001] ECR I-5409, para.71.

[559] Arrowsmith S., 2005, p. 285.

[560] Article 1(12) of the 2014 Public Sector Directive.

[561] Arrowsmith S., 2014, p. 394.

In the definition of "public contracts", requirement (2) – a pecuniary interest – and requirement (5) – the contract's object is the execution of works, the supply of products or the provision of services within the meaning of the Directives – reflect that the transaction's object must be a "quid pro quo" exchange of remuneration against works, products or services, or in the Commission's words, a "synallagmatic relationship".[562] As underlined by AG Trstenjak, this reciprocity of the contractual relationship is necessary for the requirement of a tendering procedure to apply[563], and the "quid pro quo" element is essential in the functional connection established by the CJEU between EU state aid rules applying to public service obligations and the application of EU procurement rules in *Altmark*.[564]

The requirement of "pecuniary interest" is essential for the applicability of the Directive, as it indicates that a remuneration must be offered and thus that a commercial transaction is possible. As seen in chapter 3, the possibility to be subject to commercial transactions is precisely what characterizes goods and services in the meaning of the Treaties. Thus the fact that a contracting authority *offers* remuneration and gives an opportunity of commercial transaction on specific services/goods/works is crucial to explain how the Directive - and in fact any obligation of EU procurement law – can apply even to services thus far considered as non-economic for the purpose of the fundamental freedoms, as emphasized by Hatzopoulos. *Even before the contract is awarded*, the remuneration envisaged by the contracting authority makes a commercial transaction "possible" and thus its object *becomes* services or goods in the meaning of the Treaties through the very planning of such a contract. If operators tender, if will be proof that the service *can be* provided for remuneration, can be economic, and therefore the procedure is covered by EU free movement principles, regardless of whether its object constituted services or goods in the meaning of the Treaties before the contract was planned and any procedure of procurement launched.

In convergence with the notion of "state resources" in the field of state aid, the Court's view is that a public contract's pecuniary interest needs not take the form of direct payment but may also consist in escaping an amount due, as long as it constitutes *consideration* for the provision/supply of services/goods. Thus, in *La Scala*, the Italian urban development legislation allowed the holder of a building permit or of an approved development plan to execute infrastructure works directly, and deduce the costs for these works from the contribution due to the municipality of Milano for obtaining the building permit. The Court considered that by financing and executing infrastructure works, a holder of a building permit or an approved development plan could thus settle

562 Commission, Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation') COM (2011) 1169 final, p. 19.

563 Opinion of AG Trstenjak in Case C-159/11 *Lecce* (CJEU 19 December 2012), para.30.

564 Bovis remarks that, in the CJEU's case law on state aid, "the *quid pro quo* approach distinguishes between two categories of State funding; in cases where there is a direct and manifest link between the State financing and clearly defined public services, any sums paid by the State would not constitute State aid. On the other hand, where there is no such link or the public service obligations are not clearly defined, the sums paid by the public authorities would constitute State aid." Bovis, C. H., 2006, p. 482.

a financial obligation (debt) towards the municipality and was thus not providing any service free of charge.[565]

More importantly, in convergence with the notion of remuneration in the field of free movement law, the Court of Justice (Grand Chamber) made clear in *Lecce* that a public contract's pecuniary interest exists even where the remuneration is limited to reimbursement of the expenditure incurred to provide the agreed service.[566] The Court referred to the reasoning of AG Trstenjak[567], advocating a "broad understanding" of the notion of "pecuniary interest" as a way to open markets to genuine competition, and implying that the service provider may not absolutely be required to be profit-making.[568] The Advocate General reflected that such a broad interpretation would be "in line with the broad definition adopted by the Court for freedom to provide services under Article 56 TFEU", and logical in view of the fact that the Public Sector Directive "is intended to serve the fundamental freedoms in the internal market". Thereby the Advocate General was arguably pointing at the fact that unless the pecuniary interest is "at least" remuneration in the very broad meaning this notion has been given by the CJEU, the Directive could not apply, because it would exceed the powers of the Union under the Treaties. Indeed, the Court's broad interpretation of "pecuniary interest" in *Lecce* fits well with the Court's view in *Jundt* that an activity is economic in the meaning of free movement law as soon as it is not provided for nothing.[569] Beyond the evident search for convergence searched by the Court between the notions of "pecuniary interest" and "remuneration" in *Lecce*, the AG's reasoning sheds light on the fact that the requirement for pecuniary interest is fulfilled inasmuch as that the minimum criteria for a remuneration in the meaning of Article 57 TFEU are fulfilled.

It has been argued in chapter 3 that the notion of economic activity in the meaning of free movement law on services, i.e. "provision for remuneration", has an "economic operator's perspective". By contrast, the notion of "pecuniary interest" is not related to the *provider's activity* but instead has its focus on the economic character of the *procurement transaction*. This explains that the CJEU's position in *Helmut Müller* that, for the purpose of the Public Sector Directive, the pecuniary nature of the contract means that the contracting authority which has concluded a public work contract receives a service pursuant to that contract in return for consideration.[570]

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[565] Case C-399/98 *La Scala* [2001] ECR I-5409, paras.84-86.

[566] Case C-159/11 *Lecce* (CJEU 19 December 2012), para.29.

[567] Opinion of AG Trstenjak in Case C-159/11 *Lecce*, paras.32 and 34.

[568] Ibid, para.33.

[569] Case C-281/06 *Jundt* [2007] ECR I-12231, para.32.

[570] Case C-451/08 *Helmut Müller* [2010] ECR I-2673, para.48. Such a service, continued the Court, must by its nature be of "direct economic benefit" to the contracting authority. This economic benefit can be established (1) where the public authority is to become owner of the work which is the subject of the contract, (2) where the contract provides that the contracting authority is to hold a legal right over the use of the works which are the subject of the contract, in order that they can be made available to the public, and (3) where the contracting authority may derive economic advantages from the future use or transfer of the work, in the fact that it contributed financially to the realisation of the work, or in the assumption of the risks were the work to be an economic failure. See paragraphs 49, 51 and 52.

Thus, the Court interprets the requirement of "pecuniary interest" as meaning that there is no public contract unless the exchange has an economic interest both for the provider and for the contracting authority. However, it must be noted that, while contracting authorities are certainly engaged in an economic *transaction* for the purpose of free movement law, it does not mean that they conduct an economic *activity* for the purpose of competition law. Indeed, the requirement of a "pecuniary interest" implies what AG Trstenjak calls a "remuneration obligation" on the part of the contractor[571], but it may be doubted – and is doubted by several legal authors – that EU procurement law *requires* that contracting authorities/entities engage in procurement with the objective of "value for money"[572], in other words an economic objective. As already evoked, it is anyway clear from *FENIN* that the CJEU does not consider procurement to be automatically an economic activity in the contracting authorities/entities perspective.[573] Besides, in the *Italian ambulances* case, Caranta notes that the CJEU found that the existence of a "pecuniary interest" cannot be ruled out when the remuneration given to the service providers exceeds the costs shouldered by the same provider.[574]

In sum, the requirement of "pecuniary interest" may be seen as mirroring the economic interest of the operators, and the interest of the contracting authorities to acquire goods, services or works having economic value. It appears that the requirement is understood by the CJEU broadly, in line with the Court's interpretation of the notion of remuneration in free movement law. However, a key difference between the notion of "remuneration" in free movement law and the notion of "pecuniary interest" in procurement law, is that "remuneration" is only related to the provider, while "pecuniary interest" is related to the provider and the contracting authority. For the applicability of the Treaty rules on free movement, a decisive factor is that contracting authorities plan

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[571] See Opinion of AG Trstenjak in Case C-159/11 *Lecce* (CJEU 19 December 2012), para.31.

[572] Indeed, a number of academics argue that the objective of efficient competition in EU procurement *law* should not be confused with the objective of "value for money", albeit the fact that procurement *measures* often have precisely that objective. They admit that EU procurement rules can generate welfare benefits but, as they grow in detail and complexity, they underline that these rules also *cost* considerable public and private resources in time and money and in certain cases deprive contracting authorities from the discretion needed to conduct a policy of value for money. For instance Arrowsmith holds the view that the EU procurement rules are not directed at achieving value for money *per se* in a way that is separate from internal market objectives. Better value for money is instead intended to follow from the internal market. She argues that, in the present state of EU law, it does not lie within Union competence to pursue objectives such as the wise expenditure of public money and the improvement of the quality of public services. See Arrowsmith, 2011, p. 60. See also the critical discussion of Arrowsmith 2005, p. 171-179. The CJEU is of course well aware of this debate on the restrictive and costly effects, in terms of time and money, as clear from a comment of AG Léger in Case C-399/98 *La Scala* [2001] ECR I-5409, para.59.

[573] Case T-319/99 *FENIN v Commission* [2003] ECR II-357, para.36. In paragraph 37 the Court expresses its view that an organization does not act as an undertaking simply because it is a purchaser in a given market. Consequently, in a procurement transaction, the public buyer is not as such considered an undertaking subject to EU competition rules. This view was confirmed in the appeal Case C-205/03 P *FENIN* [2006] ECR I-6295, para.26, but also in Case T-155/04 *SELEX* [2006] ECR II-4797, para.65 and Case C-113/07 P *SELEX* [2009] ECR I-2207, paras.102 and 114. It may be noted that the Court has also established in *Bodson* that public authorities awarding exclusive concessions are not either engaged in economic activity for the purpose of EU competition law. See Case 30/87 *Bodson* [1988] ECR 2479, para.18.

[574] Caranta, FIDE 2014, p. 90-91, with reference to Case C-119/06 *Commission* v *Italy (Italian ambulances)* [2007] ECR I-168, paras.50 f.

to offer remuneration to non-state actors in exchange for the supply of goods, services or works. It implies that operators are thereby in a position to decide whether they wish to provide services, goods or works *de facto* for remuneration. In the frame of the contract, their activity – if it is a service – will consist in providing a service against remuneration, and thus constitute an economic activity in the meaning of free movement law.

The question is whether operators' activity had to be economic before they were part to the transaction, which is related to the notion of "economic operators" in the definition of "public contract", analysed in the next section.

5.2.1.3 Economic operators

The notion of "economic operators" is not only present in the definition of "public contract" but also central in the general principles of awarding contracts laid down in the Public Sector Directive, requiring that

> Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way[575]

Thus, the general principles for the award of contracts have their focus on the economic interest of economic operators to have equal access to economic opportunities offered by contracting authorities. This focus reflects the CJEU's central rationale in imposing a duty of transparency and in substance a "sufficient degree of advertising" to secure the "equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality", or simply the benefit of any potential tenderer.[576]

The notion of "economic operator" was introduced in the procurement directives in their versions of 2004, but it is submitted that the Commission since a long time considers the notion of "economic operator" to have about the same meaning as the concept of "undertaking" for the purpose of competition law. Thus Articles 2 and 3 in Commission Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment – based on Article 90(3) EEC, now Article 106(3) TFEU uses the terms "economic operator" and "undertaking" apparently synonymously.[577] Perhaps as a consequence of the Commission's use of the term "economic operator", the concept begins to appear in the 1980's in the CJEU's case law

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[575] See Article 2 of the 2004 Public Sector Directive. The same provision, directed instead to "contracting entities", is found in Article 10 of the 2004 Utilities Directive.

[576] See Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paras.33 and 54, and Case C-324/98 *Telaustria* [2000] ECR I-10793, para.62.

[577] As France questioned the legality of this directive, the Court stated in *France* v *Commission* that "a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various *economic operators*" (emphasis added). See Case C-202/88 *French Republic v Commission of the European Communities* [1991] ECR I-1223, para.51.

related to breach of competition rules. The Court and the Advocate Generals have later used the term "economic operator" in the meaning of "undertaking" in quite many competition cases.[578] Also, these terms seem to have been used synonymously in statements made by the CJEU in *Corbeau* and later in *MOTOE* which both dealt with the justification of exclusive rights on the basis of Article 106(2) TFEU.[579] In procurement cases, the term "economic operator" was used by AG Fennelly in *Telaustria*[580], and by AG Léger in *La Scala*[581], before it was introduced in the procurement directives.

The notion of "economic operator" is defined in the Public Sector Directive as follows:

> The terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.
> The term "economic operator" shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification. An economic operator who has submitted a tender shall be designated a "tenderer". One which has sought an invitation to take part in a restricted or negotiated procedure is a "candidate".[582]

The statement in the second subparagraph that the term "economic operator" is used *merely in the interest of simplification* is at odds with a simple reading of the first subparagraph of this provision in combination with the first sentence of the second subparagraph. To be sure, this combined reading defines the term "economic operator" as "any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services".

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[578] See Opinion of AG Ruiz-Jarabo Colomer in Case C-333/94 P, *Tetra Pak International SA v Commission of the European Communities* [1996] ECR I-5951, para.60, where the AG obviously uses the term "economic operator" as a synonym of "undertaking" for the purpose of Article 86 EEC prohibiting abuse of dominant position. See further the General Court's synonymous use of "economic operator" and "undertaking" in a case on concerted practice, Case T-1/89 *Rhône-Poulenc SA v Commission of the European Communities* [1991] ECR II-867, para.103. See also, to the same effect, the Court of Justice's rulings in competition cases: on concerted practice, Case C-49/92 P *Commission of the European Communities v Anic Partecipazioni SpA* [1999] ECR I-4125, paras.116 and 121 ; on state aid, Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, para.75.

[579] See Case C-320/91 *Corbeau* [1993] ECR I-2533, para.14 with for a statement very similar to the statement of the Court in Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECR I-04863, para.44: "Article 86(2) EC allows Member States to confer, on *undertakings* to which they entrust the operation of services of general economic interest, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by *other economic operators* are necessary to ensure the performance of the particular tasks assigned to the undertakings holding the exclusive rights." (emphasis added)

[580] Opinion of AG Fennelly in Case C-324/98 *Telaustria* [2000] ECR I-10745, paras.39-40.

[581] In his Opinion in Case C-399/98 *La Scala* [2001] ECR I-5409, AG Léger writes under paragraph 77: "Indeed, the procedural formalities of Community law on public contracts are justified only if the contracting authorities enjoy a degree of latitude in appointing economic operators." (emphasis added)

[582] See Article 1(8) of the 2004 Public Sector Directive and Article 7(2) of the 2014 Utilites Directive.

Thus the term "economic operator" is in fact a legal concept with a defined substance in the Public Sector Directive. This is also the way it was approached in *CoNISMa.*[583]

In *CoNISMa*, the referring court referred to *Auroux*[584], where the CJEU had found that a semi-public urban development company "as an economic operator active on the market which undertakes to execute works provided for in the agreement", had to be regarded as a contractor within the meaning of the Public Sector Directive, and asked:

- Whether the Directive precluded a consortium made up solely of universities and public authorities from tendering for the award of a service contract,
- Whether the Directive's definitions of "public contract" and "economic operator" precluded national legislation reserving participation in public procurement procedures to providers offering services on the market on a systematic and commercial basis, and excluding entities such as universities and research institutes, which are primarily not-for-profit.

The CJEU began by noting that such a restrictive interpretation of the notion of "economic operator" would imply that contracts concluded between contracting authorities and bodies which are primarily non-profit-making would escape the EU rules on equal treatment and transparency, which would be inconsistent with their aim.[585] It argued that the notion of "economic operator" must be interpreted broadly in order to secure a broad applicability of the procedural obligations in the Directives, and gave the following arguments.

First, the Court underlined that the Public Sector Directive itself (i) does not distinguish between tenderers on the basis of whether they are primarily profit-making, (ii) makes clear that "a body governed by public law' can participate as a tenderer in a procedure for the award of a public contract and (iii) grants expressly the status of 'economic operator' to any 'public entity' or group consisting of such entities offering services on the market, and therefore to bodies which are not primarily profit-making, are not structured as an undertaking and do not have a continuous presence on the market.[586] Thus, the EU legislator did not intend to restrict the notion of "economic operators" to operators structured as a business or to impose specific conditions restricting access to tendering procedures, from the outset, on the basis of the legal form and internal organisation of the economic operator.[587]

Second, the Court emphasized that its own case law support a broad interpretation, in order to ensure the widest possible participation by tenderers, in the Community interest of free movement but also the interest of the contracting authority.[588] Consequently, the

[583] C-305/08 *CoNISMa* [2009] ECR I-12129.

[584] Case C-220/05 *Auroux and Others* [2007] ECR I-385, para.44.

[585] Ibid, para.43.

[586] Case C-305/08 *CoNISMa* [2009] ECR I-12129, paras.28-30.

[587] Ibid, paras.34-35.

[588] Ibid, para.37. The Court recalled its own findings that:

Court stated that the notion of "economic operators" *must be interpreted as permitting* the eligibility to tender/candidate also for entities which are primarily non-profit making and do not have the organisation structure of an undertaking or a regular presence on the market.[589]

As quoted above, the notion of "economic operator" is already defined in the Public Sector Directive as "*any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively the execution of works and/or a work, products or services*". Hence, the Court chose to add that "any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract, either directly or by using subcontractors, is eligible to submit a tender or put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis and whether or not it is subsidised by public funds".[590]

As a result, it appears that for the purpose of the Public Sector Directive, tenderers and candidates are economic operators, and thus they offer goods or services on the market[591]. In accordance with the "terms of eligibility" established by the Court in *CoNISMa*, they may be "any person or entity, regardless of whether it is governed by public law or private law, whether it is primarily for-profit or not, whether it is active as a matter of course on the market or only on an occasional basis and whether or not it is subsidised by public funds". Hence, it is submitted that the following definition of the concept of "economic operator" emerges necessarily by combining the Directive's definition and the Court's "terms of eligibility":

> An "economic operator" in the meaning of the procurement directives is any natural or legal person or public entity or group of such persons and/or bodies, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis and

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- Procurement rules are applicable to contracts for pecuniary interest between two contracting authorities, even though a contracting authority in the meaning of the Public Sector Directive does generally not pursue gainful activity on the market (with reference to Case C- *Stadt Halle and RPL Lochau*, para.47 and the case law cited there), para.38
- Candidates or tenderers entitled to conduct the service at issue under the law of the Member State in which they are established, may not be excluded solely on the ground that they do not have the legal form corresponding to a specific category of legal persons (with reference to Case C-357/06 *Frigerio Luigi and C.* [2007] ECR I-12311, para.22), para.39
- Neither the principle of equal treatment nor secondary EU law preclude contracting authorities from allowing bodies which receive subsidies enabling them to submit tenders at prices lower than those of unsubsidised tenderers to take part in procurement procedure (with reference to Case C-94/99 *ARGE* [2000] ECR I-11037, paras.25-26), para.40
- EU law does not require a contractor to be capable of direct performance using his own resources (with reference to Case C-399/98 *La Scala* [2001] ECR I-5409, para.90), para.41.

[589] Ibid, para.45.

[590] Ibid, para.42.

[591] This follows from a combined reading of the first and the third subparagraphs in Article 1(8) of the 2004 Public Sector Directive.

> whether or not it is subsidised by public funds, which offers on the market, respectively, the execution of works and/or a work, products or services.

No doubt, this understanding of the notion of "economic operator" is strikingly similar to the definition of the concept of "undertaking" in the field of competition, encompassing "every entity engaged in an *economic activity*, regardless of the legal status of the entity and the way in which it is financed".[592] This said, an interesting question is whether the status of "economic operator" – almost or perhaps wholly synonymous to the notion of "undertaking" in competition law – follows from tendering or instead entitles to tender. According to Article 1(8) third subparagraph of the Public Sector Directive, an economic operator who has submitted a tender shall be designated a "tenderer", and one which has sought an invitation to take part in a restricted or negotiated procedure is a "candidate". This indicates that operators are supposed to be economic operators *before tendering or candidating*. As the Public Sector Directive requires explicitly that contracting authorities treat *economic operators* equally, non-discriminatorily and transparently, it appears that their obligation begins not when operators have tendered, but *before these operators have tendered or put themselves forward as candidates*, as soon as they are economic operators. When can that be?

In *CoNISMa*, the Court makes clear that it is not the contracting authority's belief but the *entity's* belief that it is capable of carrying out the contract, either directly or by using subcontractors, which founds an entitlement to compete on government markets. Hence, in relation to the contracting authority's offer of economic transaction, the status of economic operator follows from self-employed persons or entities' free decision to offer goods or services on that market – in other words to conduct that economic activity, and thereby be regarded in EU procurement law as "economic operators", which seems equivalent to "undertakings" in the meaning of competition law. Their perception that they are capable of carrying out the contract is a necessary and sufficient condition to found their right to take part to a procedure for the award of public contracts covered by the procurement directives.

The freedom of operators who constitute themselves as "economic" may not be restricted by the contracting authorities/entities, which follows not only from the

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[592] The well-known definition, formulated in case C-41/90 *Höfner* [1991] ECR I-1979, para.21, has been commented above in Section 4.1. It may also be interesting to mention here that, in a recent decision of the EFTA Surveillance Authority – taken after the *CoNISMa* ruling – on the compatibility with state aid rules of the financing of municipal waste collectors in Norway, where municipalities, at the time of the decision, enjoyed a legal monopoly in the field of household waste collection within their respective regions, and precluding private operators from collecting household waste without their authorisation. The ESA took the view that being an "economic operator" for the purpose of the procurement directive implies that a person or entity is also an undertaking for the purpose of the state aid rules. By contrast, when the activity was directly awarded to in-house collectors – a procedure which the ESA had previously found compatible with the functioning of the EEA Agreement – and when at the same time the statutory monopoly prevented all other providers to conduct these services within that municipality, there was neither competition for the market nor competition in the market. Hence municipal collectors did not act as undertakings when they provided household waste collection within their own municipalities, as they could not be seen as offering services *on a market in competition with others*." See EFTA Surveillance Authority Decision No: 91/13/COL of 27 February 2013 on the financing of municipal waste collectors (Norway), points 30-31.

CJEU's ruling in *CoNISMa* but arguably also from provisions in the procurement directives, in particular Articles 1(8) and 2 of the Public Sector Directive and Articles 1(7) and 10 in the Utilities Directive. Whether the operator is actually able to satisfy the conditions laid down in the contract notice cannot at the stage of tendering/candidating, but at a later stage in the procedure.[593] At this later stage of so called "qualification", contracting authorities will select participants on the basis of criteria respecting the principles of non-discrimination, equal treatment and transparency, but they may not limit the right of economic operators to submit tenders or take part as candidates in a negotiated or restricted procedure. As to the Member States where the entities

In *CoNISMa*, confirmed in *Lecce*, the Court emphasized that the Member States can regulate the activities of entities such as universities and research institutes, which are non-profit-making and whose primary object is teaching and research, and inter alia, authorize or not authorize them to operate on the market, taking into account their objectives as an institution and those laid down in their statutes. However, the Court also established that, "if and to the extent that such entities are entitled to offer certain services on the market, they may not be prevented from participating in a tendering procedure for the services concerned".[594] Thus, as soon as a public body (1) is entitled to offer certain services on the market and (2) believes that it is capable of providing this service under the conditions of the contract, its right to take part in procedures for the award of public contracts within the scope of the directives is protected by EU procurement law. By deciding to take part to a market which it is entitled by law to take part to, a public body will be regarded as an "economic operator", conducting an economic activity in the meaning of the procurement directives.[595]

5.2.1.4 Preliminary remarks

Planning to award a "public contract" is what triggers the applicability of the Public Sector Directive, being interpreted by the CJEU as planning a transaction combining (a) the element of autonomy on both sides of the transaction, and (b) the element of pecuniary interest. The two element (a) and (b) seem to constitute the essence of the economic character of the transaction regulated by EU law. The requirement that the contract is in writing is a formal one, and it is suggested here that this requirement may be approached by the Court as allowing to *prove* rather than *constitute* the existence of a

[593] At paragraph 42 in Case C-305/08 *CoNISMa* [2009] ECR I-12129, the Court declares namely: "As the Czech Government correctly observed, whether such an entity is actually able to satisfy the conditions laid down in the contract notice must be assessed at a later stage in the procedure, by applying the criteria set out in Articles 44 to 52 of Directive 2004/18."

[594] Case C-305/08 *CoNISMa* [2009] ECR I-12129, paras.45, 48, 49 and 51, confirmed in Case C-159/11 *Lecce*, (CJEU 19 December 2012), para.27.

[595] It is unsaid in *CoNISMa* and *Lecce* whether a Member State which does not authorize non-profit public bodies to offer certain services on the market, may prevent from participating in tendering procedures taking place on its territory non-profit public bodies from other Member States, which in those Member States are authorized to offer certain services on the market.

contractual situation, which would reflect the role of the requirement of "entrustment" in EU state aid rules, an issue that is developed in chapter 9.[596]

From the analysis above, it emerges arguably that the Court consider as "procurement" the planning of an *economic transaction* between contracting authorities and operators. This implies that what is envisaged is an activity that "*is*" (as opposed to "*can be*") economic both for the purpose of free movement law (provide services/goods for remuneration) and of EU competition law (offer services/good on *that* market).

By planning a procurement, a market situation is opened both in the meaning of free movement and in the meaning of competition. It forces contracting authorities to respect both the exercise of operators' fundamental freedom to provide and to ensure that as "economic operators", as "undertakings in the frame of that market", they are treated equally. The principle of equal treatment of "economic operators" in the Public Sector Directive, in combination with the broad interpretation of the notion of "economic operators" by the CJEU in *CoNISMa* and *Lecce* seems to imply that a very broad range of operators must have access to information on the planned award, even operators that do not normally provide on the market. This may be because they may not legally provide on the market, or because there is no market for that activity in the economic operators' Member State.

In delineating the scope of the concept of "economic operator" in the Public Sector Directive in a way that is extremely similar to the concept of "undertaking", it may seem that the CJEU recognizes *in fact* a freedom for any "potential undertaking" to compete for contracts covered or partly covered by the directives, and have equal access to the award procedure. Considered in those terms, the broad eligibility decided by the CJEU suggests either (1) that the Court has implicitly applied the principle of competition or (2) that, regarding access to contracts covered by the Public Sector Directive, the Court lets the principle of equal treatment have the same effect as the principle of competition. At any rate, in *CoNISMa*, AG Mazak advocated a broad interpretation of the notion of "economic operator" in parallel with the concept of an undertaking in the context of competition law, and thereby emphasized that "competition law and rules guaranteeing fair competition in tendering procedures are [obviously] related".[597]

[596] See section 9.2.2.

[597] Opinion of AG Mazak in Case C-305/08 *CoNISMa* [2009] ECR I-12129, para.29. AG Mazak found this interpretation coherent with the Court's case law aiming at ensuring the widest possible participation by tenderers in a call for tenders AG, see paragraph 35 of the Opinion, reffering to Cases C-213/07 *Michaniki* [2008] ECR I-9999, para.39; C-538/07 *Assitur* [2009] ECR I-0000, para.26 and Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, para.47. It is worth noting that AG Kokott several years earlier in her Opinion in Case C-220/05 *Auroux and others* [2007] ECR I-385, para.50, advocated a broad interpretation of the concept of "contractor" in Directive 93/37/EC (concerning the coordination of procedures for the award of public works contracts, replaced by Directive 2004/18/EC) as she believed that the broad interpretation of the concept of "undertaking" in competition law could be transposed to the field of public procurement.

5.3 Derogations from the applicability of EU procurement rules directly following from the Treaty freedoms and principles

In this context of gradual judicial broadening of the scope of EU procurement rules, the Court's case law excluding from the scope of EU procurement law contracts lacking a certain cross-border interest, in-house provision and public-public cooperation has enormous importance for the workability of EU procurement law and for its acceptance in the Member States. The purpose of this section is to examine the relationship between these doctrines and the criteria determining that the transaction is economic in the dual meaning of EU procurement law.

5.3.1.1 The scope of primary procurement law limited to contracts having a "certain cross-border interest" (economic activity but…)

In *An Post*, the CJEU (Grand Chamber) established that the duty of transparency following from the Treaty principles applicable to procurement only applies to contracts having a "*certain* cross border interest".[598] In *An Post* the specific issue was a contract between the Irish Minister for Social Welfare and the Irish postal service An Post, providing that those entitled under various social benefit schemes could collect their payments from post offices. Based on procedural rules for cases based on Article 226 EC (now Article 258 TFEU[599]), the Commission had the burden of proof for its claim that the contract had cross-border interest and that Ireland had failed to fulfil obligations under the Treaties. In this regard neither a presumption nor a mere statement that a complaint was made to the Commission in relation to the contract in question could constitute sufficient evidence.[600] Later in *Germany v Commission,* the General Court stated however that it is for the contracting authorities/entities to examine case by case whether such a cross-border interest exists or not, which in turn determines how their procurement procedure must be designed.[601]

Although the CJEU may be perceived as ambiguous on that point[602], it is submitted that this *obligation to control the existence of a cross-border interest* supposes a basic view that the award of public contracts *as a principle* must respect the fundamental freedoms of the Treaties. Therefore it is argued that the criterion of "cross-border interest" does not constitute any "safe" exemption rule, but must in fact be understood as an obligation for public authorities in the Member States to proceed to an assessment that is valid only

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[598] Case C-507/03 *Commission v Ireland ("An Post")* [2007] ECR I-9777, para.29.

[599] Matters brought before the CJEU by the Commission alleging that a Member State has failed to fulfil obligations under the Treaties.

[600] Case C-507/03 *An Post* [2007] ECR I-9777, paras.33-34.

[601] See to that purpose the reasoning of the GC in T-258/06 *Germany v Commission*, cited above, paras.86-89.

[602] See Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-03565, para.21: "the application of the fundamental rules and general principles of the Treaty to procedures for the award of contracts below the threshold for the application of Community directives is based on the premiss that the contracts in question are of certain cross-border interest". The Court refers to that effect to Case C-507/03 *An Post* [2007] ECR I-9777, para.29, and Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paras.66-67.

under specific circumstances and is judicially reviewable[603], an obligation that would not exist if the fundamental rules of the Treaty on freedom of movement or the general principle of non-discrimination did not apply. As underlined by Arrowsmith, this case by case approach creates much uncertainty for contracting authorities/entities.[604] The Court of Justice reduced some of this uncertainty by stating in *SECAP* that the existence of a cross-border interest must be assessed in the light, *inter alia*, of its value and the place where it is carried out[605], and this was confirmed by the Court in *Lecce*.[606] Pointing at criteria for the assessment of a cross-border interest does however not provide *per se* a reliable legal framework for actors on procurement markets. The Court clarified that objective criteria, inter alia the estimated value of the contract and the place for its execution, may be laid down in regulation at national or local level, indicating that there is certain cross-border interest.[607] Furthermore, the Court took the view that such regulation can exclude the possibility of a cross-border interest "in a case, for example, where the economic interest at stake in the contract in question is very modest", but must take account of the interest which even low-value contracts located in conurbations situated in different Member States can have in certain cases.[608]

From this case law follows that the Member States cannot rely on the assumption made by the EU legislator that certain contracts "by their nature" lack certain cross-border interest. The responsibility for this assessment lies utterly by the contracting authorities themselves. A certain cross-border interest for a specific public contract or concession cannot be generally excluded on the basis of an assumption made at national or EU legislative level. However, the Member States may adopt regulation based on objective criteria in order to give guidance to contracting authorities on their territory, thus filling some of the gap caused by the parallel development of secondary and primary EU law applying to public contracts and concessions. It seems that the new procurement directives are aimed at taking back some of the lead for this guidance, by establishing a "new assumption" that social service contracts under a specific threshold are not of cross-border interest and therefore need not be published *ex-ante*. Above this threshold, only "their nature" continues to justify lighter constrains on the tendering procedure.

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[603] See, to that effect, Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565, para.30.

[604] See Arrowsmith S., 2011, p. 81.

[605] Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565 paras.20, 21 and 31 and case law cited.

[606] In paragraph 23 of this ruling, the Court stated that, outside the scope of the Public Sector Directive, "the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency apply, provided that the contract concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is carried out", see Case C-159/11 *Lecce*, (CJEU 19 December 2012).

[607] See Case Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-03565, para.31. The English version of this part of paragraph 31 is "*legislation*/.../ at national or local level" (emphasis added). The French version reads "réglementation /.../ au niveau national ou local", and thus includes arguably other instruments than law for laying down such criteria, which seems to make more sense if the criteria are allowed to be set at local level. Therefore the term regulation seems to better reflect the true view of the General Court, and has been chosen here to review it.

[608] See, to that effect, Case C-231/03 *Coname* [2005] ECR I-7287, para.20.

5.3.1.2 The scope of EU procurement law excludes in-house and cooperation between public entities sharing a common task

In *Lecce* the CJEU recalled that it has exempted two main types of transaction from the scope of EU public procurement law.[609] Firstly, the Court has established in *Teckal* that, the existence a contract between a public authority and a person legally distinct from that local authority is not sufficient to justify the applicability of the Directives if it is concluded "in-house", i.e. by a public entity with a person or entity legally distinct from that public entity where, at the same time,

- That entity exercises over the person concerned a control which is similar to that which it exercises over its own departments (the so called "control criterion") and where
- That entity carries out the essential part of its activities with the entity or entities which control it (the so called "activity criterion").[610]

Interestingly, AG Trstenjak held that the motive for an in-house exemption was to be understood as follows

> A public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore *no need* to apply the Community rules in the field of public procurement. [611]

The expression "no need" suggests that, in her view, the EU legislator is free to apply the procurement rules to in-house situations if it decides to liberalize the supply of public services. In fact, it can be questioned whether EU procurement rules *may* apply when a contracting authority provides the services with its own resources.

As seen in section 5.1.1, the Court has established in *Parking Brixen* that obligations of prior publication follow from the principles of EU law directly applicable to the award of public contracts. By grafting equal treatment onto the free movement principles in relation to public contract award, the CJEU has widened EU law's potential to contribute to the liberalization of public services, but the Court was obviously aware that it had to show some restraint in using procurement rules to impose a principle of competition in sectors where Member States retain policy powers. Thus in *Parking Brixen* the Court found that the considerations related in *Teckal* to contracts covered by the

[609] Case C-159/11 *Lecce* (CJEU 19 December 2012), para.31.

[610] Case C-107/98 *Teckal* [1999] ECR I-8121, para.50.

[611] Opinion of AG Trstenjak in Case C-159/11 *Lecce* (CJEU 19 December 2012), para.58, referring to Case C-26/03 *Stadt Halle* [2005] ECR I-1.para.48, emphasis added.

procurement directives could be transposed to service concessions only covered by primary EU procurement law as

> the principle of equal treatment and the specific expressions of that principle, namely the prohibition on discrimination on grounds of nationality and Articles 43 EC and 49 EC, are to be applied in cases where a public authority *entrusts the supply of economic activities to a third party*. By contrast, it is *not appropriate* to apply the Community rules on public procurement or public service concessions *in cases where a public authority performs tasks in the public interest* for which it is responsible by its own administrative, technical and other means, without calling upon external entities.[612]

The CJEU emphasized that this exemption had to be regarded as a *derogation from the general rules of Community law*, which motivates a strict interpretation and that the burden of proof for exceptional circumstance lies on the part relying on them to justify a derogation. Also, and importantly, the Court stressed that public authorities must apply the general rules of EC law when they entrust the supply of *economic* activities to a third party.[613] This should arguably be understood so that regarding an activity which is normally provided for remuneration (a service in the meaning of Article 57 TFEU), it *can be* economic and EU law has "the upper hand", but an in-house transaction may under strict conditions be exempted from the application because it is *not an economic transaction*.

Such non-economic transactions have in common with the notion of non-economic activity for the purpose of EU law that they are characterized by a lack of autonomy and a lack of market orientation on the provider's side, rendering difficult to regard its service provision as "for remuneration", or "offered on a market". Indeed, in *Teckal*, the Court made clear that the procurement Directive in force at that time was *applicable* where a contracting authority planned to conclude a contract *independent of it in regard to decision-making*, and in *Asemfo* the Court found that, where a providing entity has "no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tariff for its services", there can be no public contract and thus the procurement directives cannot apply.[614] Regarding the applicability of EU *primary* law on public procurement to service concessions, AG Trstenjak observes that the CJEU has determined two basic criteria as plainly decisive in determining whether the first of the two *Teckal* criteria could be fulfilled: the degree to which the concessionaire is market

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[612] Case C-458/03 *Parking Brixen* [2005] ECR I-8585, para.61, emphasis added.

[613] Ibid, paras.62-63.

[614] Case C-107/98 *Teckal* [1999] ECR I-8121, para.51, and Case C-295/05 *Asemfo* [2007] ECR I-2999, para.54. In *Econord* AG Cruz Villalón referred to *Asemfo* as an illustration of the CJEU's position that in-house is possible only where the operator has no independence at all from the contracting entity. In his view, the fundamental basis for that exception from the general requirement of a public call for tenders is that there is no 'concordance of two autonomous wills representing separate legal interests'. See Opinion of AG Cruz Villalón in Joined Cases C-182/11 and C-183/11 *Econord* (29 November 2012), paras.43-45.

orientated and the degree of its autonomy, as equivalent to the criteria of independent decision-making in in paragraph 51 of the *Teckal* judgment named above.[615]

Now let us come back to the Court's view in *Stadt Halle* that there is "no need" to apply EU procurement rules to in-house *performance of tasks conferred on it in the public interest*, and in *Parking Brixen* that it is "not appropriate" to apply the EU rules on public procurement to in-house contracts. The interesting questions are why the Court saw a need to limit the effect of procurement law and how it chose to do it. In the quoting from *Parking Brixen* cited above, the Court said itself *what* it found inappropriate: it was to apply the Community rules on public procurement or public service concessions *in cases where a public authority performs tasks in the public interest for which it is responsible*. In other words, the Court related the in-house exemption to general interest services which public authorities are in some manner obliged to supply, and remarkably, it chose to embed this concern in the very definition of "contract for the purpose of procurement". This incorporation of the notion of public service task in the "concepts of entry" of EU market rules, giving the Member States some discretion but not too much, is characteristic of the CJEU's approach related to Article 106(2) TFEU and analysed in-depth in chapter 8.

The second exemption from the application of EU procurement rules named in *Lecce* is the exemption for public-public cooperation. In *Commission* v *Germany*, the Court of Justice (Grand Chamber) exempted namely from the EU public procurement rules contracts establishing cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out.[616] The CJEU confirmed this position and decided that procurement rules *are not applicable* in so far as,

a. The public entities establish their cooperation with the aim of ensuring that a public task that they all have to perform is carried out
b. Contracts are concluded exclusively by public entities, without the participation of a private party
c. No private provider of services is placed in a position of advantage vis-à-vis competitors
d. Implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest.[617]

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[615] Opinion of AG Trstenjak in Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, para.58.

[616] Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747, para.37. Eighteen months before delivering this ruling, the Grand Chamber had rejected the Commission's claim against Ireland, and found "conceivable that [Dublin City Council] provides emergency ambulance services in the exercise of its own powers derived directly from statute. Moreover, the mere fact that, as between two public bodies, funding arrangements exist in respect of such services does not imply that the provision of the services concerned constitutes an award of a public contract which would need to be assessed in the light of the fundamental rules of the Treaty". This case, where the Grand Chamber rejected the AG's reasoning, may arguably be seen as a step towards the Grand Chamber's decision in *Commission v Germany*, although in *Commission v Germany* the Grand Chamber did not refer to *Commission v Ireland*.

Court See Case C-532/03 *Commission v Ireland* [2007] ECR I-11353, para.37.

[617] Case C-159/11 *Lecce* (CJEU 19 December 2012), paras.34-35, referring to Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747, paras. 44 and 47, emphasis added.

As emphasized in this quotation, the Court considers EU rules on public procurement to be "inapplicable", which suggests that, as is argued to be the case with in-house transactions, at least some criterion of *applicability* is not fulfilled.

Here again, it is important to question why the Court has found "appropriate" to admit this exemption and how it has chosen to restrict the applicability of procurement rules. It is evident that this second exemption is also motivated, *by the Court itself*, by the existence of public service tasks which public authorities are in some way obliged to supply. Crucially, the public-public exemption could not be "incorporated" in the definition of contract for the purpose of EU procurement rules, and thus gives more visibility to the existence of a public service task as a decisive criterion. Also the ruling in *Commission v Germany* is analysed in more detail under section 8.2.2.

5.4 Conclusions

It has been described how the CJEU has gradually "constitutionalised" EU procurement law, by elevating equal treatment from an objective of EU legislation to a principle directly deriving from the fundamental freedoms and involving positive procurement obligations under the concomitant duty of transparency. As a result, EU primary law on procurement has two objectives – secure the fundamental freedoms and undistorted competition – and the principle of equal treatment has become a principle of competition in the context of EU procurement law.[618] However, the applicability of advertising obligations following from "the general principles of EU procurement law" requires as a first "basic" test that the activity at least *can be* economic, for instance in the field of services, a service in the meaning of Article 57 TFEU.

As a result of the CJEU's approach, any operator in the EU should in principle have *equal* access to procurement contracts, which can be very wide as the Court has not yet delineated what essential criteria characterize a procurement transaction, in other words defined the notion of procurement. Therefore, an attempt has been made in this chapter to identify these essential criteria, based on the premise that EU primary law on procurement cannot apply unless certain *legal* criteria are fulfilled, by (1) studying the CJEU's interpretation of the criteria of applicability of the Public Sector Directive, which is the planning of a "public contract" and (2) examining the criteria of non-applicability of any EU procurement law, be it primary and secondary law, developed by the CJEU in its case law. The study of the Public Sector Directive's requirement of a public

[618] AG Stix-Hackl holds that "[t]he principle of competition is /…/one of the fundamental principles of Community law on the award of public contracts." Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* [2004] ECR I-9215, para.33. In the view of AG Léger, the principle of free competition is independent of the principle of the freedom to provide services in procurement law, but the two principles are closely related, with the former underpinning the effectiveness of the latter. Opinion of AG Léger in Case C-94/99 *ARGE* [2000] ECR I-11037, footnote 35.

contract shows that the following two elements emerge as essential for a planned transaction to be caught by EU procurement law:

(a) An *agreement between two autonomous wills*, finding a specific expression in the Directive's requirement of a contract. The CJEU appears to interpret this criterion functionally rather than formally, for instance when the authority's autonomy does not include the choice of the provider, or when the provider's autonomy is limited by the fact that the contract involves the exercise of public powers, including unilateral powers of modification.

(b) An *offer of remuneration in exchange for services/goods/works*, finding a specific expression in the Directive's requirement of a pecuniary interest. This criterion supposes providers' economic interest but also contracting authorities' of gaining access, for itself or third persons, to services, goods or works having economic value. The Court tends also to take a functional approach of this criterion

What emerges is that these two essential criteria characterise a broad notion of procurement as an *economic transaction* between public authorities (or public law governed bodies) and operators. EU procurement rules apply only inasmuch as, in the frame and under the conditions of the contract planned, the transaction is economic both in the meaning of free movement and in the meaning of competition.[619] The applicability of EU procurement rules (secondary or primary law rules) requires basically that the activity procured "*can be*" economic (in case of services, that it is a service *normally* provided for remuneration), but also that the transaction planned is economic, which in particular implies that the operators will provide *de facto* for remuneration, offer a service on *that* market. It is in that specific sense that operators must be "economic operators", as the CJEU's ruling in *CoNISMa* establishes that entities which do not normally act on the market are also eligible as "economic operator".[620] By contrast, whilst creating a market on which operators may decide to conduct an economic activity, contracting authorities' offer of remuneration must have a "pecuniary interest", but is not necessarily an economic activity in the meaning of competition law (as follows from *FENIN*).

The Court's creation of a body of EU primary law on procurement, its broad interpretation of what a procurement contract can be, on the basis of a what seems to be its two essential components (concomitant autonomous wills, and an exchange of remuneration against services/goods/works), and its broad understanding of the notion of "economic operators" benefitting from the principle of equal treatment creates incertitude in the Member States as to the scope of EU procurement rules.

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[619] Thus, in the frame of an economic transaction covered by EU procurement law, it seems that the notion of "economic activity" is also unitary, as in that context, "provision for remuneration" is equivalent to "offered on the specific procurement market".

[620] And perhaps may imply that the benefit of an advertising obligation is not only for operators whose activity was economic before they tendered.

As a result of the vagueness of the notion of procurement, one may in particular wonder whether the CJEU might expand the notion of procurement to other forms of economic transactions than those based on a written contract. Also, the "general principles of EU procurement law" (non-discrimination, equal treatment and transparency) come close to general principles of administrative law and it may seem tempting for the Court to apply them not only to public acquisition of works/services/goods public measures– as public contracts or concessions – but also to other public measures shaping business opportunities on their territory – such as schemes combining authorizations and public funding.[621] Not defining the notion of "procurement" in primary law leaves the Court with some freedom to pursue a pro-competitive interpretation of free movement law, in line with what Arrowsmith calls the Court's "purposive approach".[622] This explains the introduction of definitions of the notions of "procurement" and "concession" in the 2014 procurement directives, which is evoked in more detail in section 11.1.2.

This understanding of the relation between the criteria of applicability of EU procurement rules seem confirmed by the derogations from EU procurement law established in the CJEU's case law briefly analysed in this chapter. Contracting authorities' transaction with operators disposing of no decisional autonomy and participating at most only very marginally to any market – in-house transactions in the form of contract or not – are not covered by EU procurement principles, because the *transaction is not (enough) economic*. The exemption for public-public cooperation in *Commission v Germany* cannot be explained by these criteria, as the transaction was probably considered by the Court as inside the scope of EU procurement law, as in the frame of a transaction itself, both municipalities had autonomous and concomitant wills, and both could be seen as having a pecuniary interest in the transaction. In other words, something else was decisive, what could it be?

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[621] In *Hartlauer*, the CJEU recalled that authorization rules in the publicly financed healthcare system restrict *per se* the exercise of fundamental freedoms but can be justified by overriding reasons in the general interest; in particular it considered permissible for a Member State to organise medical care in such a way that it gives priority to a system of benefits in kind, the objective of this organisation being universal access to services of contractual practitioners, see para.53. However, the Court recalled its view in *Placanica* and *Dermoestética* that national legislation must pursue its objectives in a consistent and systematic manner. It found this was not the case of a system requiring authorization to set up a private health institution and providing that such an authorization could be refused if there was no need for this institution with regard of the care already offered by contractual practitioners, when contractual practitioners offering the same medical services as the private institutions were not also subject to this system of prior authorization, see paras.55-63. The Court also recalled that an authorization system must be based on objective, non-discriminatory criteria known in advance, and adequately circumscribing the exercise by the national authorities of their discretion. This was not the case of a system allowing different criteria to be used in practice in the different provinces of Austria, see paras.64-70. By combining these arguments, one finds that the freedom of establishment precluded a system which did not submit all private entities providing the same service to a requirement of authorization, and which did not secure an objective and impartial treatment of the application for authorization (para.69). In truth, does this not imply that the authorization system must respect the principles of non-discrimination, equal treatment and transparency, i.e. exactly the same combination of principles as those governing procurement?

[622] See Arrowsmith S., 2011, p. 37, where Arrowsmith evokes the formula of "leverage principle" of Treumer and Werlauff to qualify this approach, already mentioned above.

6 Conclusions of part II: total closure of "exit" from EU law for public services leads to enhanced need of Member States' "voice"

This chapter sums up and comments the results of the study conducted in part II in order to answer the first research sub-question:

> *Can the CJEU's case law on the definition and the relevance of the notion of "economic activity" explain the necessity of a constitutional public service concept in the post-Lisbon Treaties?*

6.1 "Economic activity" a unitary concept in EU market law

It has been submitted in chapter 2 that the view according to which the notion of "economic activity" has two different meanings in the fields of free movement and of competition gets no support from the *Meca-Medina* and AG's Poiares Maduro' Opinion in *FENIN*, generally invoked by authors defending the thesis. The difference in scopes between the free movement and the competition rules has another explanation, which is proposed that that the Court has expanded the scope of both EU free movement rules and EU competition rules beyond the scope of what actually constitutes an "economic activity".

Chapter 3 has shown that the CJEU makes in fact a distinction between

(a) An activity which *can be* economic in the meaning of free movement law: goods or services normally provided for remuneration (a general possibility)
(b) An activity which *is* economic in the meaning of free movement law and therefore is entitled to free movement: goods or services actually provided for remuneration (a fact in a specific case).

In the field of services, it has been found that the CJEU normally rejects the "system approach" of *Humbel* and instead privileges a case by case "economic provider's approach" to determine (b). This implies that an activity, or a transaction, is economic in the meaning of EU free movement when two basic conditions are fulfilled:

1. The provider receives a compensation amount, which exists as soon as the service is "not for nothing", does not even have to cover all provision costs, and does not have to be for-profit (the "compensation criterion").

2. The economic compensation received can be seen as a market price for the service, in the sense that the operator can agree *ex-ante* to provide the service in question for this compensation amount (the "agreement criterion").

Chapter 4 has shown that the Court, by introducing the comparative test in *Höfner*, makes in fact a distinction between

(a) Services or goods which *can be* offered on the market (the activity fulfils the comparative test in *Höfner*, and therefore *can be* economic in the meaning of EU competition rules)
(b) Services or goods which *are* offered on the market (the activity fulfils the test/definition in *Pavlov*, and therefore *is* economic in the meaning of EU competition rules).

Although the Court has not explicitly spelled which essential criteria must be fulfilled for an activity in a specific case to consist in "offering goods or services on the market" and to *be* (as opposed to *can be*) economic for the purpose of EU competition rules, it has been shown that, at this stage in the development of the CJEU's case law, the essential criteria seem to be that:

1. The entity does not provide for nothing (compensation criterion)

2. The entity can influence the economic conditions of its own service provision (agreement criterion).

Chapter 5 has shown how the CJEU, in a line of case law beginning with *Telaustria*, has established that EU primary law rules applying to procurement transactions follow from the general principles of non-discrimination, equal treatment and transparency, whereby procurement emerges as a broad notion consisting of an *economic transaction* between public authorities (or public law governed bodies) and economic operators. EU procurement rules apply only inasmuch as the transaction planned is economic both in the meaning of free movement and in the meaning of competition. It is submitted that the applicability of EU procurement rules requires basically that the transaction planned *is* economic, which in particular implies that the operators will provide *de facto* for remuneration, offer a service on *that* market. The following two elements emerge as essential for a planned transaction to be an economic transaction caught by EU procurement law:

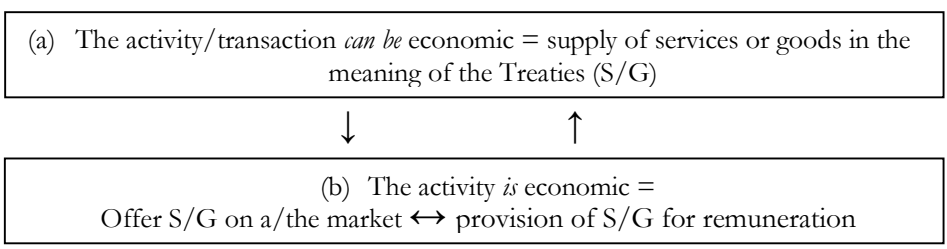
1. An *offer of remuneration in exchange for services/goods/works*, finding a specific expression in the Directive's requirement of a pecuniary interest (a compensation criterion)

2. An *agreement between two autonomous wills*, finding a specific expression in the Directive's requirement of a contract (an agreement criterion).

Planning such an economic transaction shows that the activity of *can be* economic, implies *per se* that its object constitutes services or goods in the meaning of the Treaties, even if they were not regarded as such before the transaction was planned. This explains Hatzopoulos' view that even "genuinely non-economic activities" covered by EU rules

and principles on public procurement become applicable, as soon as they are to be awarded to some non-state actor.[623]

From these results, it may be concluded first that the existence of a divide between an "economic activity"/"economic transaction" and an activity/transaction that *can be* economic is found in the three fields or EU market law. Second, two criteria emerge as essential for an activity to *be* economic for the purpose of EU free movement law, competition law and procurement law: the first is that provision is not "for nothing" (a compensation criterion) and the second is that there is an agreement between two autonomous wills (an agreement criterion). A third striking parallel is that the Court, in all three fields of EU law, has widened the scope of what is an "economic activity"/"economic transaction" by a functional approach of the two criteria. The figure below illustrates the divide (a) services and goods and (b) "economic activity". It also illustrates that the notion of "economic activity" is submitted to be unitary in EU law, and consists in providing services, goods for remuneration (free movement) which is equivalent to offer services and goods on a/the market (competition law).



The two vertical arrows illustrate that (a) and (b) interact through a "domino effect", as

- The fact that an activity is found economic in one Member State or in cross-border transactions, shows that the activity can be economic, and
- The fact that the activity can be economic (is about services or goods which can be subject to economic transactions) shows that there is market potential, and that national rules may be to "blame" for the absence of competition.

Also, and very importantly, the fact that an activity in a specific transaction/regulation is regarded as an economic activity for the purpose of EU free movement means that it is in that specific case also an economic activity for the purpose of EU competition rules, and vice versa. As will be seen in chapter 11, this seems to be the Commission's point of departure in its state aid decision-practice.

[623] See above at the beginning of chapter 5.

6.2 Relevance of the economic character of an activity/transaction for the applicability of EU rules on free movement and competition

The results of chapters 3 and 4 show also that the CJEU has developed tests and doctrines leading the impact on national rules related to public services appears to depend on three basic alternatives:

- If the activity of public service *cannot be economic*, neither the free movement nor the competition rules can apply. Therefore national rules governing the public service are not "economic rules" and not constrained by the EU rules. This is the case of activities related to the exercise of public authority, which the Court seems to understand as an activity that *cannot be a service* (Articles 51 and 62 TFEU), and *cannot be offered on a/the market* (*Eurocontrol*, *Diego Cali*).

- If the activity of public service *can be economic but is not economic* in the specific case, EU competition rules are not applicable, but EU free movement rules are applicable to national rules related to the public service. This is the situation in *Freskot* where the public service was regarded as neither provided for remuneration nor offered on the national market due to the fact that it was regulated by national rules based on the principle of solidarity, but where it overlapped at least to a certain extent with services *normally* provided for remuneration. In this alternative, the national rules related to the public service are "economic rules" and must *accommodate* the fundamental freedoms related to services/goods which they affect. This "accommodation" may be regarded as setting lighter pressure on national rules than a strict duty of "compliance", but they can force a Member State to open a public service for competition.

- If the activity of public service in general *can be economic and is economic* in the specific case, the national rules affecting this activity must *comply with* both EU free movement rules and competition.

Given the domino effect illustrated in the precedent section, and the fact that national rules become "economic rules" as soon as they affect activities regarded as services normally provided for remuneration, it is easy to see that the Court has developed a sophisticated tool box to integrate and facilitate the opening of national markets in the field of public services, in particular social services. Indeed, while the test that an activity is economic has to be made case by case, the test of whether it can be economic is made once and for all. Once it is established that a service is "normally" provided for remuneration (for instance because it is so in one Member State), national rules related to this service are *a priori* "economic rules" and must "make some place" for the fundamental freedoms which they affect. This does not mean that national rules related to that service would not be compatible with EU, but that they must be justified by the Member State as necessary to achieve missions or objectives of general interest. Also, in order to adapt to free movement imperatives, the national rules must normally be

reformed, with the probable effect that the activity will become economic in that Member State too, as the criteria of market autonomy and remuneration are found fulfilled by the CJEU on very tenuous grounds.

6.3 Exit from EU law closed for public services within Member States: an EU constitutional issue of competence

These propositions may not seem so surprising. Indeed, Lenaerts wrote as early as 1990 that "[t]here simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community'.[624] The fact that "EU law, in some of its provisions, has a practically unlimited field of application" is "the result of a well-established case law particularly in the area of the freedom of movement" is according to Azoulai "nothing that the generalists of EU law do not already know".[625] However, the analysis conducted in part II shows that the CJEU's implacable determination not to let the argument of solidarity stand in the way of EU integration through market law lead to a situation where neither the solidarity doctrine in the field of competition law nor the *Humbel* doctrine in the field of free movement law can effectively shield national rules governing social services from being challenged under EU law. There is simply no way for a Member State to totally withdraw any social service legislation from EU law.

This legal situation may be characterized as excluding the possibility for Member States to keep their welfare systems "outside" from EU market law, be it on policy grounds. If the theory of Hirschman on "voice" and "exit" described in chapter 1, is applied to this political situation, it is easy to see that Member States, as Members of the Union, are in a situation where they cannot choose "exit" to lead their welfare systems to a desirable result for their community. And in line with Hirschman's theory, it should surprise no one that Member States, in particular in the field of social services where they have repeatedly emphasized that they wish to retain their policy powers, have felt a pressing need to have their "voice" heard in EU law.

It may be argued that the CJEU has understood the legitimacy of this "voice" before other EU institutions, and that this understanding explains that the Court activated the Member States' possibility to invoke the SGEI rule in Article 106(2) TFEU. Azoulai submits that the Court has recognized the Member States' legitimate claim to retain their powers, in particular in the field of social services, through its "formula of retained powers", which has evolved since its first formulation in *Duphar* and reached a "stabilized" version in *Schumacker* where the Court stated:

[624] Lenaerts K., 1990, *Constitutionalism and the many faces of federalism* (1990) 38 American Journal of Comparative Law, p. 205-220.

[625] Azoulai L., 2011, p. 192-219.

> Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law.[626]

Azoulai argues that the formula's recurrence in the CJEU's case law amounts to the emergence of a new "total law doctrine", based on (1) the recognition of the Member States' essential own capacities of within the EU and (2) the requirement to include certain under-protected interests and situations in the manner national authorities usually use to think and to act.[627] He believes that this EU law "totalization" goes further than Weiler's theory on "absorption" as one of four categories of mutation in the CJEU's case law, and illustrated by the early *Casagrande* case.[628] Azoulai means that the absorption in *Casagrande* and the formula of retained powers are related inasmuch as they both build on a distinction between the *existence* of Member States' competence and the *exercise* of competence. However, the formula on retained powers, as formulated in *Schumacker*, goes in Azoulai's view further than the absorption doctrine, and signals a new phase in the transformation of Europe, where the CJEU acknowledges the "raison d' être" of the Member States' retained powers in the European construction, which supposes that these powers can be exercised.

One may wonder what happened between Weiler's "absorption" and Azoulai's "totalization", and the explanation is arguably to be found in the Commission's White Paper of 1985, the Single European Act (SEA) and the Treaty of Maastricht, which all opened for market integration and not open for social regulation. Gerber has described the Commission's dramatic shift of emphasis in competition law toward the problem of government interference with the competitive process, based on the view that "Community-wide liberalization of public procurement in the field of public services

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[626] Case C-279/93, *Schumacker* [1995] ECR I-225, para.21.

[627] Azoulai L., 2011, p. 211.

[628] In his classic essay on the transformation of the European Community between 1957 and 1991, Weiler argued that under a period of political stagnation, from 1973 to the mid-1980s, when the Treaty itself did not precisely define the material limits of Community jurisdiction, the Court's case law constituted evidence of a substantial change in the distribution of competences without resort to Treaty amendments. In his view, this had taken place through jurisdictional mutations in the concept of enumeration, which Weiler divided in four categories of mutation in the Court's case law, which he called extension, absorption, incorportation and expansion. He illustrated "absorption" by the *Casagrande* ruling. In that case, and on the basis of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2, Casagrande had seeked annulment of a German law entitling children satisfying a means test to a monthly educational grant, but which excluded from entitlement non-Germans except stateless people and residents under a right of asylum. In a two-phase reasoning the Court stated 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 a nature as to affect the measures taken in the execution of a policy such as that of education and training; Chapters 1 and 2 of Title III of Part Two of the Treaty in particular contain several provisions the application of which could affect this policy.*" Weiler held that in this reasoning, it was not the Community policy that encroached on national education policy, but instead the national educational policy that was impinging on Community free-movement poliy and thus had to give way. See Weiler J. H.H., 1991, p. 2440, with reference to Case 9/74 *Casagrande* [1974] 773.

[was] vital for the future of the Community economy".[629] The Commission's "public turn" had procurement law as the main "motor" and aimed at integrating the market in public sector activities, with a focus on state aid as a competition concern.[630]

In the pre-Lisbon Treaty absence of enumerated powers and in the name of market integration, the CJEU has effectively supported the Commission's public turn. However, the Court has also signalled that its determination to pursue market integration and apply the principle of EU law's supremacy did not mean that in "areas of reserved competence", the market objectives of EU law had a higher dignity than their own societal objectives. In other words, the CJEU, knowing that its case law had closed "exit" from EU law for very sensitive areas of Member States' competence, was aware that it had to enhance Member States' capacity to have their "voice" heard if they were expected to remain loyal to the project of EU integration.[631] It is submitted that this is an essential explanation of the remarkable development of the Court's pre-Lisbon case law on based on Article 106(2) TFEU, as SGEIs have a good potential to clarify what a State wants to achieve through regulation, in particular through public funding of social services.

Thus, it may be concluded, that indeed, the CJEU's case law on the definition and the relevance of the notion of "economic activity" can explain the necessity of a constitutional public service concept in the post-Lisbon Treaties.

[629] Commission, "Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985)" COM (85) 310, point 87.

[630] Gerber D.J., 1994, p. 137.

[631] In Azoulai's words, the question arises "how to safeguard the "essential functions" of Member States without undermining the "core" of EU integration? This indefinite oscillatory motion will repeat in the case law." Azoulai relates this "oscillatory motion" to the political and social context of distrust towards further integration and federalization of Europe, See Azoulai, 2011, p. 206, footnotes omitted.

Part III

SGEI a "voice" for public services in the EU Treaties

Part III addresses the second sub-question posed in this research, which may be recalled here:

> *Can SGEI be regarded as an EU constitutional concept imposing public service principles in all fields of EU market law?*

As a result of the expansion of EU law, largely due to its interpretation by the CJEU, Member States must expect that their regulatory and administrative measures, even measures related to activities within their competence, such as social services, are covered by EU market rules, at least the Treaty rules on free movement, and consequently "inexorably exposed to market forces".[632] Such measures can easily come into conflict with Treaty rules on competition and free movement, in particular since the Court has multiplied the possibilities to challenge state measures:

- The competition law instrument: the Court has established that Article 107(1) TFEU, and Article 106(1) TFEU in combination with Article 101 or Article 102 TFEU, allow challenging the public funding or the grant of exclusive or special rights to undertakings supplying public services.

- The free movement instrument: the Court has established that even non-discriminatory public service regulation restricting the exercise of the fundamental freedoms may be challenged.

- The procurement instrument: basic EU procurement rules follow directly from the Treaty principle of non-discrimination as interpreted by the Court, in particular concessions contracts and contracts for values below the thresholds set by EU legislation.

In parallel with these developments, the CJEU has been led to apply Article 106(2) TFEU on undertakings entrusted with SGEIs. On the basis of its case law, some Member States have exercised pressure to introduce former Article 16 EC through the Treaty of Amsterdam, and several important provisions on SGEIs through the Lisbon Treaty. This has led to the emergence of a "voice" on public services in the Treaties, largely articulated on the core notion of SGEI, but also of the new notions of SGI and NESGI.

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[632] The quotations are borrowed from van de Gronden and Sauter. See their conclusions in Sauter W. and van de Gronden J. W., 2010, p. 45.

Part III analyses the development of this Treaty "voice" on SGEIs, a central issue being whether SGEI may be regarded as a broad EU concept of public service in EU primary law, and more to the point whether the effect of Article 14 TFEU is to "complete" the provision in Article 106(2) TFEU and allow balancing the interest of achieving public service tasks and market integration even in the field of EU free movement and procurement law. This supposes that Articles 14 and 106 TFEU shape together an SGEI concept which is broader than tasks entrusted to undertakings and makes place for public authorities' public service missions.

The general approach consists in examining in chapter 7 the constitutional framework on SGEIs in the post-Lisbon Treaties, thereby putting emphasis on the political tension connected to this notion. This constitutionalisation of the concept of SGEI, seen as a reaction to the broad application of EU market rules to public services, is evidently aimed at enhancing the dignity of public service objectives in EU law, but it seems also to shape a broad EU principle on public services, normative in all fields of EU market law. Chapter 8 zooms in to examine which scope and normative meaning Article 106(2) TFEU has in the CJEU's case law, and whether the progressive constitutionalisation of the concept of SGEI, in particular the principle formulated in Article 14 TFEU, may be regarded as reflected in its state aid, free movement and procurement case law. Chapter 9 looks back on the Commission's tentative definitions of the concept of SGEI and proposes an understanding of the core elements of the concept of SGEI seeking coherence with the Treaty law and the case law analysed in chapters 7 and 8.

As the choice of approach and method varies throughout part III, a more detailed account is given at the beginning of each of these chapters.

7 The importance of SGEIs in the post-Lisbon Treaties

The overall purpose of this chapter is to shed light on the constitutionalization of the concept of SGEI into a broad exemption for public services, as a reaction to the broad application of EU market rules to public services. Indeed, the Court's expansionist approach has enhanced the need of what Azoulai calls a form of "pluralism", giving specific activities a "special – more relaxed – regime of justification".[633]

The first part of the chapter examines how the notion of SGEI has grown from what was considered as a strict derogation rule in Article 106(2) TFEU, to become the cornerstone of the debate on a special regime for public services in the Treaties, and now the cornerstone of several new Treaty provisions governing the Union's approach to public services. In that part, the approach is historical, as it outlines firstly the debate which has preceded and led to the introduction of these new provisions, in order to shed light on the ideological and political tensions which may still nourish and inform their interpretation. Some attention is given to the introduction of the notion of non-economic services of general interest in Article 2 of the Protocol 26 on SGI ("SGI Protocol"), which *prima facie* appears to provide for a strong derogation for some public services within the Member States' competence, but can well turn out to be a very weak shield against the Europeanization of public services.

The purpose in the second part of the chapter is to shed light on the normative synchronization which seems to exist between the SGEI framework and the Union's values and aims, in order to appraise the place Article 14 TFEU may be expected to receive in the law and the case law of the Union, and confront this analysis with the fact that no SGEI legislation with Article 14 TFEU as an *explicit* basis has been so far proposed. This part looks closer at what *in the Treaties* can justify that SGEIs are declared to be "important" in the SGI Protocol. It places SGEIs in the wider context of the post-Lisbon "quasi-constitutional" Treaties and analyses in detail the many links between the Treaties foundational principles and the principles attached to SGEIs in the Treaty framework on SGEIs. The material analysed is EU law principles, which all are valid as consolidated in the EU Treaties, but are rarely explained or directly applied by the CJEU or by the EU legislator.

In analysing and systematizing the relation between the Treaty framework on SGEIs framework and the Treaties' "foundational principles" (understood here as the provisions under Titel I TEU), the method is legal dogmatic but the approach is normative, in the sense that Union's foundational values and missions are "taken seriously", they are *all* supposed to have a substantial meaning which must be coherent with more detailed elements of the Treaties such as the Treaty framework on SGEIs. This normative approach is based on a view that the EU Treaties constitute the political deliberation which most authoritatively governs the CJEU's judicial law-making, and contains tangible terms of understanding between the Union and its peoples – through their respective States – thereby constituting an essential product of European

[633] Ibid.

democracy.[634] This is taken to be a good enough reason to take even the Treaty foundational and open-ended values and principles seriously. To reduce the arbitrary risks in this approach, non-legal material is used, such as Commission's statements on the relation it sees between SGEIs and values such as those now inserted in Article 2 TEU, and statements from experts entrusted by EU institutions and the Praesidium of the European Convention to comment on draft versions of the late Constitutional Treaty. This material is either of legal-political nature, or simply political in the case of the Commission's statements. As Dann foresaw, historical interpretation, long seen as impermissible in Union law, may play a role in the present case.[635] Certain documents may be considered as *travaux préparatoires* to the Treaties as they stand. In so far as they provide relevant elements of interpretation, such documents are therefore given significance in the discussion in that part of the chapter. The second part discusses also whether the new paradigm of "highly competitive social market economy" in Article 3(3) TEU can *per se* change the direction of the European project, and argues that the Union's implementation of Article 14 TFEU is a decisive factor for such a substantial change. The ambition is not to develop any elaborate views on this subject, but rather to shed light on the lack of scholarly consensus on the legal-political meaning of this locution, and consequently the difficulty to predict any specific direction for the Union's approach of welfare services on its basis.

The last part of this chapter draws conclusions on the analysis and discusses the consequence of EU institutions' decision not to legislate on SGEIs on the basis of Article 14 TFEU, which leaves to the CJEU a prominent role in the interpretation of the SGEI principles expressed in Article 14 TFEU, the SGI Protocol and Article 36 EUCFR.

7.1 The concept of SGEI promoted as a Treaty "voice" for public services

The development of a Treaty "voice" on SGEIs, examined in section 7.1.3, is argued to be due to the particularities of the exemption rule it is tied to in Article 106(2) TFEU, evoked in section 7.1.1, and to the legal-political doctrine which the Commission has elaborated on the basis of this Treaty notion, outlined in section 7.1.2.

[634] On this path, Pernice states: "the conclusion and earlier revisions of the Treaties, but also the attempt to substitute them by the Treaty establishing a Constitution for Europe and the finally the (sic) submission of the Treaty of Lisbon to ratification and, under some new conditions, to a second Irish referendum are certainly steps of the "constitutional process" by which the European peoples, having learned from horrible experiences of the past centuries and, in particular from World-War II are trying to find a legal framework for better organising their common future (footnotes omitted)" See Pernice I., 2009, p. 57.

[635] Dann P., 2005, p. 1463.

7.1.1 Article 106(2) TFEU: comparative advantages of a provision allowing MS to retain powers

To justify regulatory or administrative measures affecting competition and free trade in activities belonging the public sector – public aid to providers, exclusive rights, in house provision, public-public cooperation, compulsory affiliation to welfare systems, requirement of prior authorization for establishment of service operators, or requirement of prior authorization to receive services from operators which are not part to the national welfare system – Member States may adopt different legal strategies, briefly outlined here.

They may first put their faith in claiming that the activity *cannot* be economic and is not at all constrained by EU law. As shown in part II, this strategy runs a very high risk to fail even regarding publicly funded social services. The Court's decision in *Humbel*, withdrawing courses provided under national education systems from the scope of EU free movement law, can clearly not anymore be perceived by the Member States as shielding publicly funded social services from EU market law. Besides, Sweden's "experiment" shows that even publicly funded school education *can be* provided in the frame of an economic activity. Member States may also try to claim that a measure complies with EU market law because it is related to an activity which they consider as not economic as regulated in their legal system. Indeed, this can be for instance the case of social security services provided in a solidarity-based scheme subject to state control, and thus fulfilling the conditions established in the *Poucet and Pistre* case law.

However, even if they have established solidarity-based schemes for social services, Member States will often find impossible to deny the existence of a market on their territory: Van de Gronden notes that, in the sensitive and politically complex field of social services of general interest, the national legislature is often forced to make compromises between the interests of different stakeholders, with the result that even where the general intention is to exclude market mechanisms, the activity is partly on the market anyway. And even if they succeed in their claim that the activity *is* not economic in their territory because of its regulation in their legal system, it may anyway be difficult to uphold these rules if they restrict fundamental freedoms and are challenged judicially. This is clear for instance from *Freskot* or from the *Schwarz* cases where a measure was claimed to infringe both free movement and competition rules in the Treaties.[636] As observed by Azoulai, even apparently minor requirements to respect fundamental freedoms are overarching, and thus, even regarding activities in the frame of their competence, "Member States are exposed to the encroachment of EU law that they cannot withstand other than by adapting their law".[637]

In the field of procurement, Member States may claim that EU principles governing public procurement do not apply in a specific field of activity, based on their own

[636] Case C-355/00 *Freskot* [2003] ECR I-05263 and Case C-76/05 *Schwarz* [2007] ECR I- 6849 and C-318/05 *Commission v Germany* [2007] ECR I-6957.

[637] Azoulai L., 2011, p. 211.

perception that contracts will typically have no cross-border interest. Yet, as underlined in chapter 5, this assessment is made at the contracting authorities' own risk and is judicially reviewable. In periods of poor economic climate, cross-border interest can arise at lower values than the thresholds established in EU legislation. Regarding anti-competitive measures, they may also claim that the activity affected is pursued on local markets and not subject to cross-border trade – in which case EU competition and state aid rules will not "bite". Regarding state aid to social services, they may put their hope in the Commission's de minimis rules, but as emphasized by Szyszczak, the Court has repeatedly stated that *de minimis* does not exclude state aid.[638] The exemption from the duty of notification of state aid to social services, social housing and hospital care provided for by Commission's Decision COM (2011) 9380 does not exclude complaints alleging that an aid scheme does not fulfil the Decision's conditions and therefore is illegal, in which case the Commission might impose its revision.[639] Thus, it is unsure to what extent the thresholds and exceptions rules in secondary law constitute "safe havens", in particular because secondary law evolves with developments on the internal market.

To justify the compatibility with the Treaties of their regulatory and administrative measures, Member States may invoke the Treaty-based justifications in Articles 36, 51, 52 and 62 TFEU. These justifications, which may apply to discriminatory measures, are traditionally interpreted by the Court in a very restrictive manner, although Hatzopoulos observes that the Court has expanded the scope of the public health justification, in particular in the patients' mobility cases.[640] Member States may instead invoke that their regulatory or administrative measures are motivated by mandatory requirements or overriding reasons related to the general interest (ORGI).[641] These exceptions to the free movement rules, often referred to as "the rule of reason", were invented by the CJEU in Van Binsbergen and formulated more explicitly in Cassis de Dijon.[642] It appears uncertain whether the Court sees all ORGIs as exception grounds, or in certain cases as objectives involving that a measure is *ex-ante* justified and not labelled as "*restriction* of free movement" in the first place.[643]

Importantly, ORGIs may not only justify regulatory measures but also procurement measures, although they cannot justify discriminatory restrictions on fundamental

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[638] Szyszczak refers to Case C-280/00 *Altmark* [2003] ECR I-7747, para.81 and Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, para.28, where the CJEU's position seems indeed quite clear. See Szyszczak E., 2013, p. 330. This is also acknowledged by the Communication from the Commission, Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU.

[639] If that is not the case, the measure will be assessed in accordance with the principles contained in the Commission Communication on a framework for State aid in the form of public service compensation. See Recital 26 in the Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.

[640] Hatzopoulos V., 2012, p. 148.

[641] Regarded as "true exemptions" (scholarly reference), judge-made (Cassis de Dijon etc.).

[642] Hatzopoulos V., 2012, p. 151.

[643] Ibid, p. 151.

freedoms.[644] Also, it was originally understood that ORGI could not be of economic nature[645] and that they were examined by the Court under a strict proportionality test.[646] These understandings call nowadays evidently for qualification. First, the Court tends to apply a lenient proportionality test to certain grounds of general interest, which Hatzopoulos identifies as morality and solidarity in the field of social services. This view is shared here, as in the field of social services, the Court's proportionality test is indeed rather concerned with "the concrete manifestations of solidarity" and whether they exclude all market forces.[647] Second, the Court has admitted that certain ORGIs may address economic considerations, notably in the field of health care services. As argued by some authors, this incoherence is only apparent, and its relation to the normative power of the concept of SGEI is discussed under section 7.3.

The notion of ORGI has been recognized as "palliative" for the fact that non-discriminatory measures may be held to contravene free movement rules it is only such measures which should be upheld by virtue of ORGI.[648] However, ORGI was not seen by Member States as an appropriate "palliative" to certain effects of the "public turn". In combination with Articles 101 and 102 TFEU (addressed to undertakings), Article 106(1) TFEU (former Article 90(1) EEC and Article 86(1) EC) provides essentially that public undertakings, and undertakings enjoying special or exclusive rights must be treated by the Member States in a manner that is loyal to the internal market principles of free movement and undistorted competition. Relying on Article 106(1), in combination with any Treaty market rule allowed the Court – and the Commission if the Member States gave their support to legislation under Article 106(3) TFEU – to optimize the "effet utile" – in terms of liberalization – of these rules. The liberalization pursued in the area of "infrastructure public services" – electricity, telecommunications and post for instance - was mainly oriented against exclusive rights, being the "State measure par excellence among those contemplated in Article [106(1) TFEU].[649] In *Corbeau*, the Court went particularly far in its crusade against "the sacrosanct and

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[644] See Case C-153/08 *Commission* v *Spain* [2009] ECR I-9735, para.36.

[645] This perception was based in particular on the Court's position in *Bond van Adverteerders* that a restriction on the free movement of services could not be justified by a concern to secure for a national public TV foundation all the revenue from the advertising destined for the public of that Member State, see Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, para.34; also, in Case C-398/95 *SETTG v Ypourgos Ergasias* [1997] ECR I-3091, para.23, the Court considered that "maintaining industrial peace as a means of bringing a collective labour dispute to an end and thereby preventing any adverse effects on an economic sector, and consequently on the economy of the State, must be regarded as an economic aim which cannot constitute a reason relating to the general interest that justifies a restriction of a fundamental freedom guaranteed by the Treaty". For a list of cases where this stance has been confirmed, see Bekkedal T., 2011, p. 65 footnote 65.

[646] The restrictions must be suitable for securing the attainment of the objective (ORGI) which they pursue, and they must not go beyond what is necessary in order to attain it, see for instance Case C-288/89 *Gouda and Others* [1991] ECR 1-407, paras.13-15; Case C-19/92 *Kraus* [1993] ECR 1-1663, para.32, and Case C-55/94 *Gebhard* [1995] ECR 1-4165, para.37.

[647] In Hatzopoulos' view, it is clear that the Court question neither Member States' definition of morality nor their definition of the scope of social services and the extent to which solidarity applies to them. See Hatzopoulos V., 2012, p. 151, 160 and 161.

[648] Ibid, p. 157.

[649] Buendia Sierra J. L., 1999, p. 134.

inviolable character of exclusive rights".[650] Having implicitly ruled that any grant of exclusive rights is contrary to Article 106(1) TFEU, it found timely to compensate this encroachment in the Member States' exercise of their competence, by ruling also that they were permitted only to the extent that they came under the exception in Article 106(2) TFEU, which reads:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

In *Corbeau*, the CJEU "explained" that Article 106(2) "permits the Member States to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights.[651] The crucial element in the Court's SGEI-based approach was its view that a restriction on competition – in that case the exclusion of all competition from other economic operators – could be justified by the necessity to allow the holder of the exclusive right to perform its task of general interest, and to do so "under economically acceptable conditions".[652] The legitimacy of ensuring "economically acceptable conditions" was confirmed in *Almelo*.[653] This development helped arguably the Court in finding acceptance for making exclusive rights *a priori* contrary to Articles 106(1) and 102 TFEU. At the same time, it made clear that the imposition of SGEI tasks on the provision of an activity could lead to a more lenient proportionality test than ORGI, and justify state

[650] Ibid, p. 163.

[651] Case C-320/91 *Corbeau* [1993] ECR 1-2563, para.14. The Court's approach in *Corbeau* has been called "the limited competition approach" and opposed to "the limited sovereignty approach" by the participants to the XVI FIDE Conference, see Buendia Sierra J. L., 1999, p. 189.

[652] Ibid, para.16.

[653] Case C-393/92 Almelo [1994] ECR I-1477.

measures not only aiming at pursuing certain missions of general interest, but also at securing financial conditions allowing these interests to be achieved *in fact*.

In spite of the wording of Article 106(2) TFEU, it was not evident that the Court would apply Article 106(2) TFEU and not ORGIs to justify certain state measures restricting the fundamental freedoms. For instance, the Court could have chosen to examine exclusive rights in the fields of electricity as restrictions of the fundamental freedoms possible to justify on the basis of ORGI, subject to a strict proportionality test. It did not, and this choice was arguably dictated by the necessity to maintain its legal-political authority in a context where its case law had irreversibly eroded the principle of enumeration. The Court had to reassure Member States that EU law allowed them to retain relatively strong policy powers in areas of competence that they obviously were not ready to confer onto the Union. Besides, in cases where exclusive rights were challenged, the Court could not easily disregard Member States' claim that such rights were justified by the necessity to secure the fulfilment of SGEI tasks. Until the entry into force of the Treaty of Amsterdam, the provision in Article 106(2) TFEU was the *only horizontal Treaty provision*, borne out of an EU democratic process (slightly more democratic than the judge-made ORGIs) and explicitly

- Referring to the notion of general interest in another meaning than "the general interest of the Union", in other words general interests that can be conceived and decided by the Member States and their own citizens (or by the Member States as masters of the Treaties)

- Legitimating that public service tasks are used *as a point of departure* to evaluate the necessity to derogate from the Treaty market rules.

- Having a potential to be applicable "horizontally", for derogation from *any* Treaty rule. This can imply that Article 106(2) TFEU could be relevant in relation to EU procurement rules, a very controversial issue.

These features alone explain that the Court *had to* consider SGEI-based arguments and to respect the constitutional importance of SGEIs latently signalled by Article 106(2) TFEU. The necessity to dispose of efficient legal instruments to regulate certain markets became obvious when public service obligations were introduced in EU legislation on energy, telecommunications and transport. The dignity of public service missions and tasks in relation to the Treaty principles of free movement and undistorted competition is simply difficult to question *per se*. In the absence of EU legislation primarily addressing the principles and rules governing public service missions, the issue for the Court has instead been which proportionality test it would apply to conflicts between the public service missions and the Treaty principles protecting free movement and free competition. To assess the compliance with the Treaties of restrictions of free movement of goods following from exclusive rights in the form of State monopolies in the meaning of Article 37 TFEU, it was legal-technically possible for the Court to apply Article 106(2) TFEU "directly", as the restriction was operated by the State, but though an *undertaking*. By contrast, regarding state measures restricting the free movement of

services but not operated through an undertaking, for instance regulatory barriers to entry or exit from national social service systems, the Court cannot not easily apply Article 106(2) TFEU "directly" as a justification, but may instead have to "transpose" the public service logic of Article 106(2) TFEU. The reason is that it is often primarily not undertakings', but rather the *public authorities*' necessity to achieve their public service missions – for instance securing access to social services – which justifies the restrictive regulation – for instance a solidarity-based system of supply.

In any case, the Member States have grown aware that, as long as they did not legislate on these issues, the Court would continue strike a balance case by case, and sent a first "signal" through the Treaty of Amsterdam, in the form of Article 16 EC on SGEIs, which was commented by Ole Due in the following terms**:** "A new Article 7d introduces a curious provision in the EC Treaty, requiring the Community and the Member States to take care that services of general economic interest operate on the basis of principles and conditions which enable them to fulfil their missions. The Article itself provides that this must be done "without prejudice to Articles 77, 90, and 92. Nevertheless, it has been found necessary to annex a Declaration, according to which the Article shall be implemented "with full respect for the jurisprudence of the Court of Justice, *inter alia* as regards the principles of equality of treatment, quality, and continuity of such services. Both the Article and the Declaration reflects the ongoing confrontation between liberalist states and states where public services used to be synonymous with public undertakings. It seems doubtful what impact, if any, such an amendment will have on the case law of the Community Courts."[654]

Arguably, this "curious provision" had more than no impact on the Court's case law. It is possible, as suggested by Due's doubts that Article 16 EC would change anything in the CJEU's approach, that the Court had "not waited for" Article 16 EC to acknowledge the "latent" normative signal in Article 106(2) TFEU, namely the high "dignity" of SGEIs in relation to EU market law. However, it is interesting to note that the Court's first clear acknowledgement of Article 106(2) TFEU's normative signal was arguably made 21 days after the adoption of the Treaty of Amsterdam in the "electricity cases".[655] It is namely argued – and developed in chapter 8 – that it was in those cases the Court took the decisive step to explain the telos of its lenient proportionality test under Article 106(2) TFEU, thereby replacing the perception of Article 106(2) as a derogation rule to a perception of Article 106(2) TFEU as a balancing rule. Thus, the introduction of Article 16 EC did not say what the "fathers of the Treaty" want from SGEIs, but forced the Court to take loyal account of the evident political divergence on the future of public services in Europe and therefore on their liberalization through EU law. After the Treaty of Amsterdam, the Court did not *choose* a "nuanced" approach, it was rather *forced* to it.[656]

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[654] Due O., 1998, p. 70.

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[656] As a matter of fact, Article 16 EC did not go unnoticed by the Court. In 2001, AG Alber referred to "the newly promulgated Article 16 EC and Article 36 of the Charter of Fundamental Rights of the European Union" as underlining the importance of Article 86(2) EC (now Article 106(2) TFEU) as an expression of a fundamental value judgment of Community law.[656] Some months later AG Jacobs started his reasoning in *Ambulanz Glöckner*, on the

The "importance" of SGEIs had not been emphasized by the Court before the Amsterdam Treaty and certainly not before it delivered its judgments in *Corbeau* and *Almelo*.

In the period between the adoption of the Treaty of Amsterdam and of the Lisbon Treaty, the debate on services of general interest in Europe, which the Commission tried to orchestrate under the neutral theme of "need of legal certainty", evidenced the confrontation of an ordo-liberal approach and the "welfare state approach" of public services, in particular during the legislative process preceding the adoption of the Services Directive. This open confrontation has probably reinforced the Court's obligation to reflect on what the concept of SGEI and Article 106(2) TFEU *should* mean to remain coherent with the Treaties, and to give more precision to its views on these issues. In this "dialogue" going on between the Member States and the CJEU through successive Treaty modifications, the Lisbon Treaty signals arguably a new constitutional compromise regarding EU law in the field of public services, not only but particularly by introducing new provisions directly related to SGEIs (Article 14 TFEU, SGI Protocol and Article 36 in the EU Charter of Fundamental Rights). Two important decisions, the *BUPA* judgment in the field of state aid, and the *Commission v Germany* judgment in the field of public procurement, were taken by the Court *after* the adoption of the Lisbon Treaty. In both cases, the existence of *statutory* public service tasks seems to have played a particular role in public authorities' margin of discretion, and mirror possibly the emergence of a Court's doctrine on SGEIs.

7.1.2 From Amsterdam to Lisbon: 10 years of debate and a compromise on SGEIs in the Treaties

As early as 1986, Delors was aware that the SEA and the 1992 programme would intensify EU's pressure on the welfare systems in the Member States, and addressed the "masters of the Treaties" in the following terms:

> …/the more competitive countries would be greatly mistaken if they thought they could have the large market without paying the price of cohesion. Is the price merely to be paid from the budget? No, what is needed is Community spirit, otherwise the Europe of Twelve will fall apart. We must therefore prevent incidents such as these through our resolute commitment to both economic and social cohesion in the Community.[657]

Thus, the Delors Commission made no secret that EU law's expansion enhanced the Member States' need to lay claim to withhold powers to pursue their own social policy and welfare systems. Indeed, the European Council of June 1995 reported that "the

premise that "services of general economic interest have a special importance in the Community, as is /…/ emphasized by Article 16 EC".

[657] Delors, J., 1986, p. 22-37.

importance of general interest services [had been] brought out by the Heads of State and Government, who acknowledged them as part of the set of values shared by all our countries that helps define Europe."[658] Thus, the concept of "services of general interest" was probably considered as an appropriate platform for agreeing on what a European "voice" on public services would say, in particular because it was close to the notion of SGEI which already existed in the Treaty. However, by crystallizing the debate on the future of public services in Europe on the notion of SGEI, the future of public services in Europe could not be conducted as a broad public debate. Instead it was canalized in the expert and technocratic term "SGEI", which explains that the problematic lack of consensus on the future of public services in Europe could be formulated by Sauter as the Member States' incapacity to say "what they want from SGEI".[659]

The Commission inaugurated officially the debate on services of general interest in 1996, when the 1996 Intergovernmental conference prepared a review of the Treaties preparing in particular the Union's enlargement. The Commission was of course aware that some Member States and stakeholders perceived EU market law's pressure on public services as a threat, while others could perceive it as an opportunity. It is therefore interesting to note its declaration, very much evoking the compromise finally reached in the Treaty of Lisbon:

> Europe is built on a set of values shared by all its societies and combines the characteristics of democracy – human rights and institutions based on the rule of law – with those of an open economy underpinned by market forces, internal solidarity and cohesion. These values include access for all members of society to universal services or to services of general benefit, thus contributing to solidarity and equal treatment.[660]

The first communication issued in 1996 was followed by the Laeken Declaration (2001), the Green Paper on SGI (2003), the White Paper on SGI (2004), the Communication on Social Services of General Interest (2006) and the Communication on Services of General Interest, including Social Services, in 2007, perceived by the Commission as "closing the debate".[661] These communications focused increasingly on social services,

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[658] Cannes European Council 26-27 June 1995, Conclusions of the Presidency SN 211/95 point A.I.1.7. It is striking to see that the declaration of SGI's "importance" was finally introduced in the SGI-protocol.

[659] To be sure, there is still no chance to conduct a debate on the future of public services in Europe in national parliaments or in the Member States' public opinion under the parole "what is it we want from SGEI?".

[660] Commission, "Reinforcing political union and preparing for enlargement" (Opinion for the Intergovernmental Conference) COM (96)90 final, p. 1.

[661] Commission, "Services of General Interest in Europe" (Communication) EJ C 281, 26.9.1996; Commission, "Report to the Laeken European Council – Services of general interest" COM(2001)598 final; Commission, Services of general interest (Green paper) COM(2003) 270 final; Commission, Services of general interest (White paper) COM(2004) 374 final; Commission, "Implementing the Community Lisbon programme: Social services of general interest of the European Union" COM(2006) 177 final; Commission, "Services of general interest, including social services of general interest: a new European commitment" COM(2007) 725 final and the accompanying Commission Staff working documents, published in the context of Commission "A single market for 21st century Europe" COM(2007) 724 final.

when it became clear that the trend towards marketing these services, in particular health care, was there to stay, and that national measures restricting the free movement of social services were successfully challenged in processes brought to the CJEU. By then, it was impossible for the Member States to believe that they could retain powers by defining legislative "priorities". While it was their initiative to point out energy, post and telecommunications were as "priority action sectors" in the Spaak report, and later "A-services" as priority services in the procurement directives[662], they were losing the upper hand in the field of social services. By not legislating on the balance between free movement and competition of social services and the necessity to maintain welfare systems to secure objectives of solidarity, it became clear that the CJEU would decide in their place. As a logic of "voluntary integration" through legislation let the place to "integration under judicial pressure", Member States did simply not any more *openly decide* which sectors EU integration would prioritize.[663]

In the course of the open "SGI debate" – from 1996 to 2007 – some Member States, particularly concerned with EU law pressure on their systems of welfare, exercised pressure to introduce the provision in Article 16 EC, later modified by Article 14 TFEU, enhancing the dignity of SGEIs and pushing forward the idea that Article 106(2) had to be perceived not as a derogation rule, but rather as a rule balancing two equally legitimate interests – public service objectives and tasks democratically decided by Member States in the frame of their competence – and the Union's interests (principally an internal market interest before the Lisbon Treaty entered into force). That the notion of SGEI could convey the claim to retain national powers in the field of public services was most obvious in the debate on the Services Directive. This claim was evident in the process of adopting the Lisbon Treaty, and explains the final drafting of Article 14 TFEU and the introduction of the SGI-protocol. It seems thus clear that the outcome of the debate is the introduction of a distinct "voice" on SGEIs in the Treaties. Mario Monti's report made no mistake on the enhanced constitutional dignity of SGEIs, declaring that "[s]ervices of general economic interest are considered to be a key sphere for broad social policy, at the national, regional and local level." [664]

Yet, this "voice" on SGEIs is eminently heterogeneous and there is evidence of the persisting tension between holders of a broad special regime for public services, including EU procurement rules, and holders of an EU procurement regime which holds tight the Member States' discretion in order to free market forces. It is for instance clear from the following declaration of the European Economic and Social Committee in the debate preceding the adoption of the new procurement directives: "[a]fter a long debate on services of general interest (SGIs), it was concluded that these are *not public contracts in*

[662] Report to the Ministers of Foreign Affairs on the General Common Market, drafted by the Intergovernmental Committee headed by Henri Spaak ("Spaak Report"), Brussels, 21 April 1956. p. 126-135.

[663] In this regard, it was arguably a bitter experience for the German government that the CJEU considered that the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the EU procurement directives, did not add to the obligations following from the fundamental rules of the Treaties as interpreted by the CJEU. See above under section 5.1.1.

[664] Report of Mario Monti to the President of the European Commission José Manuel Barroso, 9 May 2010, "A New Strategy for the Single Market – At the service of Europe's economy and society".

the true sense of the term, but services provided by authorities or on their behalf. The EESC reiterates that contracting authorities are free to carry out all or some of their functions themselves or to outsource those tasks which they deem appropriate. Account must also be taken of the systems of the Member States which respect the principles of equal treatment, non-discrimination and transparency laid down in EU primary law and which provide a general right of access to the provision of services. SGIs themselves should not, therefore, come within the scope of the directive, although any outsourcing or contract related thereto awarded by the contracting authorities or on their behalf should be clearly subject to the directive".[665] The view was evidently – but controversially – that Member States' prerogatives to freely organize the supply of certain services, including by choosing in-house provision, must be regarded as essentially following from the character of these services as "services of general interest". In other words, the EESC regarded the concept of SGI – including SGEI – as a broad concept justifying *per se* the freedom to conclude "in-house agreements" and a "balance" with the interest of free movement of services in the public sector.

In fact, the debate on the future of public services, fundamentally related to the place of the state in a European market including public services, can simply not end with the adoption of new constitutional provisions on SGEIs in the Treaty of Lisbon. The reason is that this political "deal" on SGEIs is based on legal provisions formulated in the typical "Treaty coded language" and leaves much room to combine and use these provisions. The debate continues less officially in the interpretation, combination and use of Treaty provisions related to SGEIs, a particular issue being whether the notion of "SGEI" is given explicit or implicit relevance in the field of free movement law and in the field of procurement law.

7.1.3 New framework on SGEIs in the post-Lisbon Treaties: SGEI "voice"

7.1.3.1 Article 14 TFEU: public services at the heart of EU law, and a challenge for the coherence of EU law on public services

Article 14 TFEU is a dual provision, comprising both a policy declaration (first sentence) and a legal basis (second sentence). Let us here focus on the first sentence which almost exactly reproduces former Article 16 EC, completed through the Treaty of Lisbon by words underlined in the following text

> Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of

[665] European Economic and Social Committee, "Opinion on the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors COM(2011) 895 final – 2011/0439 (COD) Proposal for a Directive of the European Parliament and of the Council on public procurement COM(2011) 896 final – 2011/0438 (COD) Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts COM(2011) 897 final – 2011/0437 (COD)", point 4.6, emphasis added.

> 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 fulfil their missions.[666]

When Article 16 EC was introduced through the Amsterdam Treaty, Ole Due was not the only person who considered that it was a "curious provision". Most of those who commented the provision – which at the time did not contain the words "particularly economic and financial conditions" were perfectly aware of its political genesis. Duff observed for instance that Article 16 EC was "probably the clearest exposure in the Treaty of the division between those who wish to regulate to protect public utilities and the like and those who which to make them competitive".[667] Buendia Sierra evoked that some Member States wished to include a reference to "economically acceptable conditions" for undertakings entrusted with SGEI missions, and considered that, give the absence of such a reference in the final text of Article 16 EC, the new provision did not modify the balance of the Treaty as it "only repeated in a more diluted way the very principle contained in Article 86(2) [EC]", left unchanged the scope of Articles 73, 86 and 87 (now Articles 93, 106 and 107 TFEU) and did not solve the question as to how Article 86(2) should be interpreted.[668] In his view, the text of Article 16 EC suggested less flexibility than the rule of Article 86(2) EC, that exempts application of Treaty rules obstructing *in law or in fact* the fulfilment of the SGEI tasks. Regarding the normative significance of Article 16 EC, views diverged profoundly. While Edwardsson held that Article 16 EC was a pure declaration lacking any legal significance[669], Prosser believed that Article 16 EC contributed to change the general attitude to SGEIs from an unwelcome obstacle for the realization of the Internal Market to a positive policy element. He held that "[t]he objective is no longer only to limit their scope but to improve their delivery through applying principles of good governance, including (but not limited to) the use of competitive markets".[670]

These analyses must arguably be read in a new context, as the first sentence of Article 14 TFEU modifies former Article 16 EC by requiring that the Union and the Member States take care in particular that SGEIs operate on the basis of "economic and financial conditions" enabling them to fulfil their missions and as Article 14 TFEU now also includes a second sentence reading:

> 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

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[666] Emphasis added.

[667] Duff A. 1997, p. 84.

[668] Buendia Sierra J. L., 1999, p. 333.

[669] Edwardsson, E., 2003, p. 122-123. Edwardsson refers to Buendia Sierras argument and concludes that Article 16 EC had no legal significance and has not altered the legal situation for SGEIs.

[670] Prosser, T., 2005, p. 123.

Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

The meaning of Article 14 TFEU is difficult to be sure of, and it may seem uncertain how it should be enforced, but it is today difficult to find authors doubting that Article 14 TFEU has normative effect. Ross expresses what seemsto be a dominant perception that Article 14 TFEU represents a "critical step", upgrading services of general interest into positive horizontal policy-shaping considerations for both Member States and the Community institutions.[671] In fact, some elements in this provision are perhaps not so ambiguous. First SGEIs have now constitutional dignity in EU law, on the explicit motive of their importance the Union "shared values" and for their role in promoting cohesion, both social and territorial. Second, it is clear that Article 14 TFEU imposes a norm on the Union and the Member States, a "duty to take care" that the principles and conditions on which SGEI operate allow them to fulfil their missions. The incertitude on the enforcement of Article 14 TFEU is rather related to the following elements:

a. The relation between Article 14 TFEU and Articles 4, 106 and 107 TFEU requires clarification.

b. Article 14 TFEU does not define SGEI, but it reinforces its status of EU law concept and suggests strongly that this concept is relevant "transversally" in EU constitutional law. If SGEI is a transversal notion of EU law, it may arguably not be limited to SGEI tasks – or "public service obligations" (PSO) – entrusted to undertakings. There must simply be more to SGEI than tasks entrusted to undertakings. This emerges in particular from the fact that Article 14 TFEU imposes a "duty" on the Union and the Member States affecting – even if not exclusively – the exercise of their legislative and regulatory powers. In the field of public services, these legislative and regulatory powers are more often than not used to impose obligations on public authorities rather than on undertakings. The SGEI tasks are often entrusted to undertakings by public authorities which are themselves under an obligation to secure access to certain services or infrastructures.

c. Article 14 TFEU suggests that SGEIs may enjoy a specific EU law regime to fulfil their missions. It does not say by which standard the principles and conditions of this special regime may be determined, but it does say that they may consist in particular of economic and financial conditions.

d. The obligation to "take care" can obviously be understood as addressed to the Union and Member States as legislators, but it may also be understood as addressed to any EU institution, in particular the CJEU, and to public authorities as parts of the State in a broad meaning. This raises the question of how Article 14 TFEU relates to Article 106(2) TFEU, in particular whether

[671] Ross M., 2009, p. 92.

Article 14 TFEU implies that Article 106(2) TFEU has some relevance to justify derogations from EU procurement law.

A particular issue is that the new EU legislator's competence to decide on principles and conditions enabling SGEI to fulfil their missions, may be interpreted in quite different ways. It is expressed as an obligation, and as emphasized by de Witte et al., the second part of the sentence seems intended to restrict the scope of the first part of the sentence.[672] Also, it appears that in the absence of legislation EU explicitly deciding on such principles and conditions, the CJEU's has already largely contributed to define them in case law.

Given the marketization of welfare supply in the Member States and the wide interpretation of the notion of economic activity both for the purpose of free movement and competition rules, the national rules of welfare might increasingly find themselves "within the scope of EU law". Of course EU law must respect the principle of subsidiarity but, as observed by Sharpf, the supremacy doctrine postulated by the CJEU has given it the status of a constitutional court in the relationship between the EU and the Member States, which in his view implies that the case law does not recognize any sphere of national autonomy in which purposes of public policy and the measures through which these are to be realized should be chosen by democratically legitimated political processes.[673]Davies holds that the principle of subsidiarity was actually not meant to limit the Court's judicial interpretation of Treaty based liberties.[674] As a matter of fact, the Court has so far never invoked the principle of subsidiarity to restrain from balancing national rules, including rules governing the definition, organization and financing of SGEI, against free movement rights. It may be questioned whether the second sentence of Article 14 TFEU has a potential to alter this situation.

In any case, it may also be questioned whether the CJEU has begun applying the first sentence of Article 14 TFEU, more or less explicitly. This issue is evoked in more detail in section 7.3 and is at the heart of the case law analysis in Chapter 8.

7.1.3.2 Protocol 26 on SGI

The EU framework on SGEI has been fleshed out through the Protocol (No 26) on Services of General Interest or "SGI Protocol", which was adopted by the Heads of States and Heads of Government at the June 2007 European Council on the initiative of the Netherlands who, with the support of Germany and France, made its insertion in

[672] De Witte B. et al., 2010, p. 40. The authors explain that the provision's complicated drafting may be the cause of its ambiguity. They consider "contradictory to state, on the one hand, that the EU will have the competence to lay down the main principles and conditions for the operation of the SGEIs, but on the other hand, that this leaves untouched the Member State ompetence to provide, organize and finance these services".

[673] Scharpf F. W., 2009, p. 17 and 21.

[674] Davies G,, 2006a.

the final Reform Treaty to a condition for adoption.[675] The SGI Protocol adopts the architecture elaborated by the Commission and centered on the concept of SGI. As early as 1996 the Commission had launched the term "Services of General Interest" which at that time was absent from the Treaties, and explained that it covered "both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations".[676] In the later communications of the Commission on SGI a ramification was consistently reaffirmed, "services of general interest" covering both "services of general *economic* interest" and "*non-economic* services of general interest". Clearly building on this ramification, the Protocol attached to the Treaties and forming an integral form thereof, as provided in Article 51 TEU, reads:

> The High Contracting Parties,
> Wishing to emphasize the importance of services of general interest,
> Have agreed upon the following interpretative provisions, which shall be annexed to the Treaty on European and to the Treaty on the Functioning of the European Union
>
> *Article 1*
> "The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:
> - the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
> - the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
> - a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.
>
> *Article 2*
> The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest."

Regarding the expression "shared values" in the SGI Protocol, the following may be said. Although Article 14 TFEU evokes SGEIs' place in the Union's "shared values", the interpretative elements formulated in the Protocol may rather be seen as legal-political principles. This point, also made by the European Economic and Social

[675] The origin of this proposal is related to a disagreement between the Commission and the Netherlands concerning the application of the doctrine of manifest error when the public financing of measures for housing purpose was claimed by the Netherlands as justified by an SGEI mission. The Prime Minister of the Netherlands had in particular the support of Germany and France. More on the doctrine of manifest error below under xxx.

[676] Commission, "Services of General Interest in Europe" (Communication) EJ C 281, 26.9.1996, p. 2.

Committee, contributes to support the view that the redaction of the Protocol was probably not as thoroughly evaluated as other parts of the Lisbon Treaty.[677]

As to the notions of SGI and NESGI in the SGI Protocol, they consolidate the terminological categories developed by the Commission in its Communications. The notions of SGI and NESGI are thus legal notions, due to their presence in the SGI Protocol, but as the notion of SGEI, they are not defined, and the relation between the three notions is not explicitly formulated in EU law. It seems however clear that the Protocol reflects the Commission's views on the relationship between the three notions, with a "mother notion" and two "daughter notions", making of SGI a pivotal legal notion of EU primary law. At any rate, this is the perception of many legal authors. For instance, Neergaard describes the notions of SGEI, SGI, NESGI and SSGI as "the relatives in the conceptual family".[678] Regarding the relationship between the three legal notions in the SGI Protocol, Neergaard's view, based on the Communications of the Commission, is that SGI may be viewed as including both SGEIs and NESGIs. This perception of "SGI" as a "general" concept comprising the two sub-groups SGEI and NESGI is shared by Lenaerts, who also refers to the Commission' understanding of the expression "SGI".[679] Indeed, the symmetry between Article 1 on SGEI and Article 2 on NESGI, which are the only provisions contained by the SGI Protocol suggests strongly that SGI must be seen as the sum of the two categories SGEI and NESGI.

In its Communication on SGIs of 2007 the Commission considered that the Protocol constitutes "a decisive step towards establishing transparent and reliable EU framework" and affirmed that "[b]y spelling out the role of the Union, the Protocol brings *the necessary clarity* and certainty to EU rules (emphasis added)."[680] Rodrigues underlines that the Protocol is not intended to be merely a declaration of principle, but instead takes "an operational stance, as an "interpretative" guide to the Treaties and a real set of instructions on how to implement Article 14 and 106(2) TFEU for both the EU and the Member States".[681] As an interpretative tool, the Protocol must arguably be read on the background of Treaty provisions, in particular Articles 2-6 TEU, which it is profoundly related to. Presented by Damjanovic and De Witte as "the final layer of the Lisbon edifice" relating to SGEI, the Protocol may actually be seen as the *bottom* layer of this edifice as it provides a broad orientation platform:

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[677] Analysis of the implications of the Lisbon Treaty on Services of General Interest and proposals for implementation, *Discussion paper drawn up by European experts,* European Economic and Social Committee, March 2008, *p.* 46: "Although we may query whether the details given are not "principles" rather than "shared values" within the meaning of those that are behind European Construction." One should remember that the Protocol came very late in the process of adopting a Reform Treaty. Whereas the European Convention that worked upon the late Constitutional Treaty had had time to work on the linguistic consistency of the Constitutional Treaty, this was not the case of the Intergovernmental Conference mandated with laying down a proposal for the Reform Treaty in a record time.

[678] Neergaard, 2013, p. 207.

[679] Lenaerts, 2012, p. 1250.

[680] Commission, "Services of general interest, including social services of general interest: a new European commitment" (Communication) COM (2007) 725 final, p. 3.

[681] Rodrigues S., 2009, p. 263.

a. Establishing fundamental concepts of public service in EU law
b. Providing elements to identify SGEI
c. Providing principles completing Article 14 TFEU for EU legislation on SGEI
d. Providing principles completing Articles 14 and 106(2) TFEU for the application of EU market rules to SGEI
e. Providing principles for the application of EU law to NESGI

Article 1 of the SGI Protocol contains normative elements which are related to the Union's foundational values and principles, and therefore directly relevant to explain SGEI's enhanced dignity in the Treaties. This relation is addressed in section 7.2.1, especially in section 7.2.1.4. As to Article 2 of the SGI Protocol, it excludes any EU law constraint on the exercise of Member States' discretion to exercise their competence to provide, commission and organize NESGI. The lack of certainty on the concepts of SGI and NESGI is obviously a problem to delineate the scope of Article 2, and is examined in the two following sub-sections.

7.1.3.2.1 SGI not defined in EU law, only defined in the Commission's Communications

As SGI is not defined in EU law, guidance on the concept can only be found in the Commission's Communications on SGIs. The Commission's definition and political stance on services of general interest seems to have evolved between 1996 and 2007, parallel with the evolution of the Court's "working definitions" of SGEI between 2004 and 2010. This appears from a comparison between the way the Commission presented the notion of SGI when it launched the concept on its own initiative in 1996 and ten years later in 2007.

In the SGEI Communication of 2007, the Commission gives its own definition and understanding of SGI, in the following terms:

> Although their scope and organisation vary significantly according to histories and cultures of state intervention, they can be defined as the services, both economic and non-economic, which the public authorities classify as being of general interest and subject to specific public service obligations. This means that it is essentially the responsibility of public authorities, at the relevant level, to decide on the nature and scope of a service of general interest. Public authorities can decide to carry out the services themselves or they can decide to entrust them to other entities, which can be public or private, and can act either for profit or not for profit.[682]

[682] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 November 2007 "Services of general interest, including social services of general interest: a new European commitment" COM (2007) 725 final, Section 2.

In 1996, the Commission was perhaps more inspired by Durkheim's theories in explicitly connecting SGIs to their importance for social cohesion[683] and in a more diffuse way by Duguit's idea that securing certain services indispensable for social cohesion require State intervention, "serving the public" being the very fundament of State legitimacy.[684] This appears rather clearly in the following quoting the Commission's Communication on SGI of 1996:

> European societies are committed to the general interest services they have created which meet basic needs. These services play an important role as *social cement over and above simple practical considerations*. They also have a symbolic value, reflecting a sense of community that people can identify with/…/The roles assigned to general interest services and the special rights that they may ensue reflect considerations inherent in the concept of *serving the public*, such as ensuring that needs are met, protecting the environment, economic and social cohesion, land-use planning and promotion of consumer interests"/…/ Central to all these issues are the *interest of the public*, which in our societies involves *guaranteed access to essential services, and the pursuit of priority objectives*. General interest services are meant to *serve a society as a whole and therefore all those living in it*. The same applies in the Community to the universal service concept.[685]

This French sociological and legal heritage, still influential under the Delors Commission, was toned down by the Barroso Commission, as appears from the way the Commission justifies SGIs in its Communication of 2007:

> These services are *essential for the daily life of citizens and enterprises*, and reflect Europe's model of society. They play a major role in ensuring social, economic and territorial cohesion throughout the Union and are vital for the sustainable development of the EU in terms of *higher levels of employment, social inclusion, economic growth and environmental quality*.[686]

In the 2007 approach, the Commission gives a more technical conception of the EU concept of SGI, which might have contributed in making their final entry into the Treaties more acceptable by Member States under liberal governance. Importantly, it underlines that SGIs – which at the left of the political spectrum still constitute a

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[683] The issue of social cohesion in modern societies is central in the works of Durkheim, who believed that modern societies tend to achieve cohesion through "organic solidarity" rather than "mechanic solidarity". In his view social cohesion was indispensable to a society's sustainability, as "For if society lacks the unity that derives from the fact that the relationships between its parts are exactly regulated, that unity resulting from the harmonious articulation of its various functions assured by effective discipline and if, in addition, society lacks the unity based upon the commitment of men's wills to a common objective, then it is no more than a pile of sand that the least jolt or the slightest puff will suffice to scatter.", see the re-publication of the English version of Emile Durkheim's book Education morale, Durkheim E. 2002, *Moral Education,* Courier Dover Publications, p. 102.

[684] In the view of Léon Duguit the State was legitimated not by public authority but by its capacity to organize society to serve the general interest, see in particular Duguit L. 1923, *Traité de droit constitutionnel*, t. 2, Sirey, p. 55.

[685] Commission, "Services of General Interest in Europe" (Communication) 96/C 281/03, p. 3, emphasis added.

[686] Commission, "Services of general interest, including social services of general interest: a new European commitment" (Communication) COM (2007) 725 final, p. 3, emphasis added.

fundamental element of state legitimacy – "can vary through histories and cultures of state intervention".

Be as it may with the "culture of state intervention" varying among Member States, SGIs are consistently defined by the Commission in its various communications as "both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations".[687] As already aid, in this conceptual architecture SGI appears as a "mother concept" including two "daughter-concepts" SGEI and NESGI, SGEI having been present in the Treaties ever since 1957.

As there is at this stage of EU law no material provision specifically applying to the larger group SGIs, its raison d'être must be understood to establish a *legal* conceptual link between SGEIs and NESGIs to which the High Contracting Parties – the States members of the Union – recognize a particular *political* importance, as underlined in the introductory sentence of the Protocol. From a legal-political point of view this goes beyond the rhetoric of Article 14 TFEU. By declaring the importance of the wider notion of "services of general interest", the Member States express explicitly for the Union, including themselves, that the very concept of "general interest" has become part of EU's political project.[688] It seems thus that an important political page has been turned, which the Commission apparently acknowledged by entitling its Communication of 2007 on SGI "a new European Commitment".[689] It is worth remembering how the Commission already 2003 envisaged *some* broader European political concept of general interest, as it considered that "the future of non-economic services of general interest, whether they are related to prerogatives of the State or linked to such sensitive sectors as culture, education, health or social services, *raises issues on a European scale, such as the content of the European model of society*"[690] and raised the question of which role the Community should have regarding NESGIs.[691]

7.1.3.2.2 NESGI not defined in EU law: considerable uncertainty on the scope of Article 2 of the SGI Protocol

It is clear from the SGI Protocol that even NESGIs are considered as "important", which justifies the presence of Article 2 stating that the provisions of the Treaty not in any way affect *the competence of Member States to provide, commission and organize NESGIs*. Through this wording, Article 2 affirms that Member States and their authorities retain

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[687] Ibid, p. 6-7.

[688] See Recital 13 of the Preamble to the Treaty on European Union.

[689] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 November 2007 "Services of general interest, including social services of general interest: a new European commitment" COM (2007) 725 final.

[690] See Commission Green Paper of 21 May 2003 on services of general interest [2004] OJ C76/ (COM (2003)270 final), point 47.

[691] Ibid, point 48.

strong powers regarding NESGIs within their competence, but the effect of this derogation is restricted for two main reasons.

First, by carving out exhaustively which specific powers (provide, commission and organize) are withdrawn from EU law's constraint, Article 2 suggests that EU law may affect Member States' discretion to regulate NESGIs.[692] The provision may be seen as implicitly consolidating the acquis of the CJEU's case law applying to national rules on certain social services the principle of non-discrimination in Article 18 TFEU or the principle of the free movement of persons, and the rights associated to EU-citizenship. Indeed, it is perhaps easier to interpret Article 2 of the SGI Protocol if it is understood as some Member States' attempt to prevent the erosion of their discretion to take measures related to public service activities which for the time being are *normally not* conducted by market operators, in reaction to rulings where the CJEU has applied certain Treaty provisions to activities in the public sector, without considering whether the activity at issue was economic or not. An early case in point is *Gravier*.[693]

Thus, the CJEU explained in *Humbel* that the *Gravier* judgment means that the prohibition of discrimination on grounds of nationality "always applies to vocational training, *whatever the circumstances*".[694] In *Gravier* the circumstances were that fees for access to courses in strip cartoon art were imposed to nationals of other Member States and not to students who were nationals of the host Member State. The national court wished to know whether this rule infringed the Treaty and if so on which ground. Referring to *Forcheri*, the national court had found no clear answer to the question whether students should be considered as persons to whom services are provided, and even if the answer to that question was in the negative, whether access to education lies outside the scope of the Treaty.[695] The Court of Justice decided to "define precisely the nature of the problem", and found first that the questions referred concerned neither the organization of education nor even its financing, but rather the establishment of a financial barrier to *access to education* for foreign students only, and second that concerned "a particular type of education", referred to as "vocational training".[696]

In *Gravier*, the Court underlined also that, while education was to a large extent not a Community competence, the Community had begun using its Treaty-based policy competence in the field of vocational training. It considered that vocational training, by enabling persons to obtain a qualification in the Member State where they intend to work and to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired, was particularly likely to promote the Community's objectives of free movement of persons,

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[692] In the 2013 SGEI Guide, the Commission takes the view that NESGIs are not covered by the internal market and competition rules of the Treaty, but that some aspects of how these services are organised may be subject to other general Treaty rules, such as the principle of non-discrimination. See the 2013 SGEI Guide, p. 21.

[693] Case 293/83 *Gravier* [1985] ECR I-593.

[694] Case 263/86 *Humbel* [1988] ECR I-5365, para.23.

[695] Case 293/83 *Gravier* [1985] ECR I-593, para.10, referring to Case 152/82 *Forcheri* [1983] ECR 2323.

[696] Ibid, para.18.

mobility of labour and improvement of the living standards of workers. On these grounds the Court established that *access* to vocational training fell within the scope of the Treaty, and concluded that the disputed rule infringed the principle of non-discrimination.[697] The Court gave no relevance to the argument of States intervening in the case, that they had "special responsibilities" toward their own nationals in the area of education, particularly access to education, scholarships and grants, other social facilities provided for students and the contribution by students to the cost of education, and therefore could not be prevented from treating their own nationals more favourably.[698] In other words, the SGI character of the activity could whatever the circumstances – including possibly the circumstance that the SGI was a NESGI – not exclude the applicability of the principle of non-discrimination to the national rules.[699]

The second reason limiting the significance of Article 2 of the SGI Protocol for the Member States' freedom to govern public services, is the very restricted scope of the notion of NESGI which the rule itself supposes, by stating that the provision, commission and organization of NESGI is not at all affected by EU law. This very restrictive interpretation is namely indispensable to reconcile Article 2 of the SGI Protocol with the CJEU's case law on the application of free movement rules to social services. As seen in Chapter 3, the CJEU made in *Freskot* rather clear that it makes a distinction between "economic activity" and "economic rule", as it found that an activity could be non-economic for the purpose of EU free movement rules, but that its regulation was economic for the purpose of these rules.[700] In that case, the compulsory agricultural insurance activity could be argued to constitute a service of general interest, and as defined and provided under the Greek rules, was found non-economic for the purpose of both competition and free movement rules. However, the Greek rules restricted the free movement of economic services available in other Member States, and in order to comply with the Treaty, this restriction had to be proportional to its social objective, or otherwise be modified.[701] Accordingly, the Greek rules – and as a

[697] Ibid, paras.19-25. When the judgment was delivered, the Community competence in the field of vocational training was based on Article 128 EEC, now Article 166 TFEU. The principle of non-discrimination was then based on Article 7 EEC, now Article 18 TFEU.

[698] Ibid, para.16. The argument was raised by the Danish Government and the United Kingdom intervening in the Case.

[699] In Humbel the Court explained that "the judgment in the Gravier case /…/ means that the prohibition of discrimination on grounds of nationality/…/always applies to vocational training, *whatever the circumstances*." This suggests that prohibition of discrimination constrains even national rules implying that the service is non-economic in the frame of these rules. Case 263/86 *Belgian State v René Humbel and Marie-Thérèse Edel*, [1988] ECR I-5365, para.23.

[700] Case C-355/00 *Freskot* [2003] ECR I-05263.

[701] The CJEU concluded that the national court would have to examine whether the financing of the state owned organization and of its primarily social objective, would be compromised if the scheme to some extent was liberalized. The liberalization in question would involve to allow Greek farmers taking out insurance policies with private insurers in respect of certain risks covered by the compulsory insurance scheme and made exempt from paying the contribution to a corresponding extent. Interestingly, AG Stix-Hackl found also that the body managing the compulsory insurance scheme did not carry out an economic activity, but evoked the possibility to examine the disputed service monopoly under Article 106(2) TFEU, which applies to services of general *economic* interest. See Opinion of AG Stix-Hackl in Case C-355/00 *Freskot*, para.56.

consequence probably also the organization of the non-economic social service – were affected by EU free movement rules.

On this background, it is submitted that for Article 2 of the SGI Protocol to make sense, the notion of NESGI must be understood as a service of general interest which *cannot* be subject to economic activity – at least not in the present state of affairs in the Member States and in EU law – and is therefore covered neither by EU competition rules nor by EU free movement rules. If this understanding is correct, it is not sufficient that an activity *is* non-economic as defined and regulated in a specific Member State to constitute a NESGI in the meaning of Article 2 of the SGI Protocol.

In the absence of CJEU's case law clarifying this issue, it is interesting to name the Commission's understanding of this notion. In the 2013 SGEI Guide, it reiterated its view that it is useless to establish a list of non-economic services, as such a list evolves with time, but provided examples of "non-economic activities for the purpose of the competition rules" and of "non-economic activities for the purpose of EU rules", based on the CJEU's case law.[702] This may involve that the Commission envisages two categories of NESGIs, one for the purpose of EU competition rules and one for the purpose of EU free movement rules. Yet, as the Commission also states that NESGIs are not subject to specific EU legislation and are not covered by the internal market and competition rules of the Treaty, it seems possible that it considers instead NESGIs to be an activity which are non-economic for the purpose of both EU competition and EU internal market rules. The latter understanding seems more reasonable.

The lack of certainty on the limits of the notion of NESGI may appear as unproblematic as the Commission holds the view that "the vast majority of services can be considered as "economic activities" within the meaning of EC Treaty rules on the internal market".[703] Yet it is submitted that Article 2 of the SGI Protocol is a challenging provision, and that the incertitude on its scope and effect in practice reveals the excessively sophisticated character of the CJEU's case law.

7.1.3.3 Article 36 EUCFR and the principle of respect of access to SGEI

In 1999, the Council of Cologne saw a need to establish the EU Charter on Fundamental Rights (EUCFR, hereafter referred to as "the Charter") in order to make fundamental rights' importance and relevance more visible to the Union's citizens, underlining that protecting fundamental rights had become a prerequisite for the Union's legitimacy.[704]

[702] See points 27 and 224 of the SGEI Guide 2013.

[703] Commission, "Services of general interest, including social services of general interest: a new European commitment" (Communication) COM (2007) 725 final, p. 5.

[704] See Conclusions of the Presidency, Cologne European Council 3 - 4 June 1999, point 45, and Annex IV containing the European Council decision on the drawing up of a Charter of Fundamental Rights of the European Union, available at: http://www.europarl.europa.eu/summits/kol2_en.htm. One may wonder what made this reaching out to the citizens of the Union so "needed" just then. A key explanation is argued to be that – in the same document – the Council considered overall economic stability and growth to require "a growth-oriented taxation

Making the Charter binding on EU law, with the same legal value as the Treaties, in Article 6(1) TFEU, was a central element of the Lisbon political "new deal" and will have legal consequences many of which are difficult to foresee.[705] With regard to the Treaty framework on SGEI, it is submitted that this shift implies that fundamental rights recognized by the Charter are now part of the "interests of the Union" in Article 106(2) TFEU.

The Charter includes (1) freedoms and rights traditionally present in the democratic constitutions of the Member States, (2) social-economic rights inspired from the European Social Charter and inherited of the welfare models present in various forms in the Member States and (3) the *European* market freedoms and citizens' rights introduced by the Treaties. The Charter is addressed to both Union institutions/organs *and* to the Member States "only when they are implementing EU law", and subordinates the legality of their respective acts to the respect of the freedoms, rights and principles recognized by the Charter.[706] However, the fundamental rights recognized by the Charter are not absolute.[707] The Charter makes a distinction between rights – including the rights to free movement and all provisions corresponding to rights protected by the ECHR – and principles – such as social rights under Title IV on solidarity. By contrast with rights, principles are judicially cognisable only in the interpretation of acts implementing them, and in the ruling of their legality.[708]

Article 36 EUCFR is said to be what is left of a more ambitious French proposal. As doubts were raised as to whether this principle could be a matter of fundamental rights, it has been introduced in the Charter as a compromise, and reads:

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policy, in particular a decrease in the fiscal and social security burden on the labour factor, and an employment-oriented wage policy by the parties to collective wage agreements".[704] As some unpopular messages had to be delivered to citizens of the EU, it was urgent to signal that the Union took social and environmental claims seriously. That the Charter should articulate a coherent system of rules connecting the national, European and international levels of fundamental rights was in that context a secondary task.

[705] There are concerns over the Charter opening for judicial activism and leading to a "federal" interpretation by the Court of Justice. Groussot, Pech and Petursson argue that nothing in Article 51 EUCFR allows the CJEU to submit Member States to the EU fundamental rights outside the scope of EU law and to enforce common standards applicable right across the EU regardless of whether national measures fall within or outside the scope of application of EU law They regard as virtually impossible an American evolution "à la Gitlow" whereby the the potential federal effect of the Charter would be realized through judicial activism and on the basis of it primary law status. See Groussot X., Pech L. and Peturson G. T., 2011, p. 18, where a short review of *Gitlow v. New York*, 268 U.S. 652 (1925) is also made.

[706] See Article 51(1) EUCFR. Groussot, Pech and Petursson show convincingly how the wording of Article 51(1) may be an "inadvertent omission", as in the pre-Lisbon case law Member States have been held to be bound by EU fundamental rights not only when implementing or applying EU law, but more generally whenever they act *within the scope of EU law*, which – as established in *ERT* – includes situations where the Member States seek to justify national measures derogating from EU law by reasons of public interest. See Groussot X., Pech L. and Peturson G. T., 2011, p. 20, referring to Jacobs F. G., 2001, p. 338. As the authors point out, their view is shared by Craig and de Búrca, see Craig P. and de Búrca G., 2008, p. 395.

[707] Article 52(1) EUCFR.

[708] Article 52(5) EUCFR.

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

The right of access to SGEIs belongs to the category "principles" of the Charter and thus does not found any individual opposable right. The effects of Article 36 EUCFR are still unclear, but its scope is limited by Article 51 EUCFR, providing that the principle is addressed to EU institutions and bodies with due regard for the principle of subsidiarity, and to Member States only when implementing EU law. As all other rights and principles of the Charter, the principle in Article 36 EUCFR is not absolute, and therefore its application can be restricted subject to conditions formulated in Article 52(1) EUCFR, in particular that the essence of the principle is respected, that its limitation is proportional to objectives of general interest recognized by the Union, or to the need to protect the rights and freedoms of others.

In the explanations to the Charter, it is underlined that Article 36 "merely sets out the principle of respect by the Union for the access to services of general economic interest as provided for by national provisions, when those provisions are compatible with Community legislation".[709] Thus, to found a right based on Article 36 EUCFR, SGEIs must be compatible with the rules on free movement and competition. If national measures enabling their performance restrict free movement and competition, they will have to be assessed under the principle of proportionality. In particular, if their performance is publicly funded, EU state aid rules applying to SGEI and largely based on the *Altmark* ruling will apply. One may certainly wonder whether a strict application of these rules cannot endanger the principle's essence, for instance if it is found that a service operator is over-compensated.

AG Jääskinen has expressed the view that the principle that EU law respect access to SGEI as provided in national laws may necessitate a "light competition" approach of the fourth *Altmark* criterion.[710] Regarding locally provided social, educational, housing or health services, he found less evident that excessive SGEI compensations may distort competition and affect trade between Member States successful second-guessing of the appropriate cost level is perhaps of less importance. He considered that in such fields, the approach should be "one of solidarity", as Article 36 EUCFR in his view evidently excludes the termination of the provision of a SGEI only because authorities miscalculated.[711]

In Article 36 EUCFR, it is also important to note the words "provided for in national laws and practices", suggesting that even in cases where public service tasks are not

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[709] Text of the explanations relating to the complete text of the Charter of Fundamental Rights of the European Union as set out in CHARTE 4487/00 CONVENT 50, p. 33.

[710] The *Altmark* ruling has laid down four cumulative criteria preventing state funding of public services provision to constitute aid in the meaning of Article 107(1) TFEU, the fourth criterion referring to two alternative procedures allowing to avoid over-compensation, namely the use of procurement procedures or the comparison of the amount received by an undertaking with the costs of a well-run company providing a similar service.

[711] Jääskinen N., 2011, p. 600.

formally characterized as SGEIs in national law, it is sufficient that they exist de facto to be recognized and respected by EU law. Thus, a flexible application of the fourth Altmark criterion may indeed be required by Article 36 EUCFR. However, Article 36 EUCFR may support arguments against a too relaxed application of state aid rules in the field of publicly-funded social services, as such an application may instead contribute to deprive users from their rights. Indeed, if the SGEI is compensated but not clearly defined, neither EU institutions nor users have a chance to know which service – or rather which service conditions – Article 36 EUCFR protects access to.

Besides, it may be questioned whether social services are as local in nature as they often are depicted. While it is true that they tend to be provided and used locally, certain social services, such as elderly care or health care can generate considerable cross-border commercial activity. Indeed, in the process of welfare marketization, social services constitute an attractive investment sector. This business reality is well known by EU institutions, and part of the social entrepreneurship which is actively promoted by the Union. Article 36 EUCFR enjoins EU institutions to recognize and respect access to SGEI rights as fundamental rights of EU citizens. This recognition implies a certain deference to the relation established between the Member States and their peoples, but it does arguably not allow to hide behind the local character of social services to relax EU competition requirements based on Article 106(2) TFEU, because these requirements can actually promote access to the SGEI rights.

The EU network of independent experts on fundamental rights held a few years ago that the EU courts' case law on SGEIs had not yet touched on the right of access to SGEIs but essentially on aid granted to providers as a compensation for the costs incurred by public service obligations.[712] However, in the field of health care, it appears that the CJEU has in fact widened the national conditions of access to an SGEI, by requiring that Member States finance SGEIs provided in other Member States. It is namely argued, and shown in Chapter 8, that *Smits and Peerbooms, Kohl* and *Watts* can also be read as concerning the access of citizens from certain Member States to an SGEI supplied by service providers established in other Member States. This confirms that to be recognized and respected, access to SGEIs must be based on national rules respecting EU rules on free movement, and that Article 36 EUCFR cannot oblige the CJEU to unconditionally recognize and respect national conditions of access to SGEIs which restrict free movement.

Another question, not discussed here, is whether the principle laid down in Article 36 EUCFR may have some relevance in litigation between SGEI-users and undertakings entrusted with SGEI tasks.

[712] Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, p. 313.The FR network was set up by the European Commission, upon request of the European Parliament and coordinated by Olivier De Schutter, with the assistance of Valérie Van Goethem.
Available at: http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf.

7.2 SGEI's political importance for EU's foundational principles

The legal-political motives of SGEIs' dignity in EU constitutional law is signalled by several connections between the Treaty framework on SGEIs, including Article 36 EUCFR, and certain Treaty "foundational principles", by which is meant here Articles 2-6 TEU. This section examines first the relation between the Treaty framework on SGEIs and EU's values and objectives, and second the relation between the Treaty framework on SGEIs and the principles of conferral, respect of the national identity and local self-government.

7.2.1 Relation between the Treaty framework on SGEIs and EU's values and objectives

The SGI Protocol declares that SGIs, obviously including SGEIs, are "important" for the Union. This term indicates that SGEIs have a high dignity in EU law, which according to Article 14 TFEU is related to the place they occupy in the shared values of the Union, and to their role in promoting social and territorial cohesion. Accordingly, it appears that the Union's values and missions constitute the legal-political foundation, and that SGEIs are seen as playing an important function in giving substance to these values and missions in the daily life of EU peoples.

7.2.1.1 SGEI and the shared values of the Union

The term "values" appears in several provisions of the Treaties, but first and foremost in Article 2 TEU, which reads:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Are these values in Article 2 TEU equivalent to the "shared values of the Union" mentioned in Article 14 TFEU, or are they related in some other way? Some light on this question is shed by comments of a group of experts, nominated by the Legal Services of the European Parliament, the Council and the Commission, on the draft text of the Constitutional Treaty. In a report annexed to notes addressed by the Secretariat of the European Convention to the Members of the Convention, the expert group considered the use of the term "shared values" in the draft amendments to ex Article 16 EC (now the first sentence of Article 14 TFEU) as problematic when "values", in Article 2 of the draft text of the Treaty Articles establishing a Constitution for Europe, were defined in

terms of human rights values. They suggested finding another term.[713] The wording of Article 2 in the draft text of the Constitutional Treaty was actually quite close to the provision now enforced in Article 2 TEU and read as follows:

> The Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights, values which are common to the Member States. Its aim is a society at peace, through the practice of tolerance, justice and solidarity.[714]

Therefore, it seems possible to deduce from the expert group' view that "values" in Article 2 TEU and "shared values of the Union" in Article 14 TFEU are not meant as the same thing. This does not exclude that they are related. Indeed, the Praesidium of the European Convention explained how other ethical elements in the late Constitution would relate to the values of the Union listed in Article 2 of the Draft text:

> That does not, of course, prevent the Constitution from mentioning additional, more detailed elements which are part of the Union's "ethic" in other places, such as, for instance, in the Preamble, in Article 3 on the general objectives of the Union, in the Charter of Fundamental Rights (which, unlike this Article, does not, however, apply to autonomous action by the Member States), in Title VI on "The democratic life of the Union" and in the provisions enshrining the specific objectives of the various policies.[715]

This distinction between "core values" and "additional, more detailed elements of the Union's ethic", may help in understanding SGEIs' "place" in the Union's shared values. It is argued that SGEIs have a place in EU's shared values inasmuch as they convey elements of ethic which are more detailed than, but in line with, the core values enunciated in Article 2 TEU.[716] To get a better sense of this relation, let us take a closer look at Article 2 TEU.

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[713] The experts group was mandated with a view to making technical adjustments to EC and EU Treaty provisions for insertion into Part Two of the Constitutional Treaty and its report was attached to Note (CONV 618/03) addressed by the Secretariat of the European Convention to the Members of the Convention and dated 19th March 2003, p. 1, http://register.consilium.europa.eu/pdf/en/03/cv00/cv00618.en03.pdf, accessed 27 February 2015. See footnote to clause 3 under the title "The Union's values". Clause 3 reads: "This concept of "shared values" is questionable when "values" are defined in the draft Article in Part One entitled "The Union's values" (Article 2 CONV 528/03) in terms of human rights values.

[714] See Note (CONV 528/03) from the Praesidium of the European Convention to the Members of the Convention including a draft text of the Articles of the Treaty establishing a Constitution for Europe, p. 2.

[715] The Praesidium consisted of the Convention Chairman and Vice-Chairmen and nine members drawn from the Convention: the representatives of all the governments holding the Presidency of the Union during the Convention (Spain, Denmark and Greece), two national parliament representatives, two European Parliament representatives and two Commission representatives.

[716] This proposition seems supported by the following statement made by the Commission in 1996: "Europe is built on a set of values shared by all its societies, and combines the characteristics of democracy - human rights and institutions based on the rule of law - with those of an open economy underpinned by market forces, internal solidarity and cohesion. These values include the access for all members of society to universal services or to services of general benefit, thus contributing to solidarity and equal treatment." See Commission, "Reinforcing political union and preparing for enlargement" (Opinion) COM (96) 90 final.

Although the Treaties are not formally a constitution, von Bogdandy considers the concepts listed in Article 2 as legal norms constituting "founding principles" of EU law, and express a constitutive – as opposed to restrictive – constitutionalism in EU positive law.[717] This view is in line with the explanation of the provision's "early draft version" in the late Constitutional Treaty, given by the Praesidium of the European Convention, emphasizing the extraordinary powers related to the adhesion to or breach of these values:

> This Article concentrates on the essentials – a short list of fundamental European values. Further justification for this is that a manifest risk of serious breach of one of those values by a Member State would be sufficient to initiate the procedure for alerting and sanctioning the Member State [see Article 7(2) TEU], even if the breach took place in the field of the Member State's autonomous action (not affected by Union law). This Article can thus only contain a hard core of values meeting two criteria at once: on the one hand, they must be so fundamental that they lie at the very heart of a peaceful society practising tolerance, justice and solidarity; on the other hand, they must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom which are subject to sanction.[718]

The list of values in the first sentence of Article 2 is exhaustive and includes concepts present in the preamble to the EU Treaty, but there named "universal values" (second recital) alternatively "principles" (fourth recital). Article 2 TEU includes also a second sentence providing that these values are "common to Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". This wording suggests that these latter notions, expected to *prevail* in the European society, do not constitute "values" of the same dignity as those on which the Union is *founded*.[719] The Praesidium's explanation cited above appears to support this interpretation of Article 2, "slicing" the concepts it refers into (1) characteristics of European societies which are part of the social contract and illustrating what is meant with (2) the non-negotiable "core".

Micklitz holds that Article 2 TEU deals with "the Social" in line with a concept of *shared responsibility* between the Union and the Member States, the Union upholding "access justice", leaving to the Member States the responsibility to achieve social justice.[720] To Pernice, Article 2 TEU evokes a social contract, and this view is shared here, given the similitude between the values enumerated in that provision and a number of fundamental rights recognized by the EU Charter. However it is argued that this "social

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[717] Von Bogdandy A., 2010, p. 106.

[718] See Article 2 of the draft text of the Articles of the Treaty establishing a Constitution for Europe.

[719] According to Von Bogdandy, "the obscure normative function of the second sentence" illustrates the remaining uncertainties concerning the identification of European founding principles, see Von Bogdandy A., 2010, p.106-107. Whether the notions named in the second sentence of Article 2 may be considered "values referred to in Article 2" may have significance for the hopefully rare application of Article 7(2) TEU.

[720] Micklitz H.-W., 2010, p. 3 and 7. Micklitz borrows the term "the Social" from Kennedy in Kennedy D., 2006, p. 19-73.

contract" includes also Article 3(1) TEU, which declares that EU's aim is to promote peace, EU's values and the well-being of its peoples.[721] The EU may be seen as bound to EU citizens through its foundational values and aims, and also bound to do so on the basis of more specific missions and objectives enumerated in Article 3(2-5) TEU.[722] The mission to establish an internal market is cardinal but completed by societal and environmental objectives – full employment, social progress, high level of protection and improvement of the quality of the environment, social justice and protection, equality between women and men, protection of the rights of the child – which must be pursued loyally by the Union.[723]

Obviously, the particular "shared value" consisting for services of general economic interest in "a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights"[724] seems to promote the Union's values of human dignity, equality and respect for human rights, and the well-being of the peoples of Europe. This specific SGEI value seems also apt to promote social justice and combat social exclusion and discrimination.

7.2.1.2 SGEI and human rights

According to Rossi, Article 2 TEU includes a new list of fundamental values of the EU, which is broader than Article 6 of the current EU Treaty, and is equally binding for the EU and Member States, a sort of "mini-catalogue" of the values and principles promoted by the EUCFR.[725] Indeed, the semantic or logical connection between the titles of the EUCFR and the values enunciated in the first sentence of Article 2 TEU is obvious – with the important exception of title IV on "solidarity", a concept which is only present

[721] To Pernice, Article 2 TEU evokes a social contract, "which, through diverse new provisions on solidarity among the Member States, would embrace citizens individually as well as their respective countries". See Pernice I., 2009, p. 41, who underlines this element of contract between the Union and "its" citizens. Thus he points out that the protection of citizens is mentioned among the aims of the Treaty in Article 3 (3) and (5) TEU, and that Article 13 TEU states that the institutional framework shall serve not only the interests of the Union and its Member States, but also those of its citizens.

[722] Von Bogdandy is critical of the use of the term *values* in the Treaty, as he believes that "value discourses can easily acquire a paternalistic dimension", see p. 104. While he advocates a legal doctrine of principles based on a better foundation than "sociological assumptions regarding normative dispositions of EU citizens", it may be argued that the Treaty is not only written for legal scholars. The fact that certain principles are dignified in the Treaty as "values", was arguably decisive for public adhesion to the almost constitutional Lisbon Treaty in the first place, and a popular expression of this dignity was probably crucial from a democratic point of view. The Council may according to Article 42(5) entrust the execution of a common security and defence task, within the Union framework, to a group of Member States, in order to protect the Union's *values*. The concept of "value" conveys a more profound adhesion of citizens to the common project, which the Union has been given legal powers to appeal to. Is anybody ready to die for "founding principles"?

[723] Pursuant to Article 7 TFEU, the EU must also ensure the consistency of its policies and activities.

[724] Pursuant to Article 1 third dash of the SGI Protocol.

[725] Rossi L. S., 2008, p. 81.

in the second sentence of Article 2 TEU.[726] By formulating "more detailed ethic elements", Article 14 TFEU, aimed at protecting the fulfilment of SGEI missions, and Article 36 EUCFR, aimed at supporting access to SGEI, play an important function in ensuring that the Union can pursue its aim to promote the respect for human dignity and the respect for human rights, and fulfil its mission to combat exclusion and discrimination, solidarity between generations and protection of the rights of the child.[727] To be sure, SGEIs and public service obligations related thereto are generally introduced to ensure rights recognized by the Charter, in particular the right to education, the rights of the elderly, the right of access to placement services, family rights in particular to paid maternity leave, social security and social assistance, health care.[728]

A Working Paper elaborated in 1999 by the Directorate General for Research of the European Parliament explains that fundamental social rights in the context of the EUCFR are "the rights to which the individual is entitled as a member of a group and which can be made effective only if the State takes action to safeguard the individual's environment. They do not give effect to freedom from the State but to freedom with the State's assistance".[729] In many social fields, where it lacks both policy powers and powers to levy taxes, the EU depends heavily on the Member States' social policies to take action, give assistance to its peoples, and give substance to the social rights recognized by the Charter.

These social rights do not constitute litigable or "individual" rights, but they are cognisable, although according to Article 52(5) EUCFR, only in the *interpretation* of EU legislative and executive acts – and national measures implementing EU law. Such a legality review does not exclude that social rights are limited, but as already seen, any limitation must respect the essence of the social rights protected. The "essence" of social rights, protected by Article 52 EUCFR can be particularly tricky to define, in particular because its definition is generally related to costs.[730] In other words, the binding status

[726] Indeed, each value enuntiated in the first sentence of Article 2 TEU seems to correspond to one of the titles of the Charter: title I for "dignity", title II for "freedoms", title III for "equality, title V for "citizens' rights, title VI for "the rule of law".

[727] The aim follows from Article 3(1) TEU and the missions from Article 3(3) TEU.

[728] See Articles 14, 25, 28, 33, 34, 35 EUCFR.

[729] This definition is proposed in *Fundamental Rights in Europe*, European Parliament, Directorate General for Research, Working Paper, Social Affairs Series, 3 PE 168.629, Authors: Mark Eric BUTT, Julia KÜBERT and Christiane Anne SCHULTZ, Editor: Lothar BAUER, Division for Social, Legal and Cultural Affairs, Directorate-General for Research and is based on a definition made by Wipfelder, in Wipfelder H.-J., 1986, *Die verfassungsrechtliche Kodifizierung sozialer Grundrechte*, Zeitschrift für Rechtspolitik, p.140.

[730] The term "essence" appears to be as open-ended as the Court's ruling in *Karlsson* which, according to the explanations of the Charter, it is based on, see explanations of the Charter, p. 48 referring to case C-292/97 *Kjell Karlsson and others,* [2000] ECR I-02737. Under paragraph 45, the Court declares that EU law allows restrictions on the exercise of fundamental rights, in particular in the context of a common organization of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and *unreasonable* interference undermining the very substance of those rights. Interestingly it was a right to non-discrimination on the basis of nationality which the Court discussed in *Karlsson*, claimed by milk producers against EC fixed milk-quotas, but in *Karlsson* the Court referred to *Wachauf* which prohibited restrictions entailing "a disproportionate and *intolerable* interference, impairing the very substance" of fundamental rights, se Case C-5/88 *Hubert Wachauf* [1989] ECR 02609, para.18.

of the social principles recognized by the Charter does not say much of which "essence" they guarantee. In specific cases, it may be possible to argue that this essence is in particular found in public service tasks assigned on the basis of democratic mandates to public authorities in the Member States. Hence, the Union's duty to recognise and respect access to SGEI pursuant to Article 36 EUCFR may play an important legal-technical role in ensuring that EU law respects social rights, thereby fulfilling its objectives and respecting it core values.

7.2.1.3 SGEI and social and territorial cohesion

The Union must establish an internal market, pursuant to Article 3(2) TEU, but it has also a mission to promote social and territorial cohesion and solidarity among Member States according, pursuant to Article 3(3) TEU. These missions are both instrumental for the Union's aim to promote peace, which is still a concrete issue today in a Europe where racism and militant nationalism have not been eradicated.[731] The idea that market interaction and social cohesion are important for peace appears related to theories developed – in quite different ways – by Comte, Spencer and Durkheim.[732] By declaring that they play a role for social and territorial cohesion, Article 14 TFEU characterizes SGEIs as beneficial to the Unions' fundamental missions, which enhances their dignity. This declaration is important, because as seen in section 7.1.2, SGEIs are perceived by some Member States as problematic in the liberalization of public services, depending on how they are defined and regulated in EU market law. Yet, the relation between SGEIs and the EU objective of social cohesion is still very complex, in particular because SGEIs defined by Member States and provided on the basis of national rules, tend to promote national solidarity, which is arguably different from the meaning of the concept of solidarity at EU level.

In the Commission Communication on Services of General Interest of 1996, the Commission theorized on "the European model of society" and formulated the relationship between SGIs – economic or non-economic – and the Union's objectives in the following words:

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[731] The heads of States declare in the TEU preamble their desire to deepen the solidarity between their peoples and in the TFEU preamble intend to confirm the solidarity which binds Europe and the overseas countries and express their resolution, "by thus pooling their resources, to preserve and strengthen peace and liberty".

[732] See for instance Durkheim, Division of labor in society: A Study of the Organization of Advanced Societies (De la division du travail: Etude sur l'Organisation des Sociétés Supérieures, Livre I-III), 1893. Durkheim analyzed the specialization of labor and its relation to social cohesion. Lack of cohesion was found at both individual/psychological level and from a societal perspective to constitute a source of depression and misery. Together, organic interdependence and common ethical values are found to be factors of social cohesion and integration of social systems. Long before Durkheim, Auguste Comte had also acknowledged the fundamental role played by the division of labor in the structure of modern societies which he saw it as a threat to feelings of community and togetherness. By contrast with this so called "moral communalist" approach, other philosophers, like Herbert Spencer, contributed to theories on cohesion with a more liberal approach, based on a "law of equal freedom" leading to a recognition of individual rights.

> Solidarity and equal treatment within an open and dynamic market economy are fundamental European Community objectives; objectives which are furthered by services of general interest. Europeans have come to expect high-quality services at affordable prices. Many of them even view general interest services as social rights that make an important contribution to economic and social cohesion. This is why general interest services are at the heart of the European model of society, as acknowledged by the Commission in its recent report on the reform of the European Treaties.[733]

While referring to the notions of solidarity and equal treatment, this "European model of society" evoked discreetly but surely two different visions of SGIs. The first vision is one where SGIs consist of market services for which particular conditions of quality and affordability should be secured (which may not necessarily require solidarity), whereas in the other vision SGIs correspond to social rights supposing a direct welfare relation between the State and its people (normally based on solidarity). In the face of these two different visions, it may appear that the Treaties are neutral, as Article 14 TFEU emphasizes SGEI's role for social cohesion, not their role for solidarity.

Although the notion of solidarity is present in Article 2 TEU (as a value prevailing in the Member States) and in the Charter (as the title for several social rights), it is thus probable that its meaning in these contexts is specific for EU law and differs from the meaning that this notion can have – implicitly or explicitly – in the national welfare systems. As argued by Micklitz, the upgrading of solidarity in the Lisbon Treaty requires an understanding of what is behind the concept of solidarity at the European level and to what extent it complies with the particular national understanding.[734] His contention that national solidarity concepts can be disintegrated by European integration gets support from the CJEU's approach in the so called health care cases, studied in chapter 3, and in cases where Member States denying or restricting access to their social services for citizens from other Member States were found to infringe the EU principles of non-discrimination or free movement.[735]

Micklitz' view that the autonomous meaning of solidarity will play a crucial role in the dialectic of European integration and national disintegration is shared here. However, the "totalization" of EU law – and the closure of "exit" from EU market rules for social services – has arguably faced EU institutions, and the masters of the Treaties, with the challenge of upholding EU law as a *legitimate* legal order. This may imply that EU law respects the expression of social contracts uniting EU citizens to their respective States, as the latter unquestionably enjoy, in Weiler words, a "constitutional demos".[736] Indeed, it seems that Article 1 third dash of the SGI Protocol establishes a frame of compatibility between the EU understanding and the national understandings of solidarity, by providing in relation to SGEI for the "shared value" of a high level of quality, safety, and affordability, equal treatment and the promotion of universal access and the users

[733] Commission, "Services of General Interest in Europe" (Communication) 96/C 281/03, point 1.

[734] Micklitz H.-W., 2010, p.5.

[735] See in particular Case C-184/99 *Grzelczyk* [2001] ECR I-6193 and Case C-209/03 *Bidar* [2005] ECR I-2119.

[736] Weiler J.H.H., 2001, p. 6.

right. Where solidarity-based measures are found appropriate and necessary to secure these shared values as expressed by an SGEI, it may be difficult for EU institutions to submit these measures to strict proportionality tests under EU market rules, as Article 14 TFEU imposes on the Union to take care that such SGEI must enjoy conditions, in particular economic and financial, enabling them to achieve their missions as defined by Member States, and *their* expression of solidarity.

According to Article 14 TFEU, SGEIs play also a role for territorial cohesion, which is an EU mission, arguably related to the core value of equality in Article 2 TEU. As communities of persons, territories need cohesion with one another, which is promoted when they receive equal assistance from the State, for instance in the form of infrastructure, or from EU in the form of funds.[737]

7.2.1.4 SGEI and democracy

Article 14 TFEU emphasizes that the shared responsibility to take care that SGEIs can achieve their missions is assigned to the Union and the Member States, "each within their respective powers and within the scope of application of the Treaties", which reflects the principle of conferred powers provided for by Article 5(1) and (2) TEU, and the principle under Article 4(1) TEU that competences not conferred on the Union remained with the Member States. This delimitation of competence under the principle of conferral is not the only price that the Union has to pay for democracy, as the Union has also committed itself under Article 4(2) TEU to respect the national identities of Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.[738] In relation to SGEIs, respect for national identity was mirrored in the CJEU's stance in the electricity cases that in view of the Member States interest to use certain undertakings as instruments of their economic policy, in particular in the public sector, they cannot be precluded, when defining the services of general economic interest which they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings.[739]

This discretion is mirrored in Article 1 dash 1 of the SGI Protocol, which declares that national, regional and local authorities have a wide discretion in providing,

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[737] See for instance Case C-205/99 *Analir* [2001] ECR I-1271, para.27, where the objective of territorial continuity was seen as a legitimate public interest.

[738] Lenaerts underlines that "Article 14 TFEU states that, when laying down the general principles and conditions underpinning the operation of SGEI, the EU legislator must comply with Article 4(2) TEU, which states that '[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities'." See Lenaerts K., 2012, p. 1258.

[739] Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para.40. It may be argued that this approach was developed in Case T-17/02 *Fred Olsen* v *Commission* [2005] ECR II-2031, para.216 and Case T-289/03 *BUPA* [2008] ECR II-81, para.166.

commissioning and organizing SGEIs. In that provision, their discretion is related to their essential role for SGEIs, but also to its exercise "as closely as possible to the needs of the users". This locution can be interpreted as suggesting that users' needs must conduct the SGEI's definition in order to legitimate the wide discretion permitted by EU law. If this understanding is correct, it is the local self-government's capacity to come close to the "general interest" which justifies that not only national, but also regional and local authorities enjoy a wide discretion. Also, in Article 1 dash 2 of the SGI Protocol, the Union characterizes as a "shared value" the diversity between various SGEIs and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations, which may be seen as an illustration of its respect for the national identity of Member States.

This analysis shows that Article 14 TFEU and Article 1 dashes 1 and 2 of the SGEI Protocol constitute a particular expression, related to SGEIs, of the EU's aim to promote democracy, and its obligation to respect the limits of its conferred powers, respect national identity, and local self-government. By spelling which powers Member States retain in relation to SGIs covered by EU rules on free movement and competition (SGEIs), Article 1 of the SGI Protocol mirrors the divide between competence and exercise of competence made by the CJEU in the formula of retained powers, already evoked in chapter 6. The exercise of Member States' competence – as framed in the SGI Protocol – should allow them to achieve the SGEI missions resulting from a democratic bargain between them and their citizens.

7.2.2 SGEI an appropriate instrument to develop public services in a "highly competitive social market economy"?

The analysis of the evident constitutional links between SGEI and the Union's values and principles conducted above may *prima facie* make regulations on the basis of Article 14 TFEU "appropriate instruments commensurate with powers conferred on it by the Treaties" in the meaning of Article 3(6) TEU.

With the Treaty of Lisbon, a new economic paradigm has entered into the Treaties as the guiding star for the Union. Leaving behind "market economy" in the former EC Treaty, the Union must instead establish the internal market on the basis of "a highly competitive social market economy", pursuant to Article 3(3) TEU. A central issue addressed in this section is whether this shift may can play a role for EU law's effect on the welfare systems of the Member States.

A point of departure in examining this question is Neergaard and Nielsen's view that the concept of "social market economy" is related to the concept of "European Social Model". They mention that the concept of Social European Model was applied for the first time by the Commission in 1994, and had a predominant place in the Lisbon strategy formulated in 2000, as the result of a compromise between the neo-liberal and the more socially-oriented governments of Member States. They review some of the

many opinions on this concept in scholarly literature, and find a lack of consensus among legal scholars on how the concept of the European Social Model should be understood or defined.[740] This is not so surprising, because the European Social Model is still embryonic and will be the evolving creature of Member States which at present are themselves in profound political and sociological mutation. Under such circumstances, it may be expected, as Joerges & Rödl hold, that there is neither a common nor a clear picture of what the world could be in a social market economy'.[741]

Joerges and Rödl doubt also that the introduction of the concept of social market economy can bring about a social model at all. These authors remind that social market economy, ascribed to the German economist Alfred Müller-Armack, is deeply interwoven with ordo-liberalism, and they acknowledge that this model aims at infusing market economy with "social fabric". However, the concept of "social market economy" might in their view have been misunderstood by those who supported its introduction in the Treaties and might have regarded it as a constitutional principle imposing a "social Europe. [742] They contend namely that the model can only be realized in the counterfactual framework of state-like federalist competencies, and therefore they believe that "we won't get anything social out at all" of social market economy.[743] In contrast with such views, Neergaard believes that social market economy has a potential to play an explicit and significant role in the future.[744] Also, Hettne considers the introduction of this concept to give renewed arguments justifying national rules and decisions restricting the freedoms promoted by the EU Treaties.[745] On a similar path, Jääskinen holds that the Lisbon Treaty makes social market economy an objective of the European Union.[746]

To assess the potential role of the concept, it seems important to place its introduction in the context of the European development, especially the decade 2000-2010. In view of the political turbulences accompanying the process of ratification of the constitutional Treaty and of adoption of the Services Directive, the drafters of the Treaty of Lisbon had arguably sensed the Member States' "market fatigue" before it was diagnosed by Mario Monti.[747] In order to rescue a broad adhesion to the European project, they may

[740] Neergaard U. and Nielsen R., 2010, p. 15-16.

[741] See Joerges C. and Rödl F., 2004, p. 11-12.

[742] Ibid, p. 15-16.

[743] Ibid, p. 21. The authors believed that "the socially engaged conventionists were victims of their own trap: omitting a reference to an equivalent of a European "social State", they choose "social market economy" – "to get "at least something social in".

[744] Neergaard U., 2013, p. 217.

[745] Hettne considers that the Treaty of Lisbon, in particular through the social concerns its preamble expresses, provides new support for such argumentation. He underlines nevertheless that such argumentation must be conducted in the right contexts and in all available fora, both political and legal. He does not call for reinforcing judicialization of politics, but instead a better understanding for EU's legal construction and a strategic adaptation to this construction. See Bertola G., Hettne J., Scharpf F. W. and Tarschys D., p. 39.

[746] Jääskinen N., 2011, p. 599.

[747] See Report of Mario Monti to the President of the European Commission José Manuel Barroso, 9 May 2010, "A New Strategy for the Single Market – At the service of Europe's economy and society", p. 6.

arguably have seen a need to distance the Union from the philosophy of the Single European Act, when – in the lyrical words of AG Colomer – "competition was installed as the new deity on 'the altar of political ideas' and "public service has become an obstacle to be overcome in the name of a liberalisation on which all hopes were pinned".[748] It is however difficult to ascertain whether this distancing was meant as a matter of rhetoric or of substance. De Vries holds that the concept of social market economy alludes to the fact that the European economic integration process should at least not be perceived as a "neo-liberal project".[749] As to Neergaard and Nielsen, they hold that "the importance of the European Social Model and the Social Market Economy primarily lies in the function of indicating that Europe is now heading in a different direction than what it originally did".[750] They also hold that the social dimension of the EU will make the European project more acceptable to some than when it was primarily defined as an economic project.

Neergaard and Nielsen seem to have very little doubts on the fact that the concept of social market economy will change the direction of the EU project, which unavoidably implies a larger impact – and at times limitations – on the national organisation of welfare. They expect negative reactions, due to the uneven and disputed legitimacy of EU to deal with welfare services.[751] It is submitted here that EU law's expansion has already begun changing the direction of the EU project. The welfare systems of many Member States are already affected by EU law, and every Member State's social model is to some extent Europeanized, under the impact of EU law, mainly procurement and state aid rules. If this is agreed, the introduction of the concept of "highly competitive social market economy" may be seen to a large extent as an acknowledgement of the fact that EU market law applies to national welfare systems, including social services, although the latter still are in the policy competence of the Member States. The concept may indicate that EU market law applying to social services has a special telos, but what this telos must be is unsaid.

There are indeed many shades of social fabric in market economy, and the paradigm of "highly competitive social market economy" is so open-ended that it can probably be used to justify varied models of regulation of welfare service markets including any of those shades.

In this regard it is interesting to quote Mario Monti's view in his report to the former president of the Commission Manuel Barroso: "The single market today is less popular than ever, while Europe needs it more than ever".[752] Building partly on this report, the

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[748] See Opinion of AG Ruiz-Jalabo Colomer in Case C-265/08 *Federutility* [2010] ECR I-3377, para.2.

[749] De Vries S. A. De, 2013, *The protection of fundamental rights within Europe's internal market after Lisbon – An endeavour for more harmony*, in The Protection of Fundamental Rights in the EU after Lisbon, Sybe de Vries, Ulf Bernitz, Stephen Weatherill (eds.), Bloomsbury Publishing.

[750] Neergaard U. and Nielsen R., 2010, p. 15-16.

[751] Neergaard, U., & Nielsen, R. (2010). Regarding EU's legitimacy to deal with welfare services, Neergaard and Nielsen refer to views put forward by Damjanovic & de Witte, Damjanovic D. and de Witte B., 2009, p. 55.78.

[752] See Report of Mario Monti to the President of the European Commission José Manuel Barroso, 9 May 2010, "A New Strategy for the Single Market – At the service of Europe's economy and society", p. 6.

Single Market Act adopted by the Commission underlines that the internal market is based on a "highly competitive social market economy", which reflects "the trend towards inclusive, socially fairer and environmentally sustainable growth". As a token of such a trend, the Commission takes that "[n]ew business models are being used, in which these societal concerns are taking precedence over the exclusive objective of financial profit".[753] While the existence of a trend for business pursuing – according to its *legal* statutes – societal concerns before profit-maximization needs empirical support, it seems that in Brussels the winds of the Single European Act still blow in the Single Market Act, promoting a "social entrepreneurship" which in several Member States supposes a liberalization and privatization of welfare services. Also, as a part of its Social Business Initiative, the Commission has proposed a Regulation on European Social Entrepreneurship Funds, promoting the development of private funding of undertakings providing housing, healthcare, assistance for elderly or disabled persons, child care, access to employment and training as well as dependency management on the market for investment funds.[754] In this approach, "social servicing" is seen as a vector for new undertaking and for growth, rather than primarily as a vector for cohesion and democratic self-determination. Thus, the initiatives elaborated by the Barroso Commission in the field of social services reflect already a certain vision of the European Social Model based on a "highly competitive social market economy", which promotes the development of welfare service markets, in particular social service markets.

In the absence of EU legislation specific to social services, the telos of applying EU market law to social services is undetermined. The EU concept of "highly competitive social market economy" may not be seen as determining this telos, because for these services, the policy powers (the primary "telos") are retained by the Member States. Therefore, a crucial factor in the process of précising the telos of EU market rules applied to social services may instead depend on the use made – or not made – by Member States and EU legislative and judicial institutions of the EU framework on SGEIs. In other words, to know where the European social model is heading in the field of social services, it may be more enlightening to study what use Member States, the EU legislator and the CJEU make of Article 14 TFEU.

Evoking public consultations and an on-going dialogue with stakeholders, the Commission has signalled in the Communication on a Quality Framework for SGIs that it will continue to examine the need for legislation based on Article 14 TFEU, but that "the consensus at this stage seems to be that this not an immediate priority". Also, the Commission explains that it finds more appropriate a sector approach, where tailor-

[753] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Single Market Act, Twelve levers to boost growth and strengthen confidence, "Working together to create new growth" COM(2011)206 final, p. 14 (social entrepreneurship), p. 15 (legislative proposal on the transparency of social and environmental information from companies).

[754] See the Communication of the European Commission "Social Business Initiative – Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation", COM (2011) 682. This initiative has resulted in the proposal, not yet adopted, to lay down a common framework of rules imposed to investment funds wishing to use the designation "European Social Entrepreneurship Fund", see 2011/0418 (COD). It has also resulted in a proposal to reorient structural funds towards social enterprising.

made solutions can be found to concrete and specific problems in different sectors, and refers in this regard to its 2011 Package on state aid to SGEIs.[755] This reference denotes that the Commission understands as a true imperative to legislate with regard to the Union's duty under Article 14 TFEU, requiring that the Union respects the Member States' retained powers and takes care that SGEIs *existing* in their legal systems operate on the basis of principles and conditions enabling them to fulfil their missions. The reference suggests also that the Commission regards the specific regime for social services in its 2011 state aid package as *related to* its duties under Article 14 TFEU. What is sure is that neither the injunction to adopt regulations on the basis of Article 14 TFEU nor the injunction to establish an internal market on the basis of a highly competitive social market economy model have lead EU institutions to legislate *explicitly* on the basis of Article 14 TFEU.

7.3 Conclusions

In this chapter, it has been shown how the debate urged by EU law's absorption of national welfare systems has led to a new Treaty framework on SGEIs, consolidating and building on elements of the CJEU's case law, linked not only to EU's fundamental values and missions, but also to a paradigm of multilevel governance, opening for pluralism in national welfare systems, in the respect of Member States' retained powers. The Treaty framework on SGEIs emerges rather evidently as a particular expression of the Union's foundational principles in Articles 2-6 TEU, which seem to establish a kind of social contract between the Union and its peoples. This appears to imply that, in the field of social services in the Member States' competence, the Union's legislative and judicial action must be guided by the values and principles of Articles 2 and 3 TEU, but also by the respect of social rights recognized by the EU Charter, of the limits of conferred competences, and of the national identity, including local self-government.

The introduction of this strong "SGEI voice" in the post-Lisbon Treaties, with its core in Article 14 TFEU combining values of cohesion and a respect of Member States' retained competence, has installed the controversy on the development of the European Social Model at the heart of EU constitutional law. Consequently, although the EU has committed to a social market economy, and although Member States and the Union must pursuant to Article 14 TFEU adopt regulations providing for principles and conditions, in particular economic and financial, enabling SGEIs to achieve their missions, no such project seems envisaged for the time being, neither by the Commission nor by the Member States. Instead we have, in the frame of the Quality Framework on SGIs, a revised state aid Package which excludes social services from the duty of prior notification, and revised procurement directives, including more substantive provisions on social services. There are also signs that social services are seen

[755] Commission, "A Quality Framework for Services of General Interest in Europe" (Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions" COM(2011) 900 final, p. 5.

by the Commission as not only important for social cohesion but as a potential growth sector.

Yet Article 14 TFEU – interpreted by the SGI Protocol – seems here to stay as a Treaty provision having horizontal relevance. Its normative value, already clear from the 2001 Laeken declaration on the future of the Union[756], cannot reasonably be denied, and as expressed by Ross, the first sentence of Article 14 TFEU is "a yardstick by which other measures and acts can be judged".[757] Even if the Union does not adopt regulations as intended by Article 14 TFEU, it has to address its normative message in its legislative, administrative and judicial practice. This became very clear when the Commission had to introduce exemptions for SGEIs and specific social services the Services Directive, not only under pressure from a majority of the European Parliament members, but arguably also because Article 16 EC (now first sentence of Article 14 TFEU) gave legal support to their claim that Member States' competence should be respected by the Union.[758] At the same time the Commission seems determined to keep control over the notion of SGEI for the purpose of the state aid rules, as evidenced by its use of the notion of "genuine SGEI" in the 2011 Package on state aid to SGEI, to delineate public service obligations that Member States may in its view attach to services.[759]

On this background, and unsurprisingly, it is to a large extent for the CJEU to show the way and clarify how EU law can "take care" that SGEIs can achieve their missions, in the respect of the Union's and the Member States' respective competence. Article 14 TFEU is a tricky yardstick to use, for several reasons. First, it is no secret that many political and economic experts, in particular in the Commission, favour a narrow understanding of the notion of SGEI, confined to its relevance for the Treaty rules on competition and state aid. The CJEU may have reasons to support this approach, but in Article 14 TFEU the notion of SGEI seems horizontal, in particular as Article 14 TFEU is a provision having general application. This may imply that SGEI must be understood as a *broad* EU concept, capable to have relevance in any part of EU law, in particular EU market law. The CJEU's approach of the concept is crucial for the present and future normative influence of Article 14 TFEU, and chapters 8 and 9 are devoted to analyse how the Court has shaped the concept, and as a consequence how it may be understood.

Also, the meaning of the EU concept of SGEI is directly related to the type of test applied by the Court to assess whether national measures claimed to be necessary for the achievement of SGEI missions. Indeed, the lenient proportionality test applied by the Court in certain free movement cases related to social services, not requiring the least restrictive measure and not excluding that economic considerations are weighed in the

[756] SN 300/1/01 REV 1, Annex I, see in particular under the title "A better division and definition of competence in the European Union".

[757] Ross, M., 2007, p.1073.

[758] See European Parliament legislative resolution P6_TA (2006) 0061 on the proposal for a directive of the European Parliament and of the Council on services in the internal market (2004/0001(COD).

[759] Communication from the Commission, European Union Framework for State aid in the form of public service compensation (2011) 2012/C 8/03, para.13. More on this in section 11.2.2.3.

test, is often an indication of its acknowledgment that SGEI missions are at hand. This test is examined in chapter 8.

Lastly, the CJEU must interpret and enforce the normative elements of Article 14 TFEU, as it is its duty under the rule of law and the principle of sincere cooperation.[760] However, when it strives at loyally implementing the first sentence of Article 14 TFEU in its case law, the Court goes on a very tight rope. If it is too explicit in shaping the contours of the concept of SGEI, it may satisfy certain Member States but at the same time deeply frustrate others. Also, if the Court does not leave the concept of SGEI in the shadows of uncertainty, it may render very divisive the other EU institutions' approach of Article 14 TFEU in EU legislation. Finally, as legislation on SGEI principles and rules is supposed to take place in the form of regulations[761], a risk, if the Court develops principles and conditions for the application of EU rules on free movement and procurement too explicitly motivated by the existence of SGEI missions, is that the process of legislative developments made necessary by its case law become politically conflictual, and perhaps hampered. It will be seen in chapter 11 that, with the support of the Court's "nuanced approach", the Commission and the EU legislator have been able to incorporate "Article 14 TFEU-rules" (by which is meant rules motivated by the norm promulgated in this Article), in the revised procurement rules in a discreet manner, which allows maintaining the lock on the Pandora's box of the application of Article 106(2) TFEU to procurement.

[760] Pursuant to Article 4(3) TEU.

[761] Pursuant to the second sentence of Article 14 TFEU.

8 SGEI as a ground for a special regime in CJEU's case law related to public services

This chapter builds on the conclusions in chapter 7 that Article 14 TFEU, compared to the objective of "highly competitive social market economy", constitutes a more concrete and substantial obligation for the Union, that this obligation has a high dignity in relation to the obligation to establish the internal market because of the many links between SGEI principles and foundational principles of the Union, and that Article 14 TFEU, although its relation to Article 106(2) TFEU has to be clarified, suggests that SGEI is a broad EU concept, which makes EU's mission to take care of SGEI missions relevant in any part of EU law.

On this basis, the present chapter addresses two legal issues which very much seem to be related. The first one is the scope of the SGEI rule in Article 106(2) TFEU. The provision has been applied to justify restrictions of the rights to free movement, but it is uncertain whether Article 106(2) TFEU applies – and legal-technically can apply – to EU procurement rules. The second issue is what motivates the Court to decide that SGEIs' proportionate public funding needs no derogation from state aid rules under Article 106(2) TFEU, or to modify its "standard ORGI test" with characteristic elements of the lenient test it has developed under Article 106(2) TFEU, when it examines whether national measures restricting fundamental freedoms may be justified by their role for the achievement of Member States' public service missions.[762] These judicial steps seem to signal that "public service obligations" – the Court's less politically sensitive term for SGEI tasks – enjoy a higher dignity than mere "imperative reasons of general interest" (ORGIs) in the balance with any Treaty market rule, including the rules protecting the freedom of trade, because they express a particularly strong commitment of Member States to their policy objectives, and because this commitment is seen as legitimate in EU law. The overall question addressed by this chapter is whether the Court's approach of deference to Member States' definition, organisation and financing of public service obligations may be regarded as the Court's interpretation and application of Article 14 TFEU on SGEI, formerly Article 16 EC.

The general approach chosen is to put in parallel the CJEU's test under Article 106(2) TFEU and cases where the Court explicitly or implicitly deems the activity at issue to be subject to public service obligations and at the same time shows a particularly deferential approach of Member States', or their public authorities' appreciation of which measure is needed to achieve the general interest objective, called here its "SGEI-related case law".

[762] It is important to be aware that these legal issues have legal-political significance: at surface level opinions may diverge on the scope of Article 106(2) TFEU, while at a deeper level, they may diverge on which relevance a relaxed proportionality test *should* have for conflicts between national measures and the fundamental freedoms. See for instance, Bekkedal T., 2011.

Section 8.1 examines the characteristic features of the CJEU's interpretation of what it still calls "the derogation rule" for SGEI in Article 106(2) TFEU, showing it gives a wide discretion to Member States' definition of SGEIs, conducts in many cases a lenient test to review national measures, reflecting a reconciliation of economic and non-economic interests rather than a derogation from EU market rules interpreted strictly. It also looks at the de facto scope of Article 106(2) TFEU and at the requirement of entrustment of the SGEI tasks protected by this provision. The purpose is not only to show how "Article 106(2) TFEU works", but also that the CJEU has found this derogation/reconciliation rule appropriate in very varied fields of activity and policy objectives, and applicable outside EU competition law. The material studied is the CJEU's case law actualizing the application of Article 106(2) TFEU, and the purpose being to describe valid law, an EU legal method is used.

Section 8.2 examines a number of "SGEI-related cases" where the Court has not applied Article 106(2) TFEU, but explicitly or implicitly transposed its normative elements into the definition of EU market law concepts such as "public contract" or "state aid", or into the proportionality test applied under the rule of reason. The method is primarily legal in the sense that it strives at identifying EU valid law. It does so on the basis of the CJEU's case law, as it is in practice the decisive source of law concerning the standards of review affecting national measures related to public services. The intention is not to conduct an exhaustive analysis of all relevant cases, but instead to gather cases capable of illustrating how, in the fields of state aid, free movement and procurement law, the Court seems to combine characteristic features of its test under Article 106(2) TFEU – namely the relevance of acceptable economic conditions and/or a lighter proportionality test – and the existence in the case of "public service obligations" incumbent on undertakings or public authorities, arguably a corollary of SGEIs.[763] In some cases, it is indicated whether the judgment was delivered post-Amsterdam or post-Lisbon, in order to show that the Court's approach may be related to the introduction of Article 16 EC, and later of a more comprehensive framework on SGEIs centred on Article 14 TFEU.

The approach in section 8.2 is normative, in the sense that it is based on a view that legal scholarship is not bound by the Court's motives to avoid being too clear on what the EU notion of SGEI may mean, in particular because SGEIs have now a central place in the EU legal system's approach to public service systems in the Member States. As the Court is often in the difficult position to decide on the compliance with EU law of national measures related to activities under Member States' competence, it is not questioned here that it may have legitimate reasons to be cautious and avoid saying openly what it is doing. Indeed, delineating the concept of SGEI is a controversial political act which does not ideally belong to the judicial sphere, as an openly broad delineation of the concept may probably have effects on the integration of the internal market and on the process of disintegration of national welfare systems. Therefore, it may arguably be convenient for the Court to use the language of "public service tasks"

[763] This observation does not seem new. Thus, commenting on the Court's relaxed proportionality test in *Freskot* an in *Kattner Stahlbau*, Van de Gronden observes that the CJEU has apparently transplanted its "Corbeau approach" of Article 106(2) TFEU into its case law on free movement and social security and related this approach to the role played by solidarity in the financial sustainability of social security shemes. See van de Gronden J. W., 2013a, p. 142.

instead of the term SGEI to fulfil the duty to respect Article 14 TFEU in applying the Treaty market rules to public services.[764]

Legal scholarship does not have to follow this cautious path and may instead contribute to place the Treaties in a more open democratic light. Interestingly, it seems that the Commission perceives the CJEU's decisions on in-house procurement and public-public cooperation as part of the "SGEI acquis", as it provides explanations on these lines of case law in its 2013 SGEI Guide.[765] Thus, although these decisions neither mention Article 106(2) TFEU nor the concept of SGEI, the Commission appears to see them as relevant for the achievement of SGEI missions, although it remains to be explained *why and how*, which this study may give some answer to.

8.1 CJEU's case law directly based on Article 106(2) TFEU

The provision in what is now Article 106(2) TFEU raises passion in legal literature. Davies describes Article 106 TFEU as "a messy article, full of ambiguities, which has become redundant, and is positively malignant", "an unnecessary Cassandra, promising protection from threats that do not exist", that "adds nothing to what is already inherent to economic law itself". In his view, "[t]he Treaty, and society, would be better if it was gone".[766] In sharp contrast with Davies, Wernicke contests the view that Article 106(2) TFEU is superfluous, and underlines that both this provision and Article 14 TFEU are regularly used in practice, offering "unique guidance for both the Commission and the Court in the solution of conflicts between competition aims and social demands without requiring any innate hierarchy between these fields".[767] This section examines judgments of the CJEU directly founded on the application of Article 106(2) TFEU, and focuses on the following aspects:

- The tasks which the CJEU has admitted to constitute SGEI tasks in the meaning of Article 106(2) TFEU
- The scope of Article 106(2) TFEU, i.e. the Treaty principles and rules in relation to which restrictions necessitated by SGEI tasks can be justified
- The CJEU's standard in reviewing whether a measure infringing a Treaty market rule may be justified by SGEI tasks and finally
- The form and the function of the requirement of "entrustment" of SGEI tasks in Article 106(2) TFEU.

[764] As observed by Davies, there is more going on in the case law than judges choose to say. See Davies G., 2010, p. 120.

[765] 2013 SGEI Guide, points 200 and 211.

[766] Davies G., 2009, p. 51, 58, and 67.

[767] Wernicke S., 2009, p. 70.

8.1.1 SGEIs in the meaning of Article 106(2) TFEU: only control of manifest error

The EU concept of SGEI tasks is not defined in EU law but only subject to a control of manifest error by the Commission or the Court, and thus the only guidance on what SGEIs may be is found in the casuistic law making of the Court, which shows that they may be found in many activities, starting with public infrastructure. In the field of postal services, the Court considered in *Corbeau* that "the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each operation" constituted an SGEI. In *Deutsche Post*, the Belgian state-owned La Poste was not only universal postal service operator, but also responsible for numerous "tasks of public interest, including basic banking activities open to all, the delivery of press materials at reduced rates, the delivery of printed electoral materials, the payment of pensions at home, the sale of fishing licences and the receipt of administrative fines".[768]

In the field of energy, the CJEU admitted in *Almelo* that an undertaking had to fulfill SGEI tasks when obliged to ensure, for all the territory it had been granted a concession for, that "all consumers, whether local distributors or end-users, receive uninterrupted supplies of electricity in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria applicable to all customers".[769] In the so called "electricity cases" the Court regarded as SGEI tasks

- To contribute, through the planning for which it is responsible, to the proper functioning of a national system for electricity supply on the basis of costs that are as low as possible and in a socially responsible manner,[770]
- To supply energy on the basis of cost and price containment such as to guarantee the balanced economic development of the country,[771]
- To supply all customers, in the case of EDF throughout the national territory and, in the case of [Gaz de France], in the areas served; ensuring continuity of supply; and observing equal treatment between customers.[772]

Regarding public service TV broadcasting, the CJEU recognized in *Sacchi* that Member States could legitimately define a broadcasting SGEI task to include the broadcast of

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[768] Case T-388/03 *Deutsche Post* [2009] ECR II-199, para.3. It is unsure whether these "tasks of public interest", accompanying the universal postal service, were seen by the GC as SGEI tasks.

[769] Case C-393/92 *Almelo* [1994] ECR I-01477 paras.48-49.

[770] Case C-157/94 *Commission v Netherlands* [1997] ECR I-05699, para.55.

[771] Case C-158/94 *Commission v Italy* [1997] ECR I-5789, paras.51 and 60.

[772] Case C-159/94 *Commission v France* [1997] ECR I-5815, para.61 compared with para.83. The considerations put forward by the French Government did not support the conclusion that the state-owned EDF was under an obligation to seek to secure the most competitive tariffs and the lowest costs for the community. It seems that the Court implicitly drew the conclusion that the latter tasks could therefore not be seen as SGEI missions in the meaning of Article 90(2). As this question is connected to the requirement of entrustment in Article 106(2) TFEU, it is further discussed under section 8.1.4.

full-spectrum programming.[773] This was reaffirmed in *SIC v Commission* by the General Court, interpreting the statement in the Amsterdam Protocol that 'the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism', as a direct reference made by the Member States to public service broadcasting systems introduced by them and entrusted with broadcasting full-spectrum television programmes for the benefit of the entire population of those States.[774] In *TV2* the General Court allowed a wide and qualitative definition of the public service mission, such as to "provide the entire Danish population with varied programming that satisfies the requirements of quality, versatility and diversity".[775]

SGEI tasks exist in the field of water services and waste management, which is underlined in the Services Directive.[776] In these fields, many tasks of general interest are imposed by EU law on the Member States in EU secondary law enacted on the basis of Article 192 TFEU. In *FFAD* the CJEU stated that the management of particular waste may properly be considered to be capable of forming the subject of a service of general economic interest, *particularly* where the service is designed to deal with an environmental problem.[777] The Court held that "the task of processing building waste produced in that municipality and of receiving and processing that waste so that it can be reused as far as possible" constituted an SGEI task.

SGEI tasks can be found in the field of maritime infrastructure, for instance the task of ensuring the navigability of a State's important waterway[778] or as in *Corsica Ferries,* the obligation for mooring groups to provide at any time and to any user a universal mooring service.[779] The Court has however underlined that commercial ports do not operate SGEIs if they are not imposed any public service tasks.[780]

The Court has recognized SGEIs in several social sectors. In *Glöckner* the Court regarded as an SGEI task the "obligation to provide a permanent standby service of transporting sick or injured persons in emergencies throughout the territory concerned, at uniform rates and on similar quality conditions, without regard to the particular situations or to the degree of economic profitability of each individual operation".[781] In *Hanner* the Court did not question that "to contribute to the protection of public health by

[773] Case 155/73 *Sacchi* [1974] ECR 409, final ruling point 1, where the exclusive right granted by a Member State to an undertaking to make all kinds of television transmissions, even for advertising purposes, could breach the rules of competition and be incompatible with the Treaties unless justified under Article 90(2) (now Article 106(2) TFEU).

[774] Case T-442/03, *SIC v Commission* [2008] ECR II-1161, para. 201.

[775] Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04**,** *TV 2/Danmark A/S and Others v Commission* [2008] ECR II-2935, paras.122-124.

[776] See Article 17(1) (d-e) of 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.

[777] Case C-209/98 *Sydhavnens Grus och Sten*, [2000] ECR I-3743, para 76.

[778] Case 10/71 *Muller and Others* [1971] ECR 723, para.11.

[779] Case C-266/96 *Corsica Ferries* [1998] ECR I-3949, para.45.

[780] Case C-242/95 *GT-Link* [1997] ECR I-4449, para.52.

[781] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para.55.

guaranteeing access for the Swedish population to medicinal products" could constitute an SGEI task.[782] In *Ferring*, the Court regarded as SGEI tasks the pharmaceuticals wholesalers' obligation according to French law to "keep in stock a range of medicines comprising at least nine tenths of all forms of medicines currently sold in France" and to be able in particular to (a) to satisfy at all times the needs of its regular customers for a period of at least two weeks and (b) to deliver any medicine in its range within 24 hours of receipt of the relevant order.[783] In *Höfner* the Court considered as an SGEI task the activity of "bringing prospective into employees' contact with employers and administering unemployment benefits, the general aim of this activity being to achieve and maintain a high level of employment, constantly to improve job distribution and thus to promote economic growth".[784]

In *BUPA* the General Court held that Member States have a wide discretion to determine the nature and scope of an SGEI mission in areas where EU has no or only limited competence, and where the Member States retain their competence. This prerogative was confirmed by:

1. The fact that Member States definition of SGEIs can be questioned by the Commission only in the event of a manifest error, as clear from *Fred Olsen* v *Commission*[785]
2. The absence of any competence specially attributed to the Commission
3. The absence of a precise and complete definition of the concept of SGEI in Community law
4. The "division of powers" emphasized in Article 16 EC (now first sentence of Article 14 TFEU).[786]

The principle of conferral and the EU's restricted powers in the field of health care pursuant to Article 152(1) EC, imply that the Community can only engage in not legally binding action in that sector. The Court underlined that the Member States govern the organisation and provision of health services and medical care, and may also, at least *primarily*, define SGEI obligations in that sector. The Court found admissible the Commission's view that obligations imposed on all insurers active on the Irish private medical insurance (PMI) market, designed "to ensure that all persons living in Ireland would receive a minimum level of PMI services at an affordable price and on similar quality conditions" constituted SGEI tasks in the meaning of Article 106(2) TFEU.[787]

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[782] See Opinion of AG Léger in Case C-438/02 *Krister Hanner* [2005] ECR I-04551, paras.148 and 150. The Advocate General reminded that the Court had accepted that the need to guarantee that medicinal products are widely available and sufficient to meet the requirements of the population constitutes a public interest aim pursuant to Article 30 EC, referring in particular to Case C-322/01 *DeutscherApothekerverband* [2003] ECR I-14887, paras. 106 and 107.

[783] Case C-53/00 *Ferring* [2001] ECR I-9067, paras.7 and 33.

[784] See Case C-41/90 *Höfner* [1991] ECR I-1979, paras.3 and 24. A similar activity of "intermediate between supply of and demand for paid employment was considered as a SGEI in Case C-55/96 *Job Center II* [1997] ECR I-07119, paras.4 and 26.

[785] Case T-17/02 *Fred Olsen* v *Commission* [2005] ECR II-2031, para.216 and case-law there cited.

[786] Case T-289/03 *BUPA* [2008] ECR II-81, paras.166-169

[787] Ibid, para.41.

To be authorized to offer PMI in Ireland, operators had an open enrolment obligation, a lifetime cover obligation, a community rating obligation and an obligation to provide minimum benefits.[788] Member States' wide discretion to define SGEIs in their areas of competence was confirmed by the GC in *TV2*.[789] It is important to note that Article 1 first dash of the SGI Protocol does not mention a wide discretion to *define* SGEIs. This is arguably due to the fact that, in areas where the EU has been conferred powers, this freedom is potentially or *de facto* restricted.

In *BUPA*, the General Court had two important points of departure. First, it made a distinction between the general interest "in a broad sense" and SGEIs in the meaning of Article 106(2) TFEU, considering that "[t]he mere fact that the national legislature, acting in the general interest in the broad sense, imposes certain rules of authorisation, of functioning or of control on all the operators in a particular sector does not in principle mean that there is an SGEI mission".[790] Second, the GC held that the existence of SGEI tasks is not precluded because all providers of a given service are subject to certain obligations determined by law.[791] This involves arguably that the Court made a distinction between the question of the objective existence of an SGEI task and the question of its individual entrustment.

The GC found that the Irish legislation at issue could not be regarded as a regulation or authorisation of PMI insurers' activity, but constituted an act of public authority defining a specific *mission* consisting in the provision of PMI services in compliance with the PMI obligations. The reason was that it "define[d] in detail the PMI obligations, such as community rating, open enrolment, lifetime cover and minimum benefits, to which all PMI insurers within the meaning of that legislation [were] subject" and that these PMI obligations "restrict[ed] the commercial freedom of the PMI insurers to an extent going considerably beyond ordinary conditions of authorisation to exercise an activity in a specific sector", with the general interest objective to allow (at the time) about half of the Irish population to benefit from alternative cover for certain health care, in particular hospital care.

8.1.2 Standard of review under Article 106(2) TFEU: from derogation to balance

The CJEU's application of the proportionality test under Article 106(2) TFEU has been described by Buendia Sierra as "one of the most controversial areas of Community law",

[788] PMI insurers were obliged to offer a PMI contract to any person requesting such a contract, not to reject the policy-holders when they became sick or old, to apply the same premium to all policy-holders for the same type of product, irrespective of their health status, age or sex, and to offer PMI products respecting certain minimum quality standards, although they were free to design their insurance products

[789] Case T-309/04 *TV2* [2008] ECR II-2935, paras.113 *et seq.*

[790] Case T-289/03 *BUPA* [2008] ECR II-81, para 178.

[791] Ibid, para.180.

and is subject to abundant analysis in legal literature.[792] In this regard, Article 106(2) TFEU can be seen as consisting of three affirmations:

a. Undertakings entrusted with SGEI are, as other undertakings, "subject to the rules contained in the Treaties, in particular the rules on competition"

b. The Treaty rules, in particular the competition rules, apply only inasmuch as they do not obstruct the fulfilment of the SGEI tasks entrusted

c. This balancing is constrained, as "the development of trade must not be affected to an extent that would be contrary to the interests of the Union".

The Court has generally qualified Article 106(2) TFEU as a *derogation* rule[793] and there is a perception in scholarly literature that this provision must normally be interpreted restrictively.[794] Indeed, the CJEU has underlined that Member States have the burden of proof for the existence of SGEIs which they rely on to justify derogations from EU market rules. However, this seems necessary to objectify the existence of a public service *obligation* which EU institutions are not in a position to know about, rather than a sign that Article 106(2) TFEU should be interpreted strictly. In fact, the CJEU's rhetoric on the derogatory character of Article 106(2) TFEU is uncertain. In *Commission v Netherlands* the Court stated both that the provision must, as derogation from the Treaties, be interpreted strictly, and that "exemptions to the Treaty rules are permitted provided that they are necessary for performance of the particular tasks assigned to an undertaking entrusted with the operation of a service of general economic interest".[795] The Court went further in *Commission v France* and stated that "[i]n allowing derogations to be made from the general rules of the Treaty on certain conditions, [Article 106(2) TFEU] seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's

[792] Buendia-Sierra himself delivered in 1999 a particularly extensive review of the evolution of the application and perception of the proportionality test, whose interpretation has in his opinion constituted "the main legal-political battleground in the field of Article 86" (now Article 106 TFEU), see Buendia-Sierra J.-L-, 1999, *Exclusive Rights,* p. 300-355. Sauter observes that what he calls a "mild test" (manifestly disproportionate) has often been applied by the CJEU under Article 106(2) but that the more traditional "strict test" (least restrictive means) seems relevant in the presence of a common policy, see Sauter W., 2008, p. 186-188. The Court's test under Article 106(2) TFEU has been described as "flexible enough to allow the Court to identify illegitimate uses of Article 86(2), while being less intrusive than that of proportionality" by Baquero-Cruz, who also held that "[a] single test should apply to all these situations once it is clear that an undertaking has been entrusted with a task of general economic interest", a view which does not really fit with the findings of the present section, see Baquero-Cruz J., 2005, pp. 197-198; see also Stergiou H M., 2008, p. 183; and Lenaerts, who observes that, in the absence of harmonising measures, the CJEU applies a soft version of the principle of proportionality, while it applies a rather strict version of the principle of proportionality, where the EU legislator has adopted harmonising measures, see Lenaerts 2012, p. 1259.

[793] See for instance Case C-159/94 *Commission v France* [1997] I-5815, para.12; Case C-393/92 *Almelo* [1994] ECR I-1477, para.26; Case C-67/96 *Albany* [1999] ECR I-5751, para.103, Case C-209/98 *FFAD* [2000] ECR I-3743, para.31.

[794] Sauter W., 2008, p. 26.

[795] Case 157/94 *Commission v Netherlands*, [1997] ECR I-5699, paras.37-38. In paragraph 31, the Court held that the provision lays down the conditions in which undertakings entrusted with the operation of SGEI may *exceptionally* not be subject to the Treaty rules.

interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market."[796]

In *Commission v Netherlands*, the Court added that "[t]he Member States' interest being so defined, they cannot be precluded, when defining the services of general economic interest which they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings".[797] Thus, in *Commission v Netherlands*, the Court maintained the derogation rhetoric, but introduced the idea that the provision in Article 106(2) EU is not a true derogation rule, as it aims at *reconciling two legitimate interests*, the definition of SGEI tasks and their entrustment to certain undertakings being a legitimate manner for Member States to pursue national policy objectives within their competence. It is argued here that the derogatory character of Article 106(2) TFEU is expressed by the constraint in element (c) above: the development of trade must not be affected to an extent that would be contrary to the interests of the Union, a constraint which seems open-ended and gives EU institutions much discretion. Also, the constraint's effect may depends on how the Union's trade interests are defined in the Treaties. At any rate, the Court's test under Article 106(2) TFEU shows two specific features.

First, it seems settled law that proportional exemptions from the application of Treaty rules may be justified to secure the fulfilment of SGEI tasks under "economically acceptable conditions".[798] This position was first formulated in *Corbeau*, and retained later.[799] The Court clarified in *Albany* that a measure may be seen as necessary if, in the absence of the measure at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, under economically acceptable conditions; thus, it is not necessary that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest is threatened.[800] In *Glöckner*, the Court of Justice admitted that to perform its obligation in conditions of economic equilibrium, the undertaking entrusted with an SGEI task can offset profitable sectors against the profitable sectors, which justifies a restriction of competition from individual undertakings in economically profitable sectors (cross-subsidization), justified under Article 106(2) TFEU.[801]

In *Almelo*, the Court went further and stated that restrictions on competition from other economic operators *must be* allowed if they are necessary to enable the undertaking entrusted with an SGEI task to perform it. In that regard, insisted the Court, "it is necessary to take into consideration the economic conditions in which the undertaking

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[796] Case C-202/88 *France v Commission* [1991] ECR I-1223, para.12. Later this reference was often made by the Court, see for instance Case C-242/10 *Enel Produzione* [2011] ECR I-13665, para.41.

[797] Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paras.39-40.

[798] Case C-320/91 *Corbeau* [1993] ECR I-2533, para.16.

[799] Ibid, paras.14-16.

[800] Case C-67/96 *Albany* [1999] ECR I-5751, para.107.

[801] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para.57.

operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject".[802] This wording suggests that "economically acceptable conditions" is not seen as a derogation, but rather as an inherent part of what market-based supply of services of general interest normally requires. Thus, this wording in *Almelo* is arguably close to the wording of the first sentence of Article 14 TFEU (former Article 16 EC), which allows to argue that its "spirit" was in fact consolidated in Article 16 EC, and later clarified by the addition of the words "particularly economic and financial conditions" in the first sentence of Article 14 TFEU. Besides being an interesting case of reciprocal influence of Treaty-made law and judge-made law, this supports the view that the first sentence of Article 14 TFEU contains a normative element which constitutionally affects the interpretation to give to the provision in Article 106(2) TFEU. The explicit reference to "economically and financial conditions" in Article 14 TFEU confirms that to take into consideration such conditions is not a derogation but a duty for EU institutions, even when they apply Article 106(2) TFEU.

The doctrine of "economically acceptable conditions" explains also the CJEU's view, summarized in *Altmark*, that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, it does not put them in a more favourable position than competitors, and does not constitute state aid for the purpose of Article 107(1) TFEU.[803] A measure allowing undertakings to deliver SGEI tasks under acceptable economic conditions is not only seen as in principle "the right thing to do". The Court considers also that such conditions may include a margin of reasonable profit for undertakings providing SGEIs. It is important to notice that Recitals 1 and 2 of Commission Decision 2012/21/EU on state aid to SGEIs address this doctrine as a principle of EU law following from Article 14 TFEU. Recital 1 states that EU institutions have a duty to take care that such financial support is allowed under EU law, pursuant to Article 14 TFEU, and while Recital 2 states that for certain SGEIs to operate on the basis of principles and under conditions which enable them to fulfil their missions, "financial support from the State may prove necessary". The Commission considers that these duties do not prejudice its powers to enforce EU competition and state aid rules according to Articles 93, 106 and 107 TFEU.[804]

The second specific feature of the Court's test under Article 106(2) TFEU, is that it is "softer" than the three-prong proportionality test formulated in *Gebhard*, i.e. that the measure examined serves an objective of general interest (general interest objective), is necessary to attain this objective (necessity) and is the least trade restrictive measure enabling to achieve it (strict proportionality).[805] The bottomline seems to be that Article

[802] Case C-393/92 *Almelo* [1994] ECR I-1477, para.49.

[803] Case C-280/00 *Altmark* [2003] ECR I-7747, para.87.

[804] Recitals 1 and 2 of Commission Decision 2012/21/EU of 20.12.2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L7/3.

[805] Baquero-Cruz J., 2005, p. 187-197.

106(2) TFEU is interpreted by the CJEU as a "rather strict" necessity test. In *Höfner*, the Court ruled that Article 106(2) TFEU cannot justify a prerogative to limit demand for a service (employment service). In *Corbeau*, it found that cross-subsidization can be justified by the necessity to ensure that the operator can fulfil its SGEI task under financial equilibrium, but that services that are dissociable from the SGEI services must be opened to competition if that does not compromise the economic equilibrium of the SGEI operation.

However, the Court's test under Article 106(2) TFEU is satisfied if the measure at issue is appropriate and necessary to secure the SGEI's fulfilment, and does not require that the measure at issue is the most efficient, which is illustrated by the judgment in *Commission v Netherlands*, where the risk of "cherry-picking" was considered as undeniable.[806] The Court stated that, while a Member State must demonstrate in detail why removing a contested measure would satisfy the Treaty market rules but jeopardize the performance, under economically acceptable conditions, of the SGEI tasks which it has entrusted to an undertaking, Article 106(2) TFEU does not impose any duty to "prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions".[807] In other words, if a Member State makes a reasonable case that SGEI tasks are at risk if the measure is obstructed, the burden of proof of the contrary is on the part contesting this risk. In *Commission v Italy*, another of the three "electricity cases", the Court found that the Commission had not fulfilled this secondary burden of proof, as in challenging the exclusive rights, it had neither taken account of the particular features of the national system of electricity supply, nor specifically pointed at alternative measures enabling the operator to fulfil the SGEI tasks under economically acceptable conditions.[808]

In the field of social services, the judgment in *Albany* provides a good illustration of the CJEU's application of the proportionality principle under Article 106(2) TFEU. First, the Court acknowledged that securing access to the supplementary pension scheme at issue was an SGEI mission, given the low levels of statutory pension in the Dutch pensions system.[809] Considering the risk of cherry-picking as evident if the funds' exclusive right to manage the supplementary pension scheme for all workers in a given sector was removed, the Court considered that public intervention was justified. Second, the Court agreed that removing the exclusive right would lead to the supplementary

[806] The Dutch State argued that if the national electricity distributor's exclusive import rights were removed, customers and distribution companies would be able to buy electricity from suppliers in other Member States at lower prices than those charged by the exclusive right holder in their Member State. The Court underlined that it would be the main advantage of opening up the market, but at the same time it would affect the national supply system, in particular the national distributor's ability to fulfil its planning obligation and its SGEI tasks. See Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paras.53-57.

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

[808] Case C-158/94 *Commission v Italy* [1997] ECR I-5789, paras.52-53. Since the exclusive import rights were found contrary to Article 37 TFEU, the Court considered that it was unnecessary to consider whether they were contrary to Article 34 TFEU or, consequently, whether they could be justified under Article 36 TFEU.

[809] Case C-67/96 *Albany* [1999] ECR I-5751, para.105. Under paragraph 106, the Court referred also to Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community [1998] OJ L209/46.

pension fund losing "good risks" to its competitors and being left with an increasing share of 'bad' risks, which would increasing the cost of pensions for workers, and prevent the fund from offering pensions at an acceptable cost, particularly as it offered pensions with a high level of solidarity. Consequently, the exclusive right was necessary for the fund to perform the task of general economic interest it was entrusted.[810]

Regarding the nature and predictability of the Court's approach under Article 106(2) TFEU, the scholarly analyses do not diverge so much. Baquero-Cruz holds that the CJEU has consistently construed Article 106(2) as a reconciliation test rather than a true proportionality test, and applied a 'suitability' test with some added force from the 'necessity' element.[811] Lenaerts holds that Article 106(2) TFEU must be read in light of the principle of proportionality, as the CJEU must strike "a balance between, on the one hand, guaranteeing the effectiveness of EU [competition] law and, on the other hand, safeguarding the general interest pursued by national authorities".[812]

Sauter distinguishes two proportionality tests: (a) the "not manifestly disproportionate" ("mild" test), only requiring that measures imposed are *prima facie* suitable to achieving the task at hand and (b) the least restrictive means ("strict" test), imposing that, out of all imaginable measures, the one chosen is the least restrictive of market freedoms. He argues that the mild test (a) is used by the CJEU when examining a measure in the light of Article 106(2) TFEU, and involves steps 1-2 below, while the strict test (b) includes steps 1-3 below:

1. the measure is motivated by the pursuit of a general interest objective
2. the restrictions caused by the measure are balanced by the benefits obtained in terms of the general interest
3. the objective cannot be achieved by less restrictive means[813]

In Sauter's view, shared here, the Court' approach in the electricity cases, easening the Member States' burden to prove the necessity of exclusive rights, involves that in the absence of EU sector law, the Court will choose the mild test, as it "will not consider itself bound to judge on the feasibility of alternative regulatory solutions, even if these may theoretically be more consistent with EU law".[814] The Court may arguably consider that where Member States have retained powers, it is *bound not to judge on the feasibility of alternative regulatory solutions*. *Albany* supports arguably the understanding that the Court sees as its own constitutional duty not to let EU law trespass Member States' powers, as

[810] Ibid, paras.108-111.

[811] Baquero Cruz J., 2005, p. 169-212. Bekkedal adheres to Baquero Cruz's submission that the test induced by Article 106(2) TFEU cannot be regarded as a "proportionality test", understood in the traditional sense of this notion Bekkedal questions the very legitimacy of employing what he calls the "seemingly softer test entailed by Article 106(2) TFEU" to Member State regulation intended to ensure the provision of SGEIs which encroaches upon the rules on the four freedoms, as it will not be unconstitutional to employ the traditional notion of proportionality. See Bekkedal T., T., 2011, p. 68.

[812] Lenaerts K., 2012, p. 1256.

[813] Sauter W., 2008, p. 29.

[814] Ibid, p. 28-29.

it explicitly included in the "retained powers" the power to evaluate whether less restrictive measures can guarantee the objective of general interest, in the following terms:

> Finally, as regards Albany's argument that an adequate level of pension for workers could be assured by laying down minimum requirements to be met by pensions offered by insurance companies, it must be emphasised that, in view of the social function of supplementary pension schemes and the margin of appreciation enjoyed, according to settled case-law, by the Member States in organising their social security systems [references to *Duphar*, *Poucet and Pistre*, and *Sodemare*[815]], it is incumbent on each Member State to consider whether, in view of the particular features of its national pension system, laying down minimum requirements would still enable it to ensure the level of pension which it seeks to guarantee in a sector by compulsory affiliation to a pension fund.[816]

Thus, in the field of social services, the "interests of the Union" do not command a balancing favoring the least trade restrictive solution, but rather a balancing that is clearly consistent with and proportional to the welfare objective, and at the same time defers to Member States' prerogative to make the economic and political "risk assessment", i.e. the choice of objectives of general interest, and the balance between these objectives and the interest of free trade and undistorted competition. These prerogatives can be pre-empted by EU legislation, which explains the Court's strict test in *Dusseldorp*, where the Court examined national rules requiring undertakings to deliver their dangerous waste for recovery to a national undertaking on which the state had conferred the exclusive right to incinerate dangerous waste, unless the processing of their waste in another Member State was superior to that performed by that undertaking.[817] Regarding these rules' compatibility with Article 106 TFEU, in conjunction with Article 102 TFEU, the Court stated that

> Even if the task conferred on that undertaking could constitute a task of general economic interest, however, it is for the Netherlands Government, as the Advocate General points out at paragraph 108 of his Opinion, to show to the satisfaction of the national court that that objective *cannot be achieved equally well by other means*. Article 90(2) of the Treaty can thus apply only if it is shown that, without the contested measure, the undertaking in question would be *unable* to carry out the task assigned to it.[818]

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[815] Case 238/82 *Duphar* [1984] ECR 523, para.16; Case C-160/91 *Poucet and Pistre* [1993] ECR I-637, para.6; and Case C-70/95 *Sodemare* [1997] ECR I-3395, para.27.

[816] Case C-67/96 *Albany* [1999] ECR I-5751, para.122.

[817] In order to implement the objective of ensuring the best possible method of disposal of dangerous waste, the Netherlands had attributed to a national undertaking, AVR Chemie CV, the responsibility for dangerous waste management. AVR Chemie was thus designated as the sole end-processor for the incineration of dangerous waste in a high-performance rotary furnace.

[818] Case C-203/96 *Dusseldorp* [1998] ECR I-4075, para.67, emphasis added.

The Court required a strict test, as the exclusive right was acceptable only if it was the *least restrictive efficient* instrument to attain the objective. In *Dusseldorp*, the Court relied on its view in *Corbeau* and *Commission v France* rulings, that Article 106(2) TFEU may be relied upon to justify exclusive rights contrary to Article 102 TFEU "if that measure is necessary to enable the undertaking to perform the particular task assigned to it and if it does not affect the development of trade in a manner contrary to the interest of the Community".[819] In *Dusseldorp*, the Court did not refer to the element of "economically acceptable conditions" for the exclusive right holder, which was prominent in *Corbeau* and *Commission v France*. The latter argument was arguably not receivable in a regulatory context where free trade is meant to solve both the environment and the financial challenges. To ensure the recovery of used oil filters, the EU legislator has pointed to a well-functioning internal market as the solution, which supposes that some economic operators will find economically feasible to offer this service without exclusive right, and that dangerous waste will find its way to these operators through cross-border transport. Only in the face of a qualified market failure – evidence of insufficient offer of environmentally optimal end-processing of dangerous waste – could this assumption be questionable.

That exclusive rights in the field of waste management may require a qualified market failure to be justifiable under Article 106(2) TFEU is shown by the *FFAD* ruling.[820] The CJEU made itself the finding that *measures less restrictive than an exclusive right* had not necessarily ensured that the waste produced in the municipality had been recycled, which amounts to a strict test. As in *Dusseldorp*, the strict test in *FFAD* was arguably motivated by the Court's interpretation of "the interests of the Union" in the field of waste management. Compared to non-harmonized sectors, where the "interests of the Union" for the purpose of Article 106(2) TFEU are less clear and normative, the EU has clarified its policy objectives and instruments in the field of waste management. The abundant EU legislation based on Articles 191 and 192 TFEU, known as "minima-regulation", involves that the Member States may decide higher protection standards than those agreed, but must be loyal to the policy elements and premises underpinning this EU legislation.[821] EU waste law builds at present on the policy options that recovery is better than disposal, and that market integration will solve the huge infrastructure deficit in the EU and promote recovery both in quality and quantity. To support this policy, which downplays the problem of CO2 emissions caused by waste transport, free movement for recovery – and shipments for recovery – may not be restricted as easily as free movement for disposal – and shipments for disposal.[822]

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[819] Ibid, para.65. The Court referred "only" to paragraph 14 in Case C-320/91 *Paul Corbeau* [1993] ECR 1-2533, and paragraph 49 in Case C-159/94 *Commission v France* [1997] ECR 1-5815.

[820] Case C-209/98 *FFAD* [2000] ECR I-3743.

[821] By "loyal" is not meant here that the Member States may not question the existing EU policy and seek to amend both this policy, and the EU legislation which is meant to implement it.

[822] This is particularly clear from the substantial differences between the conditions under which a Member State may object to shipments of waste regarding waste shipments destined for disposal respectively for recovery, see Articles 11 and 12 in Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste [2006] OJ L190/1. Evidence that EU-intern transport of non-hazardous waste for recovery is not regarded as an environmental and health problem in the present EU policy on waste is arguably clear

Thus, in the field of waste management, the "interests of the Union" give added weight to market freedoms, and explain the strict proportionality test. In contrast with *Dusseldorp*, the CJEU in *FFAD* gave relevance to the municipality of Copenhagen's argument that exclusive rights were necessary to safeguard the performance of the SGEI task *under economically acceptable conditions*. [823] There was a "serious environmental problem", as most building waste was not recycled, due to the lack of processing capacity, and the exclusive rights, limited to a period allowing investments to be written off and to the boundaries of the municipality, were necessary to attract investment in treatment infrastructure, but guaranteeing them a flow of waste.[824] Thus, the exclusive right fulfilled the requirement of strict proportionality, given the evident lack of solutions provided by the *European* market.

In sum, it seems that the test is mild where the Member States have retained powers, as for social services, but strict in fields of activity where EU public service objectives and missions have been formulated and/or the economic approach to fulfil them has been harmonized, at least partly, at EU level. It is submitted that this asymmetry explains that the Court continues to call Article 106(2) TFEU a derogation rule.

8.1.3 Horizontal scope of Article 106(2) TFEU

The formulation of the provision under Article 106(2) TFEU does not exclude that it is invoked by Member States, and Member States' possibility to invoke this provision is nowadays not controversial in legal literature.[825] While the scope of this provision is still uncertain, Lenaerts underlines that its formulation, allowing Member States to derogate from "the rules contained in the Treaties", must be considered and involves that the derogation rule may also be relied upon to justify derogation from the Treaty principles on free movement. Indeed, the CJEU's case law shows that Article 106(2) has been applied in cases involving measures infringing these principles.[826]

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from the Sixth Environment Action Programme of the European Community 2002-2012, stating that "preference should be given to recovery and especially to recycling; the quantity of waste for disposal should be minimised and should be safely disposed of; waste intended for disposal should be treated as closely as possible to the place of its generation, to the extent that this does not lead to a decrease in the efficiency in waste treatment operations", but designating no such preference for recycling waste as closely as possible to the place of generation. It is only where pest meets cholera that the EU policy is clearly against waste transport is clear: when waste is transported on long distances for *disposal*, nuisance is exponential and transport is hardly possible to motivate by any gain of not purely economic nature.

[823] Case C-209/98 *FFAD* [2000] ECR I-3743, para.77, where the Court referred not only to paragraph 14 but also to paragraph 16 in the *Corbeau* ruling.

[824] Ibid, paras.78-80.

[825] The view defended by Bekkedal, and regarded by other authors as radical, is rather that the exception in Article 106(2) TFEU cannot be invoked by the Member States to justify *barriers to free movement*, with reference to the CJEU's approach of this provision's scope in *Campus Oil*, which to many others, arguably the Court itself, has later been rejected. Bekkedahl T., 2011, p. 65.

[826] Lenaerts K., 2012, p.1255-1256. Lenaerts refers in particular to the electricity case C-157/94 *Commission v Netherlands* [1997] ECR I-5699 and Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949.

8.1.3.1 Article 106(2) TFEU and EU competition rules

The question brought to the Court in *Corbeau* was whether exclusive rights *granted by law* to the Belgian public body Régie des Postes for both profitable and unprofitable postal activities, were compatible with the Treaty provision prohibiting abuse of dominant position. As already mentioned, the Court found that cross-subsidization, allowing the operator to offset the costs incurred for the unprofitable postal SGEI tasks by profitable postal activities, could be justified under Article 106(2) TFEU by the necessity to secure that SGEI tasks are operated under "economically acceptable conditions". However, it also emphasized that exclusive rights for services dissociable from the SGEI task could be granted only if opening them to other operators could jeopardize the operator's fulfilment of the SGEI task in financial equilibrium.[827]

The Court's approach implied that the application of Article 106(1) TFEU (imposing the Member States a duty of loyalty when granting exclusive or special rights to undertakings) in combination with the rule in Article 102 TFEU could obstruct the fulfillment of SGEI tasks because it excluded the granting of exclusive rights. As observed by Buendia Sierra, by founding the compatibility of the exclusive rights on Article 106(2) TFEU, without first determining whether they necessary led the undertaking to abuse the dominant position it was granted, the Court implicitly held that exclusive rights were *per se* prohibited by the Treaties, and justifiable only if they were objectively necessary to guarantee the effective fulfilment of SGEI tasks.[828] After *Corbeau* – called by Bekkedal the most expansive and famous interpretation of the provision in Article 106(1) TFEU[829] – the Court went back to a milder "behaviour approach" implying that exclusive rights are not presumed to be illegal and infringe Article 102 TFEU read in combination with Article 106(1) TFEU only if they lead the undertaking enjoying them to abuse its dominant position.[830]

In *Glöckner*, the CJEU found that granting statutory exclusive rights to operate profitable non-emergency patient transport, to non-profit bodies entrusted with the task of supplying non-profitable emergency transport, infringed Article 106(1) TFEU in combination with Article 102 TFEU. The exclusive rights did extend these entities' dominant position in the ambulance sector, but could be motivated under Article 106(2) if they enabled the operator to fulfil the SGEI task (emergency transport) under conditions of economic equilibrium, and as long as this operator was not manifestly

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[827] Case C-320/91 *Corbeau* [1993] ECR I-02533, paras.16-19.

[828] Ibid, paras.11-13. Buendia Sierra calls the approach in *Corbeau* "a doctrine of automatic abuse" and holds that the ruling, by enlarging the scope of the prohibition under Article 86(1) EC (now Article 106(1) TFEU) in combination with Article 82 EC (now Article 102 TFEU) and by radically reversing the burden of proof for the legality of exclusive rights, made the application of the exception rule in Article 106(2) TFEU decisive for the rise of Article 106(2) TFEU. See Buendia Sierra J. L., 1999, p. 176.

[829] Bekkedal T., 2011, p. 79.

[830] On the divide between the "effet utile approach" and "the behaviour approach" in the CJEU's interpretation of Article 106(1) TFEU in combination with Article 102 TFEU, both illustrating the Court's so called "competition approach", see Buendia Sierra's illuminating analysis of the CJEU's case law in Buendia Sierra J. L., 1999, p. 173-180.

unable to satisfy the demand for emergency transport and patient transport services, regarded by the Court as two non-dissociable activities.[831] It may be noted that Hatzopoulos sees the *Glöckner* ruling as a case of derogation EU from public procurement rules, which is evoked in more detail below.

In *Almelo* the Court found that an a regional electricity distributor's purchasing clause prohibiting local distributors from importing electricity for public supply purposes, infringed Articles 101 and 102 TFEU, as it affected trade between Member States. However, the undertaking could justify its exclusivity clause under Article 106(2) TFEU, if it could show that it was necessary to perform its SGEI task.[832]

In *FFAD*, the undertaking Sydhavnens Sten & Grus had brought an action in a national court against the Municipality of Copenhagen, which had refused its request to receive and process non-hazardous building waste in the frame of the municipality's collection system. The CJEU found that contracts with only three specific undertakings for receiving and processing such waste produced within its boundaries, concluded in the frame of municipal rules, constituted exclusive rights.[833] The national court was left with the task of determining the relevant market and whether these exclusive rights created a dominant position, but the CJEU underlined that these rights did not seem to necessarily lead to abuse infringing Article 106(1) TFEU in combination with Article 102 TFEU, and that even if were so, could be justified under Article 106(2) TFEU to address "a serious environmental problem".[834]

8.1.3.2 Article 106(2) TFEU and the free movement of goods

In the three electricity cases the Commission alleged that, by granting to a single operator exclusive rights for import of electricity, the Netherlands, Italy and France, infringed Articles 30, 34 and 37 EC, now Articles 34, 35 and 37 TFEU.[835] The CJEU held that by its wording, the provision now in Article 106(1) TFEU necessarily implies that the Member States may grant exclusive rights to certain undertakings and thereby grant them a monopoly, but found that the national import monopolies were discriminatory, and thus obviously infringed Article 37 TFEU.[836]

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[831] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paras.60-62.

[832] Case C-393/92 *Almelo* [1994] ECR I-01477 paras.48-49.

[833] Case C-209/98 *FFAD* [2000] ECR I-3743, paras.53-54.

[834] Ibid, paras.66-81.

[835] As explained by AG Cosmas, the Commission seeked a ruling that the Member States were *obliged by the Treaty* itself to repeal national legislation granting exclusive rights to import electricity and natural gas, as contrary to the prohibition of State monopolies nowadays provided for by Article 37(1) TFEU. It had proposed directives introducing a right of access for producers, distributors and final users to the transmission and distribution systems of each Member State, as a prerequisite for conditions for effective competition in the electricity and natural gas sector, and met resistance in the Council.

[836] Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para.23; Case C-158/94 *Commission v Italy* [1997] ECR I-5789 para.32; Case C-159/94 *Commission v France* [1997] ECR I-5815, para.40. In the three cases, the Court referred to Case 59/75 *Pubblico Ministero* v *Manghera* [1976] ECR 91*,* para.12, and Case C-347/88 *Commission* v *Greece* [1990]

The Commission argued that Article 106(2) TFEU could be invoked to justify State measures incompatible with the free movement of goods[837], referring to the Court's statement in *Campus Oil* that Article 106(2) TFEU does not exempt a Member State which has entrusted the operation of an SGEI task to an undertaking from the prohibition on adopting, in favour of that undertaking and with a view to protecting its activity, measures that restrict imports from other Member States contrary to Article 34 TFEU.[838]

AG Cosmas's view was that the Court's position in *Campus Oil* seemed contradicted by later decisions in *France* v *Commission*, *Porto di Genova*, *Corbeau*, and *Almelo.*[839] Although naming neither these cases nor *Campus Oil*, the Court came to the same conclusion as the Advocate General, namely that Article 106(2) TFEU was applicable to Article 37 TFEU. It explained that Article 106(1) TFEU must be interpreted as "being intended to ensure that the Member States do not take advantage of their relations with those undertakings in order to evade the prohibitions laid down by other Treaty rules addressed directly to them, such as those in Articles 30, 34 and 37, by obliging or encouraging those undertakings to engage in conduct which, if engaged in by the Member States, would be contrary to those rules".[840] With regard to the scope thus attributed to Article 106(1) TFEU, and to its combined effect with Article 106(2) TFEU, the Court held that *a Member State* may rely on 106(2) TFEU to justify that it grants to an undertaking entrusted with SGEIs, exclusive rights contrary *in particular* to Article 37 TFEU. [841] The electricity rulings seem to contradict Bekkedal's assertion that in all cases where the Court has applied Article 106(2) TFEU to infringements of the four freedoms, the Member State was held responsible for violating both the competition rules and the Treaty rules on the four freedoms.[842] In these cases, the Commission's action was solely based on Articles 34 and 37 TFEU.[843] The Court did reason on Article 106 TFEU, but only to delineate the scope of Article 106(2) TFEU as a derogation rule and to underline that Article 106(1) TFEU actually shows that the Member States may grant exclusive rights to undertakings.

ECR 1-4747, para.44, where it held that exclusive import rights give rise to discrimination prohibited by Article 37(1) against exporters established in other Member States. In *Manghera,* the Court also underlined that, in order to attain the objective of Article 37(1) TFEU in a Member State where a commercial monopoly exists, the free movement of goods from other Member States comparable to those with which the national monopoly is concerned must be ensured.

[837] Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para.26; Case C-158/94 *Commission v Italy*, para.35; Case C-159/94 *Commission v France*, para.43. All referred above.

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

[839] See Opinion AG Cosmas in C-157/94 *Commission v Netherlands*, referred above, paras.87 and 89, referring to Case C-202/88 *France* v *Commission* [1991] ECR 1-1223; Case C-320/91 *Corbeau* [1993] ECR 1-2533, para.14; and Case C-393/92 *Almelo* [1994] ECR I-1477, para.46.

[840] Case C-157/94 *Commission v Netherlands*, referred above, paras.29-30.

[841] Ibid, paras.31-32.

[842] Bekkedal T., 2011, p. 71.

[843] To that purpose, see Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para.1.

In *Hanner*, the CJEU confirmed its view that Member States may rely on Article 106(2) TFEU to justify exclusive rights infringing Article 37(1) TFEU.[844] The Court held that Article 106(2) TFEU could in principle be relied upon to justify the State monopoly for the retail trade of medicinal preparations. This monopoly was granted to Apoteket AB, which was also assigned the SGEI task to contribute to the protection of public health by guaranteeing access for the Swedish population to medicinal products". [845] Nevertheless, the Court concluded that the regulatory scheme did not fulfill all the conditions imposed by Article 106(2) TFEU to justify a derogation from Article 37 TFEU, as it did not exclude discrimination against medicinal preparations from other Member States.[846]

8.1.3.3 Article 106(2) TFEU and the free movement of services

In *Corsica Ferries,* the Court found that Italian legislation requiring vessels owned by shipping companies established in other Member States and making stops in Italian ports to use the services of local mooring groups operating on the basis of exclusive rights, for a charge higher than the actual cost of the service provided, had so negligible effect on imports of goods that it did not breach Article 34 TFEU.[847] The Court recalled that exclusive rights do not infringe Article 102 TFEU in combination with Article 106(1) TFEU, if the undertaking to which they are granted is not led to abuse its dominant position merely by exercising these rights, and if the rights do not create a situation in which the undertaking is led to commit such abuses. [848] As mooring groups were entrusted a universal mooring service for reasons of safety in port waters, an SGEI task in the meaning of Article 106(2) TFEU, the Court considered that it could be regarded as necessary, on grounds of public security, to confer on local groups of operators the exclusive right to provide the service, to include in the price of the service a component designed to cover the supplementary cost of maintaining a universal mooring service, and to lay down for that service different tariffs on the basis of the particular characteristics of each port.[849] On the facts of the case, the Court also excluded that anti-competitive agreements had taken place between the mooring groups.[850]

With regard to the scope of Article 106(2) TFEU, the Court's assessment of the effect of the obligation to use the mooring groups' services on the freedom to provide services is of particular interest. Concerning firstly the exclusive right's restriction of the freedom for operators from other Member States to provide mooring services, the Court held that "such an impediment, if it exists, is not contrary to Article 59 of the Treaty [now

[844] Case C-438/02 *Krister Hanner* [2005] ECR I-04551.

[845] Ibid, para.47.

[846] Ibid, para.48.

[847] Case C-266/96 *Corsica Ferries* [1998] ECR I-3949.

[848] Ibid, paras.40-41.

[849] Ibid, paras.45-46. In each of the ports concerned the tariffs for mooring services were fixed by the local maritime authority, on the basis of a general formula determined at national level by the public authorities.

[850] Ibid, para.53.

Article 56 TFEU] since the conditions for application of Article 90(2) [now Article 106(2) TFEU] are satisfied (precisions added)".[851] In other words, the universal service task justified the exclusive right, and therefore justified also that the freedom of other operators to provide the service be restricted. Concerning secondly the exclusive right's possible restriction of the freedom for economic operators to provide maritime transport services (transport service operators using, as consumers, the service of port waters' security), the Court observed that the mooring service was essential to the maintenance of safety in port waters and that it had "the characteristics of a public service", which the Court held to be universality, continuity, satisfaction of public-interest requirements, regulation and supervision by the public authorities. Hence, even if it could restrict the freedom to provide maritime transport services, the obligation to use the local mooring service could be justified by the interest of public security under Article 52 TFEU.

Provided that the price supplement in relation to the actual cost of the service indeed truly corresponded to the mooring groups' additional cost of fulfilling the universal service function, the objective of the service and its public service character in the national legislation motivated a restriction of the freedom to provide maritime transport services.[852] Thus, *Corsica Ferries* shows that the *same general interest* – in that case public security in port waters – can justify at the same time

- An obligation to provide a service under specific conditions, an SGEI task
- An obligation to receive the service under these specific conditions, an ORGI.

These specific conditions – in that case the public service of universal mooring service – laid down in national law, may justify both a restriction of competition and a restriction of fundamental freedoms, both in the field of the regulated service and in other fields of activity related.

8.1.3.4 Article 106(2) TFEU and EU procurement rules: why not?

The applicability of Article 106(2) TFEU to EU procurement rules is a very contentious issue. Let us formulate the question in the following terms: why would Article 106(2) TFEU apply to restrictions from the fundamental freedoms but not from EU procurement principles and rules?

In her Opinion in *Commission v Ireland*, AG Stix-Hackl took a courageous bite in this poisonous issue. The contentious issue was that the Eastern Regional Health Authority in Ireland permitted emergency ambulance services to be provided by Dublin City Council (DCC) without the Eastern Regional Health Authority undertaking any prior advertising, which the Commission claimed to infringe the Treaty based rules on public procurement. Understanding the Court's case law as indicating that the very grant of

[851] Ibid, para.59.

[852] Ibid, para.60.

exclusive rights falls within Article 106(1) TFEU in combination with Article 102 TFEU, the AG held that the exclusive rights' compatibility with the Treaties could be determined under Article 106(2) EC, "because of the lead time involved and the period to be specified for the submission of tenders, the carrying out of an award procedure entailing a call for tenders can in certain cases obstruct the performance of tasks". When this Opinion was delivered, the CJEU had begun interpreting the Treaty principles as implying advertising of contracts not covered by the directives, which according to the Advocate General raised the issue of finding a Treaty provision allowing exceptions for exclusive rights corresponding to the exceptions provided for by the procurement directives.[853] For contracts not covered by EU procurement directives, and challenged on the basis of Article 106(1) TFEU, the provision in Article 106(2) TFEU was arguably the only Treaty-based instrument offering a solution.

On these premises, the AG examined whether a partial or total restriction of competition was necessary to enable the holder of the exclusive right to perform its SGEI task under economically acceptable conditions, and concluded that the Irish state had not been able to demonstrate this.[854] Importantly, the AG's view was that Article 106(2) TFEU had relevance *only in relation to the conduct of the bodies which have been granted exclusive rights*.[855] The Court did not follow the AG's approach based on a reading of the situation as an exclusive right possibly justifiable by an SGEI task. It chose to analyse the case as a public-public arrangement which could not unavoidably be seen as public procurement covered by EU rules on procurement. It found that the Commission had not demonstrated the existence of a public contract, since it was conceivable that DCC provided emergency ambulance services based on statutory powers. Besides, the existence of funding agreements in respect of "such services" between two public bodies did not necessarily constitute an award of a public contract to be assessed in the light of the Treaty fundamental rules.[856]

The legal-political necessity to ensure that the Court's elaboration of procurement principles directly stemming from the Treaty would not restrict Member States' powers more than they had consented to in EU procurement legislation was also relevant for the General Court's reasoning in *Germany v Commission*. In this ruling, the GC examined Germany' arguments to seek annulment of the Commission Communication on EU law applicable to contracts not or not fully subject to the procurement directives (hereunder "the Communication").[857] At issue was in particular the Commission's view that the procurement directives' derogations may be applied to the award of contracts not covered by the Directives and that consequently, contracting entities may award such contracts without publishing a prior advertising, provided they meet the conditions laid

[853] Article 11(3) of Directive 92/50 and Article 31 of the 2004 Public Sector Directive. See Opinion of AG Stix-Hackl, cited above, para.111.

[854] Ibid, paras.103-106.

[855] Opinion Stix-Hackl in Case C-532/03 *Commission v Ireland* [2007] ECR I-11353, paras.100-101.

[856] Case C-532/03 *Commission v Ireland* [2007] ECR I-11353, para.37. This reasoning augurated arguably the reasoning in Case C-480/06 *Commission v Germany* [2009] ECR I-04747.

[857] Case T-258/06 *Germany v Commission* [2010] ECR II-2027.

down in the Directives for one of the derogation.[858] The General Court emphasized that the Communication did not in any way exclude the possibility of other derogations from the obligation of prior publication.[859] It held that if the Member State or the contracting authority can rely on a provision of the EC Treaty providing for a general exemption from the application of primary law, *such as Article 86(2) EC (now Article 106(2) TFEU),* or Articles 296 EC or 297 EC, the principles of the EC Treaty are not affected. The General Court concluded that "in such cases, the obligation of prior publication laid down in the Communication and flowing from the principles of the EC Treaty does not apply to the award of a public contract".[860] It seems thus that the General Court does not exclude the applicability of Article 106(2) TFEU to the obligation of prior publication derived directly from the Treaties principles applicable to public procurement.

According to Hatzopoulos, *Glöckner* constitutes the – only – example of a case where the CJEU has accepted an exemption from procurement on the basis of Article 106(2) TFEU. In this ruling, the Court accepted the argument that the emergency transport services, which require costly investments in equipment and qualified personnel may only be financially viable if its operator also enjoys special rights to non-emergency transport. In Hatzopoulos' view, this was an implicit acknowledgement that, in exceptional circumstances, not only is it impossible to have competition in the market, but also competition for the market – and thus competition is *altogether excluded*.[861] Hatzopoulos emphasizes that the Court had not developed the Treaty-based public procurement principles when *Glöckner* was decided, which explains that Article 106(2) TFEU in that case was successfully pleaded in order to avoid the application of the procurement rules, but he also believes that this is likely to remain an isolated occurrence.

On this background, the question raised above must be re-formulated: if it is not excluded that Article 106(2) TFEU is relevant to justify derogations from the Treaty-based procurement principles, why *should* it be irrelevant as a derogation from procurement rules in EU secondary law? Hatzopoulos is one of the few scholars to give an (elliptic) answer to that question, holding that, given that public procurement rules and principles specifically apply to "public" services, not provided within normal market conditions, Article 106(2) TFEU *should* in principle not allow for exceptions from them. Let us quote him for more clarity:

> Indeed, the special nature of the activity is already taken into account when an entity qualifies as a "contracting authority", thus making the procurement rules applicable in the first place. It would seem redundant or even counter-

[858] Ibid, para.138, referring to Section 2.1.4 of the Communication on '[p]rocedures without prior publication of an advertisement', the most important cases concern situations of extreme urgency due to unforeseeable events and contracts which may, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, be executed only by one particular economic operator.

[859] Ibid, para.139, referring to Section 2.1.4 of the Communication.

[860] Case T-258/06 *Germany v Commission* [2010] ECR II-2027, para.140. See, for an overriding reason relating to the general interest, Case C-158/03 *Commission* v *Spain*, paragraph 35 and the case law cited.

[861] Hatzopoulos V., 2012, p. 90-91.

productive, that this same element be considered again in order to set aside the procurement rules.[862]

If rightly understood, Hatzopoulos holds that Article 106(2) TFEU allows the "special nature of the activity" to be taken into account in the application of the Treaty rules. By claiming that this special nature is already considered in EU procurement rules – already by giving to an entity the special status of "contracting authority" – he suggests strongly that the essence of Article 106(2) TFEU is already *incorporated* in EU procurement rules. In these rules, the balance between on the one side the strict application of the Treaty rules on free movement and competition and public authorities' interests to achieve their public service missions is already made, and for that reason, *should* not be made a second time, as it would be counter-productive (by which he probably means for the opening of competition). Does this entail that EU procurement directives are meant to "lay down principles and conditions, in particular economic and financial conditions", meant to enable SGEIs to fulfil their missions for the purpose of Article 14 TFEU? The answer is perhaps in the question. If the "Article 106(2) TFEU balance" is already present within EU procurement rules, it seems quite arguable that they establish principles and set conditions to provide, to commission and to fund such services, even if they *also* cover public acquisition in fields which are not of "a special nature", such as pens and tables for schools.

8.1.3.5 Article 106(2) TFEU and state aid rules

As clear from Part II, neither the fiscal character, nor the social aim, nor the general objectives of a measure can exclude its characterization as aid within the meaning of Article 107(1) TFEU.[863] In *Altmark*, AG Léger was very much in favour that the Court would reverse its "compensation approach" in *Ferring*, and recommended the "state aid approach", implying that the financing measure constitutes aid prohibited by Article 107(1) TFEU, but is possible to justify under the exemption for undertakings entrusted with SGEI tasks under Article 106(2) TFEU. The Court decided against the Advocate General and definitively adopted the "compensation approach", whereby funding of public service obligations is not state aid in the meaning of Article 107(1) TFEU, if the undertaking receives compensation strictly proportionate to the costs incurred by the task imposed.[864] The Court formulated four cumulative conditions (known as "the Altmark criteria") under which public service compensation does not constitute state aid:

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined

[862] Ibid, p. 90.

[863] See also the Opinion of AG Léger in Case C-290/00 *Altmark* [2003] ECR I –7747, para.77.

[864] Case C-280/00 *Altmark*.

- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner

- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations

- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.[865]

Altmark is a Gordian knot in the EU legal system, by establishing public procurement as a procedure to give equal market access *and* to exclude state aid. In that ruling, the Court has not applied Article 106(2) TFEU, but it has incorporated the concept of SGEI tasks in the very definition of state aid, using the synonym notion of "public service obligations". Thus, *Altmark* has provided the Commission with a model to test the proportionality of state aid compensating SGEI tasks, and the Commission rules on state aid rules applying to SGEIs (adopted firs in 2005 and revised in 2011) are based on the Altmark criteria. However, the Altmark criteria, formulated in a case concerned with transport services, constitute a rather rigid test, and the *Altmark* ruling leaves unsaid how measures that did not fulfil these four criteria could comply with the Treaties by application of the exemption rule in Article 106(2) TFEU.[866] The question was therefore how the Court would approach the need of flexibility in the conditions of public service compensation in other fields, in particular regarding social services. Some answer to this question is provided by the rulings in *BUPA* and *CBI*.[867]

In *BUPA* the General Court found that the Commission had been right in not raising objections against a risk equalization scheme (RES) established by Irish law to ensure that all persons living in Ireland would receive a minimum level of private medical insurance (PMI) at an affordable price and on similar quality conditions. PMI insurers were found subject to SGEI tasks, and the RES aimed at securing these tasks by neutralizing differential in risk between all PMI insurers on the Irish market. The RES was found compatible with the Altmark criteria and therefore did not involve state aid for the purpose of Article 107(1) TFEU[868] Having underlined that the scopes of the

[865] Ibid, para.95.

[866] See for instance Szyszczak E., 2004, p. 991, and de Vries S. A., 2011a, p. 302.

[867] Case T-289/03 *BUPA* [2008] ECR II-81 and Case T-137/10 *CBI*, Judgment of 7 November 2012.

[868] Indeed, the General Court explained that the judgment in *Altmark* was not limited in time, which implied that it had to examine the *BUPA* facts by the *Altmark* standard, although this standard did not exist when the Commission adopted the contested decision by BUPA. The GC also found that RES was justified under Article 106(2) TFEU, see paras.258 and 305.

Altmark criteria and of Article 106(2) TFEU overlap, the GC found appropriate not to apply the Altmark criteria strictly, but rather "in accordance with the spirit and the purpose which prevailed when they were laid down", and with adjustments to the particular SGEI scheme at hand.[869]

Regarding the first and the second criteria, the Court affirmed Member States' wide discretion to define SGEI tasks, but also that its corollary is a wide discretion in the setting of compensation parameters, the complex economic facts underpinning the choice of parameters being subject to only restricted control by the Community institutions.[870] However, the Court emphasized that this very discretion motivates that the parameters must be objective and transparent, and in particular defined in such a way as to preclude any abusive recourse to the concept of an SGEI on the part of the Member State.[871]

The General Court considered appropriate not to apply strictly the third criterion requiring that compensation is proportional to the SGEI-costs, as the RES did not compensate the cost of supplying a PMI service, but instead the *risk* of providing PMI to "too many unhealthy and expensive customers".[872] Considering that the third criterion's purpose coincides broadly with the criterion of proportionality established by the case-law on the application of Article 106(2) TFEU, the GC considered that neither this purpose nor the spirit of the third Altmark criterion required that receipts be taken into account in a system of compensation which operates independently of receipts.[873] On these premises, the GC found (1) that PMI insurers' SGEI tasks made compensation necessary, (2) that the RES mechanism was not a manifestly inappropriate means of compensation and (3) that the calculation method provided for by the RES, limited payments between PMI insurers to the level strictly necessary to neutralise the differential between their risk profiles.[874] For the same reasons (the specificity of the scheme), the Court considered inappropriate to apply the fourth Altmark criterion (efficiency) strictly, and was satisfied that compensation was regulated in a manner which excluded compensation of inefficiencies.[875]

The "Altmark-light" criteria in *BUPA* have been abundantly commented by legal scholars; to Ross, *BUPA* shows that the Court does not regard the Altmark criteria as a one-size-fits-all test for SGEIs.[876] It is important to note that *BUPA* was delivered three months after the adoption of Article 14 TFEU through the Lisbon Treaty, and the GC

[869] Case T-289/03 *BUPA* [2008] ECR II-81, paras.158-160.

[870] To support the view that Member States have a wide discretion to define SGEI missions, the GC felt confident that it could refer to its own case law and to the 2001 Communication on SGEI, as it was consolidated in protocol 26 to the Lisbon Treaty and already adopted when the ruling was delivered, see Case T-289/03 *BUPA*, para.166.

[871] Case T-289/03 *BUPA*, cited above, para.214.

[872] Case T-289/03 *BUPA*, paras.239-240.

[873] Ibid, para.224, para.246, referring to paragraph 92 of the *Altmark* ruling, and para.241.

[874] Ibid, paras-232-238.

[875] Ibid, paras.247-248.

[876] See Sauter W., 2014, p. 15; Ross M., 2009, p.127-140, p. 138; Baquero Cruz J., 2013, p. 308.

may have thrived for an approach respecting the evolution of EU constitutional law, as the ruling's first paragraph refers to Article16 EC, held under paragraph 167 to reflect "generally" the division of powers between the Union and the Member States.[877] Importantly, the GC used the term SGEI *mission* (used in Article 14 TFEU) and underlined the absence of a clear and precise regulatory definition of this concept, and of an established *precise 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 in the meaning of the first *Altmark* condition or of Article 106(1) TFEU.[878]

De Vries has underlined the discrepancy between on the one side the economic approach in *Altmark* and in the Commission's 2005 state aid action plan, and on the other side what he called the "jurisdictional approach" in *BUPA*, where the GC made no in-depth economic assessment of whether the public service mission was discharged in a proportionate manner, and did not clarify how precise the definition of SGEI tasks must be to exclude the applicability of Article 107(1) TFEU to their public funding.[879] However, one must remember that Article 36 EUCFR was not yet in force, but had been introduced in EU primary law when *BUPA* was decided, imposing on EU institutions to respect the right of access to SGEIs. De Vries held the view, shared here, that *BUPA* should not be seen as a case "captured by politics", but rather as implying a recognition of the evolution of the Treaties, and of a competition model including social concerns.[880]

In contrast with *BUPA*, the *CBI* ruling indicates that the General Court does not interpret the post-Lisbon constitutional framework on SGEI as allowing a systematic "light touch" in the application of the Altmark criteria. At issue in *CBI* was the Commission's *IRIS-H* decision taken in 2005.[881] Two associations of Brussels private hospitals had alleged that unlawful state aid had been granted since 1995 to the five public general hospitals existing in the Brussels Capital Region and grouped into the IRIS network in 1996. In particular they argued that financing measures covered their deficits, and not the deficits of the Brussels private hospitals. The Belgian authorities put forward that apart from the basic hospital missions fulfilled by both public and private hospitals in Belgium, and equally financed by public authorities, the public IRIS hospitals performed additional SGEI missions, which entailed special costs compensated through the deficit financing. Without opening a formal procedure, but after a rather extensive analysis, the Commission found that the funding measures were compatible with the Commission's rules on the application of Article 106(2) TFEU to state aid compensating

[877] *BUPA* was delivered after the adoption of the Treaty of Lisbon in December 2007 and before its entry into force in December 2009.

[878] Case T-289/03 *BUPA* [2008] ECR II-81, para.165. What the Court signalled was arguably that the *regulatory function* of the EU concept of SGEI is not clear and precise, but also that there is as yet not much case law from the Court of Justice on the test to be used to assess whether measures protecting the invoked SGEI mission are compatible with the Treaty.

[879] De Vries S. A., 2011a, p. 303 and 314. De Vries saw a lack of coherence between the Commission's intention to apply a refined economic approach and the GC's approach in *BUPA*, and also in *TV2 Denmark*, see p. 305-308.

[880] Ibid, p. 314.

[881] Commission Decision of 28 October 2009 on the financing of public hospitals of the IRIS-network of the region Brussels-capitale (Belgium) in case SA.19864 (ex NN54/2009) – C (2009) 8120 final.

SGEI tasks. The association of private hospitals contested the Commission's decision and brought the case to the General Court, in what is known as the *CBI* case.[882]

In *CBI*, the GC held that "although the conditions stated in the *Altmark* judgment and in the SGEI Package concern all sectors of the economy without distinction, their application must take into account the specific nature of the sector in question". Reminding that *Altmark* concerned transport, it held that its criteria could not be applied as strictly to the hospital sector, "which does not necessarily have such a competitive and commercial dimension".[883] On these premises, and regarding the first Altmark criterion (SGEI mandate), the GC found serious doubts as to the existence of a clearly defined public service mandate relating to the specific hospital missions of the IRIS hospitals. To the Court, the very fact that the Commission had not been able to carry out a comprehensive and consistent assessment of the content of the official acts relating to these missions indicated the existence of serious difficulties.[884] Also concerning the non-hospital public service missions of the IRIS hospitals, the Court found that the Commission had not dispelled doubts as to whether their nature and content was defined with sufficient clarity.[885]

Regarding the second Altmark criterion (prior compensation parameters), the GC recalled first its view in *BUPA* that Member States have a wide discretion not only when defining an SGEI mission but also when determining the compensation for the costs connected with the SGEIs (the national legislature may even grant national authorities a certain discretion to determine this compensation). A condition of this discretion is however that the compensation *parameters* are established in advance in an objective and transparent manner, to preclude any abusive recourse to the concept of SGEI.[886] In assessing the compensation parameters of the hospital missions, the GC observed that the Commission had not separated the parameters relating to measures of advance funding and the parameters relating to the measures of deficit financing, although they could be described as different aid measures, and concluded therefore that doubts existed as to the fulfilment of the second Altmark criterion. The GC found that the Commission had not either dispelled doubts as to whether the public financing of the hospitals missions and social missions of the IRIS hospitals fulfilled the third Altmark criterion relating to the existence of procedures for avoiding overcompensation and ensuring its repayment.[887] The Court considered the breadth and complexity of the Commission's assessment of compensation proportionality as in itself a sign of serious difficulties.[888]

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[882] T-137/10 *CBI*, Judgment of 7 November 2012, para.85.

[883] Ibid, para.89.

[884] Ibid, paras.168-169-70.

[885] Ibid, paras.187-188.

[886] Ibid, paras.189-191. The Court underlined that Commission Decision 2005/842 similarly required that official acts entrusting the administration of the SGEI specify 'the parameters for calculating, controlling and reviewing the compensation'. The CG referred to Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, para.214.

[887] Ibid, paras.265 and 278.

[888] Ibid, para.288.

Regarding the fourth Altmark criterion (analysis of costs in relation to a typical, well run and adequately provided undertaking), the Court pointed out that it did not have to be fulfilled, as Decision 2005/842/EC was applicable in the case.[889] Considering that the criteria in the *Altmark* judgment were laid down not to assess whether state aid is compatible with the internal market but in order to assess the existence of state aid, the GC referred also to earlier decisions where it found the fourth Altmark criterion irrelevant for assessing the compatibility of aid measures under Article 106(2) EC.[890] The GC concluded that "as EU law now stands, the criterion linked to the economic efficiency of an undertaking in supplying the SGEI is unconnected with the assessment of the compatibility of State aid in the light of Article 86(2) EC", and thus the national authorities' choice relating to the economic efficiency of the public operator providing the SGEI could not be challenged on the basis of the fourth Altmark criterion.[891] Finally, The GC annulled the Commission's decision, finding that there were serious difficulties in the preliminary examination of the scheme and that the Commission had failed in not initiating the formal investigation procedure. As a result, the Commission has opened an in-depth investigation in October 2014.[892]

In sum, *Altmark*

- Provides a "proportionality receipe" for public funding of SGEI tasks, which is highly similar to the logic of EU procurement rules

- Offers an opportunity for the Member States, and the EU legislator, to dilute the proportionality calculus inherent to Article 106(2) TFEU in EU procurement rules. Translating the notion of SGEI by the notion of "public service obligation" facilitates this dilution, erasing the idea that procurement rules may, unless taken care of, obstruct the fulfilment of SGEI tasks in Article 106(2) TFEU

- Constitutes a rigid frame of proportionality, because the first three criteria must be fulfilled even if the SGEI task is funded through procurement.

Given the limited scope of EU procurement rules, and the limited capacity of certain EU procurement procedures to fulfil the first three Altmark criteria, Member States remain relatively free to fund social services according to autonomous procedures, but they must comply with EU state aid rules, which implies that the SGEI-character of the services remain the *visible* EU constitutional frame for their funding measures. Thus, their freedom to organize social services is counterbalanced by constraints on the

[889] Ibid, para.291. Public service compensation to hospital was already exempted from notification according to Article 2(1)(b) of Commission Decision 2005/842.

[890] Ibid, para.292, referring to Case T-354/05 *TF1* v *Commission* [2009] ECR II-471, paras.129-140, and order of 25 November 2009 in Case T-87/09 *Jørgen Andersen v Commission*, [2009] ECR II-225, para.57.

[891] Ibid, para.300.

[892] Commission Decision of 1 October 2014 on the public financing of Brussels public IRIS hospitals (Belgium) in case SA.19864 (2014/C) (ex NN54/2009) – C (2014) 6833 final.

legitimacy and the proportionality of their funding measures. In this respect, the Altmark test displays two problematic features:

a. It imposes strict proportionality between funding and SGEI-costs

b. It is a rigid model in the sense that it supposes that public authorities can calculate compensation of SGEI tasks in terms of costs and receipts, which risks restricting Member States' freedom to organize SGEIs

In *BUPA*, the Court consented to a wide definition of the SGEI objectives and of the SGEI tasks, and on that basis was ready to depart from the rigid model of the third and fourth Altmark criteria. This approach seems in line with the SGI Protocol, giving in principle a wide freedom to organize SGEIs (which can be limited by EU procurement law or EU sector law). The freedom to fund SGEIs without prior notification which Altmark grants Member States should perhaps not be restricted by an obligation to organize the SGEI in a "rigid Altmark model". Ross has expressed a view that a very light touch in the application of the third Altmark criterion, can negate the "revitalization" of Article 106(2) TFEU in the future, because it would not be seen as an acceptable rule to balance.[893] However, in *CBI*, a case also concerned with social services in the frame of Member States' competence, the GC required that the Commission applies more strictly its own rules on the application of Article 106(2) TFEU to public service compensation which constitutes state aid.[894] Thus, while the GC relaxed the rigidity of the Altmark test to accommodate a model where SGEI compensation was based on "financial solidarity" between market operators, it required a stricter observation of the Altmark test in the case of a model where SGEI compensation was based on direct State funding. The fact that state aid cases are normally brought to the General Court implies that the *BUPA* case and the *CBI* case are important but may be perceived as not conclusive regarding the CJEU's reasoned approach. As underlined by Sauter, so far we do not have the CJEU's own view on either approach – neither that of the Commission nor of the General Court.[895]

8.1.4 Entrustment

The provision in Article 106(2) TFEU can be relied on in the presence of undertakings *entrusted* with SGEIs. The Court of Justice explained in *BRT* that undertakings may come under that provision, provided that they are entrusted with the operation of SGEIs by an act of a public authority.[896] This act allows *proving* that particular and specific SGEI tasks are binding on them, and can play a central role in assessing the proportionality of

[893] Ross M., 2009, p. 138-139.

[894] Sauter seems also to perceive that the General Court's critical review of the Commission's preliminary assessment of the financing of the IRIS-hospitals in *CBI*, suggests that it may have tightened its approach as compared to *BUPA*. See Sauter W., 2014, p. 15.

[895] Ibid.

[896] Case 127/73 *BRT II* [1974] ECR 318, paras.20-22.

certain measures motivated by the tasks and affecting competition and trade. This explains the particular importance of entrustment in the field of state aid, the requirement of entrustment being in particular found in the first of the four criteria formulated by the CJEU in *Altmark* to exclude that compensation of SGEI tasks is considered as state aid in the meaning of Article 1(1) TFEU, and correspondingly also in Commission Decision 2012/21/EU exempting from prior notification certain aid measures of SGEI compensation.

It is important not to confuse (1) the existence of SGEI tasks, (2) the requirement that undertakings are entrusted with SGEI tasks objectively and transparently, and (3) the instruments which may be used to allow that such SGEI tasks are fulfilled under acceptable economic conditions. Entrustment has essentially a function of *proof* that the undertakings subject to measures derogating from the Treaty rules are actually *bound* to discharge certain SGEI tasks. Entrustment is fundamentally a procedure and should not be confused with instruments such as exclusive rights or public funding, allowing SGEI tasks to be fulfilled under acceptable economic conditions by undertakings. The use of such instruments in a specific field of activity can constitute a signal of the existence of SGEI tasks, but is not constitutive of these tasks, and does not either *per se* constitute an entrustment. The role of entrustment in relation to the concept of SGEI is further discussed in chapter 9.

The CJEU has taken a flexible approach to the modes of entrustment, admitting that SGEI tasks may be entrusted by law, legislative decrees and administrative decisions (*Servizi Ausiliari*[897]), by contract (*FFAD*[898]), and contrary to the Commission's view expressed in the 2013 SGEI Guide, also by prior administrative authorization.[899] It appears namely from *Analir* that the CJEU does not exclude prior administrative authorisations as a mode of entrustment of SGEI tasks in the meaning of Article 106(2) TFEU, requiring that "the nature and the scope of the public service obligations to be imposed by means of a prior administrative authorisation scheme must be specified in advance to the undertakings concerned".[900]

Another question is whether there has to be "an individual and formal entrustment" to a specific undertaking, or a specific group of undertakings, in law or in any other act, for an SGEI regulation to exist in national law. The General Court established in *BUPA* that there could be no requirement that each of the operators subject to the public service obligations be separately entrusted with that mission by an individual act or mandate, since the regulation chosen by Ireland did not provide for the grant of exclusive or special rights, but for the achievement of the mission by all operators active on the Irish market for private medical insurance, which – according to the Court – is a choice open to the Member States.[901]

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[897] Case C-451/03 *Servizi Ausiliari* [2006] ECR I-2941.

[898] Case C-209/98 *FFAD* [2000] ECR I-3743, paras.26 and 76.

[899] SGEI Guide 2013, point 47.

[900] Case C-205/99 *Analir* [2001] ECR I-1271, para.38.

[901] Case T-289/03 *BUPA* [2008] ECR II-81, para.183.

By contrast with this flexible approach regarding the mode of entrustment, more precise conditions are required by the Commission package on the application of state aid rules to aid compensating SGEI tasks entrusted to undertakings. In particular, it is explained in Recital 14 of Commission Decision 2012/21/EU that in order to ensure that the criteria set out in Article 106(2) of the Treaty are met, the act of entrustment should specify, at least, the undertakings concerned, the precise content and duration of and, where appropriate, the territory concerned by the public service obligations imposed, the granting of any exclusive or special rights, and describe the compensation mechanism and the parameters for determining the compensation and avoiding and recovering any possible overcompensation.[902] It is thus clear that for the purpose of state aid rules, the entrustment act has been regulated by the Commission in order to simplify the control of proportionality of the measures affecting competition and trade for that type of activity.

To combine a flexible approach to the modes of entrustment, with requirements that SGEI tasks are defined with sufficient precision to allow controlling the proportionality of measures motivated by these tasks but affecting competition and trade, is a particular challenge for EU institutions. In market-based models of supply of social services, Member States may wish to signal their commitment to welfare services by defining both SGEI objectives and missions in rather general terms in law, while defining with more precision the tasks and the financial mechanisms covering their costs in legal instruments allowing more flexibility to adapt to changing needs, public finances and market offer at local or regional level. This can render more difficult a systematic and transparent assessment of the proportionality of measures claimed to be necessary to secure public service compensation.

8.2 CJEU'S case law transposed from Article 106(2) TFEU

Bekkedal argues that the CJEU regards Article 106(2) TFEU as a special exception rather than as a general exception.[903] From a formal point of view this seems correct, however it appears that the CJEU gives normative weight to the explicit or implicit existence of SGEIs in cases where Article 106(2) was not applied. In the following sections, a number of cases are studied, in order to shed light on how the concept of SGEI is actually relevant in virtually all fields of EU market law, and how it affects a strict interpretation of these rules in different ways.

[902] In order to ensure transparency in relation to the application of this Decision, the act of entrustment should also include a reference to it. See Article 4 of Commission Decision 2012/21/EU.

[903] Bekkedal T., 2011, p. 65.

8.2.1 *Altmark*: no state aid for proportional compensation of public service obligations

By providing substantial criteria allowing public funding of SGEIs not to be regarded as aid in the meaning of Article 107(1) TFEU, the *Altmark* ruling, already evoked above, has important implications. Instead of applying Article 106(2) TFEU, it seems clear that the Court has "incorporated" the notion of SGEI tasks in the very notion of state aid. However, it is important to note that in *Altmark*, the term SGEI does not appear at all, as the Court exclusively uses the language of "public service obligations". This is all too normal, because the questions referred to the Court of Justice were related to aid to transport, subject to Article 77 EC (now Article 93 TFEU) which is formulated in the language of public service obligations.[904] In *BUPA*, the GC connected the notion of "public service obligations" to the concept of SGEI in the following terms:

> It is common ground between the parties that the concept of public service obligation referred to in that judgment corresponds to that of the SGEI as designated by the contested decision and that it does not differ from that referred to in Article 86(2) EC.[905]

This connection is ambiguous, because it suggests that the equivalence "public service obligations" and SGEI is not established by the Court itself but only *agreed* by the *parties*. Nevertheless, the profound relation between the two notions is widely admitted, to the effect that the funding of SGEI tasks as framed by the Altmark criteria is not derogatory but instead corresponds implicitly to the normal exercise of public authorities' powers in the frame of their competence.

A remarkable effect of *Altmark* is that the tension between the Union's interest of developing trade, and the duty not to obstruct SGEI missions, tangible in Article 106(2) TFEU, is translated into the neutral language of public service obligations and the apparently simple receipe of four criteria. As public procurement procedures are supposed to be able to exclude over-compensation (fourth criterion), *Altmark* contributes to promote what is basically a free movement instrument – EU procurement rules – as an instrument of EU competition law constraining public funding.[906] Also, *Altmark* seems to offer an opportunity to dilute Article 106(2) TFEU in EU procurement legislation, which becomes EU's convenient "all-in-one solution" to address internal market and competition concerns in the public sector.

8.2.2 Public service tasks (or SGEI tasks?) and exemptions from EU procurement rules

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[904] Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

[905] Case T-289/03 *BUPA* [2008] ECR II-81, para.62.

[906] On this path, see De Cecco F., 2013.

We have seen above under section 8.1.3.4 how Hatzopoulos seems to discreetly suggest that the special character of SGEIs is already incorporated in EU procurement rules. At the same time, anyone having followed the debate on EU public procurement rules under the last decade knows that many Member States – but also many members of the EU Parliament – have exercised pressure for their relaxation, in particular to get more say in the definition of tasks commissioned. On this premise, it may be easier to understand the articulation between EU law on procurement and the CJEU's case law on in-house procurement and on public-public cooperation, already studied above in section 5.2.2.2.

It has there been discussed how the Court considered "not appropriate" to apply the EU rules on public procurement to in-house contracts, and explained that it saw "no need" to apply EU procurement rules to in-house *performance of tasks conferred on it in the public interest*. Thus, the Court has itself related the in-house exemption to the existence of general interest services which public authorities are in some manner obliged to supply, and chosen to incorporate the in-house exemption in the very definition of "contract for the purpose of procurement". This incorporation of the notion of public service task in the "concept of entry" of EU procurement rules reminds of the approach in *Altmark* concerning state aid, studied in the precedent section. In practice, the effect of the in-house exemption is to widen public authorities' discretion in providing and commissioning tasks in the general interest, which seems to have been consolidated in Article 1 of the SGI Protocol.

The *Coditel* ruling supports this understanding of the *Teckal* case law as evidently an "SGEI related case law". Although the judgment does not contain any direct reference to the notion of SGEI, the entrustment of *public service broadcasting tasks* played an important role for the application the in-house exemption in that case.[907] By application of the Teckal criteria, a local authority's award of a concession to manage its cable television network to an inter-municipal cooperative it owned together with a number of other municipalities was found not to be covered by Articles 12 EC, 43 EC and 49 EC. Regarding the so called "control-criterion" the Court expressed that "where a number of public authorities own a concessionaire to which they entrust the performance of one of their *public service tasks*, the control which those public authorities exercise over that entity may be exercised jointly".[908] This ruling indicates that a flexible approach of the so called "control criterion" as formulated in *Teckal* must typically be adopted in consideration of the fact that the tasks entrusted are just "public service tasks", the word task suggesting that the municipality is *obliged* to provide a service of general interest. As a matter of fact it seems there was indeed such a public service *obligation* for the cable operators owned by municipalities in the Brussels region, as appears from the *UPC* case discussed in section 7.3.3.[909]

[907] Case C-107/98 *Teckal* [1999] ECR I-8121.

[908] Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, para.47.

[909] Case C-250/06 *UPC* [2007] ECR I-11135.

In *Coditel*, the relation between the in-house exemption and the public authorities "public service tasks" is thus made by the Court itself. Its legal-political motive is arguably to allow that public authorities retain a freedom to organize the tasks they are by law responsible for, which includes a possibility to *provide* certain services with their own resources, thereby withdrawing the task from the market. This freedom is based on the Union's obligation to respect local and regional authorities' right to self-government, as now clear from Article 4(2) TEU. The Union's duty to respect this right, enshrined in the European Charter on Local Self-Government drawn up within the framework of the Council of Europe, signed by all EU Member States and ratified by most of them, had already been emphasized by AG Kokott in *Parking Brixen*[910] and by AG Trstenjak in *Coditel*.[911] In AG Trstenjak's view, the first *Teckal* criterion was not to be construed too narrowly, as doing so "would be to attach disproportionate weight to competition-law objectives at the same time as interfering too much with the municipalities' right to self-government and with it in the competences of the Member States." AG Trstenjak underlined finally that "heed is to be paid" to the role of regional and local self-government for the relevant national identity protected by Article 4(2) TFEU.

The General Court went even further in *SIC v Commission*, by explicitly relating the SGEI status of a service and the need of flexible application of procurement rules, in particular of the in-house exemption. It held that the specific status for public service broadcasting is the basis for the freedom accorded by the Amsterdam Protocol to Member States in the award of broadcasting SGEIs. According to the GC, this specific status explained and justified the fact that a Member State cannot be required to have recourse to competitive tendering for the award of such an SGEI, at least where it decides to ensure that public service itself through a public company.[912]

It seems thus clear that the *Teckal* doctrine has its legal-political ground in the SGEI character of the services *before they are commissioned*, under the pre-procurement phase. This seems to be confirmed by Article 1 of the SGI Protocol, recognizing as an EU shared value the essential role and the wide discretion of national, regional and local authorities in *providing* SGEIs. If their discretion to *provide* SGEIs themselves is recognized, it seems to imply that the SGEI exists regardless of whether they decide to commission it, and more often than not due to their statutory *obligation* to supply SGEIs (a "public service task"). In the field of public procurement, the role of national, regional and local authorities is necessarily double: as public authorities and as contracting

[910] AG Kokott held that applying the procurement rules also to transactions between contracting authorities and their wholly-owned subsidiaries would constitute an extensive interference in the organisational sovereignty of Member States and, in particular, in the self-government of many municipalities be — even from the point of view of the market-opening function of procurement law — entirely unnecessary, as "[a]fter all, the purpose of procurement law is to ensure that contractors are selected in a transparent and nondiscriminatory manner in all cases where a public body has decided to use third parties to perform certain tasks. However, the spirit and purpose of procurement law is not also to bring about, *'through the back door',* the privatisation of those public tasks which the public body would like to continue to perform by using its own resources. This would require specific liberalisation measures on the part of the legislature (footnotes omitted)." See Opinion of AG Kokott in Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paras.70-71.

[911] Opinion of AG Trstenjak in Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paras.84-85.

[912] Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, para.154.

authorities. The functional approach of their activity for the purpose of EU competition rules, formulated in *Commission v Italy*, and operating a dichotomy between their *exercise of public powers* from their *offer of goods and services on the market*[913], seems in the field of public procurement to give way to a more "formal" approach, as public authorities are expected to act on the basis of their competence in national law even when they organize the supply of services within this competence. In other words, their societal missions must be expected – and allowed – to affect their purchasing strategies, normally funded through tax.[914]

Likewise, the exemptions consented to by the CJEU for public-public cooperation under certain conditions are connected by the Court itself to the existence of public service tasks devolved to public authorities, and justifying enhanced discretion in the organization of service provision and commission. In *Commission v Germany* the Court found that procurement rules did not apply to a contract providing for "waste pooling" and mutual assistance between the municipality of Hamburg and four smaller municipalities in the same region.[915] This conclusion rested mostly on the argument that the objective of the municipalities when entering this contract was to cooperate in fulfilling their public task, and to establish the frame of Hamburg's future procurement for the construction of an incineration facility offering sufficient treatment capacity. Several authors have questioned the relationship between this ruling and the *Teckal* case law respectively the *Coditel* doctrine.[916]

Indeed, in *Commission v Germany* the Court established connections with both *Teckal* and *Coditel* but opened a new line of reasoning. While the Court of Justice did not use the term SGEI, it emphasized first that the four smaller municipalities and the municipality of Hamburg had agreed, by the contract in dispute, on mutual commitments directly related to "public service objectives" and on mutual assistance to perform their "legal obligations to dispose of waste"; the contract was therefore seen as the "basis and the legal framework" in order *at a later stage* to contract out the performance of a "public service, namely thermal combustion of waste".[917] It is therefore submitted that the red thread of the judgment is the discretion for municipalities to *refine* the definition of the

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[913] Case 118/85 *Commission v Italy* [1987] ECR 2599, para.7.

[914] In a paper where he firmly criticizes what he calls a neo-liberal approach of public procurement, Kunzlik holds that the marketization of public services has intensified the ideological importance of the regulation of public procurement, because as government activities are increasingly outsourced and delivered through contracts, the discretion of public bodies is increasingly controlled by public procurement law. He relates the ideological meaning of this regulation to Daintith's observation in the 1970s, that government can exercise two kinds of power: "imperium" (powers to prohibit and sanction conduct of which it disapproves, resulting from the state's monopoly on the use of force) and "dominium" (the power to pursue policy objectives by deploying the state's wealth, for example, by awarding or withholding public contracts). Kunzlik insists that "the very fact that public purchasers are indeed public bodies having public functions means that they may seek to pursue "non-market" goals in their procurement so that their decisions may produce "inefficient" outcomes in the sense that they differ from the outcomes to be expected from the normal working of the free (private) market". This opinion is shared here. See Kunzlik P., p. 311.

[915] Case C-480/06 *Commission v Germany* [2009] ECR I-04747.

[916] See Naundrup Olesen K., 2011, and Steinicke M., 2011.

[917] Case C-480/06 *Commission v Germany* [2009] ECR I-04747, paras.41, 42 and 44.

task of general economic interest, *before* they procure it on the market. Under their obligation to plan and ensure treatment, the municipalities were simply seen as organizing the service through waste flow optimization. Hence the Court considered that procurement rules should not deprive the public authorities from the right to fulfil their mission better and cheaper. By pooling their needs in form of a *contract*, as a basis for Hamburg's future contract to be established through lawful procurement, they did not bereave the market of anything.[918] As in *Coditel*, the approach in *Commission v Germany* was clearly motivated by the municipalities' own public service tasks, recognized as legitimate by the Court, in line both with Article 1 of the SGI Protocol and with the Union's duty to respect local self-government pursuant to Article 4(2) TEU.

In *Lecce*, the Court of Justice summarized the criteria exempting municipal cooperation from the scope of procurement law as follows. "European Union rules on public procurement *are not applicable* in so far as,

a. The public entities establish their cooperation with the aim of ensuring that a public task that they all *have to* perform is carried out

b. Contracts are concluded exclusively by public entities, without the participation of a private party

c. No private provider of services is placed in a position of advantage vis-à-vis competitors

d. Implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest (emphasis added)".[919]

Condition (a) is that the public entities have an *obligation* to *perform a task of general interest*. The Court does not only mean that the activity is covered by the authority's competence and the principle of self-government, which must be respected by EU law. It seems clear that the Court refers to a *legal obligation* to supply a service of general interest (SGI). Condition (d) is that the cooperation's sole aim is the pursuit of the objective of general interest, and evokes the Member States' duty, provided for by Article 14 TFEU, to take care that SGEIs are operated under conditions which enable them to achieve their missions, in particular economic and financial conditions. Public-public cooperation may from an economic point of view be precisely a manner to fulfil this duty, and the CJEU's view is arguably that, under the strict conditions formulated in *Lecce*, the exemption from the application of EU procurement for such agreements (even in the form of contract) is constitutionally needed.

[918] Importantly this contract implied only financial transfers from the four small municipalities to the municipality of Hamburg, covering their part of the charges paid by Hamburg to the operator of the facilities. There was thus no direct "remuneration for the provision of a service" from the small municipalities to the municipality of Hamburg. See Case C-480/06 *Commission v Germany,* para.43.

[919] Case C-159/11 *Lecce* (CJEU 19 December 2012), paras.34-35, referring to Case C-480/06 *Commission* v *Germany* [2009] ECR I-04747, paras. 44 and 47.

Thus, regarding both the in-house exemption and the public-public cooperation exemption, the Court establishes a direct link between the exemption from EU procurement rules and the existence of general interest tasks which public authorities are under an obligation to supply. This link is not so visible regarding the in-house exemption, because the CJEU has entwined it in the notion of contract in the meaning of EU procurement rules. By contrast, the public-public exemption could not be "incorporated" in the definition of contract for the purpose of EU procurement rules, and this exemption gives therefore more visibility to the existence of a public service task as a fundamental criterion. It must be emphasized here that the notions of "public service obligations" and "public service tasks" have been used by the Court in *Altmark* in a way perceived by the General Court in *BUPA* as in principle synonym with SGEI tasks.[920] Hence it is submitted that in *Commission v Germany*, the CJEU has – discreetly – opened Pandora's Box: it has explicitly found a derogation from EU procurement rules to be necessary, under its duty as an EU institution to take care that SGEI missions can be achieved, a principle established by Article 14 TFEU, and also expressed by Article 106(2) TFEU. This time, the SGEI mission was on the public authorities.[921]

To attribute such a clear meaning to *Commission v Germany* and to *Lecce* may certainly be feared for its implications. For instance, Wiggen admits that *Commission v Germany* has broadened public authorities' margin of discretion. Also, she agrees with Karayigit that the CJEU's judgment seems to be in line with Article 14 TFEU and even envisages that the cooperation at issue, could possibly be regarded as concerning an SGEI.[922] However, she denies that this in itself could be the deciding factor, on the following arguments. She considers that a contracting authority will virtually always be acting to secure the fulfilment of what she calls its "public interest tasks". However, in *Commission v Germany*, the exemption was admissible due to the existence of a "*public service* task", not a "public interest task". She also argues that in previous cases concerning cooperation between public sector entities, the fact that the service at issue could be considered of general economic interest had not been sufficient to prevent the application of the procurement rules. This is an interesting but inconclusive argument. The fact is that *Commission v Germany* was decided by the Grand Chamber, signalling the importance of the case, and arguably also that the Court deferred to its duty to take care that SGEIs achieve their missions, under Article 14 TFEU. The SGEI missions at issue in *Commission v Germany* were hardly deniable as they were imposed by the EU legislator itself.

Wiggen's last argument was that granting against this background an exception from the Directive's scope of application would undermine the objectives of the public procurement rules. Although respectable, this is a political argument, not legal. Besides, the Court does not exactly make it easy to invoke the derogation, as the SGEI at issue

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[920] See discussion in section 7.2.3.5.

[921] Naundrup Olesen has evoked the possibility that the Court used in *Commission v Germany* the "ideas" contained in Article 16 EC (nw Article 14 TFEU), but considered that more case law would be needed to conclude that the general interest plays an important role for the issue of compliance with the procurement rules, and perhaps more broadly EU Internal market rules. See Naundrup Naundrup Olesen K., 2011, p. 254-258.

[922] Wiggen J., 2011, p. 162. Regarding Wiggen's reference to Karyigit, see Karayigit M., 2010, p. 190.

legitimates public-public cooperation subject to conditions which may be regarded as a roportionality test.

Fiedziuk has noted that Article 106(2) TFEU has so far not played any significant role in the application of EU public procurement rules, but holds that "the reliance on its provisions is becoming a necessity".[923] On the same path, Damjanovic notes that so far an exception from this regime has never been justified on the basis of Article 106(2) TFEU, but refers to *Commission v Germany* as a case implying that showing that Article 106(2) TFEU might also be invoked in relation to the application of secondary law on public procurement, even though she underlines that it is not easy to argue an exception from the application of the Public Procurement Directive on the basis of Article 106(2) TFEU.[924] In fact, in the field of public procurement, it seems arguable that Article 14 TFEU may play a role which Article 106(2) TFEU cannot easily play because it has its focus on *undertakings'* conditions to fulfil SGEI tasks.

8.2.3 Lenient review of restrictions of the free movement of services justified by public service tasks

Outside the field of social services, it seems worth mentioning here the *UPC* ruling, where the CJEU examined Belgian legislation requiring cable operators providing services in the Brussels-region to broadcast TV programmes transmitted by broadcasters designated by Belgian authorities.[925] This "must-carry-obligation" regime was part of a national policy designed to enable television viewers to have access to both private broadcasters assuming public service obligations (public service TV programs) and public service broadcasters.[926] The Court found that the must-carry-obligation restricted the freedom to provide services[927], but that it was appropriate to achieve the general interest of preserving the pluralist character of the television programmes available in that bilingual territory.[928] The obligation was *not disproportionate* in relation to that objective, if it was applied subject to a transparent procedure based on objective non-discriminatory criteria known in advance.[929] This test was evidently softer than the

[923] Fiedziuk, 2013a, p. 113.

[924] Damjanovic D., 2013, p. 1711. In contrast with Fiedziuk, Damjanovic finds the Court's restrictive approach in allowing SGEI tasks to allow derogations from EU procurement rules "understandable against the background of the effect of these rules on the Member States' welfare regimes: they do not oblige the Member States to contract out (i.e. to privatize), nor do they have any other market-opening effect, but merely oblige the Member States when they have already taken the crucial decision to contract out to do so in a transparent and fair manner, by awarding the contracts in a competitive procedure."

[925] Case C-250/06 *UPC* [2007] ECR I-11135.

[926] For instance owned by local authorities, as in *Coditel*, evoked above in 8.2.2.

[927] Case C-250/06 *UPC* [2007] ECR I-11135, para.38.

[928] Ibid, para.43. The Court held that this legislation sought to harmonise the audio-visual landscape in Belgium in order to safeguard the maintenance of the pluralism connected with freedom of expression, protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, see paras.40-41.

[929] Ibid, para.51.

standard *Gebhard* test, which requires that measures restricting the freedom of establishment do not go beyond what is necessary in order to attain the objective of general interest pursued.[930] In fact, the TV-broadcasters enjoying "a right to be carried" by cable operators had themselves public service obligations to develop local TV and to broadcast local news aimed at the local public. The must-carry-obligation was thus necessary to secure the achievement of their SGEI task, and therefore it is difficult not to see an analogy the Court's test in *UPC* and the mild test applied by the Court when it applies Article 106(2) TFEU to measures aimed at securing the fulfilment of SGEI tasks.

In a line of health care cases, the CJEU considered that although the objective of balanced medical and hospital service open to all is *intrinsically* linked to the method of financing the social security system, it may constitute an ORGI.[931] As the financing system was an intrinsinc instrument to achieve the objective of balanced hospital health care, the Court found that "to prevent the possible risk of *seriously* undermining a social security system's financial balance" constituted *per se* an ORGI.[932] On these premises, the Court found that national rules requiring prior authorization for the reimbursement of costs of medical treatment provided in another Member State by a non-contracted care provider, could under certain conditions be justified as necessary to prevent the risk of *seriously* undermining a social security system's financial balance. The Court admitted that giving insured persons full liberty to use the services of hospitals situated in the State where they are insured or in another Member State, with which their sickness insurance fund has no contractual arrangements, could jeopardize the planning of a Member State's hospital care. The Court admitted also that such planning was necessary for a rationalised, stable, balanced and accessible supply of hospital services hospital medical services, in terms of number of hospitals, their geographical distribution the nature of the medical services which they are able to offer.[933]

Called by Bekkedal a "fiction under the mandatory requirements doctrine", the Court's approach in those cases consisted in overlooking that the measures at issue were most probably connected to the maintenance of systems pursuing SGEI missions (generally established by law) and SGEI tasks (entrusted through contracts or arrangements). In this fiction, Bekkedal argues, the Court upheld its doctrinal stance that ORGIs cannot be of economic nature, but allowed economic aims exceptionally "when they are of imperative importance".[934] Bekkedal's view that the Court's approach involved a fiction is shared here, but his view that "economic aims are undoubtedly accepted under the exception in Article 106(2) TFEU" is worth discussing.[935] In cases where Article 106(2) has been invoked by Member States, it is rather the term "acceptable economic *conditions*"

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[930] Case C-55/94 *Gebhard* [1995] ECR I-4165, para.39.

[931] Case C-158/96 *Kohll* [1998] ECR I-1931, para.50, and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, para.73.

[932] This was first asserted in Case C-120/95 *Decker* [1998] ECR I-1831, para.39, and confirmed in Case C-158/96 *Kohll* , para.41, Case C-157/99 *Smits and Peerbooms*, para.72, Case C-385/99 *Müller-Fauré* [2003] ECR I-4509, para.73, Case C-372/04 *Watts* [2006] ECR I-4325, para.103, and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, para.30.

[933] Case C-157/99 *Smits and Peerbooms*, paras.76 and 81.

[934] See Bekkedal T., p. 75.

[935] Ibid.

which has been used by the Court. While such conditions may be an aim for undertakings entrusted with SGEIs, public authorities consider them as an *instrument* in the fulfilment of their missions (in particular to secure continuity and security). It is therefore argued here that "preserving the financial balance of the social security system" is not an independent economic *aim*, but rather an *economic principle* – to be respected – for the achievement of the mission to supply balanced hospital care open to all.

Bekkedal considers that the Court's approach does not take anything from the Member States, because it does not follow from the wording of Article 106(2) TFEU that it can be brought forward by the Member States in four freedom cases at all. Yet, it has been shown in section 8.1.3 above that this provision has a horizontal scope and has been successfully brought forward, for instance in *Corsica Ferries*, to justify national legislation restricting free movement, a view shared by several authors.[936] It is undeniable that Article 106(2) TFEU evokes *undertakings'* tasks, but the Court has consented exemptions under Article 106(2) for state measures, with regard in particular to its understanding of the scope of Article 106(1) TFEU, and of the fact that the protection of SGEI tasks provided by Article 106(2) TFEU does not primarily serve undertakings, but instead the interests of the Member States entrusting them.

Yet, it is also undeniable that the focus of Article 106(2) TFEU on the SGEI tasks of undertakings does not fit legal-technically with invoking public authorities' SGEI missions, which arguable explains the need of a "fiction", implying that the test of Article 106(2) TFEU is applied to justify restrictions of the free movement of services, but that the notion of SGEI is not used. The interesting question is why the Court would do that. Well, even if the CJEU may not be argued to "keep Article 106(2) TFEU in the dark", to use Bekkedal's words, it has some reason to keep the notion of SGEI itself in the dark if it wishes to conduct what Lenaerts calls an approach "open to nuances". Under this approach, it keeps a margin to design the balance between the system interest and the free movement interest in a manner that may find acceptance in all Member States, both holders of national welfare systems and holders of a more market-based policy on public services. But to this "political reason", it is argued that another very legal reason must be added for the tests used in the cases evoked here. It is submitted that the Court saw itself obliged, as an EU institution, to respect SGEI missions in the meaning of Article 16 EC, which existed and expressed a normative signal when these rulings were delivered. It is submitted that what the Court did was to apply the principle of Article 14 TFEU, before it was explicitly formulated through the Lisbon Treaty. In so doing, the Court delineated, not least for itself, the contours of the EU concept of SGEI.

It is true that the Court has applied a softer test to national measures related to "infrastructure conditions" necessary to maintain SGEI missions. Indeed, the Court has so far always allowed that Member States upholding a requirement of prior authorization to reimburse patients receiving health care from operators outside the public funded

[936] Case C-266/96 *Corsica Ferries*, [1998] ECR I-3949. Among authors supporting this view, we find Buendía Sierra, J. L. 1999; Hatzopoulos, V., 2000; Szyszczak, E. 2007, p. 217; and Lenaerts K., 2012, p. 1255.

system, without demanding that these Member States give evidence that removing this requirement implies a risk of *seriously* undermining a social security system's financial balance".[937] In that sense, and using Bekkedal's words, it may seem that the Court "does not take away anything from the Member States". However, it appears that by disregarding from the SGEI character of the missions and the tasks, the Court frees itself from reasoning in terms of "economic pressure on the undertakings entrusted with SGEI tasks", and allows itself to reason instead in terms of "financial pressure which the national social service system must tolerate". It looks as if the Court trades EU law's deference to Member States' assessment that a procedure of prior authorization is appropriate and necessary to protect the financial balance of the social security's system, against EU law's imposition of conditions on:

a. The risk standard for the social security's system and
b. The governance of the procedure of prior authorization.

Regarding (a), the Court sets a standard of "risk of seriously undermining" the system's financial balance, which may seem strict but at the same time is rather open-ended. Regarding (b), van de Gronden explains that the Court's case law on hospital care evoked above forces Member States to take account of the interests of patients in managing their systems, as the ECJ sets standards for reimbursement rates, waiting lists, and prior authorization procedures on a case-by-case basis, which inevitably leads to the harmonization of several aspects of the organization of national health care systems.[938] Thus, by keeping in the dark the SGEI-character of the regulation at issue, while transposing an element characteristic of the case law under Article 106(2) TFEU – i.e. the relevance of economic and financial conditions in the balance between fundamental market freedoms and the sustainability of national systems aimed at securing universal access to social services – the Court's fiction is to make believe that it does not regulate the economic conditions for the achievement of SGEI missions, although it does in fact decide what economic "good governance" involves in Europeanized social services. What legitimizes the Court's step is that it is left alone to decide how free movement law will "domino-affect" national welfare systems, as long as the Member States do not proceed to develop the rules in a more democratic manner.

As seen in chapter 4, the CJEU found in *Kattner Stahlbau* that a body providing insurance against accidents at work and occupational diseases did not constitute an undertaking, as it fulfilled an exclusively social objective, but that the national rules governing its activity were subject to the freedom to provide services, because they covered services which at least partly could be provided for remuneration in other Member States.[939] The Court found that the national rule imposing compulsory affiliation to the insurance body did restrict the freedom to provide services for insurers established in other Member States, but held that ensuring the financial balance of that branch of social security could constitute an ORGI, and that compulsory affiliation could be a suitable means to achieve

[937] This has been underlined by Hancher and Sauter, see Hancher L. and Sauter W., 2009, p. 17.

[938] Van de Gronden J. W., 2009a, p. 758.

[939] Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513.

this objective.[940] The Court found that the statutory insurance scheme did not go beyond what was necessary to achieve its objective of general interest, as it held that there was a high risk of cherry-picking, as the scheme was based on solidarity and offered only minimal cover, allowing undertakings to top up their cover by taking supplementary insurance possibly available on the market.[941]

Here again, it is argued that the implicit SGEI-character of the mission entrusted to the entity at issue in *Kattner Stahlbau* was decisive when the Court decided to bifurcate from the doctrine that ORGIs cannot be related to economic conditions. In its assessment of the compulsory affiliation rule, the Court did neither deprive the Member State from the possibility to invoke the financial sustainability of its welfare system, nor forced it to prove that solidarity was the least restrictive solution to secure access to the type of insurance at issue in the case. However, to be proportional to its restriction of free movement, the solidarity system had to be kept to a minimal cover – a "core welfare" – that allowed undertakings covered by the scheme to take out supplementary insurance available on the market – a "top up welfare". The Court was cautious in its liberalizing approach, stating that the restriction to a minimal cover would *militate* in favour of the proportionality of compulsory affiliation, and that it was for the national court to assess how the balance would be struck. If the Court had approached the scheme as based on SGEI missions defined by a Member State, it would have been obliged to explain why Member States must define "*core* SGEIs" instead of enjoying a wide discretion in defining SGEI missions in their areas of competence.

8.2.4 Lenient review of restrictions of the freedom of establishment justified by public service tasks: *Hartlauer*

In *Hartlauer,* already evoked[942], the Court of Justice assessed the compatibility with the freedom of establishment of Austrian rules requiring authorisation to set up a private independent outpatient clinic for dental medicine. These rules involved that authorisation must be refused if needs were covered by already established dentists, doctors and establishments contracted to or owned by sickness funds. The Austrian government did not contest that these rules restricted the freedom of establishment, but argued that the system ensured a medical service of high quality, balanced and accessible to all, and that the rules ensured the financial balance of the social security system in that they enabled social security institutions to control expenditure by adapting it to planned needs.[943] This system consisted primarily of a system of benefits in kind, and in addition

[940] Ibid, para.85 and 88.

[941] Ibid, para.89-90.

[942] See section 3.2.3.3.

[943] Case C-169/07 *Hartlauer* [2009] ECR I-1721, para.41.

of a system of reimbursement by social security institutions of costs incurred by insured persons having recourse to non-contractual practitioners.[944]

To justify the authorization requirement and the fulfilment of certain conditions to receive an authorization, the Austrian government claimed first that uncontrolled establishment of new independent outpatient dental clinics could jeopardize the possibility for contractual practitioners to offer their services under acceptable economic conditions, and in turn for patients' access to the medical services they provided throughout national territory. Second, the Austrian government argued that in the public health sector, an increase in supply tends to lead to an increase in the volume of supplies at constant prices, and therefore an uncontrolled growth in the number of providers of medical services could impose uncontrollable burdens on the social security institutions. Even if these institutions did not offer contracts to the new service providers, the rules on reimbursement of costs paid by the person insured would obliged them to spend sums substantially the same as those spent in the context of the system of benefits in kind.[945]

Having noted that the system of authorization applied without discrimination on grounds of nationality, the Court recalled that, in accordance with the CJEU's case law, the protection of public health under Article 52 TFEU may specifically justify (1) the objective of maintaining a balanced high-quality medical service open to all[946] and (2) preventing the risk of serious harm to the financial balance of the social security system.[947] The Court admitted that planning could be necessary to supply not only hospital care but also outpatient care, and that prior authorisation could prove indispensable "to ensure medical care which is adapted to the needs of the population, covers the entire territory and takes account of geographically isolated or otherwise disadvantaged regions".[948] It also admitted that the system of benefits in kind could have priority in this planning, in order to secure easy access to the services of contractual practitioners throughout the national territory.[949] However, the Court found that the national rules were incompatible with the Treaties, as they (a) submitted to a system of prior authorisation new outpatient dental clinics but not new group practices, although those two categories of providers were comparable in service features, number of practitioners and service volume and (b) allowed certain provinces to assess needs according to non-objective criteria.

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[944] Ibid, paras.16-17. Reimbursement of costs incurred by persons consulting a doctor who was not a contractual practitioner was up to a ceiling which is generally 80% of the sum which would have been charged if the treatment had been entrusted to a contractual practitioner.

[945] Ibid, para.43.

[946] Ibid, para.48. Article 52 TFEU allowing the Member States, in particular, to restrict the freedom to provide medical and hospital services in so far as the maintenance of treatment capacity or medical competence on national territory is essential for the public health, and even the survival, of the population.

[947] Ibid, para.49.

[948] Ibid, para.51-52.

[949] Ibid, para.53.

Thus, although the Austrian rules fell on their lack of consistency, the Court did neither reject the Austrian arguments supporting the need of an authorization scheme nor examine with great care whether less restrictive means were available.[950] Hancher and Sauter see a striking contrast between the soft standard of review in establishment cases such as *Hartlauer* and *German hospital pharmacies*, and the strict standard of review – a form of mutual recognition – in the free movement of service case *French laboratories*.[951] The latter case concerned French rules requiring that bio-medical laboratories had their place of business in France and barring reimbursement of analyses carried out in other Member States. The Court held that, in the absence of harmonisation, this restriction of the freedom to provide services could be justified by the aim of maintaining the quality of medical services, covered by the derogations for public health in Article 52 TFEU, in so far as it contributed to the attainment of a high level of health protection.[952] However, as similar requirements existed in the Member State of establishment, and considering that monitoring the in that State was possible and less restrictive, the Court concluded that the French rules were non-proportional and contrary to Article 56 TFEU. To Hancher and Sauter, this could suggest that the freedom to provide services is applied more strictly than the freedom of establishment, or that regulation of activities in state-run or "mixed" system enjoys a more lenient review than simple regulation of market-based provision of services.

It is submitted here that the difference in the standards of review may rather have to do with the implicit acknowledgement that the national rules set conditions for the achievement of SGEI missions in the meaning of Article 16 EC (now modified in Article 14 TFEU). In this regard, it is important to recall the GC's view in *BUPA*, already evoked above, that the fact that the national legislature, acting in the general interest in the broad sense, imposes certain rules of authorisation, of functioning or of control on all the operators in a particular sector does not in principle mean that there is an SGEI mission.[953] The French laboratories were subject to functioning rules, but apparently not to SGEI tasks.

By contrast, it seems that in *Hartlauer*, the Court implicitly acknowledged the implementation of the objectives pursued by the national Austrian authorization scheme as motivated by the national legislator's intention to secure patients' access to an SGEI, and which the Court's conditions may not obstruct. It is submitted here that this implicit acknowledgement explains the softer proportionality in *Hartlauer*, and the Court's admission that a welfare system's economic conditions may justify a restriction of the freedom of establishment, both transposed from the Court's test under Article 106(2) TFEU in areas where the Member States retain policy competence, as in the field of social services. This is not contradicted by Hancher and Sauter's observation that in *Hartlauer* and in other cases where a more lenient proportionality test is applied, the

[950] See van de Gronden J. W., 2013a, p. 146.

[951] Case C-496/01 *French laboratories* [2004] ECR I-2351; Case C-141/07 *German hospital pharmacies* [2008] ECR I-6935. See Hancher L. and Sauter W., 2009, p.17.

[952] Case C-496/01 *French laboratories*, cited above, para.66.

[953] See section XXX.

Court invoked the Member States' powers in the field of health care and their freedom of Member States to determine the desired level or health protection.[954] As seen in chapter 7 above, the respect of national identity lies namely at the core of SGEIs' values.

8.2.5 *Libert*: lenient review of restriction of the free movement of capital justified by public service obligations

The *Libert* case sheds particularly interesting light on how the CJEU may consider that undertakings' SGEI tasks may motivate public service compensation and at the same time that a restriction of fundamental freedoms may be justified by the objective pursued by these SGEI tasks. In that case, the Court had to examine two rules laid down in a Flemish Decree, both aiming at securing access to housing in Flemish communes: the first rule prevented persons without a "sufficient connection" from purchasing land or buildings in certain target communes, the second rule required from land subdividers or developers, as a condition for the grant of a building or land subdivision authorisation, to discharge a social obligation consisting in either devoting part of their building project to the development of social housing units, or paying a financial contribution to the commune in which that project was developed.

The second rule imposing a "social obligation" on undertakings was relevant both as a free movement issue and in connection to as a state aid issue.[955] The Court assessed the requirement of "social obligation" in the light of the free movement of capital.[956] It found that the obligation to devote a part of their own project to develop social housing units or contribute financially to a social housing project developed by the commune they seek authorization from, constituted a restriction of the free movement of capital, in accordance with settled case law.[957] The Court recalled that the fundamental freedoms could lawfully be restricted by an objective to guarantee sufficient housing for the low-income or otherwise disadvantaged sections of the local population, as this objective had been held to constitute an overriding reason in the public interest relating to social housing policy in a Member State.[958]

Thus, the "social obligation" at issue in *Libert* could be compatible with Article 63 TFEU, if it was justified by the objective of guaranteeing sufficient housing for the low-income or otherwise disadvantaged sections of the local population", and if it was assessed and found by the national court to be appropriate and necessary to attain this

[954] Hancher L. and Sauter W., 2009, p. 17.

[955] Joined Cases C-197/11 and C-203/11 *Libert* (CJEU 8 May 2013), para.65.

[956] Observing that the restriction of the freedom of establishment and the freedom to provide services was an inevitable consequence of the restriction of the free movement of capital, the Court considered unjustified to examine the legislation at issue in the light of Articles 49 and 56 TFEU. See C-197/11 and C-203/11 *Libert*, para.62.

[957] Cases C-197/11 and C-203/11 *Libert*, paras.64-66, with reference to Case C-567/07 *Woningstichting Sint Servatius*, [2009] ECR I-9021 paras.21-22.

[958] Ibid, para.67, with reference to *Woningstichting Sint Servatius*, paras.29-30, and Case C-400/08 *Commission* v *Spain* [2011] ECR I-1915, para.74.

objective.[959] This proportionality test of the authorization condition contains no requirement of least restrictive measure, and seems thus "softer" than the "standard Gebhard test" applied to restrictions justified by ORGI. This is important, because by contrast, and as underlined critically by Reynolds, the Court used a strict proportionality test regarding the other requirement at issue in the case of a "sufficient connection" with the target commune in the Flemish Decree. As none of the conditions for establishing a sufficient connection reflected the socio-economic aspects relating to the objective put forward by the Flemish Government, and as the conditions of sufficient conditions could also be met by persons with no specific need for social protection on the property market, the CJEU considered that the requirement went beyond what was necessary to achieve the goal pursued, and moreover, argued that there were other means of pursuing it, for instance by "subsidies for purchase or other subsidy mechanisms specifically designed to assist less affluent persons".[960]

Nicolaides found puzzling the CJEU's approach leaving to the national court the task of evaluating whether the social obligation was appropriate and necessary to attain its objective.[961] It is proposed here that these two elements – (1) the lenient proportionality test of the social obligation and (2) leaving the assessment to the national court – are explained by Court of Justice's view that the social obligation could constitute an SGEI task. The Court held namely one of the referred questions to be "in essence" whether the tax incentives and subsidy mechanisms granted to operators fulfilling the conditions for authorization, had to be classified as state aid to be notified *read in conjunction with the SGEI Decision*. It is unclear from the case whether the argument that these advantages could constitute the compensation of an SGEI task had been raised by the parties or the intervening parties to the case.[962] In any case, the Court, which in the free movement assessment had chosen the cautious and neutral term of "social obligation", held that it was not "inconceivable" that the social obligation could be regarded as a "public service".[963] Based on this view, the Court answered to the national court that it would first have to assess, on the basis of the four Altmark criteria, whether the public service compensation measures constituted state aid in the meaning of Article 107(1) TFEU, and if so, that it would have to ascertain whether the SGEI Decision was applicable to the Flemish Decree providing for that compensation.[964]

In light of the above, the following approach emerges arguably from the *Libert* ruling. The CJEU considered that the national rule, imposing a social obligation on operators applying for building/developing authorizations, could be conceived as an SGEI task. It therefore enjoined the national court to assess the national rule providing for an

[959] Ibid, paras.67-69.

[960] Reynolds S., 2015, p. 261-263. See Cases C-197/11 and C-203/11 *Libert*, paras.55-56.

[961] See his analysis of the case in Nicolaides P., 2014, p. 151-156.

[962] AG Mazàk *understood* the question referred as "seeking, in essence, to obtain clarification of the case-law within the meaning of which, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations". See Opinion of AG Mazàk in Joined Cases C-197/11 and C-203/11 *Libert*, para.49.

[963] Cases C-197/11 and C-203/11*Libert*, para.88.

[964] Ibid, paras.89-102.

economic compensation of this obligation, as public service compensation subject to a lenient test under Article 106(2) TFEU (if the fourth Altmark criterion was not fulfilled). It is proposed that the Court also conceived the State's compensation measure not only as an economic condition necessary for operators to be interested to build in those communes, but also as a qualified commitment of the State, different from "a standard ORGI". Assessed in the light of the Treaty rules on free movement, the rule imposing a social obligation (an SGEI task) was subject to a soft proportionality test, arguably because it transformed the ORGI from a simple objective, into *a concrete financial commitment from the State*, engaging State resources, in other words, into an SGEI *mission* in the meaning of Article 14 TFEU. The approach in Libert may be visualised as follows:

Objective of rules 1 and 2
= guarantee sufficient housing for the low income and otherwise disadvantaged sections of local population (social housing)

Rule 1 = undertakings seeking authorization for building or land subdivision operations in a Flemish commune must discharge a **social housing obligation** which may be discharged in two alternative forms:

a. Contribute financially to local social housing project or
b. Conduct own social housing project in that commune

Rule 2 = Additional costs for operators are compensated by tax incentives & subsidy mechanisms

Rule 2 may distort competition but compatible with EU state aid rules

- If seen as compensating an SGEI task
- If appropriate and necessary for the fulfilment of this SGEI task

↓

Soft test for rule 2 (no RLM)

Rule 1 can be seen as an SGEI task in the meaning of Article 106(2) TFEU or *Altmark*, because Member States have a wide discretion to define SGEI

Rule 2: the State must compensate SGEI costs incurred by operators → "SGEI mission" pursued by State

Rule 1 restricts free movement but compatible with Article 67 TFEU

- If seen as based on ORGI objective
- If appropriate and necessary for the fulfilment of the ORGI

Soft test for rule 1 (no RLM)

↑

No "standard ORGI test"

↑

"Qualified ORGI" in this case

8.3 Conclusions

The study in section 8.1 shows that the CJEU has used Article 106(2) TFEU mostly to justify exclusive rights to providers of services in the public sector infringing Treaty rules on competition or on free movement, and now also to justify public service funding measures constituting state aid. The standard of review under Article 106(2) TFEU emerges as heterogeneous, being in certain cases a "reconciliation rule", and in others a "derogatory rule" to be interpreted strictly. In a majority of cases, the Court applies a "soft proportionality test", which only requires that measures infringing the Treaty market rules are appropriate and necessary to enable undertakings entrusted with SGEIs to fulfil their tasks under economic acceptable conditions. By contrast, *Dusseldorp* and *FFAD* show that the review under Article 106(2) TFEU is stricter (requiring that the measure is the least restrictive) concerning SGEIs attached to activities covered by EU law harmonizing the objectives pursued in that field, and/or the measures which Member States may resort to in order to promote them. Also, the Court seems to require under article 106(2) TFEU a control of strict proportionality between undertakings' SGEI-costs and their direct public funding. This emerges from *CBI* and is important for social services. In sum, these characteristics of the test under Article 106(2) TFEU seem coherent with the SGEI principle laid down in Article 14 TFEU, the SGI Protocol and the right of access to SGEIs in Article 36 EUCFR.

The analysis in section 8.2 shows that the CJEU has applied essential elements of its soft proportionality test under Article 106(2) TFEU without applying Article 106(2) TFEU. It is submitted that this "SGEI-related case law" includes two main approaches.

The first approach, represented clearest by *Altmark* but also by *Teckal*, is one of "incorporation" of the notion of SGEI, *through the equivalent notion of public service task*, in the concepts of entry of the Treaty-based market rules. In this approach, inherently using the softer proportionality test typical of Article 106(2) TFEU, the CJEU finds that certain SGEI-justified measures do not have to be derogatory, because the derogation is incorporated in a concept decisive for the application of the market rule, "state aid" in Article 107(1) TFEU or "contract" in EU procurement rules. In *Altmark*, the CJEU used the notion of "public service obligation" as a synonym of SGEI tasks, and established that strictly proportional compensation of these tasks excludes the existence of "state aid in the meaning of Article 107(1) TFEU". In the *Teckal* doctrine, the CJEU has established that the contracting authorities' provision of "public service tasks" with their own resources excludes the existence of a "contract in the meaning of EU procurement law".

The second approach, clear from *Hartlauer* (freedom of establishment), *Kattner Stahlbau* (free movement of services), and *Libert* (free movement of capital) is one of "transposition". It implies that the soft proportionality test, typical of Article 106(2) TFEU in fields which belong to Member States' competence, is used to assess measures restricting the fundamental freedoms, and that their justification could be characterized as SGEI missions, but is instead approached by the Court as ORGI objectives. This approach is eased by the overlap between ORGIs and SGEIs recognized in EU law, this

overlap being related to the Court's "formula of retained powers" and more fundamentally explained by the post-Lisbon Treaty rules necessitating that Member States' competence and national identity are respected by the Union. Under this approach, the Court finds compatible with the Treaties certain measures restricting fundamental freedoms, such as requirements of prior authorization for service providers or service recipients, without requiring that they are proven to constitute the least restrictive measures, and admits that they may also are be justified by economic concerns. This approach builds on a "fiction" in two respects:

- The measure supports first ORGIs which, when they consist in a State's qualified commitment to securing access to certain services, evidently makes them very particular types of ORGI. These ORGIs evoke in fact rather SGEI missions in the meaning of Article 14 TFEU.
- The measure is presented by the Court as supporting a second "financial ORGI", worded by the Court as consisting in "preventing the possible risk of seriously undermining a social security *system*'s financial balance". This second ORGI is also very particular, as it amounts to an acknowledgement of the Member State's discretion to organize their task to supply welfare services in the frame of a solidarity-based *system*, and of their need to maintain this system under economic and financial conditions enabling them to achieve their tasks. This second ORGI – the necessity of a system and of its financial balance – evokes very much the "conditions, in particular economic and financial conditions", for the operation of SGEIs in the meaning of Article 14 TFEU.

In this "transposition approach", the CJEU's spirit appears arguably to consist in taking care, by allowing a "financial ORGI", that other particular types of ORGIs – which evoke very much SGEI missions – operate under acceptable economic and financial conditions. Thus, both the transposition and the incorporation approaches seem underpinned by the Court's recognition that SGEIs exist not only at the level of undertakings but also at the level of public authorities, and that they must at both levels operate under conditions, in particular economic and financial conditions, enabling the SGEI missions to be achieved. Consequently, it is submitted that the Court's transposition and incorporation approaches mirror the Court's implicit application of Article 14 TFEU, and its interpretation of the notion of SGEI for the purpose of that provision. If this understanding of the CJEU's case law is correct, it explains its heterogeneous standard of review of restrictions of the fundamental freedoms.

This understanding is supported by the important ruling in *Commission v Germany*. In this case, the Teckal doctrine was not applicable, and incorporation barred because there was no concept to incorporate the exemption into. The notion of "public contract" cannot be re-defined each time an exemption from EU procurement rules seems appropriate to accommodate EU principles related to public services, in particular the respect of Member States' competence. The application of Article 106(2) TFEU was also barred: even if the Court had wanted to apply the provision, which is quite improbable, and even though it can be – and has been – applied to justify restrictions of free movement, it is not worded in a manner that allows to address public authorities' own tasks related to SGEIs. Consequently, if the CJEU wanted to find the municipal cooperation at issue

compatible with EU procurement law, it had to specify *why* a contract between two autonomous parts was not covered by EU procurement rules. The Court declared explicitly that the decisive reason was to enable the achievement of *public authorities*' public service tasks.

It is therefore proposed that, compared to the more ambiguous approach in *Teckal*, the CJEU crossed the Rubicon in *Commission v Germany*, establishing discreetly but surely that there is more to SGEI than tasks entrusted to undertakings, that SGEI tasks may exist at the level of public authorities, and that it may motivate *exemptions* from EU procurement rules for public-public cooperation. To justify an exemption from EU procurement rules, the Court used the notion of public service task, which can hardly be doubted to constitute a part of the EU concept of SGEI, because in *Altmark* the Court used the notion of public service obligations as an equivalent of SGEI tasks, and also because in *Commission v Germany*, the Court transposed the proportionality test under Article 106(2) TFEU into the field of EU procurement law, giving the Member States discretion to organize the public service task, in order to secure that the tasks could be achieved. The Court acknowledged public-public cooperation as a principle which can be necessary to enable that SGEIs achieve their missions, as an organisation form which allows public authorities to control the economic and financial frames of their public service tasks. If the Court took that path, which was confirmed in *Lecce*, it was not under the effect of a political whim. It is submitted that it saw it as its duty under Article 14 TFEU, which it interpreted and applied.

In sum, the CJEU does not seem to interpret Article 14 TFEU as simply consolidating an essential element of the acquis under Article 106(2) TFEU that in the frame of their retained powers Member States have a wide discretion to define policy objectives and to pursue them, define SGEI tasks, entrust them to undertakings and compensate them for.[965] It goes further and – under the Treaty principle of conferral and EU's duty to respect national identity and local self-government – recognizes that Member States have not only a wide discretion to define policy objectives, but also to commit themselves to these objectives by imposing public service tasks on themselves or their public authorities (SGEIs in the meaning of Article 14 TFEU), on the basis of which public service tasks may be entrusted to undertakings (SGEI tasks in the meaning of Article 106(2) TFEU). In the frame of such public service tasks, it emerges from the case law studied that they are recognized a prerogative to do so under "acceptable conditions", including financial and economic conditions.

[965] According to Buendia Sierra a reference to "economically acceptable conditions" in Article 16 EC had implied a Treaty consolidation of a flexible interpretation of the principle of proportionality in Article 86(2) EC (now Article 106(2) TFEU), similar to the line taken in Almelo.

9 Meaning of the EU concept of SGEI emerging from the CJEU's case law

As concluded in the preceding chapter, it appears that in order to comply with Article 14 TFEU (in its earlier version Article 16 EC), the CJEU has proceeded to delineate the meaning of the concept of SGEI, even if it advances under cover of "ORGIs" and "public service obligations/tasks" deserving a "special" proportionality test under EU free movement and procurement rules. The Court seems to understand the EU notion of SGEI as including both undertakings' "public service obligations" *and* public authorities "public service tasks" which are part of the "chain of responsibilities" necessary for SGEIs to achieve their missions. This understanding supposes that public authorities, due to their public service tasks, have to be governed by principles and conditions allowing the SGEI missions to be achieved. On this basis, the purpose of this chapter is to examine whether it is possible to enumerate the core elements of the EU concept of SGEI. A major difficulty in such an enterprise it is a multi-faceted concept, related to values but also to a principle of joint responsibility (Article 14 TFEU), to a derogation/balance rule (Article 106(2) TFEU), and to a right of access (Article 36 EUCFR). Another difficulty is to render justice to the fact that SGEI is an EU notion – which legitimates EU's control of manifest error – while Member States have a wide discretion to define SGEI tasks, at least in the frame of their retained competence. Under such circumstances, the concept can arguably not be defined too precisely and lends itself better for an understanding.

A premise here is that the concept's meaning is already contained in the Treaties adopted by the Member States, which implies that it is not any more for them to define it, no more than it is for the Member States to define Treaty concepts such as "services" or "goods". A postulate founding the quasi-constitutional authority of the EU legal system is namely that the Member States know what they agree on when their governments sign new Treaties and later have them ratified. This fiction has to be accepted although of course they – and we – know that they fundamentally do not agree on certain elements. Also, while the existence of a "right of access to SGEIs" is an important element to integrate in the understanding of the concept, it is not in focus in this chapter. In focus here is that the understanding of the EU concept must be coherent for the purposes of Article 14 TFEU *and* Article 106(2) TFEU. Article 106(2) TFEU spells a proportionality rule allowing to derogate from any Treaty provision and not only from the competition rules, but it is inflexibly formulated to address SGEI tasks *entrusted to undertakings*. Article 14 TFEU requires that SGEIs operate under principles and conditions enabling them to achieve their missions, and thereby does not exclude that other entities than undertakings may need such specific principles and conditions, but contains no proportionality requirement. Therefore, it seems that the two provisions are meant to complement each other, Article 14 TFEU enouncing a principle that SGEIs deserve special principles and conditions to achieve their important missions, and Article 106(2) TFEU requiring a proportionality assessment, where the interests of the Union – including market integration – may not be affected.

The approach in this chapter is to set the understanding of the EU concept of SGEI emerging from the CJEU's case law in relation to the understanding emerging from "definitions" in soft law and EU secondary law.[966] Thus, the Court's understanding of the EU concept of SGEI does not land in a political vacuum.[967] In section 9.1, these contextual elements are charted, with a historical approach of the Commission's "definitions" of SGEIs, mirroring both the political evolution of the Commission's approach and its persistent lack of legal clarity and comprehensiveness. Lastly, section 9.1 looks at the doctrinal search for a comprehensive understanding of the concept and sums up the section's findings.

Section 2 elaborates a tentative understanding of the notion of SGEI, inspired by Tuori's theory that envisages law as consisting of at least three dynamically interconnected layers, the surface level, the legal culture layer and the deep structure of law.[968] Thus, the understanding proposed is based on an analysis of the CJEU's case law studied in chapter 8, but in this analysis, the approach consists in looking "through" or "under the surface" of the CJEU's confusing use of the terms "public service obligations" (PSO) and "public service tasks" (PST), and of its special standard of review for national measures related to social services in their competence. The notion of "entrustment" in Article 106(2) TFEU, which appears to constitute a formal rather than a substantial element of the SGEI concept, is studied particularly. The relevance of this approach is supported by the fact that the Court is arguably in a quite tricky situation, where it has some reasons not to say what it is doing. In openly delineating the meaning of the EU concept of SGEI as including more than tasks entrusted to market operators, the Court may regard that it fulfils its duty to respect Article 14 TFEU, but at the same time it is exposed to the worries of frustrating the more liberal Member States, of having to clarify the telos it serves in applying the Treaty market provisions to the Member States regulation, organization and financing of social services, and perhaps also of opening the Pandora's box of the relation between SGEIs and EU procurement rules. At the same time, if the CJEU delineates the EU concept of SGEI without saying so, it denies that it clarifies the legal-political substance of Article 14 TFEU, delivering important rulings in a "what without a why manner", i.e. a style criticised by Weiler as communicating in essence "[i]t is so, because we say it so. And what it means – well you will find out."[969]

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[966] SGEIs have been defined for the purpose of Directive on Services 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services on the internal market (hereinafter "the Services Directive).

[967] Rather to the contrary, as proposing a clear understanding of the meaning of the EU concept of SGEI may be compared to walking on a minefield.

[968] Tuori's critical positivist theory, based on a vision of law as a "multi-layered normative phenomenon" – the *surface* of individual statutes, decisions and scholarly interventions (the "will") being underpinned by *sub-surface cultural elements* of law such as general legal concepts and principles, legal theories or doctrines, and patterns of argumentation (the "reason"). Tuori professes that legal science is dual by nature, being a combination of legal practice and scientific practice. As a scientific practice legal science looks both at law as legal practices (which it is a part of) and as a legal normative order (which it considers from an observer's perspective). See Tuori K., 2002.

[969] Weiler J. H. H., 2013, p. 249. At page 238 of this paper, Weiler asks rhetorically: "The ECJ never crossed the line between law and politics? Transparent, non-cryptic, soundly reasoned decisions?"

9.1 Clear understanding of the EU concept of SGEI in soft law and secondary law?

The Commission's understanding of the EU notion of SGEI can be expected to transpire from its many Communications on services of general interest between 1996 and 2007, and its SGEI Guides (so far 2010 and 2013). Although it should not be forgotten that the Commission and the EU legislator are political institutions and that these documents are not legally binding, the understanding they convey is important because their ambition is *a priori* to be more comprehensive than – although based on – the CJEU's case law. Therefore their "vision" of the concept may differ from the CJEU's more or less implicit understanding, especially if the latter is too cryptic to take over EU institutions' visions of what the EU concept of SGEI should mean. In this regard it is important to look at the EU legislator's approach of the concept in the Services Directive. The following analysis focuses on the "definitions" of SGIs and of SGEIs.

9.1.1 The Commission's understanding of the concepts of SGI and SGEI

Neergaard has explained how the Commission's strategy has included continuous attempts to connect SGEIs to the European Social Model, which in her view could be regarded as an attempt, in particular through its Communications on SGIs (including SGEIs), to make regulation of services of general interest at EU level more acceptable.[970] In this strategy, an important step has been to propose a "third way" in the debate going back to the 1960s between the holders of a "national approach" (that Member States were free to choose which public services they intended to secure for their citizens and that the ends of these public services were always compatible with the Treaties) and the holders of a "Community approach", arguing instead that Community institutions had powers to control and sanction the genuine character of the general interest claimed.[971] In this "third way", the Commission formulated a compromise stating that Member States have a wide discretion to define what they regard as SGEIs[972], a view nowadays firmly held by the Court of Justice.[973]

Another important step has been to introduce what is called here "working definitions" of the EU concepts of SGI and SGEI. As evoked in chapter 7, the Commission's "definition" of SGI has evolved over time, from what Neergaard calls the "grand words" of the SGI Communication of 1996 to the SGEI Communication of 2007.[974] As to the EU concept of SGEI, which the Commission was also under pressure from the Council

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[970] Neergaard U., 2008, p. 104-106.

[971] For a more detailed account of this discussion, see Buendia Sierra J. L., 1999, p. 279-283.

[972] Commission, "Services of general interest in Europe" COM (2000) 580 final, point 22.

[973] Case T-106/95 *FFSA* [1997] ECR II-229, para.99; Case T-17/02 *Fred Olsen* [2005] ECR II-2031, paragraph 216; Case T-289/03 *BUPA* [2008] ECR II-81, paras.166-169; Case T-442/03 *SIC* para.195; Case T-309/04 *TV2* [2008] ECR II-2935, paras.113 *et seq*.

[974] Regarding the "grand words" and their meaning, see Neergaard U., 2008, p. 105, referring to Freedland M., 1998.

and the EU-Parliament to clarify the meaning and EU regulation of, the 2001 Communication provided the following understanding:

> Services of general economic interest are different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so. /…/ [I]f the public authorities consider that certain services are in the general interest and market forces may not result in a satisfactory provision, they can lay down a number of specific service provisions to meet these needs in the form of service of general interest obligations./…/The classical case is the universal service obligation /…/ [that is to say] the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions, irrespective of the profitability of individual operations.[975]

This was the first "working definition" of the concept of SGEI formulated by the Commission, and it is important to note that it presents SGEIs as "altogether" a specific category of services that

- public authorities (undefined at which level – EU, national, regional or local) consider must be provided even when not commercially profitable

- due to a criterion of "general interest" and a *risk*, assessed *by public authorities*, that the service cannot be provided satisfactorily (arguably for reasons of quality in a broad sense, or of price)

- USOs are an example of SGEIs, presented by the Commission as the "classical case", which may raise the question of whether it is also the Commission's "preferred case".

It may be noted that in *BUPA*, a case which dealt with a risk-based SGEI compensation, the General Court chose to quote this early "working definition", although when the judgment was delivered in 2008, the Commission had had the time to give out new tentative definitions in the frame of its Communications.[976] But more importantly, this "definition" is puzzling. It includes public authorities' decision to "lay down specific service *provisions*", which suggests that SGEIs can be laid down as statutory rules, by the – EU or national – legislator. These SGEIs are said to meet general interest needs in the form of "service of general interest obligations", a term not used later by the Commission. In the frame of its Green and White Papers on SGIs, the Commission proposed namely other "working definitions" of SGEIs, presented as reflecting "Community Practice" and later "Union practice".[977]

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[975] Commission, "Services of general interest in Europe" (Communication) 2001/C 17/04, point 14.

[976] See Case T-289/03 *BUPA* [2008] ECR II-81, para.10.

[977] Some authors call it "clarification", see Sauter W. and Schepel H., p. 154.

Thus, in the 2003 Green Paper the Commission wrote simply that

> In Community practice there is broad agreement that the term {SGEI] refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion.[978]

This definition was completed in the White Paper of 2004 by the following "clarification":

> The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations.[979]

It may be noted that in the Green Paper's and the White Paper's "definitions", the Commission replaces the term "service of general interest obligation" in the 2001 Communication by the notion of "public service obligation" (PSO) – a term introduced by the CJEU in *Altmark*. Thus, PSOs are held to be a central element of the concept of SGEI, but it is unclear whether what the CJEU calls "public service tasks" (PSTs) in *Commission v Germany* are included too, either as "a particular kind of PSO" (public service obligations not imposed through entrustment on undertaking, but imposed on public authorities themselves), or simply as an element of the concept of SGEI together with PSO (where SGEI may in principle include PST and PSO).[980]

In its 2010 SGEI Guide, the Commission gave yet another "working definition", reading:

> In Union practice, the term refers *in general* to services of an economic nature that *the public authorities in the Member States at national, regional or local level, depending on the allocation of powers between them under national law*, subject to specific public service obligations *through an act of entrustment*/…/on the basis of a general-interest criterion and *in order to ensure that the services are provided under conditions which are not necessarily the same as prevailing market conditions*. The Court has established that SGEIs are services that exhibit special characteristics as compared with those of other economic activities.[981]

This new definition mirrored a typically "narrow" understanding of the EU concept of SGEI, in the sense that it only involved PSOs based on an act of entrustment, i.e. *undertakings*' SGEI tasks in the meaning of Article 106(2) TFEU. This was remarkable in

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[978] Commission, "Services of general interest" (Green Paper) COM (2003)270 final, p. 7.

[979] Commission, "Services of General Interest" (White Paper) COM (2004) 374 final, p. 22.

[980] See Case C-280/00 *Altmark* [2003] ECR I-7747 and Case C-480/06 *Commission v Germany* [2009] ECR I-4747 and Case 202/88 *France v Commission* [1991] ECR I-1223.

[981] 2010 SGEI Guide, p. 15-16, emphasis added.

a context where the Commission's guide addressed in particular "social services of general interest" (SSGIs), and explained how not only state aid rules, but also procurement and internal market rules apply to SSGIs. The impression is that the Commission had to give guidance on the application of procurement and internal rules to SSGIs, but wished to avoid relating exemptions from these market rules to the SGEI-character of SSGIs. As a result, it is still unclear whether the Commission understands the procurement and free movement exemptions to be motivated by (1) the SGI-character of SSGIs, or (2) the SGEI-character of SSGIs implying that their EU regulation is covered by the principle formulated in Article 14 TFEU.

The Commission was perhaps not itself at ease with the narrow "definition" of the 2010 SGEI Guide. On the website of DG competition per September 2011, it preferred a wider definition:

> Services of general economic interest (SGEIs) are economic activities that *public authorities identify as being of particular importance to citizens* and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. Examples are transport networks, postal services and social services.

Compared to the 2010 SGEI Guide, this "definition" lays emphasis both on the State's responsibility for SGEIs and on the democratic justification of the public intervention. Indeed, there is a striking difference between on the one hand the "democratic/functional" emphasis in this last definition and the definition of the Green Paper, and on the other hand the "competition/functional" emphasis of the 2010 SGEI Guide.

In its 2013 SGEI Guide, the Commission adjusted again the "definitions" of SGIs and SGEIs. It asserted that it had clarified the concept in its Quality Framework, holding there that they are services that public authorities of the Member States at national, regional or local level classify as being of general interest and, *therefore*, subject to specific public service obligations (PSOs). In this understanding, it seems that the imposition of SGEI tasks in the meaning of Article 106(2) TFEU (if seen as equivalent to PSOs), *follows from* the fact that the service is classified as SGI by public authorities in Member States. As to SGEIs, the Commission put forward the following definition:

> SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention. A PSO is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission.[982]

[982] 2013 SGEI Guide, p. 21.

This definition raises the following remarks here. First, the legal-economic notion of "overall public good" dominates, and it is interesting to note the assertive wording: "SGEIs *are*", suggesting that the Commission sets out to define rather than explain. Second, SGEIs are called "activities", although it is not clear whether the Commission means a whole field of activity (for instance social security) or a specific service as regulated by a Member State or by the EU (for instance private medical insurance). The activity must be "economic", although it is not clear what the Commission means by that, for instance whether it considers as economic for the purpose of the concept of SGEI an activity which is covered by the Treaty rules on free movement because it "can be" economic in some Member States. Third, the relation between SGEIs and PSOs is perhaps even more unclear than in previous definitions, and there is an obvious redundancy "obligation/imposed", raising the question whether there may be some *obligation before entrustment* takes place, and if so who it engages. And fourth, it seems that the only SGEI missions envisaged are the undertakings' PSOs. In this understanding, public authorities have no operative "SGEI missions", only a role in defining SGIs and in "intervening" by defining PSOs entrusted to undertakings. Also, it is unsaid which authorities may define PSOs.[983]

Thus, it appears that the Commission's definition of SGEIs in the 2013 SGEI Guide, which in spite of its wording is of course *not* a legal definition, raises more questions than it brings answers. After all these years, the evolution of the Commission's "working definitions" has not brought about a clear and comprehensive vision of what SGEIs are about. Some important questions eluded by these many "definitions" of the concepts of SGI and SGEI by the Commission, are submitted to be:

- Are PSOs synonym of SGEI tasks, and does the Commission see SGEI tasks as consecutive of a service's classification as SGI by national/regional/local authorities?

- Is the Commission's understanding that public authorities' PST (public service tasks) are part of SGIs and not of SGEIs, and does it imply that the Union and the Member States have no duty to care that PST may be conducted under principles, in particular economic and financial conditions, allowing them to fulfil the SGEI missions? This last question is related to the interpretation that may be made of the CJEU's ruling in *Commission v Germany*, an interpretation which the Commission does not seem eager to propose.[984]

[983] In the 2010 SGEI Guide, the Commission specified that SGEIs are economic services subject to public service obligations imposed by national, regional or local authorities, depending on the allocation of powers under national law, and did not name PSOs imposed by the EU, although the Green Paper on SGI presented SGEI as covering in particular "certain services provided by the big network industries such as transport, postal services, energy and communications". It was unsaid why the Community – without being replaced by the Union – was left out as one of the governance levels establishing specific public service obligations. In the 2013 SGEI Guide, it seems that PSOs are meant as a "public intervention", where it is unsaid which institutions are meant to intervene and impose obligations.

[984] Case C-480/06 *Commission v Germany* [2009] ECR I-04747.

9.1.2 SGEIs' definition in the Services Directive, a(nother) source of confusion to understand the EU concept of SGEI

The view that the concept of SGEI is relevant for the purpose of competition and state aid rules and not in the field of free movement is not only challenged by CJEU's case law but also by the presence of specific provisions on SGEI in the Services Directive. The point of departure in the Services Directive is that it generally applies to SGEIs, with the exemption for the freedom to provide services.[985] Also, a number of social services – which certainly can be deemed to be largely subject to SGEI regulation in the Member States – have been altogether exempted from its scope. As Neergaard observes, the formulations regarding SGEIs in the Services Directive are cryptic and "not very coherent".[986] Thus, the provisions related to the freedom of establishment apply to SGEIs on the condition that this should force the Member States neither to liberalise SGEIs, nor to privatise public bodies which provide such services, nor to abolish existing monopolies for other activities or certain distribution services.[987] Neergaard holds that the Directive seems anyway applicable to SGEIs as regards provisions on the right of service recipients (free movement of services), and as regards the quality of services.[988] Healthcare and social services as defined in the Directive are totally exempted from the scope of the Directive. Therefore, it has been assumed that the potential effects of the Directive on SGEIs are very limited.

On this background, it is interesting that the EU notion of SGEI has a specific definition for the purpose of the Services Directive, reading as follows:

> For the purposes of this Directive, and *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, and should specify the precise nature of the special task.[989]

This definition may restrict the scope of provisions specifically pertaining to SGEIs in the Directive by focusing on SGEIs *entrusted* to undertakings. It seems for instance to imply that only waste treatment *provided in application of a special task entrusted by the Member State to the provider by way of an act précising the task* is exempted from Article 16 on the basis of Article 17. In this definition, the mention "without prejudice to Article 16 of the Treaty" suggests that restricting SGEIs to SGEI tasks *entrusted* has a potential to affect the purposes of Article 16 EC (now Article 14 TFEU). This could in particular be the

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985 Articles 16 and 17(1) of the Services Directive.

986 Neergaard U., 2008, p. 74-75.

987 See Recital 8 of the Services Directive.

988 See Section 2 Chapter IV respectively Chapter V of the Directive on Services 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services on the internal market.

989 See Recital 70 of the Services Directive, emphasis added.

case if the definition in the Services Directive only covers a part of what is meant by SGEIs in Article 14 TFEU, a meaning which itself has not been clarified explicitly by the CJEU. SGEI "elements" which may be covered by Article 14 TFEU but are not covered by the definition in the Service Directive would thus be the object of the liberalization test in Article 16 of the Services Directive. The question is therefore whether the definition of SGEIs in the Services Directive excludes elements of SGEIs in the meaning of Article 14 TFEU and which elements this may be.

As a matter of fact, there is an asymmetry between the Directive's definition of SGEIs – focusing on entrusted SGEI tasks – and the open wording (not mentioning "entrustment") of Article 17(1) providing for a derogation from the rules on free movement of services for SGEIs such as services within the postal, electricity and gas sectors, water distribution and supply services and waste water services and treatment of waste.[990] This asymmetry mirrors the uncertainty as to whether

a. There is one EU concept of SGEI for the purpose of EU law, or
b. There is one understanding of SGEIs for the purpose of Article 14 TFEU and another for the purpose of Article 106(2) TFEU.

In *BUPA* the General Court touched on the issue of which elements SGEIs may be composed of. It found that in the contested state aid decision, the Commission had implicitly accepted that private medical insurance (PMI) services as regulated in Irish law had *per se* SGEI character. The Court considered that because of "the indissoluble link" between the obligations imposed to PMI insurers and the PMI services, it was impossible for the Commission to limit its assessment solely to the PMI obligations without also taking into account the PMI services forming the subject-matter of those obligations and the provision of which was dependent on compliance with those obligations. Therefore the Commission recognised that the PMI obligations constituted SGEI tasks and at the same time that the PMI services formed part of a more *general* SGEI mission defined by the Irish legislator. As interpreted by the GC, the Commission had thus seen (1) the obligations imposed on insurance companies *and* (2) the national public service mission in private medical insurance served by these obligations as *both* having SGEI character.[991]

The asymmetry between the Directive's definition of SGEIs and the open wording (not mentioning "entrustment") of Article 17(1) contributes to create confusion on the meaning of the EU concept of SGEI. This, together with several other elements in the Directive's drafting, has led Snell to declare that the Services Directive mayin some cases be detrimental to legal certainty.[992]

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[990] See Article 17(1).

[991] Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, p. 175-176. Interestingly the General Court presents the view of the Commission without clearly expressing its support to this view. The word "recognises" seems to indicate that the Commission's appreciation in that part is viewed by the Court as in principle binding.

[992] Snell J., 2008, p. 191.

9.1.3 Academic approaches of the notion of SGEI

A few years ago, Neergaard questioned whether the absence of exact definition is acceptable, considering that at least from a legal point of view this situation creates major problems.[993] In her view, a "rethinking of the terminology" seemed needed, along different possible lines. One was to focus on the nature of the service in what constitutes an SGEI, rather than who provides it or how it is financed, another being to develop the link between the concepts of SGI/SGEI/NESGI and the economic terms "public goods" and "private goods", and yet another to decide explicitly which services should be retained under national competence and which at EU level.[994] It may seem that, regarding social services, the EU legislator has partly followed the proposed path of connecting a specific legal treatment in EU state aid law and EU procurement law to the "special" nature of these services rather than to their SGEI-character.

Buendia Sierra has given his own comprehensive understanding of the EU concept of SGEI, as

> a service of an economic nature whose provision to the general public is considered to be essential. This character justifies a degree of State intervention in order to make sure that the service is actually supplied and to control the conditions under which it is supplied.[995]

This "definition" includes two elements in the concept of SGEI: a concrete service and a state intervention. Indeed, the element of "concrete service" seems crucial to understand the principle recognizing the right of access to SGEI, as it would make no sense to be recognized access to a *regulation*, while it seems that what is protected as a fundamental right is precisely access to a specific *service* secured (in Buendia Sierra's words "made sure") by the intervention of the State. Second, Buendia Sierra's "definition" supposes that state powers legitimate some degree of intervention in an economic activity. It leaves open the question of which government level has such powers and on which mandate. It also leaves open the question of which market actor is affected by this intervention, allowing the case where SGEI imposes constraints on the public authorities themselves, on the undertakings which are entrusted tasks in the frame of the SGEI and possibly also on users in their choice of provider, which together form "multi-layered obligations implied by an SGEI". Thus it does cover the possibility of entrusting missions to undertakings ("market missions") but does not limit the notion of SGEI to such "market missions", as it leaves outside the word "entrustment".

In Buendia Sierra's understanding, the EU concept of SGEI allows state intervention making sure that a service – of an economic nature – can be "provided to the general public". This element may be understood as excluding neither SGEI provision wholly

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[993] Neergaard U., 2008, p. 35.

[994] Ibid, p. 49.

[995] Buendia Sierra, J. L., 2008, p. 192. In spite of negligible differences, this is the same definition he submitted 1999, see Buendia Sierra, J.L., 1999, p. 277.

funded by the state (for instance in the field of social services), nor environmental services which the Commission has approved as SGEI, such as subsidised acquisition of land for sustainable nature conservation, where state intervention allows the economic service of sustainable nature management to be provided not to individuals but instead to the general public, including future generations.[996] It is namely easy to "explain" the EU concept of SGEI in a manner that is overly restrictive of Member States' discretion. One such misunderstanding was arguably found in the report of the Commission of inquiry on the Swedish national rules relevant for the internal market for goods and services[997], considering that the existence of SGEI requires a service to be (1) important for consumers, (2) open to all consumers and (3) supplied on homogeneous conditions. The Commission has namely seen no manifest error in classifying as SGEI an environmental service that is not "important for consumers", but rather "important for citizens".[998]

Buendia Sierra's approach shows arguably that it is worth trying to explain the EU concept of SGEI without defining it. Compared to the Commission's approach, he leaves outside the notion of entrustment, which may bring more coherence to the Treaty framework on SGEIs, as discussed in section 9.2. At any rate, it is submitted here that at this stage of the development of EU law, the terminology of the Treaties cannot be rethought. The SGI/SGEI/NESGI terminology cannot easily be discarded on Neergaard's argument that it is a "conceptual disaster", first because the disaster reflects a political tension that should be addressed, and second because the EU concept of SGEI is not simply the Treaties' expression of a "social touch" in the European social model. It is the bearer of a fundamental principle recognized by the EU Charter of fundamental rights, and of a right for citizens to use their democratic and economic powers to govern certain services on the European and the global market. Last, but not least, the EU concept of SGEI is so far the only Treaty concept capable of legitimating that Member States fund social services regarded in EU law as market services, without following detailed procurement procedures and without notifying the Commission. It is certainly worth understanding the meaning of such a concept. It is also worth questioning whether looking away from it in applying EU market rules to social services necessarily leads to better law in that field in the Member States.

9.1.4 Some signs of conceptual confusion on the core elements of the SGEI concept

SGEI is developing into a concept of EU constitutional law, standing for checks and balances, but also for principles of *governance* – in particular the promotion of social

[996] See Commission Decision of 2 July 2009 on nature conservation areas (Germany) in case NN8/2009 – C(2009) 5080 final, and Commission Decision of 13 July 2011 on subsidy scheme for acquisition of land for nature conservation (Netherlands) in case SA.31243 (ex N308/2010) – C(2011)4945 final.

[997] Report of the commission of inquiry on the Internal market "EU, Sverige och den inre marknaden – En översyn av horisontella bestämmelser inom varu- och tjänsteområdet" SOU 2009:71, p. 151.

[998] See Commission's Decision of 13 July 2011 on subsidy scheme for acquisition of land for nature conservation (Netherlands) in case SA.31243 (N 308/2010) – C (2011)4945 final, point 13.

cohesion, the respect of human dignity, of equality and of democracy – the respect of which EU and the Member States are politically accountable for in accordance with the Lisbon Treaties. In its post-Lisbon Treaty framework, the concept does not seem impossible to understand, but its legal definition may imply crucial political choices. Seen on this background, the confusion arising from the Commission's successive explanations and definitions of SGEIs is not accidental. It is the reflection of profound ideological differences on what the State respectively the market can do for human societies, and on what society should be.

What emerges is that SGEIs, which have been defined restrictively in the Services Directive (as only SGEIs which have been entrusted), are also all the more narrowly defined in the latest communications of the Commission. This development does not only cause confusion on what SGEIs are or may be, but risks limiting Member States' powers recognized by the Treaties and public authorities' capacity to achieve social and environmental missions considered as important or essential by citizens in the Member States. As a preliminary step towards a more correct approach of the notion, let us look at some confusing elements in the Commission's approach, and at the incoherence they may lead to.

In the 2010 SGEI Guide the Commission specifies that SGEIs are economic services subject to public service obligations imposed by national, regional or local authorities, depending on the allocation of powers under national law, through an act of entrustment. This definition, as the definition in the 2013 SGEI Guide, has its focus on SGEI tasks imposed by *public authorities* on *undertakings* through *entrustment*. It does not highlight the fact that SGEI missions may be imposed by the legislator – the national or the EU legislator – and that they may be imposed on undertakings but also on public authorities. While the Green Paper on SGIs presented SGEIs as covering in particular "certain services provided by the big network industries such as transport, postal services, energy and communications", the 2010 and 2013 Guides leave out the national legislator and the EU legislator as institutions which de facto have defined SGEIs.

By insisting on entrustment and by not mentioning Member States or the Union as institutions susceptible to define SGEI missions, the Commission's recent definitions suggest that SGEIs only exist through entrustment to undertakings and not at the stage of their definition as a democratically decided mission to be implemented at different levels in a market context.[999] This focus on entrustment as a constitutive element of SGEIs is also found in legal doctrine, as Sauter affirms that "a service of general economic interest in principle requires an explicit act of entrustment: this can be seen as a constitutive act (i.e. creating the SGEI where there was none previously)".[1000]

The General Court's stance in *BUPA* that SGEIs may be entrusted to undertakings through law, confirmed also the essential perception that SGEI missions may constitute a legislative commitment from the State. A good example is electricity, for which the

[999] 2010 SGEI Guide, SEC (2010)1545 (final), point 2.2.

[1000] Sauter W., 2008, p. 184.

core public service missions are defined in the Electricity Directive, and constitute the first level of governance of this SGEI.[1001] The universal service obligation imposed by the Directive creates SGEI rights which the Member States are obliged to secure.[1002] The SGEI mission existed most arguably at the very moment the Electricity Directive entered into force, before any measures were taken at national level to implement the Directive, and independently of its specific entrustment to any operator. Indeed, the achievement of the SGEI mission in the field of electricity supply (a universal service obligation) does not simply rest on the operators' willingness to respect the universal service obligation, but also on the Member States' obligation to ensure that operators' behavior allows the mission to be achieved.[1003] The Member States have not only an obligation to implement the Directive, but also to ensure the realization of universal service by intervening, if necessary for ensuring households' access to electricity, through regulatory, supervisory or other measures. The universal service obligation is not only directed at undertakings, but is also a commitment from the EU legislator and a duty for the national legislators.

The view here is that entrustment need not – or rather may not – be part of the *definition* of the EU concept of SGEI. Entrustment constitutes one possible element in the chain of implementation of an SGEI, a specific element allowing to control the proportionality of public measures towards specific undertakings, for instance exclusive rights, funding or authorisations. Entrustment – in law or otherwise – can be necessary to prove the existence of an SGEI task at the level of specific undertakings, but it cannot be a general condition for the existence of an SGEI, because SGEIs, which promote access to social or environmental fundamental rights, are not simply tasks for undertakings entrusted with their provision, but also missions imposed on public authorities by legislative or administrative decisions. The acknowledgement of a legal linkage between public authorities' missions and market operators' tasks may be crucial for the efficiency and the coherence of public intervention in certain fields of activity.

This *public* service dimension of the EU concept of SGEI, the idea that the obligation is imposed on market provision in a manner that restricts market freedom and at the same time expresses political power is perhaps the most "persistant irritant". In this regard, it is symptomatic that precisely when the CJEU sends a signal in *Commission v Germany*

[1001] This analysis of SGEIs as a multi-level responsibility appears to be reflected by the expression "*projects* of general economic interest" used by Buendia Sierra, 1999, p. 176.

[1002] Article 3(3) of Directive 2003/54/EC provides that "Member States shall ensure that all household customers, and, where Member States deem it appropriate, small enterprises, (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable and transparent prices."

[1003] That the Electricity Directive creates an SGEI is expressed in recital 26 of the Electricity Directive: "The respect of the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of common protection, security of supply, environmental protection and equivalent levels of competition in all Member States." The recital clarifies further that the SGEI thus defined must be "refined" at national level: "It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the respect of Community law."

that SGEIs in the post-Lisbon Treaty framework should be understood as a "broad concept", the Commission has taken the bold step of introducing in its 2011 state aid Package on SGEIs its own "narrow concept" of what SGEIs may be. This is commented further in chapter 11.

There is arguably, in the space created by the Treaty principles of conferral, subsidiarity and national identity, a wide freedom of the Union's peoples to decide through their elected representatives that certain objectives of societal nature which cannot or not fully be translated into service markets, constitute SGEI *missions* that public authorities at national, regional or local level are responsible to ensure throughout varying market circumstances. Their prerogative to *govern* public authorities' intervention on markets for services and goods related to fundamental rights recognized by the Charter may arguably not be restricted by the Commission, be it with the tacit ascent of Member States' governments. Restricting such prerogatives would require a democratic process.

The CJEU's case law on exemptions from EU procurement rules is now evidently related to the existence of public service tasks (PST) imposed on public authorities, for instance by the EU legislator. This relation, clearest established in *Commission v Germany*, is neither explained nor problematized in the many soft law documents of the Commission, as if its existence did not play a fundamental role in the debate on EU rules applying to SGEIs.[1004] It all seems as if the Commission, and governments in the Member States, are satisfied with the CJEU's very discreet approach of the issue of whether public authorities' general interest tasks (public service tasks) are included in the EU concept of SGEI. As long as the CJEU is not crystal clear on that matter, the Commission may be excused of its unclear and confusing approach. This can go on *ad vitam eternam*.

To ensure a democratic development of the European social model, in which SGEIs are declared to play an important role, it is submitted that the concepts of SGI and SGEI must *really* be clarified.[1005] Member States' elected representatives must know what is in the concept of SGEI, in order to make sense of their duties and prerogatives according to the Treaties. Not clarifying EU concepts is simply proof of a profound distrust in the political institutions of the Member States, and it is difficult to see how a robust European democracy can be built on such sad sands. The following section proposes an understanding of the EU concept of SGEI which hopefully can contribute to reduce confusion.

9.2 Out of confusion: core elements of the SGEI concept

[1004] See Case C-480/06 *Commission v Germany*, cited above.

[1005] Szyszczak considered that a legislative framework on SGEI from the Commission would allow deploying the definition and clarification of the concepts of SGI and SGEIs. She believed that the legal base for the Internal market (Article 114 TFEU) could be used for measures relating to SGEIs. See Szyzczak E., 2009, p. 301.

The case law studied in chapter 8 shows that the CJEU has not only recognized explicitly the existence of SGEIs in applying Article 106(2) TFEU, but also implicitly admitted the SGEI-character of a service, particularly in the field of social services, by choosing a specific proportionality test to examine the compliance of state measures with free movement and procurement rules. In *Commission v Germany*, the Court admitted that public service tasks *devoluted to public authorities* can justify a derogation from *existing* EU procurement rules, in order to achieve their missions under acceptable economic and financial conditions.[1006] Hence, it is submitted that the CJEU has not only identified SGEIs in a large variety of sectors (social services, environmental services), but also acknowledged the relevance of the SGEI-character of a regulation to allow many types of state intervention (regulation, organization, commission, funding, provision). This broad interpretation of the EU concept of SGEI is supported by its present status of *horizontal* Treaty concept, and it is in that spirit that the three following elements are argued to be inherent to the EU concept of SGEI and constitute its "core":

1. Economic relevance of the service (the "E" in SGEI)

2. General interest of the service (the "GI" in SGEI)

3. Obligation/right (the "S" in SGEI)

It is analysed how these elements may be identified in national law or EU regulation, on the basis of the CJEU's case law studied in chapter 8. The approach is normative in the sense that it seeks coherence between the derogation in Article 106(2) TFEU and the principle expressed in Article 14 TFEU, by considering that they both fundamentally aim at enabling missions and tasks related to services of general interest to be achieved. This approach implies that the notion of entrustment which is specific to the particular purposes of Article 106(2) TFEU is not seen as a core element of the concept.

9.2.1 SG(E)I: it is enough that the activity *can be* economic

Whereas SGEIs are covered by the Treaty rules by virtue of their economic character, it is generally held that the economic character of the service is difficult to assess. An important question is whether the (E) in SG(E)I means that the activity has economic relevance or whether the general interest is of economic character.

It has been submitted that the Court, in *Commission v Germany*, based implicitly its argumentation on the SGI character of the municipalities' task (a public service task), which raises the following question. If the SGI which public authorities have to perform was considered non-economic, the CJEU's approach, which puts strict conditions on public authorities' cooperation, would be in direct conflict with Article 2 in the SGI Protocol, which declares that the Treaties do not affect in any way the competence of

[1006] Case C-160/08 *Commission v Germany* [2010] ECR I-03713.

Member States to provide, commission and organize non-economic services of general interest. The reason allowing the CJEU to impose conditions on municipal cooperation (and on in-house) is that such public service cooperation has a potential to affect an activity which is not necessarily economic in the Member State where the cooperation or the in-house transaction takes place, but that *can be* economic at EU level, and is *therefore* covered by EU free movement and procurement rules. In other words, the Court's regulation of the conditions under which public authorities' public service tasks (services of general interest) may derogate from procurement procedures implies that the term "economic" in SGEI must be understood as "*can be* economic" (or some would say "economic in the meaning of EU free movement law).

This understanding finds support in *MOTOE* where the Court found that granting authorizations to organize motor cycling events constitutes an act of public authority, and therefore cannot constitute a "service of general economic interest" within the meaning of Article 106(2) EC.[1007] To be an SGEI, a public service task must be attached to an activity which at least *can be* economic. As seen in part II, the exercise of public authority *cannot* be economic, and is therefore neither covered by EU competition law nor by EU free movement law.

While the notion of "general interest" in the SGEI concept is analysed under section 9.2.3, it is necessary to evoke here the locution "general economic interest", which is argued to cause confusion. In a very early case, *Port de Mertert*, AG Dutheillet stated that SGEIs "must be of interest to the general economic activity of society".[1008] Much later, Advocate General Léger characterized in *Hanner* the adequate supply of medicinal products on uniform terms throughout Sweden as "a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities".[1009] The locution "general economic interest" is also found in scholarly literature. For instance Buendia Sierra held that – by contrast with Article 36 TFEU and overriding reasons related to a general interest – the exception for SGEIs in Article 106(2) TFEU can justify objectives of an economic nature, as this provision "was especially conceived to protect objectives of general economic interest".

First it must be underlined that, in contrast with this view and as seen in chapter 8, the Court has actually admitted economic considerations, in particular in cases where an SGEI-based national system was arguably in the picture, using an "ORGI fiction". But the point here is rather Buendia Sierra's submission that an economic objective may be

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[1007] Case C-49/07 *MOTOE* [2008] ECR I-4863, paras.46-47.

[1008] Buendia Sierra J.L., 2007, p. 207. In *Port de Mertert* Advocate General Dutheillet de Lamothe held that running a river port could constitute a service of general economic interest entrusted to an undertaking, when two conditions are fulfilled: first that the port should be for the public and, unless in exceptional cases, not a port reserved for the needs of one or more undertakings; second that the traffic using the port should be involved in a general economic activity. Thus, AG Dutheillet rather evoked a "general economic activity" than a "general economic interest". See Opinion of Advocate General Dutheillet de Lamothe in Case 10/71 *Port of Mertert* [1971] ECR 739.

[1009] See Opinion of AG Léger in Case C-438/02 *Krister Hanner* [2005] ECR I-04551, para.150, where AG Léger uses exactly the formulation used in Case C-179/90 *Merci Convenzionali* [1991] ECR I-05889, para.27 and Case C-266/96 *Corsica Ferries* [1998] ECR I-03949, para.45.

part of an SGEI, as "an instrumental objective, directed at guaranteeing the achievement of one of the non-economic objectives", which seems difficult to reconcile with his view that the general interest pursued must be of a non-economic nature to ground a valid SGEI in the meaning of Article 106(2) TFEU.[1010] It is unfortunately difficult to find any explicit assessment on this issue in the CJEU's case law, but the Court has in several rulings referred to its statement in *Sacchi* that considerations of public interest *of a non-economic nature* (and not some "general economic interest") may justify that Member States remove certain services from competition by granting exclusive rights.[1011]

It seems thus rather clear that the CJEU assumes the general interest motivating an SGEI in the meaning of Article 106(2) TFEU to be non-economic, which should surprise no one. The general interest in the concept of SGEI is defined by legislators and public authorities on the behalf of citizens. It is precisely this public prerogative – and not a financial purpose – which justifies that public authorities may use solidarity-based funding mechanisms, and to this purpose levy tax or charge fees to finance certain activities seen by the peoples they represent as essential, often on the basis of constitutional values and rights. The general interest of an SGI does not become economic simply because it is pursued in a market environment, or indeed in cooperation with market operators who have their own economic paradigm. What becomes economic under such circumstances is argued to be the service tasks, and as *economic* tasks, they will have to be defined, devolved, entrusted and funded in the knowledge of the market paradigm, but also constrained by market freedoms protected by EU law (as the activity affected is or at least *can be* economic). Another thing is that the exercise of these market freedoms must allow the general interest task to be operated under conditions, in particular economic and financial conditions, which allow authorities and providers to achieve the missions in cooperation. In many cases SGEI-related measures are based on the analysis of the effects free competition can in specific circumstances be expected to have on the possibility to fulfil the tasks (economic calculus). It is also true that public authorities may rely on economic considerations, in particular the necessity to hold their budgets and to remunerate undertakings to which they entrust SGEI tasks, but the primary general interest that legitimates the missions/tasks does not thereby become economic.[1012]

On this background, it appears that the locution "general economic interest" may lead to assume that a general interest in the notion of SGEI can be of economic nature. However, it is submitted that in the EU concept of SGEI the term "economic" relates instead to the word "service", and implies simply that the service characterized as SGEI is conducted with a general interest but has market relevance. The terminological combinations "general interest" and "economic service" reflect in a clearer manner the

[1010] Buendia Sierra J. L., 1999, p. 216 and 278.

[1011] Case 155/73 *Sacchi* [1974] ECR 409, para.14. This statement was referred to in several other cases, for instance Case C-320/91 *Corbeau,* para.9, Case C-260/89 *ERT* [1991] ECR I-2925, paras.10-12 and 20, Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV 2* [2007] ECR II-00491, para.103.

[1012] This involves that the control of manifest error does not only concern the Member States' definition of SGEI missions, but also their implementation of these missions, in particular because the costs related to the missions can call for the assessment of complex economic facts.

tension – inherent to SGEIs – between *societal* general interests and the interest of free trade and undistorted competition, and also mirror the difference between the interest of public authorities in entrusting SGEI tasks and the interest of the undertakings entrusted with such tasks, which generally is to make profits. Besides, the introduction of the legal notions of service of general interest and non-economic service of general interest seems to confirm that the term "economic" must be dissociated from the notion "general interest" in the concept of SGEI.

It must also be mentioned here that in *CBI*, the General Court explained that in the application of Article 106(2) TFEU, it is necessary to take into consideration the lack of a commercial dimension to the public service in question, and that its classification as an SGEI is explained more by its impact on the competitive and commercial sector.[1013] In *SIC v Commission*, the General Court stated that "although the public service of broadcasting is considered to be an SGEI and not a service of general non-economic interest, it must none the less be pointed out that that classification as an SGEI is explained more by the de facto impact of public service broadcasting on the otherwise competitive and commercial broadcasting sector, than by an alleged commercial dimension to broadcasting".[1014] Thus, although it uses the weird locution "service of general non-economic interest", the General Court appears to hold that the activity impacted must be economic, not the general interest.

In sum, although it is used in some EU legislation – for instance in the Electricity Directive – the locution "general economic interest" is problematic in trying to explain the meaning of the concept of SGEI.[1015] It is argued that the term "services of general economic interest" may be seen as a rather unlucky terminological choice, which need not be taken so seriously as after all, the Treaties have never been perfect. SGEI could as well have been called economic services of general interest (ESGI).

9.2.2 "Obligation" rather than "entrustment" as a core part of the SGEI concept

In *Enirisorse* the Court of Justice observed that "[it was] not clear from the documents /…/ that public-service duties have been entrusted to the Aziende, and still less therefore that such duties have been clearly defined".[1016] This denotes the necessity to distinguish the definition of the obligation and its entrustment

- The larger concept of SGEI-obligation, imposed on bodies acting within the frame of their State prerogatives and/or on market operators and

[1013] Case T-137/10 *CBI*, Judgment of 7 November 2012, para.88.

[1014] Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, para.153.

[1015] See Article 3(2) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ 211/55.

[1016] Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243 para.34.

- The concept of entrustment in the meaning of Article 106(2) TFEU.

In this respect, it seems that the Court shows, most clearly in *Commission v Germany* but also much earlier in *France v Commission*, that the concept of SGEI must be treated with respect for its function.[1017] While 106(2) TFEU should in principle, as an exemption from the rules of the Treaties, be interpreted strictly, the notion of SGEI as a task or mission defined to achieve social or environmental goals may not be interpreted narrower than what the principles of subsidiarity and respect of the national identity of the Member States, inclusive of self-government, require.

On this background, it seems that the terminology of Article 106(2) TFEU cannot be used to define the very notion of SGEI. It is submitted that the use of the word "entrustment" implies confusion between the *condition* necessary for the application of Article 106(2) and the functional *task* or *mission* characterizing an SGEI. The "tasks assigned" to undertakings entrusted with SGEIs in the meaning of Article 106(2) as well as the "missions" of SGEIs in the meaning of Article 14 TFEU are functional notions. Both are obligations potentially affecting the conditions for a given market, the difference between tasks and missions being the degree of precision necessary in the definition of the specific tasks which are entrusted to undertakings and therefore can imply compensatory mechanisms of particular importance to competition. Another question is that such obligations will only have to be examined according to Article 106(2) TFEU if the need for an exemption from the Treaty rules is or could be necessary. Entrustment, as already suggested, fulfils a function of proof (of the obligation) and of support for control of the exemption's proportionality. This function of entrustment as a control instrument is well expressed by the Court in *Commission v France*, stating that "it is appropriate to examine the necessity of maintaining EDF's and GDF's exclusive import and export rights, but only in relation to the public-service obligations of which the French Government *has proved the existence*, namely the obligations of supply, continuity of supply and equal treatment between customers or consumers."[1018]

The case law shows that the CJEU makes a distinction between the two following aspects of an SGEI:

- A phase when the Union, the Member States or their national/regional/local authorities define the public service objective and a public service task, in the knowledge that there is or might be a market for some tasks of this mission but that the market alone can fail to fulfil the public service objective

- A phase when they refer to this task – or mission – to motivate an exception from competition and/or internal market rules.

[1017] See Case C-480/06 *Commission v Germany* [2009] ECR I-4747 and Case 202/88 *France v Commission* [1991] ECR I-1223, para.12.

[1018] Case C-159/94 *Commission v France* [1997] ECR I-5815, para.89.

This was particularly clear in the General Court's following statement in *BUPA*:

> even though the Member State has a wide discretion when determining what it regards as an SGEI, that does not mean that it is not required, when it relies on the existence of and the need to protect an SGEI mission, to ensure that that mission satisfies certain minimum criteria common to every SGEI mission within the meaning of the EC Treaty, as explained in the case law, and to demonstrate that those criteria are indeed satisfied in the particular case. [1019]

Thus, the GC underlined that a Member State has a wide discretion *when determining what it regards as an SGEI*. It is at the moment it relies on the existence of and the need to protect an SGEI mission that a Member State is required to prove that certain criteria are fulfilled, which requires that the public service mission/task is legally objectifiable.[1020] The Commission expressed arguably a similar meaning in its Communication on the application of State aid rules to public service broadcasting, when it underlines that "[t]he question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services".[1021]

Much earlier, in *Merci convenzionali Porto di Genova*, the Court had already indicated how the reasoning should be conducted:

> In that respect it must be held that it does not appear either from the documents supplied by the national court or from the observations submitted to the Court of Justice that dock work is of a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities or, *even if it were*, that the application of the rules of the Treaty, in particular those relating to competition and freedom of movement, would be such as to obstruct the performance of such a task.[1022]

The Court stated thus that the key element in the identification of an SGEI is its "*special characteristics* compared with the general economic interest of other economic activities". These characteristics, normally based on what a given society at a given time regards as fundamental needs, will then be assessed when the rules of the Treaties are relied on to justify a proportional exception from the rules of the market to secure those needs. Apparently these "special characteristics" had not been clarified in *Merci convenzionali Porto di Genova*.

In this respect some valuable clarification was given in *Corsica Ferries France*, which is also worth quoting:

[1019] Case T-289/03 *BUPA* [2008] ECR II-81, para.166, see also Case T-17/02 *Fred Olsen* [2005] ECR II-2031, para.216 and the case law cited under that paragraph. The definition of such services by a Member State can be questioned by the Commission only in the event of manifest error.

[1020] Ibid, para.172.

[1021] Commission, "Communication on the application of State aid rules to public service broadcasting" 2009/C 257/01, para.49.

[1022] Case C-179/90 *Merci convenzionali* [1991] ECR I-5889, para.27.

> It is evident from the file on the case in the main proceedings that mooring operations are of general economic interest, such interest having special characteristics, in relation to those of other economic activities, which is capable of bringing them within the scope of Article 90(2) of the Treaty. Mooring groups are *obliged to provide at any time and to any user a universal mooring service, for reasons of safety in port waters*. At all events, the Italian Republic could properly have considered that it was necessary, on grounds of public security, to confer on local groups of operators the exclusive right to provide a universal mooring service.[1023]

The Court does not use here the term "entrustment" to determine the presence of special characteristics which can bring an economic activity in the scope of Article 106(2), but instead the word "obligation", also present in "public service obligations", often used by the Court as a synonym for SGEIs. This approach seemed already to show that what makes an SGEI is not the formal entrustment of an undertaking but its intrinsic characteristics, including

- A legal *obligation*, for instance on Member States to ensure the conditions of existence of a service, on municipalities to ensure access to a service or on undertakings to perform a service): "how"

- A concrete mission for this obligation in the form of a service in a wide sense (a social or environmental "function") and specific conditions in the provision of this service (for instance universal provision at any time to any user, environmentally sound treatment of waste at a facility close to the source of waste, a certain nature and level of healthcare to any person in need of it within a given territory): "what"

- A plausible contribution of this mission to the realization of a general (economic) interest (safety, environmental protection, social protection): "why"

It is the *politically decided* objective to ensure, in a market context, the supply of a service in the general interest which is at the heart of the concept of SGEI. The same objective of general interest can therefore many times have to be analysed from different perspectives, as it can imply obligations for public authorities as well as for the undertaking(s) which many times will be entrusted with the performance of specific tasks within the frame of the SGEI. In some cases the objective of general interest at the core of an SGEI will be relevant to define the freedom of national, regional or local authorities legally responsible for securing the service to organize it in a particular way (for instance through public-public partnerships as in *Commission v Germany*).[1024] In other situations – normally pure competition issues – the objective of general interest inherent to the SGEI can be relevant as a reference for what the undertaking entrusted with

[1023] Case C-266/96 *Corsica Ferries* [1998] ECR I-3949, paragraph 45; see also Case C-242/95 *GT-Link* [1997] ECR I-4449, paras.52-53, emphasis added.

[1024] Case C-480/06 *Commission v Germany* [2009] ECR I-4747.

specific obligations must achieve and which exemptions from internal market and competition rules may be justified, as for instance as in *Commission v France*.[1025]

This understanding of the EU concept of SGEI finds support in the reasoning of the Court of Justice in *Commission v Germany*, in which the Court builds its solution by reference to a law-based chain of responsibility from the EU-legislator to municipalities to ensure the achievement of SGEI missions related to environment protection. In its reasoning the Court starts by referring to the *obligation* for Member States, imposed by the Framework Waste Directive, to draw up plans for waste management.[1026] These plans must provide for 'appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste', one of the most important of such measures being to ensure that waste be treated in the nearest possible installation.[1027] This can be seen as a first link in the chain of responsibility, where the Union imposes on Member States an *obligation to take state measures* by virtue of a general interest. The second link of responsibility identified by the Court is an obligation for all municipalities, on the basis of national German law, to ensure that waste treatment capacity is available in accordance with the Directive requirement of proximity, an obligation which the Court qualifies as a "public interest task".[1028] The third link of responsibility is evoked as the future construction and operation of a facility intended to *perform* a "public service, namely thermal incineration of waste".[1029]

The obligation to perform tasks forming part of the SGEI (construction and operation of the waste treatment facilities) is made through acts of entrustment creating obligations for market actors.[1030] Entrustment constitutes thus only the act stating and proving the transfer of specific SGEI obligations to the third link of responsibility. Obviously, in *Commission v Germany*, SGI obligations are considered to exist already in the frame of the second link of responsibility, *before entrustment*. It is in consideration of these obligations that the Court, under certain conditions, is ready to allow that procurement procedures

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[1025] See Case C-159/94 *Commission v France* [1997] ECR I-05815. Under paragraph 71 the Court underlined that "[i]t should nevertheless be borne in mind that it is clear from the case law of the Court (see *Almelo*/…/ paragraph 49) that such obligations or constraints may be taken into consideration for the purpose of considering to what extent derogations from the Treaty rules which it is sought to justify are necessary in order to enable the undertaking in question to perform the tasks of general interest entrusted to it." Reference to case C-393/92 *Almelo* [1994] ECR I-01477.

[1026] Case C-480/06 *Commission v Germany* [2009] ECR I-4747 para.37, referring to Council Directive 75/442/EEC of 15 July 1975 on waste [1975] OJ L194/39.

[1027] This task was pursuant to Article 5(2) of Council Directive 91/156/EEC of 18 March 1991, amending Directive 75/442 [1991] OJ L 78/32. A similar task is now provided by Article 16(1) and (3) of Directive 2008/98/EC of the European Parliament and of the Council of 19 Novembre 2008 on waste and repealing certain Directives, among which Directive 91/156/EEC (as consolidated by Directive 2006/12/EC on waste) [2008] OJ L312/3.

[1028] Thus, by referring to the EU principle of proximity for the treatment of municipal waste, imposing on public authorities to plan this treatment in a manner that ensures that municipal waste is treated as close as possible from the place where it has been produced, the Court did clarify, although quite shortly, what the general economic task consisted in, contrary to Steinicke's view. See Steinicke M., 2011, p. 270.

[1029] Case C-480/06 *Commission v Germany* [2009] ECR I-4747, para.44.

[1030] As already mentioned the Court has at several occasions used the term "public service" as a synonym for SGEI.

normally required in presence of a contract for pecuniary interest are not applied. The question arises however whether the Court considers that

a. The obligation imposed to the municipalities is a non-economic task of public interest which leads them to entrust SGEI tasks or

b. The obligations resting by the local authorities to ensure access - in good economic conditions – to the service of general interest are an integral part of the SGEI or "public service" consisting in thermal incineration of waste, as well as the tasks which will later be entrusted to market operators.

It is submitted that the answer given by the Court may be taken to be (b), as the Court stresses the fact that there was no indication in the case that the local authorities at issue were contriving to circumvent the rules on public procurement. In other words the municipalities gave clear signs that they were aware of waste treatment being an economic activity, of their duty to procure some tasks and seemed ready to use the procurement rules. There is thus no doubt that the measures taken by the EU-legislator, the national legislator and the public authorities in charge with ensuring the service all had been adopted in the knowledge that they had a potential to effect trade and competition, and that their legality, based on the common objective to ensure that waste will be treated in adequate installations in accordance with the principle of proximity and the waste hierarchy, could have to be examined in the light of competition and internal market rules.

The compulsory character of the public service task was in *Commission v Germany* thoroughly underlined by the Court. By contrast, the relevance for the conditions of application of Treaty principles of equal treatment, non-discrimination and transparency and/or procurement rules, of the *compulsory* character of the public authorities' public service task, is not clear in the *Teckal* to *Coditel* "in-house" case law. The Court asserted namely in *Coditel* that a public authority has the possibility of performing the *public interest tasks conferred on it* by using its own resources, and that it may do so in cooperation with other public authorities. It is nevertheless unsure whether the Court meant by the terms "tasks" and "conferred" that the possibilities named by the Court depend on public authorities being imposed an *obligation* to ensure the performance of a public interest task, and if so from which legal sources and in which form the obligation originates. A particularly interesting question is whether public authorities, on the base of general powers to act in the general interest, may impose on themselves obligations to ensure a public service task.

In a recent case actualizing a failure to apply the principle of transparency in procuring ambulance transport services, the CJEU made an explicit distinction between on the one hand the categorization of a service as SGEI – which it simply considered as unquestionable in the view of the judgment in *Ambulanz Glöckner* – and on the other hand a Member State invoking Article 86(2) EC (now Article 106(2) TFEU) to justify an exemption from procurement rules – which implies for the Member State an obligation to show that all the conditions for application of that provision are

fulfilled.[1031] This seems to confirm that, contrary to the Commission's understanding emerging from its soft law documents, an SGEI can exist independently from any specific entrustment.

9.2.3 A general interest of "public service"

As seen in chapter 8, the CJEU transposes elements of its test under Article 106(2) TFEU to measures justified by the economic sustainability of welfare systems pursuing general interest missions, calling these missions ORGI instead of services of general interest missions. This transposition is facilitated by the fact that the Court uses synonymously the notions of general interest and of public interest, as shown by the following assertion of the General Court in *BUPA*

> In the first place, as the case law shows, the provision of the service in question must, by definition, assume a general or public interest/.../In addition, as the applicants claim, the general or public interest on which the Member State relies must not be reduced to the need to subject the market concerned to certain rules or the commercial activity of the operators concerned to authorisation by the State.[1032]

The bifurcation from the notions of SGI or SGEI allows the Court to define welfare systems related to public service obligations which can exist both at the level of public authorities and at the level of undertakings often publicly financed – as ORGIs instead. This bifurcation allows the Court to open these systems (which some authors call "disintegration") to both more service recipients and more service providers than they had calculated their national systems for. In the field of social services, this bifurcation from the SGI/SGEI terminology gives the Court a possibility to redefine the service of general interest underpinned by the national system, and to include conditions that Member States had not counted with. This bifurcated approach is important in several ways:

- It dispenses the Court from deciding whether the service of general interest underpinned by the system is an SGEI or a NESGI.

- It leaves the Court *formally* unbound by its own case law, studied in chapter 8, affirming that Member States retain a wide discretion to determine the nature and the scope of SGEI missions, especially in fields outside the Union's.[1033]

[1031] Case C-160/08 *Commission v Germany* [2010] ECR I-03713, paras.125-126.

[1032] Case T-289/03 *BUPA* [2008] ECR II-81, para.178

[1033] Ibid, paras.12 and 166, referring to paragraph 22 of the Communication on SGEIs and to the case law of the Court of First Instance (now general Court).

- It allows to tone down welfare systems' role in the relation between Member States and "their peoples", which gives more elasticity to the notion of solidarity-based systems.

The CJEU's case law studied in chapter 8 shows the Court's readiness – and in many cases the Commission's too – to easily admit the general interest ratios invoked by Member States as a justification to their intervention on certain markets and rather focus on the proportionality of its intervention. However, the Court has made clear that the discretion of Member States is limited by the control of manifest error and in *BUPA* the GC emphasized that a Member State "must indicate the reasons why it considers that the service in question, because of its specific nature, deserves to be characterised as an SGEI and to be distinguished from other economic activities".[1034] In the absence of such reasons, even a marginal review by the Community institutions on the basis of both the first *Altmark* condition and Article 86(2) EC with respect to the existence of a manifest error by the Member State in the context of its discretion would not be possible.

It is important to distinguish between the issue of the legitimacy to attach public service missions to an activity and the issue of whether certain entities – public authorities or undertakings – may invoke public service missions to justify measures infringing Treaty rules. In *BRT II*, the Court of Justice denied copyright management the character of service of general interest in the meaning of Article 106(2) TFEU, not because the service could intrinsically not be in the general interest, but rather because the undertaking invoking a derogation from competition rules had not been entrusted any such task by the State – at any relevant governance level.[1035]

The CJEU distinguishes services in the general interest and services in the private interest. In *Züchner* the Court explained that although cross-border transfer of customers' funds constitutes an operation falling within the special tasks of banks, that was not sufficient to make them undertakings within the meaning of Article 106(2) TFEU unless it could be established that in performing such transfers, banks were operating an SGEI entrusted by a measure adopted by public authorities.[1036] Likewise, in *GVL*, a company offering copyright and performing rights management services denied that it had abused its dominant position by refusing to conclude management contracts with performing artists who were neither German nationals nor resident in the Federal Republic of Germany, and claimed that it was entrusted with an SGEI. The Court recognized that the German legislation on monitoring of this activity went further than the public supervision of many other undertakings. This showed that the activity was regarded as important, but was not sufficient for GVL that it was an undertaking in the meaning of Article 106(2).[1037]

[1034] See Cases C-170/90 *Merci Convenzionali* [1991] ECR I-5889 para.27, C-38/01 *Enirisorse* [2003] ECR I-14243, at I-14247 paras.33-34 and T-289/03 *BUPA* [2008] ECR II-81, para.172.

[1035] Case 127/73 *BRT II* [1974] ECR 318, paras.22-23.

[1036] Case 172/80 *Züchner* [1981] ECR 2021, para.7.

[1037] Case 7/82 *GVL v Commission* [1983] ECR 483, paras.31-32.

In *BUPA* the GC referred to *GVL* and *Züchner*, pointing out that SGEIs must be distinguished from *services in the private interest*, notwithstanding the fact that a private interest may be more or less collective or be recognized by the State as legitimate or beneficial.[1038] It further reminded that the mere fact that the national legislature, acting in the general interest in the broad sense, imposes certain rules of authorisation, of functioning or of control on all the operators in a particular sector does not in principle mean that there is an SGEI mission.[1039] The Court found that an SGEI mission may consist in an obligation imposed on a large number of, or indeed on all, operators active on the same market.[1040] Characteristic for an SGEI was a public authority's act creating and defining a specific mission consisting in the provision of a service in compliance with the service obligations.[1041] It emphasized that, with the stated object of serving the general interest by allowing approximately half of the Irish population to benefit from alternative cover for certain health care, in particular hospital care, the private medical insurance obligations at issue restricted the commercial freedom of the insurers to an extent going considerably beyond ordinary conditions of authorisation to exercise an activity in a specific sector.

Thus, serving the public by ensuring access to essential services and goods is a core value in SGEI matters.[1042] The general interest as understood in the concept of SGEI is not limited to serving individuals, but can reside in serving society as a whole. In *SIC v Commission*, the General Court referred to a resolution of the Council stating that public service broadcasting has a vital significance for ensuring democracy, pluralism, social cohesion, cultural and linguistic diversity, and must be able to continue to provide a wide range of programming, for "society as a whole".[1043]

9.2.4 Relationship between SGEIs and Universal Service Obligations (USO)

It seems important to say some words here on USO-regulation of services in the public sector, which has been the model adopted for EU harmonizing of several important services in the public sector. The concept of universal service obligation (USO), said to have its origin in the United Kingdom, made its entrance in the EU legal-political sphere in the 1980s and has played a major role in the Europeanization of electricity, gas, postal and telecommunications services.[1044] In the EU legislation harmonizing the markets for these services, universal service access is pursued through private law based solutions,

[1038] Case T-289/03 *BUPA* [2008] ECR II-81, para.178.

[1039] Ibid, para.178.

[1040] Ibid, para.179.

[1041] Ibid, para.182.

[1042] See van de Gronden J. W., 2013a, p. 8.

[1043] Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, para.153. The GC referred to the Resolution of the Council and of the Member States of 25 January 1999 concerning broadcasting, OJ 1999 C 30, p. 1 (recital B and point 7 of the Resolution).

[1044] See Prosser T., 2005, p. 177-181.

replacing earlier public law-based citizen-state relationships in many Member States. The concept of USO is not defined in EU law but the Commission proposed a general understanding in the White Paper on SGI:

> It establishes the right of everyone to access certain services considered as essential and imposes obligations on service providers to offer defined services according to specified conditions including complete territorial coverage and at an affordable price.[1045]

More precise understanding may be gained by considering the Member States' universal service obligation according to the Electricity Market Directive to secure all household customers, (and where Member States deem it appropriate, small enterprises) "the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable and transparent prices".[1046] To secure this right, the Directive requires that Member States impose on electricity distribution companies an obligation to connect customers to their grid under terms, conditions and tariffs set in accordance with a procedure laid down in the Directive, and it allows Member States to appoint a supplier of last resort to ensure the provision of universal service.[1047] Thus, the Electricity Directive does not put obligations directly on service providers but instead requires that the Member States put certain minimum obligations on providers in order to secure users rights. Several authors have pointed to the fact that USO-based EU legislation on public services requires specific policy objectives and public intervention to achieve concrete welfare objectives. For instance, *Sauter* emphasizes USO that universal service is rather pointless if it is not linked to other public policy objectives as quality and continuity in order to achieve a worthwhile universal service guarantee in a particular case.[1048]

Regarding more specifically the Electricity Directive, Roth points out that the users right created by the Member States constitutes a "minimum service standard", harmonized at EU level, and emphasizes that affordability is closely linked to the right of access to services.[1049] As a matter of fact, the Electricity Directive allows Member States to increase their regulatory pressure in order to reinforce regulatory efficiency. Thus, Member States may impose public service obligations on market operators related to a limited number of specific general interests listed in the Directive, including affordability of the service.[1050] These regulatory powers are crucial, because the Electricity Directive imposes only that "reasonable" prices are offered, while the imperative of affordability is clearer in the USOs laid down in the Directives on Postal services and on electronic

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[1045] Commission, "Services of General Interest in Europe" (Communication) COM (96) 443 final, p. 2.

[1046] Article 3(3) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ 211/55.

[1047] Ibid.

[1048] Sauter W., 2008, p. 14. *Sauter* explains that "imposing full national coverage for free at zero quality would obviously be pointless".

[1049] Rott P., 2009, p. 226.

[1050] Article 3(2) the Electricity Directive.

telecommunications.[1051] As it is reckoned that USO-regulation of liberalized electricity markets does not exclude that prices for services covered by USOs remain in certain cases too high for many users, the responsibility to ensure these services' affordability is left primarily on Member States.[1052] They must determine criteria for determining affordable prices, and the Court of Justice has recognized in *Enel* that, in the interest of the end consumer and of ensuring the security of the electricity system, they may impose price limitations on operators owning installations considered essential for this security.[1053]

The *Enel* case, and the closely related *Federutility* case in the field of gas services, shed light on the important issue in terms of liability if the service provider entrusted with universal service obligations fails to fulfil those obligations. As emphasized by Rott, the vagueness of many aspects of USOs makes it unlikely that citizens deprived of access to the service would succeed in claiming a right of access against their state. This explains that the CJEU has in those cases admitted Member States' claim for the appropriateness and necessity of price control measures – generally held as very intrusive in a market economy – compensating their weak liability for the "rights" created by EU legislation.[1054]

9.2.5 Summing up: relation between SGEI missions, tasks and obligations

To a large extent "because of *Altmark*", the notion of "public service obligation" (PSO) has developed into a cornerstone element of the CJEU's understanding of the EU concept of SGEI and is predominant in the legal understanding of SGEIs.[1055] It is present in the Treaties, as Article 93 TFEU declares compatible with the Treaties aid meeting the needs of transport coordination or representing reimbursement for the discharge of certain obligations inherent in the concept of public service. In Article 93 TFEU, the obligations reimbursed are said to be "inherent" to the concept of public service. This suggests that the concept of public service as understood in that provision contains more than "public service obligations" to be funded by state resources. In the light of the analysis conducted so far, the question in focus in this section is therefore whether there is nothing more to SGEIs than PSOs imposed on undertakings.

[1051] See Article 3(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51: "Member States shall ensure that the services set out in this Chapter are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an *affordable price*"; Article 3(1) of Directive 97/67/EC: "Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at *affordable prices* for all users.".

[1052] Rott P., 2009, p.215-232. To justify these measures, these Member States had to rely on public service obligations in accordance with Article 106(2) TFEU, allowing a strong state commitment on the market.

[1053] See Case C-242/10 *Enel* [2011] ECR I-13665.

[1054] Rott P., 2009, p. 232.

[1055] Case C-280/00 *Altmark* [2003] ECR I-7747, para.89.

It is strongly questionable whether such a narrow understanding of the EU concept of SGEI – where all there is to SGEI is PSOs imposed on undertakings – can be upheld convincingly, because it does not seem to fit with the CJEU's case law in general, but most evidently not with the *BUPA* ruling. As observed by van de Gronden, a novelty in *BUPA* was that the GC regarded *all* undertakings operating in a given market as entrusted with a special task within the meaning of Article 106(2) TFEU, in a manner similar to the Commission Decision on the Dutch health-care insurance system that concerned state financial measures.[1056] Commenting the GC's approach deriving a public service obligation from the general requirements laid down in the national legislation, van de Gronden proposed that "a SGEI mission may only be derived from general obligations that amount to the performance of tasks in favour of citizens or enterprises."[1057] Not only is this view shared, but it is moreover argued here that it may precisely be such missions of "securing public access to certain services" which explain that the CJEU found national measures related to welfare services as justified to ORGI, but based on a proportionality test that looked very much like the test applied by the Court under Article 106(2) TFEU.

This said, van de Gronden held that "SGEI and public service obligations are concepts that are alike in that both concern special tasks that state bodies impose on undertakings", but it is argued here that in *BUPA*, the General Court made clear that it did not understand PSO and the concept of SGEI as synonyms.[1058] Indeed, the Court admitted as common ground between the parties "that the concept of public service obligation referred to in the Altmark judgment/…/does not differ from that referred to in Article 86(2) EC".[1059] However, having underlined that the services submitted to the PSO (private medical insurance, PMI) should be distinguished from the PSO imposed on all PMI providers (the PMI *obligations*), the GC regarded that the link between the PMI obligations and the PMI services was "indissoluble".[1060] Subsequently, the GC regarded the obligations as SGEI tasks and at the same time considered that "the PMI services have *as such* an *SGEI character*" (emphasis added).[1061] What the Court exactly meant by an indissoluble link is not so clear, but by considering the service itself as a part of the SGEI, the GC's approach in *BUPA* gave sense to the principle in Article 36 EUCFR that the Union respects access to SGEIs as provided for in national laws and practice. As mentioned in section 9.1.3, it makes little sense that EU should respect the

[1056] Van de Gronden J. W., 2008, p.238-239. This author noted that prior to *BUPA*, the provision now in Article 106(2) TFEU had only been applied to cases where only one or a limited number of undertakings were entrusted with SGEI tasks.

[1057] Ibid, p. 237-239.

[1058] Ibid, p. 236.

[1059] Case T-289/03 *BUPA* [2008] ECR II-81, para.162.

[1060] Ibid, para.175. It is reminded here that the obligations imposed on PMI insurers were open enrolment, community rating, lifetime cover and minimum benefits. The Court held that this"indissoluble link" implied that the Commission could not limit its state aid assessment to the obligations without also taking into account the services forming the subject-matter of those obligations and the provision of which was dependent on compliance with those obligations.

[1061] Ibid, para.176.

right of access to public service obligations, if the service they secure is not a part of the SGEI.

In *Altmark*, were public funding of PSOs imposed on undertakings was at issue, the Court of Justice appears to also have admitted that in such circumstances, the concept of SGEI may encompass the service itself. The Court found that public subsidies intended to enable the operation of certain transport services were not caught by Article 107(1) TFEU "where such subsidies are to be regarded as compensation for the *services* provided by the recipient undertakings in order to discharge public service obligations (emphasis added)".[1062] In this landmark ruling constituting the ground of all state aid rules applying to SGEIs, the compensation is connected to the services provided, and not only the PSO discharged by the service providers.

In light of the above, it is submitted that, based on the Treaties framework on SGEIs, the CJEU sees more in the EU concept of SGEI than PSOs imposed on undertakings. Thus,

SGEI = PSOs imposed on undertakings + X

In this equation, (X) is everything that is not PSOs imposed on undertakings but is part of the EU concept of SGEI. Answering the question "what may (X) be?" is fundamentally related to two issues: (1) who imposes PSOs on undertakings (or SGEI tasks in the meaning of Article 106(2) TFEU) and (2) on which mandates/criteria.

Regarding the "who" (1), it is important to remind that public authorities – national, regional and local – are ensured by the SGI Protocol a wide discretion to organize, commission and provide SGEIs. This supposes that SGEIs may exist *before they are entrusted to undertakings*. In other words, the SGI Protocol supposes that public service tasks may exist at the level of public authorities. This may well be the Commission's understanding too. Indeed, in its Communication on the application of state aid rules to SGEI compensation, the Commission states that:

> The first Altmark criterion requires the definition of an SGEI task. This requirement coincides with that of Article 106(2) of the Treaty. It transpires from Article 106(2) of the Treaty that undertakings entrusted with the operation of SGEIs are undertakings entrusted with 'a particular task'. Generally speaking, the entrustment of a 'particular public service task' implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions. Applying a general interest criterion, Member States or the Union may attach specific obligations to such services.[1063]

[1062] Case C-280/00 *Altmark*, [2003] ECR I-7747, para.95.

[1063] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, 2012/C 8/02, points 47, footnotes omitted.

Firstly, it is important to note that the Commission Communication uses here the term "public service task" (PST) as synonym for "public service obligation" (PSO). The term "public service task" is used by the CJEU (Grand Chamber) in *Commission v Germany* and *Lecce* regarding *public authorities*' obligation to secure the supply of certain services, and this obligation is regarded as a decisive condition for an important derogation from EU procurement rules. This semantic overlap seems to indicate that (1) PSO and PST are seen as comparable notions, and (2) that PST imposed on public authorities may be part of the SGEI concept, both in the Court's and the Commission's "deep layer's" understanding. If the notion of entrustment, specific to Article 106(2) TFEU, is understood as a proof of obligation rather than its substance, there is a strong commonality between PSOs – the term generally used for public service tasks which undertakings are imposed – and PSTs – the term used by the CJEU for public service tasks which public authorities are imposed.

This understanding appears to give sense to the strong prerogatives which state authorities enjoy in relation to public service tasks according to the SGI Protocol and according to the CJEU's approach in *Altmark*, in *Teckal* and *Commission v Germany*. In a model where the legislator does not exclude the entrustment of SGEI tasks to undertakings, but imposes first on public authorities (at national, regional or local level) to secure the performance of these tasks, it is submitted that public authorities' public service tasks are inherent to the achievement of the SGEI missions, and thus are part of the SGEI. The public prerogatives are strong because the public obligations may also be strong, especially when they are not "simple" ORGI objectives but instead amount to "the performance of tasks in favour of citizens or enterprises".[1064]

Second, the Commission holds that PSOs are imposed on undertakings by application of "a general interest criterion". This "general interest criterion" is a very vague term. In fact, PSOs are often imposed on undertakings on the basis of public authorities' own public service tasks (PST). PST *imposed* on public authorities reflect a particularly strong commitment of the State (through national or EU legislation) to secure the performance of specific tasks in favour of citizens or enterprises. This commitment is particularly strong when the State is not simply engaged in regulating and supervising market performance, but also in defining the conditions of service provision, and in supplying the service to the public by securing its organization and funding. In this strong commitment, public authorities do not act on the basis of general objectives, but on the basis of compulsory missions, based on democratic mandates.

Hence, when the reason for imposing SGEI tasks on undertakings is directly related to public authorities' own public service tasks, the "general interest criterion" to secure access to essential services is a mission depending on the capacity of both public authorities and undertakings to fulfil their respective tasks. It is submitted that in such a regulatory model, both PSO and PST are part of the SGEI and contribute to an SGEI mission in the meaning of Article 14 TFEU, broader than the SGEI tasks addressed by Article 106(2) TFEU.

[1064] See van de Gronden J., not 1056.

9.3 Conclusions

In sum, looking at the Commission's Communications and Guides between 1996 and 2013 shows not only an evolution towards a more technocratic description of the EU concept of SGEI, but remarkably also an increasing sense of confusion. In the field of social services, this never ending succession of "clarifications" send a signal that the SGI or the SGEI character of social services plays an important role for the application of EU free movement and procurement rules to social services in the public sector of the Member States. Yet, this signal is clouded by a bifurcation from the concepts of SGI and SGEI to the notions of PSO and PST, used as synonyms by the Commission in the meaning "undertakings' SGEI tasks" without consideration for the fact that the CJEU has connected the notion of PST to *public authorities'* public service tasks, and found that such tasks may justify important derogations from EU procurement rules, most clearly so far in *Commission v Germany*.

In light of the study so far, it seems unreasonable to let this confusion stand in the way of attempts to propose an updated understanding of the EU concept of SGEI, based on the case law of the CJEU and more coherently connected to the post-Lisbon Treaties. In that spirit, it is proposed that the notion of entrustment has a specific function for the purpose of Article 106(2) TFEU, but falls outside the core of the concept of SGEI, and that this core includes the following elements:

1. The SGEI mission involves public service obligations/tasks which may be imposed by the legislator directly on undertakings (model (a) of the *BUPA* case), or imposed by the legislator on public authorities, which then have a wide discretion to provide the SGEI, organize the SGEI and commission the SGEI, although this discretion can be constrained by national rules (model (b) of the *Commission v Germany* case).

2. The general interest is not in itself economic, but consists in serving the public by ensuring access to essential services and goods. The general interest as understood in the concept of SGEI is not limited to serving individuals, but can reside in serving society as a whole. It is the final mission which is addressed by Article 14 TFEU, not only the tasks imposed on undertakings in the meaning of Article 106(2) TFEU. Depending on the regulatory model at issue, both PSO/PST imposed on undertakings and/or on public authorities, contribute to the achievement of SGEI missions, and must operate under conditions, in particular economic and financial conditions, enabling the SGEI missions to be achieved.

3. The activity affected by an SGEI mission is not necessarily economic in the Member State defining this mission, but at EU level *can be* economic. This explains that the definition of an SGEI mission can be relevant both in a competition perspective and in a free movement (including procurement) perspective. In certain models, PSOs imposed on undertakings may necessitate measures which can have to be reconciled with the Treaty competition rules

> under Article 106(2) TFEU. In other models of SGEI-regulation, not only PSOs imposed on undertakings but also PSTs imposed on public authorities may necessitate measures which must be reconciled with the free movement and procurement rules following from the Treaties.[1065]

In this understanding, which is argued to get at least implicit support from the CJEU's case law, the EU concept of SGEI constitutes a broad concept, allowing to address both the vertical and the horizontal principles of EU law affecting public service tasks, and a functional concept comprising the missions, the tasks and the rights created by the missions. This understanding seems coherent with Article 14 TFEU and Article 36 EUCFR, but also with Article 106(2) TFEU, which requires that measures adopted to secure that undertakings fulfil their SGEI tasks do not derogate more than necessary from EU market principles and rules, and thereby that the "interests of the Union" are respected in fields where the balance non-economic and economic interests has been harmonized. Hence, the Union's duty to take care that SGEIs operate according to conditions, in particular financial and economic conditions, enabling them to achieve their missions, implies also that free movement and procurement rules capable to obstruct the fulfilment of any public service tasks related to the SGEI mission, be it public authorities or undertakings.

[1065] Although it is difficukt to say whether the Court makes a clear and consistent use of the terms PSO and PST in its case law, it appears that it has so far generally used the term public service obligation regarding undertakings and public service task regarding public authority.

10 Conclusions of part III: SGEI emerges as a broad "voice" in EU constitutional law

The purpose of this chapter is to provide a comprehensive answer to the second sub-question of this study. First, it recapitulates and concludes on the main results of part III. Second, it addresses critically Judge Lenaerts's view that the meaning of the concept of SGEI is still for the Member States to decide. Third, it draws on some effects which may take place if the CJEU took a less "nuanced" approach, and was more open on its "deep layer" understanding of the EU concept of SGEI.

10.1 The EU concept SGEI emerges as a broad constitutional concept

It has been shown in chapter 7 that, in reaction to the Court's closure of "exit" from EU market rules for public service regulation in the Member States, the Treaty of Lisbon creates a "voice" for public services based on the concept of SGEI present in Article 106(2) TFEU, but with its normative core in Article 14 TFEU, interpreted by a specific Protocol, and reinforced by a specific fundamental principle recognized by the EU Charter of Fundamental Rights. As the SGEI "voice" stands for a flexible application of EU market rules to public service regulation, there is unsurprisingly no political agreement on whether the concept of SGEI should be interpreted broadly or narrowly. However, it has been shown in Chapter 7 that the Treaty provisions on SGEIs constitute a strong "voice" for public service regulation, related to several foundational Treaties principles and to the new paradigm of "social market economy". Therefore it cannot be ignored, which is complicated because respecting the principle expressed by Article 14 TFEU requires that the notion of SGEI founding this principle is understood. The heterogeneity of political views on what SGEI *should* mean explains that no legislation has been adopted on the basis of Article 14 TFEU, although the Union and the Member States are enjoined to use the legal ground introduced in this provision to regulate the principles and conditions applying to SGEIs. Meanwhile, the CJEU must apply the principle contained in article 14 TFEU to relevant cases and thereby interpret that provision in coherence with the Treaties, in particular other provisions on SGEIs.

In this very problematic task, the CJEU takes a "nuanced" approach and its application of the Treaty market rules to SGEIs, analysed in chapter 8, has led to the following findings. The Court does apply Article 106(2) TFEU to justify measures infringing free movement rules, but then mostly in relation to exclusive rights. In applying Article 106(2), the Court applies in fact a heterogeneous test under Article 106(2) TFEU, amounting to a soft "reconciliation test" in a majority of cases, and to a stricter "exemption test" in cases related to harmonized activities. Also, the analysis of the Court's case law has shown that without applying Article 106(2) TFEU, the Court applies essential elements of its soft proportionality test under Article 106(2) TFEU to certain measures justified by the need to achieve SGEI missions restricting the exercise of the

fundamental freedoms, under two main approaches called here "incorporation" and "transposition".
First, the Court has "incorporated" the notion of SGEI in the concepts of entry of EU market rules, "state aid" in Article 107(1) TFEU and "contract" in EU procurement rules. Essentially, these cases imply that, due to their democratic mandates to secure SGEIs and under specific conditions, Member States may fund SGEI tasks (*Altmark*) and may provide SGEI-regulated services with their own resources (*Teckal*). This incorporation is realized by the Court *through the notion of public service task*. Second, it has been found that the Court "transposes" its soft test under Article 106(2) TFEU to measures motivated by "public service tasks" but restricting the exercise of the fundamental freedoms. In particular, regarding public services wholly or partly funded by a Member State, the Court considers that such measures may be motivated by a "financial ORGI" connected to ORGI objectives which very much look like SGEI missions. This approach is illustrated in the health care cases, where the fundamental freedoms could be restricted by measures aimed at securing the management of welfare *system* under financial conditions allowing the *system* to achieve its missions. Transposition is also used in procurement cases such as *Commission v Germany* and *Lecce*, where incorporation is legal-technically not feasible: a soft test is used to allow a derogation from EU procurement rules for contracts allowing public authorities to achieve under acceptable financial conditions their common public service tasks though cooperation.

Thus, both the transposition and the incorporation approaches emerge as a judicial expression of the Union's duty to take care that SGEIs operate according to principles (freedom to organize SGEIs, for instance in solidarity-based systems maintained by public authorities) and conditions (economic and financial conditions, for the system and the providers in the system) enabling SGEIs to achieve their missions. This leads to conclude that the CJEU has in fact been applying and interpreting Article 16 EC, and now Article 14 TFEU, be it discreetly and through a terminological bifurcation, whereby the term "public service tasks" replaces the notion of "SGEI tasks", and the notion of ORGI is expanded and articulated in a manner that avoids explicitly connecting exemptions from free movement rules and procurement rules to the existence of SGEI-regulation.

If the veil of these terminological "nuances" is lifted, which is done in chapter 9, it is submitted that the CJEU's case law establishes the EU concept of SGEI as a broad concept of EU law, implying that public service tasks imposed on undertakings and on public authorities have an indisputable place in EU's social market economy. Looking through the CJEU's ambiguous terminology based on public service tasks and obligations instead of SGEI tasks and on economic and systemic ORGIs instead of SGEI missions, it appears that SGEI missions as defined by Member States may justify the allocation of public resources to undertakings (*Altmark*), certain exemptions from the applicability of EU procurement rules (subject to conditions, *Teckal*, *Commission v Germany*), and the organisation of welfare services in national systems securing that their financial balance is not "seriously" undermined by the exercise of fundamental freedoms. At any rate, the Court's approach of the concept of public service tasks, which

can be imposed on undertakings but also on public authorities, depending on the regulatory model, is at odds with the Commission's understanding. Chapter 9 concludes that the notion of entrustment in Article 106(2) TFEU is not a core element of the EU concept of SGEI in the Court's approach, but instead a functional element necessary to control the existence, the nature and the costs of the public service *obligations* affecting undertakings on a given market.

10.2 SGEI is approached by the CJEU all the more as an EU constitutional (legal) concept and all the less as a "national" political concept

The author of this study submits that the proposed understanding of the EU concept of SGEI is legally arguable, but is quite aware that this interpretation is not explicit in the Court's case law. The reason of this lack of clarity is argued to be that the Court approaches the notion all the more as a constitutional (legal) notion, but at the same time is aware that it is a highly politicised notion.[1066] If the Court looks at SGEI as a *political* notion, it has to agree with everybody that the Member States disagree on the meaning it *should* have, and that the Court is probably not the EU-institution meant to decide which must take over. If the Court looks at SGEI as a *legal* notion, it has to acknowledge that it is now part of *four* important Treaty provisions, which may have to be respected *coherently* by the Court itself in its judicial activity. In applying the Treaty market rules to service regulation – explicitly characterized as SGEI or not in the cases at issue – the Court is forced to respect the essence of the Treaty provisions on SGEI, which inevitably leads it to interpret the concept of SGEI.

In a paper of 2012, Judge Lenaerts held that the notion of *SGI* (services of general interest) may be examined under two competing socio-economic models, from an ordo-liberal perspective as derogation from the Treaty provisions on competition to be interpreted restrictively, or from the perspective of a "second socio-economic model", as the symbol of the European social model, in accordance with which EU institutions must strive to protect SGIs from any threat which may impair their proper functioning. Lenaerts considered that a constructive debate on SGI must be open to nuances, because the EU must

> not really choose between those two competing socio-economic models, as the role of SGI in the EU legal order is being defined by striking a fair balance between the general interest pursued by such services and the effectiveness of the relevant Treaty provisions governing the internal market. It is only by striking the said balance that one may portray the role of SGI in the EU legal

[1066] In Vedder's view, "from a strictly legal perspective nothing has changed", and like Article 16 EC "[t]he Protocol on Services of General Interest attached to the Treaty of Lisbon has a similar political character without actually changing the legal framework". On such premises, and in the light of what he called "political fireworks", the question became "when and to what extent legal rules and judicial bodies become captured by politics". See Vedder H., 2008, p. 25.

> order accurately. When interpreting primary EU law, it will be for the ECJ to set out the basic elements that must be included in such balance. When the EU legislator has adopted measures, the ECJ will interpret and apply them in ways consistent with that same balance.[1067]

This view is quoted here at length because it contains several elements important for this study. A first remark is that Lenaerts's approach does not only demonstrate what Weiler calls wittingly his "harmonising skills" but seems to set the scene for an institutional dialogue between the CJEU and the Union legislator, in a manner which Dougan holds to exist regarding EU citizenship.[1068] Another remark is that Lenaerts appears to consider the notion of SGI as the non-economic policy element of the notions of SGEI and NESGI, which seems in line with the analysis of the concept of SGEI made in chapter 9.

Regarding the EU concept of SGEI, Lenaerts points at the principle of conferral guaranteeing that, when interpreting the expression "SGEI", the CJEU and, as the case may be, the EU legislator, must respect the competences retained by the Member States ans their wide discretion to define what they regard as SGEI. At the same time, Lenaerts holds the following view, which also deserves being quoted:

> If, in accordance with Article 14 TFEU, the EU legislator ever decides to provide a general definition of SGEI, such a definition would have to incorporate the principles and conditions listed in Protocol (No 26). It would also have to be compatible with Article 36 of the Charter in so far as it must guarantee access to SGEI. Most importantly, such a general definition must comply with the principle of conferral and with the principle of institutional balance.[1069]

This appears as a problematic view, as it implies that a concept of EU primary law, which as underlined by Neergaard, "is normally considered a Community concept" and "has from the very beginning been thought of as such", may be defined by the Member States in secondary law.[1070] But why would the judicial autonomy of the Court be more restricted regarding Article 14 TFEU, introduced in the Treaties as a result of EU law's expansion, brought about by the Court's judicial autonomy regarding the basic concepts contained in Articles 28, 49, 56 and 63 TFEU (goods, persons, services, capital)? The concept of SGEI is *in* Article 14 TFEU and *in* Article 106(2) TFEU, and constitutes there the basis for obligations addressed to the Union, the Member States, and undertakings. It is not at all disputed here that, as expressed by Lenaerts, "[n]either the ECJ nor the EU legislator are entitled to second-guess the determinations made by national authorities as to whether a service is of general interest, unless the latter commit

[1067] Weiler J. H. H., 2013, p. 237.

[1068] Dougan M., 2013.

[1069] Lenaerts K., 2012, p. 1257-1258, footnote omitted.

[1070] Neergaard U., 2008, p. 22.

a manifest error of assessment".[1071] However, the very existence of this control power (strongest in harmonised fields but not absent in others), involves that the EU concept of SGEI is not "whatever the Member States decide it to be". Besides, what Article 14 TFEU leaves open for legislation are the principles and rules enabling SGEIs to fulfil their missions, and *not the definition of the EU concept of SGEI*.

Lenaerts' view that it is for the Member States to define the EU concept of SGEI is thus problematic in a constitutional perspective, and it is argued here that it does not fit with the results of the analysis of the CJEU's case law conducted in chapter 8. In fact, Lenaerts' view rather reinforces the impression that the Court's strategy has so far been to respect the substance of the SGEI provisions in the Treaties, in particular Article 14 TFEU, while at the same time keeping a low profile on the understanding of the EU concept of SGEI which its respect of Article 14 TFEU implies.[1072] Lenaerts' view can also be read as formulating the "recipe" used by the Court to address the SGEI provisions and which shapes its understanding of the concept, and to be followed by the EU legislator, when it is ready to use it. If it ever uses the "recipe", this may lead the EU legislator to define the concept in general terms in a manner which will happen to be in line with the Court's case law, because it would consolidate an understanding which the Court all along applies implicitly but restrains from spelling clearly. The point here is not to discuss the Court's strategy, only that its existence must be held as very probable in its tense political context.

Thus, the CJEU is forced to give judicial effect to the principle spelled in Article 14 TFEU, whereby it appears that the Court delineates the EU concept of SGEI broadly, which arguably was so far clearest in *Commission v Germany*. If this understanding of the CJEU's law is correct, a legitimate question is whether avoiding an open recognition of this understanding may be explained *only* by a concern to let democracy take (at least formally) the lead. In fact, another explanation is argued to be that the Court's approach, keeping the relation between Article 14 TFEU and EU free movement and procurement rules in the shadows of ORGIs and of "public service tasks", provides the Court itself, but also EU institutions, with more discretion in the balance between non market and market interests regarding activities in the Member States' competence. This explanation emerges from asking what the consequences would be if the Court, in its SGEI related case law, ever decided to clearly say what it does, and using "transparent, non-cryptic, soundly reasoned decisions" explained why and how it has "crossed the line between law and politics".[1073]

[1071] Lenaerts K., 2012, p. 1258.

[1072] The author of this dissertation does not here take a polemic

[1073] These words are borrowed from Weiler in final chapter to a book where a number of distinguished scholars have given their views on the legitimacy of the CJEU's case law. In the final chapter, Weiler has chosen to focus on a critical commentary of Lenaerts' views developed in the book's first chapter. See Weiler J. H. H., 2013, p. 237-238.

10.3 Some risks if the CJEU is too clear on its understanding of the EU concept of SGEI

If the Court did not bifurcate through the terminology of "public service tasks" and its case law on "special ORGIs", and instead spelled out that the SGEI-character of the service at issue is decisive for its soft test of certain measures restricting free movement or derogating from EU procurement rules, some effects may arguably incur.

First, the Court would have to clarify why it applies a soft test to services which *can* be economic, but which are not covered by EU competition rules because the activity *is* non-economic in the Member State applying this measure. If the Court considers that such services constitute NESGIs, which is unsure (see above the discussion in section 7.1.3.2), it cannot motivate this by the principle formulated in Article 14 TFEU, because this principle is only valid for *SG(E)I*. This may explain that Lenaerts draws attention to Article 9 TFEU, as one of the new provisions introduced by the Lisbon Treaty "highlighting the 'social aspects' of the European integration project", which states that:

> In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Lenaerts underlines that, compared to its predecessor Article 127(2) EC, Article 9 TFEU goes beyond macroeconomic employment issues and holds that it could be seen, if the Court agreed with AG Cruz Villalón's view in *de Santos Palhota*, as 'a "cross-cutting" social protection clause' allowing to argue that non-discriminatory national measures which are not covered by EU competition rules because the service is non-economic under the law of the Member State at issue, but which restrict free movement, may be examined under a soft version of the principle of proportionality.[1074] In other words, non-discriminatory NESGIs would be on par with the fundamental freedoms, not because they are defined by the Member States and as such important for cohesion and EUs values, but inasmuch as they are compatible with an EU standard of social protection (a standard that is uncertain, may be decided judicially, and if categorized the activity is seen as NESGI, is not protected by the EU Charter of Fundamental Rights).

[1074] Lenaerts K., 2012, p.1261. Reference to Opinion of AG Cruz Villalón in Case C-515/08 *de Santos Palhota and Others* (CJEU 7 October 2010), para.51: "The Advocate General relied on that provision (as well as on Article 31 of the Charter) with a view to arguing that '[a]s a result of the entry into force of the Lisbon Treaty, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, […] is expressed in practical terms by applying the principle of proportionality."

A case in point is *Kattner Stahlbau*, where the compulsory affiliation rule was seen as motivated by the ORGI of "ensuring the financial equilibrium of a branch of social security". The Court's soft test of this restriction is difficult to justify by Article 9 TFEU, which was not in force when the judgment was delivered, and as already argued, the test evoked rather an SG(E)I test under Article 14 TFEU. Evoking Article 9 TFEU as justifying a soft test of a measure under the free movement rules appears as an after-construction intended to legitimate that measures motivated by a non-economic SGI are submitted to the free movement rules, but as *NESGI*, with a weaker constitutional safeguard than SGEIs under Article 14 TFEU, Article 1 of the SGI Protocol and Article 36 EUCFR. It would be far more convincing intellectually if the Court recognized that the "E" in SGEI does not mean that the activity is economic but that it *can be* economic, which would have the merit of clarity and of legal certainty, even if it would display the very restricted scope of Article 2 of the SGI Protocol.

Second, not using the terminology of "public service tasks" would make definitively clear that, while EU procurement rules cannot easily be covered by Article 106(2) TFEU, they are covered by Article 14 TFEU, because they affect the conditions, in particular the financial and economic conditions, under which SGEIs operate. This would raise the question why the new EU procurement procedures are harmonized through directives and not through regulations as provided for by Article 14 TFEU. Indeed, Szyszczak found strange that although Article 14 TFEU provides a legal base for Union legislation to be adopted while the post-Lisbon Treaties do not confer competence upon the Union to regulate SGEIs, and found paradoxical the Commission announcement that as a result of the SGI Protocol there was no need for Union legislation.[1075] In fact, an alternative manner to understand the situation is that there is no need of *more* Union legislation covering SGEIs, because there is *already* Union legislation establishing certain principles and conditions meant to enable SGEIs to achieve their missions, in the form of procurement and state aid legislation.

The problem, if the procurement directives were explicitly regarded as regulating SGEI conditions, is that the SGI Protocol – but also Article 36 EUCFR – provides principles for the balance to be struck by the EU legislator in these fields, but it does not indicate what policy the Union pursues with these services. By way of comparison, environment legislation based on Article 192 TFEU is legitimated by the policy competence provided for by Article 191 TFEU. As evoked by Szyszscak, there is no competence on the Union to legislate on conditions enabling SGEIs to be achieved, because what SGEIs must achieve in fields outside EU's policy competence is not under EU's competence, unless the Member States decide so (through regulation for instance). If the Court made clear that EU procurement law is covered by Article 14 TFEU, there would be an overt competence issue for EU procurement rules affecting social services. In such a situation, it may be questioned whether Article 9 TFEU could fill in that gap too. Barnard and De Baere note that the CJEU's reference to Article 9 TFEU in *Deutsches Weintor* would appear to imply that any of the goals in Article 9 TFEU, including the guarantee of adequate social protection, the fight against social exclusion, and a high level of

[1075] Szyszczak E., 2009, p. 295.

education and training, could potentially constitute an objective of general interest justifying, where appropriate, a restriction of a fundamental freedom.[1076] As Lenaerts, they refer to AG Cruz Villalón's view, and conclude that the main relevance of Article 9 TFEU is its potential to require that EU measures do not affect in a disproportionate manner the social objectives listed in it.[1077] However, they consider that Article 9 TFEU does not constitute a new conferral of competences and therefore obvious that it cannot be used as a legal basis for any EU act.[1078] As their view is shared here, it seems that the competence issue, which is not overtly debated but is argued to exist as EU procurement rules are submitted to be covered by Article 14 TFEU, remains unsolved.

Third, acknowledging that EU procurement rules are in principle covered by Article 14 TFEU could raise concerns that positive market integration be compromised. Indeed, as seen in chapters 7 and 8, this Treaty provision, together with the SGI Protocol and Article 36 EUCFR, constitutionalizes EU law's respect of Member States' retained powers, which according to Azoulai are "the collective goods the State is supposed to protect so as to ensure the social cohesion of its own population in its territory". Azoulai's view is that, by recognizing retained powers, the Court recognizes that "Member States have a primordial (rather than exclusive) power in the organization of a subject area that is considered to be essential to social integration" and that they are "autonomous political actors fulfilling their duties as guarantor of the cohesion of the European populations".[1079] It is certainly arguable that the Court, under the pressure of Treaty modifications and of reality, acknowledges that Member States have a primordial responsibility in giving access to public services, and therefore should have more say in their definition and funding.[1080] At this stage in the development of EU law, the problem is rather at which stage – legislative or judicial – their say should be allowed to be given some weight.

In the field of procurement, Fiedziuk seems to advocate more flexibility at the derogation stage. She holds the view that Article 106(2) TFEU could become an alternative to the rigid in-house exemption test in the application of EU public procurement rules, as "the currently changing legal trends evolving towards more

[1076] In Case C-544/10 *Deutsches Weintor* (CJEU 6 September 2012), para.49, the Court held that "the protection of public health constitutes, as follows also from Article 9 TFEU, an objective of general interest justifying, where appropriate, a restriction of a fundamental freedom". See Barnard C. and De Baere G., 2014, p. 36-37.

[1077] Barnard C. and de Baere G., 2013, p. 36-37. According to these authors, "[a] key tool for systematically ensuring that the EU's common social objectives are mainstreamed in all relevant EU policy areas is the social impact assessment within the Commission's general Impact Assessment System (IAS), and the European Economic and Social Committee has advocated further strengthening of it".

[1078] De Witte B. et al., 2010, p. 34. The authors hold that Article 9 TFEU cannot be used as a legal base for the establishment of a pro-active and comprehensive EU social policy, covering all the domains mentioned in that provision.

[1079] Azoulai L., 2011, p. 207.

[1080] In *Sodemare* it is submitted that the CJEU acknowledged that in fields where Member States have retained most policy powers, they may not only decide policy objectives but they retain also economic powers. When adjudicating in the field of social services, the central constitutional issue appears to be which powers, in particular *economic powers*, the Member States retain in the exercise of their retained competence in the social sphere.

restrictive rules on public spending call for more flexible derogatory tests".[1081] To suggest that market-based provision can in certain cases be argued to be too expensive for Member States that must balance their budgets, was rather heretic before 2008 and the beginning of the long-lived economic crisis. By contrast, Davies considers that "[t]he more that general interest considerations are shunted off to Article 86(2), the less they will be internalised in the competition rules themselves, and the less these rules will come to be economically realistic and responsible. That will lead to bad, inefficient and incoherent policy."[1082] It is noted here that Davies uses the vague formula of "general interest considerations" (compared to SGEIs imposed in order to secure the achievement of service missions), but if his reasoning is correctly understood, the SGEI character of services is best taken hand at the legislative stage.[1083]

Fourth, if the CJEU acknowledged that by combining two welfare ORGIs – for instance (1) secure balanced medical and hospital service open to all and (2) prevent the possible risk of *seriously* undermining a social security system's financial balance" – it fulfils its duty to take care that public welfare systems operate under financial conditions enabling them to fulfil their SGEI mission, the Court would have to explain why it makes a different interpretation of "economic and financial conditions" regarding SGEI tasks entrusted to undertakings (acceptable economic conditions, including a reasonable profit) and regarding SGEI missions in national welfare systems (not seriously undermining the financial balance).

10.4 Concluding with a burning issue: which normative role left for Article 106(2) TFEU in the European framework governing public services?

Certain of the elements evoked in the precedent section may explain the CJEU's discreet approach of the Treaty provisions on SGEIs, offering a kind of "third way" where SGEI-related principles are incorporated to the acquis, but through the terminology of "public service tasks" and the fiction of economic ORGIs and "public service ORGIs". Indeed, by calling public authorities' public service tasks "SGEI tasks", the Court would take the risk of forcing EU institutions to consolidate its case law on the basis of regulations in accordance with Article 14 TFEU. In openly political words, Sauter fears that to give direction to public services though a European Parliament and Council

[1081] Fiedziuk N., 2013a, p. 108. According to Fiedziuk, the in-house exemption plays the role of *sui generis* Article 106(2) TFEU general exemption in the field of procurement law. However, she underlines that unlike the in-house exemption, Article 106(2) TFEU allows undertakings providing SGEIs to operate in parallel on the open market carrying out activities of a commercial nature, the only limitation being that their internal accounts must show separately the costs and revenues associated with the SGEI from those of the other services.

[1082] Davies G., 2009, p. 330.

[1083] Rules that are "economically realistic and responsible" should not dispense from transparent and precise SGEI tasks, secured by proportionate economic and financial conditions, because as will be argued in part IV, transparency and proportionality are necessary for a democratic governance of quality services in the public sector.

Regulation based on the SGEI provision in Article 14 TFEU "could degenerate into an open invitation to wild-eyed believers in state interventionism who favour public provision of everything, and more cynical supporters of cosy corporatist arrangements, to drive a battering ram into the delicately balanced edifice of the internal market, backfiring badly".[1084] Although such concerns are probably shared by the CJEU, and may explain its avoidance of the term SGEI where it seems to be what is meant, this avoidance is nevertheless problematic for a clear understanding of EU constitutional law and also makes difficult to assess whether the Court's decisions are coherent and compatible with the normative stances established by the Treaties.

Nevertheless, the CJEU has made clear that Article 14 TFEU formulates a public service principle which has horizontal relevance in the Treaties, and in particular affects the substance of EU free movement and procurement law. Meanwhile, there is still much uncertainty regarding the exact meaning of this principle, and its articulation in the field of competition and state aid law with the public service principles stemming from Article 106(2) TFEU, which remains a major constitutional element in the Treaty framework on public services. Its specificity lies arguably in that (1) it reminds that there is a tension to be resolved between the EU general interest of market integration and other non-market interests and (2) it imposes the principles of transparency and proportionality on the process on defining SGEI tasks and taking measures ensuring their fulfilment. The combination of the principles stemming from Articles 14 and 106(2) TFEU is particularly important in the field of social services in the public sector of the Member States, which are normally highly regulated and subsidised and are in focus in part IV.

The principle of transparency allowing to control proportionality is embedded in the notion of "entrustment" in Article 106(2) TFEU and in the *Altmark* criteria, which has extended Member States' powers to finance SGEI tasks, but it does not give them carte blanche: *Altmark* submits Member States' use of these powers to strict transparency and proportionality requirements.[1085] Yet, van de Gronden and Rusu observe that, by contrast with *Altmark*, the CJEU's case law in *BUPA*, *TV2* and *AG2R* adopts a relaxed approach regarding the requirement of entrustment in Article 106(2) TFEU and in the first Altmark criterion. Therefore, the message is not so clear, in particular given the GC's ruling in *CBI*, enjoining the Commission to examine more thoroughly the funding scheme of public hospitals, in particular the entrustment and the precision of the SGEI tasks compensated for.

Consequently, it appears that the EU legislator is left with quite some discretion regarding the enforcement of the principles of transparency and proportionality following from Article 106(2) TFEU, as it very much depends on the form and contents of the entrustment of SGEI tasks to undertakings in publicly funded welfare systems. While it has been submitted that the notion of "entrustment" lies outside the core of the notion of SGEI, it has a potential to be a key element in the EU *governance* of public services and may therefore have to be "rethought". The EU legislator is also left with a

[1084] Sauter W., 2014, p. 179.

[1085] This is underlined by van de Gronden and Rusu, in van de Gronden J. W. and Rusu C. S., 2013, p. 194.

large discretion to catch the signal sent by the CJEU and apply the principle laid down Article 14 TFEU to its procurement rules. What it does with this discretion is the main subject of part IV.

Part IV

The price of loyalty: SGEIs good to have but better to forget?

The last and fourth part of this study addresses the third sub-question, formulated as follows:

> *What place does the EU legislator give to the Treaty principles on SGEIs in EU legislation harmonizing the market for social services and how can it affect the liberalization of these services in the Member States?*

During the last decade, and even more since the financial crisis in 2008 and the austerity measures in many Member States, the EU dimension of the governance of social services regulated, organised and to a large extent funded by the Member States has increased considerably. The introduction of a new basis to legislate on SGEIs in Article 14 TFEU conveys a sense that it is now legitimate for EU institutions to sit together and decide how social services to which SGEIs are attached should be framed by EU law in order to achieve their missions. This would be one way of concretising the new "social market economy" principle. However, as already mentioned, the Commission has assessed that it cannot – at least for the time being – propose any legislation on this legal basis.

The EU policy on social services, in focus in the Commission's Communication "A Quality Framework for Services of General Interest in Europe" (hereinafter "the SGI Quality Framework"), takes instead the path of harmonizing the rules applicable to social services in procurement and state aid legislation. Although the state aid rules applying to SGEIs have been poorly applied in the Member States, the Commission has decided to decentralise the control of their application to the Member States, and to strengthen procurement rules applying to social services in order to breed cross-border trade and open up competition in those sectors. These procurement rules are quite undemanding, and so the Commission is apparently, at least for the time being, not so preoccupied by the proportionality of public funding of social services.[1086]

One may wonder what the vision is exactly with these steps, and how they relate to the Treaty principles on SGEIs. In fact, the Quality Framework for SGIs has been put forward in the double context of the post-Lisbon constitutional frame, and of the

[1086] The Commission acknowledges distortions of competition can occur in in the field of social services, but considers that such funding, even with large sums, will have only limited and acceptable effects on competition. See Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L7/3, para.11.

strained economic situation in Europe.[1087] The Commission has evoked the need to develop new services, delivered both physically and on-line, that generate growth and create jobs.[1088] Chapter 11 takes therefore a closer look at the new state aid rules and (not yet implemented) procurement legislation applying to social services, to analyse how much pressure they put *in practice* on the Member States to respect the Treaty principles and rules on SGEIs when they entrust the provision of social services to market actors and finance this provision with public resources.

An important feature of the new rules applying to social services is that systems of choice and voucher systems are exempted from the scope of the new procurement directives, and this suggests that the EU legislator is willing to accommodate their development in several Member States. In a market integration and a market growth perspective, this would be logical since such systems tend allow a production cost "per service unit" to emerge, thereby facilitating cross-border trade of services. However, these systems should in principle be rigged by rules ensuring that competition is not too distorted by the need of flexibility which social services can require. The state aid rules now applicable to SGEIs in the field of social services are meant to provide the flexibility required by social services which are neither procured, nor compensated on the basis of the comparison with efficient undertakings in accordance with the fourth Altmark criteria.

Van de Gronden and Stefan Rusu hold that the 2011 Altmark Package constitutes a significant step toward an EU approach to social services, and that, given the scarcity of hard law on social services in EU law, the Commission Decision is of great interest for social services and for national social welfare states.[1089] However, this supposes that the state aid rules applying to SGEIs, and beyond the principle in Article 106(2) TFEU, are applied loyally.

It may be questioned whether this is the case in Sweden, where the provision of social services is still largely tax-funded, but also largely opened to provision by private actors, and also liberalised by the possibility (regarding primary health care, the obligation) for local authorities to organise them in systems of choice. Whilst for-profit provision of school education is allowed in the public system, the Swedish legislator has been particularly reluctant to acknowledge the economic character of social services, and also to rely on their SGEI-character to justify their public funding in systems of choice. Thus, even when social services were not subject to any EU procurement rules, Sweden argued, not so convincingly, that its systems of choice fulfilled the fourth Altmark criterion, which suggests strongly that the EU state aid rules applying to SGEIs under Article 106(2) TFEU were perceived as not fitting the policy pursued and the systems adopted.

[1087] Commission, "A Quality Framework for Services of General Interest in Europe" (Communication) COM (2011) 900.

[1088] Commission, "Europe 2020: A Strategy for smart, sustainable and inclusive growth" (Communication) COM (2010) 2020.

[1089] Van de Gronden J. W. and Rusu C. S., 2013, p. 185-186.

On this background, chapter 13 looks at the systems of choice for elderly home care (contract-based) and school education (authorisation-based) to assess whether they comply with EU rules on state aid to social services. This may allow drawing some conclusions on the relation between the lack of clear SGEI tasks and issues of service quality, service continuity, under-compensation and over-compensation, which have occurred in these fields. Indeed, the difficulty in formulating clear and measurable quality criteria in the field of social services is notorious, but it cannot be excluded that the Swedish systems as they stand today are designed in a manner that does not fit the concept of SGEI addressed by the regulatory model of the Commission's state aid rules.

The study of these two cases is introduced in chapter 12 by an overview of the Swedish rules governing local and regional authorities' (LRAs) competence in the field of social services, which allows to relate the cases studied to the broader question of the decentralised and increasingly individualised Swedish model of welfare services and to give some very general reflexions on the role of SGEIs in the modernisation of welfare systems in chapter 14.

Chapter 14 draws conclusions based on the results of the analysis conducted in part IV and connects them to the conclusions of parts II and III.

11 EU public procurement and state aid legislation: which pressure on Member States to enforce SGEI principles in the field of social services?

This chapter examines the new procurement directives (adopted in 2014) and the latest Commission legislative package on SGEIs (adopted in 2011-2012, hereinafter the 2011 SGEI Package) with a focus on social services and in the light of two general questions:

- How do these rules relate to Article 14 TFEU?

- Do these rules put pressure on the Member States to identify SGEIs in their their legal and administrative systems in order to put the public funding and the organization of SSGIs in compliance with the 2011 SGEI Package?

Evidently, there is no possibility here for an in-depth study, and the purpose is instead to shed some light on the legal-political process of harmonisation of EU market law on social services by giving more focused attention to specific questions regarding the new procurement directives and the 2011 SGEI Package.

The first section of the chapter looks at the new procurement directives, and tries identifying the relation between the Directives and the Treaty rules on SGEIs, first and foremost Article 14 TFEU, with the following questions in mind

- Do the new procurement directives mirror the CJEU's case law suggesting that procurement directives are covered by Article 14 TFEU and construe the concept as broadly as the CJEU's case law suggests?

- How do the new procurement directives relate to SGEIs in the field of social services and how explain that the new procurement directives do not use the notion of SGEI to justify the lighter regime for social services?

- How do the new procurement directives relate to the SGI Protocol and clarify what SGEIs and what NESGIs are?

The approach consists in reading the Directives at the surface level to identify the explicit references to SGEIs, but also in scrutinizing the textual elements denoting that the EU legislator had the Treaty provisions on SGEIs in mind when drafting the Directives. A point of departure is taken in some important novelties in the procurement directives, to look then at the relation between the procurement directives and the Treaty rules on SGEIs, and finally to "zoom in" on the particular regime for social services and its ambiguous connection to the Treaty rules on SGEIs.

The second section looks at the 2011 SGEI Package *in the perspective of social services*, with the following questions in focus

- Does the 2011 SGEI Package really clarify what constitutes an economic activity for the purpose of the state aid rules in the field of social services?

- Does the 2011 clarify what SGEIs are and is the Commission's approach legitimate in that respect?

Before the 2011 SGEI Package is examined in light of these questions, the regime for social services according to its predecessor of 2005 (hereinafter the "2005 SGEI Package") is first outlined, and second some cases in the Commission's state aid practice on social services are reviewed. The reason for this approach is to highlight that the application of the 2005 SGEI Package in the field of social services supposed that two important issues would be clarified: how determine that the activity funded is economic, with what precision the SGEI task funded should be defined. The Commission's practice shows that its reasoning on these two questions is not so clear, highly dependent on the CJEU's case law in the field of free movement, and in certain cases extremely time-consuming. As it seems, the Commission is itself engaged in a "dialogue" with the CJEU on those issues. In other words, when the Commission decentralises the control of the compliance of public funding of social services with its 2011 SGEI Package, it should know that it entrusts a *very* difficult task to the Member States.

In the last section, the results are summed up and some conclusions are drawn in relation to the two general questions formulated at the beginning of this introduction.

In this approach, the method is overall legal and the legal sources consist mainly of EU secondary law on procurement and state aid. As social services are in focus, the new Public Sector Directive, and the Commission Decision which is part of the 2011 SGEI Package[1090] are predominant, but the legislative context these texts are part of is evoked in relevant places, in particular soft law in the 2011 SGEI Package which indicates the Commission's views on several important elements of its rules.[1091] Some decision practice of the Commission and of the EFTA Surveillance Authority (ESA) is also used to illustrate the approach taken by institutions which so far have been responsible to control state aid to social services, and in the analysis of these authorities' reasoning, a state aid decision of the EFTA-Court had also to be called in.

11.1 The 2014 procurement directives

The 2004 public procurement directives (hereinafter "the old public procurement directives"), expected to offer a flexible framework promoting efficient EU-wide

[1090] Commission Decision 2012/21/EU on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form **of** public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012[OJ L7/3.

[1091] Commission, "Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest" 2012/C 8/02, p. 4-14.

competition and aiding the fight against corruption, were short-lived.[1092] They were replaced less than ten years later by the new public procurement directives, which together with a revision of the rules on state aid to SGEIs, were presented by the Commission as one of the twelve levers meant to re-boost growth in Europe, in the post-Lisbon context of economic crisis.[1093] In fact, the Commission had many reasons to revise the directives. First, it had to address a years-long pressure from many stakeholders for simpler and more flexible procurement procedures, giving more possibilities to pursue environmental and social objectives. Second, it had long envisaged hard-law regulation of service concessions, which were only covered by the Treaties. Third, it was time to consolidate important case-law on in-house arrangements and public cooperation arrangements, and the Treaty-based procurement rules found applicable to social services.[1094] Last but not least, the post-Lisbon Treaty framework on SGEIs had to be acknowledged and applied.

11.1.1 General features

The 2014 Public Sector Directive Directive and the 2004 Utilities Directive have been replaced by the 2014 Public Sector Directive and the 2014 Utilities Directive. The rules on works concessions have been moved to the 2014 Concessions Directive, which regulates both work and service concessions and covers both the public sector activities and utilities, subject to exceptions in the sector of water.

The Commission underlines that the new procurement directives address the policy requests of simplification and flexibility.[1095] It is in particular emphasized that they introduce a higher threshold for sub-central authorities than central ones and a higher threshold for social, health and educational services than for other services, that they offer more flexibility to choose a procurement procedure which allows negotiations

[1092] Recitals 15, 16 and 43 of the 2004 Public Sector Directive.

[1093] In response to the fear of a long-lasting economic crisis, the EU adopted the "Europe 2020 strategy" (Commission, "Europe 2020, A strategy for smart, sustainable and inclusive growth" (Communication) COM (2010) 2020). In its Conclusions of 24/25 March 2011, the European Council held that the Single Market had a key role to play to deliver growth and employment and promote competitiveness, and the Commission identified twelve levers in order to boost growth on the EU market, with a key action for each lever by the end of 2012, see Commission, "Single Market Act - Twelve levers to boost growth and strengthen confidence - Working together to create new growth" (Communication) SEC (2011) 467 final.

[1094] In Case T-258/06 *Germany v Commission* [2010] ECR II-2027, the GC found inadmissible an action brought by Germany against the Commission's Interpretative Communication of 23 June 2006 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives. The General Court found that it did not contain new rules for the award of public contracts, in other words the rules formulated by the Communication did follow from the Treaties.

[1095] See the information leaflet *New rules on public contracts and concessions simpler and more flexible*, published by the Commission and available per 31 December 2014 on its webbsite at

http://ec.europa.eu/internal_market/publications/docs/public-procurement-and-concessions_en.pdf. See also the many references to simplification and flexibility in the preambles of the Directives, for instance Recital 42 in the 2014 Public Sector Directive. Another general feature highlighted by the Commission is the reinforcement of rules allowing to fight corruption.

between contracting authorities and tenderers, and that they put emphasis on the possibility for individual contracting authorities to use procurement as a policy instrument and make choices related to environmental and social policy. These features seem to fit with the policy aims attributed to the Directives as market-based instruments to be used to achieve smart, sustainable and inclusive growth increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and enabling procurers to make better use of public procurement in support of common societal goals.[1096]

One novelty which has received much public appraisal is the reform concerning the choice of award criterion, implying that the sole criterion of "most economically advantageous tender" (MEAT, with a new meaning compared to the old procurement directives) has replaced the choice between lowest price and what was called MEAT in the old Directives. In the new regime, it is mandatory to identify the MEAT on the basis of a price or cost criterion, using a cost-effectiveness approach (one of those being the life-cycle costing approach regulated by Article 68), and it is voluntary to include the "best price-quality ratio" approach (a new term for what was called MEAT in the old Directives). Thus, while it is not the place here to analyse this aspect in any detail, it seems right to hold as Bordalo Faustino that "in practice, the choice between awarding a public contract solely on the basis of price (or cost), or on the basis of a combination of the latter with quality, still applies". In her view, this novelty may be argued to encourage contracting authorities to procure in a more quality oriented way but in practice, contracting authorities may still decide that the lowest price is the most suitable criterion for the award of a particular contract.[1097]

Two other important novelties are the Directives' codification of the exceptions for in-house arrangements and public-public cooperation arrangements established by the CJEU in case law, the removal of the divide between prioritized "A" and non-prioritized "B" services, and the introduction of a new legal category of "social and other specific services", to which a lighter regime applies. These elements are commented on in more detail below.

[1096] Recital 2 of the 2014 Public Sector Directive, Recital 4 of the 2014 Utilities Directive and Recitals 1 and 3 of the 2014 Concessions Directive.

[1097] Bordalo Faustino P., 2014, p. 125-126. As underlined by Bordino Faustino, the price or cost is now a mandatory element of the MEAT, according to Article 67(2) of the 2014 Public Sector Directive, but Member States may exclude or restrict the sole use of price or cost, which she considers to be in line with the *Sintesi* case law, see Case C-247/02 *Sintesi* [2004] E.C.R. I-9231. Imposing a price or cost element in the MEAT implies that a composition, where non-cost criteria are part of the MEAT *instead* of price, is not possible any longer except for the case where price or cost is fixed, which follows from Article 67(2) second paragraph of the Directive, providing that "[t]he cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only." Recital 93 clarifies that where national provisions determine the remuneration of certain services, it remains possible to assess value for money on the basis of other factors than solely the price or remuneration.

11.1.2 Explicit and implicit connections to the Treaty principles on SGEIs and NESGIs

The Directives contain several explicit references to the Treaty provisions on SGEIs and NESGIs. The most central rule related to SGEIs appears to be the following provision, introduced in the three new Directives, and reading:

> This Directive does not affect the freedom of Member States to define, in conformity with 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.[1098]

This provision, which has its focus on the freedom to *define* SGEI missions, it is asserted that the *Member States*' freedom to define what they consider to be SGEIs is not affected by the Directives, but that this definition must conform to EU law. There is no reference in the provision or in the recitals to what this conformity requires, but the very duty to conform to some – be it generous – constraint implies that the notion is regarded by the EU legislator as an EU notion. It may be wondered why the notion is not "defined" for the purpose of EU procurement law, considering that the EU legislator considered appropriate to define the notion for the purpose of the Services Directive. After all, if it is asserted solemnly that the Directive does not affect something, it seems legitimate to know what that can be, and which EU rules constrain Member States' definition of that "something".

The preamble provides some precision, explaining that the three new Directives do not prejudice the freedom of *national, regional and local authorities* to define, in conformity with Union law, services of general economic interest, their scope and the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue their public policy objectives.[1099] Together with these recitals, it seems possible to interpret the articles named above so that the Directives recognize a freedom to *define* SGEIs for both Member States (at legislative level) and for public authorities (at administrative level), a position that does not seem contradicted by the CJEU's case law related to the modes of entrustment of SGEI tasks. The possibility that SGEIs be defined at legislative or at administrative level is not explicitly formulated, and the recitals do not address issues such as the degree of precision in SGEIs (general missions or precise tasks) or the type of entities are addressed by the SGEIs (undertakings, public authorities). Also, recitals' wording suggests that, while *EU law* does not detract public authorities at national, regional and local level from defining SGEIs, it is not excluded that their freedom to do so may be restricted by national rules.

[1098] Article 1(4) first sentence of the Public Sector Directive, Article 1(4) first sentence of the 2014 Utilities Directive, and Article 4(1) of the 2014 Concessions Directive.

[1099] Recital 7 of the 2014 Public Sector Directive, Recital 9 of the 2014 Utilities Directive, and Recital 6 of the 2014 Concessions Directive.

Further, it is stressed in recitals to the three new Directives that they "should be without prejudice of the power" of national, regional and local authorities to provide, commission and *finance* SGEIs, in accordance with Article 14 TFEU and the SGI Protocol.[1100] As public authorities' prerogatives to *finance* SGEIs is not at all named in the SGI Protocol, the recognition of national, regional and local authorities' power to finance SGEIs in these recitals must be related to Article 14 TFEU. However, Article 14 TFEU has its focus on the *duty*, in particular for the Union, to *take care that SGEIs operate under economic and financial conditions enabling them to achieve their missions*. As made clear by *Altmark*, the Union's duty implies that the Member States may use their economic powers to *finance SGEIs*. But in the field of procurement law there is more to this duty for the EU legislator. While the very existence of public procurement procedures can certainly enhance competition and lead to savings in the public acquisition of SGEI-regulated services, their *design* is covered by Article 14 TFEU, because it can obviously affect the economic and financial conditions under which SGEIs operate. This is argued to be the implicit but essential motive for the important ruling in *Commission v Germany*.[1101] Therefore, it is submitted that the recitals' wording side-steps the fact that under Article 14 TFEU, EU procurement rules must not simply respect Member States' power to *remunerate* SGEIs, they must strike the right balance regarding the degree of flexibility which contracting authorities dispose of for their SGEI missions to be achieved. The recitals underline also that none of the three Directives deals with the funding of SGEIs or with systems of aid granted by Member States, in particular in the social field, in accordance with Union rules on competition.[1102] What is meant by "systems of aid granted by Member States, in particular in the social field, in accordance with Union rules on competition" is rather cryptic.

Several provisions address specifically the freedom to *organise* SGEIs. In this regard, Article 1(4) of the Public Sector Directive and Article 1(4) of the Utilities Directive contain the same rule, reading as follows

> Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.

This provision gives visibility in EU legislation to a constitutional principle introduced by the Lisbon Treaty, that public authorities have a wide freedom to *provide* SGEIs. The discretion provided by Article 14 TFEU and the SGI Protocol is evoked in relation to public authorities' "public functions", an expression which is absent from both the Treaty provision and the SGI Protocol. It is hardly possible not to see that the EU legislator carefully avoids the terminology used in Article 14 TFEU, which formulates a duty related to "*SGEI missions*".

[1100] Recital 7 of the 2014 Public Sector Directive, Recital 9 of the 2014 Utilities Directive, and Recital 6 of the 2014 Concessions Directive.

[1101] C-480/06 *Commission* v *Germany* [2009] ECR I-4747.

[1102] Ibid.

Likewise, recitals in both the Public Sector Directive and the Utilities Directive emphasize that nothing in these Directives obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or *to organise by means other than procurement within the meaning of these Directives*, but without connecting this organisational freedom to Article 14 TFEU and the SGI Protocol, and thus to SGEIs.[1103] It is very important to note that what gives organisation freedom in the Public Sector and the Concessions Directives is not the SGEI-character of the service, but instead:

1. The EU legislator's recognition that public authorities may provide themselves services under their competence

2. The EU legislator's decision to define "procurement within the meaning of the Directives", thereby excluding – as will be seen with much support from Sweden – "situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems", which should not be understood as being procurement but simple authorisation schemes.[1104]

In this approach, every organisation of public services implying an externalisation falling within the broad concept of procurement in the meaning of the Directives, i.e. including concession contracts, is constrained by the EU procedural rules. In other words, EU procurement rules harmonise profoundly the principles and rules for an externalised organisation of public services, and evidently restrict public authorities' freedom to organise SGEIs. The clearest recognition of this fact lies arguably in the carving out of customer choice and service voucher systems from the definition of "procurement within the meaning of the Directives". Absent this legal-technical solution, this contract-based entrustment of tasks remunerated by the State would have had to comply with the procurement principles, in particular the principle of equal treatment, unless motivated by the principle of Article 14 TFEU.

If free choice or vouchers systems were covered by the notion of procurement, accommodating them under EU procurement rules would seem coherent with the principles on SGEIs enunciated in Article 1 of the SGI Protocol. To accommodate such systems by derogation from the principle of *equal treatment* would have to be justified as necessary to enable the achievement of SGEI missions in the meaning of Article 14 TFEU, whereby ensuring free choice would probably have to be claimed to constitute a "shared value" of SGEIs". Thus, if systems of choice or vouchers had been

[1103] Recital 5 of the 2014 Pubic Sector Directive and Recital 7 of the 2014 Utilities Directive.

[1104] Recital 4 of the 2014 Public Sector Directive. In the Concessions Directive, it is held that this "situation" should not either be regarded as concession, see Recital 13, stating that "arrangements where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not qualify as concessions, including those based on legal agreements between the public authority and the economic operators. Such systems are typically based on a decision by a public authority defining the transparent and non-discriminatory conditions on the continuous access of economic operators to the provision of specific services, such as social services, allowing customers to choose between such operators."

accommodated as procurement procedures on the basis of their SGEI missions (including the mission of "free choice"), the EU legislator would have been forced to acknowledge that harmonisation of procurement procedures affect the *organisation* of SGEIs before they are entrusted. It would arguably also force the EU legislator to explain why rules specifically enabling SGEI missions to be achieved, are harmonised through directives instead of regulations, as required by Article 14 TFEU. Lastly, it would arguably force the EU legislator to explain why the light procurement regimes is not more generally related to the SGEI-character of social services, and the contract-based entrustments not more clearly connected to the state aid rules.

Besides, the carving out of customer choice and service voucher systems from the scope of "procurement contract" and "service concession", made in the Recital 4 of the Public Sector Directive and Recital 13 of the Concessions Directive, is ambiguous. In recitals touching on services to the person, it is stressed that Member States and/or public authorities remain free to organise social services in a way that does not entail the conclusion of concessions or public contracts, "for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas". Such authorisation schemes can constitute the supply component of systems of service vouchers or customer choice, and therefore may be expected not to be unaffected by the new procurement directives. Yet, regarding social services, the Directives' recitals underline that the Member States' freedom to use such funding, authorisation or licensing systems is subject to *the condition* that such systems *ensure sufficient advertising* and comply with the principles of transparency and non-discrimination.[1105] So after all, free choice or system voucher systems are perhaps regarded by the EU legislator as not "really outside" the scope of EU procurement law, unless the requirement of sufficient advertisement is simply regarded as following from EU administrative law.[1106]

Public authorities' freedom to choose to perform their tasks themselves is also explicitly laid down as a principle in the Concessions Directive. However, by contrast with the Public Sector Directive and the Utilities Directive, this freedom is in the Concessions Directive not put in relation to Article 14 TFEU and the SGI Protocol, but instead *incorporated* as a part of a more general "principle of free administration by public authorities" formulated in Article 2(1), which reads

[1105] Recital 114 fourth paragraph of the Public Sector Directive, Recital 120 fourth paragraph of the 2014 Utilities Directive, and Recital 54 Directive of the 2014 Concessions Directive.

[1106] Question 7 in the Questionnaire established as a platform for the FIDE Sessions on public procurement addressed the boundaries of EU procurement law and read: "Do the principles of non-discrimination/equal treatment and transparency (or rules derived therefrom) also apply to the selection of the beneficiary of unilateral administrative measures?" In his report on this question, Caranta held that ""One can assume that non-discrimination, equal treatment and transparency are general principles potentially applicable to all instances where the State or any other public law entity disburses money or grant benefits or privileges (including the right to carry out an economic activity), on a selective basis, choosing among a number of market participants potentially exceeding the resources being distributed, such as for instance when exclusive rights are granted to a specific economic operator in connection with the provision of a SGEI". See Caranta R., 2014, p. 79-175.

> This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.
> Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators.[1107]

It appears as a remarkable step that the Concessions Directive introduces a principle of free administration, obviously transposing the Treaty principles on SGEIs and the "shared values" of SGEIs according to the SGI Protocol, but making the notion of SGEI invisible. This development is arguably worth scholarly attention.

Finally, it must be noted that provision is explicitly made that NESGIs "are not" or "should not be" covered by any of the three new directives. In this regard, there is a clear difference between the assertive approach in the Utilities Directive providing that "[t]he scope of this Directive shall not include non-economic services of general interest"[1108] and "[n]on-economic services of general interest shall fall outside the scope of this Directive"[1109], and the more cautious approach in the Public Sector Directive, where it is considered appropriate to clarify, but only in a Recital, that "non-economic services of general interest *should not* fall within the scope of this Directive".[1110] This asymmetry may have a first explanation in the fact that the utilities sector covers activities which can be categorised with more certainty as economic SGIs (SGEIs). A second explanation may be that, while the Member States *a priori* retain powers to organise social services as non-economic SGI in their territory, the fact that a Member State allows service concessions for a specific type of social service will normally imply a degree of liberalisation that *per se* excludes the possibility for the service to be non-economic in that state.

Unsurprisingly, what is considered as NESGI is very unclear in the new procurement directives, which arguably constitutes a serious problem in a rule of law perspective. Recitals to the Public Sector Directive and the Concessions Directive "recall" that Member States are free to organise the provision of "compulsory social services or of other services such as postal services" as "services of general economic interest or as non-economic services of general interest or as a mixture thereof".[1111] As these recitals also "recall" that this freedom is subject to compliance with the principles of the TFEU

[1107] Article 2(1) of the 2014 Concessions Directive.

[1108] Article 1(6)) of the 2014 Utilities Directive.

[1109] Article 4(2) of the 2014 Concessions Directive.

[1110] Recital 6 of the 2014 Public Sector Directive.

[1111] Recital 6 of the 2014 Public Sector Directive and Recital 6 of the Concessions Directive. The word "recall" is strange in that ontext, given the fact that the case law on this issue is quite unclear, and that the only EU institution summing up and interpreting this case law is the Commission, in soft law documents.

on equal treatment, non-discrimination, transparency and the free movement of persons, it seems that the Directives interpret NESGIs as services regulated and organised in a Member State in such a manner that their operation is not economic for the purpose of EU competition rules, even if this service, in theory or given its regulation in other Member States, *can be* economic and therefore is covered by EU free movement rules. Yet the examples named in these recitals shed very little light on which services are actually meant (what do "compulsory social services" and other services such as postal services" have in common?) and there is no indication whatsoever in these recitals on the criteria which may be decisive for a service to be classified as SGEI or NESGI. This disastrous lack of legal certainty on what NESGIs actually are, may explain the introduction of recitals of the Public Sector Directive and the Utilities Directive, stressing that the provision of services based on laws, regulations or employment contracts should not be covered by the Directives.[1112]

As already mentioned, the exceptions for in-house arrangements and public-public cooperation arrangements have been codified in the new Public Sector Directive and the new Utilities Directive.[1113]. While this novelty is already subject to abundant scholarly attention, the purpose here is only to draw attention to elements betraying the EU legislator's awareness of the connection between these exceptions and the Treaty principles on SGEIs.[1114] The conditions of application of the in-house exception have been extended compared to those established by the CJEU. The Directives allow direct private capital participation in the controlled legal person on the condition that it takes non-controlling and non-blocking forms, is required by national legislative provisions in conformity with the Treaties, and does not exert a decisive influence on the controlled legal person.[1115] The conditions of application of the rule on cooperation between public authorities are also more "generous" in the Public Sector Directive than the conditions required by the CJEU in case law, as they do not preclude the participation of a private part.[1116]

As underlined by Wiggen, the latter change is rather significant, not only as compared to the existing case law, but also to the Commission's proposal, and she explains that, "to soften the blow", the Commission's proposal to add an activity criterion similar to the in-house exemption has been retained, implying that the participating contracting

[1112] Recital 5 of the 2014 Public Sector Directive and Recital 7 of the 2014 Utilities Directive, which provide examples of services not covered because their provision is based on laws, regulations or employment contracts: regarding the public sector "certain administrative and government services such as executive and legislative services or the provision of certain services to the community, such as foreign affairs services or justice services or compulsory social security services" and regarding the utilities sector "in some Member States/…/the provision of certain services to the community, such as the supply of drinking water."

[1113] "Public contracts between entities within the public sector" under Article 12 of the 2014 Publc Sector Directive and "contracts between contracting authorities" under Article 28 of the 2014 Utilities Directive.

[1114] See in particular Burgi M., 2014; Janssen W. A., 2014; Wiggen J., 2014; FIDE General Report on Public Procurement Law, 2014.

[1115] Article 12(1)(c) of the 2014 Public Sector Directive and Article 28(1)(c) of the 2014 Utilities Directive .

[1116] Recital 32 of the 2014 Public Sector Directive clarifies namely that "contracting authorities such as bodies governed by public law, that may have private capital participation, should be in a position to avail themselves of the exemption for horizontal cooperation".

authorities perform on the open market less than 20 % of the activities concerned by the cooperation.[1117] In the legislative negotiation, concerns of an increased risk of competition distortion have had to be measured against a need of increased flexibility for mixed capital contracting authorities. The result tells us that "some argument" gave the upper hand to flexibility concerns, and it is argued here that the SGEI character of the missions pursued by the cooperation may have been implicitly decisive, because it has constitutional support in Article 14 TFEU.

This is probably an explanation which the Commission would not easily agree on, given its implications, but there is an indicium that the concept of SGEI has been in the EU legislators' head when drafting the provision on cooperation between public authorities. The first condition required for the application of this exemption is namely in both Directives that

> [T]he contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that *public services* they have to perform are provided *with a view to achieving objectives they have in common.*[1118]

This criterion is unmistakably close to the principle formulated in Article 14 TFEU, namely that conditions under which SGEIs operate must be designed in a manner which enables the missions pursued by the SGEI to be achieved. However, the notion of "public service task" in the first criterion formulated in *Commission v Germany* and *Lecce* is replaced in the Directives by the combination of the terms "public service" and "objectives", which tones down the idea contained in the notion of public service task, that the public authorities are under an obligation to achieve the same type of mission, instead of simply having a common "objective". It is submitted that, as every word of this provision must have been balanced on a gold weighing scale, the terminology difference is surely deliberate.[1119]

In sum, the EU legislator – and principally the Commission – has registered the signal from the CJEU: Article 14 TFEU applies to EU procurement rules, but a cautious terminology is used in order to keep this acknowledgement as implicit as possible, so that the concept of SGEI cannot be understood as "too broad".

[1117] Article 12(4)(c) of the 2014 Public Sector Directive and Article 28(4)(c) of the 2014 Utilities Directive. See Wiggen J., 2014, *Directive 2014/24/EU: the new provision on co-operation in the public sector*, Public Procurement Law Review, 2014 Issue 3, p. 91.

[1118] Article 12(4)(a) of the 2014 Public Sector Directive and Article 28(4)(a) of the 2014 Utilities Directive, emphasis added

[1119] It is important to note the difference between the notion of "public service" in these provisions and the notion of "public tasks" used in Article 1(6) of the 2014 Public Sector Directive establishes that "Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of *public tasks* between contracting authorities or groupings of contracting authorities and do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive."

11.1.3 Lighter procurement regime for social services: implicit acknowledgement of their SGEI missions

A very important novelty in the new procurement directives is the introduction of procedures for the procurement of social services and a number of other services, which belonged to the group of non-prioritized "B-services" in the old Directives. A simplified regime has however been considered appropriate for what is characterised in the Directives as "social and other specific services", with a higher threshold than other services (EUR 750 000 for public service contracts).[1120] Under that threshold, such services are regarded as typically lacking cross-border interest, unless there are concrete indications to the contrary, and no EU rules apply. Above the thresholds, the EU rules imply that contracting authorities or entities awarding social service contracts or social service concessions must publicise *ex-ante* their intention to award contracts and publicise *ex post* contract award notices informing on the results of the procurement procedure.[1121]

These minimal EU rules are accompanied by EU law "principles of awarding contracts", which the Member States must respect in determining their national procurement rules applicable to these services. These principles, formulated in the Recitals of the Concessions Directive[1122], but are subject to specific provisions in the Public Sector Directive and the Utilities Directive, where they read as follows:

> Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable *as long as* such rules allow contracting authorities to take into account the specificities of the services in question.[1123]

[1120] Articles 74-77 of the 2014 Public Sector Directive, Articles 91-94 of the 2014 Utilities Directive, Article 19 of the 2014 Concessions Directive. Article 4(d) of the 2014 Public Sector Directive, apply to a list of services found in Annex XIV of the Public sector Directive, Annex XVII of the Utilities Directive, and in Annex IV of the Concessions Directive.

[1121] Article 75 of the 2014 Public Sector Directive, Article 92 of the 2014 Utilities Directive and Articles 19, 31(3) and 32 of the 2014 Concessions Directive.

[1122] Recital 53 of the 2014 Concessions Directive, which reads: "An obligation to publish a prior information notice and a concession award notice of any concession with a value equal to or greater than the threshold established in this Directive is an adequate way to provide information to potential tenderers on business opportunities, as well as to provide information to all interested parties on the number and type of contracts awarded. Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for those services, aimed at ensuring compliance with the principles of transparency and equal treatment of economic operators, while allowing contracting authorities and contracting entities to take into account the specificities of the services in question. Member States should ensure that contracting authorities and contracting entities are allowed to take into account the need to ensure innovation and, in accordance with Article 14 TFEU and Protocol No 26, a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of users' rights."

[1123] Article 76(1) of the 2014 Public Sector Directive and Article 93(1) of the 2014 Utilities Directive, emphasis added.

The freedom to determine procurement rules for social services is thus constrained by

a. The principle of transparency
b. The principle of equal treatment of economic operators
c. A condition ("as long as") – or given the title of the provision rather meant as a principle – that contracting authorities must be enabled to take account of the *specificities* of the services in question".

As national legislators may wonder which "specificities" are meant by the first paragraph of this provision, it appears that the second paragraph of these provisions is meant as provide some precision. This paragraph reads as follows:

> Member States *shall* ensure that contracting authorities *may take into account the need* to ensure *quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation*. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.[1124]

The relation between the two paragraphs of this provision is unsure, but it is easy to discern the connection between the provision and the SGEI principles in the Treaties, in particular the enumeration of specific SGEI elements in Article 1 of the SGI Protocol. In fact, the relation between the provision and SGEIs is eminently ambiguous and is commented further below, in light of the recitals underpinning it.

Let us however first focus on social security services, for which the connection between the Directives rules and the Treaty principles on SGEIs is most explicit. The three Directives contain namely the following provision:

> This Directive does not affect the way in which the Member States organise their social security systems.[1125]

This provision is reinforced by recitals stating that the Directives should not affect the social security *legislation* of the Member States.[1126] The connection of this rule with the CJEU's formula on retained powers is clearest in the Concessions Directive, where it is established under the title "freedom to define SGEIs" and embedded in a provision specifying that the Directive does not affect the freedom of Member States to define, *in conformity with Union law*, what they consider to be SGEIs, how those services should be organised and financed, in compliance with the State aid rules, and what specific

[1124] Article 76(2) of the 2014 Public Sector Directive and Article 93(2) of the 2014 Utilities Directive. This is also stressed in Recital 53 of the 2014 Concessions Directive.

[1125] Article 1(5) of the 2014 Public Sector Directive and of the 2014 Utilities Directive, Article 4(1) of the 2014 Concessions Directive.

[1126] Recital 6 of the 2014 Public Sector Directive, Recital 8 of the 2014 Utilities Directive, and recital 7 of the 2014 Concessions Directive.

obligations they should be subject to.[1127] Attention may be drawn here to the repetition of the Recitals' stance that Member States are free to organize services as SGEIs or NESGIs or as "a mixture thereof", in a footnote (1) included in the Annexes listing social and other services covered by the Directives' lighter regimes. It is important to note that this footnote indicates that services marked with that note are not covered by the present Directive where they are organised as non-economic services of general interest, but that the only services referring to this footnote in the lists are compulsory social security services. Thus, these services seem to be the only ones for which the Directives *seriously* envisages the "very specific specificity" that they may be NESGIs, and this footnote is at odds with the assertion that Member States are "free to choose".

Regarding second "certain social, health and educational services", the connection between their "specificity" and the Treaty provisions on SGEIs is treated separately from social security services in the Directives' preambles, where they are categorised as "services to the person". The specific regime applying to "services to the person" (but actually also to other "specific services") is motivated in recitals to the Directives by their provision in "a particular context that varies widely amongst Member States, due to different cultural traditions". "The importance of the cultural context and the sensitivity of these services" is explained in the recitals to motivate that the Directives' rules "take account of the imperative"

- to give Member States a *wide discretion to organise* the choice of the service providers in the way *they* consider most appropriate
- to make sure that contracting authorities are able to apply specific quality criteria for the choice of service providers[1128]

It is simply impossible not to interpret those recitals as an implicit acknowledgment by the EU legislator that the principle formulated in Article 14 TFEU and interpreted by the SGI Protocol have constrained its legislative approach and choices, in particular because Member States are required in those recitals *to take Article 14 TFEU and Protocol No 26 into account when determining the national procedures* to be used for the award of contracts for services to the person.

Discreetly but rather logically, the Member States are reminded that if there are SGEI missions in their legal systems, their achievement should not be obstructed by inappropriate national procurement rules. It is argued that this supports the view that procurement rules are relevant for *contracting authorities*' SGEI missions, and that SGEIs exist before they are entrusted. At the same time, it is also evident that the EU legislator avoids evoking SGEI missions as the rationale of its own duty to give Member States a wide discretion in the organisation of the choice of providers. Possible reasons for this avoidance have already been submitted (se chapter 10) and therefore not repeated here. What is important to note is that the new procurement directives in fact strive at

[1127] Article 4(1) of the 2014 Concessions Directive.

[1128] Recital 114 of the 2014 Public Sector Directive, Recital 120 of the 2014 Utilities Directive, and Recital 53 of the 2014 Concessions Directive.

harmonising social services, by avoiding the concept of SGEI and using instead the term "specificities" in the provision on awarding principles for social contracts, thereby "incorporating" SGEI elements.

If the provision on principles of awarding contracts in the Public Sector Directive is understood correctly, Article 76(2) indicates to Member States how fulfil the principle in Article 76(1) and ensure that their procurement rules allow contracting authorities to take care of social services' "specificities". "Specificities" seem thus to correspond to conditions that contracting authorities may have to ensure. The Directives do not clarify at which governance level the "*needs*" mentioned by Article 76(2) should be defined and in what form, but the word "may" in the locution "ensure that contracting authorities *may* take into account the *need* to ensure*"* in the second paragraph suggests that the contracting authorities have voluntary or compulsory social service missions to achieve (in other words, public service tasks imposed on public/contracting authorities by law or decided by public/contracting authorities in the frame of their competence). In the specificities of social services, there is not only a place for the characteristics enumerated (non-exhaustively) in the SGI Protocol, but also for *including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation*. The latter criteria seem to promote a more residual welfare approach (the vulnerable and the disadvantaged, as in social housing), or an approach favouring users' free choice of welfare services (through their "empowerment"). Thus, in requiring that contracting authorities are allowed to take into account social services' "specificities", the EU legislator invites the Member States to put in the balance not only their existing SGEI regulation, but also policy elements which are more compatible with a trade in social services.

It is also worth noting that, in taking Article 14 TFEU and Protocol No 26 into account, and according to the Public Sector Directive's and the Utilities Directive's recitals,

> Member States should also pursue the objectives of simplification and of alleviating the administrative burden for contracting authorities and economic operators; it should be clarified that so doing might also entail relying on rules applicable to service contracts not subject to the specific regime.[1129]

If correctly understood, this may be a message that when taking Article 14 TFEU into account, in other words when establishing principles and conditions enabling SGEIs in the field of social services to achieve their missions, the Member States should keep in mind the principle of proportionality in the balance between the public service missions and the interest of opening the markets of social services to competition (a principle which in the Treaty framework on SGEIs seems inherent to Article 106(2) TFEU rather than to Article 14 TFEU). Also, regarding quality criteria for the choice of service providers, Member States are invited in these recitals to use the criteria set out in the voluntary European Quality Framework for Social Services, published by the Social

[1129] Recital 114 of the 2014 Public Sector Directive, Recital 120 of the 2014 Utilities Directive.

Protection Committee Member States (SPC).[1130] SPC being an EU advisory policy committee, its approach is to a large extent a *European* approach to social services.[1131]

These elements – encouraging Member States to adopt procurement rules alleviating the administrative burden for contracting authorities and economic operators, promoting the use of the European Quality Framework on social services, and adding to the criteria enumerated in the SGI Protocol other criteria for social services entrusted through procurement – are typically policy elements. They can certainly find support by the EU legislative instances, but it is striking that they are introduced through market harmonising EU directives, especially inasmuch as they may have an impact on the Member States' definition and organisation of SGEIs in the field of social services. Indeed, the EU legislator seems perfectly aware that Article 14 TFEU and the SGI Protocol cover EU – and national – procurement legislation, and the Member States are invited to adopt procurement rules which allow the SGEIs contained in their own legal system to achieve their missions. However, it seems clear that in the field of social services, the EU legislator is decided to "show them the way" outside the "SGEI frame".

While the Union is undeniably empowered to harmonize procurement rules on the basis of Article 114 TFEU, it has still very limited policy powers in the field of social services. As Article 9 TFEU may hardly justify that Union law imposes on the Member States to take account of the "specificities" of social services in their *national* procurement rules, the only provision able to give legitimacy to such a principle of awarding contracts appears to be Article 14 TFEU. However, acknowledging too explicitly that Article 14 TFEU is relevant for national procurement rules on social services is problematic because it means that it is *a priori* relevant for the EU rules and may pose the question of the legal basis of the EU procurement rules. It may also be problematic if it tends to cement SGEIs which EU institutions, in particular the Commission, may wish that Member States themselves liberalise.

In sum, the contract awarding principles imposed on the Member States in implementing the EU procurement rules related to social services show that the EU legislator acknowledges the applicability of Article 14 TFEU to EU procurement rules related to these services. It seems clear that concerns of market opening, but also of market integration have led the EU legislator to tone down the fact that the lighter regime is

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1130 A Voluntary European Quality Framework for Social Services, The Social Protection Committee, SPC/2010/10/8 final.

1131 The policy frame of the Voluntary European Quality Framework for Social Services builds in particular on arguments of growing financial constraints, cost-effectiveness, individual preferences, and growth potential. It holds in particular that "[a]s most social services are highly dependent on public funding, a consensus on the quality of social services in the present context when public authorities in the Member States are exposed to growing financial constraints will help policy-makers to prioritise investments that promote continuous development of both quality and cost-effectiveness of social service provision." (p. 1), that "the cross-border provision of social services, presently very limited but expected to grow, in particular in the area of long-term care, will call for a greater level of service comparability and transparency, as well as for new forms of protecting both users and workers" (p. 2) and that "**™**]he service provision should empower users to define their personal needs and should aim to strengthen or maintain their capacities while retaining as much control as possible over their own lives." (p. 7).

constitutionally justified by the SGEI-character of the services. In implementing the new Directives, Member States are not explicitly required to allow their contracting authorities to take account of social services' SGEI missions, but instead of social services' "specificities", which include more, and more market-friendly, service conditions than those enumerated in the SGI Protocol. This implies that, in the field of social services, the new procurement directives put a low pressure on the Member States to identify SGEIs in their systems. It also implies that EU procurement rules applying to social services do not focus on competition concerns.

11.2 Commission's state aid rules on public service compensation of social services

The Member States' freedom to give economic or financial support to undertakings in the internal market is restricted by the central state aid rule in Article 107(1) TFEU, providing that

> Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

The objective of this Treaty provision is to prevent trade between Member States being affected by advantages granted by the public authorities which distort or threaten to distort competition.[1132] Given the CJEU's wide interpretation of the concept of undertaking, and the public turn of EU's competition policy, this provision came in frontal collision course with the public funding of public service missions in national welfare systems, and in that way could paradoxically stand in the way of liberalising welfare systems by externalising provision. As a Treaty provision making public funding of social services a "persona non grata" on the internal market was at a certain stage of the development of EU law politically intolerable, the *Altmark* ruling has been welcome as a "deus ex machina" providing an EU market law test of this type of funding and apparently useable in any field of activity. Its core is evidently the principle of proportionality, supported by the principle of transparency, and its enormous political dimension lies in the promotion of public procurement procedures as a privileged instrument to avoid over-compensation and ensure proportionality. Governance through contracts was offered as a way to escape the bureaucracy and incertitude of EU centralised state aid notification procedures.

[1132] See Case C-173/73 *Italy* v *Commission* 119741 ECR 709, para.26. Opinion of AG Léger of 19 March 2002 in Case C-280/00 *Altmark* [2003] ECR I-7747, para.77.

The *Altmark* ruling was particularly welcome because the Treaties do not offer many instruments to solve the tension between public funding of social services and market interests. Baquero Cruz has aptly pointed at the limited functionality of the exemption rules in Article 107(2) and (3) TFEU in justifying aid to the provision of social services otherwise prohibited by Article 107(1) TFEU.[1133] This explains that the Commission did not hesitate to use its powers pursuant to Article 106(3) TFEU and Article 108(3) TFEU, and build up on the basis of the CJEU's criteria in the *Altmark* ruling a first legislative package on the application of state aid granted to undertakings entrusted with the operation of SGEI. This first SGEI Package, known as the "post Altmark package" or "Monti package", and called here the "2005 SGEI Package", was replaced in 2011 by the 2011 SGEI Package, also known as "Almunia package".

11.2.1 Social services in the 2005 SGEI Package

By building the 2005 SGEI Package on the basis of the *Altmark* ruling, the Commission's aim was to enhance the legal certainty for Member States' funding of public services. The Commission believed that many public service provision schemes did not fulfil the Altmark criteria, and that providers faced a risk of litigation on the legality of compensation payments received, as these payments had not been notified prior to implementation.[1134] The 2005 SGEI Package consisted of three documents: a Decision – hereinafter the "2005 SGEI Decision" – specifying the conditions under which compensation would be compatible with Article 86(2) EC and not subject to the prior notification requirement of Article 88(3) EC, a Framework – hereinafter the "2005 SGEI Framework" – spelling out the conditions under which State aid could be found

[1133] Baquero Cruz J., 2013, p. 296-300. Article 107(2)(a) TFEU, which allows aid having a social character granted to individual consumers, seems to be interpreted by the Commission as covering services. The provision is arguably of no use in case of qualified market failure, but may be of interest to address equity concerns on existing markets. In the latter case, Baquero Cruz holds that the provision can be used to finance provision of social services, but normally in combination with public service obligations and subject to tariff regulation. Article 107(3)(a) and (c) TFEU may allow to justify aid to providers of social services, but "to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment" (Article 107(3)(a) TFEU, for instance employment and training aid) or "to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest (Article 107(3)(c) TFEU, for instance regional aid schemes or rescue and restructuring aid schemes). Thus, under these exemptions, the aid's main concern must be to protect or create employment. Baquero Cruz noted that the Commission had approved on the basis of Article 17(3)(c) TFEU a Swedish aid scheme aimed at encouraging the construction of elderly housing in Northern Sweden. Indeed, in decision SA.33896 (2011/N), the Commission examined a scheme notified by Sweden, aimed at offering a financial incentive to property owners to construct special housing for elderly people, in the face of "a growing *demand*". The Commission raised no objections, finding the scheme compatible with the internal market as "aid to certain economic sectors" under Article 107(3)(c) TFEU, thereby accommodating the Swedish government's choice not to rely on Article 106(2) TFEU to motivate an aid scheme for elderly housing in a scarsely populated area.

[1134] Commission, "Commission proposes new rules to increase legal certainty for services of general economic interest" (Press Release of 18 February 2004) IP/04/235, available at http://europa.eu/rapid/press-release_IP-04-235_en.htm?locale=en.

compatible with the common market pursuant to Article 86(2) EC, and the Transparency Directive.[1135]

Both the 2005 SGEI Decision and the 2005 SGEI Framework distinguished between two basic alternatives allowing SGEI compensation to comply with the Treaty rules on state aid:

- In the first "Article 107(1) TFEU alternative", public funding fulfilling the four Altmark criteria was strictly limited to the amount needed to compensate an efficient operator, did not constitute state aid, and therefore did not have to be notified.

- In the second "Article 106(2) TFEU based alternative", a measure compensating undertakings for the costs of SGEI tasks but not fulfilling the fourth Altmark criterion (often called "the efficiency criterion") *could involve some distortion of competition* contrary to Article 107(1) TFEU but could be compatible with the Treaties, as *the distortion could be justified on the basis of Article 106(2) TFEU*.

The 2005 SGEI Decision applied (1) to annual public service compensation of less than EUR 30 million to SGEI providers with a turnover of less than EUR 100 million per year, as an average over the two years preceding the assignment of the SGEI, (2) public service compensation of air and maritime links to islands and to ports and airports with limited amounts of passengers, and (3) to hospitals and social housing[1136], regardless of the aid amounts. Aid within that scope was exempted from notification on the following conditions (which did not have to be fulfilled if the aid was covered by the general de minimis rule):

a. There had to be an act of entrustment by way of one or more official acts, specifying the nature and duration of the public service obligations (PSO), the undertaking and the territory concerned, the nature of any special and exclusive rights involved, the parameters for compensation and a recoupment mechanism for overcompensation.

b. Compensation had to be limited to the costs necessary to discharging the public service obligations (PSO costs) plus a reasonable rate of return. The PSO costs

[1135] Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2005] OJ L 312/67; Community framework 2005/C 297/04 for State aid in the form of public service compensation, [2005] OJ C 297/4; and Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, [1980] OJ L 195/35.

[1136] The exemption concerned more precisely "hospitals providing medical care, including, where applicable, emergency services and ancillary services directly related to the main activities, notably in the field of research, and undertakings in charge of social housing providing housing for disadvantaged citizens or socially less advantaged groups, which due to solvability constraints are unable to obtain housing at market conditions", see Recital 16 in Commission Decision 2005/842/EC.

covered all variable costs incurred in providing the SGEI, a proportionate contribution to fixed costs common to both SGEI and other activities and a reasonable profit; the costs linked with investments necessary for SGEI operation

c. Regular checks on overcompensation had to be carried out, with an obligation for undertakings to repay any overcompensation received, and a possibility to carry forward to the next year overcompensation not exceeding 10% of the amount of annual compensation.

As observed by Sauter, the 2005 SGEI Decision was in effect a Block Exemption, and the three conditions a-c above could be regarded as expressing the principle that aid had to be justified by an objective task, necessary for fulfilling this task and proportional to the costs incurred for the task.[1137] In substance, it seems that the alternative for Treaty compliance of PSO compensation designed by the Commission in its 2005 SGEI Decision, exempted the fourth criterion of efficiency of the "Article 107(1) TFEU alternative" in the *Altmark* ruling, but "in exchange" specified the first criterion in a manner that brought the substantial conditions in the "Article 106(2) TFEU alternative" much closer to public procurement's classical elements: a specification of what is funded, award criteria set in advance transparently, official documents (which may be a contract) objectifying the PSO arrangement, its "duration" and its conditions of operation for the specific provider(s). Seen in that perspective, the 2005 SGEI Decision was rather clearly initiating a process of material convergence between state aid rules and procurement rules for certain SGEIs, in particular for social services.

11.2.2 A first state aid package but much legal uncertainty emerging from the Commissions' decision practice on state aid in the field of social services

The Commission has taken relatively few state aid decisions related to public financing of social services. A number of them in the fields of health care insurance services, medical services, and education services are examined in this section, as they illustrate how difficult it is for the Commission to state in clear terms what makes an activity economic for the purpose of state aid rules. The second area of legal uncertainty follows from the Commission's approach in assessing the proportionality of public measures destined to secure the financing of SGEIs in the field of social services.

[1137] Sauter W., 2014, p. 10. It may be interesting to note that, under point 167 of the state aid *IRIS-H* decision – NN54/2009, commented on in section 11.2.2.1 and 11.2.2.2 – the Commission gave a picture of how the material criteria of its 2005 SGEI Package relate to the conditions formulated in case law for public service compensation to comply with the proportionality principle in Article 106(2) TFEU.

11.2.2.1 Determining whether the activity is economic for the purpose of state aid: the Commission's practice

In the following, the Commission's approach in assessing whether the activity of the social service provider is economic is examined by sectors.

Health insurance schemes

In the "easy" *BUPA* case, there was no doubt at all that private medical insurers covered by the risk equalization scheme at issue conducted an economic activity. By contrast, the economic character of the activity at issue was less straightforward in the *Zorgverzekeringswet* case. Van de Gronden observes that in the Commission's reasoning, the decisive criterion to find that the Dutch insurance companies constituted undertakings was that were allowed to aim for-profit.[1138] According to van de Gronden, the Commission built on the CJEU's finding in *AOK* that profit making should be regarded as a significant condition for applying the concept of undertaking. Unfortunately, the Commission Decision in *Zorgverzekeringswet* is only available in Dutch, a language that the author of this study does not understand. However, while the profit-making character of the entities at issue in *AOK* was indeed relevant in that case, it was not to conclude that they were undertakings but to the contrary, to underline that, although these entities had to seek profit, they were not undertakings, because (1) they were required to seek profit by law and (2) they equalized their profits and thus profit-making had nothing to do with economic competition, in other words they they did not operate on a market. Thus, contrary to van de Gronden's view, it is argued here that "profit" did not make any return in *AOK*, as it seems that the Court had never denied that, whilst for-profit is not a requisite for an entity to constitute an undertaking, for-profit can constitute an *indicium* that the entity's activity is economic.[1139] Van de Gronden observes that the Commission gave also weight to the fact that the Dutch health insurance companies were able to influence the rates of the contributions and to determine the level of benefits granted to insured persons, a criterion of autonomy quite in line with the findings on the essential criteria used by the CJEU to determine the economic character of an activity in "difficult cases", see the conclusions of chapter 4 of this study.

Medical and hospital services

The *IRIS-hospitals* decision has already been evoked, as it was at issue in the *CBI* ruling discussed in section 8.1.3.5. Let us rapidly remind here that the case concerned the complaint of two associations representing private hospitals against the Belgian State for

[1138] Commission Decision of 22 December 2005 on the introduction of a risk equalisation system in the Dutch Health Insurance (Netherlands) in cases N541/2004 and N542/2004 – C (2005) 1329 final.

[1139] Van de Gronden J. W., 2009b, p. 13.

alleged illegal and incompatible aid to the IRIS-hospitals in the Brussels region.[1140] The IRIS-hospitals operated alongside with private hospitals in the Brussels region. Both public and private hospitals were publicly funded on the same basis, but the public IRIS-hospitals benefitted from additional financing measures related to specific missions which were not imposed on the private hospitals. In this decision, the Commission found that IRIS hospitals constituted undertakings subject to the Treaty rules on state aid. It observed first that the hospital healthcare being almost free of charge in Belgium did not exclude that hospital care could also be provided for remuneration by private operators in that Member State. The Court referred to the comparative criterion applied in *Glöckner*, where it had found that providers of ambulance services for remuneration from users and on a market constituted undertakings, regardless of the fact that their public service obligations could render the service less competitive.

Thus, while Sauter and van de Gronden have a point in holding that the decision *took into account* the argument of potential competition in accordance with Glöckner. However, it seems that the Commission did not regard the comparative criterion in *Glöckner* as sufficient, but instead found decisive that private entities *de facto* provided similar hospital care on the Belgian market. The Commission recalled namely that in *Smits and Peerbooms* the CJEU considered that for public hospitals, payments received from public authorities constituted remuneration, regardless of the fact that fees received from patients are very low or inexistent.[1141] As clear from the French text, the Commission seemed to consider that *Smits and Peerbooms* gave support for its argument that public IRIS-hospitals were remunerated and pursued an economic activity, because private hospitals in Belgium provided similar services.[1142] Yet in *Smits and Peerbooms*, the Court did not explicitly state that public hospitals conducted an economic activity under the scheme at issue *because private entities were allowed to provide the same service*, but instead that they could be seen as receiving remuneration when providing services *under the contractual arrangements* with the sickness funds. As argued in section 3.2.1.3, the formulation in *Smits and Peerbooms* suggested that their margin of negotiation regarding the economic conditions for providing the service had relevance.

[1140] Commission Decision of 28 October 2009 on the Public financing of Brussels public IRIS hospitals (Belgium), **in case** SA.19864 (2014/C) (ex NN54/2009).

[1141] Ibid, point 109.

[1142] Ibid, points 108-109. The Commission's reasoning is worth quoting: "Sur base des arguments développées par la jurisprudence et rappelés ci-dessus, les financements que peuvent recevoir les H-IRIS par le biais de diverses allocations des autorités publiques centrales ou locales peuvent être analysés comme constituant la contrepartie économique des prestations hospitalières fournies, au même titre que les financements accordés par le biais des caisses maladies et autres organismes publics octroyant des fonds de manière similaire. Tel que mentionné par la Cour, le fait que par ailleurs le montant des paiements faits par les patients soit nul ou faible ne saurait altérer cette analyse (footnote omitted).*En l'espèce*, les activités principales des H-IRIS sont des activités hospitalières consistant dans la prestation de soins de santé médicaux, de services d'urgence et de services auxiliaires directement liés. Ces activités hospitalières prestées par les H-IRIS sont *également fournies par d'autres types d'organismes ou entités*, parmi lesquels des cliniques, des hôpitaux privés et d'autres centres spécialisés, *dont les hôpitaux privés plaignants*. *Dès lors*, ces activités hospitalières prestées par les H-IRIS doivent être considérées comme économiques (footnote omitted and emphasis added)."

The Commission's approach in *IRIS-hospitals* shows how difficult it is to be sure on how the succinct paragraph in *Smits and Peerbooms* should be interpreted. The central question is whether, in the absence of formal contractual arrangements, the public character of an entity and the decisional autonomy it disposes of in relation to the public authorities funding it may have any relevance to determine whether its activity is economic. It seems that the Commission's answer to that question is "no", as in the *IRIS-H* decision, the funding of hospitals was largely based on statutory and administrative decisions which hospitals could apparently not influence.[1143] In any case, having thus concluded that IRIS-hospitals conducted an economic activity, the Commission saw a need to "top" its argumentation on the more "orthodox" basis of competition cases *FENIN*, *FFSA* and *Albany*. As AG Poiares Maduro in *FENIN*, the Commission made a distinction between the management of the national healthcare system, an activity which it regarded as including the exercise of powers typical of public authorities, and healthcare service provision. The latter could be regarded as economic in the case, in spite of solidarity elements, because private hospitals provided services similar – although perhaps not identical – to those provided by the public hospitals.[1144]

In Hancher and Sauter's perception, "the Commission found that in view of established case law, the economic nature of the hospitals' activities was *without doubt* (footnote omitted and emphasis added)".[1145] Although the authors' footnote is omitted, it is worth particular attention, in light of their assertion that the Commission "held no doubt". It is quite possible that the Commission held no "legal" doubt, as the authors note rightly that the Commission referred to CJEU's competition law – *Enirisorse*, *Höfner*, *and Pavlov* – reflecting its functional approach of the notion of undertaking. However, and interestingly, the authors omit mentioning that the Commission also felt a need to refer rather extensively to *Smits and Peerbooms,* which shows its awareness that its decision was politically sensitive. The Commission's combined references to free movement and competition case law follows from the scarsity of rulings regarding the criteria of applicability of EU competition rules in the field of social services. Faced with a case dealing with services which are in the policy competence of the Member States, the Commission felt arguably a need to ensure the full legitimacy of its decision. It did not simply apply the comparative test and the functional approach of *Höfner*, but also seeked *legitimacy* support for its assessment in free movement case law. It did so by evoking the

[1143] In the Belgian hospital system described in the IRIS-H decision, both public and private hospitals had mostly an identical public financing, in particular through payments from sickness and invalidity insurance funds (see points 28-30), and through budgets covering their running costs and decided by the Ministry of Social Affairs according to rates decided by law and laid down in ordinations (see points 33-40). Thus as a whole, in the Belgian system, it seems that public financing to any hospital was largely based on unilateral conditions set by the State rather than on "contractual arrangements". While private hospitals could express their decisional autonomy by seeking agreement, thereby establishing a kind of "non-contractual but bilateral arrangement" with public authorities, it is less clear whether the public hospitals had such an autonomy and whether their financing could come close to any "bilateral arrangement". Another thing is that the additional SGEI tasks for which public IRIS hospitals received compensation were entrusted through *conventions* with public bodies for social action (with some decisional autonomy on the part of these hospitals).

[1144] Ibid, para.110.

[1145] Hancher L. and Sauter W., 2013, p. 259-260. In this paper, the authors conduct a in-depth discussion of the case.

very elliptic obiter dictae in *Smits and Peerbooms*, which it unfortunately interpreted in a manner that is not unquestionable.

In any case, the Commission seems to share the view submitted in chapter 4 that a service is not offered "on a market" unless it can be regarded as provided – not "normally" but *de facto* – for remuneration. In fact, the Commission's decision in *IRIS-hospitals* gives support for the view that "for remuneration" in the field of free movement and "on the market" in the field of competition law mean substantially the same thing. The Commission's decision was annulled by the GC on the request of the association of private healthcare entities.[1146] The GC considered namely that, in presence of serious difficulties in the examination of the case at issue, the Commission should have engaged a formal procedure in accordance with Article 108(2) TFEU. However, the GC confirmed the Commission's conclusion that the public IRIS-hospitals constituted undertakings.

Having underlined the particular nature of hospital services, which motivates a flexible application of the *Altmark* ruling reflected in the 2005 SGEI Decision, the GC held firstly the hospital sector does not necessarily have such a competitive and commercial dimension.[1147] Also, the GC recalled its finding in *FENIN* that when a national healthcare system is organized in accordance with the principle of solidarity, by its mode of financing and by providing services free of charge and on the basis of universal coverage, the bodies managing the system do not act as undertakings. The GC considered that this finding was taken into account in the Commission's decision, as it rightly made a distinction between the activity of "healthcare system management" conducted by public bodies exercising powers specific of public entities[1148] and the activity consisting in the provision of healthcare services.[1149] Importantly, the GC did not question the fact that the Commission had reached its conclusion through "crossover reasoning", i.e. by combining the CJEU's analytical elements in free movement case law and competition case law. Unfortunately, the GC did not seize this opportunity to give its view on whether in the field of social services, public operators' lack of autonomy in relation to the public authorities funding them may have any relevance for the economic character of their activity, or whether the fact that private entities may offer similar services also publicly funded, is wholly decisive.

College and kindergarten services

In the *Prerov* decision, the Commission found that the city of Prerov's financial contribution to a college for tertiary education situated on its territory, destined to purchase educative equipment, did not constitute state aid in the meaning of Article 87

[1146] Case T-137/10 *CBI* (GC 7 November 2012).

[1147] Ibid, paras.86-89.

[1148] The link between the degree of solidarity in a system and the exercise of public authority in its management is not studied here.

[1149] Case T-137/10 *CBI* (GC 7 November 2012), para.91.

EC (now Article 107 TFEU), on the basis of *two alternative grounds*.[1150] First, the Commission argued that EU state aid rules did not apply because the college's activity was not economic, referring to definitions in competition case law: the *Höfner*'s definition of an undertaking, completed by the *Pavlov* definition of an economic activity as "the offer of goods or services on the market".[1151] However, the Commission did not complete its argumentation on the basis of the *Poucet and Pistre* case law on activities fulfilling an exclusively social function, applied by the CJEU in the sectors of social security. Given the lack of case law on the applicability of EU competition rules to education, the Commission chose instead to refer to the Court's stance in *Humbel* that "courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services within the meaning of Article 59 of the EEC Treaty [now Article 56 TFEU], properly construed".[1152]

This led the Commission to conclude that the college did not conduct any economic activity but "pursued an educational role of general interest activity" and acted "under the national education system", as it had been granted a state agreement to act as a tertiary technical education establishment and could not perform any other activity separable from this central activity.[1153] Meanwhile, and although it is not clear from the decision, it seems that the college was also financed by private funds. This would explain that the Commission referred to *Wirth*, where the Court of Justice has taken the view that courses provided in establishments financed essentially out of private funds, and which seek to make an economic profit, constitute services in the meaning of the Treaty. In *Prerov*, the Commission considered that the college did not seek to make profits, as possible profits had to be reinvested into the college's central activity. Under such circumstances, it found that its aim was not to offer a service for remuneration.[1154]

Finally, the Commission stated that, even if the college's activity could be seen as economic, the aid granted had no effect on trade, given its relatively small amount (ca EUR 229 000), and the college's local dimension, teaching language, location and size. This shows that the Commission was uncertain on its argumentation to the purpose that the college's activity was non-economic. Also, by transposing the *Humbel* doctrine and the reasoning in *Wirth* in the field of EU competition law, the Commission appears to suppose the equivalence between the requirement that a service is provided for remuneration (economic activity for the purpose of free movement law) and the requirement that an entity offers services or goods on the market (economic activity for the purpose of EU competition law). On this background, interesting state aid cases

[1150] Commission Decision of 8 November 2006 on aid to the Přerov Logistics College (Czech Republic) in case NN54/2006 (C (2006) 5228).

[1151] Ibid, point 14. It is not clear from the decision whether the Czech Republic had ever claimed that the college conducted a non-economic activity.

[1152] Case 263/86 *Humbel* [1988] ECR I-5365, para.20.

[1153] This consideration was important not only to regard the college as covered by the *Humbel* doctrine; it was also relevant to exclude a risk that public subsidization received for a non-economic activity could be used to distort competition in another economic activity.

[1154] Ibid, point 16.

decided by the EFTA Surveillance Authority (ESA) and by the EFTA-Court must be evoked here.

The *Barnehagers* decision was taken following a complaint by the Norwegian Association of Private Kindergartens against Norwegian rules on kindergartens' funding. It was established that, at the time of the complaint, municipalities could secure universal access at reasonable fees, either by running kindergarten services themselves or by giving financial support to non-municipal kindergartens. As a result, both municipal and non-municipal kindergartens were financed by a combination of parental payments and of public subsidies, one principle being equal treatment between municipal and non-municipal kindergartens.[1155] The complaint alleged that financial features in the system, in particular the cost coverage principle, favoured municipal day-care centres, while the Norwegian State argued that this principle was precisely aimed at securing equal treatment of all kindergartens.[1156] In its decision, the ESA adopted a strategy comparable to the Commission's in *Prerov*. It "piled up" alternative grounds motivating that the challenged statutory measures did not infringe EU state aid rules:

a. The municipal kindergartens' activity was not economic

b. The municipal kindergartens activity was economic but the Norwegian scheme did not constitute aid in the meaning of Article 107(1) TFEU as it did not affect trade and

c. The Norwegian scheme included state aid, but kindergartens were entrusted services of general economic interest and the scheme was justified under Article 106(2) TFEU.

To reach the conclusion that the municipal kindergartens's activity was non-economic (ground (a) above), the ESA referred to many concepts and criteria developed in different parts of the CJEU's case law related to the applicability of free movement case law and competition case law to social services. The ESA, considering kindergarten as "pre-school education" part of the national education system and referring to the Commission's *Prerov* decision, regarded the *Humbel* doctrine as relevant for assessing the applicability of EU state aid rules.[1157] However, perhaps because it felt that this argument was weak, the ESA also referred to *Poucet and Pistre*, *Cisal* and *AOK Bundesverband,* and held that *municipal* kindergartens fulfilled an exclusively social function ("their duties towards their own populations in the social, cultural and educational fields") and were

[1155] See EFTA Surveillance Authority Decision No 39/07/COL on public financing of municipal day-care institutions in Norway, p. 5-6. The financing came from parental payments (up to 20% of the cost of services) and public subsidies (50% from the state channeled through the municipalities, and 30% directly from the municipalities).

[1156] Ibid, p. 7-8. The Norwegian State motivated the cost-coverage principle by cost variations between kindergartens caused by e.g. geographical cost differences, personnel education level, children with special needs, and held that granting a lump sum to all kindergartens would not fulfill the objective of equal treatment of all kindergartens

[1157] Ibid, page 9.

financed according to the principle of solidarity.[1158] It was even brought up that in providing kindergarten services, municipalities exercised powers which are typically those of a public authority. On the basis of this pell-mell of arguments, the ESA concluded that "the tasks performed by the municipal kindergartens are of general interest, and not market-based."

The Association of private kindergartens appealed to the EFTA Court, referring to the comparative test in *Höfner* and the fact that it was itself an association of undertakings running kindergartens as an economic activity to argue that kindergartens constituted an economic activity in Norway.[1159] The EFTA-Court dismissed the action, finding *doubtless* that the municipal kindergartens did not constitute undertakings.[1160] It held that the comparative test alone was not decisive as what had to be assessed was "whether the Norwegian municipalities, when offering their kindergarten places, are providing a service as an economic activity or whether they are exercising their powers in order to fulfil their duties towards their population".[1161] In this regard, the EFTA-Court took the view that "the reasoning of the ECJ in *Humbel*, which concerned the notion of "service" within the meaning of the fundamental freedoms, can be transposed to a State aid case such as the one at hand"[1162], the question being whether the municipal kindergartens could be regarded as receiving remuneration for the kindergarten services they provided. Remuneration was absent in the activity of municipal kindergartens in Norway, said the EFTA-Court, because "[t]he parents' fee which constitutes only a fraction of the true costs of the service cannot be qualified as a quid pro quo vis-à-vis the municipal kindergartens, but only as a contribution to a system which is predominantly funded by the public purse. It is therefore clear that the Norwegian State, when establishing and maintaining a system where every child increases the costs incurred, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields".[1163]

[1158] It was underlined that, according to Norwegian law, the municipal kindergartens' activity was entirely non-profit and that their financing was based on the principle of solidarity, as user fees were fixed, not proportional to the cost of the individual service and reduced for parents with more than one child and families with low income demonstrates the principle of solidarity. Ibid, p. 10-11.

[1159] Case E-5/07 *Private Barnehagers*, Efta Court Report 2008, p. 62, para.79.

[1160] Ibid, para.84.

[1161] Ibid, para.80.

[1162] Ibid, para.80.

[1163] Ibid, para.83. Under paragraph 82 the EFTA-Court had particularly emphasized that

- ca 80% of the costs of municipal kindergartens were borne by the public purse
- there was no connection between the actual costs of the service provided and the fee paid by the parents whose child is attending the kindergarten
- the municipalities had a statutory duty to ensure that sufficient places for children below compulsory school age exist for their population
- kindergartens in Norway have important social, cultural, educational and pedagogical purposes

It may be recalled here that in *Commission v Italy*, the Court of Justice established that in the field of competition law, a distinction must be made between the State carrying on economic activities of an industrial or commercial nature by offering goods and services on the market on the one side and on the other side the State acting by exercising public powers.[1163] The EFTA-Court's finding implies a strong correlation between the fulfilment of the states duties towards its own population and the exercise of public powers.

This ruling raises perplexity. First, the EFTA-Court did not see any need to discuss whether the municipalities' planning and financing activities as coordinators and financers for the supply of kindergarten to their population could be separable from their activity as providers of those services. The EFTA-Court did not either explain why, while it found free movement case law in the field of education relevant, it considered the *Poucet and Pistre* competition case law, invoked by the applicants in the case, and referred to by the ESA, irrelevant for its conclusion that municipalities did not pursue an economic activity. Most surprising is the EFTA-Court's statement that the ESA had not failed in not opening a formal investigation procedure because it did not need to entertain doubts on any of grounds (a-c) above.[1164]

A good reason to doubt was namely the *Oslo kindergartens* decision, taken by the ESA some years earlier, where the issue was the municipality of Oslo's subsidies to real estate leasehold contracts granted to private undertakings in order to encourage them to establish and manage day-care facilities, thereby meeting the local *demand* and helping the municipality to fulfil its public service obligations.[1165] The ESA concluded that the support scheme regarding the establishment of private day-care facilities did not constitute State aid within the meaning of Article 61 (1) of the EEA Agreement, as it considered that it had no effect on trade. In the *Oslo kindergartens* decision, the ESA *did not conduct any reasoning* on whether these kindergartens were part of the national education system or on the educational and social aspects of these activities; it simply acknowledged that support in the form of reduced annual leasehold was given to private day-care facility providers, giving them an advantage they would not have enjoyed in the normal course of *business*.[1166] Thus, the ESA found that municipal kindergartens were not undertakings (2007, as part of the national system of pre-school education) but that kindergartens run by private entities but mostly financed by public resources were undertakings[1167], although both public and private kindergartens regarding apparently the same scheme governing a national system.[1168]

On the same path, more recently, the Commission had to examine complaints lodged in 2008 against the privatization of schools, kindergartens and medical centres in the area of Stockholm. It was claimed that in the frame of a school privatization, the

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[1164] Ibid, para.84. The ESA's obligation to open a formal investigation procedure in case of doubts on a national measure's compatibility with state aid rules follows from Article 61(1) EEA, which corresponds to the Commission's obligation under Article 108(2) TFEU. The ESA held that there were several ways trade could potentially be affected. One was that the users of services from other EEA states would be more inclined to use the Norwegian service than the one in other EEA states. A second possible effect was that the support the municipal kindergartens receive would enable them to expand the scope of their services abroad. The third possible effect was that service providers from other Member States would be affected in their actual or potential operation in Norway. See Decision No 39/07/COL p. 12.

[1165] 291/03/COL EFTA Surveillance Authority decision of 18 December 2003 regarding the establishment of private day-care facilities on public sites with subsidized real estate leasehold fees in Oslo (Norway). Not mentioned in the 2013 SGEI Guide.

[1166] Ibid, under section 2.2.

[1167] Indeed, it seems that private kindergartens allowed to provide for-profit, see section 2.3 *in fine*.

[1168] It seems that the rules on financing of public and private kindergartens at issue in the *Barnehagers* case were already in force in the *Oslo kindergartens* decision, as suggested in section 2.5 in the latter decision.

municipalities had sold key assets – in particular goodwill – under market price. More than three years later, the Commission sent a letter to the Swedish government informing on its decision to close the case administratively (i.e. without taking a formal decision to on the measures' compatibility with the Treaties).[1169] Considering that "the absence of effect on internal market and trade between Member States would *a priori* indicate that the measures described in the complaints would not constitute aid in the meaning of Article 107(1) TFEU, the Commission reserved itself the discretion to review the matters if new evidence arose. This "informal decision" reflects undeniably a view that education as provided by the operators at issue in the case is an economic activity for the purpose of state aid rules and more broadly of EU competition rules.

The picture emerging from the cases evoked in this section is that, when examining financing measures benefitting entities providing for-profit pre-school education (*Oslo day care centres*) and for-profit healthcare and school education (the Swedish privatization cases), neither the Commission nor the ESA refer to the *Humbel* doctrine. The economic character of the education or socio-educative activity is not questioned, but the measures examined are not considered as state aid in the meaning of Article 107(1) TFEU, because they are held not to affect trade. By contrast, when examining measures benefitting entities providing not-for-profit university education (*Prerov*) and pre-school education (*Barnehagers)*, the Commission, the ESA and the EFTA-Court do refer to the *Humbel* doctrine to motivate that the entities at issue are not undertakings. In *Barnehagers*, the EFTA-Court royally ignores the criteria set in the *Poucet and Pistre* case law. However, in order to reach the conclusion that education provided by public entities is not economic, it seems that neither the Commission nor the ESA feel comfortable with relying exclusively on the *Humbel* doctrine to divert from the CJEU's functional approach of the notion of "economic activity" in the field of competition.

In sum, it apears that in the field of health insurance, the Commission finds possible to conduct its assessment on the basis of existing competition case law. By contrast, regarding medical and educational services, the state aid decisions evoked in this section show that the Commission and the ESA give relevance to the fact that the entities at issue may or not be considered as receiving "remuneration". This detour by a Treaty concept of free movement law is made necessary by the lack of CJEU cases for these social services, clarifying whether and how the entity's solidarity objectives can limit the broad applicability of competition and state aid rules to social services, based on the functional approach of the notion of undertaking developed by the CJEU. In this approach the Commission seems not satisfied with the comparative test, but seeks to find out whether the social service *is de facto in the specific case* provided for remuneration.

However, and importantly, the Commission seems to interpret the CJEU's stance in *Smits and Peerbooms* (the famous paragraph 58) as meaning that as soon as private operators offer services similar to those of the public operators, the latter's public funding should be seen as a *remuneration* for which they provide the service, and their

[1169] Letter to the Head of Section for Market and Competition Division at the Swedish Ministry of Enterprise, Energy and Communication, registered under reference COMP/H-2/BC – (2012)33624, dated 29.03.2012.

activity should therefore be seen as economic for the purpose of state aid rules. For this social service, the lack of autonomy and the non-profit aim of the public entity are seen by the Commission as irrelevant for its qualification as an undertaking. In the field of education, it is striking to see that the Commission also takes a detour by free movement case law, but this time referring to *Humbel*, to establish whether the activity is economic. The result in that case is that the fact that the entity is part of the education system and not-for-profit is sufficient to declare that its motives are exclusively social. For that social service, the non-profit aim is suddenly relevant for its qualification as an undertaking, which may explain that, in the Swedish case, the Commission could not deny the economic character of the activity of private for-profit schools.

11.2.2.2 Should the aid's assessment be economic or jurisdictional? Some insight in the Commission's practice

As already mentioned in section 8.1.3.5, de Vries and several other authors have underlined the considerable lack of clarity arising from the discrepancy between on the one side the Commission's legislative approach mirroring a detailed and strict assessment, in line with the economic approach promoted by its State aid Action Plan, and on the other side the more relaxed approach in the Commission Decision practice. In the still scarce decision practice of the Commission in the field of social services, we find the already evoked health care insurance systems cases *BUPA* (Irish private medical insurance system) and *Zorgverzekeringswet* (Dutch health care system) and the *IRIS-hospitals* case concerning public hospitals in Belgium Decisions.

The Commission's *BUPA* decision, taken in 2003 before the ECJ delivered its *Altmark* judgment was based on its now overruled approach in *Ferring*.[1170] The Commission found that the notified risk equalization system did not amount to aid in the meaning of Article 87(1) EC, or if it did, that it constituted public service compensation necessary to maintain the stability of a community rated health insurance market justified as compatible with the common market pursuant to Article 86(2) EC.[1171]

The *Zorgverzekeringswet* decision was taken in 2005 and concerned a risk equalisation system under the Dutch Health Insurance Act. [1172] As described by van de Gronden, the basic health care scheme in the Dutch health care system was managed in competition by private insurance companies allowed to aim for profit, and regarded as undertakings.[1173] As the Dutch private insurers were submitted to a risk equalisation scheme managed by a state body, payments made in the frame of that scheme fell within

[1170] Case C-53/00 ***Ferring*** [2001] ECR I-9067.

[1171] Commission Decision of 13 March 2003 on a risk equalisation scheme in the Irish health insurance market (Ireland) in case N 46/2003 – C (2003) 1322 final, points 60-61.

[1172] Commission Decision of 22 December 2005 on the introduction of a risk equalisation system in the Dutch Health Insurance (Netherlands) in cases N541/2004 and N542/2004 – C (2005) 1329 final. The Dutch Act is outlined in Hamilton G.J., 2005, p. 8ff.

[1173] For a detailed analysis of this decision, see van de Gronden J. W., 2009b, p. 14-17.

the scope of the state aid rules. The Commission found that the Dutch risk equalisation scheme constituted aid in the meaning of Article 107(1) TFEU, considering that the fourth Altmark condition was not fulfilled as all insurance companies were entitled to a similar amount of compensation, whether or not they operated efficiently. Also, the Commission considered that the equalisation scheme could not compensate public service costs but rather aimed at neutralizing differences in risk profiles. Considering that it may be impossible for national health care authorities to set up general compensation schemes that take due account of the individual costs of efficient companies, Van de Gronden holds that a compensation scheme directed at an open group of operators should be expected to fail to meet the fourth *Altmark* condition.[1174]

Nevertheless, the Commission considered that all health insurance companies were entrusted with SGEI tasks, although these tasks were not explicitly entrusted in a specific act of entrustment. The Commission interpreted Article 86(2) EC extensively, by deriving these tasks from general obligations imposed on the insurers by the the Dutch Health Insurance Act (open enrolment, community rating, benefits granted to insured persons, and supervision mechanisms). According to van de Gronden, it was the first time this approach was used by an EU institution and came in strong contrast with the perception that SGEI tasks should be entrusted by an explicit act.[1175] However, this author also underlined that in finding the scheme compatible with the internal market on the basis of Article 106(2) TFEU, the Commission gave consideration to the fact that the Dutch scheme built mostly on *ex-ante* correction, leaving more room for competition by not compensating all costs. The lenient approach of the SGEI tasks' precision and entrustment mode was thus accompanied by a signal that *ex-ante* equalization is preferred, which in the future would constrain the Dutch government's options. It is easy to agree with van de Gronden that the case shows how, through the standstill provision, imposing notification of welfare financing schemes to the Commission before they can be put into operation, the Commission had the power to influence core elements of welfare systems.[1176] Following a path suggested by this author, it is argued here that the Dutch health care system has not only been regulated by national public authorities, but also by the Commission.[1177]

The insight of this power and the social importance of the schemes notified may also explain the Commission's approach in the *IRIS-H* decision.[1178] As seen in the precedent section, the Commission had found that the public hospitals at issue constituted

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[1174] Van de Gronden, 2009b, p. 14-15.

[1175] Ibid, p. 15.

[1176] Ibid, p. 16. Van de Gronden held that, concerning health care systems, this is not necessarily unquestionable, as Article 152(5) EC stipulates that the organisation and delivery of health care belong to the competences of the Member States. As a matter of fact, the Treaty of Lisbon makes more generally clearer that competences which have not been conferred on the EU remain by the Member States, which is the case in general for services to the person and to a large extent for education.

[1177] Ibid, p. 15.

[1178] Commission Decision of 28 October 2009 on the financing of public hospitals of the IRIS-network of the region Brussels-capitale (Belgium) in case NN54/2009 – C (2009) 8120 final. The *CBI* ruling is commented in section 8.1.3.5 above.

undertakings. It had to examine i) the alleged absence of clear entrustment of hospital and non-hospital public service tasks, (ii) the compensation of the IRIS-hospitals' deficit, (iii) the alleged over-compensation of the public service obligations and lack of transparency in their financing mode and (iv) the alleged cross-subvention of these hospitals' commercial activities.[1179]

The Commission assessed first the Treaty compatibility of the funding measures in the light of the Altmark criteria ("Article 107(1) TFEU alternative") and found that the first Altmark criterion was fulfilled. With reference to the *BUPA* ruling and to Article 152(1) and (5) EC (now Article 168 (1) and (7) TFEU), the Commission underlined the wide freedom of the Member States to define SGEIs, and considered that both public and private hospitals were subject to a common body of public service obligations, and also that the public IRIS-hospitals were subject to additional and specific public service obligations: (1) an obligation of universal service for both emergency or non-emergency care, and (2) a duty to maintain a full range of hospital services at every location. Also, and unsurprisingly in light of the Commission's *Zorgverzekeringswet* decision, the Commission found the fourth Altmark criterion not fulfilled, considering that a compensation scheme granted to several operators, and based on average costs, could "mathematically" not exclude over-compensation, otherwise than for the average undertaking of reference.[1180] As the fourth Altmark criterion was not fulfilled, the Commission did not assess the second and third Altmark criteria, but instead went over to assessing the funding measures under substantive compatibility following from Article 106(2) TFEU (the "Article 106(2) TFEU alternative" of compatibility).

The specific tasks imposed on the public IRIS-hospitals were related both to hospital and non-hospital services, the first covered by dthe 2005 SGEI Decision and the second by the 2005 SGEI Framework, and so the Commission referred in its decision to th "2005 SGEI Package", and relying implicitly on the fact that the material requirements laid down in the two acts overlap to a large extent. Concerning the substantive condition related to the definition and the entrustment of the SGEI, the Commission referred to its assessment of the first Altmark criterion. According to the Commission, the fact that the tasks were entrusted through different legal or administrative acts, or that certain

[1179] Ibid, points 1 and 9.

[1180] Ibid, point 161. Hancher and Sauter underlined that in *IRIS-hospitals* the Commission considered that SGEI compensation granted to several undertakings and based on their average costs without requiring evidence of sound management would inevitably lead to overcompensation, and noted that at a later stage of the decision the Commission adopted what they considered to be the opposite view, namely that compensation based on average costs can lead to under-compensation; see Hancher L. and Sauter W., 2013, p. 263 and 264. In fact, it is argued here that the Commission's views are not illogical, as the point of departure is that compensation on the basis of average costs can involve *both* a risk of over-compensation and of under-compensation. In assessing the fulfilment of the fourth Altmark criterion, only the risk of over-compensation is relevant, while the risk of under-compensation may exist but needs not be mentioned at that stage. The risk of under-compensation is relevant as an issue when taking care that the conditions of operation enable the SGEI mission to be fulfilled, and may be invoked to justify an *ex post* measure allowing the SGEI mission to be ensured. The problem is of course that ex post measures do not allow much efficiency control, but do *ex-ante* compensation measures not have the same drawback, unless the tasks are precised, the parameters of compensation well adapted, and the efficiency control efficient? This emerges arguably from the Swedish case studied in chapter 12.

elements, such as the territory covered by the SGEI tasks, derived from the applicable legal rules and in accordance with their purpose, did not put in question the existence of SGEI tasks.[1181] Although the Commission asserted this approach to be settled practice, Hancher and Sauter underline rightly that it is at odds with the 2005 SGEI Decision and the SGEI Framework, which require that the SGEI tasks are clearly defined and entrusted through an official act, in accordance with the principle of transparency.[1182]

Concerning the control under Article 106(2) TFEU of the proportionality of the compensation for discharging an SGEI task, as established by an act of general application, the Commission referred to the following position taken by the GC in *BUPA*:

> [T]hat review is limited to ascertaining whether the compensation provided for is necessary in order for the SGEI in question to be capable of being performed in economically acceptable conditions (…), or whether, on the other hand, the measure in question is manifestly inappropriate by reference to the objective pursued (…)

The Commission recalled also that under Article 106(2) TFEU, public authorities may compensate SGEI providers up to 100% of the net costs incurred plus a reasonable profit, irrespective of any consideration related to efficiency.[1183] Hancher and Sauter have argued that, although this test may be undesirable from a perspective of competition, it is in line with the "balancing test" under Article 106(2) TFEU and with the 2005 SGEI Package.[1184] However, as seen in section 8.1.3.5, the GC annulled this decision, finding that the Commission should have initiated a formal procedure, as there were serious doubts regarding, first, the existence of a clearly defined mandate relating to the hospital and social public service missions specific to the IRIS hospitals, second, the existence of previously established compensation parameters and, third, the existence of procedures for avoiding overcompensation in the funding of the public service missions. Also, there were also serious difficulties regarding the proportionality of the measures at issue.[1185]

In sum, the Commission does not seem ready to systematically apply the fourth Altmark criterion as generously as the General Court did in *BUPA*, where the Court was satisfied that the equalisation system was regulated in a manner which excluded compensation of inefficiencies. This involves that the legality of funding depends on a "balance of interests" made under Article 106(2) TFEU. It is clear from the *Zorgverzekeringswet* and the *IRIS-H* decisions that this approach gives to the Commission a space of freedom in the exercise of its powers under Article 108(3) TFEU, which it may use differently depending on the cases at issue and its own policy agenda. It is also evident that the

[1181] Point 174.

[1182] Hancher L. and Sauter W., 2013, p. 264.

[1183] Point 199.

[1184] Hancher L. and Sauter W., 2013, p. 267.

[1185] T-137/10 *CBI* (GC 7 November 2012), paras.308-309.

principles and rules it uses in this balance have a potential impact on the organisation and funding of social services in the Member States.

Seen in this perspective, the Commission's rules on state aid to SGEI must be seen as capable to harmonise social services on the basis of policy choices – in particular an economic approach of state aid. This harmonisation, initiated by the adoption of the 2005 SGEI Package, must be seen as imposed on the Commission itself, under the rule of law. It is therefore striking to find that, at odds with the material requirements in its 2005 SGEI Package that the act or acts of entrustment must specify, at least, the precise nature, scope and duration of the public service obligations imposed and the identity of the undertakings concerned[1186], the Commission, in practice, tends to accept a rather imprecise definition of SGEI tasks and very implicit modes of entrustment of SGEIs. This may be the main reason for the annulment of its *IRIS-H* decision by the General Court in *CBI*: the GC appears to expect the Commission to apply the principles and rules it has itself laid down.

11.2.2.3 Summing up on the Commission's approach of state aid cases in the field of social services

The Commission's practice examined in section 11.2.2.1 shows that, the Commission sees a necessity to combine references to competition case law and to free movement law when determining whether operators of social services in the field of medical care, health care insurance, education, and child-care constitute undertakings. The reason is submitted to be that the Court's functional approach in *Höfner* and the scarcity of the CJEU's case law on social services in the field of competition, clarifying the minimum criteria for the *Pavlov* definition of an economic activity ("an offer of goods or services on the market") to be fulfilled, does not offer sufficient legal certainty to apply state aid rules to public operators acting in mixed systems. By using the test "provided for remuneration" instead of "offered on a market", the Commission shows that it sees those tests as equivalent. The problem is that it imports into competition law the "education exception" which characterizes the CJEU's case law on free movement, to the effect that the profit/not-for profit aims of the operator become relevant in competition, which is inconsistent with the case law of the Court. It is unsure whether the CJEU endorses all elements of the Commission's reasoning to determine the economic character of an activity. One thing is sure: given its approach, the Commission sends a signal that it may be easier for private operators to challenge the public funding of social services in Member States using mixed systems of social service supply.

Under such circumstances, the Commission's understanding of the application of state aid rules to SGEIs based on the *Altmark* ruling or on Article 106(2) TFEU, consolidated for the first time in its 2005 SGEI Package, becomes a prominent parameter for Member States in securing the legality of their welfare services' funding. The very adoption of this

[1186] See Recital 8 of Commission Decision 2005/842/EC and point 12 (a) and (b) of Community Framework 2005/C 297/04.

package signalled that the Commission was decided to participate actively in the governance of social services in the Member States. It is therefore striking to find that, although the Commission's decisional practice implies that "the margins for public policy on public services in healthcare have been reduced", it is not only "flexible" as stressed by Sauter[1187], but in fact *more flexible than its own rules in the 2005 SGEI Package seem to allow*.

In a legal perspective, this "gap" may result from the lack of clear guidance from the CJEU on which impact the Lisbon Treaty's new constitutional framework shoukd have on state aid rules applying to social services. The CJEU's approach is unconclusive, given the fact that the General Court adopted in *BUPA* and in *TV2/Denmark* an approach based on a lenient application of the *Altmark* criteria, but seemed to require a stricte approach from the Commission in *CBI*. Perhaps the Commission understood the GC's approach in *BUPA* as signalling that the post-Lisbon constitutional frame did not allow to apply an economic approach to the control of Member States financing of social services, and perhaps the meaning of *CBI* is to rectify this perception.

In a more political perspective, Sauter and Hancher claim that the Commission has taken an overly cautious approach by considering "all but the grossest violations of EU law out of bounds to intervention", especially in areas where the EU so far lacks what they call "extensive involvement" (some may call it "powers").[1188] This caution is certainly related to the dialogue with the Member States and other stakeholders. In 2008, the Member States addressed their reports on the implementation of the Decision to the Commission, as required by the 2005 SGEI Package, and many Member States seized this occasion to give their views on the rules as a whole. Some of them referred to the Lisbon Treaty, and many to the difficulty to understand and apply the rules for public authorities in charge of social services.[1189] If anything, the *IRIS-H* case sheds light on the high complexity of the assessments required. The *IRIS* decision may have been an eye opener to the fact that a strict application and enforcement of the proportionality rule under Article 106(2) TFEU is extremely complex, time-consuming and administratively expensive, which can be quite problematic in case of litigation.

[1187] See Sauter W., 2014, p. 16, where Sauter adds that as a result conformity with EU norms is likely to increase.

[1188] Hancher L. and Sauter W., 2013, p. 271.

[1189] Some Member States pointed at their efforts and costs to inform public authorities responsible for social services on these rules, and at their difficulty to assess whether the market for certain social services was purely local and whether in that case public funding would not be seen as aid. Some mentioned that local authorities tended to regard the very fact that an activity had to be organized on the basis of public funding as a sign that there was no "market" for it. Several Member States requested more emphasis on the CJEU's case law to the effect that social services are under certain conditions non-economic and therefore not covered by state aid rules, and emphasized that post-Lisbon, the Commission had to consider how it would secure their discretion to organize and finance social services, considering that public procurement is not the only manner to secure the compliance of public service funding with EU state aid rules.[1189] Some reports also held that a single horizontal framework could not give sufficient precision on the way state aid rules could be complied with. It must be underlined that the views gathered here have been formulated in reports drafted in languages which the author of this study could most easily understand, i.e. from Germany, UK, France, and Sweden.

11.2.3 Some important issues related to social services in the 2011 SGEI Package

At a policy level, the Commission presented its 2011 SGEI Package as an important instrument to address the economic crisis that broke out in 2008, stressing that it did not only make people across EU more dependent on "high quality public services", but that, as Member States were forced to reduce public budget deficits, there had to be a stronger focus on the economic efficiency of public spending and there was a "need to boost productivity across the board".[1190] At a legal level, the 2011 SGEI Package appears as a more comprehensive and ostensibly more "EU policy-oriented" package than the 2005 SGEI Package. [1191] This section focuses only some elements of the Communication on the application of the EU state aid rules to SGEIs (referred to in this section as "the Communication"), of the EU Framework on state aid rules applicable to public service compensation (referred to as "the 2001 SGEI Framework") and of the 2005 SGEI Decision. At a more legal level, the 2011 SGEI Package has been adopted in a context where the importance of both procurement and state aid rules for the EU harmonisation of social services had become clear to most, but where very important issues had to be spelled out:

- The criteria determining that these services are economic
- The EU meaning of the concept of SGEI
- The state aid rules applying to social services.

According to the Commission, the Communication's aim is "to clarify the key concepts underlying the application of the State aid rules to public service compensation".[1192] Regarding the notion of "economic activity" for the purpose of the state aid rules, Buendia Sierra and Panero Rivas point particularly at points 12, 14, 13 and 37 of the Communication, which in their view display some confusion between what constitutes an economic activity and the separate question of how the market is affected by the measure.[1193] While their view is essentially shared here, the following remark may be

[1190] Commission, "Reform of the EU State Aid Rules on Services of General Economic Interest" (Communication) COM (2011) 146 final, p. 4.

[1191] The 2011 SGEI Package or "Almunia Package"' consists of five instruments adopted by the European Commission between December 2011 and April 2012 for the modernisation of SGEI rules: (1) Commission, "A Quality Framework for Services of General Interest in Europe" (Communication) COM(2011) 900 final (the "SGI Quality Framework") JO C/2012/102/35; (2) Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (the "2011 SGEI Decision") [2012] OJ L7/3; (3) Commission, "Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest" (the "2011 SGEI Communication") 2012/C 8/2; (4) Commission, "European Union framework for State aid in the form of public service compensation" (Communication) (the "2011 SGEI Framework") 2012/C 8/03; and (5) Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (the "SGEI de minimis Regulation") [2012] OJ L114/8.

[1192] 2011 SGEI Communication, point 3.

[1193] See Buendia Sierra J. L. and Panero Rivas J. M., 2013, p. 134-135.

added. Firstly, the Commission's explanations on this question reflects the casuistic approach of the CJEU; the Commission does not offer any systematic and pedagogical explanation of what the notions it uses – market, remuneration, competition – concretely mean and how they relate to each other. At the surface, the rule of law looks safe, but for the Member States to which this Communication is addressed, the notion of economic activity does not emerge as a concept understandable and workable by public authorities in the Member States. This is in particular so in light of the lack of clarity of the Commission's approach in its decision-making practice

This is particularly problematic in a context where the control of state aid rules applicable to housing, hospitals and social services is decentralised. When the Commission states that "[w]hat is not a market activity today may turn into one in the future, and *vice versa*", it should clarify what can make this "vice versa" happen, as the Member States may be legitimately curious to know.[1194] Regarding the notion of "economic activity", it is striking to observe that the Commission, in line with the analysis conducted in part II of this study, uses the notion of "provided for remuneration" as equivalent to "offered on a/the market", but that it does not explain *why* it considers these definitions of the notion of "economic activity" equivalent. In its decision practice, the Commission uses this equivalence to use free movement case law to fill in the lack of competition case law in the field of social service, but thereby also the oddity of the *Humbel* doctrine, with the result that for most social services the not-for-profit character of an entity's activity is irrelevant, while it magically becomes a relevant criterion in the field of school education.

Regarding the meaning of the EU concept of SGEI, it is remarkable to find that the Commission, spells first that

> In the absence of specific Union rules defining the scope for the existence of an SGEI, Member States have a wide margin in defining a given service as an SGEI and *in granting compensation to the service provider*. The Commission's competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI

and then considers that

> [i]t *would not be appropriate* to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions. As for the question of whether a service can be provided by the market, the Commission's assessment is limited to checking whether the Member State has made a manifest error.

This stance is almost exactly repeated in the 2011 SGEI Framework, but this time the Commission *pronounces* that "Member States *cannot* attach specific public service

[1194] Point 12 of the Communication.

obligations under such circumstances" (emphasis added).[1195] It is submitted that this definition excludes that *public service tasks* may exist at the level of public authorities as SGEI missions which must be enabled to be achieved. Besides, unless the Commission clarifies that "conditions defined by the State" are SGIs, its stance may easily appear as a hopeless circular reasoning, where the national legislators are prevented from defining and imposing SGEI missions on public authorities in charge of supplying social services, and thereby make it *impossible for them to evaluate when the market fails*, i.e. when they must intervene on the market so that the SGI/SGEI missions can be achieved. In other words, this would mean that the market offer, even if based on public purchase, may not be affected by the way the legislator defines the service conditions regarded on the basis of ex ante decisions of what is *needed* by all and therefore may be publicly funded. As observed by Buendia Sierra, "the Commission is widening, or threatening to widen – the traditional scope of the assessment of what constitutes a "true" SGEI. The Commission's stance in the 2011 SGEI Framework leads Kavanagh to state that "if the service can be provided by the market at a price and level of access that are compatible with the public interest, it is *not* an SGEI".[1196] He calls this a "reverse definition" of SGEI.

It is easy to see that understood in that manner – and Kavanagh is probably not alone in understanding it so – the Commission's stance is at odds with the CJEU's (and the Commission's) recognition of the Member States' broad discretion to define SGEI missions, and thereby formulate what conditions of supply of social services they find appropriate in a policy perspective. How does the market know which conditions, "such as price, objective quality characteristics, continuity and access to the service", are "consistent with the public interest, as defined by the State", if this is not clear *ex-ante* in a transparent and clear definition of SGEI missions made by the legislator or by public authorities? The most problematic is perhaps not in that stance, but in the fact that it introduces ambiguously, through the notion of "public service obligations" which is so very close to the notion of SGEI that many hold them as synonyms, a *definition of SGEI* meant to govern *also* the Member States' discretion in the field of *social services*. This approach of discrete "small steps" towards an ever more restrictive definition of SGEIs, is arguably a constitutional issue. If the meaning of the EU concept of SGEI should ever be consolidated by any EU institution, it is submitted that it should be the EU legislator on the basis of Article 14 TFEU, and by no one else.

Regarding more specifically the fate of social services, the important step has been taken to include a number of them in the scope of the 2011 SGEI Decision, which exempts the Member States from the duty to notify their funding.[1197] Article 2 provides that the social services exempted are SGEIs "meeting social needs as regards health and long

[1195] Point 123 of the 2011 SGEI Framework.

[1196] Kavanagh J., 2013, p. 152.

[1197] At this stage in the development of the Treaties, another approach had arguably been difficult to justify in a subsidiarity perspective. It is stated under Recital 11 that "in the present economic conditions and at the current stage of development of the internal market", social services may require an amount of aid beyond the threshold of EUR 15 million to compensate for the public service costs", and thus that a large amount of compensation for social services does not necessarily produce a greater risk of distortions of competition.

term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups". Van de Gronden and Rusu foresee that, as a result of the lack of definition of these services in the 2011 SGEI Decision, the Commission and the CJEU will be called upon to define these services, which eventually will lead to a European approach to important features of the social welfare states.[1198]

To benefit from the exemption, the 2011 SGEI Decision imposes material conditions of transparency and proportionality which generally go further than the conditions provided by the 2005 SGEI Decision. First, the undertaking must be specifically entrusted with a public service obligation. The operation of the service of general economic interest must therefore be entrusted to the undertakings concerned by acts which may vary in form from one Member State to another, but which must include

(a) the content and duration of the public service obligations
(b) the undertaking and, where applicable, the territory concerned,
(c) the granting of any exclusive or special rights,
(d) a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation,
(e) the arrangements for avoiding and recovering any overcompensation and
(f) a reference to the Decision[1199]

Importantly, the Decision applies only to public service obligations entrusted for a period not exceeding 10 years, unless the task implies a significant investment for the service provider, and needs to be amortized over a longer period in accordance with generally accepted accounting principles.[1200]

Second, the amount of compensation must be limited to the costs of discharging the public service obligations and a reasonable rate of return. The eligible costs are all variable costs involved in providing the service and a proportionate contribution to fixed costs that are shared with other services, and necessary investment costs. The rate of return is determined with reference to the risk profile of the sector.[1201] Third, the Member States must ensure that undertakings do not receive overcompensation. They must carry out regular checks on overcompensation, at least every 3 years during the period of entrustment and at the end of that period. Importantly, the undertakings concerned must commit to repayment of any overcompensation received.[1202] Besides, the Decision requires that the Member States keep available, during the period of entrustment and for at least 10 years from the end of the period of entrustment, all the

[1198] Van de Gronden J. W. and Rusu C. S., 2013, p. 213.

[1199] Article 4 of Decision C (2011) 9380.

[1200] Article 2(2) of Decision C (2011) 9380. As an example of service where significant investments may be necessary, Recital 12 names social housing.

[1201] Article 5 of Decision C (2011) 9380.

[1202] Article 6(1) of Decision C (2011) 9380.

information necessary to determine whether the compensation granted is compatible with this Decision.[1203]

For the state aid to be compatible with EU law, it is imperative that all these conditions are fulfilled, and thus it seems that the 2011 SGEI Package takes a decisive step towards an Europeanization of social services. Indeed, as observed by van de Gronden and Rusu, "significant bits and pieces" of a model for the delivery of social services are introduced by the Decision and they are certainly right in holding that "the path is paved for more binding EU measures in order to further build an EU model for social services".[1204] However, it is submitted here that the perception of the 2011 SGEI Decision as a resolute step towards social services of quality, "with efficiency considerations and a certain degree of competition" is too simple.

A first issue, raised by Sanchez Graells, is the tighter link in the Communication between procurement and state aid rules, which is relevant for the 2011 SGEI Decision.[1205] In his view, the increased flexibility in the public procurement rules "frontally clashes with the assumption that they impose a tight procedure that works as a 'black box' and always ensures that the outcome is objective and excludes all possible economic advantages to the awardee of the contract". He believes that the feeble justification for the current position of the European Commission that compliance with EU public procurement rules excludes the risk of disguised State aid is in crisis.[1206] In this respect, the Commission holds rather cryptically that for such systems "where it is not a legal requirement" to follow procurement procedures imposed by the new procurement directives, "an open, transparent and non-discriminatory public procurement procedure" is an appropriate method to compare different potential offers and set the compensation so as to exclude the presence of aid".[1207] One may wonder if this point addresses contracts under the thresholds or can also cover contract-based systems of choice, despite the fact, mentioned already, that voucher systems and systems of choice are (according to their recitals) exempted from the scope of the new procurement directives.

Indeed, if procured contracts should be seen as an efficient alternative to otherwise complex and time consuming proportionality assessments, they should provide for transparent and equal competition. This supposes that the tasks are as clear and precise as possible. A very good reason for transparency and precision in the tasks' definition is not only operators' equal treatment, but at least as important should be the objective to

[1203] This information must be available on request of the Commission, see Article 8 Decision C (2011) 9380.

[1204] Van de Gronden J. W. and Rusu . S., 2013, p. 214-215.

[1205] 2011 SGEI Communication, points 63-64: "The simplest way for public authorities to meet the fourth Altmark criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with [Directive 2004/18 …] the conduct of such a public procurement procedure is often a mandatory requirement under existing Union rules. […] Also in cases where it is not a legal requirement, an open, transparent and non-discriminatory public procurement procedure is an appropriate method to compare different potential offers and set the compensation so as to exclude the presence of aid."

[1206] Sanchez Graells A., 2013, p. 178.

[1207] 2011 SGEI Communication, point 64.

secure access to quality services. Also, transparent and precise SGEI tasks are crucial for users and citizens to know what the publicly funded public service tasks are really meant to provide.

A second issue, underlined by Sauter, is the enforcement of the 2011 SGEI Package. Indeed, this is likely to be the very weak point of this emerging model, "as has always been the case for state aid and in the present context concerns in particular the services that will be covered by the new Decision".[1208] This raises the question of which policy calculus may lead the Commission to formulate stricter material requirements for the definition, entrustment and control of SGEIs in the field of social services *and at the same time* decentralise the control of their enforcement to Member States, so far notoriously uninclined to respect these rules? In spite of the Commission's rhetoric of confidence in the loyalty of the Member States in performing this control, in practice decentralization gives the Member States considerable leeway not to fulfil their duty of loyalty towards EU law. Indeed, Baquero Cruz considers that such a move sacrifices "efficiency, sustainability and quality gains that a more vigorous enforcement of the State aid rules could bring to social services" as "there is almost nothing at the national level that can take care of distortions of competition with regard to those *seemingly* minor [social] services" (emphasis and precision added).[1209]

11.3 Conclusions

The study conducted in this chapter gives ample evidence of the EU legislator's acknowledgement that EU procurement rules are covered by the principles in Article 14 TFEU and the SGI Protocol. The new procurement directives reflect explicitly an awareness that EU procurement rules profoundly harmonise the principles and rules for the organisation of public services, and that their design must therefore respect the principle in Article 14 TFEU. This principle imposes on the EU legislator to take care that the procurement rules at least allow SGEIs to operate according to conditions, in particular financial and economic conditions, enabling them to achieve their missions. In this respect, and importantly, the new procurement directives add to the SGI Protocol a stance that national, regional and local authorities have a wide freedom to *finance* SGEIs, which is indispensable for the very legitimacy of public procurement in many fields of activity.

In the new Public Sector Directive and the new Utilities Directive, the consolidation of the in-house and public-public cooperation exemptions is explicitly connected to Article 14 TFEU and the SGI Protocol, but in ambiguous terms. With respect to these Treaty provisions, public authorities are said to retain their power to decide if they want to perform *public functions* themselves. The notion of SGEI is also deafening silent in the

[1208] Sauter W., 2012, p. Sanchez Graells agreed with this view, see Sanchez Graells A., 2014, p. 3-4.

[1209] Baquero Cruz J., 2013, p. 309 and 310. Regarding this issue, it seems interesting to draw attention to a paper presented by Brice Daniel on his research studies, se Daniel B., 2014.

provision of the new Concessions Directive laying down a "principle of free administration by public authorities", although this principle obviously transposes Treaty principles on SGEIs and the shared values of SGEIs in the SGI Protocol. The new procurement directives convey an understanding of the concept of SGEI which is rather broad as relevant for the design of procurement rules, but not clearly acknowledging that the concept may cover *public service tasks devolved to contracting authorities*.

The lighter regime for social services is "officially" motivated in the new procurement directives by the vague and politically malleable justification of their "specificities". However, the "principles of awarding contracts" for social services introduced in the Public Sector Directive and the Utilities Directive, oblige the Member States to allow their contracting authorities to take account of these "specificities", which are unofficially but evidently connected to "shared values" of SGEIs in the SGI Protocol and Article 14 TFEU. It is submitted that the only provision legitimising that the Union imposes such an obligation on the Member States is in fact Article 14 TFEU. It is also argued that by imposing this obligation, the Union fulfils its own duty to take care that SGEI missions can be achieved pursuant to Article 14 TFEU.

This leads to conclude that the new procurement directives establish a principle of awarding contracts in the field of social services which is meant to enable the achievement of SGEI missions for the purpose of Article 14 TFEU, which does not fit with the rule in that provision that the Union and the Member States shall adopt regulations to establish such principles and rules. Confronted with the problem of legislating de facto on principles enabling SGEIs in the field of social services to fulfil their missions but on doing it on the "wrong" legal basis, the EU legislator chooses to "dilute" the notion of SGEI in the notion of "specificities". This dilution implies that, in the field of social services, the new procurement directives put some pressure to identify SGEIs in their systems, but does not force them to claim their existence to justify lighter procurement procedures and what is more, invites them to include more, and more market-friendly, service conditions than those enumerated in the SGI Protocol.

By toning down that the lighter regime is necessary due to the existence of SGEI missions in the field of social services, the new procurement directives prevent the conservation of "old SGEIs", and facilitate the Europeanisation of these services. At the same time, this approach weakens public procurement as a mode of entrustment preventing illegal state aid in the field of social services. As a consequence of this "mittelweg" approach ("un poco ma non troppo SGEIs") in the new procurement directives, the proportionality of public funding of social services provided on the market depends heavily on which normative effect EU institutions give to Article 106(2) TFEU in applying state aid rules to social services. To render this instrument operative and legitimate, it is necessary for authorities in charge of their application that its basic concepts – in particular the notions of "economic activity" and "SGEI" are clarified.

Unfortunately, the new procurement directives do not at all clarify what characterizes the difference between SGEIs and NESGIs, and the 2011 SGEI Package does not deliver notable precision on the notion of "economic activity". The overview study of

the Court's decision-making practice in the field of social services shows that it often has recourse to "cross-over reasoning" when determining the economic character of the activity at issue in a case, referring to competition case law and free movement case law in the same case. This approach seems to reflect well the conclusions in chapter 6 that the two locutions "provided for remuneration" (free movement) and "offered on a/the market" (competition) are equivalent in the CJEU's case law, and in that sense it is argued that "crossing-over reasoning" is not *a priori* incorrect.

Nevertheless, the problem with the Commission's cross-over reasoning is that it is not explained, and that is is not coherent with its view that the notion of "economic activity" may correspond to two different sets of criteria in the field of free movement and of competition.[1210] Another problem with the Commission's "cross-over reasoning" is that it transposes the oddity of the *Humbel* ruling from the field of free movement law to the field of competition law, which increases the inconsistency of the criteria determining that an activity is economic in the meaning of competition law. In other words, the Commission does not give "the keys to the castle" to national authorities to which it has delegated the responsibility to control that public funding of many social services complies with EU state aid rules. It may be argued that in the field of school education, the Commission gives the wrong keys.

In the consultation on the Commission's draft notice on the notion of "aid", it is argued by certain stakeholders that the Commission should more systematically refer to the case law of the CJEU rather than to its own decisions. A problem is however that with the CJEU's reluctance to articulate the notion of "economic activity", there is less reason for the Commission to turn to the Court for guidance and more reasons to fall under the pressure of many interest groups.[1211] Due to the Court's understandable reluctance

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1210 Regarding this issue, it is important to note that the Commission has issued a draft Notice on the notion of aid, where it anew tries to charter "what is an economic activity for the purpose of state aid rules" in different fields of activity. The Commission writes: "In the absence of a definition of economic activity in the Treaties, the case-law appears to follow different criteria for the application of internal market rules and for the application of competition law (Case C-519/04 P *Meca-Medina* [2006] ECR I-6991, para.30-33; Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraphs 66, 72, 74 and 75; Opinion of Advocate General Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, paras.50-51.)" Communication from the Commission, Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, para.16. The inconsistency of the Commission's view that the notion of economic activity may be dual with its own decision-making practice has been noted by King's College in London in its comments on the draft notice in the following terms: "Paragraph 16 is rather ambiguous, as it does not explain to what extent the interpretation of Court of the notion of economy/non-economic activities in the context of internal market, competition and State aid is different. Further explanations are needed in this regard – or alternatively the paragraph should be deleted altogether. This is especially so as many footnotes in Section 2 of the draft Notice, refer interchangeably to internal market/competition case law suggesting an identical application." Comments on the Draft Commission Notice on the notion of State aid pursuant to Article 107 (1) TFEU from Centre of European Law, King's College London, available at

http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html, point 3.7.

1211 The final version of the Commission Notice on the notion of state aid, which was planned to be adopted in the second quarter of 2014, has not yet been adopted. In December 2014, Commissioner Vestager declared: "[a]s for the Communication on the Notion of Aid, the one piece of the SAM which has not yet been adopted, I have decided to take a moment for reflection at the start of my mandate. This document is too important for us to rush into a decision. But once I have had the chance to better assess where the limits of State aid control are, I intend to propose a Communication to the College for adoption."/…/ Speech at High Level Forum of Member States by Margrethe

to spell explicitly and clearly how the EU concept of SGEI under Article 14 TFEU may be understood, the Commission gets also more leeway to formulate its own views on this concept, and has done so in the 2011 SGEI Package, where it professes a restrictive understanding of what the Member States may define as SGEIs. This initiative is particularly problematic in a context where this view is not legitimated by the co-decision procedure. It is submitted that if the concept of SGEI should be restricted, it should at least be decided by the EU legislator on the basis of Article 14 TFEU. This argument seems to get support from Sauter, who considers that adopting state aid rules based on Article 108(3) TFEU is the most effective method to harmonize the regime applying to SGEIs, but reckons that legitimacy concerns may eventually force the Commission to propose a regulation based on Article 14 TFEU.[1212]

Under such circumstances, where the two key concepts of "economic activity" and "SGEIs" are still so easy to litigate on, the decentralisation of state aid control in the field of social services becomes an issue. Fiedziuk observes that traditionally, "decentralisation of State aid control has been regarded as a controversial topic due to the high potential for political bias in decision-making on the national level in this field".[1213] If one adds to this the Commission's rather lenient approach of what may be regarded as "clear and precise SGEI tasks", the risk of untransparent and over-compensated public service tasks in the field of social services is arguably non-negligible, especially when many Member States wish to render this activity field more attractive to private operators.

Decentralisation may be seen as a manner for the Commission to "focus on the important state aid issues", and let distortions of competition in the sensitive social services be dealt with by national authorities. It is however argued here that if decentralisation of state aid control leads to devitalise the principle of proportionality inherent to Article 106(2) TFEU in the public funding of social services, this may be detrimental for EU citizens' access to well-defined and reliable social rights. Indeed, the essence of the principle that the right of access to SGEIs must be respected when EU law is applied may be argued to be that there are clearly defined SGEI-tasks, which are transparent not only for authorities for the citizens concerned, especially when the trend goes towards market control by users in that area of activity. If public funding of SGEI tasks is not subject to proportionality requirements, the tasks do not have to be precise. The more diffuse the tasks, the more the principle of "access to SGEIs" looses substance.

In sum, the legislation underpinning the Commission's "Quality Framework for SGIs" denotes much ambivalence to the emergence of SGEI as a "new" Treaty concept capable of structuring principles and rules in a process of Europeanisation of public

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Vestager, Commissioner for Competition, 18 December 2014 available at http://ec.europa.eu/commission/2014-2019/vestager/announcements/speech-high-level-forum-member-states-margrethe-vestager-commissioner-competition-18-december-2014_en .

[1212] Sauter W., 2014, p. 179.

[1213] Fiedziuk N., 2013b., p. 18.

services. The Commission and the EU legislator seem aware that the integration and growth of social service markets must show a certain degree of loyalty to the Treaty rules on SGIs, in particular on SGEIs, to be legitimate. At the same time, there are many signs that the EU legislator avoids tieing up the procurement and state aid rules too clearly and functionally to the explicit or *de facto* existence of SGEIs in the Member States. In the field of social services, the EU procurement rules seem to show the way out from "welfare state SGEIs" towards lighter "market SGEIs" closer to the concept of universal service obligations. The Member States are invited to include to the shared values of SGEIs such values as "the specific needs of different categories of users, including disadvantaged and vulnerable groups", "the involvement and empowerment of users" and "innovation". These words rather promote the acquisition with public funds of social services which are more differentiated according to "groups" where the disadvantaged are specified as a particular group, and the rationalisation of production methods.

In this discourse, systems of choice and voucher systems fit well, and the fact that such systems have been exempted from the new procurement directives may be taken as a token that they are politically welcome at EU level. Seen in that perspective, the choice to decentralise the control of state aid rules applying to social services to the Member States can arguably not be seen in the simplistic light of a Commission victim of centrifugal forces, but rather of a European political development that receives support from a majority of governments in the Member States. If lighter "market SGEIs" should develop on the financial platform of "welfare SGEIs", this can only be made by the Member States themselves, and they need some legal leeway to achieve this shift.

12 Social services under the competence of Swedish local and regional authorities: SGEIs?

The EU policy on a Quality Framework on SGI, and the recently revised procurement and state aid rules applying to social services suppose and require that public authorities in the Member States are able to assess whether a social service, as provided in a specific regulatory context, is economic, and whether it is attached to SGEIs. The purpose of this chapter is (1) to evaluate whether social services in the Swedish public sector may be generally seen as SGIs and generally expected to be provided as an economic activity and whether Swedish law makes this clear, and (2) to provide a legal background on local and regional authorities' wide competence in the field of social services, necessary for a better understanding of the analysis of two specific social services in systems of choice in chapter 13, and to draw more general conclusions in chapter 14.

To these purposes, the general approach consists first in focusing on social services under local and regional authorities' competence, for the simple reason that the large majority of social services in the public sector have been devoluted to these authorities, and that they have extensive possibilities to intervene in the organisation and the financing of these services. Second, the approach consists in proceding to a general appreciation of how easy Swedish law and concepts make it for public authorities to be aware that certain of their measures in the field of social services are covered by EU rules on state aid because the activity is "economic", and also to identify SGEIs existing in the national regulation of services under their competence.

To assess whether social services under Swedish local and regional authorities may generally be regarded as services of general interest (SGIs), and thus are "important" in EU law and EU policy, one is of course confronted with the fact that the notion of SGI is even "less defined" in EU law than the notion of SGEI. In order to propose the terms of a "comparison" between SGIs and social services under LRAs' competence, one must therefore be convincing but relatively free. The "freedom" here is to decide that the notion of "general interest" in services of general interest must have both a meaning and a substance, and to try finding out which meaning and substance it has in Swedish law on social services supplied under the responsibility of public authorities at local and regional level. The second "freedom" here is to decide that the notion of "general interest", which is an essential element of local and regional authorities' competence in Swedish law, must be related to the principles of public action in the Swedish constitution. This is perhaps the boldest step, because it supposes that the general interest of public action may have to be interpreted on the basis of the national constitution and not only on the basis of EU constitutional objectives and principles. In the Swedish legal tradition, the Instrument of Government, which is one of the four Swedish constitutional laws, has arguably not been used as a source of law in this type of issue so far, which explains that this approach is commented in more depth in chapter 1 of this study.

To evaluate whether Swedish law facilitates the reception of EU law's wide and functional understanding of the notion of "economic activity", the approach is not so ambitious, as it simply consists in examining how concepts of entry of national rules governing the intervention of LRAs on the market are traditionally understood (in particular in preparatory works) and how this fits with the economic reality of rapid and profound changes in the supply of social services in Sweden during the latest twenty years. A choice has been made to concentrate on legal concepts in the Swedish Acts of horizontal character (the Local Government Act, the Competition Act, and the Procurement Act). It seems sufficient to show how difficult it may be for Swedish public authorities, in the present state of Swedish law, to rapidly assess which entities may be subject to EU market rules, and how it may affect their decisions.

In this chapter, horizontal and sector law applicable to social services under LRA's competence is interpreted with the support of preparatory works, jurisprudence and doctrine, in accordance with the Swedish legal method. In the more analytical part of this chapter, a number of Swedish constitutional provisions related to public authorities' missions are examined, in particular those related to social rights, because they are relevant to apprehend the "essence" of elusive notions such as "general interest" and "local self-government", which demineate LRAs' competence in Swedish national law. To include Swedish constitutional provisions in the interpretation of positive law is unusual in Swedish practice, where constitutional laws have less impact in Sweden than in many other countries. However, in the "light comparative" entreprise to determine whether social services under Swedish local and regional authorities' competence may be regarded as SGIs, it is argued that the EU legal method, allowing to rely on "constitutional" objectives as principles guiding the interpretion, may influence the "traditional" Swedish legal method. Therefore constitutional provisions formulating the objectives and missions of Swedish public authorities are considered here as relevant elements of interpretation.

Some terminology indications must also be given here. Both local and regional authorities exist in Sweden, and are in the following generally referred to as "LRAs".[1214] The terms "local authorities" and "regional authorities" are used instead when the issue examined is more directly related to the competence attributed to the local or regional levels of government. The terms "municipal entities" and "LRA-owned entities" are used in this chapter synonymously in the meaning of entities which are "in-house" in the meaning of EU procurement law, in other words, either parts of LRAs' own administration producing services, or companies which they wholly own, and control, either alone or together with other LRAs.

[1214] See Chapter 1 Article 7 of the Instrument of Government. In Sweden, "local authorities" exist at two levels, local and regional, called municipalities and county councils, or alternatively "primary and secondary municipalities". 290 primary municipalities and 18 county councils. The Swedish constitution consists of four fundamental laws: the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. The principles governing specifically the powers and missions of local and regional authorities are laid down in Chapter 14 of the Instrument of Government.

The first section outlines the constitutional and statutory principles and rules governing LRAs' competence, in particular social services. The second section examines whether the Swedish rules governing the organization of social services under LRAs' mandatory competence may imply that the activity is economic in the meaning of EU law, and whether this is visible in Swedish law.

12.1 Do social services under LRAs' competence constitute SGIs?

The purpose of this section is to examine whether social services under LRAs' competence may be regarded as services of general interest in the meaning of the Treaties.

12.1.1 General interest central for LRAs' competence in the Local Government Act

LRAs' *general* competence is laid down in the following provision of the Swedish Local Government Act:

> Municipalities and county councils may themselves attend to matters of general interest which are connected with the area of the municipality or county council or with their members and which are not to be attended to solely by the state, another municipality, another county council or some other body. [1215]

On the basis of this provision, a local or regional authority may decide to take *voluntary* responsibility and on that basis intervene in a given sector. Whatever their precise object, measures taken on the basis of the general competence must be in the general interest of the municipality or its members. This is in line with the general interest principle in the Swedish Instrument of Government (Sw: *Regeringsformen*)[1216] which is one of the four fundamental laws constituting the Swedish constitution.

Several principles and rules limit LRAs' discretion when adopting measures in the frame of their competence. Thus, a local or regional authority's measures must be connected to its area or its members, and may not impede on the competence of other LRAs (the so called "localization principle"). Also, LRAs must treat their members equally, unless objective reasons allow otherwise, and may not take retroactive decisions which are detrimental to their members, unless there are very strong grounds for doing so (the so

[1215] Chapter 2 Section 1 of the Local Government Act.

[1216] The Swedish constitution consists of four fundamental laws: the Instrument of Government (Sw: Regeringsform (1974:152), the Act of Succession (Sw: Successionsordning (1810:0926)), the Freedom of the Press Act (Tryckfrihetsförordning (1949:105)), and the Fundamental Law on Freedom of Expression (Sw: Yttrandefrihetsgrundlag (1991:1469)).

called "equality principle" and "non-retroactivity principle").[1217] The requirement of a "general interest" does not mean that quantitatively significant needs must exist, but is instead assessed on the basis of whether it is appropriate, rational, reasonable, etc. that a local or regional authority attends to the matter in question. Unless provided for by specific law, LRAs may not support individuals, as such assistance as a general rule does not constitute a general interest.[1218] These principles of localisation, equality and non-retroactivity, apply both to LRAs' general and mandatory competence, unless exemption from their application is provided by law.

LRAs may conduct commercial activities, as confirmed by the following provision:

> Municipalities and county councils may engage in commercial activity if it is conducted without a view to profit and is essentially concerned with providing communal amenities or services for the members of the municipality or county council.[1219]

Thus, while a large portion of commercial activity is regarded in Swedish law as normally reserved to private undertakings, LRAs may traditionally engage in certain commercial activities such as waste management, energy, housing, sporting facilities, transport, harbours, airports, and parking places.[1220] Where provided by LRAs, these services are to a large extent funded by fees and it cannot be excluded that they generate profits. However, as clear from the provision above, LRAs' aim with conducting the activity must essentially be to provide their own members with certain facilities or services, and may in principle not be to seek profit (the so called "principle of non-speculation").

A number of principles govern how LRAs may organize, provide and finance measures in the frame of their competence. They may deliver services under their competence through their own administration, but they have also statutory powers to transfer the management of their activities to private legal or natural persons, through municipal companies or through external providers in the frame of contracts.[1221] In the exercise of this power they must nevertheless respect the following rules. Activities which according to law or decree must be conducted by a municipal administration, and activities which include the exercise of authority to companies, may not be transferred to private legal or natural persons unless provided for by special law.[1222] Also, a local or regional authority which decides to transfer the management of one of its activities to a limited company

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[1217] Chapter 2 Sections 2 and 3 of the Local Government Act.

[1218] Report of the commission of inquiry on the Local Government Act "Kommunallagskommittén" SOU 1947:53, s. 68.

[1219] Chapter 2 Section 7 of the Local Government Act.

[1220] This discretion was consolidated in 1991 and is provided in Chapter 2 Section 7 of the Act (1991:900) on Local Government. A complication is which activities may be seen as commercial for the purpose of the Local Government Act., an issue examined under Section 12.2.2. Commercial activities regarded as in principle reserved to the private sector are commonly known in Swedish law practice as "the genuine business sector".

[1221] Chapter 3 Section 16 first paragraph of the Local Government Act.

[1222] Chapter 3 Section 16 second paragraph of the Local Government Act.

it wholly or partly owns, must keep control over the purpose and the major decisions of this company.[1223]

LRAs may finance their tasks through taxes, but they may also levy charges for services and facilities.[1224] However, for services or utilities which they are under an obligation to provide, they may not charge fees unless this is expressly prescribed.[1225] Importantly, the general principle established by the Local Government Act is that they may not charge more than the cost of the services or utilities which they provide (the "prime cost principle").[1226]

LRAs have a constitutional right to levy taxes. They are under a duty to respect budget balance rules[1227] and must act – within their administrations and at the level of their companies –according to good economic management.[1228] In particular, they must take care that their funds generate a good return and are administered with adequate security.[1229] The principle of good economic management sets a general objective for municipal action, and it was not meant by the legislator that a municipal measure can be challenged simply on the basis of this principle. However it is not excluded that it can be invoked against measures which diverge extremely from what can be seen as good economic management.[1230] In line with the principle of good economic management, LRAs' powers to grant financial aid to undertakings is also strictly circumscribed. They may take measures, including aid, for the general promotion of enterprise in their municipality, but not grant aid to individual undertakings unless "there are very strong grounds for doing so".[1231]

As is the case for the localization principle, the equality principle and the non-retroactivity principle, the economic principles governing LRAs' action as providers (not-for-profit, prime-cost) have been consolidated in the Local Government Act. Although they are still approached as "general principles", several of them, in particular the prime cost principle, are growingly seen as problematic in sectors where private

[1223] Chapter 3 Sections 17-18 of the Local Government Act. Regarding a company that it wholly owns, a local or regional authority must in particular take care that the company activity's purpose and the authority's competence for this activity are explicitly stated in the articles of association.

[1224] It is well established in Swedish case law that a local or regional authority may decide to partly or wholly tax-finance services or facilities for which there are no statutory charging principles (the so called "deficit-principle"). For references to this case law, see Lindquist U., 2011, p. 177-178.

[1225] Chapter 8 Section 3b of the Local Government Act. As will be seen, such prescription is made in several laws concerning social services.

[1226] Chapter 8 Section 3c of the Local Government Act.

[1227] Chapter 8 Section 5a of the Local Government Act. Very simplified, a year's negative result must be resorbed under the three following years.

[1228] Chapter 8 Section 1 of the Local Government Act provides that "municipalities and county councils shall exercise good economic management in their activities and in activities conducted by the agency of other legal entities."

[1229] Chapter 8 Section 2 of the Local Government Act.

[1230] See decision of the administrative court in Malmö of 26 June 2013, case nr.13858-10. For instance, this principle imposes on local authorities to strive to get the best possible price when selling municipal property.

[1231] Chapter 2 Section 8 of the Local Government Act.

operators provide the same service as LRA-owned entities, which is now the general case in Sweden. A "market operator principle" has therefore been introduced in several laws, regulating activities where LRAs may act as providers on the basis of their general competence. The "market operator principle" obliges LRAs to derogate from the prime cost principle but also from the not-for-profit principle, regardless of whether the activity is conducted in administrative form or through private law companies.[1232] Also, in accordance with the Act on Certain Municipal Competence (Sw: *lag (2009:47) om vissa kommunala befogenheter*), which extends LRAs' powers in the frame of their general competence, LRAs may also provide collective transportation, ambulance transport, office industrial buildings and service sector premises, on the condition that they do so in accordance with the "market operator principle", and thus by derogation from the principles of non-profit and of prime-cost.[1233] In certain sectors, they may also derogate from the equality principle and from the localization principle.[1234]

Thus, the very principle that LRAs may conduct such commercial activities has so far not been challenged as such. Indeed, the general interest motivating LRAs' measures must be connected to their municipality, but it is often linked to general interests founding social or environmental policies set at global, European or national level. Such policies build a *non-binding political expectation* – by international bodies, national authorities, their voters, or varied interest groups – that LRAs will loyally endorse and implement them in the frame of their competence. LRAs are thus expected to efficiently contribute, *if appropriate as providers*, to the achievement of environmental goals (often connected to measurable standards defined at national, EU or international level), social goals (cohesion and social peace, access to freedom of choice, employment, minimum living standard) and economic goals (good infrastructure for growth, welfare efficiency through competition, regional development, public finances in balance).

Both the Local Government Act and the Instrument of Government mention that LRAs' powers and obligations follow also from special law.[1235] Indeed, a large amount of Acts regulating activities in the public sector establish what is called LRAs' "special competence" or "mandatory competence", and in fact impose on LRAs obligations to ensure access to certain services or infrastructures under conditions determined by law. In these sector laws, LRAs are not only required to conduct planning and supervisory activities, in particular physical planning and certain environmental control of certain industrial and commercial activities). They also have to *ensure the supply* of public services and facilities as education, healthcare, social services as well as limited social security,

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[1232] Government bill on LRAs' competence, *Kommunala kompetensfrågor* m.m., proposition 2008/09:21, p. 58.

[1233] See Section 3 of the Act on Certain Municipal Competence (in Sw: *Lag (2009:47) om vissa kommunala befogenheter*). On the basis of this Act, LRAs may also provide tourism infrastructures, export expertise on municipal administration, etc.

[1234] In some traditional municipal sectors, LRAs acting as providers are not only obliged to act business like but may also derogate from the localisation principle laid down in the Act on Local Government. This is for instance the case according to Chapter 7 Sections 1 and 2 in the Swedish Act on Electricity (in Sw: *Ellag (1997:857)*), Section 39 of the Distance Heating Act (in Sw: *Fvärrvärmelag (2008:263)*) or Section 57 of the Public Water Services Act (in Sw: *Lag (2006:412) om allmänna vattentjänster*). The reason for this exception is often of technical nature.

[1235] Chapter 2 Section 4 Local Government Act.

emergency services, library, collective transport, water and waste management. In other words, sector-specific Swedish frameworks in social and environmental fields impose on LRAs a *legal obligation to fulfil tasks of general interest*.

Inasmuch as the principles governing LRAs' general competence in the Local Government Act come into conflict with provisions in sector laws governing their mandatory competence, the latter prevail as *lex specialis*. As a result of the cohabitation of old "general principles" in the Local Government Act and of many exemptions in special law, LRAs' margin of discretion as operators has been limited: they must in all the more fields behave as market economy market investors and at the same time in the general interest of their members or of their territory, a circle which can be tricky to square.[1236]

12.1.2 LRAs' general and special competence for social services

Based on their *general* competence, local authorities (here meant as only "local" and not regional) may conduct commercial activities, most notably in the fields of housing and ambulance transport. Concerning housing, LRAs' discretion to act as providers on the market on the basis of their general competence has been and is still of paramount importance. In that sector, it is important to be aware of the distinction between housing measures based on LRAs' voluntary respectively LRAs' mandatory competence. LRAs' general competence allows them to voluntary decide to *provide* housing, in particular rental housing, in the general interest of their municipality or of their members. By contrast, LRAs have a mandatory competence to supply housing, under certain conditions, to elderly persons and to disabled persons. Regarding ambulance transport, it may be noted that securing the supply of such services is a mandatory competence of *regional* authorities, not of local authorities, but that the latter may offer ambulance transport services to regional authorities – in the frame of procurement procedures – and thereby must respect the market operator principle which allows that they derogate from the localization principle and in fact prohibits that they apply the prime cost principle.

The most important part of LRAs' competence in the field of social services is however based on *special* regulation. According to several framework laws, LRAs have thus a

[1236] Cyndecka holds that "being profit-motivated or pursuing economic objectives is the fundamental characteristic of a behaviour that is typical of private market operators" but that "the state is by no means precluded from pursuing [non-economic objectives] when acting as a private investor would", as in particular, "a public investor does not need to be guided by profitability in the short term. It may be so also in a medium or long term while pursuing a structural policy, either general or sectoral". See Cyndecka M. A., 2015, p. 319. To argue that a long-term profitability may comply with the market economy investor principle (MEIP) appears to be a convenient way to "square the circle", and prevent that public authorities' decisions to invest for instance in housing in geographic areas where profitability is inexistant, and where a private investor would not invest a penny, to be challenged on the ground that they are incompatible with the MEIP imposed on their behaviour. Another manner to address the problem, arguably more solid legally, is to admit that in case for-profit is required from public investors as a general rule, market failure may necessitate a derogation from the MEIP under Article 106(2) TFEU.

mandatory competence for a broad range of social services. In the field of health care, most of the responsibility for securing the supply of services is assigned to regional authorities.[1237] Local authorities have also been attributed mandatory missions in the field of health care, but they must also secure the supply of childcare,[1238] elderly care[1239], support for disabled persons[1240], preschools, primary and secondary education[1241], emergency services and emergency preparedness, economic support for their members in temporary need, specific forms of housing to several groups of persons in particular special elderly housing[1242], family support services[1243] and housing support in ordinary housing.[1244]

In this decentralized model, and based on the principle of self-government, LRAs have a margin of discretion in fulfilling their missions. Their tasks in the field of social services are regulated through framework law, for instance in the Health and Medical Services Act and the Social Services Act. This type of legislation does not confer enforceable rights, but puts instead on local or regional authorities obligations to secure that their members have access to subsidized social services according to their need. In other words, the individual situation is decisive for the service received.[1245]

LRAs' missions based on their general competence and on their mandatory competence in special laws are fundamentally related to the duties of public authorities – at national, regional or local level – laid down in Chapter 1 Section 2 of the Instrument of Government.

12.1.3 Public authorities' duty to secure and promote social rights: a "principle" of Swedish constitutional law

[1237] These missions are mainly regulated by the Health and Medical Services Act (Sw: *Hälso- och sjukvårdslag (1982:763)*), but also for instance by other acts such as the Act on Care of Addicts under certain circumstances (Sw: *lag (1988:870) om vård av missbrukare i vissa fall*); the Act on Involuntary Commitment (Sw: *lag (1991:1128) om psykiatrisk tvångsvård*); the Act on Forensic Psychiatry (Sw: *lag (1991:1129) om rättspsykiatrisk vård*).

[1238] These missions are generally regulated by the Social Services Act (Sw: *Socialtjäntlag (2001:453)*) but also by other pieces of legislation, for instance, for children in problematic family or social situation, the Act on Care of certain Young Persons (Sw: *Lag (1990:52) med särskilda bestämmelser om vård av unga*).

[1239] The task consists in supplying assistance at home to elderly persons in need of it, see Chapter 5 Section 5 first paragraph in the Social Services Act.

[1240] This task is subject to provisions in the Social Services Act, named above, but also in other legislation such as the Act on support and service to persons with disabilities (Sw: *lag (1993:387) om stöd och service till vissa funktionshindrade*).

[1241] Education Act (Sw: *Skollag (2010:800)*).

[1242] This task consists in setting up special housing for elderly persons in need of special care, see Chapter 5 Section 5 second paragraph in the Social Services Act.

[1243] Chapter 5 Section 3 in the Social Service. The main task within this social service is to contribute to solving conflicts and problems in family and couple relations through therapeutic conversation.

[1244] To persons living in their own ordinary housing who need support because of handicap or addiction problems.

[1245] Whether the public authorities or the individuals themselves may evaluate this need is another question.

In the frame of the latest constitutional reform which came into force in 2010, the foundational principles on local and regional authorities have been completed and gathered in a specific chapter (Chapter 14) on local authorities in the Instrument of Government (IG). One of the modified provisions (Section 2) gives a general definition of LRAs' competence:

> *The local authorities are responsible for local and regional matters of public interest on the principle of local self-government. More detailed rules on this are laid down in law. By the same principle, the local authorities are also responsible for other matters laid down in law*.[1246]

This provision's primary aim was to clarify that the principle of local self-government applies to LRAs' general *and* mandatory competence. However, it constitutionalizes at the same time the fact that LRAs' responsibility for matters of public interest consists both of voluntary tasks under their general competence, and mandatory tasks under their competence in special law. It is important to note that the term "public" is used in the English version of the Instrument of Government accessible on the site of the Swedish government, as a translation of the Swedish word "allmän". However, the Swedish word "allmän" is also routinely translated by the English word "general". Hence, the English version can arguably also be "matters of *general* interest". As already mentioned, to finance their activities and tasks, LRAs' economic powers include a right to levy tax, which is constitutionally enshrined.[1247]

While the notion of "general interest" in Chapter 14 Section 2 IG is open-ended, its constitutional substance must arguably be interpreted in the light of the very first provisions of the Instrument of Government, spelling the fundamental principles, values and objectives which govern public power in Swedish law. In particular, Chapter 1 Article 2 IG reads as follows:

> Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the individual.
> The personal, economic and cultural welfare of the individual shall be fundamental aims of public activity. In particular, the public institutions shall secure the right to employment, housing and education, and shall promote social care and social security, as well as favourable conditions for good health.
> The public institutions shall promote sustainable development leading to a good environment for present and future generations.
> The public institutions shall promote the ideals of democracy as guidelines in all sectors of society and protect the private and family lives of the individual.
> The public institutions shall promote the opportunity for all to attain participation and equality in society and for the rights of the child to be safeguarded. The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance affecting the individual.

[1246] Chapter 14 Article 2 of the Instrument of Government

[1247] Chapter 2 Section 5 of the Local Government Act, referring to Chapter 14 Section 4 Instrument of Government.

> The opportunities of the Sami people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted.[1248]

Introduced in 1976 in the Instrument of Government adopted in 1974, this provision, put forward by the commission of inquiry on fundamental freedoms and rights, is the result of a political compromise.[1249] In short, it may be seen as the condition which socio-democrats put for introducing in the Swedish constitution a specific chapter on fundamental rights and freedoms and a provision on judicial review which reinforced the rule of law in Sweden but could also restrict parliamentary powers.[1250]

Importantly, although the Instrument of Government has been reformed several times, this "political" provision stands relatively unchanged since more than 40 years in the very first chapter of the Swedish constitution.[1251] It is provided in the second paragraph that public authorities have a "duty to secure" a number of social rights, but Lind observes that the status of social rights has so far been neither analysed nor problematized in the Swedish constitutional process.[1252] Nevertheless, a point of departure of the commission of inquiry which proposed the introduction of the provision was that, in addition to classical fundamental freedoms and rights destined essentially to protect an individual *against* the state, some countries had included in their constitution "social rights" destined essentially to protect an individual *with the help* of the state. The commission of inquiry on fundamental freedoms and rights found natural to establish rights to employment, education, health care and social care in the Swedish constitution etc., as in its view they expressed both a modern society's care for the individual person, and principles of great importance for individual welfare.[1253] Having emphasized the role of fundamental freedoms and rights for democracy, the commission of inquiry found obvious that a certain material standard of life for individual persons was necessary for a democratic government, and therefore that certain social and economic rights were necessary, or at least very important in order to give citizens a possibility to take part in the political work and an interest in maintaining democracy. In

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[1248] Chapter 1 Article 2 Instrument of Government

[1249] A commission of inquiry was set up directly after the adoption of a new Instrument of Government to examine in detail the constitutional status of fundamental freedoms and rights. It was this commission that proposed the introduction of the provision under in Chapter 1 Section 2 of the Instrument of Government, see report of the commission of inquiry on fundamental rights "Medborgerliga fri- och rättigheter – Regeringsformen" SOU 1975:75.

[1250] For a very detailed account of the political and legal debates underpinning the preparatory works that eventually led to the introduction of the provision in Chapter 1 Section 2 of the Swedish Instrument of Government, see Lind A., 2009, p. 52-76.

[1251] The following modifications were introduced through the latest broad modification of the Instrument of Government, in force since 2010: under paragraph 2 "secure the right to health" was replaced by "promote favourable conditions for good health", in paragraph 4 a specific duty to promote the opportunity "for the rights of the child to be safeguarded" was introduced, in paragraph 5 the Sami people is specifically named.

[1252] Lind shows that the preparatory works and proposals discussing this provision only give a summary analysis of its practical significance. See Lind A., 2009, p. 76.

[1253] Report of the commission of inquiry on fundamental rights "Medborgerliga fri- och rättigheter – Regeringsformen" SOU 1975:75, p. 163.

this sense, promoting welfare was regarded as constituting a part of political democracy.[1254]

However, it was repeatedly emphasized by the commission of inquiry on fundamental freedoms and rights that the provision in Chapter 1 Article 2 IG is not a legal rule formulating what public powers *must* do, but instead a declaration of objectives formulating what public powers *ought to* do.[1255] Consequently, whether public powers fulfil these objectives can only be submitted to a political control and not to a legal control. As the duty to treat individuals as equals, the social rights laid down in Chapter 1 Section 2 IG may be understood as a *principle* directed to the legislator which, in the commission of inquiry's view, should not be absent from a constitution. Hence, neither this principle nor the social rights written down in the Swedish constitution are *per se* binding on the state, which is understandable given the life expectancy of a constitution and the variation of political and economic conditions which may be expected in a democratic state.[1256]

Petrén, who observed and deplored that the Swedish judiciary had at that time no tradition to take the constitution seriously and control its application, expressed doubts as to whether it was in principle right to lay down in a democratic constitution meant to be valid over a long period of time certain "political objectives rather limited in time".[1257] At any rate, in 2003, the protection of the environment and of the rights of minorities were added to Chapter 1 Section 2 IG. The government bill which proposed this modification held that this constitutional provision, although it does not confer any personal rights, may be legally relevant in the interpretation of diverse statutory rules.[1258]

But is it really so that the provision in Chapter 1 Section 2 IG has no legal meaning at all and mostly fulfils a "psychological" function, by mobilizing the public opinion to defend social rights?[1259] The answer seems clearly to be "no". In fact, the commission of inquiry on fundamental freedoms and rights explained that this provision, spelling the fundamental values of Swedish democracy profoundly anchored in the Swedish society, may be regarded as a *substantial* equivalent to Chapter 1 Section 1 IG establishing that Swedish democracy is founded on free formation of opinion and universal and equal

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[1254] Ibid.

[1255] Even socio-democrats, who drove forward the adoption of this constitutional provision, were against binding rules both on positive and negative rights. Their view was that it could freeze political reforms, and that the establishment of a minimum level in the Swedish constitution would not give a correct picture of further developments in that field. See Lind A., 2009, p. 73.

[1256] Back in 1978, Petrén went further and held that *no law* can guarantee a right to good care, employment, housing etc., a statement which may be discussed. This view may be discussed in the light of the Swedish Act on support and service to persons with disabilities act on assistance to disabled persons, cited above in footnote xxx, which gives disabled persons an opposable right to assistance and support allowing them to a good standard of life. See Petrén G., 1978, p. 29.

[1257] Petrén G., 1978, p. 30-31.

[1258] Government bill on certain modifications to the Instrument of government, *Ändringar i regeringsformen – samarbetet i EU m.m.*, proposition 2001/02:72, p. 15-16.

[1259] Such a psychological effect was envisaged in the report of the commission of inquiry on fundamental rights "Medborgerliga fri- och rättigheter – Regeringsformen" SOU 1975:75, p. 13.

suffrage, and realized through (a) a representative and parliamentary form of government and (b) local self-government.[1260] And if there is, as suggested by the commission of inquiry, normative "substance" to Chapter 1 Section 2 IG, it is submitted here that it is a tangible expression of what may be regarded as "matters of general interest", in particular such "matters of general interest" which LRAs may attend. In other words, it is submitted that the objectives and missions enunciated in Chapter 1 Section 2 IG, in particular the duty to secure social rights, constitute general interests explicitly promoted by Swedish constitutional law.

The perception that certain social services are of general interest in the sense that securing access to such services legitimates public powers is clear for instance from the government bill on the 2010 reform of the framework for municipal housing companies. Reminding that local authorities, in accordance with the Local Government Act, may voluntarily engage in activities in the general interest of their territory or their members, the government underlined that Chapter 1 Section 2 IG can be seen as expressing the *importance* of housing and that public powers must support access to housing.[1261] The "importance" of housing for individual welfare implies that securing access to this service is in the general interest and motivates that LRAs have powers, on the basis of their general competence, to voluntary engage in providing rental housing on the market. Likewise, the "importance" of other objectives in Chapter 1 Section 2 IG, often connected to social or environmental policies at global, European or national level, creates an already mentioned political expectation that LRAs will voluntarily intervene in certain economic sectors not or not fully harmonized at national or EU level.

Regarding LRAs' responsibility for "other matters laid down in law" – their mandatory tasks - it is not specified in Chapter 14 Section 2 IG quoted above whether they also must be of general interest. Nevertheless it seems clear that such "other matters" – tasks and powers defined by the national legislator – must also be in the general interest as they are defined in sector laws constituting *lex specialis* to the Local Government Act, and fundamentally legitimated by the principles enumerated in Chapter 1 Section 2 IG.[1262] And thus, services for which LRAs are responsible for on the basis of their mandatory competence are in the general interest, though *not specifically* of their own territory or of their own members.

On this background, it may be questioned whether Sweden's membership in the EU can affect Swedish public authorities' fundamental missions in accordance with Chapter 1 Section 2 IG. Since 2010, Sweden's membership in the EU is mentioned in the introductory chapter on the basic principles in Chapter 1 Article 10 IG, reading as follows

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[1260] Report of the commission of inquiry on fundamental freedoms and rights "Medborgerliga fri- och rättigheter – Regeringsformen" SOU 1975:75, p. 183-184.

[1261] Government bill on municipal housing companies, *Allmännyttiga kommunala bostadsaktiebolag och reformerade hyressättningsregler*, proposition 2009/10:185, p. 12-13.

[1262] This is particularly clear from Chapter 3 Section 2 Paragraph 2 in the Swedish Act on Social Services laying down that "the Social board must in the frame of its activity promote the individual's right to labour, housing and education."

> Sweden is a member of the European Union. Sweden also participates in international cooperation within the framework of the United Nations and the Council of Europe, and in other contexts.

By introducing this provision, the objective was to signal clearly to the Constitution's readers that Sweden plays an active role in extensive international cooperation that has a major impact on Swedish society, the EU membership being Sweden's most significant area of cooperation.

As a consequence of this "small revolutionary step"[1263], Sweden's EU membership is constitutionalized, which is explicitly meant by the Swedish legislator to draw readers' attention to the political and legal consequences on the Swedish society following from the fact of EU membership. What is less clear is whether, by constitutionalizing EU membership, the Swedish legislator intended to increase the dignity of EU objectives, compared to values and principles in Swedish law. In other words, does the new provision in Chapter 1 Section 10 IG *per se* imply that the Swedish State has a stronger duty of loyalty to EU values and objectives than to Swedish constitutional values and objectives? As evoked by Wenander, there is a debate between legal scholars believing that certain provisions in the Swedish constitution should be seen as simply descriptive of a political agreement, and other legal scholars considering that constitutional provisions must be regarded as having *as such* normative substance. Wenander, clearly part of the latter group, considers that what is legally interesting is to assess which legal meaning a provision consolidating this political compromise may be taken to have.[1264]

While Wenander's view is shared here, it goes beyond the frame of this study to analyse in depth the normative strength of EU objectives and values in Swedish law. However, it is argued that nothing – even the fact that EU law has precedence over national law in case of conflict – seems to support *a priori* that the duty to respect EU objectives and fundamental freedoms has a *higher* normative dignity in Swedish law than the duty to promote Swedish values and social rights laid down in the Swedish constitution, in particular in policy fields where the principles of Chapter 1 Section 2 IG are directly relevant for Swedish legislation. What may have happened with the constitutionalisation of Sweden's EU membership is that the two normative sets in Chapter 1 IG – public authorities' loyalty to the values and social rights enumerated in Section 2 and public authorities' loyalty to the values and rights implicitly following from EU membership – are more openly "on par" than before. Thus, a paradox can be that by constitutionalizing EU membership as a "political fact", the Swedish legislator has also reminded the "political fact" in Chapter 1 section 2 IG, the latter being at least as constitutional as the former and certainly not less democratically anchored. As a result, if the values and

[1263] See the report of the commission of inquiry on the reform of the constitution "En reformerad grundlag" SOU 2008:125 del 1, p. 47-48. Bergström has described the introduction of this provision as a "small revolutionary step", because it gives constitutional status to the Sweden's membership in the EU. Bergström C. F., 2009, p. 204; see also the Comments from the Swedish Institute for European Political Studies (Sieps) on the report of the commission of inquiry on the reform of the Swedish constitution "En reformerad grundlag" SOU 2008:125, Dnr 16/2009, http://www.sieps.se/sites/default/files/Remissvar_sou2008_125.pdf, accessed 27 February 2015.

[1264] Wenander H., 2011, p. 549, and his references to legal scholars' positions in this debate, under footnote 68.

principles for public action formulated in Chapter 1 Section 2 IG have some normative value in Swedish law, they have been given *more* visibility by the implicit reference to EU values and objectives in Chapter 1 Section 10 IG.

It is important to keep in mind that the EU legal system and the Swedish legal system base public authorities' action on separate institutional grounds. By contrast with Union institutions, Swedish public authorities have no constitutional mission to establish an internal market, including a system ensuring that competition is not distorted. The constitutional missions of Swedish public authorities, including the State, are laid down in the Instrument of Government (IG) and consist in securing societal objectives and social rights. Consequently, the legitimacy of legal frameworks decided the Swedish state's parliamentary representatives and defining LRAs' powers and obligations in certain environmental or social fields of activity depends on their coherence with the fundamental objectives and missions of public powers enunciated under Chapter 1 Article 2 of the Instrument of Government. The Swedish welfare frameworks found their fundamental legitimacy in the public powers' constitutional welfare missions and objectives, in particular the mission to secure social rights, in the respect of the equal worth of all and the liberty and dignity of the individual. In other words, it may be doubted that constitutionalizing Sweden's EU membership has the effect to transform the Swedish constitution into an economic constitution. It is namely difficult to imagine why constitutionalizing EU membership can restrict the political freedom of the Swedish legislator – and beyond the Swedish citizens – more than the constitutionalization of public missions decided by these citizens, even if it was a long time ago. Another thing is that this double loyalty to Swedish constitutional missions and EU constitutional missions, requires that the Swedish legislator thinks – literally – twice.

12.1.4 Preliminary remarks

On the background of the Swedish constitutional and statutory rules outlined in sections 12.1.1 to 12.1.3, it is submitted that social services under LRAs' competence constitute services of general interest in the meaning of EU law. The duty for public authorities to secure social rights does not *per se* found individual opposable rights, but must instead be seen as a principle, connected by the Swedish legislator to the notion of "social contract" and explicitly meant by the Swedish legislator to contribute to social cohesion.[1265] The social rights formulated in Chapter 1 Section 2 IG constitute a frame for legislative work and administrative decision-making which is primarily addressed to

[1265] In the government bill on the Social Services Act, it was recalled that some form of legal regulation giving individuals a right to livelihood support has existed since the 18th century, with the Enlightenment's idea that the state has welfare duties towards its citizens, this "membership" implying rights but also duties. It also underlined that the notion of "social rights" had been used as a legilative instrument to build up the welfare state, by expressing the need of distributing society's resources and as an instrument to solve conflicts between the interests of individual and of public authorities. See government bill on the Social Services Act, *Ny socialtjänstlag m.m.*, proposition 2000/01:80, p. 81. The goal of cohesion is confirmed by the existence of a compensation system equalizing LRAs' economic resources and allowing them to supply their members with equivalent standards of welfare services.

the legislator. By placing certain social rights under LRAs' mandatory competence, the legislator must primarily fulfil *its own* duty as public power to promote access to these rights. The Swedish legislator must *also*, in the exercise of its legislative power related to LRAs' responsibility, respect the equal worth of all and the liberty and dignity of the individual.

12.2 Are social services within LRAs' competence covered by EU law on free movement and competition (including state aid)?

As services of general interest, social services within LRAs' competence may be subject to EU competition and state aid rules, depending on how they are regulated in Swedish law. This section outlines therefore first how these social services may be organized in Sweden. In the second part of this section, an attempt is made to show how a number of concepts delineating the applicability of horizontal Swedish competition and aid rules to LRAs' activity as operators and financers of social services contribute to delay the acknowledgement of the economic character of many social services under LRAs' competence, and of the necessity to comply with EU market rules, in particular state aid rules. In the last part, a general assessment of the economic character of social services within LRAs' is conducted, before the question is approached in more depth and precision in the frame of the case studies in chapter 13.

12.2.1 Organization of social services under LRA's competence with a focus on systems of choice

Regarding most social services within their mandatory competence, LRAs may decide whether the service will be provided in-house or by private entities. In fact, as a result of the legal and political developments in Sweden, most tax-funded social services are today provided by both public and private operators. When the service is provided by external entities, the Swedish rules on procurement procedures must normally apply. The Swedish procurement rules implement the EU procurement directives, but they also include autonomous rules concerning in particular the procurement of social services and services under the directives' threshold values, for which they put stricter procedure requirements on contracting authorities than the directives.[1266] Instead of these procurement procedures, LRAs may also choose to open for competition social services covered by the Act on free Choice Systems (LOV). LRAs' *freedom* to use LOV-based systems is subject to two important exceptions. First, regional authorities are under a statutory obligation to organize publicly funded primary care so that all their members can choose provider within the whole authority's territory, and thereby to apply LOV.[1267]

[1266] The only general excption from the obligation to apply the procedures provided for bythe Swedish procurement rules is for low-value contracts, i.e. contracts with a value of less than 28 % of the threshhold values.

[1267] Section 5 paragraphs 2 and 4 of the Health and Medical Services Act.

Second, there is an extensive system of free choice in the field of school education, but this system is not covered by LOV.

In LOV-based systems, individual users may choose among providers which are part to the system.[1268] LRAs having introduced LOV-based systems of choice have often their own entities as providers in the system, in which case users have access to a choice of private and public providers, for profit or not-for-profit. For the user who does not choose a supplier, the contracting authority must provide a no-choice alternative. A contracting authority that has decided to establish or change a system of choice must publish the relevant tender documents on the national website set up for the purpose, and it must continuously request applications.[1269] All applicants satisfying the requirements referred to in the contract notice and tender documents must be approved and may conclude a contract with the contracting authority.[1270] While operators admitted to participate in the system must fulfil the obligations imposed on the activity by Swedish legislation (including administrative rules), the local or regional authority may impose its own additional requirements as a condition to provide within its system of free choice, in particular on service quality.

It is important to note that providers allowed to participate in LOV-based system do not compete on price, but are meant instead to compete on quality. Interestingly, this crucial element is not provided for by the Act itself, but instead by its preparatory works.[1271] In the preparatory works, it is also stipulated that the tender documents must give information on the economic compensation for a service unit, which for given tasks must be the same for all providers.[1272] The compensation rates set by the contracting authority must be specified in the contract documents, and the amount ultimately paid by the authority to a service provider depends on the amount of users which have chosen this provider.

Subject to EU and Swedish autonomous procurement rules, local and regional authorities may cooperate to fulfil their missions in the field of social services through public law and private law instruments. In the field of health care and social services, they may form local federations or cooperate through common boards.[1273] They may

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[1268] Chapter 1 Section 1 second paragraph of the Act on Systems of Choice (Sw: *lag (2008:962) om valfrihetssystem*, LOV) entered into force 1st January 2009. This provision clarifies also that the contracting authority does not need to apply the same system of choice within all services affected. The Act does not only cover social services under LRAs' competence. The Swedish Public Employment Service may apply the Act when procuring services within its labour-market activities, and since 1 May 2010, establishment of systems of choice is mandatory for some of its activities focusing on recently arrived immigrants. The Swedish Competition Authority has been given the task to supervise the establishment of systems of choice.

[1269] The national webite is www.valfrihetswebben.se.

[1270] A provider may be excluded pursuant to Chapter 7 Section 1 of the Act.

[1271] See the government bill on the Act on Systems of Choice, *Lag om valfrihetssystem*, proposition 2008/09:29, p. 80.

[1272] Ibid.

[1273] In the field of health care and social services, common boards are generally subject to provisions in the Local Government Act, and may be used to take care of services listed in the Act on common board in the field of health care and social services (Sw: *lag (2003:192) om gemensam nämnd inom vård- och omsorgsområdet*).

also cooperate through contracts[1274], although normally not regarding tasks involving the exercise of public authority. Since 1991 LRAs may conduct certain tasks in the form of private law entities. As a result, LRAs have incorporated many of their activities, even in the field of social services.

LRAs may fund with tax most social services to the person under their competence, but they may (and do) finance charge fees in accordance with rules in special laws on for instance health care and on social services. In systems of choice, such fees must not be confused with the compensation paid to private operators to which a local or authority entrusts a social service.

12.2.2 Lack of visibility in Swedish law of social services' economic character for the purpose of EU law

The existence and rapid development in Sweden of markets for publicly funded social services, including school education, is the result of a policy sustained by the Swedish liberal government and embraced by many local and regional authorities. Studies and reports on the development of private for-profit activity in publicly funded social services show what is known in international business contexts that this sector has grown into an attractive business sector in Sweden over the last decade.[1275] The present existence of such social services markets, where a number of bigger companies active in Sweden also conduct their activity in other Member States, is undeniable, regardless of the uncertainty which the change of Swedish government in September 2014 implies for future developments. On this background, it is remarkable that the economic character of social services, in particular for the purpose of EU law, is still so unclear in Swedish law. The main concepts delineating the scope of application of the Swedish rules governing LRAs' intervention as financers, organizers or operators of welfare services, are spread in several horizontal Swedish Acts, the Local Government Act (LGA), the Procurement Acts, the Competition Acts. These concepts are all in some sense related to the notion of "economic activity" in EU law, but their meaning, generally explained in relatively old preparatory works, has not yet been updated to the reality of Swedish welfare activities.

As already mentioned, a local or regional authority may pursuant to Chapter 2 Section 7 LGA engage in so called "commercial activity", but not with a view to profit, as it must

[1274] See Chapter 2 Section 5 of the Social Services Act and Section 3 paragrap 3 of the Act on Health and Medical Services.

[1275] See for instance the report of Grant Thornton Sweden AB on the development of the markets for health care and care in Sweden "Den privata vård- och omsorgsmarknaden ur ett finansiellt perspektiv - Hur mår den privata vård- och omsorgsmarknaden i Sverige?" November 2012, accessed 27 February 2015 at http://www.grantthornton.se/Global/Dokument/Publikationer/Rapporter/2012/V%C3%A5rdstudie%202012.pdf, The existence of these markets is not only well-known in Sweden, but in fact has been the main subject of the national elections in September 2014, with a focus on the profits made by some operators (four private companies made together a profit of 590 million kronor for 2013, according to an article of Jan Almgren, "Flera välfärdsjättar återinvesterar vinsterna" *Svenska Dagbladet Näringsliv* (Stockholm, 9 October 2014).

instead be essentially concerned with providing services or facilities of general interest to its members. The meaning of the term "commercial activity" in this provision is neither clear from LGA's text, nor from its preparatory works. In the bill on LGA, the government explained that the use of the term "commercial" in the provision's text played a role in delineating LRAs' competence. It was underlined that there was no clear legal distinction between "the municipal sector" and "the commercial sector", but that LRAs may only exceptionally conduct commercial activities considered as being reserved to private undertaking (generally called in Swedish law "the genuine commercial sector"). Consequently, although LRAs may thus conduct certain activities normally provided by commercial operators, for instance energy supply and transport service, the government held necessary to prohibit as a main rule a profit motive in LRAs' "commercial activity", to reinforce that it is the criterion of "general interest" which founds LRAs' competence in such cases.[1276] It is very clear (and broadly consensual in the legal practice) that the term "commercial activity" in Chapter 2 Section 7 LGA was not meant to cover social services when the provision was introduced in the Local Government Act.[1277] Hence, this provision conveys the perception that social services are not "commercial activities", and thus gives no visibility that social services as organized under Swedish law, may constitute an economic activity in the meaning of EU free movement and competition law.

It has also been mentioned that LRAs are forbidden to grant aid to "individual enterprise" according to Chapter 2 Section 8 paragraph 2 LGA.[1278] Indén has observed that the main difficulty in applying this provision – obviously related to the prohibition of state aid in Article 107(1) TFEU – is the lack of precision of the notion of "individual enterprise".[1279] What is sure is that the provision does not cover LRA-owned entities. As a result, the notion of "individual enterprise" in this provision is not equivalent to the notion of undertaking for the purpose of EU competition and state aid law, and consequently the scope of this provision is not equivalent to the scope of the state aid provision in Article 107(1) TFEU.[1280] In the preparatory works, the notion of

[1276] Government bill on a new Local Government Act, *En ny kommunallag*, proposition 1990/91:117, p. 32-33.

[1277] In fact, if the term "commercial activity" in Chapter 2 Section 7 LGA was understood as covering social services, the point of departure expressed in the government bill to the Local Government Act of 1991, regarding LRAs' engagement in business sectors as a matter of exception, would place LRAs' mandatory competence for social services in the category of "exception", which from a political and constitutional point of view would probably be problematic. The Swedish legislator would have the tricky task to explain how a competence directly connected to the constitutional mission of public authorities to promote social rights can be allowed "by exception".

[1278] This provision was also introduced in the Local Government Act in 1991 but regarded as consolidating case law, see Lindquist U., 2011, p. 363.

[1279] Indén T., 2008, p. 50-51.

[1280] This was brought to the Swedish government's attention by the report put forward by the law firm Öberg and Associés (hereafter the "Öberg report") on the request of the committee of inquiry on LRAs' competence, and included in the report of the commission of inquiry on LRAs' competence "Kommunal kompetens i utveckling" SOU 2007:72, and entitled "Opinion on the relation between Chapter 2 section 8 LGA and EC state aid rules" (Sw: *Utlåtende avseende förhållandet mellan 2 kap. 8 § kommunallagen och EG:s statsstödsregler*). The committee proposed not to adapt the provision in Chapter 2 Section 8 § LGA to EU law, based on a view that the Swedish aid prohibition is more restrictive than the state aid rules in EU law, a view that is questionable, but not discussed here.

”individual enterprise” in Chapter 2 Section 8 paragraph 2 LGA is said to mean only the ”genuine commercial sector”.[1281]

The following case law sheds light on the fact that this “genuine commercial sector” can include the provision of publicly funded social services. Indeed, the Swedish Supreme Administrative Court had in the *Stockholm elderly care* case no doubt that a private operator of publicly funded elderly care which had taken over the activity of a municipal entity was an “individual enterprise” in the meaning of this provision Chapter 2 Section 8 paragraph 2 LGA. On that basis, the Court found that it had received individual aid prohibited by this provision, as it had acquired the municipal entity’s assets under market-price in the frame of the spin-off procedure.[1282] The Supreme Administrative Court’s approach, implying that social services are not *per se* excluded from the scope of the aid prohibition in LGA, was also adopted in two earlier cases in the Swedish administrative courts of appeal.[1283] These two cases – the *Tibble gymnasium* case[1284] and the *Sollentuna schools and pre-schools* case[1285] – are particularly interesting because the courts’ decisions are clearly based on the view that the operators of the private schools and pre-schools at issue in the cases constituted “individual enterprises”, and thus were part of the “genuine commercial sector”.

These cases call for some observations. First, the Swedish courts found so evident that the private providers of publicly funded social services at issue constituted individual “enterprises”, that they did not even mention it. Second, it is interesting to note that the administrative courts of appeal chose not to examine whether the aid at issue also infringed Article 107(1) TFEU, although the applicants had raised this ground in both cases (at least in first instance in the *Sollentuna schools and pre-schools case* and in appeal in the *Tibble gymnasium* case). Third, the *Stockholm elderly care* case implies logically that, as covered by Chapter 2 Sector 8 paragraph 2 LGA, the social service of elderly care, although placed under LRAs’ mandatory competence, seen as belonging to the “genuine commercial sector”.

Although the judgments of the administrative courts of appeal do not set precedent, they signal that providers of school in the national education system probably also must be regarded as belonging to the “genuine commercial sector”, at least in Sweden. As LRA-owned entities are not covered by the notion of “individual entreprise” in Chapter 2 Section 8 paragraph 2 LGA, this brings about a situation where publicly funded social services belong to the “genuine commercial sector” when provided by private operators and not when provided by LRA-owned entities, a legal political result which defies

[1281] Report of the commission of inquiry on LRAs’ competence “Kommunal kompetens i utveckling” SOU 2007:72, p. 68 and the Öberg report, p. 5.

[1282] In particular, the private operator had only been charged for equipment, and not for the municipal entity’s goodwill, see the judgment of the Supreme Administrative Court, RÅ 2010 ref. 100 (Stockholm kommun).

[1283] It is important to underline that while judgments from the Supreme Administrative Court set precedent in Swedish law, judgments from the administrative courts of appeal do not, and are merely ”indicative”.

[1284] Judgment of the Administrative Court of Appeal, Kammarrätten i Stockholm, KR nr 584-08 (Täby kommun).

[1285] Judgment of the Administrative Court of Appeal, Kammarrätten i Stockholm, KR nr 3801-09 (Sollentuna kommun).

common sense and arguably needs be addressed by the Swedish legislator.[1286] At any rate, the aid prohibition in Chapter 2 Section 8 paragraph 2 LGA does not give visibility to the fact that EU competition and state aid rules may cover LRA-owned entities (within or outside their administration), provided the latter offer services or goods on the market and thereby conduct an economic activity in the meaning of EU law.

It is also interesting to note that the Swedish legislator decided not to introduce in the Swedish Public Sector Procurement Act the term "economic operator" used in the Public Sector Directive to cover both contractors, suppliers and service providers, but instead the term "provider" (Sw: "*leverantör*").[1287] In the Swedish Act's bill, this choice was based on the argument that the term "provider" has so far been broadly used in Sweden and should be kept, although it is now generally held that Swedish law should adopt a terminology similar to EU procurement directives, in order to facilitate their implementation and the interpretation of decisions taken by the CJEU.[1288] This choice makes "invisible" the fact that LRA-owned entities (even within their administration) may tender in certain fields of activity such as emergency transport, thereby constituting "economic operators" in the meaning of procurement law, and offering services on a market.

Lastly, the notion of "LRAs' sales activity" in the Competition Act must be named in this non-exhaustive review of concepts which in Swedish law delineate LRAs' intervention in economic activities. Its scope is not defined clearly – neither in the Act's text nor in its preparatory works, and therefore it is uncertain whether LRAs' own operation of social services may be seen as such "sales activity", or whether LRAs' measures as operators in the field social services may be subject to EU competition and state aid rules. The provisions of the Competition Act on LRAs' sales activities are explained and commented in more detail in section 13.1.2.

In sum, the economic character for the purpose of EU competition and state law of activities under LRAs' competence – in particular social services – is so far quite invisible in Swedish law. The conceptual situation outlined above is not only problematic in a Swedish perspective, given its lack of coherence and connection to the economic reality. Its effect is also arguably that the applicability of EU rules on state aid and competition to social services is not signalled in central Swedish Acts, and not either the possible necessity to rely on the existence of SGEI missions and tasks to justify certain measures in the field of social services, in particular public funding.

[1286] A solution might be to stop using the expression "genuine commercial sector", which nowadays appears to be a source of incoherence.

[1287] Sw: Lag (2007:1091) om offentlig upphandling.

[1288] Government bill on new procurement Acts, Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster, proposition 2006/07:128, p. 147.

12.3 Conclusions

Based on the Swedish constitutional and statutory rules, it is submitted that social services under LRAs' competence may be regarded as services of general interest in the meaning of the SGI Protocol.

It has been also been found that all regulation of social services to the person under LRAs' competence must with certainty be seen as economic regulation constrained by EU market law, because this regulation is related to activities which *can be* economic, to services *normally* provided for remuneration in the meaning of Article 57 TFEU. This is due to the fact that economic operators in Sweden may and do provide them in exchange for remuneration, either wholly from public authorities, or from public authorities and users in combination. As a consequence, and in accordance with *Freskot*, Swedish law affecting social services such as elderly care at home, primary care must respect the fundamental freedoms related to these activities. Also, EU competition law *can be relevant* for Swedish law on these social services, because they fulfil the comparative test in *Höfner*. They are not necessarily, and have not always been, provided by public bodies. As will be seen in more detail in chapter 13, this is now also true of school education.

Another question is whether the different categories of operators providing different social services under different types of Swedish schemes must be regarded as undertakings conducting an economic activity in the meaning of EU law. This question, and the question of whether social services under LRAs' competence are *de facto* SGEIs, must be answered on a case by case basis, as a preliminary step to analyse the compatibility of Swedish rules with EU competition law (including state aid law). As concluded under part II, the economic character of a service provided by an operator under a specific scheme may be determined *equivalently* by asking whether the operator offers this service on the/a market or by asking whether the operator *actually* provides the service for remuneration.

There is some judicial evidence that social services under LRAs' competence should in many cases have to be regarded as economic activities. The cases in Swedish courts concerning the privatization of Swedish schools and health care entities cases show that they have come within the radar of Swedish rules on public aid. Also, in its assessment of the complaints brought against the privatization of a number of Swedish municipal health care and school units, the Commission has signalled rather clearly that it regarded the private providers of primary care and school education at issue in the cases as undertakings *a priori* not excluded from EU state aid rules. Moreover, the necessity of assessing the market character of social services in public systems has become all the more obvious in the light of the *IRIS-H* case.[1289]

[1289] The Commission has now opened an in-depth investigation to gather additional information regarding the compatibility of the financing of certain SGEI missions entrusted topublic hospitals in Belgium.

13 Compatibility between EU secondary law on SGEIs and systems of choice in Swedish law: the case to two social services

The purpose of this chapter is to examine how EU rules on state aid and procurement may affect the Swedish systems of choice for social services within LRAs' competence. More to the point, the question is whether these systems are regulated and used in compliance with EU law on state aid and procurement, and if not, whether this may explain the Swedish legislator's avoidance of the notion of SGEI in this field. The approach is selective as only two social services are in focus, both under the compulsory competence of local authorities, and both examined in the frame of systems of choice. It must be recalled here that local authorities *may* supply elderly home care in a LOV-based system of choice. They may also use other models to ensure access to that service, in particular they may provide the service themselves or procure the service under the Public Sector Act. In the case of school education, systems of choice are mandatory for local authorities, which do not either have much influence on which private school operators are established on their territory.

The approach consists in examining these two services in the light of the following questions

- Are operators providing these services in systems of choice to be regarded as undertakings in the meaning of EU competition and state aid law?

- Are these services de facto subject to SGEI regulation in Sweden?

- Does their public funding comply with EU state aid rules applying to the compensation of public service obligations imposed on undertakings entrusted with SGEI tasks?

In this chapter the method is overall dogmatic, as the focus is on valid law. Therefore, traditional legal sources of the Swedish (Scandinavian) legal method are used, in particular Swedish public law, preparatory works, administrative courts cases, and doctrine. Also, where EU market law need be interpreted, an EU legal method is used. Moreover, the necessity to rely on certain economic facts in order to conduct the reasoning on the applicability of EU state aid rules to social services in Swedish systems of choice, has led to use non-legal material A choice has been made among the many reports and studies on different aspects of systems of choice for social services published since the mid-2000s, based on criteria of reliability, probable objectivity and relevance to the question studied. Thus, the material used includes academic research reports on the process of marketization of social services, reports by well-established organizations and firms, providing economic data on the market for the social services studied, or on the models of compensation used by local authorities, surveys on the quality of social services supplied in systems of choice, and finally institutional reports. This material is important to evaluate whether and why an explicit characterisation of the Swedish rules

on social services as SGEIs may have been perceived as problematic in the process of liberalisation of these services.

The case of elderly home care in LOV-based systems is examined first and school education in free choice second. At the end of that second section, some legal effects which may follow in the field of free movement from the developments of the Swedish school education system are envisaged. In the third section, conclusions are drawn in relation to the questions addressed by the chapter.

13.1 The case of elderly home care provided under the Act on systems of choice (LOV)

Introduced under the 1950s, Swedish public elderly care has been provided on a universal basis, and has thus consisted of comprehensive, publicly financed and high quality services available to all citizens according to their needs rather than their ability to pay.[1290] Demographic, political and economic developments have led to a situation where elderly care is nowadays mostly provided at home, with the proportion of persons above 80 years of age in the group getting most home care (25 hours a week or more) increasing steadily, and a very small proportion of elderly persons living in nursing homes. While coverage has declined in Sweden regarding both home care and nursing homes, Sweden is still one of the world's most generous countries when it comes to spending on eldercare, as users pay only a small fraction of the cost (5-6%).[1291]

13.1.1 Regulation

All forms of elderly care – at home or in nursing homes – are regulated by the Social Services Act, which is a typical "goal-oriented" framework covering many other social services. This Act does not confer any right to specific services but instead a basic right for any person at any stage of life, who is unable to ensure his/her needs, to claim assistance for his/her maintenance and everyday life from the local authority's social board. This assistance must secure that the person has a decent standard of living and be organized in a manner promoting an autonomous life.[1292] However, local authorities have a wide margin to decide elderly care's specific objectives, budgets, and mode of

[1290] Characteristic for a universal model is normally that the same services are directed at, and also used by, all social groups. See the research report of the Nordic Research Network on Marketisation in Eldercare, 2013, "Marketisation in Nordic eldercare: a research report on legislation, oversight, extent and consequences", Meagher G. and Szebehely M. (eds.), Department of Social Work, Stockholm University, p. 24.

[1291] See the report of the Stockholm Gerontology Research Center, Hjalmarson I., 2014, "Vem ska bestämma i hemtjänsten?", Rapporter/Stiftelsen Stockholms läns Äldrecentrum 2014:2, p. 11.

[1292] Chapter 4 Section 1 of the Social Services Act.

supply. This explains the large variation regarding the services offered and their organization among local authorities.[1293]

In particular, the type of services which local authorities must make available to elderly persons in need of assistance is not specified in statutory rules. Generally, local authorities include in the assistance to elderly persons both cleaning, washing, shopping and catering services, but also more personal services such as personal assistance for hygiene, shower, dressing/undressing and eating, as well as safety alarm, and in some municipalities, accompanying services and replacement of relatives are also available. Publicly funded elderly home care is initiated formally by a request from the elderly person, and provided on the basis of an administrative decision précising the services he/she is entitled to, on the basis of an evaluation of his/her needs.[1294]

Service provision may be entrusted by local authorities through contract to natural or legal persons, including other local authorities.[1295] In 2013, 132 out of 290 local authorities had introduced LOV-based systems of choice for elderly home care.[1296] In this system, an elderly person must receive information from the administrator about the system when informed about the administrative decision entitling to assistance. The person can choose any contracted provider, which is then commissioned by the administrator, and there is also a no-choice alternative. A care plan is then set up, normally together with the person concerned, including the provision of a given amount of specific services (in hours). The provider chosen will be remunerated at flat rates in accordance with the compensation model chosen by the local authority. This compensation must, as already mentioned, be distinguished from fees paid by users to the local authority, in accordance with rules outlined below.

13.1.2 Applicability of Swedish competition rules to elderly home care services in LOV-based systems: the conflict solving rule

There is no doubt that private providers of social services in LOV-based systems are seen by the Swedish legislator as conducting an economic activity. In Swedish law, public funding in LOV-based systems is addressed as an issue of competition neutrality rather than as an issue of undistorted competition between all providers, and thus the

[1293] See Research report of the Nordic Research Network on Marketisation in Eldercare, 2013, "Marketisation in Nordic eldercare: a research report on legislation, oversight, extent and consequences", Meagher G. and Szebehely M. (eds.), Department of Social Work, Stockholm University, p. 24.

[1294] The local authority board in charge of elderly care is composed of elected representatives, see Chapter 4 Section 1 of the Local Government Act. On delegation, see Chapter 6 Section 33 of the Local Government Act.

[1295] Chapter 2 Section 5 of the Social Services Act. Tasks which are related with the exercise of official authority may not be entrusted to other legal or natural persons on the basis of this provision.

[1296] Report of the Swedish Association of Local Authorities and Regions (SALAR) on quality requirements in systems of choice for elderly home care, 2014, "Kvalitetskrav i valfrihetssystem – en analys av förfrågningsunderlag för hemtjänst", http://webbutik.skl.se/bilder/artiklar/pdf/978-91-7585-100-6.pdf?issuusl=ignore, accessed 27 February 2015, p. 9.

preparatory works of the Act on Systems of Choice emphasize that the funding conditions should be equal between private and LRA-owned providers.[1297] The difficulty to ensure neutral competition is acknowledged, in particular because the local authority, as *public authority*, is ultimately responsible to secure that the service is actually provided and therefore must have access to additional capacity, in particular in acute situations.[1298] By contrast, the preparatory works are ambiguous on whether LRA-owned entities constitute undertakings when they participate in systems of choice.[1299] The bill on LOV underlines that elderly care entities which are part of the municipal administration cannot be entrusted their tasks on the basis of contracts, but that they must be given the same conditions as external operators.[1300] The bill characterizes the local authority's decision on compensation model as *primarily political*, but adds that competition rules apply to that decision, and refers thereby to the "conflict solving rule" (Sw: *konfliktslösningsregeln*), without explaining why and how this rule could be relevant for that decision.[1301]

The conflict-solving rule, in force since 2010, aims at preventing anti-competitive "sales activities" carried out by public authorities – or by a legal person under their direct or indirect dominant influence – in competition with private undertakings. Accordingly, the District Court of Stockholm may forbid that a local or regional authority conducts anti-competitive "sales activities" or adopts certain anti-competitive conducts, for instance cross-subsidization and price-dumping.[1302] The bill names activities such as fitness centres, plants, broadband, and property maintenance, but does not exclude the applicability of the rule to other activities, although it underlines that LRAs' competence is not affected. The bill explains also that the provision applies to national, regional or local authorities conducting activities as "undertakings", defined in the Act as a legal or natural person which conducts an activity of economic or commercial nature.[1303] It is underlined that the notion of "undertaking" excludes elements consisting in the exercise of public authority, but that the notion of economic activity has the same wide meaning as in EU law, i.e. can be for-profit or not and be conducted by a public entity, but only consists in *selling* goods, services and other facilities.[1304]

[1297] Government bill on the Act on Systems of Choice, *Lag om valfrihetssystem*, proposition 2008/09:29, p. 22.

[1298] Ibid, p. 62. As another example of this difficulty, the bill names that as employers, LRAs are bound by collective agreements giving their employees working conditions which can differ from those granted by private employers, and in particular local authorities may grant a right to work full-time.

[1299] In LOV's preparatory works, LRA-owned entities are referred to as "own management" (Sw: *egen regi*), but it is clear that entities regarded as part of LRAs' own management can be either entities in the own administration or LRA-owned private law entities.

[1300] See government bill on the Act on Systems of Choice, *Lag om valfrihetssystem*, proposition 2008/09:29, p. 90.

[1301] Ibid. When the governent bill on LOV was put forward, the conflict solving rule was not yet in force in the Swedish Competition Act.

[1302] The main rule is laid down in Chapter 3 Section 27 of the Swedish Competition Act (Sw: *Konkurrenslagen (2008:579)*, but is completed by Sections 28-32 in the same chapter. The District Court of Stockholm is the first instance civil court in Sweden.

[1303] Chapter 1 Section 5 of the Competition Act.

[1304] Government bill on conflict solving for public sales activities on the market, *Konfliktlösning vid offentlig säljverksamhet på marknaden m.m.*, proposition 2008/09:231, p. 34.

The District Court may not prohibit (1) public authorities' conduct that is justifiable on public interest grounds and (2) activities carried out by local or regional authorities which comply with law. These exemptions necessitate an analysis and proportionality test that is complex and has to be clarified through case law.[1305] As it first affirms that public authorities may not distort or restrict competition when acting as providers on the market, but admits that such distortions and restrictions must be accepted if necessary by regard to the general interest, the conflict solving rule is obviously related to the balancing rule in Article 106(2) TFEU.[1306] It differs however from the EU balancing rule, in particular because it only covers economic activity conducted by LRA-owned entities, whereas Article 106(2) TFEU covers any undertaking entrusted SGEI tasks, private or public. Besides, the exemptions from the conflict solving rule are not clearly related to the SGEI exemption and consequently not either to EU competition rules applicable to SGEIs.

Given this lack of connection to the EU notion of SGEI, the application of the conflict solving rule may perhaps get unexpected effects.[1307] It is explained that the rule should not lead to prohibit the conduct of a local or regional authority (or entities under their control) which is a direct or an inevitable effect of legislation, but that such conduct *cannot be justifiable on public grounds if it breaches against law*.[1308] As will be seen in the next section – LRA-owned entities seem to act as undertakings in many fields under their competence, and the legality of LRAs' decisions vis-à-vis these entities can also depend on their compliance with EU state aid law. One may wonder whether the Civil Court of Stockholm may prohibit anti-competitive measures which cannot be justified on the basis of Article 106(2) TFEU, an eventuality which has not been openly envisaged by the Swedish legislator.[1309]

On this background, the "ambiguous connection" evoked above may be understood as follows. When a local or regional authority decides on a model of compensation for a social service in free choice, it may (and arguably should) have a political ambition to ensure a social service's continuity and quality, but it must also beware of the risk to thereby distort competition, as it might infringe the conflict solving rule. This confirms, albeit discreetly, the view that the conflict solving rule may be claimed to apply to LRAs' definition and funding of social services under their competence. It also suggests that LRA-owned entities in systems of choice are, in fact, regarded as undertakings by the Swedish government.

[1305] Ibid, p. 37-40. This complexity has been emphasized in the legislative process and underlined by Hedelin J., 2010, p. 225.

[1306] On the elements of similarity between the conflict-solving rule and Article 106 TFEU, see Hedelin J., 2010.

[1307] Hedelin J., 2010, p. 246.

[1308] Government bill on conflict solving for public sales activities on the market, *Konfliktlösning vid offentlig säljverksamhet på marknaden m.m.*, proposition 2008/09:231, p. 34.

[1309] The risks of the uncalculated effects which the conflict-solfing rule may have on LRAs' competence have been evoked in the legislative debate, see the report of the Swedish parliament's constitutional committee conflict solving for public sales activities on the market "Konfliktlösning vid offentlig säljverksamhet på marknaden" 2009/10:NU8, p. 11-13.

13.1.3 Applicability of EU state aid rules to elderly home care services in LOV-based systems

The government bill on LOV drew attention on the importance of not over-compensating the services supplied in free choice systems, as this could involve that providers receive an advantage which may be regarded as incompatible with EU state aid rules.[1310] However, this perception is arguably not settled as a commission of inquiry on certain activities within LRAs' competence held as late as 2007 that

> On the background of EU law as expressed in particular in the Services Directive and the law on transparency (sic), it may be presumed that services subject to a high degree of public financing are not covered by the notion of market, as they often are so called non-economic services such as school, social service or culture. If goods or services are tax-funded, the consumer does not directly pay for the service, and thus they cannot either be regarded as provided on a market. Therefore the fact that the activity is financed by tax should also be relevant for a notion of market in relation with the application of the prime-cost principle.[1311]

Given the complexity of the CJEU's case law and the political sensitivity of the matter, this uncertainty on the applicability of EU market rules to social services is certainly not specific for Sweden, but it is problematic in particular because the Commission trusts the Member States to control the correct application of EU competition and state aid rules in that field, and because an incorrect interpretation of EU law on SGEIs risks being detrimental to the respect of certain social rights.

Under the contractual arrangements provided for by LOV, it must be held as certain that private operators offering elderly home care services – regardless of whether they are for-profit or not – offer services on the publicly funded markets for elderly care, and consequently conduct an economic activity in the meaning of EU law. They act autonomously, and doubtlessly perceive payments from public authorities as compensation for the services delivered, a remuneration in the meaning of free

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[1310] See government bill on the Act on Systems of Choice, *Lag om valfrihetssystem*, proposition 2008/09:29, p. 81. For instance, evoking the general funding of health care provided by regional authorities' own entities, and the fact that these entities may conduct both commercial activities and tasks related to the exercise of public authority, the government bill on mandatory systems of choice for primary healthcare recommended that the activity which is in competition with private operators be organized as a separate production entity in the administration or that its costs be subject to a separate accountancy, in order to prevent cross-subsidization and competition distortions. The government considered that the principles for separate accountancy of financial compensation to undertakings entrusted with services of general *economic* interest laid down in the EU framework on the application of state aid rules to SGEI may be guiding, even for funding below the thresholds set by this framework. See government bill on the obligation for regional authorities to introduce free choice of primary care under LOV, *Vårdval i primärvården*, proposition 2008/09:74, p. 44.

[1311] See the report of the commission of inquiry on LRAs' competence "Kommunal kompetens i utveckling" SOU 2007:72, p. 113 and 116.

movement law.[1312] In LOV-based systems, private operators are evidently undertakings in the meaning of EU competition and state aid rules.

Whether LRA-owned entities providing elderly home care in LOV-based systems conduct an economic activity in the meaning of EU law may seem less straightforward, but the element of competition in the system seems decisive. As users can choose *any* provider in the system, *all* providers – even LRA-owned providers are in competition on the market for elderly home care. Under such circumstances, and on the background of the CJEU's case law studied in chapter 4[1313], there is not either much doubt that even LRA-owned entities conduct an economic activity in the meaning of EU competition and state aid law. Hence, it is submitted that a local authority must be regarded as an undertaking in the meaning of the state aid rules, inasmuch as it provides elderly home care through its own entities in a system of choice, independently of the fact that it has itself decided to set up this system and manages it, and in spite of the solidarity elements in the system which must now be examined.

13.1.4 Does elderly home care include SGEI missions?

According to the Social Services Act, the objective of public elderly care is that elderly persons can live in dignity and well-being. Local authorities have much discretion regarding how this objective should be pursued, but they must supply elderly care covering citizens' needs.[1314]

At a general level, the local authority's board in charge of elderly care must in principle act so that elderly persons can live and dwell in safe conditions and have an active and meaningful existence together with other people, but the board – and the local authority itself – have also substantial duties. The board must take care that elderly persons have good housing and must supply to those in need of it, assistance and help at home and other services that it has decided to give them access to. It must know well the living conditions of elderly persons in the local authority's area, inform them on which social service is available for them in the municipality, and give them as much as possible choice regarding when and how they receive assistance services at home. The local authority must plan its measures in the field of elderly care, in particular cooperate with the regional authority (that has a broad mandatory competence regarding health care services) and with other organisations. It must set up special housing for elderly persons in need of special assistance, and take care that personnel able to speak Finnish, Meänkieli or Samish is available where necessary for elderly care.[1315]

[1312] In other words, they are in a situation similar to the situation of hospitals analyzed by the CJEU in Case C-157/99 *Smits and Peerbooms* [2001] ECR I-05473, para.58.

[1313] Beginning with Case 118/85 *Commission v Italy* [1987] ECR 2599.

[1314] Government bill on the Social Services Act, *Ny socialtjänstlag m.m*, proposition 2000/01:80, p. 83.

[1315] Chapter 5 Sections 4-6 of the Social Services Act. Meänkieli is an official minority language of Sweden.

At an individual level, the local authority must ensure that each elderly person has *access* to the assistance and support he/she may need for his/her livelihood. The assistance provided must ensure that the person has a reasonable living standard, and be organized in a way that strengthens the possibility to live an autonomous life, but this statutory obligation does not give an elderly person any right to specific services.[1316] When evaluating an elderly person's need of assistance, the local authority may not consider his/her economic means but may charge fees which must be related to income, and neither exceed the local authority's prime cost for the service nor exceed certain thresholds.[1317] Also, the fees charged may not deprive the person from a minimum amount covering his/her personal needs and other normal life costs, and not either imply an unreasonable deterioration of the economic situation of the person's wife/husband/cohabitee.[1318] Fees do not vary depending on which entity provides the services, as they are paid to the local authority and not to the provider. In accordance with the so called "quality paragraph", assistance provided on the basis of the Social Services Act must be of good quality. However, what "good quality" requires in substance is imprecise, as it is only prescribed that social services must be provided by personnel with appropriate qualification and experience and that the activity's quality must be developed and secured systematically and continuously.[1319]

It may thus be concluded that the Social Services Act imposes on local authorities a public service task to secure access to elderly home care assistance of good quality for any person in *need* of it, which is binding on them in two ways. First, individual persons seeking elderly care may appeal in administrative courts against the local authority's decision related to his/her request for home care assistance.[1320] Second, every local authority has the *ultimate* task to secure that persons residing in their territory receive the support and assistance which they need, although the local authority's task does not restrict the obligations incumbent on other principals.[1321]

[1316] Chapter 4 Section 1 of the Social Services Act.

[1317] Chapter 8 Section 2 paragraph 2 of the Social Services Act. In August 2013, the maximum fee was SEK 1,780 per month, corresponding to approximately €205. Municipalities may set the fees up to the national maximum threshold and up to the actual cost for providing services. For those with small amounts of help the fees can vary considerably between the Swedish municipalities, from SEK 77 to SEK 435 per hour.

[1318] Chapter 8 Section 6 of the Social Services Act. This minimum amount (Sw: *förbehållsbelopp*) takes account of the person's life minimum costs and housing costs separately. The minimum life costs cover normal costs for food, clothes, shoes, hygiene, daily newspaper, telephone, radio- and TV-fees, home insurance, open health care, dental care, household electricity, consumer goods, transport, furniture, household effects and medicine.

[1319] Chapter 3 Section 3 of the Social services Act. A commission of inquiry on care assistants proposed to introduce a law on the professional qualification of care assistants, based on a three-year secondary school programme or a validation from the employer. It did not lead to any government bill as it was feared, in particular by the Swedish Better Regulation Council, to increase undertakings' administrative costs for instance for staff planning, learning and validating. It was also criticised because employers' validation of experience could lead to an extremely heterogeneous quality standard. See the report of the commission of inquiry on care assistents "I den äldres tjänst Äldreassistent – ett framtidsyrke" SOU 2008:126.

[1320] Chapter 16 Section 3 of the Social Services Act.

[1321] Chapter 2 Section 1 of the Social Services Act.

This provision in the Social Services Act is the specific expression of a general principle, reaffirmed recently by the Swedish legislator, that LRAs remain mandators (Sw: *huvudmän*) of all their activities regardless of who operates the service.[1322] This principle is considered important to ensure democratic control, good quality and rule of law in LRAs' activity. It has also been reaffirmed that the principle is valid even when LRAs have a statutory obligation to introduce systems of choice.[1323] LRAs' mandatorship implies that they have the general *political* responsibility for the activity under their competence, by which is meant that they must first decide the activities' objectives, volume and quality, and second control and follow up the activity.[1324] The extent of this responsibility may vary depending on the activity's importance for the local or regional authority's members, the municipal fees charged for it, or the tax resources invested in the activity.[1325] When an activity is entrusted to private operators through contracts, LRAs must control and follow up the activity, ensure through those contracts that they receive information allowing the public to get insight in the activity. The authority's council must establish for each mandate period a programme with objectives and guidelines for private operators, indicating how they are followed up, but also how the respect of legal rules governing the activity is followed up, and how public information on the activity is ensured.[1326]

The government bill on LOV-based systems underlines that they build on the principle that the contracting authority is responsible to secure that the services are supplied to the users or the inhabitants and that this responsibility implies in substance also that the tender documents and contracts must secure that private operators fulfil the levels of quality wished by the local or regional authority.[1327] Therefore LRAs must have adequate and requirements in the contracts with the private operators and cannot acquit themselves of this responsibility by referring to insufficient or inadequate contract requirements.

In light of the above, it is submitted that local authorities have under the Social Services Act a public service task, which may be seen as an SGEI mission in the meaning of Article 14 TFEU, to secure for any person in *need* of it, access to elderly home care assistance of good quality, at an affordable cost.[1328] When they choose to organise the

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[1322] Government bill on private operators in municipal activities, *Privata utförare i kommunal verksamhet*, proposition 2013/14:118, p. 34.

[1323] Ibid, p. 37. In the report which led to this bill, the commission of inquiry held that LRAs' responsibility was indirectly clear from a provision in Chapter 6 Section 7 LGA, requiring that LRAs' boards' control that the activity is conducted satisfactorily, even when it has been externalized. Interestingly, the commission's proposal to introduce a provision explicitly reminding that LRAs remain responsible of activities which they externalize, was not approved by the government and therefore finally not introduced in law. See report of the commission of inquiry on private operators "Privata utförare – kontroll och insyn" SOU 2013:53, p. 102-103.

[1324] Ibid, p. 38.

[1325] Ibid, p. 39.

[1326] Chapter 3 Sections 19, 19a and 19b of the Local Government Act.

[1327] Government bill on the Act on Systems of Choice, *Lag om valfrihetssystem*, proposition 2008/09:29, p. 137.

[1328] This task is comparable to the public service task at issue in Case C-480/06 *Commission v Germany* [2009] ECR I-4747.

SGEI in LOV-based systems, this mission implies that *SGEI tasks* entrusted to *providers* must be defined and financed adequately, that the local authority has a reserve capacity covering the "no choice alternative" and sudden disruptions in the system, and that it delivers an infrastructure ensuring free choice.

13.1.5 Risk of state aid under Article 107(1) TFEU

LOV-based systems provide for a flat-rate compensation without any price competition, and therefore, as already mentioned, both the commission of inquiry on LOV and the government saw risks of state aid.

In a LOV-based system, providers are remunerated by local authorities, covered by the notion of "state" in Article 107(1) TFEU. The compensation is selective as it is only directed to services such as cleaning, washing, catering, and personal assistance. Also, there is cross-border trade for such services, as some larger companies conduct elderly home care in Sweden and other Nordic countries.[1329] Competition distortions may arise firstly because private providers of elderly home care may offer additional services to users willing to "top" the assistance services which they are entitled to by administrative decision of their local authority. Many of those services are since 2007 subject to tax-reduction for domestic services, and it is easier for providers in LOV-based systems of elderly home care to offer these extra services to elderly persons having chosen them.[1330] Second, and more importantly, some of the large elderly home care companies are owned by holding companies conducting other activities and in particular other social services, such as elderly housing, health care services and for some even school education services. Risks of cross-subsidization are not negligible.

As the general de minimis exemption is not applicable, the question is whether LOV-based payments to elderly care providers complies with EU law on the basis of their SGEI tasks, which can be the case if the public service compensation fulfils the four cumulative Altmark criteria, and consequently does not constitute aid in the meaning of Article 107(1) TFEU: (1) the SGEI task must exist and be clearly defined, (2) the parameters of compensation must be defined *ex-ante*, be objective and transparent, (3) there must be a system to prevent and avoid over-compensation, and (4) if the task is not entrusted through procurement, the compensation must be calculated on the basis of the costs incurred by a well-run undertaking able to meet the necessary public service requirements.

[1329] Attendo AB conducts elderly care in Sweden, Finland, Norway and Denmark. Aleris AB conducts elderly care in Sweden, Norway and Denmark, but as it seems elderly home care only in Sweden and Denmark. In February 2014, Attendo had about 3, 4 % and Aleris about 1% of the total volume of elderly home care provision in Sweden, see presentation of Mats Bergman and Henrik Jordahl "Goda år på ålderns höst?" Available at http://www.sns.se/sites/default/files/2014-02-21_bergman_jordahl.pdf.

[1330] This tax-reduction was originally allowed for cleaning, maintenance and washing (Sw: *Rengöring, Underhåll och Tvätt)*, and is known in Swedish as the "RUT-avdrag". It was introduced in Swedish law in 2007. See the Act on the functioning of tax reduction for household work (Sw: *Lag (2009:194) om förfarandet vid skattereduktion för hushållsarbete*) referring to Section 67 of the Act on income tax (Sw: *Inkomstskattelagen* (1999:1229)).

When it pointed at the risk of state aid, the commission of inquiry considered that setting the amounts paid to providers on the basis of the costs of LRA-owned entities would fulfil the fourth Altmark criterion and exclude aid. Thus, it acknowledged implicitly the existence of SGEIs in social services covered by LOV, but ackwardly did not assess whether the other Altmark criteria were fulfilled by the scheme. In any case, it is very doubtful that municipal entities may be considered as the "typical and well run undertaking" of the fourth Altmark criterion. That municipal entities are regarded as undertakings in the meaning of EU competition law seems correct, but for the municipal entity to be held as "typical" and "efficient", its service tasks must be clearly defined *and* "typical", so that its costs constitute an acceptable market benchmark in the meaning of the fourth Altmark criterion. This is not only doubtful but also somewhat ironic, as it contradicts the legislator's declaration in LOV's bill that inviting external providers to compete with LRAs' own entities leads to increase quality and efficiency in this field of activity.[1331]

This approach has been followed by local authorities introducing LOV-based systems, but the Swedish Agency for Public Management has described the analysis of municipal providers' costs as a very challenging task.[1332] It found that the task of calculating LRA-owned entities' costs in order to establish reasonable economic conditions for operators had led local authorities to be more aware of the costs incurred for providing elderly home care, which in turn has led them to assess more critically the way their own administration had organized the service so far, and to realize that the time and assistance granted to a person in the administrative decision must be distinguished from the time actually provided to the user by operators.[1333] Also, in a pilot study aimed at testing a method for determining if external care providers and the municipalities' own providers are given equal financial conditions to compete within systems of choice for home care services, the Swedish Competition Authority found that the tasks were not clearly defined in two of the three local authorities studied.[1334] Also, SALAR found a large variation of the compensation amounts across local authorities[1335] and published a guide addressed to local authorities using the costs of the municipal elderly home care provider

[1331] As underlined by the government bill on LOV, the County Administrative Boards had seen deficiencies in LRAs' quality work in several fields of activity, see government bill on the Act on Systems of Choice, *Lag om valfrihetssystem*, proposition 2008/09:29, p. 18 and 70. In Sweden, the County Administrative Board is the representative of the Government in the region and the coordinating body for State activities in the county.

[1332] This is in particular because there were originally no separate accounts for municipal entities, and because their activity is financed through yearly allocations. Report of the Swedish Agency for Public Management on the effect of LOV on the development of costs and efficiency in LRAs' activities, "Lagen om valfrihetssystem. Hur påverkar den kostnader och effektivitet i kommunerna?", Statskontorets slutrapport 2012:15, p. 32, 34-36.

[1333] Ibid, p. 37 and 74.

[1334] Report of a pilot study conducted by the Swedish Competition Authority on neutral competition in local authorities' systems of choice "Konkurrens på likvärdiga villkor i kommunernas valfrihetssystem Pilotstudie i tre kommuner med valfrihetssystem inom hemtjänsten" Rapport 2013:8, p. 7-8, accessed 27 February 2015 at

http://www.kkv.se/globalassets/aktuellt/nyheter/konkurrens-pa-likvardiga-i-kommunernas-valfrihetsssytem.pdf,.

[1335] In 2014, SALAR found that the compensation amount per hour varied between SEK 228 and SEK 512 per hour, se SALAR statistics on elderly home care at

http://skl.se/demokratiledningstyrning/driftformervalfrihet/valfrihetssystemersattningssystem/ersattningssystem/ersattningssystemsocialtjanst/ersattningssystemhemtjanst.1064.html

as a benchmark, in which it highlighted the fact that many local authorities did not follow up how much time was actually spent with elderly persons.[1336]

The above leads to submit that, while municipal entities may be well run, they cannot be *a priori* held to constitute typical well-run undertakings in the meaning of the fourth Altmark criterion. Besides, it must be emphasized that a comparison with the municipal entity' costs was only *recommended* by the commission of inquiry which proposed LOV, and not imposed on local authorities by the Act nor otherwise. Also, the Swedish Competition Authority underlined that it can be difficult to achieve neutral competition between private operators and LRAs' own operators, because the contracting authority bears the primary obligation to ensure that users receive the services which they are entitled to.[1337] This implies that LRA-owned entities may bear additional public service obligations, for instance to provide service to users in remote areas of the authority's territory, or to users whose operator suddenly ceases to provide.

Although the fourth Altmark could hardly be argued to be fulfilled on the basis of the comparison with a well-run municipal entity, the Swedish State declared in its report on the application of the 2005 SGEI Decision that public funding in LOV-based schemes was no aid.[1338] If its point of departure was that participants to these systems are undertakings in the meaning of EU competition law, this assertion had to be based on a view that the fourth Altmark criterion was fulfilled because the tasks were procured. In fact, although LOV uses to a large extent the concepts of procurement law and is perceived in Sweden as a procurement regime, LOV-based contracts have no defined volume, no total contract-value, and in general no specified contract duration. The government's view was that LOV-based contracts had to comply with the EU principles on free movement, but that they were not covered by EU procurement directives because they constituted service concessions.[1339]

[1336] "Koll på hemtjänsten? En handledning för analys av kommunens hemtjänstkostnader", A guide to conduct the analysis of the costs of the municipal elderly home care provider, published by SALAR and rådet för främjande av kommunala analyser, 2013, http://www.rpg.org.se/static/sv/882/images/Koll%20pa%20hemtjanst.pdf, p. 16.

[1337] Guide of the Swedish Competition Authority on LOV, *Lagen om valfrihetssystem– en introduktion*, available at http://www.konkurrensverket.se/globalassets/publikationer/informationsmaterial/lagen-om-valfrihetssystem--en-introduktion.pdf, p. 10.

[1338] In Sweden's report on the application of the 2005 SGEI Decision, it is stated (own translation) that: "as a large part of the services are not of economic nature, state aid rules are held not to apply. These are services consisting in the exercise of public authority and services normally not offered on a market as primary education, certain cultural activity etc. There are also services which are compensated so that the so called Altmark criteria are fulfilled. Such compensation does normally not constitute state aid." See Sweden's report on the application of the 2005 SGEI Decision "Rapport om genomförandet av kommissionens beslut av den 28 november 2005 om tillämpningen av artikel 86(2) EG-fördraget på statligt stöd i form av ersättning för offentliga tjänster som beviljas visa företag som fått i uppdrag att tillhandhålla tjänster av allmänt ekonomiskt intresse" N2008/5126, p. 2-3, accessed 27 February 2015 at http://ec.europa.eu/competition/consultations/2010_sgei/se_sv.pdf.

[1339] Government bill on the Act on Systems of Choice, *Lag om valfribetssystem*, proposition 2008/09:29, s. 52 and 55-57. This view was held by the government despite the fact that the services were not remunerated by users, and because providers bear not only the normal commercial risks of conducting the activity at issue but also bear an important economic risk in the transaction, as they are dependent on whether users choose them instead of competitors. This view has been challenged by legal scholars, see Sundstrand A., 2012.

Now that the Concessions Directive has been adopted, it appears that LOV-based contracts do not fit with the definition of service concessions, but that systems of choice such as LOV-systems are in any case not covered by the new procurement directives, which follows from Directive recitals which the Swedish government makes no secret of having pushed forward in the process on the Directives' adoption.[1340] As a result, LOV-based cannot be argued to exclude aid if the tasks are not seen as "procured", but simply compensated on the basis of a flat-rate based system. As aid is not excluded, the compatibility of public funding of elderly home care should be assessed on the basis of Article 106(2) TFEU and under 2011 SGEI Package.

13.1.6 Compliance of elderly home care in LOV-systems with the 2011 SGEI Package

The Regulation on de minimis aid to undertakings providing SGEI is not applicable, because there are large companies in that field, and because aid is not calculated precisely *ex-ante*.[1341] Aid to undertakings providing elderly home care in LOV-based systems must instead be examined in the light of the 2011 SGEI Decision.[1342] Under the Decision, LOV-based systems for the supply of publicly funded social services – including elderly home care, and regardless of the aid amount – do not have to be notified to the Commission, but substantive conditions must be fulfilled for these systems to comply with EU law. In LOV-systems, public service obligations are entrusted to providers through contracts in which local authorities have a wide discretion to decide the service

[1340] The Swedish Ministry for Social Affairs explains how it pushed forward these recitals in order to ensure that LOV would not be covered by the new procurement directives (in Sw: *"Regeringen tog inför och under direktivförhandlingarna aktivt del av intressenternas synpunkter bl.a. genom en referensgrupp och Upphandlingsutredningen. Sverige fick i förhandlingarna gehör för flera ståndpunkter/…/Sverige förhandlade också fram skrivningar som avser att garantera att lagen (2008:962) om valfrihetssystem (LOV) inte ska påverkas av de nya direktiven*), in *Färdplan för den offentliga upphandlingen*. S2014:22, Socialdepartementet, available at http://www.regeringen.se/content/1/c6/24/62/40/2bddbc31.pdf, p. 5. In fact, it appears from the 2013 SGEI Guide that Sweden's position had already won the Commission's support, see point 4.2.17: "The competent public authority may, for example, establish in advance the conditions for provision of a social service and, after sufficient advertising and in accordance with the principles of transparency and non-discrimination, grant licences or authorizations to all providers meeting these conditions. Such a system does not specify any limits or quotas concerning the number of service providers; all those meeting the conditions can participate. Providers which have obtained a licence/authorization must provide the service at the request of the user, who will thus have the choice of several providers, at a price set beforehand by the public authority." The system described in the 2013 SGEI Guide is strikingly similar to LOV. While the EU legislator has decided to characterize a system such as LOV as an authorization or a license scheme in the meaning of EU free movement law, it cannot be excluded that, if consulted on the matter, the CJEU would take a different line. It is namely challenging to reconcile the concept of authorization with LOV-based contracts, under which services are provided against public remuneration.

[1341] Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L114/8.

[1342] See Recital 11 and Article 2(1) (c) of Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L7/3.

requirements. Local authorities have also a wide discretion to design the compensation mechanism. So far, Swedish national law – including administrative rules – does not draw local authorities' attention to the fact that their compensation mechanism for elderly home care under LOV *must* comply with the conditions set by the Decision, already outlined above in section 11.2.3.

As a result, many local authorities may breach the 2011 SGEI Decision's requirements on their compensation mechanism, and risk that their compensation system be challenged, as they are not made aware that:

- Contracts for elderly home care must refer to the 2011 SGEI Decision.

- The public service obligation compensated must be *ex-ante* clearly defined.

- LOV-based contracts for elderly home care *must* be limited to 10 years for their system to be compatible with the Decision (it is doubtful whether the costs of elderly home care, essentially related to wages and transport, may be considered as necessitating a longer amortising period). It is only stated in LOV's *preparatory works* that the tender documents must include information on the contract period.[1343]

- The compensation mechanisms *must* ensure compensation proportionality, which in particular supposes that there are not only arrangements to avoid over-compensation but also to *recover* over-compensation.

- There is an *obligation* on the Swedish State, and on local authorities, to ensure that undertakings do not receive overcompensation (with checks at least every 3 years during the period of entrustment and at the end of that period).

- There is an *obligation* on the Swedish State, and on local authorities, to require that the undertakings concerned must commit to repayment of any overcompensation received.

The principle of sincere cooperation implies that it is the Swedish State's duty to take any appropriate measures, general or particular, to ensure that public authorities in Sweden fulfil obligations arising out of EU primary and secondary law. A cornerstone of this duty is to ensure that public service compensation in the frame of LOV-based systems fulfils the first Altmark criterion which is also the first condition set by the 2011 SGEI Decision: the SGEI tasks must be clearly defined and transparently entrusted. In law, this duty exists as soon as competition distortions which can arise from aid to elderly home care providers can have an effect on trade. The Commission has taken a number of decisions considering that certain activities had a purely local impact and therefore did not affect trade between Member States, but the CJEU's position appears generally

[1343] Government bill on the Act on Systems of Choice, *Lag om valfrihetssystem*, proposition 2008/09:29, p. 71.

to be that an aid measure's effect on trade does not depend on the local or regional character of the services supplied or on the scale of the field of activity concerned.[1344]

The Commission observed in March 2011 that there is a progressive development of a "real" internal market in health services, as "a relatively small, but growing, number of companies deliver health care in more than one country in Europe".[1345] As to other social services, the Commission deemed that there are mainly provided at local level by small operators entrusted by the public authorities, but that in some fields, large service providers are present with subsidiaries in several Member States.[1346] Under such circumstances, and in particular because large companies provide different social services on the market and can cross-subsidise, it is argued that by infringing the 2011 SGEI Decision's requirements, aid to elderly care providers may affect trade.

13.1.7 Definition of public service tasks and compensation mechanisms in LOV-based systems for elderly home care: some important issues

To comply with the Treaties, public funding of undertakings entrusted with SGEIs must be limited to what is necessary to cover the net costs incurred in discharging the public service obligations, including a reasonable profit.[1347] This proportionality constraint implies that (1) the public service obligations must be defined clearly and precisely, (2) the parameters used to calculate, control and review the compensation are known *ex-ante* and (3) arrangements exist to avoid and recover any overcompensation. In the following, an attempt is made to assess whether local authorities' systems of choice for elderly home care fulfil these conditions.

Regarding condition (1), it must be noted that LOV does not lay any specific requirements on operators, an approach which the legislator has motivated by the variety of activities covered by the Act.[1348] Instead, requirements on operators are meant to follow from the LOV-based contract, which firstly implies that the operator fulfils the obligations following from Swedish law. The obligation following from the Social Services Act is that the provider must provide elderly home care of "good quality", characterised in the Act only by two criteria formulated in very general terms: the service should be delivered by qualified personnel and the operator should have a quality management system. In 2011, the Swedish National Board of Health and Welfare was mandated to give more precision to this "quality condition", and adopted administrative

[1344] Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-01627, para.33 "The second condition for the application of Article 92(1) of the Treaty, namely that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the services supplied or on the scale of the field of activity concerned. Also, see Case C-280/00 *Altmark* [2003] ECR I-7747, para.87. para.82.

[1345] Commission, "The Application of EU state aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation" SEC(2011) 397, p. 26-27.

[1346] Ibid, p. 28.

[1347] Article 5(1) of Decision 2012/21/EU.

[1348] Government bill on the Act on Systems of Choice, "Lag om valfrihetssystem" proposition 2008/09:29, p. 71.

rules requiring that operators use such quality management systems to plan, steer, control, assess and improve the activity.[1349] These administrative rules are binding on operators, and if correctly fulfilled, they certainly involve costs which may be compensated for. However, they are difficult to see *per se* as "public service obligations".

In LOV-based systems, local authorities are free to add more specific requirements in the tender documents, but the government bill lays much emphasis on the fact that these requirements must comply with EU principles of non-discrimination, transparency, equal treatment, proportionality and mutual recognition. As an example of possible contract requirement, the bill mentions an obligation for the provider to serve any person choosing this provider, which clarifies that there is no *statutory* universal service obligation on elderly home care providers.[1350] In general, the bill on LOV underlines that contracts should contain requirements that are precise enough for LRAs to ensure the service quality, but warns that too many and too specific requirements can hinder the establishment of potential operators.[1351] In the bill, quality is primarily expected to be secured by free choice and user exit possibilities, although it is admitted that quality cannot be left to their responsibility.[1352]

The question is therefore how clearly public service obligations local authorities are in practice defined by contracts. The Swedish association of local and regional authorities (SALAR) published in 2014 a report on contract requirements in LOV-based systems, in which it distinguished between structure requirements, process requirements, and result requirements.[1353] It found that process requirements dominate hugely (88 %) and

[1349] See Chapter 3 Section 1 of the General rules and recommendations on management systems for systematic quality work of the Swedish National Board of Health and Welfare (Sw: *Ledningssystem för systematiskt kvalitetsarbete Socialstyrelsens föreskrifter och allmänna råd* SOSFS 2011:9), adopted on the basis of Chapter 8 Section 5 of the Social Services Ordinance, Sw: *Socialtjänstförordningen* (2001:937). Operators must inform on how the tasks related to systematic and continuous quality control and development are assigned in the activity, continuously analyse which events may affect the activity's quality, have a self-monitoring which allows securing quality, take and inquire on complaints on the activity's quality, and fulfil the incident reporting obligation set by law (Chapter 5). They must also document this quality work (Chapter 7 Section 1).

[1350] Government bill on the Act on Systems of Choice, *Lag om valfrihetssystem*, proposition 2008/09:29, p. 71-72.

[1351] Ibid, p. 73.

[1352] Ibid. The government foresees that it will take many years until quality criteria could be unanimously accepted by all parts involved.

[1353] Study of the Swedish Association of Local Authorities and Regions (SALAR) on quality requirements in systems of choice "Kvalitetskrav I valfrihetssystem". Taking as a point of departure Avis Donabedians model for different quality measurement, the requirements found were divided between (1) "structure requirements" related to which resources are invested in the activity, for instance personnel amount and qualification, (2) "process requirements" related to how the service is organized and conducted in practice, and (3) "result requirements" as for instance users' satisfaction and good health condition. In this model it is expected that structural quality can increase the development of good quality on the process which in turn can lead to good results. Structure requirements stood for 12 % and result requirements for 1 % of all requirements, see p. 16 and 29. SALAR's report came in a context of "demands for stricter regulation and more quality control /…/heard from many corners – from the government, the political opposition and from organisations representing private providers as well as users and older people in general". See Research report of the Nordic Research Network on Marketisation in Eldercare, 2013, "Marketisation in Nordic eldercare: a research report on legislation, oversight, extent and consequences", Meagher G. and Szebehely M. (eds.), Department of Social Work, Stockholm University, p. 74. The issue of which constraints should be imposed on private operators of welfare systems has been intensily debated in Sweden during the latest years.

are often abstract and difficult to follow up, for instance "the user must get as much to say as possible."[1354] It also found that about half of the requirements were impossible to follow up, 44 % possible to follow up but impossible to measure, and only 7 % possible to follow up and measurable. As several other studies on the subject, SALAR's report pointed to the difficulty of formulating workable quality requirements.[1355] Nevertheless, it showed that a large majority of the requirements in LOV-based contracts did not allow assessing whether the requirements were fulfilled, and not either terminating the contract for non-fulfilment of the quality expected.[1356] In other words, public service obligations compensated in LOV-based elderly home care are generally not clearly defined.

Regarding requirement (2), i.e. *ex-ante* parameters of compensation, it has already been mentioned that in LOV-based systems, local authorities are free to choose the model of compensation, but it is a tricky task and central public agencies provide guidance. In practice, data gathered by SALAR show that local authorities build up their compensation model on the basis of the municipal entities' costs. In most models, elderly home care providers are compensated on a time parameter, generally per hour provided, and some local authorities differentiate their payment per hour depending for instance on whether the service area is urban or sparsely populated, or on the type of task.[1357] Some local authorities differentiate between private providers and municipal providers (the latter having an obligation to serve users in the whole territory of the local authority). Some local authorities invest in user satisfaction surveys and pay a bonus to operators obtaining high scores on a parameter of good treatment.

The picture emerging from these reports is that service time is so far the totally dominating compensation parameter. Other quality requirements may be found in tender documents or in contracts, but a minority of these requirements are clear enough to be followed up, most of which cannot be measured and therefore are not used as compensation parameters. Under such circumstances, it is submitted that the proportionality of compensation is in general not ensured by the compensation models

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[1354] Another example of abstract requirement was "in delivering home care the provider must have an activating working method and attitude".

[1355] Ibid, p. 32. In particular, SALAR's report questions whether it is at all possible to impose requirements that are possible to follow up, as there are few objective quality standards (compared for instance to health care) and as individual users can have different perceptions of what service quality is. It also suggests that certain requirements are signals to providers on what the local or regional authority considers as valuable and important in the service, and need not be possible to follow up. Finally it recommends to place requirements in tender documents in a larger perspective, where other instruments can support quality control, for instance interviews with users and providers, inspections or questionnaires.

[1356] Ibid, p. 30. One example of requirement which can be followed up but is not measurable is "there must be a contact personnel function". One example of specific and clear "result requirement" is: "in average, there must be a maximum of 10 persons helping a customer entitled to daily assistance under a 14-days period."

[1357] According to SALAR's data, only a third of local authorities supplying elderly home care in LOV systems reported in 2013 the time effectively spent with users. It varies between 44 and 82 percent of the working time and is in average 65 percent of the working time. SALAR's data on compensation models for 2013, accessed 27 February 2015 at

http://www.skl.se/demokratiledningstyrning/driftformervalfrihet/valfrihetssystemersattningssystem/ersattningssystem/ersattningssystemsocialtjanst/ersattningssystemhemtjanst.1064.html.

themselves, as they stand today. The conclusions drawn by SALAR on the basis of these data converge with studies which have led the National Board of Health and Welfare to find that LOV procedures to set up requirements and follow up care services must be defined more clearly to ensure that the services delivered are of good quality.

Finally, regarding requirement (3), i.e. the existence of mechanisms preventing and avoiding over-compensation, it seems that local authorities have grown aware that the time spent with users can differ from the time they pay to providers, and some local authorities require registration of the time performed, either manually by the personnel, by telephone or by electronic means. However, a general mechanism allowing to recover over-compensation *ex post* does, according to what was found in this research, not exist for LOV-based contracts.

Certain measures have been taken to analyse the performance of elderly care provision in a context where about half of Swedish local authorities have introduced free-choice systems for elderly home care. At national level, systems have been set up to monitor users' feeling of quality and cost efficiency, for instance "Open comparisons of eldercare services", an initiative commissioned by the government and developed by the Swedish Association of Local Authorities and Regions together with the National Board of Health and Welfare.[1358] For elderly home care, the quality parameters used in Open comparisons are (1) fall frequency and (2) customer satisfaction index (CSI).[1359] These surveys fulfil a political and a national governance role, but they focus on the performance of private providers *globally compared to* public providers, not on the performance of individual providers.

Surveys on customer index satisfaction at the level of local authorities are commissioned by some local authorities themselves, in certain cases in connection to a bonus payment for providers showing good results in these surveys.[1360] Such surveys may be perceived as a local authority's manner to follow up how providers deliver the assistance which users have been entitled to, as they remain ultimately responsible for quality results of their free choice systems, in spite of the expectation that users' choice "naturally" breeds quality. According to the Nation Board of Health and Welfare it is unclear to which

[1358] Open Comparisons for eldercare are published in two ways: the web-based *Äldreguiden* (the Elderly Guide) and the printed and the web-based publication *Öppna jämförelser - Vård och omsorg och äldre (Open Comparisons – Eldercare)*. The system of Opens comparisons is outlined in the research report of the Nordic Research Network on Marketisation in Eldercare, 2013, "Marketisation in Nordic eldercare: a research report on legislation, oversight, extent and consequences", Meagher G. and Szebehely M. (eds.), Department of Social Work, Stockholm University, p. 39-42. According to this report, the focus of this system on measuring results and efficiency is conform to the New Public Management approach.

[1359] The Swedish Board of Public Administration (Sw: *Statskontoret*) uses these two quality criteria, although it underlines that "quality" is subjective. It observes that in the satisfaction surveys carried out in the frame of the national projects of open comparisons, satisfaction does not necessarily mirror the appreciation of the specific service received but can also express the fact that users appreciate the possibility to choose provider. See report on LOV's effect on LRAs' costs and efficiency "Lagen om valfrihetssystem – Hur påverkar den kostnader och effektivitet i kommunerna?", Statskontorets rapport 2012:15, p. 49-50.

[1360] This activity is also growing in the sector of welfare services, in Sweden Demoskop AB is one of the main providers.

extent local authorities fulfil this obligation, as there are hardly any studies on that question.[1361]

In any case, such initiatives do not measure the proportionality of public service compensation, and do not ensure that local authorities' entrustment and compensation of elderly home care complies with EU state aid rules. It is submitted that as a whole, LOV-based systems elderly home care, in the frame of the present regulation, do neither avoid nor *systematically* prevent over-compensation.

An efficiency driven compensation model without clear and measurable *ex-ante* quality obligations may be regarded as a manner for local authorities to both close their budgets and avoid over-compensation, but it raises serious issues. While it does not exclude over-compensation of "bad quality providers", it threatens the existence of "good quality providers" (private or LRA-owned), it puts at risk offer diversity in particular through market foreclosure. While over compensation risks infringing EU state aid rules, under-compensation is not consistent with Article 14 TFEU requiring that Member States take care that SGEIs in the frame of their competence are governed by principles and rules allowing them to achieve their missions.

These risks have been evoked in the bill on LOV.[1362] In the absence of clear public service obligations in *ex-ante* measurable qualitative terms, the co-existence of LOV-based schemes allowing providers to offer extra services and "increase their operation and reach a higher profitability"[1363], with the Swedish tax-reduction scheme for household services[1364], can lead to cross-subsidisation and over-compensation of services actually covered by the LOV-based contracts. In the absence of clearly defined quality standards for SGEI-compensated services, the combination of the LOV-schemes and the RUT tax scheme blur providers' public funding to the point where it

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[1361] Report of the National Board of Health and Welfare, 2012, "Kommunal eller enskild regi, spelar det någon roll? – en jämförelse av utförare av vård och omsorg om äldre", p. 56, accessed 27 February 2015 at http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/18732/2012-5-30.pdf.

[1362] Government bill on the Act on Systems of Choice, *Lag om valfrihetssystem*, proposition 2008/09:29, p. 81. To identify under-compensation, the bill suggests to check test whether LRAs' own entities, even when they have rationalized their activity and increased its cost-efficiency, cannot produce elderly home care at the same level of compensation as private providers. If they do not, it may constitute a sign that compensation is too low, although it may be due to the fact that LRA-entities may have additional costs due to LRAs' ultimate responsibility for all users.

[1363] Government bill on the Act on Systems of Choice, *Lag om valfrihetssystem*, proposition 2008/09:29, p. 123.

[1364] Many of those extra services (Sw: *tilläggstjänster*) are covered by a tax reduction scheme introduced in 2007, entitling taxpayers to deduct 50 % of the price of household services (in Swedish this legislation is often called "RUT").[1364] Persons entitled to elderly home care by administrative decision can thus order more hours or more services from the same provider chosen in the frame of the LOV-based system. It is difficult for the local authority to know whether this "private order" in fact corresponds to needs which should be covered by an increase of the assistance time granted by the administrative decision. By under-compensating the LOV-based services, local authorities may indirectly give an advantage to RUT-based services, which may be cheaper than LOV-based fees for the user, and better remunerated – although also heavily tax-subsidized – for providers. In such situations, providers lack interest in informing the local authority on the increased needs of users, but get eventually "over-compensated".This problem of "interaction" between LOV and RUT is evoked in several reports, for instance in the report of the National Board for Health and Welfare, 2012 *Vad efterfrågar kommuner?*, referred above, p. 13.

becomes very difficult to know what the SGEI task exactly is and local authorities' funding exactly covers. This may perhaps not be so detrimental to certain objectives of LOV-based systems, such as the promotion of women entrepreneurship, of small undertakings in the public sector, and of more attractive conditions generally to operate in the field of public social services.[1365] However, this combination tends arguably to blur users' understanding of what their "social SGEI-based right" includes, and where their consumer rights begin, and renders very uncertain their capacity to defend these rights effectively. At a more general policy level, the real contribution of solidarity funding to equity-based services becomes very difficult to assess, and public authorities' *legal accountability* for quality social services diminishes.

13.2 The case of school education

"Sweden has a history of adopting original education policies. In 1842, in order to improve equity, Sweden became the first country to establish compulsory schooling laws. Exactly 150 years later, Sweden became the second country – after Chile – to adopt a nationwide education voucher system."[1366] This quote from Shafik points to the originality of the Swedish education policy, especially in a European context, as it is very similar to the neoliberal school voucher system promoted by economist Milton Friedman's in the 1950's.[1367] This development may involve state aid and free movement issues, which actualise the question of whether providers of school education in the Swedish national system may be regarded as undertakings entrusted with SGEI tasks in the meaning of Article 106(2) TFEU. The Swedish education system comprises activities from preschool to university courses, but the focus in this part is on education covered by the Swedish Education Act.

13.2.1 School education in Swedish law: a right and an obligation

The Swedish constitution imposes on public institutions a particular duty to secure the right to education.[1368] Moreover, the constitution also guarantees all children subject to

[1365] These objectives are also promoted by LOV, see government bill on the Act on Systems of Choice, *Lag om valfrihetssystem,* proposition 2008/09:29, p. 18-19.

[1366] Shafiq M. N. and Myers J. P., 2014, p. 113.

[1367] Friedman described his school model in the following words: "Governments could require a minimum level of education which they could finance by giving parents vouchers redemable for a specified maximum sum per child per year if spent on "approved" educational services. Parents would then be free to spend this sum and any additional sum on purchasing educational services from an "approved" institution of their own choice. The educational services could be rendered by private enterprises operated for profit, or by non-profit institutions of various kinds. The role of the government would be limited to assuring that the schools met certain minimum standards such as the inclusion of a minimum common content in their programs, much as it now inspects restaurants to assure that they maintain minimum sanitary standards."

[1368] Chapter 1 Section 2 of the Instrument of Government.

statutory compulsory school attendance the right to a free of charge elementary education in the national school system.[1369] This implies that there is no unrestricted right for individuals to education in upper secondary education and university, which means that the state may impose conditions on pupils, for instance conditions of eligibility and aptitude, to have access to non-compulsory education, and also impose conditions related to available places.[1370] These education rights, of which the "right to free of charge education connected to compulsory school attendance" is evidently the strongest, are reaffirmed in the Education Act, where it is also provided that the obligation to attend school is imposed on children between 7 and 16 living in Sweden, and that "certain rights" to school education exist even outside the scope of compulsory education.[1371]

All children – regardless of their place of residence, social situation and economic situation – must be given equal access to education in the Swedish public school system, subject to certain restrictions in the Education Act.[1372] This "right to equal access", arguably founded of the constitutional value of equal worth of all, is applicable throughout the national school system, at pre-school, compulsory and upper secondary levels, and regardless of whether pupils/students attend a school in the municipality of residence, in another municipality or an independent school.[1373] In practice, this implies for instance that in compulsory school and upper secondary education, teaching material, school meals, health services and under certain conditions school transport are free of charge.[1374]

13.2.2 Regulation and organisation of the school system in Sweden: general features

The main principles and rules for the organisation of the Swedish school system, in particular the goals and guidelines for the education to be provided, are set by the Education Act. The education system consists mainly of ground school education (compulsory for children aged 7 to 16) and of upper secondary education. At present, upper secondary education is voluntary, but a vast majority of ground school pupils enrol directly in upper secondary school, which consists of three-year programs offering basic eligibility for students to continue studies at the post-secondary level. Upper secondary education consists of 'national programs', alongside with specially designed and individual study programs, and four-year programs for the learning disabled. On a voluntary basis, six years old children may also attend a one-year preschool class. The

[1369] Chapter 2 Section 18 of the Instrument of Government.

[1370] This was reaffirmed by a commission of inquiry on independent schools "Friskolorna i samhället", SOU 2013:56, p. 54-55.

[1371] Chapter 7 Section 3 of the Education Act (Sw.: *Skollagen (2010:800)).*

[1372] Chapter 1 Section 8 of the Education Act.

[1373] See Chapter 7 Section 3 of the Education Act. The value of of equal worth for all is enshrined in Chapter 1 Section 2 first paragraph of the Instrument of Government.

[1374] See Chapter 9 Section 8, Chapter 10 Section 10 and Chapter 15 Section 17 of the Education Act.

national school system includes also kindergartens, adult education, education for adults with learning disabilities, Swedish courses for migrants and after-school centres completing education in pre-school and compulsory classes.[1375]

Both publicly owned schools (hereinafter called "municipal schools") or privately-owned schools (hereinafter called "independent schools") are allowed to participate to the system, and have a certain degree of discretion to allocate resources and organise activities so that pupils attain the national goals. This freedom has been restricted in the new Education Act which came into force in July 2011. As a result, the methods used and the results to be achieved are now subject to more detailed rules and supervision at central level.[1376] The system of choice in the field of education implies that pupils have a rather extensive freedom to choose provider of pre-school, compulsory and upper secondary education.

To have access to public funding, independent schools must have received an authorization from the Schools Inspectorate. Authorization entitles independent schools to receive a fixed amount of compensation per child/pupil (Sw: *skolpeng*) from every municipality where a child enrolled in that school resides, and importantly, independent schools may be for-profit.

These features in the Swedish school system result mainly from two legislative reforms, in 1991 the decentralisation to local authorities of the responsibility for school education by a social-democrat government, and in 1992 the introduction of a system of free choice by a market liberal government.[1377] Since these reforms, and owing to consecutive legislative reforms and measures promoting the privatisation of municipal schools, the number of independent schools has increased considerably in the course of the latest 10 years, leading the percentage of children enrolled in these schools to increase steadily.

13.2.3 Are Swedish schools covered by Swedish and EU law on competition, including state aid?

The fact that school education has developed into a business activity in Sweden is hard to deny, as 85 percent of the pupils in independent upper secondary schools were enrolled in schools owned by for-profit limited companies, the corresponding

[1375] See Chapter 1 Section 1 of the Education Act.

[1376] The National Agency for Education (Sw.: *Skolverket*) is responsible for following up and evaluating the school system. The Schools Inspectorate (Sw.: *Statens Skolinspektion*) is the central Swedish agency responsible for supervising schools and ensuring that municipal and independent schools follow existing laws and regulations.

[1377] The new political majority elected in 1991 promoted the development of independent schools as vectors of competition, cost efficiency and free choice in the field of education. Before the 1992 reform, independent schools could be publicly funded if they were considered beneficial to complement the municipal schools, typically in terms of alternative pedagogical methods.

proportion for compulsory elementary schools being of 66 percent.[1378] Independent ground schools operate in about 210 of the 290 municipalities, mostly the urbanized areas of south and middle Sweden and in particular in the Greater Stockholm. For school year 2011/12, 207 000 pupils attended an independent school, of which 54 per cent of them in compulsory elementary school and 46 per cent in upper secondary school.[1379] About 11 per cent of the pupils at compulsory level and 22 per cent of the students at upper secondary level were enrolled in independent schools.[1380] By 2010, more than 15 per cent of ground schools and 48 per cent of upper secondary schools were independent schools in Sweden. Although a larger proportion of independent schools are elementary schools, independent upper secondary schools have relatively the "strongest position".[1381] Most independent schools are situated in the largest Swedish cities, and the largest number of authorisations go to the biggest ten companies on the market. So far, the Swedish market for independent schools seemed characterized by a rather steady growth, and by trends of consolidation (one fourth of the pupils attending independent schools are enrolled in one of the ten biggest independent school companies) and of incorporation (one fourth of the principals are part of a concern).[1382]

During the latest years, the number of authorizations to open independent schools has decreased.[1383] Spin-offs have also become rare.[1384] These trends can be related to demographic and market data but they must also be seen in the context of the present intense debate on the liberalization of social services in Sweden. Among the topics of this debate, we find bankruptcies affecting the continuity of pupils' education, tax planning of independent schools owners, the drop of Swedish pupils' results in PISA studies since 2000, and signs of growing segregation.[1385] Business analysts perceive the

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[1378] Report of the National Agency for Education on private actors in preschool and school education, "Privata aktörer inom förskola och skola - En nationell kartläggning av enskilda huvudmän och ägare", Skolverkets rapport 410 (2014), Stockholm: Frizes, p. **59**.

[1379] Report of the commission of inquiry on independent schools, "Friskolorna i samhället" SOU 2013:56, p. 76.

[1380] Report of the National Agency for Education "Enskilda huvudmän och skolmarknadens ägarstrukturer", Skolverkets aktuella analyser 2012, Stockholm: Fritzes.

[1381] Report of the commission of inquiry on independent schools, "Friskolorna i samhället" SOU 2013:56, p. 76.

[1382] Ibid, p. 26 and 29.

[1383] As a result, actors applying for an authorization cannot show that they will have a sufficient number of pupils to operate satisfactorily. According to the Swedish Schools Inspectorate there may be several factors for the lower interest in opening an independent school: stricter requirements on operators have been introduced in the Education Act, an uncertain state of the market, the political debate on independent schools, and decreasing pupils groups. See report of the Swedish Schools Inspectorate to the Swedish government "Årsredovisning 2012", published 2013-02-19, Dnr 2012:5700, available at

http://www.skolinspektionen.se/Documents/publikationssok/regeringsrapporter/arsredovisningar/skolinspektionen-arsredovisning-2012.pdf, p. 37.

[1384] Planning becomes a difficult exercise in a dynamic market with free choice for users. Demographic aspects, like the decrease of the number of pupils, can necessitate consolidation but also cooperation between municipal schools to secure quality and continuity.

[1385] In 2009, the gap between the best and worst Swedish students was larger than the OECD average, and while there was still less difference between good and bad schools than in many OECD countries, the gap in Sweden was in 2009 twice as wide as in 2000. See PISA 2009 results: What Students Know and Can Do – Student Performance in Reading, Mathematics and Science, Vol. 1, available at http://www.oecd.org/pisa/pisaproducts/48852548.pdf.

public debate as mostly centred on the for-profit issue, and underline that this is the main worry for operators in that sector. Their perception is that the development of a market sector in the field of education may be irreversible, for financial and legal reasons.[1386]

It has been mentioned above (section 12.2.2) that in the *Tibble gymnasium* and the *Sollentuna schools and pre-schools* cases[1387], the Swedish Supreme Administrative Court found that local authorities which closed municipal schools and sold their assets under market price to private operators starting independent schools at their place, infringed the Swedish administrative rule prohibiting that local authorities grant aid to individual undertakings.[1388] As already underlined, these judgments are not binding, but they mirror the perfect lack of doubts of Swedish courts on the commercial character of the independent schools at issue in those cases, which were in both cases limited companies for profit.

Another question is whether local authorities, whose municipal schools directly compete with independent schools on pupils' enrolment, may be seen as exercising "sales activities" in the meaning of Chapter 3 Section 27 of the Swedish Competition Act. Given the uncertainty of the notion of "sales activities" in that provision, this is perhaps not excluded, but let us leave this question unanswered here, and focus instead on whether independent schools in Sweden constitute undertakings in the meaning of EU competition (including state aid) rules. This question has already been answered elsewhere, but the main elements of the reasoning should be rapidly recapitulated here.[1389]

The relevant question, in accordance with the definition in *Höfner*, is whether independent schools conduct an economic activity, which, as established by the CJEU in *Pavlov*, consists in "offering services or goods on the market.[1390] It has been shown and concluded in part II that the meaning of the notion of "economic activity" appears to be unitary in EU market law, which involves that determining whether a service is offered on a/the market gives the same result as determining whether a service is

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[1386] See report of Grant Thornton Sweden AB on the development of the markets for health care and care in Sweden, Den privata vård- och omsorgsmarknaden ur ett finansiellt perspektiv - Hur mår den privata vård- och omsorgsmarknaden i Sverige? November 2012, available at http://www.grantthornton.se/Global/Dokument/Publikationer/Rapporter/2012/V%C3%A5rdstudie%202012.pdf p. 12. Interviewed on the subject of political proposals to prohibit for-profit in the sector of publicly funded welfare services, professor Lars Henriksson has expressed doubts as to whether provisions requiring that from a certain date in the future, independent schools are driven in a specific legal form and not for profit, can be reconciled with constitutional rights enjoyed by existing companies, regardless of the activity pursued. See Kristina Lagerström and Johan Zachrisson Winberg, "Grundlagen skyddar skolbolagens vinster" *Sveriges Television* (8 September 2014), accessed 27 February 2015 at http://www.svt.se/nyheter/sverige/grundlagen-skyddar-valfardsvinsterna.

[1387] Judgments of the administrative courts of appeal: Kammarrätten i Stockholm KR nr 584-08 (Täby kommun) and Kammarrätten i Stockholm KR nr 3801-09 (Sollentuna kommun).

[1388] Chapter 2 Section 8 paragraph 2 of the Local Government Act.

[1389] Madell T. and Wehlander C., 2013, p. 487-493.

[1390] Case C-41/90 *Höfner and Elser* [1991] ECR I-1979 and Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451.

provided for remuneration. It has also be seen in section 11.2.2.1 that this understanding explains that the Commission commonly applies a "cross-over reasoning" in state aid cases, assessing whether a service in a specific situation is "provided for remuneration" to find out whether it is "offered on a/the market" by the entity at issue. If this approach is used in the case of independent schools in Sweden, they are unmistakably to be regarded as undertakings.

The simple reason is that the amount per pupil enrolled which they receive from local authorities constitutes *for them* the consideration for the service in question. Not only does this consideration correspond to costs which they envisage to incur to provide the service, but it is also agreed by them when they apply for an authorization to open an independent school in a specific area which they consider appropriate. Independent schools are not bound to the national system by contract, and their strategic decisions are not subject to a strict State control. They operate on the basis of their own interest, even if this interest in some cases can be more "socially responsible" than simply aimed at maximizing profits. Although they have been formally integrated in the Swedish system of education, and therefore are cosnstrained by public service obligations, they organise their activity autonomously, in particular regarding crucial financial decisions, which may imply considerable risks for them but even more for their users, as was the case in June 2013 when one of the largest operators of independent schools in Sweden went bankrupt.[1391]

In other words, it does simply not seem arguable to apply the *Humbel* formula to them and hold that their activity is not a service provided for remuneration because "*the State, in establishing and maintaining the system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population*". The situation of independent schools is comparable to the situation in *Jundt*, where courses occasionally provided by a German teacher at a French university in exchange for allowances, i.e. not for nothing, were regarded by the CJEU as a service, although these courses were not paid by students but by the university (and thus indirectly, by the French State).[1392] Education provided by independent schools constitutes a service provided for remuneration, offered on the Swedish quasi-market of school education. Let us therefore conclude that they constitute undertakings in the meaning of the Treaty rules on competition (and state aid).

Another perhaps even more burning issue is whether municipal schools in competition with the independent schools, should also be regarded as undertakings. Their "raison d'être" may be rightly perceived by themselves as being exclusively to fulfil the duties of local authorities towards their population. However, in the functional approach of the CJEU, this circumstance – i.e. their social objective – is *a priori* not relevant. It seems quite probable that the fact that they are in competition with market operators (competing for pupils) they should also be regarded as undertakings. To be sure, this is some revolution, be it quiet.

[1391] The John Bauer concern of independent upper secondary schools was sold 2008 to the Danish private equity firm Axcel.

[1392] Case C-281/06 *Jundt* [2007] ECR I-12231 (this case is discussed above under section 3.2.1.1).

13.2.4 Financing of schools in free choice system: risk of state aid?

Independent schools must cover their costs with the voucher received from local authorities for each pupil enrolled, and may not charge fees from their users. This voucher consists of a basic voucher, plus an additional voucher for each pupil/student in need of extensive support or entitled to native language lessons.[1393] The basic voucher's amount, set for each calendar year by every local authority on the basis of the municipality's budget, is meant to cover a determined set of costs such as teaching material, wages, pupils' healthcare, meals, facilities and VAT. This amount varies between local authorities and is also different for different programmes, but it must correspond to the average costs per child/student for an equivalent municipal school unit and programme.[1394] The Swedish legislator has emphasized that the "principle on equal conditions" must not only govern children's access to the public education system, but also the economic conditions of school operators, as a condition for a real freedom of choice.[1395]

Hence, a central objective in Swedish law on school education is to ensure that independent schools have the same economic conditions as municipal schools. In a pedagogical perspective, as independent schools are now a part of the public system, the preparatory works underline that they must serve the same national objectives as municipal schools, and therefore must operate under equivalent conditions, so that school education has an equivalent content and high quality everywhere in Sweden, secures good skills and paves the way for life-long learning. Meanwhile, it has also been repeatedly emphasized that equivalence should not mean uniformity, as schools must be allowed pedagogical freedom, and to develop their own profile.[1396] The bill on the new Education Act in force since 2011 expressed an ambition to achieve a balance between pedagogical freedom and creativity – which made independent schools attractive to their users and legitimate to support with public funding in the first place – and a level of convergence between municipal and independent schools securing quality, equal chances and legal security.[1397]

As a result, there is today more homogeneity in the public service obligations imposed on municipal and independent schools, but there are no detailed rules on how vouchers

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[1393] The principles for determining vouchers granted to independent schools are set by governmental decrees (when this is written, these decrees include in particular *Skolförorningen (2011:185)* for elementary schools, and *Gymnasieförordningen (2010:2039)* for upper secondary schools).

[1394] An independent school is not obliged to enrol or keep a pupil in need of extensive support or of native language lessons, if the municipality has not granted the additional voucher for this pupil. The municipality is not either obliged to grant the additional voucher in case this causes particular organizational or financial problems.

[1395] Government bill on state funding on equal conditions, *Offentliga bidrag på lika villkor*, proposition 2008/09:171, p. 25.

[1396] Ibid.

[1397] See government bill on the new Education Act, *Den nya skollagen - för kunskap, valfrihet och trygghet*, proposition 2009/10:165, p. 206. An earlier report of the commission of inquiry on an Education Act for quality and equality "Skollag för kvalitet och likvärdighet" SOU 2002:121, had already expressed the view that municipal and independent schools to the largest possible should be submitted to the same regulation.

should be used for each of the posts they are meant to cover. Thus, independent schools are free to organize teaching in a specific school, as long as "quality is high enough to enable the objectives set for education to be achieved" (own translation).[1398] This space of freedom can serve pedagogical and organisational innovation, but opens also for over-compensation in a system where remuneration per service unit is fixed, and thus risks of state aid arise if the condition of trade effect is fulfilled.

In this respect it is important to mention here the "independent Schools Committee" appointed to establish a broad political platform on the question of independent schools, in particular the conditions for spin-offs, in a context of growing concern about Swedish pupils' worsening performance and turbulent debate on issues such as operators' profits and "grades' inflation". [1399] In their report, issued in 2013, the political parties gathered in the committee did not agree on the cause of these problems, in particular on whether decentralisation of school education or for-profit actors in the public school system were to blame. Nevertheless, six of these parties agreed to propose modifications in the Education Act in order to make clear that "the possibility to make profit in that sector is always coupled to requirements on good quality" (own translation).[1400]

A point of departure for the independent schools committee was that its proposals would not preclude independent schools from being for-profit. Its report emphasized that school operators must achieve a surplus in order to secure their long-term financial stability and invest in the activity, and that schools organized in limited companies must primarily seek profit, and may distribute dividends.[1401] The report took the view that in spite of these market-mechanisms, the school system was not a genuine market, because children and their families can choose education but do not pay for it, because the community financing public education has own preferences on its definition, and because the price of the service is set through political decisions and not through an agreement between the provider and the recipient.

However, referring to the Commission's decision to close the Swedish complaints on school spin-offs, the independent schools committee remarked that the Commission had not stated that state aid rules do not apply to measures such as schools' spin-offs.[1402] The committee concluded that "the legal situation was clear", that there was no

[1398] Report of the commission of inquiry on independent schools "Friskolorna i samhället" SOU 2013:56, p. 62.

[1399] Ibid, p. 43. In appointing this committee, the government gave its view that the independent schools' reform has been a success which *raised interest in other countries*, but expressed a concern that private operators should pay a market price when taking over the activity of municipal schools, and that it was necessary to provide more information on independent schools for pupils, families and other stakeholders to assess their quality. See the mission of inquiry of the commission (Sw: *Kommittédirektiv 2011:68*), in the report of the commission of inquiry on independent schools "Friskolorna i samhället" SOU 2013:56, p. 374-375.

[1400] The six parties were De nya moderaterna, Folkpartiet, Centerpartiet and Kristdemokratern (the four parties which together have governed Sweden between 2006 and 2014 under the name "Alliansen"), Social-demokraterna and Miljöpartiet. An even more recent report of the commission of inquiry on the Swedish school system "Staten får inte abdikera" SOU 2014:5) concluded that the problems affecting Swedish education are related to the decentralisation of the responsibility for school education to local authorities.

[1401] Ibid, p. 79-80.

[1402] Report of the commission of inquiry on independent schools "Friskolorna i samhället" SOU 2013:56, p. 283

possibility to sell municipal assets under market price, and that "an assessment must be made in each individual case" (own translation).[1403] It is easy to see that the report did perhaps not consider pupils are real consumers (although amusingly, the report explained that in the Swedish education system, resources are allocated on the basis of a "*customer* choice model"[1404]), but did consider independent schools as real undertakings. The independent schools committe described namely the public funding of independent schools, under the principle of equal conditions, in the following terms:

> The funding is therefore not related to the costs actually incurred by the school for providing the service. The funding is not either related to the education's quality, even if a certain level of quality is required to be authorized as principal and to offer education in an independent school. /…/Schools cannot compete through price, because they are funded by the State on the basis of flat rates. They can instead compete by raising quality and by adapting education to the requests of pupils and their families. However, for this competition to promote quality, the consumer must be able to make rational choices based on facts.[1405]

If we sum up the independent schools committee's observations, the situation is rather clear: independent schools' activity is surely economic in the meaning of EU state aid law, but there is no competition on price, public funding is not related to the costs incurred and not either to the quality of the education provided. Under such circumstances, the risk of over-compensation is patent, one indication being the profit levels of some actors in that sector, although the committee found out that there was no statistics available on profits for undertakings conducting elementary school education and upper secondary school education.[1406] This may be related to the fact that the government has never used its legal mandate to adopt provisions requiring from independent school principals to submit an economic account of their activity, with an objective to increase the control and the transparency of their use of public resources.[1407]

Depending on how clearly and precisely independent schools' public service tasks are formulated and followed up, the risk that flat rate vouchers lead to over-compensate certain operators must clearly be envisaged, in particular because they know their costs best. However, to constitute state aid in the meaning of Article 107(1) TFEU, public funding must not only provide or risk providing selective advantages to undertakings, it must also affect trade between the Member States. For medium and large firms on the Swedish market, it seems clear that the amounts perceived in their school education activities exceeds the general de minimis threshold and the SGEI de minimis threshold,

[1403] Ibid.

[1404] Ibid, p. 86.

[1405] Ibid, p. 87 and 90, own translation.

[1406] Ibid, p. 83.

[1407] This mandate follows from Chapter 29 Section 25 of the Education Act. The committee pointed to the fact that no provisions have been adopted on the basis of this delegation, see the report of the commission of inquiry, "Friskolorna i samhället" SOU 2013:56, p. 140.

and thus effect on trade cannot *a priori* be excluded.[1408] An effect on trade could be argued to be lacking, as education markets may be described as in principle local, given the fact that pupils must normally attend a school not too far away from their place of residence.

However, school education services can also be subject to international trade, especially if the service is connected to an "education concept" that may be sold to public or private school owners in other countries. This seems to be the approach of some large school concerns established in Sweden. For instance, Kunskapsskolan Education, owned to a large part by the Magnora group, is the owner and developer of the "KED program", described by the company as a "proven concept for personalized education".[1409] Kunskapsskolan explains that its goal is "to establish, operate and develop schools where every student is recognized as a unique individual with the ability, ambition and support to learn and grow beyond what she or he thought possible".[1410] The company informs on its joint venture since 2013 with investors in Saudi Arabia to build schools on a Saudi version of the KED Program, its collaboration since 2014 with a Dutch company to offer Dutch schools consulting services and/or the possibility to introduce the whole KED Program, and since 2012 its opening of "academies" in the UK. AcadeMedia, which is owned by the Swedish private equity firm EQT, is the largest company for independent schools in Sweden, but runs also pre-schools and adult education, both in Sweden and Norway.[1411] AcadeMedia's CEO declared recently that the voucher system, in an export perspective, can allow a rapid expansion of kindergartens in Europe and sees strong possibilities to export Swedish companies' service model.[1412]

Such examples show not only that school education is already to some extent an international business activity, but also that companies conducting school education and integrated in larger business corporations, can easily cross-subsidize other activities

[1408] The de minimis amount is of EUR 200 000 over any period of three fiscal years pursuant to Article 3(2) of Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1, and of EUR 500 000 over any period of three fiscal years pursuant to Article 2(2) of Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest [2012] OJ L114/8.

[1409] When this is written, Magnora owns a large part of Kunskapsskolan, as well as a communication consultancy firm (Kreab Gavin Anderson), a company for market and opinion research consultancies (Demoskop), and a company for elderly care and housing (Silver life).

[1410] Kunskapsskolan explains that its founding idea is "that successful learning must be personalized and based on each student´s individual strengths, weaknesses, previous educational experiences and goals. This task demands a tailor-made education on an individual level. We take on the burden of conceptualizing and standardizing materials, tools and systems, thereby freeing the schools to customize and personalize the students´ education. When the resources of learning — time, curricula, syllabuses, premises and working tools — are geared to support the same educational concept and if these resources are designed from the best proven practices, optimal conditions are created for schools to succeed in the task of focusing on each individual."

[1411] AcadeMedia owns also one of Norway's largest provider of kindergartens, Espira.

[1412] See article of Karin Grundberg Wolodarski, "Skoljättarna ökar vinsterna" *Dagens Industri* (Stockholm, 12 March 2014).

subject to trade within and outside the EU, unless the proportionality of their compensation for school education services is secured. Hence, it is submitted that risks of state aid may exist, and therefore the question is whether the amounts received from local authorities may be seen as public service compensation for SGEI tasks entrusted to independent schools under Article 106(2) TFEU.[1413]

13.2.5 Municipal and independent schools' public service tasks: SGEI tasks?

In this section, the purpose is simply to give a summarized and non-exhaustive account of tasks imposed on school operators. The point of departure is that principles and missions are set for the national school system as a whole[1414], but that public and private school operators are individually responsible for the compliance of their education activities with Swedish law.[1415] Both municipal and independent schools must be open without distinction to all pupils entitled to education in pre-school, compulsory school and upper secondary school.[1416] However, an independent school does not have to enrol a child with special educational needs if this would cause serious economic or organizational difficulties for the school. Conversely, the municipality is not obliged to compensate a free school that enrols such children. Whereas instruction may not be confessional, independent schools may include confessional education, on a non-compulsory basis for the children enrolled.

Pupils must have access to qualified teachers, learning support, and objective and comprehensive instruction, regardless of which operator is managing the school unit.[1417] As a general rule curricula are decided at central level and must be followed by all local operators – public or private – of compulsory schools.[1418] National programs in upper secondary schools are likewise established at central level and as a general rule must be followed by all operators. All operators are subject to an obligation to secure that the facilities are appropriate for education purposes, that pupils and students have access to certain health care services, to a school library, and at relevant level to student- and professional counselling. Also, all operators must secure that their teachers have opportunities to skills development.

The amount of teaching hours in elementary and upper secondary school is gernally regulated by the Education Act, and teaching at elementary school may not be provided

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[1413] For an overview of the structure of several large school concerns in Sweden, see a report of the National Education Agency on independent schools and the school market ownership structure, *Enskilda huvudmän och skolmarknadens ägarstrukturer*, Skolverkets aktuella analyser 2012, p. 36-41.

[1414] Chapter 1 Section 4-5 of the Education Act.

[1415] Chapter 2 Section 8 of the Education Act.

[1416] See Chapter 9 Section 17, Chapter 10 Sections 25 and 35, Chapter 11 Sections 25 and 34, Chapter 16 Sections 42–48, Chapter 18 sections 8–9 of the Education Act.

[1417] See the preparatory works to the Education Act, Government bill on the new Education Act, *Den nya skollagen - för kunskap, valfrihet och trygghet*, proposition 2009/10:165, p. 206.

[1418] Chapter 10 Section 8 of the Education Act.

on Saturdays, Sundays and holidays.[1419] Although upper secondary schools have a certain freedom to allocate teaching hours to different courses, provisions on the number of teaching hours which pupils have a right to are laid down in the Decree on elementary school (Sw: *Skolförordningen* (2011:185) and the Decree on upper secondary school education (Sw: *Gymnasieförordningen* (2010:2039).

Some specific obligations rest upon the municipal schools, as particular instruments for the local authorities to fulfil their duties towards their inhabitants. Local authorities must in particular ensure that all pupils entitled to compulsory education have access to education in ground school (operated by public or private bodies) and that all students entitled to upper secondary education have access to the national upper secondary education programs.[1420] By contrast, private operators are not entrusted with continuity obligations. They may offer a limited number of upper secondary education programs and may close down a school unit for economic reasons, which in practice happens in case of bankruptcy. Furthermore, a number of exception rules offer more flexibility to independent schools under certain conditions.

The sum of these obligations seems to go further than simply imposing certain rules of authorization, of functioning or of control on all operators, as the Education Act instead defines service conditions of universality, quality, and adaptation to users' needs, which the GC considered in *BUPA* as characteristic of an SGEI.[1421] If the public funding of independent schools is considered justified by the SGEI character of their task, it would appear that their public service obligations are defined in law, principally the Education Act, and that law is also the official document whereby the tasks are entrusted to them, a form of entrustment that was found compatible with the Treaties by the GC In *BUPA*.[1422]

13.2.6 Does school education provided in free choice comply with the 2011 SGEI Package?

As school education is still axiomatically claimed to be a non-economic activity if it is conducted in the frame of a national school system, the Commission has not found useful to mention education among the social services covered by the 2011 SGEI Decision, which implies that Swedish law imposing on local authorities to compensate public service obligations imposed by the State on undertakings providing education in the Swedish school system would have to be notified to the Commission, plausibly on the basis of the 2011 SGEI Framework.

[1419] Chapter 7 Section 17 of the Education Act. Chapter 16 Section 18.

[1420] Chapter 10 Section 24 and Chapter 16 Section 42 of the Education Act.

[1421] Case T-289/03 *BUPA* [2008] ECR II-81, para.182. See above section 9.2.3. The GC considered that the obligations at issue restricted the commercial freedom of the insurers to an extent going considerably beyond ordinary conditions of authorisation to exercise an activity in a specific sector.

[1422] Ibid, para.179.

This is where serious problems appear, as the 2011 SGEI Framework requires that the act or acts of entrustment of SGEI tasks include in particular the content and duration of the public service obligations (point 16 (a)), the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation (point 16 (d)), and the arrangements for avoiding and recovering any overcompensation (point 16 (e)). Also, the duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets, and in principle, and should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI (point 17).

It is obvious that the system of free choice for school education does not fulfil these conditions, in particular because no duration is provided for the authorizations granted to independent schools, and as no arrangements exist for recovering any overcompensation. Some would say that the 2011 SGEI Framework requirements, meant to balance market interests and public service interests, seem almost incapable to accommodate the specificities of a social service as characterized by needs of continuity, equal treatment, and "objective" quality as school education, and that it may a sure sign that school education, *a fortiori* if it is compulsory and wholly tax funded, *should* perhaps not be economic. But facts are hard here: the activity *is* economic in Sweden.

In contrast with this study, the Swedish State has not yet questioned whether the system of free choice for school education is compatible with EU state aid rules, in other words whether it is "legal". However, the Swedish State is struggling to find an appropriate balance between the many interests it has attached to school education, and the following proposals have been agreed to by six political parties in the parliamentary committee on independent schools evoked above:

- Assessment of principal's suitability in terms of conduct and economic diligence
- Assessment of owners' suitability and long-term engagement
- Consultation with local authority before establishment
- Protection of whistle-blowers for workers in independent schools
- Transparent information on independent schools, in particular on their economy
- Sanctions in case of serious deficiencies.[1423]

One of the most arduous issues is how secure school education's continuity, in a sector where limited companies dominate, and where private equity firms own several of the largest independent school companies. In order to prevent frequent changes of ownership and to secure independent schools' quality, the committee on independent schools considered appropriate to verify owners' intention to conduct the activity on a long-term basis. The Swedish government agrees that a control of owners' "seriousness" should be introduced in law and has put forward a bill proposing the introduction of

[1423] Report of the Commission of inquiry on independent schools "Friskolorna i samhället" SOU 2013:56, p. 287.

several provisions proposed by the committee.[1424] Also, a commission of inquiry was appointed 2012 to examine which conditions should be imposed on owners and operators of welfare service companies in Sweden.[1425]

To pursue this objective is easier said than done. The independent schools committee underlined that, for administrative efficiency motives, the Schools Inspectorate should not have to examine in detail each change of ownership in an independent school company leading a new owner to gain a decisive influence on the company's activity. The difficulty seems to lie in finding a legal instrument capable of imposing a commitment from private operators, in order to secure school education' critical need of *continuity*, *stability* and *planning*, in the interest of young citizens, their family, and public authorities responsible for securing access – *equal* access conditions – to school education.

The Swedish authorization-based system for free choice school education is particularly advantageous for private owners of independent schools, as they can at any time withdraw from the provision of school education without incurring particular sanctions, and also because the public authorities funding their activity have no clear powers on their establishment (independent schools are only required to engage a *consultation* with the local authority before they establish). The new procurement directives do not impose any procedure leading to their funding by local authorities, carving out from the notion of procurement both:

- "situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems" which "should not be understood as being procurement but simple authorisation schemes".[1426]

- "acts such as authorisations or licences, whereby the Member State or a public authority thereof establishes the conditions for the exercise of an economic activity, including a condition to carry out a given operation, granted, normally, on request of the economic operator and not on the initiative of the contracting authority or the contracting entity and where the economic operator remains free to withdraw from the provision of works or services", which "should not qualify as concessions".[1427]

In other words, EU *procurement* legislation does not impose *any* procedure for the entrustment of wholly tax-funded SGEIs tasks in the systems of choice, allowing to introduce some competition between providers by imposing a contract-based continuity obligation, be it a long-time concession contract, and preventing over-compensation by

[1424] Government bill on condition for independent schools, *Villkor för fristående skolor m.m.*, proposition 2013/14:112.

[1425] Report of the commission of inquiry on requirements on private actors providing welfare services "Krav på privata aktörer i välfärden" SOU 2015:7 (Ägarprövningsutredningen).

[1426] Recital 4 of the 2014 Public Sector Directive.

[1427] Recital 14 of the 2014 Concessions Directive.

precluding that operators withdraw too easily from their publicly funded task. This is even more so if school education provided by independent schools is not even characterized as a service in the meaning of the Treaties, on the fragile argument that it is provided in the frame of a national school system.

13.2.7 A very inconvenient question: has school education in public systems become a service in the meaning of Article 57 TFEU?

It has been argued in section 13.1.2.3 that the compensation received for each pupil enrolled in an independent school is perceived by this school as remuneration for the service provided, and logically, this implies that school education as provided in such schemes constitutes an activity that *is* economic in Sweden, a service entitled to free movement in accordance with Article 56 TFEU. An important issue is whether the fact that this type of service *is de facto* provided for remuneration in *one* Member State implies automatically that it may be considered as *normally* provided for remuneration and therefore a service in the meaning of Article 57 TFEU.

As seen in chapter 3, the CJEU's approach to this question appears to be "once a service, always a service", in other words Member States where the provision of a service is not economic due to regulatory restrictions will have to adapt their regulation to the fact that in other Member States, operators may provide a similar service for remuneration, related to fundamental freedom protected by Article 56 TFEU. This is because the existence, be it in other Member States, of economic operators of this activity proves that this activity, for instance a service, *can be* economic, *can be* provided for remuneration, and may considered as *normally* provided for remuneration in the meaning of Article 57 TFEU. So the answer to the inconvenient question is probably "yes".

Interestingly, Davies raised this issue more than a decade ago, considering that "the use of the duty of the State [made by the CJEU] as a magic bullet to stop Article 49 [now Article 56 TFEU] is an oddity of *Humbel* and *Wirth*, rather than an authentic legal rule".[1428] Asking when payment from a State body can be remuneration/consideration, Davies saw three structural differences in the welfare arrangements in the fields of school education respectively health care. In his view the health care situation was characterized by a stronger link recipient-payer and identifiable payments for specific services, while in the education case payments seemed more internal, as payer and provider were part of the same system. He concluded that *Humbel* notwithstanding, the most convincing element determining that the service is provided for remuneration is the separateness of the paying and providing institutions, the element of "free will" and wrote:

> If a Member State introduced a voucher education system, where students (or parents) were issued vouchers which they could use at either State or private

[1428] Davies G., 2002, p. 32.

> schools, which would then be return the voucher to the State for payment, this would introduce that market, free will element.[1429]

Thus, writing at a time (2002) when no Member State allowed publicly funded school education to be for-profit, Davies suggested already that "education should fall under Article 49" adding that "of course public policy might well allow national restrictions to be maintained".[1430] The situation in Sweden is that, not only do pupils and their families have a right to freely choose school, but private schools have a right to receive payment per pupil enrolled from public authorities (a well identified payment for the specific service), and to have another objective than the State with their activity (in most cases seek profit). Under such circumstances, *Humbel* gives simply no argument to claim that school education is not a service in the meaning of the Treaties.

In the field of school education, where pupils' cross-border mobility can be expected to be very low, and where school education, which is a very integrated service extremely determined by national public law rules as well as by local human and material resources, it may seem difficult to let the specific national school education service cross border, and so the fact that school education may be regarded as a service, at least in its definition in Sweden, is perhaps not a big issue for other Member States from a regulatory point of view.

However, as explained above, Swedish school education companies have established in other Member States. In Member States which do not allow for-profit education, these companies can instead offer and sell their pedagogical concepts on the market, for instance Magnora in the Netherlands. [1431] Under such circumstances, it is not unimaginable that education companies at a certain stage of their development find opportune to claim that their right to establishment should not be restricted by the national rules of the Member States where they have exercised this right, for instance by national rules reserving public funding to private not-for-profit operators. If they claimed this right judicially, Member States wishing to uphold that rule would probably have to rely on the CJEU's approach in *Sodemare*, of which, as mentioned above, several legal scholars believe that it might be reversed by the Court.[1432]

Such developments should arguably be anticipated, given the political interest existing in certain Member States for the model experimented in Sweden, and the democratic importance of the governance of school education. An important question is which legal arguments Member States would be able to rely on in order to claim their powers to

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[1429] Ibid, p. 33-35.

[1430] Ibid, p. 35 footnote 24, where Davies delivered this conclusion after making the following remark: "[t]he voucher system is difficult to distinguish from the current situation in the Netherlands, where both private and State universities and schools exist, and receive funding from the State for each student they take. There may be no vouchers that pass through hands, but the system is essentially the same."

[1431] This appears to be the case of Kunskapsskolan in the Netherlands, clearly, and perhaps in UK, less clearly, as the financing terms of "sponsors" for academies in UK is not easy to understand for outsiders.

[1432] See section 3.1.3.4, where in particular Hancher's and Sauter's views on the Court's reasoning in *Sodemare* are mentioned.

regulate the conditions which msut be fulfilled by school operators in their publicly funded system, for instance a not-for-profit condition. Would their system be regarded as involving SGEI tasks for operators or would it be considered as a NESGI? Could they successfully claim their view that cohesion and education quality might be adversely affected by the introduction of profit motives in school provision?

13.3 Conclusions

Findings related to elderly home care in the Swedish LOV-based systems of choice

It has been found that public funding of elderly home care in Sweden can affect trade. Although the Swedish market for elderly home care is local on the demand side, and characterised by the presence of many SMEs, it comprises also large companies offering their services both in Sweden and in other Member States, and which often belong to company groups conducting other activities in the field of social services or in other fields. The analysis of elderly home care in LOV-based systems of choice has shown that LOV-based systems for elderly home care do not, in the present state of Swedish and EU law, comply with the Altmark criteria, in particular the fourth criterion, as

- LOV does not seem to constitute procurement in the meaning of EU procurement directives, and as
- Municipal entities do not constitute benchmarks in the meaning of the fourth Altmark criterion.

LOV-based systems for elderly home care do not either comply with the 2011 SGEI Decision which applies to this social service as LOV

- Does not impose explicitly that local authorities refer to the SGEI Decision in their contracts,
- Does not impose on local authorities to define the tasks compensated precisely to ensure that providers are on equal terms,
- Does not limit the duration of the contracts with providers under 10 years,
- Does not provide for a mechanism preventing or avoiding over-compensation.

If correct, this finding may explain the Swedish State's reluctance to explicitly characterise the public funding of elderly home care as a compensation of SGEI tasks, as it would have highlighted the applicability of EU state aid rules under Article 106(2) TFEU and rendered very difficult to rapidly develop LOV-based markets for a social service such as elderly home care.

To justify the competition distortion which can arise from funding elderly home care on the basis of LOV-contracts by the service's SGEI character involves that public service obligations should be clear in order to avoid over-compensating certain operators, but can probably also reduce the number of operators in the system and perhaps involve

higher costs. If local authorities refrain from attaching precise public service tasks to market services which they compensate in the frame of a LOV-based elderly home care system, and pay the same amount to all operators, they infringe the principle of undistorted competition. It may be tempting to justify this derogation by the argument that refraining from precise public service tasks is necessary to serve the "general interest that users may choose among many different market operators". But is a "broad market choice" what is meant by the SGEI values of "high level of quality, safety and user rights" in the SGI Protocol?
Arguably not, and therefore the legal issue of imprecise SGEI tasks should be related to the policy issue of service quality. To define clear quality criteria *ex ante* in elderly home care is frequently claimed to be very difficult, in particular because users know best what is good for them, but it is arguably *possible* to define *ex ante* non-discriminatory and proportional quality requirements – including time spent with users – which can be followed up and measured, and which *any* user would like if allowed to choose. The vagueness of elderly home care providers' tasks has become a central policy issue in Sweden, but it is arguably also a legislative issue, as it seems that local authorities' discretion under LOV can affect the proportionality of the compensation paid (an EU competition law issue), and the equal treatment of users by allowing a heterogeneous service quality (a Swedish administrative law issue).

In the Swedish decentralised model of elderly home care, local authorities have undeniably a statutory public service task to supply elderly home care of good quality to all of their inhabitants in need of such care, but this task is formulated in very general terms in the Social Services Act, in fact rather as a universal service obligation, and leaves them with a wide discretion to define operators' SGEI tasks. Unless they receive clear instructions from the legislator, the risk is patent that they do "the wrong thing" and define the public service obligations attached to the services which they finance vaguely, especially

- If the Swedish legislator lays emphasis on the risk that requirements are not proportional and infringe EU free movement law
- If the Swedish legislator insists that two specific requirements may limit the number of operators in the system
- If the Swedish legislator puts them under budget balance constraints.

This is where a broad understanding of the notion of "SGEI" in Article 14 TFEU, which seems to be the CJEU's understanding, becomes valuable in a normative perspective. Article 14 TFEU supposes that the SGEI missions exist *before* they are entrusted, as the reference allowing Member States to determine the principles and conditions enabling these missions to be achieved. By imposing a universal service obligations of elderly home care on local authorities, it is submitted that the Swedish legislator defines an SGEI mission in the meaning of Article 14 TFEU, but unless the objective of this mission is clear, it is doubtful whether the SGEI tasks entrusted to undertakings will be precise. A factor explaining the lack of clear public service requirement in LOV-based elderly home care is arguably that LOV, as already mentioned, has many policy objectives, not only to supply "good quality" elderly home care, but also to promote

women entrepreneurship, small undertakings in the public sector, and attractive conditions to operate in the field of public social services.

If the substantial conditions imposed by the 2011 SGEI Decision were loyally considered as a normative point of departure in LOV-based elderly home care systems, the public service tasks would have to be defined with more precision, which would arguably allow to address competition concerns and quality concerns at the same time. This would be valuable because quality in elderly home care systems is delivered in many homes, and difficult to ensure through market control.

Findings related to school education in the Swedish authorisation-based systems of choice

The analysis of the Swedish system of choice for primary and upper-secondary school education shows that in that system, operators conduct an economic activity. It is submitted that both private and public operators in the system constitute undertakings for the purpose of EU competition law. While this argument has already been made elsewhere[1433], it has also been found here that the public funding of school education can affect trade is constrained by EU state aid rules, given the risks of cross-subsidisation and the presence in the Swedish school market of companies offering school education services in several Member States and in third countries. It has also been submitted that the statutory obligations imposed on school operators constitute public service obligations and that private and public school undertakings may be seen as undertakings entrusted with SGEI tasks in the meaning of Article 106(2) TFEU.

If it is admitted that Article 107(1) TFEU applies to the public financing of large companies conducting for-profit school education in Sweden and related educational services as well as other social services in other Member States, a logical conclusion should be that this public financing should be compatible with the EU state aid rules on SGEIs, which primarily aim at limiting competition distortions caused by the existence of public service missions imposed of some or all operators on a market. It seems arguable that a loyal application of these rules would allow addressing both competition and quality concerns.

A loyal application of the 2011 SGEI Framework covering school education in Sweden would namely imply that a duration for the entrustment of operators' SGEI-tasks *must* be clear in the act or acts entrusting these tasks. As the possibility to ensure continuity in the service provision of school education seems to be a burning issue in Sweden, it seems that a loyal application of EU rules on SGEIs may, for once, be welcome by the Swedish legislator. It seems easier to control private school operators' performance in terms of continuity by introducing a statutory condition of explicit and proportional

[1433] Madell T. and Wehlander C., 2013, p. 471-495.

duration for the education task entrusted and publicly funded, than by trying to control the motives and conditions of school operators' ownership[1434].

[1434] This is the regulatory alternative which has been studied by the committee of enquiry on requirements on private actors providing welfare services "Krav på privata aktörer i välfärden" ("Ägarpröningsutredningen") SOU 2015:7, already evoked above.

14 Conclusions of part IV: who is afraid of SGEI?

This final chapter recapitulates the results of chapters 11-13 in order to see how they allow answering the question for part IV which is

> *What place does the EU legislator give to the Treaty principles on SGEIs in EU legislation harmonizing the market for social services and how can it affect the liberalization of these services in the Member States?*

The first section looks into what use the EU legislator has made of the Treaty principles on SGEIs in EU legislation adopted under the SGI Quality Framework and harmonizing the market for social services, while the second section discusses how it can affect the liberalization of these services in the Member States. The third section returns to the main research question and to the title of this study and proposes an answer based on the study results, and the last section points at the democracy issue in the process of Europeanisation of social services.

14.1 What place does the EU legislator give to the Treaty principles on SGEIs in EU legislation harmonizing the market for social services?

While the applicability of Article 106(2) TFEU to procurement has long been debated, and problematic given this provision's wording, the analysis in chapter 11 has shown that the EU legislator recognises that EU procurement rules can *in principle* affect the possibility to fulfil SGEI missions, and are therefore covered by Article 14 TFEU and the SGI Protocol. It has been found that in the 2014 Public Sector Directive and the 2014 Utilities Directive, the derogations for in-house and public-public cooperation are in fact approached as "conditions enabling SGEI missions to be achieved" in the meaning of Article 14 TFEU.. Also, the "principle of free administration" in the 2014 Concessions Directive transposes arguably the SGEI principles in Article 14 TFEU and the SGI Protocol.

In the field of social services, the new public procurement directives impose a duty for the Member States to allow their contracting authorities to take account of social services' "specificities". It has been submitted that this duty is obviously related to the principles in Article 14 TFEU and the SGI Protocol and can only be legitimated by the Treaty principle in Article 14 TFEU.

Thus, the new procurement directives recognise that pursuant to Article 14 TFEU, the Union and the Member States must adapt their procurement rules to the existence of SGEIs in the national systems, but the new procurement directives have not been adopted "with regard of Article 14 TFEU".

This ambiguous presence of Article 14 TFEU in the new procurement directives reflects the Commission's arbitration of the debate on whether legislation based on Article 14 TFEU should be adopted.[1435] Indeed, former commissioner Barnier has stated that he had relied on Article 14 and the SGI Protocol each time he could between 2010 and 2014, in order to "modify earlier attitudes", the most important thing being in his view to take inspiration from Article 14 TFEU and the SGI Protocol, and "take steps forward".[1436] His view suggests that the Commission took the *political* decision to infuse the new procurement directives with normative elements from Article 14 TFEU, but it is argued here the Commission could *in law* not propose new procurement directives without at least acknowledging the normative relevance of these provisions for procurement rules at EU and national level.

Given the CJEU's use of the criterion "public service task" in *Commission v Germany* – the Commission could consolidate the case law on in-house and public cooperation without putting into words that contracting authorities' "public service tasks" may be seen as SGEI *missions* in the meaning of Article 14 TFEU, but it could not deny that this may be the case. This emerges rather evidently from the stance that the Public Sector Directive and the Concessions Directive do "not affect the decision of public authorities whether, how and to what extent they wish to perform *public functions* themselves pursuant to Article 14 TFEU and Protocol No 26".[1437]

Second, introducing procurement rules for social services over a certain threshold could not happen without taking into account that SGEI missions *de facto* exist in that field. In fact, by limiting these rules to a duty of prior notice of contracts seems actually to confirm that the Commission saw a need, pursuant to Article 14 TFEU, to strike *ex-ante* a balance between the EU interest of free movement and competition and the SGEI missions usually pursued by contracting authorities in the field of social services. Yet, the principle that Member States must allow contracting authorities to ensure quality, safety, affordability, user rights etc. in their procurement does not refer to SGEI missions, but to a "need to ensure" these results, given the "specificities" of social services. Social services' "specificities" and the "need to ensure" them are very vague

[1435] Maxian Rusche gives insight on this political debate, which has divided both the EU Parliament and the Member States, see Maxian Rusche T., 2013, p. 107-109.

[1436] Asked why the Commission had not adopted legislation on basic banking services on the basis of Article 14 TFEU, as it first intended to, former commissioner Michel Barnier answered (in French): "Je me suis appuyé depuis trois ans et demi sur cet article 14 et les valeurs du Protocole 26, chaque fois que j'en ai eu l'occasion pour changer les attitudes par rapport au passé. Je pense que nous y sommes parvenus que ce soit par les aides d'État, les marchés publics, les concessions, et l'accès aux services essentiels, avec notre proposition sur le compte bancaire de base qui correspond à un besoin essentiel. Nous avons défendu d'autres avancées dans ces domaines comme l'entreprenariat social. Ce qui est important c'est que le texte soit proposé, nous avons finalement atteint notre objectif par le biais du marché intérieur, l'essentiel pour moi est d'être pragmatique. Il peut y avoir encore quelque réticence à utiliser ces articles qui sont nouveaux, cela change, l'essentiel étant que nous nous en inspirions. Que nous avancions." See interview of Michel Barnier, former Commissioner for Internal Market and Services by Sophie Mosca, "Remettre les services publics au coeur du projet européen", Europolitics, Hiver 2013-2014, Hors série, available at http://www.philippejuvin.fr/wp-content/uploads/2014/01/D13113-Europolitics-HS-FR-4.pdf, p. 24.

[1437] Article 1(4) of the 2014 Public Sector Directive and Article 1(4) of the 2014 Utilities Directive.

terms, which do not explicitly indicate that national procurement rules should enable contracting authorities to achieve *their* public service tasks, often defined in law.

In fact, the EU legislator was not free to take inspiration from Article 14 TFEU and the SGI Protocol in the new procurement directives, but had to respect their principles. A *political* choice has been made to refer to these provisions in a generally vague and cautious manner, which is arguably due to the risks of acknowledging the *application* of these provisions too openly. One risk was that the concept of SGEI may be understood "too broadly". Another risk must have been that relating the mild procurement regime to the SGEI character of social services would raise the issue of which legal basis should have been chosen, which could have jeopardised the broad revision of EU procurement rules so many stakeholders wanted.

However, by "diluting" the notion of SGEI missions in the vague notion of "public functions" and the SGEI missions of social services in the notions of "needs" and "specificities", it may seem that contracting authorities may freely decide how they organise, commission and provide social services. Yet, their decisions *must* be guided by their constitutional, statutory or administrative missions, which constitute the benchmark of the "needs" to ensure. The new procurement directives do not deny these missions, but clearly invite the Member States to transform "communitarian SGEIs" into lighter "market SGEIs" which are closer to the concept of universal service obligations and facilitate the Europeanisation of these services.[1438] Thus, the Member States are invited to procure social services in a manner which differentiates "categories of users" and specifically "the disadvantaged and vulnerable groups", and promotes innovation.

In this approach, the principle that the Union must take care that the principles under which SGEI operate allow them to achieve their missions is actually used to introduce *new* EU principles for social services, going beyond those enumerated exhaustively in the third paragraph of Article 1 in the SGI Protocol and reflecting the "residual" and market-friendly approach of welfare services which the Commission has generally promoted, in particular in the field of housing. It is highly questionable whether the missions of social services financed by citizens in the Member States should be redefined under the pressure of EU directives on procurement. It seems neither compatible with the value

[1438] The term "communitarian" is borrowed from Davies. By "communitarian reasons" Davies pointed at "subtle, non-quantitative, subjective, unprovable motives" for designing welfare systems which go beyond the goal of ensuring the most effective treatment and teaching right now. He considered that governments can have legitimate reasons to structure their systems in a manner that may restrict change and individual freedom, and therefore competition, in particular the will to ensure that the system is stable, enjoys support, and can go on developing and surviving, that it contributes to a society's cohesion and identity. In his view, "[g]overnments concerned about the quality of life of their citizens – which might be influenced by trust in society, social division and the criminal and social costs it brings, and the perception and actual pursuit of equality – must look at welfare institutions in context, and consider the contribution they make beyond the concrete services they provide". Thus "communitarian reasons" cannot easily "be expressed in terms of the narrowly functional requirements to provide the highest-quality services at the lowest cost to all customers now" and are "well expressed in terms of social capital". See Davies, 2010, p. 114, referring to Rothstein B., 2001, *Social capital in the social democratic welfare state*, (2001) 29 Politics and Society 207.

of democracy which the Union and the Member States must loyally respect, nor with Article 14 TFEU imposing on the Union and the Member States to establish such principles through *regulations*.

By their evident lack of concern with undistorted competition, the light rules for the procurement of social services have a clear potential to weaken public procurement as a mode of entrustment preventing illegal state aid in this field, depending on how the notion of "aid" will be defined by the Commission. Also, systems of choice and vouchers systems have been excluded from the definition of procurement for the purpose of the new procurement directives. It may be noted that this exemption is only made in the recitals, and does not evoke the elements of contract and acquisition which may characterise such systems. Thus, the normative strength of Article 106(2) TFEU, and the proportionality of public funding of social services – be it through procurement, systems of choice, or vouchers systems – depends heavily on the design of state aid rules applicable to social services under Article 107(1) TFEU or under Article 106(2) TFEU.

A crucial feature in the design of state aid rules applicable to social services is that the control of their application has been devolved to the Member States, which calls for precise guidance from the Commission. In this respect, the short study of particular relevant parts of the 2011 SGEI Package, and of the Commission's decision-making practice, has led to the following findings.

First, it has been found that the Commission does not provide sure and clear guidance on the criteria allowing to determine the economic character of social services funded with public resources, although it is primordial for a correct application of these rules by the Member States. While the Commission had announced clarifications on that issue in the Notice on the notion of aid drafted and proposed for a consultation (ended in June 2014) but not yet adopted, it appears that the draft Notice is still characterised by a lack of systematisation of these criteria. In the draft Notice the Commission tends takes a rather casuistic approach, and tends to refer to its own decision-making practice, which, as shown in chapter 11, often includes a "cross-over reasoning", by which is meant here that this assessment is made with the support of competition case law and free movement case law.

The Commission's "cross-over reasoning" appears to build on a view that "provided for remuneration" is equivalent to "offered on a/the market", which is in line with the results of the study conducted in part II and summarised in chapter 6. However, the "why" of this approach is not explained by the Commission in soft law, is at odd with its view that there may be two sets of criteria for the notion of economic activity (one in the field of free movement, the other in the field of competition and state aid), and moreover has the major drawback of importing the oddity of the *Humbel* doctrine into the field of state aid law.

Second, it is submitted that, by asserting that Member States cannot attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics,

continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions, the Commission causes confusion in a field that was not in need of it.[1439] This stance seems namely to imply that national legislators may not define SGEI missions, for instance in the field of social services, allowing them to evaluate whether and how the market offer can achieve the missions defined, and to intervene on the market so that the SGI/SGEI missions can be achieved.

Although the Commission's position has some doctrinal support, as for instance Sauter seems to have defended a similar understanding[1440], this narrow "reversed definition" is problematic in several respects. It follows clearly from the case law studied in chapter 8 that, to borrow Schweitzer's words, Article 106(2) TFEU "acknowledges that a political choice to intervene into the market may be legitimate irrespective of a finding of a "market failure" in a narrow economic sense", and "respects the Member States' political decision to pursue redistributive policies in the provision of essential services and to pursue citizenship values over and beyond the mere protection of user rights".[1441]

Indeed, the Commission's narrow definition is also at odds with the findings summarised in chapter 10 that, largely as a result of the impossibility for Member States to withdraw public services within their competence from EU market law, SGEI emerges from the EU Treaties and the CJEU's case law as a broad concept of EU constitutional law, whose core is not limited by the notion of entrustment and which is therefore able to encompass public service tasks incumbent on public authorities, as clearest in *Commission v Germany*.[1442] Last but not least, it is certainly not coherent with the affirmation made in Article 1(4) of the Public Sector Directive that "this Directive does not affect the decision of public authorities whether, how and to what extent they wish to *perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26*".

In fact, it is difficult to understand why the Commission chooses to launch a cross-sectoral definition of what Member States may characterise as SGEI, encompassing even social services were redistribution policies can be an expression of democratic choices.

[1439] Point 123 of the 2011 SGEI Framework.

[1440] In a paper of 2008, Sauter held namely that: "the concept of market failure (and/or government failure) is a logical starting point when defining the scope of SGEI and universal service obligations" as "it is only in those cases that the services concerned are not already provided to the requisite standard by the market (and/or by public authorities) that market parties must be entrusted with the provision of particular services in the public interest." See Sauter W., 2008, p. 17-18. In a later paper of 2014, Sauter concluded that the concept of SGEI is still developing. He found a new emphasis on the requirements of universality and market failure, and considered that this "tandem" of equity and efficiency is likely to further increase the relevance of what he calls "this ever-expanding exception". Sauter W., 2014, p. 18.

[1441] Schweitzer H., 2011, p. 59, footnotes omitted. Schweitzer refers to an see Opinion prepared by the State Aid Group of EAGCP of 29 June 2006, "Services of General Economic Interest", 1 and 2-3, and to Prosser's view that there are three different rationales for regulation, in principle all covered by Article 106(2) TFEU: economic principles, individual rights, and social solidarity, in Prosser T., 2006, p. 364-365.

[1442] Case C-480/06 *Commission v. Germany* [2009] ECR I-4747.

Third, it appears that the relation of the rules on social services in the 2011 SGEI Package with the Treaty provisions on SGEIs is somewhat unclear. Undeniably, the 2011 SGEI Decision, which exempts public funding of social housing, hospital health care and now a wide range of social services from the duty of notification, requires that substantial conditions are fulfilled, and thus shapes an "EU model for social services" endorsing efficiency and a certain degree of competition.[1443] Meanwhile, the Commission's own decision-making practice does not seem to require precise public service obligations. Such leniency risks perhaps not sanction over-compensation of public service obligations, and thereby "devitalise" Article 106(2) TFEU as an exception rule, but in cases where compensation *has been paid* on the basis of vaguely defined tasks, it may also be regarded as following from the principle laid down in Article 36 EUCFR that EU law must not to endanger access to SGEIs, which can be the case if operators unexpectedly must pay back over-compensation.

On the other hand, when assessing the compatibility of models of organisation and funding of social services with the 2011 SGEI Decision, it seems that allowing unreasonably vague public service obligations does not serve efficiency and may lead to quality issues. Besides, it has been submitted that unclear public service obligations do not allow to delineate what user rights include and does not allow to enforce them efficiently.

Considered on this background, the decentralisation of the control of state aid to social services is thought provoking. It seems defendable on reasons of administrative economy, and to give Member States time to adapt to the emerging "EU model for social services", but it also seems to overestimate the possibility to apply these rules correctly on the basis of the guidance provided by the Commission. The record of Member States' application of state aid rules applying to social services is very low and cannot be expected to be much better in the future, unless the Member States receive pedagogic, precise and concise guidance, in particular because the rules exercise pressure on their systems.

The Commission is certainly aware that its guidance on the criteria determining that an activity is economic and on the degree of precision in defining public service obligations is still uncertain. The Commission is certainly also aware that its 2011 SGEI Package comprises both legislation adopted in the frame of its powers and soft law documents where its interpretation of EU law, in particular of the EU concept of SGEI, may be affected by political preferences. It could therefore well be so that the Commission does not expect that Member States loyally apply these rules, but instead enter an "incubation phase", under which its vision of an EU harmonisation of social services gains acceptance at national level and is discussed, although not in the brutal light of a too democratic debate.[1444]

[1443] Van de Gronden J. W. and Rusu . S., 2013, p. 214-215.

[1444] European commissioner for Competition Margrethe Vestager has however addressed the following message to the Member States: "To balance that change, your commitment was to take greater responsibility for ensuring compliance./…/I would like to propose a strategic approach to how we can work together." Speech at High Level Forum of Member States by Margrethe Vestager, Commissioner for Competition, Brussels 18 December 2014,

14.2 Can EU rules on procurement and state aid applying to social services affect their liberalisation in the Member States?

This question has been approached through the case study of social services in systems of choice in Sweden. It has been found in chapter 12 shows that social services under the competence of Swedish local and regional authorities (LRAs) constitute services in the meaning of the Treaties. They are *normally* provided for remuneration (and thus services in the meaning of Article 57 TFEU) and are not necessarily provided by public entities (and thus fulfil the comparative criterion in *Höfner*). It has also been found that social services in local and regional authorities' competence may certainly be regarded as services of general interest. This does not necessarily imply that the activity conducted by entities providing social services conduct an economic activity subject to state aid rules, as this question must be examined case by case.

Regarding elderly home care in LOV-based systems of choice and school education in systems of choice, it has been found that both private and municipal entities conduct an economic activity and constitute undertakings in the meaning of EU competition and state aid rules, a fact which is not visible in Swedish national rules and preparatory works on LRAs' aid to economic operators and on LRAs' sales activities.

Taking as a plausible point of departure that public funding of elderly home care in Sweden can affect trade, due to the presence of large companies offering both elderly home care and other services both in Sweden and in other Member States, it has been found that LOV-based systems for elderly home care do not to comply with the fourth Altmark criterion. To be compatible with the Treaties, public service compensation received by providers in the system must therefore fulfil the criteria in the 2011 SGEI Decision, which is not the case, and had not either been under the 2005 SGEI Framework which had applied to these systems before the 2011 SGEI Decision came into force.

Had these legal facts been established, which depends to a large extent on whether an effect on trade becomes plausible, it seems that LOV would have had to be modified, and required the definition of public service obligations, as well as mechanisms preventing and avoiding over-compensation. Such requirements had probably reduced profit opportunities and rendered the activity less attractive for private operators, which had affected the development of this market in Sweden.

Regarding systems of choice for school education, where both municipal and independent schools may operate, and where many operators are for-profit, including larger groups conducting this activity in Sweden but also selling educational services in other Member States and in third countries, it has been argued that public service compensation can affect trade. If and when this condition is fulfilled, it is covered by

available at http://ec.europa.eu/commission/2014-2019/vestager/announcements/speech-high-level-forum-member-states-margrethe-vestager-commissioner-competition-18-december-2014_en

the 2011 SGEI Framework, which in particular requires that the duration of operators' SGEI-tasks is set by the act or acts entrusting these task, a condition that makes less attractive for private equity firms to invest on the Swedish school market, and can affect market development.

While this question has not particularly been highlighted in chapter 13, it must be noted here that neither LOV-based elderly home care systems nor school education systems seem *prima facie* covered by the new procurement directives, under the condition that they constitute such systems of choice that are exempted from these Directives. As a result, these Directives do *a priori* not affect this mode of organisation of social services in Sweden. Another thing is that these systems must comply with EU free movement rules, an issue which is outside the scope of this study.

Although it seems that the Commission does not put particular pressure on the Member States to assess whether the 2011 SGEI Decision applies to the social services which they fund and how they ensure compliance, there are good reasons to examine this issue. One is evidently to ensure the legality of the systems, and thereby secure the social rights which they uphold. Another is the interesting question of whether EU rules on state aid applying to elderly home care in LOV-based systems and to school education in the Swedish systems of choice may have a positive role to play in the governance of these public services in Sweden.

Some of the problems arising in systems of choice have been evoked in chapter 13. In LOV-based systems of elderly home care, there are issues related to the proportionality of public service compensation, and also of service quality, in particular concerning the time actually spent with elderly persons. School education in the Swedish systems of choice is presently subject to intense debate, given the decline in pupils' performance and the growing differences between schools in terms of achievement.[1445] A particularly burning issue is the continuity of service provision, as nothing so far obliges operators to commit to a duration of the tasks for which they receive public funding. Such

[1445] To name but a few of the studies conducted on the Swedish system of education, a recent OECD analyses the decline in student performance and the growing differences in achievement between schools in Sweden, on the background of the decentralised model, the importance to school choice, and the presence of many corporate providers to enter the education market, see Blanchenay P., Burns T. and Köster F., 2014, *Shifting Responsibilities - 20 Years of Education Devolution in Sweden: A Governing Complex Education Systems Case Study*, *OECD Education Working Papers,* No. 104, Paris: OECD Publishing, DOI: http://dx.doi.org/10.1787/5jz2jg1rqrd7-en, p. 37. Böhlmark and Lindahl have found that the Swedish system of school choice appears to generate positive results, but see a risk that it may increase school segregation and affect pupils' equal chances, see Böhlmark A. and Lindahl M., 2012, "Friskolereformens långsiktiga effekter på utbildningsresultat", SNS Analys nr 7 (2012), available at http://www.sns.se/sites/default/files/sns_analys_nr_7.pdf, p. 10. Vlachos recalls that school choice is popular and does not deny that competition may have positive effects, but points at performance, segregation and continuity issues and calls for debate on how regulation, control and sanction instruments could limit the system's adverse effects. See Vlachos J., 2011, *Friskolor i förändring* in Konkurrensens konsekvenser – Vad händer med svensk välfärd? Laura Hartman (ed.), Stockholm: SNS Förlag, p. 107.

problems should certainly be addressed because these systems of choice have been presented by both right and left parties governing in Sweden as "here to stay".[1446]

It has been argued in chapter 13 that quality issues in elderly home care systems, which is delivered in many homes, and difficult to ensure through market control, may be related to the vagueness of providers' tasks, and to the legislator's insistence on designing requirements capable of attracting a large amount of operators. It is not excluded that if the substantial conditions imposed by the 2011 SGEI Decision were loyally considered as a normative point of departure in LOV-based elderly home care systems, the public service tasks would have to be defined with more precision, which may allow to address competition concerns and quality concerns at the same time. It has also been argued in chapter 13 that continuity in market-based school education may be easier to achieve by introducing a statutory condition of explicit and proportional duration for the education task entrusted and publicly funded, than by trying to control the motives and conditions of school operators' ownership[1447].

If applied loyally to these systems, the SGEI rules may perhaps contribute to solve some of these issues. Indeed, both under the Altmark criteria and under the 2011 SGEI Package, clearly and precisely defined public service obligations constitute a point of departure in the assessment of compensation proportionality. Also, applying the 2011 SGEI Framework to the public funding of schools in systems of choice would imply that the duration of the task entrusted is set in the act of entrustment and justified by reference to objective criteria such as the need and the costs of continuity in service provision. Besides, linking systems of free choice to EU rules on the public funding SGEIs would arguably also imply a duty for the Swedish legislator's as well as local authorities', to ensure under Article 14 TFEU that the conditions of SGEIs' operation, in particular financial and economic, enable them achieve their missions. Given the public service task – arguably an SGEI mission in the meaning of Article 14 TFEU – to ensure access to social service of good quality in the Swedish Social Services Act, this may lead the issue of under-compensation to receive more attention in the design of LOV-based elderly home care systems.

EU state aid rules on SGEIs are not argued here to constitute a panacea for a good governance of social services, and these EU rules are not only dynamic but should also be subject to democratic scrutiny. However, as already emphasized, in a context where local authorities responsible for social services have to address an array of societal objectives and must achieve their statutory missions under budget discipline, the explicit SGEI characterization of a service may bring more focus on the "core mission". In market-based systems of choice, the obligation to explicitly characterise publicly funded service provision as SGEI tasks may constitute an instrument of democracy, by obliging the legislator to be more explicit on what missions public authorities exactly have.

[1446] The independent schools committee of inquiry's conclusions were that "independent schools are here to stay", as the possibility to choose school is important both for pupils and for the development of education. (p. 287).

[1447] This is the regulatory alternative which has been studied by the committee of enquiry on requirements on private actors providing welfare services "Krav på privata aktörer i välfärden" ("Ägarpröningsutredningen") SOU 2015:7, already evoked above.

More precise missions, in particular concerning the quality levels ensured, may force public authorities to design more clearly the public service obligations which they fund, thereby preventing that citizens funding the system and individuals entitled to use it bear a disproportionate societal and individual risk of poor delivery. Indeed, many would agree with Davies that in the field of social services "it [is] hard for a customer to truly judge the quality of what he receives".[1448] Thus, in a report commissioned by the Swedish Competition Authority, Spagnolo held that a customer choice model should not create special problems public service provision if added to a well-designed procurement strategy, but can lead to very poor outcomes if introduced *instead* of a well design strategy for the selection and management of contractors. The reason in his view is that the role of a skilled public procurer cannot be delegated to uninformed customers, generally unwilling to collect information, compare performance, and switch suppliers, which firms are well aware of.[1449]

I this respect, it is interesting to note that, although Sweden has so far been reluctant to explicitly characterise social services as SGEIs, the Swedish Competition Authority considered in a report of 2009 that

> Also aid not comprised by the EU's state aid rules can have a tangible competition-distorting effect in markets in Sweden. Consequently there is a need for a national set of rules to handle aid which, in this manner, ends up outside the EU's state aid rules. There are at present no national rules with which to deal efficiently with public subsidies./…/National state aid rules should, however, according to the Swedish Competition Authority comprise all aid given from the public, consequently also the municipal sector.[1450]

14.3 Who is afraid of SGEI?

This study has amply shown that it is possible to understand SGEI as a constitutional EU concept relevant throughout the EU Treaties. The expansion of EU market law led to it, the Treaty provisions suggest it, the CJEU's case law confirms it, and the 2014 procurement directives acknowledge it.
Yet it is clear that the CJEU approaches the concept with much caution. In the context of the post-Lisbon Treaties, the Court's challenge is to find a politically acceptable

[1448] Davies adds wittingly that "[h]ospitals simply wanting to come high in customer satisfaction rankings would probably do better to teach their staff to smile a lot and provide free tea than invest in the latest treatments and advances. An analogous statement could be made of education, see Davies G., 2010, p. 113.

[1449] Report of Giancarlo Spagnolo commissioned by the Swedish Competition Authority "Open Issues in Public Procurement", p. 20-21, footnotes omitted, accessed 27 February 2015 at

http://www.konkurrensverket.se/globalassets/publikationer/uppdragsforskning/open-issues-in-public-procurement.pdf.

[1450] Report of the Swedish Competition Authority "Action for Better Competition", report 2009:4, p. 104-105, accessed 27 February 2015 at http://www.kkv.se/globalassets/english/publications-and-decisions/action-for-better-competition.pdf.

understanding of the concept, neither too restrictive nor too broad. It has been shown that by using the notions of ORGI, "public service obligations", and "public service tasks" the Court has been able to suggest its understanding without being too explicit. The use of alternative notions has allowed the Court to apply the Treaty market rules to public services with a varying degree of political empowerment and market empowerment, thereby avoiding that characterising a regulation or a measure as constituting an SGEI becomes a trump argument for any derogation from the market freedoms.

Unfortunately, this bifurcated approach involves that the CJEU's understanding of the EU concept of SGEI is still obscure, even if this study has proposed some interpretations of its case law and argued that the Court approaches SGEI as an EU concept. At the same time, the Court withholds margins of decisional freedom by delineating the criteria of applicability of free movement and competition case by case, which makes it difficult to see the "system", even if this study has also tried to identify it.[1451] The price of these approaches is that in the field of public services, the Court's case law does not emerge as firm and assessable, and rather far from the ideal formulated by Pescatore that "the structure of the European Community and its law form a system, that is to say, a structured, organised and finalised whole. The Community thus benefits from the resources and the dynamics of the system."[1452]

Under such circumstances, the EU legislator may look away and develop its own "system" for the application of EU market law to public services, now also social services, were EU law is more obviously political. In that regard, it is important to see that in engaging the process of EU harmonisation of social services, the Commission is not "afraid of SGEI", but keeps Article 14 TFEU and the SGI Protocol at a cautious distance. The pragmatic approach consists in not proposing legislation on the basis of Article 14 TFEU, but to take sufficient "inspiration" from Article 14 and the SGI Protocol to render harmonisation acceptable, thereby avoiding very carefully to force Member States to render their SGEIs explicit, arguably so that they are not tied up to present models and can liberalise them.

As to the Swedish legislator's choice not to characterise social services as SGEIs, the two cases studies have shown rather clearly the complications which the application of EU state aid rules on SGEIs may imply for a rapid and large scale development of systems of choice. Therefore, this "fear of SGEI" is not simply an ideological reaction against a concept which may conserve the welfare state, but can be explained pragmatically by the Swedish State's ambitions to develop the internal consumption of social services and to promote Swedish companies' export of social services.

[1451] Baquero Cruz: "It is at least true that our knowledge tends towards forming a system. Without this tendency – the tendency towards finding a meaningful connection between the various particulars – reality falls apart." Baquero Cruz J., 2002, p. 5.

[1452] Pescatore P., 1974, p. 41.

Besides, in the field of school education, things are of course not simple at all. Admitting that school education is an economic activity in Sweden implies that the activity *can be* economic, which makes school education a good candidate to become a "service in the meaning of Article 57 TFEU". Politically, acknowledging this legal-economic fact would render the Swedish welfare liberalisation hugely unpopular in some Member States. Nobody would like to announce such news, even if EU is not ancient Greece and messengers of bad news are not killed on the spot.

The answer to the main research question is thus that indeed, a transparent and loyal enforcement of the Treaty principles attached to SGEIs is, by different institutions and at different levels of governance, feared to restrict the Member States' discretion to liberalize social services and the expansion of a European market for social services. "Old SGEIs" existing de facto in the legislation of many Member States are good to have, as they support welfare systems as we still know them. If the principle of proportionality inherent to Article 106(2) TFEU should remain vital, they ought to be formulated, in particular because it is necessary for a loyal application of the 2011 SGEI Package. Yet their explicit formulation can tie Member States to welfare commitments and modes which restrict a differentiated demand of social services, may restrict profit opportunities in this field of activity, and render liberalisation more difficult.

14.4 A democratic issue

The Commission has taken the bold step to engage EU into the governance of social services through the EU harmonisation of EU procurement and state aid law, in the frame of a policy alluringly entitled "the SGI Quality Framework". The Union is now in the front line of the governance of social services, and if we believe Nettesheim, this may threaten its legitimacy.[1453] To be sure, the SGI Quality Framework has been presented as an answer to Europe's economic crisis, but it comes also in the context of Union requirements of budget discipline controlled by EU institutions on the basis of a legislative armada[1454], and of controversial austerity programmes imposed by the Union on certain Member States of the Eurozone.[1455]

[1453] "[T]ant que l'UE se contentait d'imposer aux États la discipline au sein du marché, elle était non seulement forte politiquement mais aussi légitime du point de vue de l'efficacité économique de son objectif et de sa mission. En devenant gardienne de la vertu sociale européenne elle s'aventure en terrain miné et extrêmement politisé ; elle s'affaiblit ainsi politiquement et menace sa propre légitimité." Nettesheim M., 2008, Les services d'intérêt général en droit communaturaire entre libre concurence et état social, Revue Internationale de Droit Comparé 3-2008, p. 637.

[1454] By this expression is meant the impressive amount of new legislation adopted since 2011, including in particular the so called "Six Pack" and the Treaty on Stability, Co-ordination and Governance (TSCG) signed on 2 March 2012 by 25 Member States.

[1455] Scharpf fears that these austerity programmes "create the conditions for anti-European political mobilization from the extremes of the political spectrum", and in the worst case undermine democracy in EU member states as well as endanger European integration itself. Scharpf F. W., 2011, p. 38.

The democracy issue is patent: social services are now under pressure not only of EU economic control, but now also of EU market rules, without any debate on what the "EU model for social services" may become in this process. There are probably visions underpinning the frameworks, but citizens are not invited to know what they are, and even less to discuss them. Is there for instance a positive bias for "lighter procurement" and systems of choice? Is there a policy preference for residual models of welfare services, differentiating between disadvantaged groups and more well-off groups of users, as some wording in the Public Sector Directive suggests?

To initiate an EU governance of social services, the Union communicates with EU citizens and their representatives through two voluminous and highly technical legal Packages mixing binding rules and political recommendations in legal text. Unless the governments having voted the new procurement directives and discreetly endorsed the 2011 SGEI Package inform their parliaments on the meaning of these acts, and unless these parliaments perceive this new reality, translate it into intelligible language, and inform their voters on the state of the art, EU citizens will have no idea of which laws govern the social services financed with their tax.

The scholarly response to these developments vary, and thus Baquero Cruz is concerned that EU law may trivialise social services[1456] while Davies is confident that "[t]he liberalization of welfare can be understood as a statement or suggestion that Europe is politically mature"[1457]. Scharpf is convinced that "a European social market economy cannot come about, and social market economies at the national level will be destroyed, unless the politically uncontrolled dynamics of (negative) "Integration through Law" can be contained."[1458]

The concern here is one of democracy.[1459] EU institutions and national governments take a considerable risk if they allow EU law to be used as an instrument pre-empting a debate on the Europeanisation of social services, as "given any plausible model of democracy, citizens need a rough idea of how public policy is produced."[1460] This kind of empowerment is the necessary foundation of a politically mature European

[1456] Baquero-Cruz in Social Services in EU Law, p. 290: the CJEU may have found a reasonable balance but concern that EU law may trivialize social services, and have a market bias, see p. 292.

[1457] "The liberalization of welfare can be understood as a statement or suggestion that Europe is politically mature, and no longer needs closed institutions to maintain its social cohesion—it can now have the best of both worlds, of freedom and solidarity. /…/The fear that it evokes may then be understood as a fear of ourselves, that we are in fact not ready for freedom – perhaps given the chance we will rush off and be selfish and abandon the weak to their fate. To use the European's (unjustified) stereotype of the United States; are we just Americans waiting to be released, or do we really have rooted European social values?" Davies G., 2010, p. 121.

[1458] Scharpf F. W., 2009, p. 30.

[1459] In his speech on the "State of the Union 2012", former president Barroso appealed to European democracy in grand words. Taking the view that the economic interdependency of the Member States requires a stronger economic policy co-operation, former president Barroso said: "I would like to see the development of a European public space, where European issues are discussed and debated from a European standpoint. We cannot continue trying to solve European problems just with national solutions. This debate has to take place in our societies and among our citizens."

[1460] Lindvall J. and Rothstein B., 2006, p. 49.

democracy. Who knows, EU citizens may be able to understand the EU domino games that shape their lives and the destinies of their children.

References and Bibliography

I. EC/EU law related material

Regulations

Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste [2006] OJ L190/1

Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (the "SGEI de minimis Regulation") [2012] OJ L114/8.

Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1

Directives

Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, repealed by Directive 2004/18/EC [1971] OJ L185/5

Council Directive 75/442/EEC of 15 July 1975 on waste [1975] OJ L194/39

Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, [1980] OJ L 195/35

Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (the Capital Movements Directive) [1988] OJ L178/5

Council Directive 91/156/EEC of 18 March 1991, amending Directive 75/442 [1991] OJ L78/32

Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community

Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (2003] OJ L41/26

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Utilities Directive) [2004] OJ L 134/1

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Public Sector Directive) [2004] OJ L 134/114

Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (the Transparency Directive) [2006] OJ L318/17

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (the "Services Directive") [2006] OJ L 376/36

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, among which Directive 91/156/EEC (as consolidated by Directive 2006/12/EC on waste) [2008] OJ L312/3

Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ 211/55

Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] L88/45

Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (the "2011 SGEI Decision") [2012] OJ L7/3

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (the 2014 Concessions Directive) [2014] OJ L94/1

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (the 2014 Public Sector Directive) [2014] OJ L94/65

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC 2014] OJ L 94/243

Commission State aid Decisions

Commission Decision of 13 March 2003 on a risk equalisation scheme in the Irish health insurance market (Ireland) in case N46/2003 – C (2003)1322 final

Commission Decision of 22 December 2005 on the introduction of a risk equalisation system in the Dutch Health Insurance (Netherlands) in cases N 541/2004 and N542/2004 – C (2005)1329 final

Commission Decision of 8 November 2006 on aid to the Přerov Logistics College (Czech Republic) in case NN54/2006 (C (2006) 5228)

Commission Decision of 2 July 2009 on nature conservation areas (Germany) in case NN8/2009 – C (2009)5080 final

Commission Decision of 28 October 2009 on the public financing of Brussels public IRIS hospitals (Belgium) in case SA.19864 (ex NN54/2009) – 2014/C

Commission Decision of 20 April 2011 on subsidies for nature management (Netherlands) in case SA.31494 (ex N376/2010) – C (2011)2631 final

Commission Decision of 13 July 2011 on a subsidy scheme for acquisition of land for nature conservation (Netherlands) in case SA.31243 (ex N308/2010) – C (2011)4945 final

Commission Communications, Notices, Guidelines and Frameworks

White Paper from the Commission of 14 June 1985 to the European Council (Milan, 28-29 June 1985) "Completing the Internal Market" (COM (85)310 final)

Commission, "Reinforcing political union and preparing for enlargement" (Opinion for the Intergovernmental Conference) COM (96)90 final

Commission Opinion of 28 February 1996 "Reinforcing political union and preparing for enlargement" (COM (96) 90 final)

Communication from the Commission "Services of General Interest in Europe" [1996] OJ C281/03

Communication from the Commission "Services of general interest in Europe" (COM (2000) 580 final)

Communication from the Commission "Services of general interest in Europe" (2001/C 17/04)

Report of the Commission of 17 October 2001 to the Laeken European Council "Services of general interest" (COM (2001)598 final)

Commission Green Paper of 21 May 2003 on services of general interest [2004] OJ C76/ (COM (2003)270 final)

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 12 May 2004 "White Paper on services of general interest" (COM (2004) 374 final)

Communication from the Commission "Implementing the Community Lisbon programme – Social services of general interest of the European Union" (COM (2006) 177 final)

Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives [2006] OJ C179/2

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 November 2007 "A single market for 21st century Europe" (COM (2007)724 final)

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 November 2007 "Services of general interest, including social services of general interest: a new European commitment" (COM (2007)725 final)

Communication from the Commission on the application of State aid rules to public service broadcasting [2009] OJ C257/01

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Reform of the EU State Aid Rules on Services of General Economic Interest" (COM(2011) 146 final)

Communication from the Commission "Europe 2020: A Strategy for smart, sustainable and inclusive growth" (COM (2010) 2020)

Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions "Single Market Act – Twelve levers to boost growth and strengthen confidence – Working together to create new growth" (COM/2011/0206 final)

Commission Staff Working Paper on The Application of EU state aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation (SEC(2011) 397)

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A Quality Framework for Services of General Interest in Europe" (COM (2011) 900 final)

Commission, Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ("public-public cooperation") (COM (2011) 1169 final)

Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C8/4 (2012/C 8/02)

Communication from the Commission on a European Union framework for State aid in the form of public service compensation [2012] OJ C8/15 (2012/C 8/03)

Table of Cases

Court of Justice Cases

6/64 *Costa v ENEL* [1964] ECR 1141

7/68 *Commission v Italian Republic* [1968] ECR 423

10/71 *Ministère public luxembourgeois v Madeleine Muller, Veuve J.P. Hein and others (Port of Mertert)* [1971] ECR 723

127/73 *BRT II* [1974] ECR 318

155/73 *Giuseppe Sacchi* [1974] ECR 409

2/74 *Reyners* v *Belgium* [1974] ECR 631

8/74 *Procureur du Roi v Dassonville* [1974] ECR 837

9/74 *Donato Casagrande v Landeshauptstadt München* [1974] ECR 773

36/74 *Walrave and Koch* [1974] ECR 1405

59/75 *Pubblico Ministero* v *Manghera* [1976] ECR 91

13/76 *Donà* [1976] ECR 1333

29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* [1976] ECR 1541

117/76 and 16/77 *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen ; Diamalt AG v Hauptzollamt Itzehoe* [1977] ECR 1753

209/78, 215/78 and 218/79 *Van Landewyck* [1980] ECR 3125

810/79 *Peter Überschär v Bundesversicherungsanstalt für Angestellte* [1980] ECR I-2747

279/80 *Criminal proceedings against Alfred John Webb (Webb)* [1981] ECR 3305

271/81 *Société coopérative d'amélioration de l'élevage et d'insémination artificielle du Béarn* [1983] ECR 2057

152/82 *Sandro Forcheri and his wife Marisa Forcheri, née Marino, v Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées - Ecole Ouvrière Supérieure* [1983] ECR I-2323

238/82 *Duphar BV and others v The Netherlands State (Duphar)* [1984] ECR I-00523

86/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377

72/83 *Campus Oil Limited and others v Minister for Industry and Energy and others (Campus Oil)* [1984] ECR 2727

143/83 *Commission v Denmark* [1985] ECR 427

293/83 *Gravier v. City of Liège* [1985] ECR I-593

118/85 *Commission* v *Italy* [1987] ECR 2599

352/85 *Bond van Adverteerders and Others* ECR [1988] p. I-2085

263/86 *Belgian State v René Humbel and Marie-Thérèse Edel (Humbel)* [1988] ECR I-5365

30/87 *Bodson v Pompes Funèbres des Régions Libérées SA (Bodson)* [1988] ECR 2479

45/87 *Commission v Ireland* [1988] ECR I-4929

C-3/88 *Commission v Italy (Re Data Processing)* [1989] ECR I-4035

C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 02609

C-202/88 *France v Commission* [1991] ECR I-1223

C-347/88 *Commission* v *Greece* [1990] ECR 1-4747

C-221/89 *R. v Secretary of State for Transport, ex parte Factortame (Factortame II)* [1991] ECR I-3905

C-243/89 *Commission v Denmark (Storebaelt)* [1993] ECR I-3353

C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (ERT)* [1991] ECR I-2925

C-2/90 *Commission v Kingdom of Belgium (Walloon Waste)* [1992] ECR I-4431

C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH (Höfner)* [1991] ECR I-1979

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

C-179/90 *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA* [1991] ECR I-05889

C-239/90 *Boscher, Studer et Fromentin* v *British Motors Wright* [1991] ECR 1-2023

C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-00637

C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard (Keck)* [1993] ECR I-6097

C-320/91 *Criminal proceedings against Paul Corbeau (Corbeau)* [1993] ECR 1-2563

C-19/92 *Dieter Kraus v Land Baden-Württemberg (Kraus)* [1993] ECR I-1663

C-42/92 *Adrianus Thijssen v Controledienst voor de verzekeringen* [1993] ECR I-4047

C-109/92 *Stephan Max Wirth v Landeshauptstadt Hannover (Wirth)* [1993] ECR 1-6447

C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43

C-393/92 *Gemeente Almelo and Others v Energibedrijf Ijsselmij NV (Almelo)* [1994] ECR I-01477

Case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker* [1995] ECR I-225

C-415/93 *Bosman* [1995] ECR I-4921

C-17/94 *Gervais and Others* [1995] ECU I-4353

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

C-87/94 *Commission v Belgium ("Walloon Buses")* [1996] ECR I-2043

C-157/94 *Commission v Netherlands* [1997] ECR I-05699

C-158/94 *Commission v Italy* [1997] ECR I-5789

C-159/94 *Commission v France* [1997] ECR I-5815

C-244/94 *Fédération Française des Sociétés d'Assurances and Others v Ministère de l'Agriculture et de la Pêche (FFSA)* [1995] ECR I-4013

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

C-120/95 *Decker* [1998] ECR I-1831

C-242/95 *GT-Link A/S v De Danske Statsbaner (DSB) (GT-Link)* [1997] ECR I-4449

C-343/95 *Diego Cali & Figli Srl v. Servizi Ecologi Porto di Genova (Diego Cali)* [1997] ECR I-01547

C-35/96 *Commission* v *Italy* [1998] ECR I-3851

C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73

C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (Deliège)* [2000] ECR I-2549

C-55/96 *Job Centre coop. arl.* [1997] ECR I-7119

C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (Albany)* [1999] ECR I-5751

C-108/96 *Criminal proceedings against Dennis Mac Quen, Derek Pouton, Carla Godts, Youssef Antoun and Grandvision Belgium SA, being civilly liable, intervener: Union professionnelle belge des médecins spécialistes en ophtalmologie et chirurgie oculaire (McQuen)* [2001] ECR I-837

C-158/96 *Raymond Kohll v Union des Caisses de Maladie* [1998] ECR I-1931

C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Dusseldorp)* [1998] ECR I-4075

C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione (Corsica Ferries)* [1998] ECR I-3949

C-114/97 *Commission v Spain* [1998] ECR I-6717

C-115/97, C-116/97, C-117/97 and C-219/97 *Brentjes Handelsonderneming BV v Stichting Bedrijfspensioenfons voor de Handel in Bouwmaterialen (Brentjens)* [1999]ECR I-6025

C-219/97 *BV Matschappij Drijvende Bokken v Stichting Bedrijfspensioenfonds voor de Vervoer- en Havenbedrijven (Drijvende Bokken)* [1999] ECR I-6121

C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland mot Finanzamt Aachen-Innenstadt* [1999] ECR I- 6161

C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein (Haim)* [2000] ECR I-5123

C-16/98 *Commission v France* [2000] ECR I-8315

C-22/98 *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV. (Becu and Others)* [1999] ECR I-5

C-107/98 *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia (Teckal)* [1999] ECR I-8121

C-180/98 to 184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten (Pavlov)* [2000] ECR I-6451

C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune (Pavlov)* [2000] ECR I-3743

C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG (Telaustria)* [2000] ECR I-10793

C-355/98 *Commission* v *Belgium* [2000] ECR I-1221

C-399/98 *Ordine degli Architetti delle province di Milano e Lodi, Piero De Amicis, Consiglio Nazionale degli Architetti and Leopoldo Freyrie v Comune di Milano, and Pirelli SpA, Milano Centrale Servizi SpA and Fondazione Teatro alla Scala (La Scala)* [2001] ECR I-5409

C-411/98 *Angelo Ferlini v Centre hospitalier de Luxembourg (Ferlini)* [2000] ECR I-8081

C-94/99 *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft (ARGE)* [2000] ECR I-11037

C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen (Smits and Peerbooms)* [2001] ECR I-5473

C-184/99 *Rudy Grzelczyk mot Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193

C-205/99 *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estadonalir* [2001] ECR I-1271

C-237/99 *Commission* v *France* [2001] ECR I-939

C-268/99 *Aldona Malgorzata Jany and Othersand Staatssecretaris van Justitie (Jany)* [2001] ECR I-8615

C-283/99 *Commission* v *Italy* [2001] ECR I-4363

C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap (Wouters)* [2002] ECR I-1577

C-385/99 *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen (Müller-Fauré and van Riet)* [2003] ECR I-4509

C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089

C-478/99 *Commission v Sweden* [2002] ECR I-4147

C-53/00 *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS) (Ferring)* [2001] ECR I-9067

C-55/00 *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)* [2002] ECR I-413

C-59/00 *Bent Mousten Vestergaard v Spøttrup Boligselskab* [2001] ECR I-9505

C-136/00 *Rolf Dieter Danner* [2002] ECR I-8147

C-218/00 *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [2002] ECR I-691

C-355/00 *Freskot AE v. Elliniko Dimosio* [2003] ECR I-5263

C-34/01 to C-38/01 *Enirisorse SpA v Ministero delle Finanze* [2003] ECR I-14243

C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] ECR I-2493

C-422/01 *Försäkringsaktiebolaget Skandia (publ) and Ola Ramstedt v Riksskatteverket (Skandia)* [2003] ECR I-6817

C-496/01 *Commission v France (French laboratories)* [2004] ECR I-2351

C-171/02 *Commission of the European Communities v Portuguese Republic* [2004] ECR I-5645

C-247/02 *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici* [2004] ECR I-9215

C-442/02 *CaixaBank France* [2004] ECR I-8961

C-438/02 *Criminal proceedings against Krister Hanner* [2005] ECR I-04551

C-26/03 *Stadt Halle och RPL Recyclingpark Lochau GmbH mot Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna (Stadt Halle)* [2005] ECR I-1

C-147/03 *Commission* v *Austria* [2005] ECR I-5969

C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-1627

C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities (FENIN v. Commission)* [2006] ECR I-6295

C-209/03 *The Queen (on the application of Dany Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills (Bidar)* [2005] ECR I-2119

C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti (Coname)* [2005] ECR I-7287, paragraphs 16 to 19

C-242/03 *Ministre des Finances v Jean-Claude Weidert and Élisabeth Paulus (Weidert and Paulus)* [2004] ECR I-7379

C-250/03 *Giorgio Emanuele Mauri v Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'appello di Milano (Mauri)* [2005] ECR I-1267

C-264/03 *Commission* v *France* [2005] ECR I-8831

C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori* [2006] ECR I-2941

C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG (Parking Brixen)* [2005] ECR I-8585

C-532/03 *Commission v Ireland* [2007] ECR I-11353

C-29/04 *Commission* v *Austria* [2005] ECR I-9705

C-94/04 *Federico Cipolla v Rosaria Fazari, née Portolese and Stefano Macrino and Claudia Capoparte v Roberto Meloni (Cipolla)* (C-202/04) [2006] ECR I-11421

C-222/04 *Ministero dell'Economia e delle Finanze mot Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato och Cassa di Risparmio di San Miniato SpA* [2006] ECR I-289

C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141

C-372/04 *Yvonne Watts v Bedford Primary Care Trust, Secretary o State for Health (Watts)* [2006] ECR I-4325

C-410/04 *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA (ANAV)* [2006] ECR I-3303

C-412/04 *Commission* v *Italy* [2008] ECR I-619

C-470/04 *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* [2006] ECR I-7409

C-519/04 P *David Meca-Medina and Igor Majcen v Commission (Meca-Medina)* [2006] ECR I-6991

C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557

C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach (Schwarz)* [2007] ECR I- 6849

C-112/05 *Commission* v *Germany* [2007] ECR I-8995

Case C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado (Tragsa)* [2007] ECR I-2999

C-318/05 *Commission v Germany* [2007] ECR I-6957

C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet (Laval)* [2007] ECR I-11767

C-393/05 *Commission v Austria* [2007] ECR I-10195

C-404/05 *Commission v Germany* [2007] ECR I-10239

C-442/05 *Finanzamt Oschatz mot Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* [2008] ECR I-01817

C-444/05 *Stamatelaki* [2007] ECR I-3185

C-446/05 *Procureur du Roi v Ioannis Doulamis (Doulamis)* [2008] ECR I-1377

C-465/05 *Commission v Italy* [2007] ECR I-11091

C-119/06 *Commission* v *Italy* [2007] ECR I-168

C-147/06 and C-148/06 *SECAP SpA and Santorso Soc. coop. arl v Comune di Torino (SECAP)* [2008] ECR I-03565

C-221/06 *Stadtgemeinde Frohnleiten, Gemeindebetriebe Frohnleiten GmbH v Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* [2007] ECR I-9643

C-250/06 *United Pan-Europe Communications Belgium SA and Others v Belgian State (UPC)* [2007] ECR I-11135

C-281/06 *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg (Jundt)* [2007] ECR I-12231

C-337/06 *Bayerischer Rundfunk and Others v GEWA - Gesellschaft für Gebäudereinigung und Wartung mbH* [2007] ECR I-11173

C-480/06 *Commission* v *Germany* [2009] ECR I-4747

C-518/06 *Commission v Italy* [2009] ECR I-3491

C-49/07 *Motosykletistiki Omospondia NPID (MOTOE) v. Elliniko Dimosio (MOTOE)* [2008] ECR I-4863

C-141/07 *Commission v Germany (German hospitals pharmacies)* [2008] ECR I-6935

C-169/07 *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung and Oberösterreichische Landesregierung (Hartlauer)* [2009] ECR I-1721

C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others (C-171/07) and Helga Neumann-Seiwert (C-172/07) v Saarland and Ministerium für Justiz, Gesundheit und Soziales (Apothekerkammer des Saarlandes)* [2009] ECR I-4171

C-324/07 *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale (Coditel Brabant)* [2008] ECR I-8457

C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft (Kattner stahlbau)* [2009] ECR I-1513

C-538/07 *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano (Assitur)* [2009] ECR I-4219

C-567/07 *Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius* [2009] ECR I-9021

C-570/07 and C-571/07 *José Manuel Blanco Pérez a.o. v. Consejerá de Salud V Servicios Sanitarios and Principado de Asturias (Asturias)* [2010] ECR I-4629

C-47/08 *Commission v Belgium* [2011] ECR I-4105

C-160/08 *Commission v Germany* [2010] ECR I-03713

C-196/08 *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others (Acoset)* [2009] ECR I-9913

C-206/08 *Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH (Eurowasser)* [2009] ECR I-8377

C-265/08 *Federutility m.fl. v Autorità per l'energia elettrica e il gas (Federutility)* [2010] ECR I-3377

C-314/08 *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu (Filipiak)* [2009] ECR I-11049

C-438/08 *Commission v Portugal* [2009] ECR I-10219

C-451/08 *Helmut Müller GmbH v Bundesanstalt fur Immobilienaufgaben (Helmut Müller) [*2010] ECR I-2673

C-515/08 *Criminal proceedings against Vítor Manuel dos Santos Palhota and Others* (CJEU 7 October 2010)

C-570/08 *Symvoulio Apochetefseon Lefkosias mot Anatheoritiki Archi Prosforon* [2010] ECR I-10131

C-155/09 *European Commission v Hellenic Republic* [2011] ECR I-65

C-215/09 *Mehiläinen Oy and Terveystalo Healthcare Oy v Oulun kaupunki* [2010] ECR I-13749

C-271/09 *Commission v Poland* [2011] ECR I-13613

C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL (AG2R)* [2011] ECR I-973

C-242/10 *Enel Produzione SpA v Autorità per l'energia elettrica e il gas (Enel)* **[**2011] ECR I-13665

C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz (Weintor)* (CJEU 6 September 2012)

C-599/10 *SAG ELV Slovensko a.s. and Others v Úrad pre verejné obstarávanie* (CJEU 29 March 2012)

C-31/11 *Marianne Scheunemann v Finanzamt Bremerhaven* (CJEU 19 July 2012)

C-84/11 *Marja-Liisa Susisalo, Olli Tuomaala and Merja Ritala (Susisal)* (Court of Justice 21 June 2012)

C-138/11 *Compass-Datenbank GmbH mot Republik Österreich* (CJEU 12 July 2012)

C-182/11 *Econord Spa v Comune di Cagno and Comune di Varese* and C-183/11 Comune di Solbiate and Comune di Varese (29 November 2012)

C-159/11 *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others (Lecce)* (CJEU 19 December 2012)

C-197/11 and C-203/11 *Eric Libert, Christian Van Eycken, Max Bleeckx, Syndicat national des propriétaires et copropriétaires ASBL, Olivier de Clippele v Gouvernement flamand (Libert)* (CJEU (CJEU 8 May 2013)

C-221/11 *Leyla Ecem Demirkan v Federal Republic of Germany* (CJEU 24 September 2013)

C-244/11 *European Commission v Hellenic Republic* (Court of Justice 8 November 2012)

C-501/11 P *Schindler Holding Ltd and Others v European Commission* (CJEU 18 July 2013)

C-577/11 *DKV Belgium SA v Association belge des consommateurs Test-Achats ASBL (DKV)* (CJEU 7 March 2013)

C-327/12 *Soa Nazionale Costruttori* (CJEU 12 December 2013)

General Court Cases

T-513/93 *Consiglio Nazionale degli Spdizionieri Doganali* v *Commission* [2000] ECR II-1807

T-106/95 *Fédération française des sociétés d'assurances (FFSA) and Others v Commission of the European Communities (FFSA)* [1997] ECR II-229

T-128/98 *Aéroports de Paris v Commission of the European Communities* [2000] ECR II-3929

T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* [2003] ECR II-357

T-17/02 *Fred Olsen* v *Commission* [2005] ECR II-2031

T-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities (BUPA)* [2008] ECR II-81

T-388/03 *Deutsche Post and DHL International v Commission (DHL)* [2009] ECR II-199

T-442/03, *SIC v Commission* [2008] ECR II-1161

T-155/04 *Selex Sistemi Integrati v Commission (SELEX)* [2006] ECR II-4797

T-309/04, T-317/04, T-329/04 and T-336/04**,** *TV 2/Danmark A/S and Others v Commission* [2008] ECR II-293

T-354/05 *TF1* v *Commission* [2009] ECR II-471

T-258/06 *Germany v Commission* [2010] ECR II-2027

T-81/07 to T-83/07 *Jan Rudolf Maas and Others v Commission of the European Communities* [2009] ECR II-2411

T-23/09 *Conseil national de l'Ordre des pharmaciens (CNOP) and Conseil central de la section G de l'Ordre national des pharmaciens (CCG) v European Commission* [2010] ECR II-5291

T-87/09 *Andersen* v *Commission* [2009] ECR II-225

T-137/10 *Coordination bruxelloise d'institutions sociales et de santé (CBI) v Commission (CBI)* (GC 7 November 2012)

II. EEA Law

EFTA Court Case

E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority*, Efta Court Report 2008, p. 62

EFTA Surveillance Authority Decisions

No 291/03/COL EFTA Surveillance Authority decision of 18 December 2003 regarding the establishment of private day-care facilities on public sites with subsidized real estate leasehold fees in Oslo (Norway)

No 39/07/COL EFTA Surveillance Authority Decision on public financing of municipal day-care institutions in Norway

III. Swedish law

Swedish law statutes

The Instrument of Government (*Kungörelse (1974:152) om beslutad ny regeringsform*)

Health and Medical Services Act (*Hälso- och sjukvårdslag (1982:763)*)

Act on Care of Addicts under certain circumstances (*lag (1988:870) om vård av missbrukare i vissa fall*)

Act on Care of certain Young Persons (*lag (1990:52) med särskilda bestämmelser om vård av unga*)

Local Government Act (*Kommunallagen (1991:900)*)

Act on Involuntary Commitment (*lag (1991:1128) om psykiatrisk tvångsvård*)

Act on Forensic Psychiatry (*lag (1991:1129) om rättspsykiatrisk vård*)

Act on support and service to persons with disabilities (*lag (1993:387) om stöd och service till vissa funktionshindrade*)

Act on Electricity (*Ellag (1997:857)*)

Act on income tax (*Inkomstskattelagen* (1999:1229))

Social Services Act (*Socialtjäntlag (2001:453)*)

Act on common board in the field of health care and social services (*lag (2003:192) om gemensam nämnd inom vård- och omsorgsområdet*)

Public Water Services Act (*lag (2006:412) om allmänna vattentjänster*)

Distance Heating Act (*Fvärrvärmelag (2008:263)*)

Competition Act (*Konkurrenslagen (2008:579)*)

Act on Systems of Choice in the Public Sector (*lag (2008:962) om valfrihetssystem*)

Act on Certain Municipal Competence (*lag (2009:47) om vissa kommunala befogenheter*)

Act on the functioning of tax reduction for household work (*lag (2009:194) om förfarandet vid skattereduktion för hushållsarbete*)

Education Act (*Skollag (2010:800)*)

Government bills

Government bill on a new Local Government Act, *En ny kommunallag*, proposition 1990/91:117

Government bill on the Social Services Act, *Ny socialtjänstlag m.m.*, proposition 2000/01:80

Government bill on certain modifications to the Instrument of government, *Ändringar i regeringsformen – samarbetet i EU m.m.*, proposition 2001/02:72

Government bill on new procurement Acts, *Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster*, proposition 2006/07:128

Government bill on LRAs' competence, *Kommunala kompetensfrågor* m.m., proposition 2008/09:21

Government bill on the Act on Systems of Choice, *Lag om valfrihetssystem*, proposition 2008/09:29

Government bill on the obligation for regional authorities to introduce free choice of primary care under LOV, *Vårdval i primärvården*, proposition 2008/09:74

Government bill on state funding on equal conditions, *Offentliga bidrag på lika villkor*, proposition 2008/09:171

Government bill on conflict solving for public sales activities on the market, *Konfliktlösning vid offentlig säljverksamhet på marknaden m.m.*, proposition 2008/09:231

Government bill on the new Education Act, *Den nya skollagen - för kunskap, valfrihet och trygghet*, proposition 2009/10:165

Government bill on municipal housing companies, *Allmännyttiga kommunala bostadsaktiebolag och reformerade hyressättningsregler*, proposition 2009/10:185

Government bill on condition for independent schools, *Villkor för fristående skolor m.m.*, proposition 2013/14:112

Government bill on private operators in municipal activities, *Privata utförare i kommunal verksamhet*, proposition 2013/14:118

Commissions of inquiry

Report of the commission of inquiry on the Local Government Act, *Kommunallagskommittén*, SOU 1947:53

Report of the commission of inquiry on fundamental rights "Medborgerliga fri- och rättigheter – Regeringsformen" SOU 1975:75

Report of the commission of inquiry on an Education Act for quality and equality "Skollag för kvalitet och likvärdighet" SOU 2002:121

Report of the commission of inquiry on LRAs' competence "Kommunal kompetens i utveckling" SOU 2007:72

Report of the commission of inquiry on the development of trade for welfare services, "Tjänster utan gränser? Internationalisering av offentliga sektorns tjänster", Bilaga 5 till långtidsutredningen 2008, SOU 2007:95

Report of the commission of inquiry on municipal housing companies "EU, allmännyttan och hyrorna" SOU 2008:38

Report of the commission of inquiry on the reform of the constitution "En reformerad grundlag", SOU 2008:125

Report of the commission of inquiry on the Internal market "EU, Sverige och den inre marknaden – En översyn av horisontella bestämmelser inom varu- och tjänsteområdet" SOU 2009:71

Report of the commission of inquiry on care assistents "I den äldres tjänst Äldreassistent – ett framtidsyrke" SOU 2008:126

Report of the commission of inquiry on private operators "*Privata utförare – kontroll och insyn"*, SOU 2013:53

Report of the commission of inquiry on independent schools, "Friskolorna i samhället", SOU 2013:56

Report of the commission of inquiry on the Swedish school system (!) with the title "the State should not abdicate" ("Staten får inte abdikera", SOU 2014:5

Report of the commission of inquiry on requirements on private actors providing welfare services "Krav på privata aktörer i välfärden" ("Ägarpröningsutredningen") SOU 2015:7

Ministry publication on municipal housing companies "Allmännyttiga kommunala bostadsaktiebolag - övervägande och förslag" Ds 2009:60

Court decisions

Judgment of the Administrative Court of Appeal, Kammarrätten i Stockholm, KR nr 584-08 (Täby kommun)

Judgment of the Administrative Court of Appeal, Kammarrätten i Stockholm, KR nr 3801-09 (Sollentuna kommun)

IV. Books and articles

Arrowsmith S., 2005, *The Law of Public and Utilities Procurement*, 2nd edition, London: Sweet and Maxwell

Arrowsmith S. et al., 2011, *EU Public Procurement Law: an Introduction*, Arrowsmith S. (ed.), Asia Link Europe Aid

Arrowsmith S., 2014, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3rd edition, London: Sweet and Maxwell

Azoulai L., 2011, *The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?* European Journal of Legal Studies, Volume 4, Issue 2 (Autumn/Winter 2011)

Baquero Cruz J., 2013, *Social Services of General Interest and the State Aid Rules*, in Social Services of General Interest in the EU, Neergaard et al. (eds.), The Hague: T.M.C. Asser Press

Baquero Cruz J., 2002, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, Oxford and Portland: Hart Publishing

Baquero-Cruz J., 2005, *Beyond Competition: Services of general interest and European Community Law*, in EU Law and the welfare state; in search of solidarity, in De Búrca G. (ed) EU law and the Welfare State, Oxford: Oxford University Press

Baquero-Cruz J., 2005, *Beyond Competition: Services of general interest and European Community law*, in EU law and the welfare state, De Búrca G (ed), Oxford: Oxford University Press

Baquero-Cruz J., 2011, *The Case Law of the European Court of Justice*, in Health Care and EU Law, van de Gronden J. W. et al. (eds.), The Hague: T.M.C. Asser Press

Barnard C. and de Baere G., 2013, *Towards a European Social Union – Achievements and Possibilities under the Current Constitutional Framework*

Baquero-Cruz J., 2013, *Social Services of General Interest and the State Aid Rules*, in Social services of General Interest in the EU, Neergaard U. et al (eds.), The Hague: T.M.C. Asser Press

Barnard C. and De Baere G., 2014, *Towards a European Social Union: Achievements and Possibilities under the Current EU Constitutional Framework*, KU Leuven Euroforum

Bauby P., 2011, *From Rome to Lisbon: SGIs in Primary Law*, in Developments in Services of General Interest, E. Szyszczak E. et al. (eds.), The Hague: TMC Asser Press

Bauby P., 2013, *Unity and Diversity of SSGIs in the European Union*, in Social Services of General Interest in the EU, Neergaard et al. (eds.), The Hague: T.M.C. Asser Press

Bekkedal T., 2011, *Article 106 TFEU is Dead. Long live Article 106!* in Developments in Services of General Interest, Szyszczak E. et al. (eds.), The Hague: T.M.C. Asser Press

Bernitz U., 2009, *Europarättens genomslag i svensk rätt – var står vi idag?* Juridisk tidskrift, nr 3 2009/10

Bergström C. F., 2009, *Grundlagsutredningen och EU*, Europarättslig Tidskrift Nr 2/2009

Bertola G., Hettne J., Scharpf F. W. and Tarschys D., *Är EU en social marknadsekonomi, Sociala Europa – en antologi*, Svenska Institutet for Europapolitiska Studier (SIEPS) 2011: 2op

Bordalo Faustino P., 2014, *Award Criteria in the new EU Directive on public procurement*, Public Procurement Law Review, pp. 125-126

Bovis C. H., 2006, *Developing public procurement regulation: Jurisprudence and its influence on law making* (2006) 43 Common Market Law Review, Issue 2, pp. 461–495

Bovis C. H., 2012, *Public procurement in the EU: Jurisprudence and conceptual directions* (2012)49 Common Market Law Review, Issue 1, pp. 247–289

Buendia Sierra J.-L., 1999, *Exclusive Rights and State Monopolies Under EC Law*, Oxford: Oxford University Press

Buendia Sierra, J. L., 2008, *Finding the Right Balance: State Aid and Services of General Economic Interest*, in EC State Aid Law: *Liber Amicorum* Francisco Santaolalla, Alphen aan den Rijn: Kluwer

Buendia Sierra J. L. and Smulders B., 2008, *The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism*, in EC State Aid Law: *Liber Amicorum* Francisco Santaolalla, Alphen aan den Rijn: Kluwer

Buendia Sierra J. L. and Panero Rivas J. M., *The Almunia Package: State Aid and Services of General Economic Interest*, in Financing Services of General Economic Interest – Reform and Modernisation, Szyszczak E. and van de Gronden J. W. (eds.), The Hague: T.M.C. Asser Press

Burgi M., 2014, *Contracting authorities, in-house services and public authorities cooperation*, in Modernizing Public Procurement: the New Directive, Lichère F., Caranta R. and Treumer S. (eds.), Copenhagen: DJØF Pusblishing

Caranta R., 2014, FIDE General Report on Public Procurement Law: Limitations, Opportunities and Paradoxes in The XXVI FIDE Congress in Copenhagen, 2014, Congress Publications Vol. 3, Neergaard U., Jacqueson C. & Skovgaard Ølykke G. (eds.), Copenhagen: DJØF Publishing, pp. 79-175, available at http://www.aanbestedingsrecht.org/project/userfiles/Fide_rapport_2014.pdf.

Chérot J.Y., 2003, *Le droit communautaire de la concurrence fonde-t-il un ordre concurrentiel - Essai sur la notion d'entreprise et d'activité économique dans la jurisprudence de la Cour,* in L'ordre concurrentiel: mélanges en l'honneur d'A. Pirovano, Paris: Frison-Roche

Craig P. and De Búrca G., 2008, *EU Law Text, Cases and Materials*, 4th edition, Oxford: Oxford University Press

Cyndecka M. A., 2015, *The Applicability and Application of the Market Economy Investor Principle, University of Bergen*, Norway

Damjanovic D. and de Witte B., 2009, *Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty*, in Integrating Welfare Functions into EU Law – From Rome to Lisbon, Neergaard U., Nielsen R. and Roseberry L. (eds.), Copenhagen: DJØF Publishing

Damjanovic D., 2013, *The EU market rules as social market rules: Why the EU can be a social market economy* (2013) 50 Common Market Law Review, Issue 6, pp. 1685–1717

Daniel, B., *Why no one cares about mandatory rules applicable to Service of General Economic Interest at the local level in France and why it is likely to change? A neo-institutionalist perspective*, Paper prepared for the 15th UACES student forum conference, Birmingham, 23-24 April 2014, available at http://uaces.org/documents/papers/1440/daniel.pdf

Dann P., 2006, *Thoughts on a Methodology of European Constitutional Law*, German Law Journal Vol. 06 No. 11

Davies G., 2002, *Welfare as a Service*, Legal Issues of Economic Integration 29(1): 27-40

Davies G., 2006a, *Subsidiarity: the wrong idea, in the wrong place, at the wrong time* (2006) 43 C.M.L.Rev. 63, 63.

Davies G., 2006b, *The Process and Side-Effects of Harmonisation of European Welfare States*, Jean Monnet Working Paper 02/06

Davies G., 2009, Article 86, *The EC's economic approach to competition law, and the general interest*, European Competition Journal August 2009

Davies G., 2009, *What does Article 86 Actually do?* in The Changing Legal Framework for Services of General Interest in Europe, Krajewski M., Neergaard U. and van de Gronden J. W. (eds.), The Hague: T.M.C. Asser Press

Davies G., 2010, *The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare* in Promoting Solidarity in the European Union, Ross M. and Borgmann-Prebil Y. (eds.), Oxford: Oxford University Press

De Cecco F., 2013, *State Aid and the European Economic Constitution*, Oxford and Portland: Hart Publishing

Delors, J., 1986, *The Single Act and Europe: A moment of truth*, Luxembourg: Office for Official Publications of the European Communities

De Vries S. A., 2011a, *BUPA: A Healthy Case, in the Light of a Changing Constitutional Setting in Europe?*, in Health Care and EU Law, van de Gronden J. W. et al. (eds.), The Hague: T.M.C. Asser Press

De Vries S. A., 2011b, *Services of General Economic Interest in the Interplay between Public and Private in Europa after Lisbon: the Search for More Coherence*, Europarättslig Tidskrift Nr 3/2011, pp. 462-482

De Vries S. A. De, 2013, *The protection of fundamental rights within Europe's internal market after Lisbon – An endeavour for more harmony*, in The Protection of Fundamental Rights in the EU after Lisbon, de Vries S., Bernitz U., Weatherill S. (eds.), Bloomsbury Publishing

De Witte B. et al., 2010, *Legislation after Lisbon, New Opportunities for the European Parliament*, EUI, accessible at http://www.eui.eu/Projects/EUDO/Documents/EUDO-LegislatingafterLisbon(SD).pdf

Dougan M., 2009, *The Spatial Restructuring of National Welfare States: The Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon*, in Integrating Welfare Functions into EU law, Neergaard, Nielsen Roseberry (eds.), Copenhagen: DJØF Publishing

Dougan M., 2013, *The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens*, in Judging Europe's Judges: The Legitimacy of the Case Law

of the European Court of Justice, Adams M. et al (eds.), Portland and Oxford: Hart Publishing

Due O., 1998, *The Impact of the Amsterdam Treaty upon the Court of Justice*, Fordham International Law Journal, Volume 22, Issue 6 1998 Article 4

Duguit L. 1923, *Traité de droit constitutionnel*, tome 2, Sirey

Durkheim E., 2002, *Moral Education,* Courier Dover Publications

Durkheim, *Division of labor in society: A Study of the Organization of Advanced Societies (De la division du travail: Etude sur l'Organisation des Sociétés Supérieures*, Livre I-III), 1893

Edwardsson E., 2003, *Konkurrenslagen och konkurrensbegränsande offentliga regleringar*, Uppsala universitet

Ehlerman C.D, 1987, *The Internal Market Following the Single European Act*, Common Market Law Review, 1987 Vol 24 Issue 3, pp. 361-409

Enchelmaier S., 2011, *Always at your service (within limits): the ECJ's case law on article 56 TFEU (2006-11)* European Law Review (2011) 36

Fiedziuk N. A., 2013a, *Putting Services of General Economic Interest up for Tender: Reflections on Applicable EU Rules*, Common Market Law Review Volume 50: 87–114

Fiedziuk N. A, 2013b, *Services of general economic interest in EU law: The role of the 'public service' exception in the light of recent devlopments in EU law*, Oisterwijk: Wolf Legal Publishers (WLP)

Foster N., 2008, *EU Law Directions*, Oxford: Oxford University Press

Freedland M., 1998, *Law, Public Services, and Citizenship – New domains, New Regime,* in Public Services and Citizenship in European Law.Public and Labour Law perspectives, Freedland M. and Sciarra S. (eds.), Oxford: Clarendon Press

Friedman F., 1955, *The Role of Government in Education*, in Economics and the Public Interest, Robert Solo (ed.), New Brunswick, NJ: Rutgers University Press: http://www.edchoice.org/The-Friedmans/The-Friedmans-on-School-Choice/The-Role-of-Government-in-Education-%281995%29.aspx

Fundamental Rights in Europe, European Parliament, Directorate General for Research, Working Paper, Social Affairs Series, 3 PE 168.629, Authors: Mark Eric BUTT, Julia KÜBERT and Christiane Anne SCHULTZ, Editor: Lothar BAUER, Division for Social, Legal and Cultural Affairs, Directorate-General for Research

Gerard D., 2010, *EU Competition Policy after Lisbon: time for a review of the "state action doctrine"?* Available at: http://ssrn.com/abstract=1533842 or

http://dx.doi.org/10.2139/ssrn.1533842, p. 10.

Gerber D.J., 1994, *The Transformation of European Community Competition Law*, Harvard University Law Journal, Volume 35, Number 1

Gideon A., 2012, *Higher Education Institutions and EU Competition Law*, Competition Law Review Volume 8 Issue 2 pp. 169-184**.**

Groussot X., Pech L. and Peturson G. T., 2011, *The Scope of Application of Fundamental Rights on Member States Action: in search of Certainty in EU Adjudication*, Eric Stein Working Paper 1/2011

Hamilton G.J., 2005, *A new Private Universal Health Insurance in the Netherland*', Competitive Social Health Insurance Yearbook *2004*, den Exter A. (ed.), Rotterdam: Erasmus University Press

Hancher L. and Sauter W., 2009, *One foot in the grave or one step beyond? From Sodemare to DocMorris: the EU's freedom of establishment case law concerning healthcare*, available at TILEC DP 2009-028 / http://ssrn.com/abstract=1429315

Hancher L. and Sauter W., 2013, *This Won't Hurt a Bit: The Commission's Approach to Services of General Economic Interest and State Aid to Hospitals* in Financing Services of General Economic Interest – Reform and Modernization, Szyszczak E. and van de Gronden J. W. (eds.), The Hague: T.M.C. Asser Press

Hatzopoulos V., 2011, The concept of "economic activity" in the EU Treaty: from ideological dead-ends to workable judicial concepts, Research Papers in Law 06/2011, College of Europe

Hatzopoulos V., 2012, *Regulating Services in the European Union*, Oxford: Oxford University Press

Heide-Jørgensen C., 2013, *Private Distortions of Competition and SSGIs in Social Services of General Interest in the EU*, The Hague: T.M.C. Asser Press

Hedelin J., 2010, *De nya svenska reglerna om konkurrensbegränsande offentlig verksamhet – en spegel av reglerna om tjänster av allmänt ekonomiskt intresse?* in Den nordiska välfärden och marknaden: Nordiska erfarenheter av tjänster av allmänt intresse i en EU-rättslig kontext, Madell T., Bekkedal T. and Neergaard U. (eds.), Uppsala: Iustus förlag

Hettne J., 2008, *Rättsprinciper som styrmedel – Allmänna rättsprinciper i EU:s domstol*, Stockholm: Norstedts Juridik

Hirschman A. O., 1970, *Exit, voice, and loyalty: responses to decline in firms, organizations, and states*, Cambridge, Mass.: Harvard Univ. Press

Hordijk P.and Meulenbelt M., 2005, *A bridge too far: why the European Commission's attempts to construct an obligation to tender outside the scope of the Public Procurement directives should be dismissed* (2005) 14 Public Procurement Law Review 123

Idot L. L. Idot, 2003, *La notion d'entreprise en droit de la concurrence, révélateur de l'ordre concurrentiel* in *L'ordre concurrentiel: mélanges en l'honneur d'A. Pirovano,* Paris: Frison-Roche

Indén T., 2008, *Kommunen som konkurrent, Kommunalrättsliga befogenheter och konkurrensrättsliga begränsningar*, Skrifter från juridiska institutionen vid Umeå universitet, Uppsala: Iustus Förlag

Jacqué J.-P., Weiler J.H.H., *On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference*, Common Market Law Review, Volume 27 (1990) Issue 2, pp. 185–207

Jacobs F. G., 2001, *Human Rights in the European Union: the Role of the Court of Justice*, (2001)26 European Law Review 331

Jääskinen N., 2011, *The New Rules on SGEI*, EStAL 4/2011

Jacobs F. G. *Human Rights in the European Union: the Role of the Court of Justice* (2001) 26 European Law Review 331

Janssen W. A., 2014, *The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a More Coherent Approach?*, Utrecht Law Review, Volume 10, Issue 5 (December) 2014, URN:NBN:NL:UI:10-1-115852

Joerges C. and Rödl F., 2004, *"Social Market Economy" as Europe's Social Model*, European University Institute, Florence, EUI Working Paper Law 2004/8

Kavanagh J., 2013, *Financing Services of General Interest: the European Commission's Economic Tests*, in Financing Services of General Economic Interest – Reform and Modernization, Szyszczak E. and van de Gronden J. W. (eds.), The Hague: T.M.C. Asser Press

Karayigit M., 2010, *A new type of exemption from the EU rules on public procurement established: "in thy neighbour's house" provision of public interest tasks*, (2010) 6 Public Procurement Law Review 183

Kennedy D., 2006, *Three Globalizations of Law & Legal Thought*, in The New Law and Economic Development, A Critical Appraisal, Trubek D. and Santos A. (eds.), Cambridge: Cambridge University Press

Kunzlik P., *Neoliberalism and the European Public Procurement Regime*, Cambridge Yearbook of European Legal Studies, Barnard C. et al. (eds.), Vol. 15, 2012-2013, pp. 283-356

Lasser M., de S. –O. –L'E, 2004, *Judicial Deliberations – A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford: Oxford University Press

Lenaerts K., 1990, *Constitutionalism and the many faces of federalism* (1990) 38 American Journal of Comparative Law, pp. 205-220.

Lenaerts K., 2012, *Defining the Concept of "Services of General Interest" in Light of the "Checks and Balances" set out in the EU Treaties*, Jurisprudencija/Jurisprudence 2012, volume 19 nr.4, p.1247-1267

Lind A., 2009, *Sociala rättigheter I förändring – en konstitutionell studie*, Uppsala universitet

Lindholm J., 2008, *Idrottens särart och EU:s konkurrensrätt*, Europarättslig tidskrift, (4): 914-933.

Lindquist U., 2011, *Kommunala befogenheter*, Stockholm: Norstedts Juridik

Lindvall J. and Rothstein B., 2006, *Sweden: The Fall of the Strong State*, Scandinavian Political Studies, Vol. 29 – no. 1, 2006,

McDougall G. and Roberts A. S. 2009, *Commercializing Air Traffic Control: Have the Reforms Worked?* Canadian Public Administration, Vol.51, No.1, p.45-69, available at Suffolk University Law School Research Paper No. 09-11

Madell T., 2011, *Tjänster av allmänt intresse – ett svenskt perspektiv*, Stockholm: Svenska Institutet för europapolitiska studier, SIEPS 2011:8

Madell T. and Wehlander C., *SSGIs in Sweden: With a Special Emphasis on Education* , in Social Services of General Interest in the EU, Neergaard et al. (eds.), The Hague: T.M.C. Asser Press

Maxian Rusche T., 2013, *The Almunia Package: Legal Constraints, Policy Procedures, and Political Choices* in Financing Services of General Interest, Reform and Modernization, Szyszczak E. and van de Gronden J. W. (eds.), The Hague: T.M.C. Asser Press

Merola M., 2011, *Conclusions of the Conference on the Reform of State Aid Rules on Services of General Economic Interest from the 2005 Monti-Kroes Package to the 2011 Almunia Reform*, College of Europe, Bruges, 30 September 2011, Conference proceedings available at https://www.coleurope.eu/content/gclc/documents/GCLC%20-%20SGEI%20Conference%20Booklet.pdf

Micklitz H.-W., 2010, *Failure or Ideological Preconceptions – Thoughts on Two Grand Projects: The European Constitution and the European Civil Code*, EUI Working Papers, Law 2010/04

Naundrup Olesen K., 2011, *Formål af almen interesse som element i EU-retten*, in Den nordiska välfärden och marknaden: Nordiska erfarenheter av tjänster av allmänt intresse i en EU-rättslig kontext, Skrifter från juridiska institutionen vid Umeå universitet 2011 Nr 23

Neergaard U., 2008, *Services of General (Economic) Interest and the Services Directive*, in The Services Directive – Consequences for the Welfare State and the European Social Model, Nergaard U., Nielsen R. and Roseberry L. M. (eds.), Copenhagen: DJØF Publishing

Neergaard U., 2009, *Services of General Economic Interest: the Nature of the Beast* in The Changing Legal Framework for Services of General Interest in Europe: between Competition and Solidarity, Krajewski M. et al (eds.), The Hague: T.M.C. Asser Press

Neergaard U. and Nielsen R., 2010, *Blurring Boundaries: From the Danish Welfare State to the European Social Model?* Social Science Research Network (SSRN), 2010, pp. 1-96

Neergaard U., 2013, *The Concept of SSGI and the Asymmetries Between Free Movement and Competition Law*, in Social Services of General Interest in the EU, Neergaard et al. (eds.), The Hague: T.M.C. Asser Press

Nicolaides P., 2014, Recent Devlopments in State Aid, critical Analysis of Major Judgments and Commission Decisions, Lexxion Publisher

Nielsen R., 2010, *Scandinavian Legal Realism and EU Law*, in The Role of Courts in Developing a European Social Model – Theoretical and Methodological Perspectives, Copenhagen: DJØF Publishing

Odudu O., 2009, *Economic Activity as a Limit to EU Law*, in The Outer Limits of European Union Law, Barnard and Odudu (eds.), Oxford and Portland: Hart Publishing

Pernice I., 2009, *The Treaty of Lisbon: Multilevel Constitutionalism in Action,* Walter Hallstein-Institut für Europäisches Verfassungsrecht, Humboldt-Universität zu Berlin, WHI - Paper 2/09

Pescatore P., 1974, *The Law of IntegrationEmergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities*, Leiden: A. W. Sitjhoff

Petrén G., 1978, *Vägen till en svensk rättighetskatalog*, in Skrifter till minne av Halvar G.F. Sundberg, Stockholm: Institutet for offentlig och internationell rätt

Piernas Lopez J. J., 2010, *The notion of State aid and regulation in the EEU: drawing the shape of a moving target*, Cuadernos de Derecho Transnacional, Vol. 2, Nr. 2 2010

Prosser T., 2005, *The limits of Competition Law: Markets and Public Services*, Oxford: Oxford University Press

Prosser, T., 2005, *Competition Law and Public Services: From Single Market to Citizenship Rights?* European Public Law, Volume 11, Issue 4, The Hague: Kluwer Law

Prosser T., 2006, *Regulation and Social Solidarity*, (2006) 33, Journal of Law and Society

Research report of the Nordic Research Network on Marketisation in Eldercare, 2013, "Marketisation in Nordic eldercare: a research report on legislation, oversight, extent and consequences", Meagher G. and Szebehely M. (eds.), Department of Social Work, Stockholm University

Reichel J., 2011, *European Legal Method from a Swedish Perspective*, in European Legal Method – Paradoxes and Revitalisation, Eds. Neergaard U., Nielsen R. and Roseberry L., DJØF Publishing

Rodrigues S., 2009, *Towards a general EC framework instrument related to SGEI?*, in The Changing Legal Framework for Services of General Interest in Europe, Between Competition and Solidarity, Krajewski M., Neergaard U. and van de Gronden J. W. (eds.), The Hague: T.M.C. Asser Press

Ross M., 2009, *A healthy approach to services of general economic interest? The BUPA judgment of the Court of First Instance*, European Law Review. February 2009, p.127-140

Ross, M., 2007, *Promoting solidarity: from public services to a European model of competition?*, Common Market Law Review, 44 (4). p. 1057-1080

Rossi L. S., 2008, *How Fundamental Are Fundamental Principles? Primacy and Fundamental Rights After Lisbon*, Yearbook of European Law (2008) Vol. 27(1) p. 65-87, Oxford Journals

Roth W.-H., 2011, *The Importance of the Instruments Provided for in the Treaties for Developing a European Legal Method*, in European Legal Method – Paradoxes and Revitalisation, Neergaard R., Nielsen R. and roseberry L. (eds.), Copenhagen: DJØF Publishing

Rothstein B., 2001, *Social capital in the social democratic welfare state*, (2001) 29 Politics and Society 207

Rott P., 2009, *The user-provider relationship: informed choice and user protection through private law*, in The Changing Legal Framework for Services of General Interest in Europe, Between Competition and Solidarity, Krajewski M., Neergaard U. and van de Gronden J. W. (eds.), The Hague: T.M.C. Asser Press

Sanchez Graells A., 2011, *Public Procurement and the EU Competition Rules*, Oxford and Portland: Hart Publishing

Sanchez Graells A., 2013, *The Commission's Modernisation Agenda for Procurement and SGEI*, in Financing Services of General Economic Interest, Reform and Modernization, Szyszczak E. and van de Gronden J. W. (eds.), The Hague: T.M.C. Asser Press

Sanchez Graells A., 2014, *Enforcement of State Aid Rules for Services of General Economic Interest before Public Procurement Review Bodies and Courts*, The Competition Law Review, Volume 10 Issue 1 pp 3-34 July 2014

Sauter W., 2008, *Services of General Economic Interest and Universal Service in EU Law*, available as TILEC DP 2008-017, http://ssrn.com/abstract=1136105

Sauter W., 2014, *Public Services in EU Law*, Cambridge: Cambridge University Press

Sauter W., 2014, *The criterion of advantage in state aid: Altmark and services of general economic interest*, TILEC Discussion Paper, DP 2014-015, available at ISSN 2213-9419 http://ssrn.com/abstract=2426230

Sauter W. and Schepel H., 2007, *"State" and "Market" in the Competition and Free Movement Case Law of the EU Courts*, 2007, TILEC Discussion Paper

Sauter W. and van de Gronden J. W., 2010, *Taking the temperature: A survey of the EU law on competition and state aid in the healthcare sector*, Research Centre for State and Law research papers, 5 November 2010

Scharpf F. W., 2009, *The Double Asymmetry of European Integration Or: Why the EU Cannot Be a Social Market Economy* Max Planck Institute for the Study of Societies, MPlfG Working Paper 09/12

Scharpf F. W., 2011, *Monetary Union, Financial Crisis, and the Preemption of Democracy*, Max Planck Institute for the Study of Societies Discussion paper 11/11,

Schweitzer H., 2007, *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81*, EUI Working Papers Law 2007/30

Schweitzer H., 2011, *Services of General Economic Interest: European Law's Impact on the Role of Markets and of Member States*, in Market Integration and Public Services in the European Union, Cremona M. (ed.), Oxford: Oxford University Press.

Semmelmann C., 2010, *The European Union's economic consittution under the Lisbon Treaty: soul-searching among lawyers shifts the focus to procedure*, ELRev 35:516-541

Semmelmann C., 2014, *General Principles of EU Law The Ghost in the Platonic Heaven in Need of Conceptual Clarification*, Pittsburg Papers on the European Union, ISSN: 2161-6590 | 10.5195/PPEU.2013.7

Shafiq M. N. and Myers J. P., 2014, *Educational Vouchers and Social Cohesion: A Statistical Analysis of Student Civic Attitudes in Sweden 1999-2009*, American Journal of Education, Vol. 121, No. 1 (November 2014), p. 111-136

Snell J., 2008, *Freedom to Provide Services in the Case Law andin the Services Directive: Problems, Solutions, and Institutions*, in The Services Directive – Consequences for the Welfare State and the European Social Model, Neergaard U., Nielsen R. and Roseberry L. M. (eds.), Copenhagen: DJØF Publishing

Spaventa E., 2007, *Free Movement of persons in the European Union: barriers to movement in their constitutional context*, Alphen aan den Rijn: Kluwer

Steinicke M., 2011, *In house-kontrakter eller administrative aftaler*, in Den nordiska välfärden och marknaden – Nordiska erfarenheter av tjänster av allmänt intresse i en EU-rättslig Context, Madell T., Bekkedal T and Neergaard U. (eds), Skrifter från juridiska institutionen vid Umeå universitet Nr 23

Stergiou HM, 2008, *The increasing influence of primary EU law and EU public procurement law: Must a concession to provide services of general economic interest be tendered?,* in EU and WTO law on services: limits to ther realization of general interest policies within the services market, van de Gronden J. W. (ed), Alphen aan den Rijn: Kluwer

Szyszczak E., 2004, *Financing Services of General Interest*, 67 MLR, p. 382-1011

Szyszczak, E. 2007, *The regulation of the State in competitive markets in the EU,* Oxford and Portland: Hart Publishing

Szyszczak E., 2009*, Legal Tools in the Liberalization of Welfare Markets*, in Integrating Welfare Functions into EU Law – from Rome to Lisbon, Neergaard U., Nielsen R. and Roseberry L. M. (eds.), Copenhagen: DJØF Publishing

Szyszyczak E., 2013, *Soft Law and Safe Havens* in Social Services if General Interest in the EU, Neergaard et al. (eds.), The Hague: T.M.C. Asser Press

Treumer and Werlauff, "The Leverage Principle: Secondary Law as a Lever for the Development of Primary Community Law" (2003) 28(1) ELRev 124.

Tridimas, 1999, *The General Principles of EU law*, Oxford University Press

Tuori K., 2002, *Critical Legal Positivism*, Aldershot: Ashgate

Van de Gronden J. W. and Rusu C. S., 2013, *The Altmark Update and Social Services: Toward a European Approach*, in Financing Services of General Interest – Reform and Modernization, Szyszczak E. and van de Gronden J. W. (eds.), The Hague: T.M.C. Asser Press

Van de Gronden J. W., 2008, *The Services Directive and SG(E)I*, in The Changing Legal Framework for Services of General Interest in Europe, Krajewski M., Neergaard U. and van de Gronden J. W. (eds), the Hague: T.M.C. Asser Press

Van de Gronden J. W., 2009a, *Cross-border Health Care in the EU and the Organization of the National Health Care systems of the Member States: the Dynamics resulting from the European Court of Justice's Decisions on Free Movement and Competition Law*, Wisconsin International Law Journal 26:705–760

Van de Gronden J. W., 2009b, *Financing Health Care in EU Law: Do the European State Aid Rules Write Out an Effective Prescription for Integrating Competition Law with Health Care?*, December 2009 Volume 6 Issue 1 pp 5-29

Van de Gronden J. W., 2011, *The Treaty Provisions on Competition and Health Care,* in Health Care and EU Law, Van de Gronden J. W. et al. (eds.), The Hague: T.M.C. Asser Press

Van de Gronden J. W., 2013, *Free Movement of Services and the Right of Establishment: Does EU Internal Market Law Transform the Provision of SSGI?*, in Social Services of General Interest in the EU, eds. Neergaard et al., The Hague: T.M.C. Asser Press

Van de Gronden J. W. and Rusu C. S., 2013, *The Altmark Update and Social Services*, in Financing Services of General Economic Interest, Reform and Modernization, Szyszczak E. and van de Gronden J. W. (eds.), The Hague: T.M.C. Asser Press

Vedder H., 2008, *The Constitutionality of competition – EC internal market law and the fine line between markets, public interests and (self-)regulation in a changing constitutional setting*, accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1282035

Vlachos J., 2011, *Friskolor i förändring* in Konkurrensens konsekvenser – Vad händer med svensk välfärd? Laura Hartman (ed.), Stockholm: SNS Förlag

Von Bogdandy A., 2010, *Founding Principles of EU Law: a Theoretical and Doctrinal Sketch*, European Law Journal, Vol. 16, No. 2, March 2010

Vries S. A. De, 2013, *The protection of fundamental rights within Europe's internal market after Lisbon – An endeavour for more harmony*, in The Protection of Fundamental Rights in the EU after Lisbon, Sybe de Vries, Ulf Bernitz, Stephen Weatherill (eds.), Bloomsbury Publishing

Weatherill, S., 1995, *Law and Integration in the European Union*. Oxford: Clarendon Press

Weiler J. H.H., 1991, *The Transformation of Europe*, The Yale Law Journal, Vol. 100 No. 8, p. 2403-2483

Weiler J.H.H., 2001, *Federalism and Constitutionalism: Europe's Sonderweg*, in The Federal Vision: Legitimacy and Levels of Governance in the US and the EU, Nicolaidis K. and Howse R. (eds.), Oxford: Oxford University Press

Weiler J. H.H., 2005, *Mutual Recognition, Functional equivalence and harmonization in the Evolution of the European Common Market and the WTO*, in The Principle of Mutual Recognition in the European Integration Process, Kostoris F. and Schioppa P. (eds.), Basingstoke: Palgrave Macmillan

Weiler J. H. H., 2013, *Epilogue: Judging the Judges – Apology and Critique*, in Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice, Adams M. et at (eds.), Oxford and Portland: Hart Publishing

Wenander H., 2011, En princip om internationell öppenhet – 1 kap. 10 § regeringsformen och socialförsäkringsrätten, Särtryck ur häfte 3 2011, Förvaltningsrättslig Tidskrift

Wernicke S., 2009, *Taking stock: the EU Institutions and SGEI*, in The Changing Legal Framework for Services of General Interest in Europe, Krajewski M., Neergaard U. and van de Gronden J. W. (eds.), The Hague: T.M.C. Asser Press

Wiggen J., 2011, *Public procurement rules and cooperation between public sector entities: the limits of the in-house doctrine under EU procurement law*, (2011) 20 Public Procurement Law Review 157

Wiggen J., 2014, *Directive 2014/24/EU: the new provision on co-operation in the public sector*, Public Procurement Law Review, 2014 Issue 3

Winterstein A., 1999, *Nailing the Jellyfish: Social Security and Competition Law*, [1999] ECLR, No 6

Wipfelder H.-J., 1986, *Die verfassungsrechtliche Kodifizierung sozialer Grundrechte*, Zeitschrift für Rechtspolitik

Ølykke G. S., 2011, *The Definition of a "Contract" Under Article 106 TFEU* in Developments in Services of General Interest, E Szyszczak et al. (eds.), The Hague: TMC Asser Press

V. Reports and press articles

Administrative reports

Report to the Ministers of Foreign Affairs on the General Common Market, drafted by the Intergovernmental Committee headed by Henri Spaak ("Spaak Report"), Brussels, 21 April 1956

Report on Part Two of the Constitution by the working party of experts nominated by the Legal Services of the European Parliament, the Council and the Commission, Brussels, 17 March 2003, attached to Note (CONV 618/03) addressed by the Secretariat of the European Convention to the Members of the Convention and dated 19 March 2003, accessed 27 February 2015 at http://register.consilium.europa.eu/pdf/en/03/cv00/cv00618.en03.pdf

Report of the law firm Öberg and Associés commissioned by the commission of inquiry on LRAs' competence ("Kommunal kompetens i utveckling" SOU 2007:72) "Opinion on the relation between Chapter 2 section 8 LGA and EC state aid rules" (Sw: *Utlåtende avseende förhållandet mellan 2 kap. 8 § kommunallagen och EG:s statsstödsregler*)

Comments of the Swedish Institute for European Political Studies (Sieps) on the report of the commission of inquiry on the reform of the Swedish constitution ("en reformerad grundlag" SOU 2008:125) Dnr 16/2009, accessed 27 February 2015 at http://www.sieps.se/sites/default/files/Remissvar_sou2008_125.pdf,

Report of the Swedish Parliament's constitutional committee on the conflict solving rule for public sales activities on the market "Konfliktlösning vid offentlig säljverksamhet på marknaden", 2009/10:NU8

Sweden's report on the application of the 2005 SGEI Decision "Rapport om genomförandet av kommissionens beslut av den 28 november 2005 om tillämpningen av artikel 86(2) EG-fördraget på statligt stöd i form av ersättning för offentliga tjänster som beviljas visa företag som fått i uppdrag att tillhandhålla tjänster av allmänt ekonomiskt intresse", N2008/5126, accessed 27 February 2015 at http://ec.europa.eu/competition/consultations/2010_sgei/se_sv.pdf

Report of the Swedish Competition Authority "Action for Better Competition", 2009:4, accessed 27 February 2015 at http://www.kkv.se/globalassets/english/publications-and-decisions/action-for-better-competition.pdf

Report of Giancarlo Spagnolo commissioned by the Swedish Competition Authority "Open Issues in Public Procurement", uppdragsforskningsrapport 2009:7, accessed 27 February 2015 at http://www.konkurrensverket.se/globalassets/publikationer/uppdragsforskning/open-issues-in-public-procurement.pdf

Report of Grant Thornton Sweden AB on the development of the markets for health care and care in Sweden "Den privata vård- och omsorgsmarknaden ur ett finansiellt perspektiv - Hur mår den privata vård- och omsorgsmarknaden i Sverige?" November 2012, accessed 27 February 2015 at http://www.grantthornton.se/Global/Dokument/Publikationer/Rapporter/2012/V%C3%A5rdstudie%202012.pdf

Report of the Swedish Agency for Public Management on the effect of LOV on the development of costs and efficiency in LRAs' activities "Lagen om valfrihetssystem. Hur påverkar den kostnader och effektivitet i kommunerna?", Statskontorets slutrapport 2012:15, accessed 27 February 2015 at
http://www.statskontoret.se/upload/Publikationer/2012/201215.pdf

Report of the National Education Agency on independent schools and the school market ownership structure, "Enskilda huvudmän och skolmarknadens ägarstrukturer", Skolverkets aktuella analyser 2012, accessed 27 February 2015 at
http://www.skolverket.se/publikationer?id=2769

Annual Report 2012 of the Swedish Schools Inspectorate to the Swedish government "Årsredovisning 2012", Skolinspektionens årsredovisning 2012 Dnr 10-2012:5700, accessed 27 February 2015 at
http://www.skolinspektionen.se/Documents/publikationssok/regeringsrapporter/arsredovisningar/skolinspektionen-arsredovisning-2012.pdf

Report of the National Agency for Education "Enskilda huvudmän och skolmarknadens ägarstrukturer", Skolverkets aktuella analyser 2012, Stockholm: Fritzes

Report of the National Board of Health and Welfare, 2012, "Kommunal eller enskild regi, spelar det någon roll? – en jämförelse av utförare av vård och omsorg om äldre", accessed 27 February 2015 at
http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/18732/2012-5-30.pdf

Data of the Swedish Association on Local Authorities and Regions (SALAR) on compensation models for 2013, accessed 27 February 2015 at
http://www.skl.se/demokratiledningstyrning/driftformervalfrihet/valfrihetssystemersattningssystem/ersattningssystem/ersattningssystemsocialtjanst/ersattningssystemhemtjanst.1064.html

Report of a pilot study conducted by the Swedish Competition Authority on neutral competition in local authorities' systems of choice "Konkurrens på likvärdiga villkor i kommunernas valfrihetssystem Pilotstudie i tre kommuner med valfrihetssystem inom hemtjänsten", rapport 2013:8 accessed 27 February 2015 at
http://www.kkv.se/globalassets/aktuellt/nyheter/konkurrens-pa-likvardiga-i-kommunernas-valfrihetsssytem.pdf

Report of the Stockholm Gerontology Research Center, Hjalmarson I., 2014, "Vem ska bestämma i hemtjänsten?", Rapporter/Stiftelsen Stockholms läns Äldrecentrum 2014:2
Report of the Swedish Association of Local Authorities and Regions (SALAR) on quality requirements in systems of choice for elderly home care, 2014, "Kvalitetskrav i valfrihetssystem – en analys av förfrågningsunderlag för hemtjänst", accessed 27 February 2015 at
http://webbutik.skl.se/bilder/artiklar/pdf/978-91-7585-100-6.pdf?issuusl=ignore

Report of the National Agency for Education on private actors in preschool and school education, "Privata aktörer inom förskola och skola - En nationell kartläggning av enskilda huvudmän och ägare", Skolverkets rapport 410 (2014), Stockholm: Frizes

Study of the Swedish Association of Local Authorities and Regions (SALAR) on quality requirements in systems of choice for elderly home care, 2014, "Kvalitetskrav i valfrihetssystem – en analys av förfrågningsunderlag för hemtjänst", accessed 27 February 2015 at
http://webbutik.skl.se/bilder/artiklar/pdf/978-91-7585-100-6.pdf?issuusl=ignore

Miscellaneous

Commission proposes new rules to increase legal certainty for services of general economic interest" (Press Release of 18 February 2004) IP/04/235, available at http://europa.eu/rapid/press-release_IP-04-235_en.htm?locale=en

Report mandated with a view to making technical adjustments to EC and EU Treaty provisions for insertion into Part Two of the Constitutional Treaty and attached to Note (CONV 618/03) addressed by the Secretariat of the European Convention to the Members of the Convention and dated 19th March 2003, p. 1. Available at: http://register.consilium.europa.eu/pdf/en/03/cv00/cv00618.en03.pdf

ICAO report of the Conference on the Economics of Airports and Air Navigation Services, Montréal 15-20 September 2008, Doc 9908 CEANS 2008, accessed 30 October 2013 at http://www.icao.int/Meetings/ceans/Documents/Doc9908_en.pdf

Report of Mario Monti to the President of the European Commission José Manuel Barroso, 9 May 2010, "A New Strategy for the Single Market – At the service of Europe's economy and society"

A Voluntary European Quality Framework for Social Services, The Social Protection Committee, SPC/2010/10/8 final

Report of the Swedish National Board of Housing, Building and Planning *Boverkets översyn av bostadsförsörjningslagen*, rapport 2012:12

Commission's Report on Public finances in EMU, 2013, European Economy 4|2013, prepared in the Directorate-General of Economic and Financial Affairs, available per 2014/07/22 at
http://ec.europa.eu/economy_finance/publications/european_economy/2013/pdf/ee-2013-4.pdf

General Report on "Public Procurement Law: Limitations, Opportunities and Paradoxes", The XXVI FIDE Congress in Copenhagen, 2014, Congress Publications Vol. 3, Neergaard U., Jacqueson C. and Skovgaard Ølykke G. (eds.), 2014

Press articles

Kristina Lagerström and Johan Zachrisson Winberg, "Grundlagen skyddar skolbolagens vinster" *Sveriges Television* (8 September 2014), accessed 27 February 2015 at http://www.svt.se/nyheter/sverige/grundlagen-skyddar-valfardsvinsterna

Erik Esbjörnsson, "Afrikas medelklass öppnar för ny skolmarknad" *Dagens Nyheter* (Stockholm, 17 January 2013)

Jan Almgren, "Flera välfärdsjättar återinvesterar vinsterna" *Svenska Dagbladet Näringsliv* (Stockholm, 9 October 2014)

Karin Grundberg Wolodarski, "Skoljättarna ökar vinsterna" *Dagens Industri* (Stockholm, 12 March 2014)