THE POWER TO SHAPE THE INTERNAL MARKET: CONSTITUTIONAL IMPLICATIONS OF THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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ABSTRACT

This thesis aims to determine the constitutional implications of the exclusive authority granted to the CJEU to interpret the Treaties in the context of the internal market. In particular, it examines how the Court's interpretation of the free movement and competition rules – the two principal components of the internal market law – has shaped the constitutional division of competences between the EU and the Member States (the vertical dimension) and between the EU's legislative institutions and the Court (the horizontal dimension). The argument to be advanced in this thesis is based on a comparative analysis of the Court's reasoning in cases involving conflicts between, on the one hand, the free movement and competition rules and, on the other, domestic regulatory measures that embody various social policy considerations. The policy areas selected as case studies for the inquiry are healthcare, education, collective labour law, and gambling. None of these areas has been harmonised at EU level, save for the legislation essentially codifying the case law, and therefore come within the purview of EU law mainly through the judgments of the Court adopted in the context of the internal market. The comparative analysis – both among the selected policy areas and between the Court's free movement and competition case law – reveals the inconsistencies in the Court's exercise of its interpretative authority in light of the principles that govern the division of competences and powers in the EU. The thesis ultimately argues that, unlike its competition case law, the Court's free movement case law involving the areas of healthcare, education and collective labour law, but not gambling, has encroached on national regulatory autonomy to an extent incompatible with the principles of conferral, subsidiarity and proportionality, and has reduced the scope of EU legislative action to the point of upsetting the institutional balance of powers between the EU's judiciary and legislature.

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To my parents.

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TABLE OF ABBREVIATIONS

AG	Advocate General
ARD	Acquired Rights Directive
CAT	UK Competition Appeal Tribunal
CFI	Court of First Instance
CFR	Charter of Fundamental Rights (EU Charter)
CJEU	Court of Justice of the European Union
CRD	Citizens' Rights Directive
EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EP	European Parliament
EU	European Union
GC	General Court
ILO	International Labour Organization
NCAs	National Competition Authorities
NHS	National Health Service
OFT	Office of Fair Trading
OMC	Open Method of Coordination
PPDs	Public Procurement Directives
PSOs	Public Service Obligations
PWD	Posted Workers Directive
SEA	Single European Act
SGEI	Service of General Economic Interest
TEU	Treaty on European Union

TFEU	Treaty on the Functioning of the European Union

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I. INTRODUCTION

An ever closer union that is grounded in the values of national diversity, a highly competitive economy that embodies the ideals of social justice, economic integration that is accompanied by parallel progress in other fields – these are just a few of the highly ambitious goals to be achieved in the process of European integration. Overly ambitious, perhaps? Unattainable in practice? This may well be true, especially in a union where the regulatory powers of the judiciary, namely the CJEU, in important ways seem to be broader in scope than those of its legislative institutions. But is it appropriate at all to speak about the *regulatory* powers of a *court*? What *are* the powers of the CJEU, according to the Treaties? How broadly can these powers be interpreted? What are the implications of this interpretation for the values and ideals pursued by the EU and particularly for the autonomy of its Member States? These are challenging and controversial questions, to which this thesis does not attempt to provide any definitive answers. Yet it contributes to a better understanding of the fundamental issues underpinning the functioning of the EU's legal order by critically evaluating the role of the Court and its judicial practice in the EU's integration process since its very beginnings.

The legal context and the aims of the thesis

> The Union shall encourage cooperation between the Member States … and, if necessary, lend support to their action. … Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care.[1]

The above is an excerpt from Art. 168 TFEU – Treaty legal basis for EU action in the area of public health. Similar stipulations appear in a number of other sector-specific

1 Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (TFEU), art 168 (1) and (7).

legal bases of the TFEU. The purpose of these clauses is to protect the autonomy of the Member States to regulate independently certain policy areas that are deemed unsuited, mainly due to their political sensitivity, to be subjected to EU-wide legislation. In practice, however, no policy area can be completely insulated from the EU's influence for the reach of EU law is wider than its legislative competence. Member States must ensure compliance with EU primary law – internal market law forming its core – even in policy areas that in principle fall outside the EU's legislative competence. This obligation is overseen by the CJEU, which is conferred the exclusive authority to 'ensure that in the interpretation and application of the Treaties the law is observed'.[2]

This situation presupposes a constitutional asymmetry of powers between the EU legislature and the judiciary and thus puts a lot of weight on the Court as an actor in the process of EU integration. Depending on how broadly the Court interprets the scope of the provisions of the Treaties and, hence, the scope of its own powers, its judgments may have serious implications for the substantive law and policy of the Member States, especially where they interfere with distinctive national preferences and traditions. Notably, the impact of the Court's judgments often cannot be remedied by EU-level legislative solutions due to, on the one hand, the lack of competence deriving from the EU's legislative institutions (Commission, Council and the Parliament acting together) and, on the other hand, political blockages, even where legislative competence may in principle exist under the functionally broad Treaty bases.[3]

Against this background, this thesis is set to determine the constitutional implications of the power granted to the Court to interpret the Treaties in the context of the internal market. In particular, it examines how the Court's interpretation of the free

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2 Consolidated version of the Treaty on European Union [2008] OJ C115/13 (TEU), art 19.

3 The specific set-up of EU legislative competences is explained in ch III, s 3 and further discussed in ch V, s 3.

movement and competition rules – the two principal components of the internal market law – has shaped the constitutional division of competences between the EU and the Member States (the vertical dimension) and between the EU's legislature and the Court (the horizontal dimension). It demonstrates that the Court has exercised its judicial authority in a manner that has upset the institutional balance of powers between the EU's judiciary and the legislature[4] and has encroached on national regulatory autonomy to an extent incompatible with the principles of conferral, subsidiarity and proportionality.

Research methodology

The argument advanced in this thesis is based on a comparative analysis of the Court's reasoning in cases involving conflicts between, on the one hand, the free movement and competition rules and, on the other hand, domestic regulatory measures that embody various social policy considerations. The policy areas selected as case studies for the inquiry are healthcare, education, collective labour law, and gambling. All of these areas are highly regulated at the national level in order to either ensure universal access to public services or protect vulnerable societal groups, consumers and employees. The four policy areas have another common feature – none of them has been harmonised at EU level, save for the legislation essentially codifying the case law.[5] In the case of healthcare, education and collective labour law, this is due predominantly to the absence of explicit legislative competence conferred upon the EU.[6] In the case of gambling, it is due to political blockages to the exercise of

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4 In this context, the terms 'competences' and 'powers' are used interchangeably and both refer to the respective mandates of EU institutions.

5 See eg Council Directive 2011/24/EU on the application of patients' rights in cross-border healthcare [2011] OJ L88/45, discussed in this regard in ch III, s 3(e).

6 See TFEU, arts 153(1), 165(1), 168.

competence,[7] as, unlike in the first three areas under study, the Treaties impose no constraints on the EU's action in the gambling sector.

In the absence of any meaningful EU legislative action, these four areas come within the purview of EU law mainly through the judgments of the CJEU adopted in the context of the internal market. The thesis analyses this body of case law with the view to: first, determining its effects on the scope of national regulatory autonomy; second, comparing the different standards of judicial review employed by the Court; and third, assessing the implications of the case law for the balance of competences and powers in the EU's constitutional order.

The method of comparative analysis, both among the selected areas of national policy and between the Court's free movement and competition case law, helps to expose inconsistencies in the Court's exercise of its interpretative authority. The thesis finds that, unlike its competition case law, the Court's free movement case law involving the areas of healthcare, education and collective labour law, but not gambling, is incompatible with the principles of conferral, subsidiarity and proportionality, on the vertical dimension, and the principle of institutional balance, on the horizontal dimension.

Contribution to academic research

There is a considerable amount of legal and political science literature covering issues concerning the powers of the CJEU and its place in the EU's constitutional order. However, that inquiry is either largely theoretical or not based on a comprehensive case

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7 See eg European Parliament, 'Resolution on online gambling in the internal market' 2011/2084(INI), recitals 11–12, and 'Resolution on online gambling in the internal market' 2012/2322(INI), preamble. See also P Runner, 'EU Parliament Opposes Creation of Online Gambling Market' (*EUobserver*, 10 March 2009) <www.euobserver.com/?aid=27752> accessed 18 November 2016.

law analysis, or sometimes both.[8] At the same time, the extant EU law scholarship concerning the areas of healthcare, education, collective labour law, and gambling for the most part focuses on the analysis of the problems arising in each of these areas individually, without placing them in the context of the Court's wider case law.[9]

This project connects these two streams of inquiry. It conducts a cross-cutting analysis of CJEU case law in three social policy areas – healthcare, education and labour law – and contrasts this body of case law with the case law involving gambling, another area of public policy characterised by high levels of socially driven regulation (Chs. II, III and IV). Then, it turns to the constitutional questions explored by political scientists and EU constitutional law scholars, but grounds them in a systematic case law analysis (Chs. V and VI).

While fitting into the broad framework of the judicial activism debate, this thesis does not intend to offer a general assessment of the extent to which the Court has furthered or should further negative integration.[10] Rather, it explores the *direction* of negative integration taken by the Court, namely, its unique emphasis on the economic, deregulatory dimension of integration as opposed to social, market-correcting

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8 See eg H Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policymaking* (Martinus Nijhoff Publishers 1986) (Rasmussen); A-M Burley and W Mattli, 'Europe before the Court: a Political Theory of Legal Integration' (1993) 47 Int'l Org 41; FW Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in G Marks et al (eds), *Governance in the European Union* (SAGE Publications 1996); G de Búrca and J Weiler, *The European Court's Political Power* (OUP 2001); A Stone Sweet, *The Judicial Construction of Europe* (OUP 2004); A Arnull, *The European Union and its Court of Justice* (2nd ed, OUP 2006); K Alter, *The European Court's Political Power: Selected Essays* (OUP 2010); D Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (OUP 2015).

9 See eg A Littler, *Member States versus the European Union: The Regulation of Gambling* (Martinus Nijhoff Publishers 2011); L Hancher and W Sauter, *EU Competition and Internal Market Law in the Healthcare Sector* (OUP 2012); M Freedland and J Prassl (eds), *EU Law in the Member States:* Viking, Laval *and Beyond* (Hart Publishing 2014); A Gideon, *Higher Education Institutions in the EU: Between Competition and Public Service* (T.M.C Asser Press 2017).

10 For seminal accounts on this topic, see Rasmussen (n 8); M Cappelletti, 'Is the European Court of Justice "Running Wild"?' (1987) 12 EL Rev 3; J Weiler, 'The Court of Justice on Trial – a Review of Hjalte Rasmussen: On Law and Policy in the European Court of Justice' (1987) 24 CML Rev 555. A broader overview of the academic debate is provided in ch V, s 1.

dimension. By doing so, the thesis seeks to assess the constitutional legitimacy of the Court's choices, measured against concrete legal principles underpinning the EU's constitutional order. The breadth and detail of this project allows it to expose and consider problems of a constitutional nature that transcend issues specific to social policy. Accordingly, the conclusions drawn and the propositions advanced in this thesis are suited to guide the Court's interpretative practice in any constitutionally sensitive area of EU competence.

Structure of the thesis

The thesis is organised into seven chapters. Following the Introduction, Chapter II analyses the main developments in CJEU free movement case law involving the areas of healthcare, education, labour law, and gambling, with a view to assessing the implications of this body of case law for the scope of Member State regulatory autonomy. It finds that the Court has reduced considerably the scope for domestic regulatory action in the first three policy areas, in some cases threatening the integrity and sustainability of national systems of social protection, whereas the impact on the gambling sector has been close to negligible.

Chapter III conducts a comparative analysis of the Court's reasoning employed in the judgments concerning the four policy areas. It identifies as the principal common pattern in the Court's reasoning the generous interpretation of the scope of the free movement rules. Significant differences are however observed in the Court's application of proportionality review. The test seems to be applied with similar intensity in the healthcare, education and labour law cases. By contrast, in the gambling cases, proportionality is essentially confined to reviewing the suitability, or consistency, of Member States' regulatory frameworks, thus deferring to national authorities on substantive policy choices. The chapter then turns to discuss what is referred to throughout the thesis as the 'quasi-legislative' effects produced by the case law. It illustrates through concrete examples of EU legislation in what ways the case law concerning the first three areas under study – healthcare, education, and labour law – has shaped the power dynamic between the Court and the EU's legislative institutions.

Chapter IV analyses developments in EU competition law. The analysis encompasses not only the judgments of the CJEU and the General Court, but also the administrative decisions adopted by the Commission and National Competition Authorities. The chapter considers these various developments from the perspective of national regulatory autonomy, whilst also viewing them in light of the Court's free movement case law. Owing to the relative absence of case law in the areas of education and gambling, the greater part of the discussion concerns healthcare and collective labour. However, the chapter also considers in what ways EU competition law may affect the areas of education and gambling in the future. The chapter finds that the manner in which EU competition law has been interpreted and applied by EU institutions seems to be better suited than the free movement law to accommodate national regulatory choices.

Building on the analysis conducted in the previous chapters, Chapter V examines these judicial developments from the perspective of EU constitutional law. It argues that the Court has exercised its interpretative authority in a manner that has upset the constitutional balance of competences and powers in the EU, especially as regards the free movement law involving the areas of healthcare, education and collective labour law. The case law in these areas has encroached on national regulatory autonomy to an extent incompatible with the principles of conferral, subsidiarity and proportionality. At the same time, it has reduced the scope of EU legislative action to the point of upsetting the institutional balance of powers between the EU's judiciary and legislature.

Chapter VI advances a proposition aimed at restoring the balance of competences and powers within the EU and thus ameliorating the tensions created by the case law. It proposes that the principles of subsidiarity and proportionality should be reinforced into EU-level judicial practice concerning the areas of national policy that are in principle excluded by the Treaties from the legislative competence of the EU. In practice, this proposition would require the Court to employ in relation to these areas a set of techniques of judicial interpretation aimed at relaxing the Court's standard of review. The proposed techniques are margin of appreciation, fair balancing and exemption from EU law.

Chapter VII is the Conclusion.

II. Social policy in the Framework of EU Free Movement Law: Case Law Developments and Implications for the Scope of National Regulatory Autonomy

Chapter II discusses the main developments in CJEU case law concerning the intersection between the free movement rules and domestic regulatory measures in the areas of healthcare, education, collective labour law and gambling, with the view to determining the implications of this body of case law for the scope of national regulatory autonomy of the Member States. These implications vary, as shall be demonstrated, from significant, in the first three policy areas under study, to negligible, in the gambling sector.

In order to set the background for the overall argument of the thesis, it is necessary first to establish what factors justify a comparative analysis among the selected policy areas. First, all of these areas are characterised by particular *social* sensitivity. They are highly regulated at the national level and have been for a long time in order to ensure adequate access to public services in the healthcare and education sectors, accordingly, and protect vulnerable societal groups (consumers and employees), in the case of collective labour law and gambling. Here, market principles apply only to a limited degree determined by the government. Therefore, it is almost inevitable that the application of EU internal market rules with regard to these policy areas is likely to create tensions between the EU and national governments.

Secondly, from the point of view of EU law, the four policy areas are considered as areas of particular *political* and *constitutional* sensitivity. Owing to the lack of competence of the EU and/or political blockages to its exercise, none of them has been harmonised at the EU level, save for the legislation essentially codifying the Court's case law – an issue that is discussed at length in Chapter III. As a result, they come within the purview of EU law mainly through the Court, which will perform a case-by-case review of national regulatory measures for compatibility with EU free movement and competition rules.

As shall be demonstrated throughout the thesis, especially in Chapters II, III and IV, the particular political and social sensitivities surrounding the selected policy areas also manifest themselves in the governments' submissions to the Court. The arguments that governments put forward to justify regulatory action in these areas will typically stem from considerations of social solidarity, emphasise the peculiarity of the sector – be it healthcare, education, labour law, or gambling – and highlight the need to protect vulnerable groups. In this connection, one of the aims of Chapter II is to determine to what extent the Court accommodates these various concerns advanced by national governments and, accordingly, how much space it leaves for domestic regulatory action targeted at addressing them.

Chapter II is organised into four sections, each dedicated to one policy area. Each section begins with (a) an outline of the EU legal framework concerning the policy area in question, with the view to assessing the extent to which it is covered by EU law. Then, it moves to (b) the analysis of the Court's case law, which: (i) covers the central developments in the case law, both chronologically and thematically; (ii) outlines the main rules and principles to be derived from the case law; and (iii) discusses the implications of the case law for the scope of national regulatory autonomy of the Member States.

1 Healthcare

(a) *EU Legal Framework for Healthcare*

(i) National legal framework: universal healthcare

The healthcare systems of EU Member States share one central common characteristic: they are predominantly organised on the basis of the principle of social solidarity, whereby access to healthcare is guaranteed to all patients, in accordance with their medical needs and regardless of ability to pay.[1] For that reason, national healthcare sectors in the EU are largely managed by the State and characterised by high levels of public funding, cross-subsidisation and rationing aimed at controlling the costs.[2]

The concrete ways in which Member States manage their healthcare systems differ from one Member State to another. Two basic models of organisation of public healthcare can however be distinguished: the Bismarckian system (compulsory social insurance) and the Beveridgian system (national health service).[3] In the Bismarckian system, compulsory social insurance insures the entire population of the State through either a reimbursement or a benefits-in-kind system. In the reimbursement systems, the patient is reimbursed for outpatient services. For inpatient services, which are normally more costly, the insurance carrier reimburses the healthcare provider directly. Benefits-in-kind systems offer direct benefits through specific providers. Specialist procedures are performed on a referral basis. Therefore, in comparison to the reimbursement

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1 See Council, 'Council Conclusions on Common values and principles in European Union Health Systems' [2006] OJ C146/1; Council Directive 2011/24/EU on the application of patients' rights in cross-border healthcare [2011] OJ L88/45 (Patients' Rights Directive), preamble, recital 21; E Mossialos et al, 'Health Systems Governance in Europe: The Role of European Union Law and Policy' in E Mossialos et al (eds), *Health Systems Governance in Europe: The Role of European Union Law and Policy* (CUP 2010) ch 1 (Mossialos et al).

2 RF Rich and KR Merrick, 'Cross Border Health Care in the European Union: Challenges and Opportunities' (2006) 23 J Contemp Health L & Pol'y 64 (Rich and Merrick).

3 Covered in detail in Rich and Merrick (n 2).

systems, patients have a smaller range of choice of healthcare providers. The Beveridgian system, or the national health service, provides universal coverage to all residents through a publicly organised system that is financed from general taxation. Medical services are generally free of charge, but patients must receive their care from providers within or connected to the public health system.

(ii) EU legal framework: from coordination measures to EU-wide rights for patients

The Treaties recognise the prerogative of the Member States to organise and manage their social healthcare systems independently from the interference of the EU. Art. 168 TFEU provides the EU only with complementary competences in the area of public health, excluding the possibility of harmonisation of national laws, and obliges the EU to 'respect the responsibilities of the Member States for the definition of their health policy and the organisation and delivery of health services and medical care'. These responsibilities also include the allocation of the resources assigned to the management of healthcare.[4] In addition, Art. 9 TFEU requires that the objective of a high level of protection of human health be streamlined into the definition and implementation of EU policies.[5] Finally, Art. 35 of the Charter guarantees to everyone the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices.[6]

Despite the fact that, according to the Treaties, healthcare is in principle reserved to the competence of the Member States, it does not follow that while managing their healthcare systems, Member States are free to disregard other provisions of the Treaties, such as the free movement rules. Medical services provided

4 TFEU, art 168. See also art 6(a).

5 See also TFEU, arts 114(3), 168(1).

6 Charter of Fundamental Rights of the European Union [2000] OJ C364/01 (EU Charter).

for consideration fall within the scope of the freedom to provide services under Art. 56 TFEU, which, as will be discussed in the following subsection, precludes the application of any national rule that has the effect of making the provision or receipt of cross-border healthcare services more difficult than the domestic ones.

One of the central developments in the EU-level regulation of healthcare seems to be the recognition by the CJEU that patients residing in the EU have the right to receive healthcare in any of the EU Member States and are entitled to reimbursement of its costs. Some of the questions relating to the reimbursement are covered by Regulation 883/2004[7] on the coordination of national social security systems, which replaced Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.[8] Regulation 883/2004, adopted under Arts. 42 and 308 EC (now Arts. 48 and 352 TFEU), like its predecessor, is limited to the coordination of basic national rules in the field of social and healthcare benefits, thus falling short of achieving any substantial degree of harmonisation.[9] In content not much different from the original version of 1971, Regulation 883/2004 extends its personal scope to cover any individual, irrespective of their economic status, who receives authorisation to obtain medical treatment abroad.[10]

Regulation 883/2004 allows EU nationals to travel to another Member State for medical goods and services at the expense of their own healthcare system provided that their healthcare authorities give express authorisation beforehand. According to Art.

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7 Council Regulation (EC) 883/2004 on the coordination of social security systems [2004] OJ L166/1 (Reg 883/2004).

8 Council Regulation (EEC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2 (Reg 1408/71).

9 Parliament, DG Internal Policies of the Union, 'The ECJ Case Law on Cross-Border Aspects of Health Services' (Briefing note) [2006] IP/A/IMCO/FWC/2006-167/C3/SC1 (Parliament, Cross-Border Aspects of Health Services).

10 Cf Reg 883/2004 (n 7), art 2 and Reg 1408/71 (n 8), art 2.

20(2) of the Regulation, the competent institutions must grant the authorisation if two conditions are satisfied: the treatment in question must be among the benefits provided for by the legislation where the person concerned resides; and a person cannot be given such treatment in their home Member State within a time limit which is medically justifiable, taking into account their current state of health and the probable course of illness. The phrasing of the second condition is more detailed than the original text in Art. 22(2) of Regulation 1408/71, which conditions the grant of authorisation upon the impossibility to receive the treatment in question in the patient's Member State of residence. If the authorisation is provided, the patient's healthcare system covers the costs of treatment by paying directly to the foreign healthcare provider according to the rate and rules applied in the State where the treatment is performed.

The CJEU has adopted a broad interpretation of conditions for granting authorisation for reimbursement of medical expenses under the Regulation, to the point where, as shall be argued, it pronounced on issues that were not directly covered or intended to be covered by the Regulation.[11] Most of the actions brought before the CJEU have been inspired by restrictive pre-authorisation policies maintained by the Member States, as a result of which patients would be refused permission to obtain treatment abroad. In addition, the Court was faced with cases falling outside the scope of the Regulation, where EU citizens travelled to another Member State – without residing there for work or study – specifically for receiving medical treatment, but had not applied for prior authorisation from their national health insurance institution. Through addressing these types of situations, the Court has developed a set of rules and principles governing cross-border healthcare directly on the basis of Art. 49 EC (now Art. 56 TFEU), thus creating a dual system of access to cross-border healthcare. This

11 This argument is advanced in ch III, s 3(d)(i).

line of case law has been recently codified in the EU Directive 2011/24/EU on the application of patients' rights in cross-border healthcare.[12] The Directive covers all EU citizens wishing to receive medical treatment in other Member States and aims to clarify the legal framework for reimbursement of their medical expenses on the basis of Art. 56 TFEU. This directive shall be considered in detail in Chapter III.

(b) *Cross-Border Access to Healthcare in the Case Law of the CJEU*

This subsection discusses the Court's case law involving issues of cross-border healthcare. Thematically, it focuses on the rights of mobile patients, whilst also giving an outline of developments concerning the rights of cross-border healthcare providers. The analysis in not exhaustive, but is structured with the view to covering the main developments in the Court's case law and demonstrating its evolutionary character.

(i) Outpatient medical care in *Decker* and *Kohll*: laying the foundations for patient mobility

The *Decker*[13] and *Kohll*[14] judgments, delivered on the same day, set the ground for the regulation of cross-border healthcare at the EU level. Both disputes concerned Luxembourg citizens who had been denied reimbursement for medical goods and services purchased abroad. Mr. Decker was refused reimbursement of the cost of spectacles which he had purchased in Belgium on the ground that he had not obtained prior authorisation from the relevant social security institutions. Mr. Kohll, on the other hand, requested for authorisation in order for his daughter to travel to Germany for dental treatment, but was turned down on the grounds that the treatment was not urgent

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12 Patients' Rights Directive (n 1), preamble, recital 8.

13 Case C–120/95 *Nicolas Decker* [1998] ECR I–1831 (*Decker*).

14 Case C–158/96 *Raymond Kohll* [1998] ECR I–1931 (*Kohll*).

and could be provided in Luxembourg. On a reference for a preliminary ruling, the Court had to decide whether national rules, making the reimbursement of medical expenses incurred abroad subject to prior authorisation, were compatible with EU free movement rules.[15] The judgments delivered by the CJEU in the two cases are almost identical and therefore will be considered together.

The CJEU started by addressing the question whether the prior authorisation requirement laid down in Art. 22(1) of Regulation 1408/71 was compatible with Arts. 30 and 59 EEC (now 34 and 56 TFEU). As mentioned above, Art. 22(1) allowed an insured person to receive sickness benefits in kind in another Member State only on the condition that the person had been authorised to do so by their home State. The Court explained that this provision was not intended to regulate, and hence did not in any way prevent, the reimbursement by the patient's State of insurance, at its own tariff, of the cost of medical products and services purchased abroad even in the absence of prior authorisation.[16]

Then, the Court went on to assess whether the requirement of prior authorisation in the circumstances of Mr. Decker and Mr. Kohll respectively was compatible with the free movement rules. The Court, first of all, made it clear that the free movement rules applied to health services even where the services were provided in the context of a social security scheme: 'the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement'.[17] Next, the Court held that the requirement of prior authorisation that was applicable to the reimbursement of the costs of medical care provided in another

15 *Decker* (n 13), paras 32–36.

16 *Decker*, paras 26–29; *Kohll* (n 14), para 27.

17 *Kohll*, para 20.

Member State but not for the costs incurred in the State of insurance restricted free movement in the EU.[18] In *Decker*, it did so by encouraging insured persons to purchase medical products at home rather than abroad;[19] in *Kohll* – by deterring insured persons from approaching providers of medical services established in other Member States.[20]

The Court turned to consider whether the respective restrictions on the fundamental freedoms could be justified by the public interest objectives advanced by the government. The government claimed that prior authorisation was necessary for the maintenance of financial balance of the social security system and for the protection of public health.

The Court recalled that aims of a purely economic nature could not justify a barrier to the fundamental freedoms. However, the financial balance of the social security scheme was an acceptable ground of justification because it was aimed at ensuring a balanced medical and hospital service accessible to all patients.[21] Yet the government failed to show that the prior authorisation procedure was a necessary measure in that respect.[22] It held that neither the reimbursement of the cost of products at a flat rate, nor treatment in accordance with the tariff of the home State would have a significant effect on the 'financing or balance' of the social security system.[23]

With regard to the second ground, the protection of public health, the government submitted, inter alia, that prior authorisation was meant to ensure the quality of medical products and services purchased abroad. In response, the Court

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18 *Decker* (n 13), paras 34–36; *Kohll* (n 14), paras 33–35.

19 *Decker*, para 36.

20 *Kohll*, para 35.

21 ibid, paras 38, 39, 41; *Decker*, para 39.

22 *Kohll*, para 52.

23 *Decker*, para 40; *Kohll*, para 42.

invoked the principle of mutual recognition of professional qualifications, which was spelled out in several EU directives on medical qualifications.[24] According to this principle, the purchase of medical goods and services from providers established in other Member States was to be considered as affording the same quality standards as those provided at home. Mutual recognition thus required a degree of trust to be afforded to healthcare provided in other Member States.

The *Decker* and *Kohll* judgments are important for two reasons. First, they established that EU free movement rules apply to healthcare provided under social security schemes. Second, they laid down a rule that has become a fundamental principle of patient mobility in the EU: insofar as medical goods and services are covered by the national healthcare system, they should be available for purchase in any other Member States and refunded as if they have been delivered in the patient's home State. Moreover, subsequent case law made clear that a requirement of prior authorisation for *outpatient* medical care abroad could not, as a matter of principle, be justified by overriding reasons of general interest.[25] The rationale behind an unconditional access to outpatient care provided abroad was that patient outflows in the context of outpatient care were likely to stay relatively small (hence not become a burden on public budgets), considering the 'linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care provided [abroad]'.[26] In this connection, the Court also clarified that inpatient treatment capable of being performed outside hospital environment would be classified as outpatient treatment.[27]

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24 *Decker* (n 13), para 43; *Kohll* (n 14), para 48.

25 See eg Case C–385/99 *Müller-Fauré* [2003] ECR I–4509 (*Müller-Fauré*).

26 ibid, paras 95–96.

27 *Müller-Fauré* (n 25), para 75.

At the point when the *Decker* and *Kohll* decisions were delivered, it was unclear whether, and if so, how the free movement rules applied in relation to inpatient medical care or to healthcare systems other than those based on social insurance, such as benefits-in-kind and NHS systems. Thus, the potential impact of *Decker* and *Kohll* on national healthcare budgets remained uncertain. The questions left unanswered by these judgments led to a number of further references to the Court, giving it the opportunity to clarify the scope of application to cross-border healthcare of both the free movement rules and Regulation 1408/71.

(ii) Hospital care: the conditional validity of prior authorisation schemes

Smits and Peerbooms

Smits and Peerbooms[28] concerned the freedom to provide services in relation to hospital, or inpatient, care in the benefits-in-kind system. Mrs. Smits, a Dutch national, went to Germany to receive a specialised treatment for Parkinson's. Mr. Peerbooms, also a Dutch citizen, received treatment for a neurological disorder in Austria. The treatment applied to Mr. Peerbooms was available in the Netherlands only on a restrictive, experimental basis and would not have been available in his case. Both patients paid for the relevant treatments directly and subsequently applied for reimbursement through the Dutch sickness fund. Both claims for reimbursement were rejected on the basis that such services were available in the Netherlands and neither patient had obtained prior authorisation. On a preliminary reference, the CJEU had to consider three main issues: first, whether the rules developed in *Decker* and *Kohll* applied to systems of benefits-in-kind or were confined to systems based on reimbursement; second, whether those rules applied to hospital care rather than just

28 Case C–157/99 *Geraets-Smits and Peerbooms* [2001] ECR I–5473 (*Smits and Peerbooms*).

outpatient care; and, third, if so, whether the prior authorisation requirement in this context was compatible with (then) Art. 49 EC.

The Dutch social healthcare system provided insured patients with free medical care (or benefits in kind) so long as it was obtained from the service providers that had contracts with the Dutch sickness funds. If an insured person wished to obtain treatment from a different provider, regardless of whether the provider was established in the Netherlands or elsewhere, they had to obtain authorisation. Such authorisation was granted under two conditions: first, the treatment in question fell within the scope of the Dutch sickness insurance scheme, which covered treatments considered as 'normal in the professional circles concerned'; and second, the treatment was medically necessary, meaning that adequate treatment could not be provided in time by a contracted provider.[29]

The CJEU first had to consider whether EU free movement rules applied to a benefits-in-kind system. It was asked whether hospital care provided in kind, free of charge and on a non-profit-making basis, was a service within the meaning of Art. 50 EC (now Art. 57 TFEU). The Court answered in the affirmative, explaining that a service provided in one Member State and paid for by the patient did not cease to fall within the scope of Art. 49 EC merely because the patient was later reimbursed under the sickness insurance legislation of a type which provided benefits in kind.[30] What mattered was that contracted hospitals ultimately received consideration from the sickness insurance funds for the treatment they had provided. This consideration represented remuneration for the hospitals receiving it, suggesting that they were

29 *Smits and Peerbooms* (n 28), para 60.

30 ibid, paras 55–57.

engaged in an activity of an economic character within the meaning of Art. 50 EC.[31]

The prior authorisation procedure employed by the Dutch sickness funds was considered to constitute a restriction on the freedom to provide (and receive) services. Since authorisation was not required for the treatment received in contracted hospitals, the majority of which were located in the Netherlands, it prevented, or at least deterred, insured persons from using healthcare services offered in other Member States.[32] The Court accepted that such restriction could in principle be justified on two grounds, to some extent already discussed in *Decker* and *Kohll* – the need to ensure the financial stability of the social security system and the protection of public health. The protection of public health involved considerations relating to the maintenance of a 'balanced medical and hospital service open to all' and 'treatment capacity or medical competence' within the territory of a Member State insofar as was 'essential for the public health, and even the survival, of the population'.[33] As these health-related considerations were 'intrinsically linked' to the method of financing of the social security system, the Court considered the two objectives together.

Considering the need for a prior authorisation requirement in light of the aforementioned objectives, the Court found it important to take into account the specificity of the hospital sector, in that it generated considerable costs and had to satisfy increasing needs yet with limited financial resources available. Accordingly, the maintenance of the hospital care and infrastructure required adequate planning in order to be able to ensure the supply of hospital services, control costs and prevent wastage of resources.[34] In this context, a requirement of prior authorisation for treatment

31 *Smits and Peerbooms* (n 28), para 58.

32 ibid, paras 67–69.

33 ibid, paras 72–74.

34 ibid, paras 76, 78–79.

received abroad helped to ensure that all the planning that goes into the hospital sector was not jeopardised. As such, it was considered to be a necessary and reasonable measure.[35]

However, the Court further held that the specific conditions attached to the grant of authorisation had to fulfil the requirement of proportionality. In this regard, a scheme of prior authorisation was not supposed to legitimise discretionary decisions which would be liable to negate the effectiveness of the fundamental freedoms. It had to be based on 'objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily'.[36] The procedure itself had to be easily accessible, capable of ensuring impartial and timely decision-making and subject to judicial or quasi-judicial review.

In this connection, the Court recalled that the Dutch authorities used a two-fold test for granting authorisations: first, the treatment had to be regarded as normal in the professional circles concerned, and second, it could not be obtained in sufficient time from a contracted provider. The Court expressed doubts as to the necessity of the first condition. It considered that what was regarded as normal in professional circles could be interpreted in a number of ways. If the test was confined to the professional opinion within the country, this would effectively restrict patients' access to treatments readily accepted as normal in other Member States. Such system could not be regarded as fair and objective. The required objectivity could only be assured by interpreting 'normal in professional circles' to include international professional circles, thus including

35 *Smits and Peerbooms* (n 28), paras 80–81.

36 ibid, para 90.

treatment 'sufficiently tried and tested by international medical science'.[37]

With regard to the second condition, concerning the necessity of the treatment, the Court held that it had to be construed to the effect that authorisation could be refused only if the same or equally effective treatment was available in a contracted hospital without undue delay.[38] In order to determine the availability of such treatment, national authorities were required to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when the authorisation was sought but also of their past record.[39] In summary, the Dutch prior authorisation scheme was considered as justified insofar as the criteria for the grant of authorisation were construed in the way suggested by the CJEU.

Watts

In the *Watts*[40] case, the CJEU was faced for the first time in its case law with the application of both Art. 49 EC and Art. 22 of Regulation 1408/71 in relation to the NHS system of the UK. The fact that NHS systems are funded through general taxation and medical care is free of charge means that the question of reimbursement does not arise and is not regulated. Therefore, at the time of the judgment, the UK legislation had not set any tariff for the reimbursement of the costs of treatment received either in the territory of the UK or abroad.

Mrs. Watts, a British citizen, applied twice for prior authorisation under Regulation 1408/71 to go to France for a hip replacement surgery. Both applications were refused on the ground that treatment in a local hospital could have been received

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37 *Smits and Peerbooms* (n 28), para 94. For similar circumstances, see also, more recently, Case C–173/09 *Ivanov Elchinov* [2010] ECR I–8889, paras 62, 70 (*Elchinov*).

38 *Smits and Peerbooms*, para 103.

39 ibid, para 104.

40 Case C–372/04 *Yvonne Watts* [2006] ECR I–4325 (*Watts*).

‘within the government’s NHS Plan targets’ and thus ‘without undue delay’. Mrs. Watts would have had to wait for one year, a waiting-period that was upon appeal reduced to three or four months due to the deterioration in her state of health. Instead, Mrs. Watts proceeded with the surgery in France and subsequently sued for reimbursement in the UK. On a preliminary reference, the Court was effectively asked whether EU rules on cross-border healthcare under Art. 49 EC and Regulation 1408/71 applied any differently in relation to NHS systems.

The CJEU held that Mrs. Watts’ case fell within the scope of the freedom to provide services, reiterating the already established rule that Art. 49 EC applied in situations where a person went to another Member State and received treatment there for consideration. Although it was ‘questionable’ whether the provision of hospital services in the context of the British NHS, from which Mrs. Watts sought reimbursement, in itself constituted services within the meaning of Art. 50 EC, the Court found this issue immaterial.[41]

The Court accepted that the procedure of prior authorisation could in principle be justified in light of the overriding reasons of general interest, such as: the risk of seriously undermining the financial balance of the social security system; the objective of maintaining a balanced medical and hospital service open to all; and the maintenance of treatment capacity or medical competence on national territory.[42] However, to be justified on either of these grounds, the scheme had to fulfil the procedural criteria laid down by the Court in *Smits and Peerbooms*. In essence, it had to be non-discriminatory, objective and transparent, easily accessible, and subject to

41 *Watts* (n 40), paras 89, 91.

42 ibid, paras 103–105.

judicial review.[43] This meant in the circumstances of the case that a refusal to grant prior authorisation under either Art. 22 of Regulation 1408/71 or Art. 49 could not be based exclusively on the existence of waiting lists, even if they served to enable the planning and management of the supply of hospital care. The system of the waiting lists was unacceptable insofar as it was based on predetermined general clinical priorities, without carrying out an objective medical assessment of the patient's medical condition, the history and probable course of their illness, the degree of pain they were in and/or the nature of their disability at the time when the request for authorisation was made or renewed.[44] Therefore, where the delay arising from the waiting lists appeared to be excessive, having regard to an objective medical assessment of all the circumstances of the situation and the clinical needs of the person concerned, none of the following considerations could justify a refusal to grant prior authorisation: an alleged distortion of the normal order of priorities linked to the relative urgency of the cases to be treated; the fact that the hospital treatment provided under the national system in question was free of charge; that an NHS system would have to establish a financial mechanism for reimbursement of the cost of treatment provided abroad; or that the costs of treatment may have been lower in the patient's home Member State than abroad.[45]

As regards the calculation of the reimbursement, the Court held that a patient relying on the Regulation was entitled to receive a full reimbursement for the cost of treatment received in another Member State, even where the procedure was available free of charge in their home Member State. If the legislation of the host Member State

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43 *Watts* (n 40), para 116. See also *Smits and Peerbooms* (n 28), para 90; *Müller-Fauré* (n 25), para 85.

44 *Watts*, paras 62, 68.

45 ibid, paras 113, 119–120, 123.

did not provide for the reimbursement in full of the cost of treatment provided in its territory, the patient was entitled to the reimbursement of the difference between the costs, in order to ensure that they were not placed in a less favourable position when seeking treatment abroad. Where the patient relied on Art. 49 TFEU alone, the reimbursement could be legitimately limited to the cost of equivalent treatment in the home Member State.

In order to comply with the *Watts* judgment, the UK government introduced two reforms into its healthcare system: it established a tariff system for calculating the costs of medical procedures and increased the powers of specialist doctors so that their clinical judgment was given more weight in relation to the choices of healthcare managers charged with rationing health resources.[46]

(iii) The rights of healthcare providers

In accordance with the Court's finding that healthcare services provided in the framework of social security constitute an economic activity within the meaning of Art. 57 TFEU, healthcare providers operating within the EU can rely on Arts. 49 and 56 TFEU in order to establish themselves or provide services on temporary basis in another Member State on equal footing with the nationals of that Member State.[47]

Since in the case of the temporary provision of services the health provider remains subject to the regulatory system of the Member State where it is established, the Court's review focuses on the extent to which the host Member State is entitled to deviate from the principle of mutual recognition by imposing on foreign providers

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46 SL Greer, 'Power Struggle: The Politics and Policy Consequences of Patient Mobility in Europe' (Observatoire Social Européen policy paper 2/2008) 2 < http://www.ose.be/files/publication/policy_papers/OSEPolicypaper2_Greer_EN.pdf > accessed 8 June 2014.

47 W Gekiere, R Baeten and W Palm, 'Free Movement of Services in the EU and Health Care' in Mossialos et al (n 1) 461–475 (Gekiere, Baeten and Palm).

additional regulatory requirements.[48] In this respect, rules that are 'liable to prohibit or otherwise impede the activities' of foreign service providers will be considered as an obstacle to free movement.[49] The test of what constitutes an obstacle to the freedom of establishment seems to be virtually the same, if not broader. It precludes any regulatory rule of the host Member State that is 'liable to hinder or make less attractive' the pursuit of economic activities by foreign service providers.[50] The types of restrictions can range from quantitative measures, restricting the number of providers according to population size or catchment area, or regulating staff levels, pricing and quality, to more qualitative restrictions, such as rules on professional conduct and qualification, ownership or legal form.[51]

To be justified, regulatory measures must fulfil four standard conditions developed in the landmark *Gebhard* judgment, itself an adaptation of *Cassis de Dijon*[52] in relation to the mutual recognition of the activities of the self-employed.[53] National measures must be (i) applied in a non-discriminatory manner; (ii) justified by imperative requirements in the general interest, related to the protection of public health or the financial balance of the social security system;[54] (iii) suitable for securing the attainment of the objective which they pursue; and (iv) not go beyond what is

48 See eg Case C–294/00 *Deutsche Paracelsus* [2002] ECR I–6515, para 43 (*Deutsche Paracelsus*); Case C–496/01 *Commission v France* [2004] ECR I–2351, paras 74, 85 (*Commission v France*).

49 *Commission v France* (n 48), paras 64, 91.

50 Case C–55/94 *Reinhard Gebhard* [1995] ECR I–4165, para 37 (*Gebhard*); Case C–108/96 *Mac Quen* [2001] ECR I–00837 (*Mac Quen*); *Deutsche Paracelsus* (n 48), para 38; Case C–169/07 *Hartlauer* [2009] ECR I–1721, para 33 (*Hartlauer*).

51 Gekiere, Baeten and Palm (n 47) 506–507.

52 Case C–120/78 *Cassis de Dijon* [1979] ECR 649.

53 *Gebhard* (n 50), para 37.

54 See eg *Mac Quen* (50), para 26; *Deutsche Paracelsus* (n 48), para 39; *Hartlauer* (n 50), para 47.

necessary in order to attain it.[55]

The necessity review is, however, employed rarely,[56] confined to cases where national rules seem to be unreasonable, thereby more akin to protectionism rather than a genuine aim to protect public health, as in, for example, the *Greek Opticians* case, where qualified opticians were prohibited from operating more than one optician's shop, or the *French Laboratories*, where bio-medical laboratories were required to have a place of business in France in order to be allowed to provide services in its territory.[57] The standard of review adopted by the Court is generally premised on the recognition that EU law does not detract from the powers of the Member States to organise their social security systems and, in particular, health services and medical care. Accordingly, it is in the discretion of the Member States to determine the level of health protection they wish to pursue and employ the means they deem fit to that end.[58] Consequently, the fact that one Member State imposes rules that are more or less strict than those applied in other Member States is immaterial for the assessment of the need for or the proportionality of the adopted rules.[59] National rules will be assessed on their own merits, in light of the objectives and the level of protection pursued by the government. However, the Court requires that these rules be appropriate for the achievement of the objectives in question, that is, applied in a consistent and systematic manner.

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55 See eg *Hartlauer* (n 50), para 44.

56 See eg Case C–141/07 *Commission v Germany* [2008] ECR I–6935, paras 56–57 (*Commission v Germany*).

57 See, respectively, Case C–140/03 *Commission v Greece* [2005] ECR I–3177, paras 34–35; *Commission v France* (n 48), paras 68–70.

58 See eg Case C–70/95 *Sodemare* [1997] ECR I–3395, para 27; *Commission v Germany* (n 56), para 51; *Hartlauer*, paras 29–30; Joined cases C–570/07 and C–571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I–04629, para 44 (*Pérez and Gómez*).

59 *Commission v Germany*, para 51; *Mac Quen* (50), paras 33, 34.

The seminal judgment delivered in the *Hartlauer* case by the Grand Chamber illustrates how the test of consistency is applied in practice and, in particular, what it takes to fail this test. *Hartlauer* concerned Austrian legislation establishing a prior authorisation scheme for setting up and operating independent outpatient dental clinics, but not for setting up new group practices. The scheme was based on an assessment of the needs of the market and was supposed to help social security institutions to control expenditure, in order to maintain the financial balance of the social security system and ensure a balanced supply of medical service.[60] The Court agreed that, in principle, a prior authorisation requirement was a necessary and reasonable measure for that purpose. However, the authorisation scheme was to be regarded as appropriate only if it 'genuinely' reflected a concern to attain the objectives pursued 'in a consistent and systematic manner'.[61] Having clarified that group practices generally offered the same medical services and were subject to the same market conditions as outpatient clinics, the Court concluded that the prior authorisation scheme could not have consistently and systematically pursued the public interest objectives concerned.[62]

Moreover, referring to its patient mobility case law, the Court recalled that prior authorisation schemes had to be based on objective, non-discriminatory criteria known in advance, in such a way as to adequately circumscribe the exercise of national authorities' discretion.[63] No pre-existing criteria were in place in the Austrian case, and each of the Austrian provinces involved in the scheme applied different criteria in the

60 *Hartlauer* (n 50), para 41.

61 ibid, para 55, with a further reference to Case C–500/06 *Corporación Dermoestética* [2008] ECR I–5758, paras 39–40 (*Corporación Dermoestética*), concerning inconsistency in advertising rules. See also, more recently, *Pérez and Gómez* (n 58), paras 94–103, on consistency in relation to the geographical organisation of pharmacies.

62 *Hartlauer*, paras 57–63.

63 ibid, para 64.

assessment of the existence of a need for the services of a new dental clinic. As a result, the scheme lacked procedural fairness and, hence, was not suitable for attaining the objectives pursued by the government.[64]

The foregoing goes to show that the Court's review seems to be predominantly procedural rather than substantive. The Court does not question the necessity of each and every rule, but instead requires that the regulatory system be internally consistent and offer guarantees of procedural fairness. Notably, the Court has not had the chance to pronounce on the application of the consistency requirement to federal healthcare systems that allow the co-existence of a number of individual regulatory regimes within the country. However, the case law concerning areas other than healthcare suggests that the Court will take into consideration the specific structures of government when applying this test.[65]

(c) *The Regulatory Implications of the Case Law*

(i) Principles governing cross-border healthcare in the case law of the CJEU

The two main principles underlining the Court's case law on cross-border healthcare are that healthcare services provided in the framework of social security are subject to EU free movement rules and that the freedom to provide these services includes the freedom for patients to receive them in other Member States, irrespective of whether they are provided in an outpatient clinic or a hospital.

Hospital services will fall within the scope of Art. 56 TFEU as long as, first, the patient pays the foreign service provider for the treatment they receive and, second, hospitals in the patient's State of affiliation generally receive consideration for the

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64 *Hartlauer* (n 50), paras 66–71.

65 See Case C–156/13 *Digibet and Albers* (CJEU, 2 June 2014) (*Digibet*), discussed in ch II, s 4.

treatment they provide from the sickness funds or other managing bodies. Both transactions represent remuneration and qualify the healthcare service as an activity of an economic character within the meaning of Art. 57 TFEU.[66] This effectively means that the rules regulating cross-border healthcare in EU law apply to all kinds of healthcare systems, irrespective of whether they operate on a benefits-in-kind, reimbursement or NHS basis.

There is however a difference in the application of these rules depending on whether they concern outpatient or inpatient care. This difference becomes relevant at the stage of justification of national measures. The requirement of prior authorisation for reimbursement of the costs of *outpatient* treatment received abroad constitutes a type of restriction which cannot be justified by considerations relating to the financial balance of the social security system. Therefore, if certain medical goods and services provided on an outpatient basis are covered by the patient's national healthcare system, they can be purchased in another Member State and refunded as if they had been delivered in the patient's home State. By contrast, the requirement of prior authorisation in relation to *hospital* treatment is not in itself incompatible with the freedom to provide services because it is considered necessary to ensure that the efforts that go into planning of hospital care are not jeopardised by uncontrollable outflows of patients.

However, the specific conditions attached to the grant of authorisation will be reviewed for compliance with Art. 56 TFEU. These conditions have to be justified by overriding reasons of general interest and comply with the test of proportionality. In terms of procedure, the scheme for granting authorisations must be fair, transparent and subject to review. For instance, this would require that the scope of treatment covered

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66 *Smits and Peerbooms* (n 28), paras 53–58; *Watts* (n 40), para 89.

by public healthcare be defined in the terms that do not discriminate between national and international healthcare providers. On the substantive level, authorisation cannot be refused if equally effective treatment in the patient's home country is not available within a medically justifiable time. This condition applies regardless of whether the patient is relying on Regulation 883/2004 or Art. 56 TFEU.

The Court's interpretation of what constitutes a medically justifiable time focuses on the individual situation of the patient. National authorities must take into account all the circumstances of each specific case, including the history and probable course of the patient's illness, the degree of pain they are in and the nature of their disability at the time when the request for authorisation was made and when it was renewed.[67] A refusal to grant prior authorisation cannot be based merely on the existence of government-mandated waiting lists drawn on the basis of predetermined general clinical priorities. Therefore, where the delay arising from the waiting lists appears to be excessive, having regard to 'an objective medical assessment of all the circumstances of the situation and the clinical needs of the person concerned,' virtually no considerations advanced by the government are capable of justifying the refusal to grant prior authorisation.

The Court also reviews all regulatory rules applicable in the Member States that are liable to hinder or make less attractive the provision of healthcare in their territory by foreign service providers. However, unlike in situations of patient mobility, restrictive measures, as long as they do not seem unreasonable, will be justified provided that they are applied in a consistent and systematic manner.

(ii) The implications of patient mobility: less room for regulatory autonomy, better healthcare for EU citizens?

[67] *Smits and Peerbooms* (n 28), para 53; *Müller-Fauré* (n 25), para 89–90; *Watts* (n 40), paras 59–61.

The starting point in virtually every judgment of the CJEU involving cross-border healthcare is the recognition, in accordance with Art. 168(7) TFEU, that EU law 'does not detract from the power of the Member States to organise their social security systems' and 'decide the level of resources to be allocated to their operation'.[68] At the same time, Art. 168(7) does not exclude the possibility that Member States may be required under other Treaty provisions, such as the free movement rules, or measures adopted on their basis, such as Regulation 883/2004, to make adjustments to national social security systems.[69] These necessary adjustments do not however undermine Member States' sovereign powers in the field.[70] In line with this logic, the Court's interpretation of conditions for obtaining treatment abroad is supposed to balance EU citizens' right to cross-border healthcare with national concerns relating to the sustainability and financial stability of social security systems.[71]

It will be argued that the Court's case law, in fact, deprives Member States of a substantial part of their powers to organise and manage their social security systems and threatens to jeopardise their financial sustainability, thus endangering the protection of the most vulnerable groups of patients.

The extended scope of public healthcare

In the first place, the Court's case law interferes with Member State prerogative to define the scope of treatment to be covered by social security. The CJEU recognises that, in the absence of EU-level harmonisation, it is for the legislation of each Member

68 *Kohll* (n 14), para 17; *Smits and Peerbooms* (n 28), para 44; *Watts* (n 40), para 121.

69 See eg *Watts*, para 121.

70 ibid, para 121.

71 ibid, para 122.

State to determine the personal scope, conditions of entitlement and range of benefits.[72] However, the case law does not support this contention. It requires that the scope of treatment be defined in international, or 'Europeanised', language,[73] which in itself increases the number of cases eligible for reimbursement. Moreover, since inpatient treatment capable of being performed outside hospital environment is qualified as outpatient treatment,[74] reimbursement for unauthorised treatment can potentially be claimed in a much wider category of services, which further constrains the power of national governments to plan healthcare expenditure.

The relationship between medical necessity and the protection of public health

Even more problematic is the judicial interpretation of what constitutes an undue delay in waiting for medical treatment. The Court holds that the requirements arising from Art. 56 TFEU are based on 'the need to balance the objective of the free movement of patients against overriding national objectives relating to the management of available hospital capacity, control of health expenditure and financial balance of social security systems.'[75] This balance is to be achieved by drawing a distinction between, on the one hand, reasonable waiting time for receiving medical treatment in the home State and, on the other hand, undue delay or medically unjustifiable waiting time. If the waiting time is reasonable, the fact that equally effective treatment is available more quickly in another Member State does not suffice to challenge a decision to refuse authorisation (and consequently claim reimbursement of the costs of treatment received abroad). Otherwise, the Court explains, patient migration would be liable to put at risk

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72 See eg *Kohll* (n 14), para 18; *Smits and Peerbooms* (n 28), para 45.

73 *Smits and Peerbooms*, para 94.

74 *Müller-Fauré* (n 25), para 75.

75 *Watts* (n 40), para 145.

governments' planning and rationalisation efforts, which could in turn create problems of hospital overcapacity, imbalance in the supply of hospital medical care and logistical and financial wastage.[76] However, where the waiting time for treatment in the home State exceeds medically justifiable time, according to the interpretation of this concept provided by the Court, the granting of authorisation and subsequent reimbursement of costs cannot be considered as liable to jeopardise the sustainability of hospital care.[77]

The Court's reasoning does not seem to reflect the realities of the operation of the healthcare sector. Its interpretation of medical necessity is solely focused on the examination of the individual situation of the patient, excluding any comparative analysis in a broader context, which would take into account the medical needs of other domestic patients. While this approach is fairly common in adjudication of individual rights, it does not seem suitable for dealing with complex socioeconomic issues, such as the distribution of funds allocated for public healthcare. It is so because, first of all, where the inquiry focuses on the individual's personal circumstances, especially when these circumstances relate to serious health issues, 'every human inclination will be to rescue [them] by providing treatment even if its likelihood of success is uncertain'.[78] However, such inquiry leaves aside those whose treatment may be affected as a result, in this way allowing the vocal minority of patients to gain priority over other patients potentially with more urgent medical needs.[79]

From the systemic perspective, the focus on the individual interferes with the governments' capacity to plan healthcare expenditure. Since the budget allocated to

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76 *Smits and Peerbooms* (n 28), para 106; *Müller-Fauré* (n 25), para 91; *Watts* (n 40), para 71.

77 *Watts*, para 75.

78 C Newdick, 'Citizenship, Free Movement, and Healthcare: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43 CML Rev 1645, 1650 (Newdick).

79 *Watts*, para 42; Newdick (n 78) 1650, 1662.

social healthcare is usually not sufficient to allow for the swift provision of treatment to *all* patients, competent authorities make use of the available resources by planning and setting priorities.[80] Waiting lists, for instance in the British NHS, reflect those priorities and are intended to maintain fairness and equality between patients who require hospital treatment.[81] By dispensing with the waiting lists, the test of medical necessity may divert resources from the most vulnerable groups of patients, typically composed of disabled, mentally ill and elderly patients.[82] As a consequence, the waiting time for those groups of patients will become longer. To avoid this situation and maintain equal access to hospital care, governments would need to either provide additional financing for the healthcare budget or restrict the range of treatments available, which speaks to the magnitude of the potential implications of the Court's judgments for national healthcare systems.

Impact on the less developed Member States

The financial pressures created by the case law may exacerbate the existing inequalities among the healthcare systems of EU Member States. It is an uncontested fact that many of the new, less economically powerful Member States invest into healthcare considerably less than the old Member States, which, in turn, affects the quality of and access to healthcare they are able to offer. The patients of the new Member States are therefore likely to be among the most active users of their right to cross-border healthcare, especially after the Directive on Patients' Rights has made cross-border healthcare more accessible to ordinary citizens by clarifying their rights and entitlements. Signs of this tendency already appear in the more recent case law of the

80 *Watts* (n 40), para 13.

81 ibid, para 14.

82 Newdick (n 78) 1646.

CJEU. For instance, the Court has recently ruled that Romanian authorities should pay for a heart surgery performed on a Romanian citizen in Germany because the treatment available for her in Romania could not be considered as sufficiently effective, owing to the lack of basic medical supplies and healthcare infrastructure in the territory.[83] What this ruling means for Romania – or any other economically less developed Member State, for that matter – is that it is obliged to pay for the treatment provided abroad at the rates of a more developed Member State whilst at the same time continuing to cover the infrastructural costs of maintaining domestic hospitals.[84] It therefore seems plausible to suggest that if the frequency of cross-border healthcare were significantly to increase, the additional financial pressure would arguably hurt the new Member States much more than the old ones, possibly further decreasing the level of healthcare protection in their territories.[85] In light of this, without an EU-level fund for balancing the extremes of the inequalities between Member States, patient mobility in the EU may sooner or later prove to be unsustainable.[86]

The unresolved questions

Lastly, the case law leaves certain issues unresolved. It offers no guidance for the Member States which receive patients. Are they permitted to decline to treat foreign

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83 Case C–268/13 *Elena Petru* (CJEU, 9 October 2014), paras 33–36 (*Petru*). To this effect, see also *Elchinov* (n 37).

84 For an account on these financial impacts, see G Davies, 'The Process and Side-Effects of Harmonisation of European Welfare States' (2006) NYU Jean Monnet Program Working Paper 2/2006 <http://www.jeanmonnetprogram.org/papers/06/060201.pdf> accessed 7 June 2014 (G Davies, 'Harmonisation') 125–128.

85 This problem is further discussed in: A Kaczorowska, 'A Review of the Creation by the European Court of Justice of the Right to Effective and Speedy Medical Treatment and its Outcomes' (2006) 12 ELJ 345, 366–367 (Kaczorowska). See also Health and Consumer Protection Directorate-General, European Commission, Summary report of the responses to the consultation regarding 'Community action on health services' SEC (2006) 1195/4.

86 Kaczorowska (n 85); G Davies, 'Harmonisation' (n 84) 125–128; D Schiek, 'The EU Constitution of Social Governance in an Economic Crisis: in Defence of a Transnational Dimension to Social Europe' (2013) 20 MJ 195.

patients where this leads to waiting list problems for their own nationals? Would Art. 56 apply in this case, and if so, how strictly? The EU Patients' Rights Directive explicitly states in the Preamble that 'nothing in this Directive should oblige healthcare providers to accept for planned treatment patients from other Member States or to prioritise them to the detriment of other patients, for instance by increasing the waiting time for treatment of other patients'.[87] The Directive further explains (not in the clearest of language) that Member States receiving patients should retain the possibility to rely on the grounds of public health to limit the inflows of patients that may create a demand exceeding the capacities for a given treatment in that Member State. However, the case law on patient mobility suggests that the existence of EU secondary legislation cannot prevent the Court from relying directly on the Treaty in order to derive rights and obligations for individuals.[88] It is thus not inconceivable that when faced with restrictions imposed on incoming patients by a Member State receiving them, the Court would adopt a position whereby States would not be able to refuse treatment of foreign patients whose medical condition necessitates such treatment.[89] Future case law will have to clarify this question, but the mere fact that questions of this sort are decided by an external judicial body rather than national healthcare authorities seems problematic, especially in light of the assurances of respect for Member State autonomy provided in Art. 168 TFEU.

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87 Patients' Rights Directive (n 1), preamble, recital 8.

88 This issue is further discussed in ch III, s 3(d)(i).

89 To that effect, see ch II, s 2, discussing thematically similar issues in CJEU education case law.

2 Education

(a) *Legal Framework for Education: the EU and Beyond*

The original competences of the Community (now the EU) in the field of education were limited to regulating certain cross-border aspects of vocational training. According to Art. 128 EEC (now Art. 166 TFEU), the EC had the power to 'lay down general principles for implementing a common vocational training policy' capable of contributing to the economic goals of the Community. The common vocational training policy was intended to contribute to the advancement of the European labour market by dealing with the issues of worker mobility and the transnational transfer of vocational qualifications.[90] The Treaty of Maastricht introduced a specific legal basis for EC action in the field of general education, thus extending Community competences in education beyond vocational training. The new competence, laid down in Art. 126 EC, was however complementary in nature, confined to promoting cooperation between Member States' educational establishments and encouraging the mobility of students and teachers. The Treaty of Maastricht also introduced the concept of European citizenship in Art. 8 EC (now Art. 20 TFEU), which granted nationals of EU Member States, including students, the right to 'move and reside freely' within the territory of the EU, subject to the conditions laid down in the Treaty and EC secondary legislation.[91]

In the present Treaty framework, the competence to regulate matters of general education in principle still belongs to the Member States, whilst the EU is accorded a

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[90] P Cort, 'The EC Discourse on Vocational Training: How a "Common Vocational Training Policy" Turned into a Lifelong Learning Strategy' (2009) 2 Vocations and Learning 87, 91 <http://link.springer.com/article/10.1007%2Fs12186-008-9019-9#page-1> 27 April 2014 (Cort).

[91] Consolidated version of the Treaty on European Union [1992] OJ C191/05 (EC), arts 8 and 8a (now TFEU, arts 20 and 21).

complementary (or supplementary) role to support Member State action.[92] Art. 165(1) TFEU stipulates that the EU has the duty to 'contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action'. One main objective of the EU's action in the field of education is to encourage 'mobility of students and teachers through the academic recognition of diplomas and periods of study'. However, any sort of interference by the EU must fully respect 'the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity'.[93] Accordingly, the EU's legislative competence is confined to adopting incentive measures, 'excluding any harmonisation' of national laws or regulations.[94]

Student mobility appears to be the central element of the EU's education policy. The European Commission has adopted a range of non-binding measures aimed at encouraging student mobility and facilitating the recognition of academic qualifications. Commission initiatives mainly focus on ensuring that the information about one's academic qualifications is easily accessible and comprehensive throughout the EU and that the procedure of academic recognition is speedy, open and transparent.[95] Action towards facilitating student mobility has also been taken outside the EU's institutional framework, that is, at the intergovernmental level. In 1998, European governments adopted the Bologna Declaration, which established the

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92 TFEU, arts 6, 165.

93 TFEU, art 165(1).

94 TFEU, art 165(4).

95 For a detailed overview of EU measures, see Commission, 'A guide to the rights of mobile students in the European Union' (Staff Working Document) COM (2010) 477 final, 13. See also M Dougan, 'Fees, Grants, Loans And Dole Cheques: Who Covers The Costs Of Migrant Education Within The EU?' (2007) 1 J Contemporary Eur Research 4, 7 (Dougan, 'Costs of Migrant Education').

Bologna Process – a project currently involving 48 European countries, with 28 EU Member States among them, aimed at policy convergence towards a common structure of higher education in Europe.[96] The underlining objective of the project is to enable students and graduates to move more easily from one country to another. This is to be achieved through, inter alia, establishing a three-tier (Bachelor-Master-Doctorate) higher education system as a uniform standard and facilitating the recognition of foreign academic degrees and qualifications. This regulatory framework is supposed to ensure structural compatibility and comparability of national education systems. It does not, however, entail substantive harmonisation of the content of education and, moreover, is solely based on voluntary cooperation and does not create any binding obligations for the participating governments.[97] In light of the above, the Bologna Process has been described in the literature as an attempt by national governments to reduce the EU's involvement in the field of higher education.[98]

(b) *Cross-Border Access to Education in the Case Law of the CJEU*

Despite student mobility having been the focus of both EU and intergovernmental action, up until the 1980s, the rights of students wishing to take up studies in other Member States depended solely on the national legislation in the host Member States. Incoming students could be charged higher tuition fees and did not have general access to government grant systems for maintenance support. This situation changed when in the landmark judgment in 1985 in the *Gravier* case, the CJEU brought access to higher

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96 See official website at <http://www.ehea.info/pid34250/members.html> accessed 23 April 2017. See also S Garben, 'The Bologna Process: From a European Law Perspective' (2010) 16 ELJ 186 (Garben).

97 Garben (n 96) 190.

98 ibid 187, 209–210; S Garben, 'The Future of Higher Education in Europe: the Case for a Stronger Base in EU Law' (2012) LSE 'Europe in Question' Discussion Paper 50/2012, 9–10 <http://www.lse.ac.uk/europeanInstitute/pdfs/LEQSPaper50[1].pdf> accessed 23 April 2017.

education within the framework of the Treaties. Ultimately, EU citizens have been granted by the CJEU a fully-fledged right to study in another Member State under equal conditions of access and, to a certain extent, even maintenance. These rights have been developed on the basis of EU non-discrimination and citizenship provisions rather than the free movement rules, since the Court never considered the provision of public education to be a service within the meaning of what is now Art. 57 TFEU.[99]

The aim of the following analysis is two-fold: to cover the most important stages in the evolution of the rights of mobile students in the case law of the CJEU and assess the implications of this case law in light of Art. 165 TFEU, which appears to guarantee Member States the right to organise and manage their education systems independently from EU interference.

(i) Access to education

The number of mobile students in the territory of the EU has been steadily increasing in the last two decades. According to the most recent available data provided by the Commission, in 2008, there were more than half a million of students enrolled in tertiary education in an EU Member State different from the one in which they completed their secondary education, which marks an increase in student mobility levels of about 50 percent since 2000.[100] Student mobility is however not balanced across the region, with some Member States being the net-exporters of students while others are their net-importers.[101] The Court's case law on access to education concerns

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99 Case C–263/86 *Humbel* [1988] ECR–5365, paras 18–19; Case C–109/92 *Wirth* [1993] ECR I–6447, para 15; Case C–153/02 *Valentina Neri* [2003] ECR I–13555.

100 Commission, 'Progress towards the common European objectives in education and training (2010/2011): Indicators and benchmarks' (Staff Working Document) COM (2011) 526 final, 33–40. This data has not been updated since.

101 For a comprehensive study of imbalances in student mobility across the EU, see A Grabher et al, 'Student Mobility in the EHEA: Underrepresentation in Student Credit Mobility and Imbalances in

exactly the latter group of countries, which experience the inflow of foreign students significantly exceeding the outflow of local students. Countries facing this problem are typically those that have low threshold, open access or low tuition-fee admission policies and/or teach in a language also spoken in other Member States. The net-importers of students in the EU are Austria, Belgium, the UK, and, to a lesser extent, the Czech Republic, Denmark and the Netherlands.[102]

The present analysis will focus on the Court's case law concerning two Member States – Austria and Belgium. The two countries share some important common characteristics: both of them pursue a policy of unrestricted access to higher education and both are bordered by a large Member State with the same or shared official language in which access to certain university programmes is subject to restrictive entrance conditions. As a consequence, every year both Austria and Belgium receive a great number of applications from students who fail admission in Germany and France respectively. To illustrate the problem, in 2005–2006, between 78 and 86 percent of the study places at medical and paramedical schools in the French-speaking Community of Belgium were occupied by foreign (mainly French) students.[103] In Austria, in certain courses and institutions, for example, the psychology faculties at Salzburg and Innsbruck universities, which are close to the German border, foreign students

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Degree Mobility' (Research Report, Institute for Advanced Studies, Vienna, January 2014) esp 34–45 <http://www.eurostudent.eu/download_files/documents/Student_mobility_in_EHEA.pdf> accessed 23 April 2017.

102 N Cambien, 'Student Mobility in the European Union: Facing New Hurdles?' (2009) 11 Revista Universitaria Europea 77, 81, referring to C Chevalier and M Gerard, 'Financing Higher Education and Student Mobility across Europe' (2008) ARPEGE Research Paper <http://www.aic.lv/ace/ace_disk/2007_09/sem07_09/Brussels_mob/Chevalier.pdf> accessed 24 April 2017 (Cambien); JP Myklebus, 'Facing a Rising Imbalance of Mobile Students' (*University World News*, 31 January 2014) <http://www.universityworldnews.com/article.php?story=20140130145446403> accessed 27 April 2014.

103 Case C–73/08 *Bressol and Chaverot* [2010] ECR I–2735 (*Bressol*), Opinion of AG Sharpston, para 20; AP van der Mei, 'Free Movement of Students and the Protection of National Educational Interests: Reflections on *Bressol and Chaverot*' (2011) 13 EJML 123 (Van der Mei).

accounted for more than 80 percent of students in year 2013.[104] Seeking to reduce the high inflows of foreign students, the authorities in Belgium and Austria have on multiple occasions taken measures limiting foreign students' access to their universities, in particular in relation to medical and paramedical studies. These policies have been repeatedly challenged before the CJEU and, by and large, declared incompatible with the Treaties.

Gravier

Gravier[105] is the landmark EU case concerning the prohibition of discrimination on the basis of nationality with regard to access to higher education. The case concerned a rule introduced by Belgium in 1970s requiring that foreign students pay an additional enrolment fee, so called 'minerval', as a condition of access to university. The fee resembled the out-of-state tuition that American State universities demand from non-resident students.[106] It was aimed at offsetting the fact that foreign students (or their parents) do not contribute to the financing of education to the same extent as residents do by paying income taxes.[107] Miss Gravier, a student of French nationality who was required to pay the 'minerval' upon her enrolment in the university, challenged the validity of the fee in national courts. On a preliminary reference, the CJEU was asked to pronounce on the compatibility of the Belgian rule with the principle of non-discrimination on grounds of nationality, laid down in Art. 7 EEC (now Art. 18 TFEU).

Since the prohibition of discrimination only applies in situations that fall within

104 'Vienna Aims to Halt Influx of German Students' (*Presseurop*, 28 May 2013) <http://www.presseurop.eu/en/content/news-brief/3817391-vienna-aims-halt-influx-german-students> accessed 27 April 2014.

105 Case C–293/83 *Gravier* [1985] ECR 593 (*Gravier*).

106 Van der Mei (n 103) 125.

107 *Gravier* (n 105), para 12.

the scope of application of the Treaty, the Court, first of all, had to decide whether the principle applied to education matters. It noted that 'although educational organisation and policy [we]re not as such included in the spheres which the Treaty ha[d] entrusted to the Community institutions', access to vocational training was 'not unconnected' with Community law.[108] It was enshrined in Art. 128 EEC and was subject to several soft law measures adopted by the Council concerning vocational training in the context of worker mobility. This led the Court to declare that a 'common vocational training policy' of the Community was being gradually established.[109] Furthermore, vocational training constituted 'an indispensable element of the activities of the Community' because it promoted the free movement of persons by enabling them to obtain the necessary training and qualifications in the Member State where they intended to work and 'develop their particular talents' in Member States whose vocational training programmes included 'the special subject desired'.[110] For all of the above reasons, the conditions of access to vocational training fell within the scope of the Treaty and thus were subject to the prohibition of discrimination under Art. 7 EEC.

Since the EEC Treaty did not contain any legal basis specific to education – vocational training being the only link to general education existing in the Treaty –, the Court turned to consider whether university education fell under the definition of vocational training. In this connection, the Court adopted a broad interpretation of the term 'vocational training', describing it as 'any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment, … even if the

108 *Gravier* (n 105), para 19.

109 ibid, paras 20–23.

110 ibid, paras 23–24.

training programme includes an element of general education.'[111] This meant that, in principle, courses provided by a higher education institution constituted vocational training for the purposes of Art. 128 EEC. Consequently, the Court ruled that the imposition on foreign students of an additional enrolment fee as a condition of access to university, which was directly discriminatory against non-nationals, breached Art. 7 EEC.

The Court's legal reasoning in *Gravier* is rather remarkable. The Court made effective use of the concept of vocational training to derive individual rights for mobile students in the absence of a Treaty basis for education and notwithstanding that vocational training was included in the Treaty primarily for reasons relating to the training of migrant workers. Access to education thus fell within the scope of Community law because of its indirect link to the labour market.[112] Yet that indirect link was enough for the Court to lay down the legal foundations for the free movement of students in the EU.

Notably, *Gravier* remains the only case where the Court dealt with direct discrimination. In subsequent cases, the judicial analysis shifted to assessing to what extent Member States could justify indirectly discriminatory treatment of foreign students.

Commission v Belgium

Commission v Belgium[113] arose out of the infringement proceedings brought by the Commission against Belgium, concerning legislation on the recognition of foreign

111 *Gravier* (n 105), paras 30–31.

112 FG Jacobs, 'Citizenship of the European Union – a Legal Analysis' (2007) 13 ELJ 591, 602 (Jacobs, 'Citizenship').

113 Case C–65/03 *Commission v Belgium* [2004] ECR I–6427 (*Commission v Belgium*).

qualifications and diplomas adopted by the French Community of Belgium. The legislation in question stipulated that foreign applicants who were not able to prove that they qualified for admission in their own country of origin had to pass an 'aptitude test' to enrol into a Belgian university.[114] This requirement applied, inter alia, to courses in medical and paramedical studies. It effectively ensured that the French students who due to *numerus clausus* (minimum grade requirement) had not been admitted to the French universities were also barred from entering the Belgian schools. The Commission claimed that Belgian legislation was in breach of Art. 12 EC (formerly Art. 7 EEC, now Art. 18 TFEU), read in conjunction with Arts. 149 and 150 EC (now Arts. 165 and 166 TFEU).

Since *Commission v Belgium* was brought before the CJEU almost two decades after the *Gravier* judgment, the Court took note of the changes introduced to the EU constitutional framework in the meantime. In particular, the Court pointed out that the Treaty of Maastricht had introduced a legal basis for education in Art. 149(2) EC. This provision covered all levels and types of education and expressly provided that EU action shall encourage the mobility of students and teachers by, inter alia, encouraging the academic recognition of diplomas and periods of study. Similarly, Article 150(2) EC provided that EU action shall facilitate access to vocational training and encourage the mobility of instructors and trainees. Consequently, there was no doubt that Art. 12 EC applied to the conditions of access to higher education set by the Member States.[115]

The Court observed that Belgian legislation placed students holding secondary education diplomas awarded in other Member States at a disadvantage, since they could not gain access to higher education under the same conditions as the holders of

114 *Commission v Belgium* (n 113), paras 5, 13.

115 ibid, paras 26, 27.

Belgian diplomas. The criterion of differentiation thus worked primarily to the detriment of the nationals of other Member States and for that reason had to be regarded as indirectly discriminatory against them.[116] As Belgium did not advance any grounds of justification for the differential treatment, the Court concluded that it failed to fulfil its obligations under Art. 12 EC.[117]

Commission v Austria

Commission v Austria[118] also arose out of infringement proceedings, this time brought against Austria, and concerned restrictive conditions for admission to Austrian universities, rather similar to those introduced by the French Community of Belgium. Austrian Law on University Studies granted students holding a secondary education diploma awarded in Austria unrestricted access to university, but laid down special admission criteria for foreign students. This law sought to increase the percentage of Austrian citizens with a higher education qualification, in line with the government's policy to increase the number of university graduates in the country.[119] Accordingly, applicants who held a foreign diploma had to demonstrate that they met the specific entrance requirements for the relevant course of study applicable in the State which issued their general qualification. For the German applicants, the majority of whom could not follow the study of their choice in Germany due to the *numerus clausus*, this condition meant that they would also not be admitted for the study in question in Austria.

Following *Commission v Belgium*, the CJEU found that the Austrian university

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116 *Commission v Belgium* (n 113), para 30.

117 ibid, para 31.

118 Case C–147/03 *Commission v Austria* [2005] ECR I–5969 (*Commission v Austria*).

119 ibid, Opinion of AG Jacobs, para 26.

admission rules were liable to have a greater effect on nationals of other Member States and therefore constituted indirect discrimination on the grounds of nationality.[120] Notably, in reaching this conclusion, the Court also made a reference to Union citizenship, briefly noting that it enabled those who found themselves in the same situation to enjoy the same treatment in law irrespective of their nationality.[121]

Unlike Belgium, Austria argued that the difference in treatment between Austrian and foreign nationals could be justified because it served to protect the homogeneity of the Austrian higher education system.[122] The concept of homogeneity referred to one of the objectives of Austrian education policy, which aimed to guarantee Austrian citizens unrestricted access to education from primary school to university. The idea behind it was that if citizens complete their educational path in Austria, they would most likely establish themselves in its territory. The government pointed out that this was particularly important with regard to medical studies, as they ensured that there would be a sufficient number of qualified graduates in order to maintain a balanced and unrestricted medical service in the country.[123] In that connection, it submitted that if EU students were granted unrestricted access to education in Austria, its education system would be flooded by foreign (mainly German) students, whose number in medicine courses could then be as high as five times the number of available places. Drawing analogy with the patient mobility case law,[124] the government argued that the influx of foreign students would entail

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120 *Commission v Austria* (n 118), paras 41–47.

121 ibid, para 45, with further references to Case C–184/99 *Rudy Grzelczyk* [2001] ECR I–6193, para 31 (*Grzelczyk*) and Case C–224/98 *D'Hoop* [2002] ECR I–6191, para 28.

122 *Commission v Austria*, paras 49–59.

123 C Rieder, 'Case C–147/03, *Commission of the European Communities v. Republic of Austria*, Judgment of the Court (Second Chamber) 7 July 2005' (2006) 43 CML Rev 1711 (note), 1718–1719 (Rieder).

124 *Commission v Austria*, para 50, with further references to *Kohll* (n 14), para 41.

‘structural, staffing and financial problems’ in the education sector, thus posing a risk to the financial equilibrium of the Austrian education system and, consequently, to its very existence.[125]

The Court accepted that the considerations advanced by Austria could in principle justify the difference in treatment between local and foreign students, but only if they were substantiated by ‘specific evidence’ and ‘accompanied by an analysis of the appropriateness and proportionality of the restrictive measure’ adopted by the government.[126] In that connection, the Court observed that Austria did not present any figures to support its claim that in the absence of the restriction concerned, ‘the existence of the Austrian education system in general and the safeguarding of the homogeneity of higher education in particular would be jeopardised’.[127] Moreover, Austrian authorities had accepted that the national legislation in question was ‘essentially preventive in nature’.[128] Finally, the Court suggested that excessive demand for access to specific courses could be met by the adoption of non-discriminatory measures, such as the establishment of an entry examination or the requirement of a minimum grade.[129]

For its second ground of justification, Austria argued that restrictive measures prevented abuse of Community law by German students, who would come to Austria to reap the benefits of its education system without contributing to its financing.[130] The Court swiftly dismissed this argument, noting that the right for EU nationals to study in

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125 *Commission v Austria* (n 118), paras 50, 64; *Commission v Austria*, Opinion of AG Jacobs, para 26.

126 *Commission v Austria*, para 63.

127 ibid, para 66.

128 ibid, paras 64–65.

129 ibid, para 61.

130 ibid, para 67.

another Member State under equal conditions with nationals of that Member State constituted the 'very essence of the principle of freedom of movement for students guaranteed by the Treaty', and, as such, could not be regarded as an abuse.[131]

The aftermath

In order to comply with the judgment in *Commission v Austria*, the Austrian government amended its laws so that secondary diplomas from other Member States were to be regarded as equal to Austrian diplomas. This caused an influx of German students into the country, who applied to Austrian universities after having being rejected by German ones.[132] In response, Austrian authorities introduced in 2006 a new set of measures restricting access to specific programmes whereby 95% of study places were allotted to EU citizens and 75% of these were reserved for students holding an Austrian secondary diploma.[133]

In Belgium, the French Community had abolished the rules contested in *Commission v Belgium* even before the Court delivered its verdict.[134] After that, for three years in succession the French Community organised an entry exam for those applying to study veterinary science. As a result of the entry exam, a very limited number of Belgian nationals qualified for the entry: for example, in 2005, only 34 out of 250 successful candidates were Belgian.[135] To address this situation, in 2006, the French Community of Belgium adopted a decree limiting access to certain medicine programmes for students who were 'non-resident' in Belgium. This decree was

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131 *Commission v Austria* (n 118), para 70.

132 For figures, see Rieder (n 123) 1715–1716.

133 ibid 1716.

134 *Commission v Belgium* (n 113), paras 6–8.

135 ibid, Opinion of AG Sharpston, para 115.

challenged in the *Bressol* case, to be discussed below.

After Belgium and Austria introduced the aforementioned measures, the Commission sent letters of formal notice to both Member States for the infringement of Community law. On the basis of the replies received, the Commission considered that there was *prima facie* evidence that without the restrictions, the health systems of Belgium and Austria, respectively, would experience problems arising from a potential shortage of health professionals.[136] The Commission therefore decided to suspend the infringement procedures for five years, in order to give both Member States the opportunity to provide more complete and more detailed data to justify the restrictions. The Commission's decision to suspend the cases was, by and large, the outcome of the political pressure exerted by the Austrian government during the negotiations leading to the adoption of the Treaty of Lisbon. Austria demanded a special Treaty protocol which would allow it to set a cap on the number of foreign students it would take in.[137] The quiet agreement with the Commission did not, however, preclude private litigation, which resulted in yet another preliminary reference to the CJEU in the *Bressol* case, brought against Belgium but in terms of the Court's reasoning equally applicable to the Austrian situation.

Bressol

The *Bressol* case reached the CJEU after a group of French students and university lecturers challenged the new Belgian admission rules, setting a quota of 30 percent for non-resident students enrolling in any of the nine medical and paramedical courses that were over-subscribed. In order to qualify as resident, students were effectively required

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136 S Garben, 'The Belgian/Austrian Education Saga' (2008) Harvard European Law Working Paper 1/2008, 17.

137 S Garben, 'Case C–73/08, *Bressol, Chaverot and Others v. Gouvernement de la Communauté française*, Judgment of the Court (Grand Chamber) of 13 Apr. 2010' (2010) 47 CML Rev 1493 (note), 1496–1498.

to have their principal residence in Belgium.

The CJEU started its ruling with some broader observations about the distribution of competences between the EU and the Member States in the field of education. It recognised that whilst EU law did not detract from the power of the Member States as regards the organisation of their education systems, pursuant to Art. 165(1) TFEU, when exercising that power, Member States had to comply with the provisions on the freedom to move and reside within the territory of the EU, in accordance with Arts. 18 and 21 TFEU.[138] The freedom of movement conferred by EU citizenship (Art. 21 TFEU) was a sufficient basis to establish that the situation fell within the scope of the Treaty for the purposes of applying the prohibition of discrimination enshrined in Art. 18 TFEU.[139]

The Belgian government, supported by the Austrian government, advanced three grounds to justify the difference in treatment: the need to avoid excessive burdens on the financing of higher education, the protection of the homogeneity of the higher education system and the protection of public health. With regard to the first point, Belgium argued that a difference in treatment helped to avoid excessive burdens on the financing of education as it prevented the number of foreign students from becoming excessively high.[140] The Court found this argument unfounded because the financing of education in the French Community was organised through a 'closed envelope' system, where the overall allocation of funds did not vary depending on the total number of students, i.e. an increase or decrease in student numbers was budget-neutral.[141]

138 *Bressol* (n 103), para 28.

139 ibid, para 31, with further references to, inter alia, Case C–209/03 *Dany Bidar* [2005] ECR I–2119, paras 32, 33 (*Bidar*); Case C–158/07 *Jacqueline Förster* [2008] ECR I–8507, paras 36, 37 (*Förster*).

140 ibid, para 49.

141 ibid, para 50.

With regard to the second ground of justification, Belgium claimed that the high level of non-resident students in the courses concerned was likely to cause a deterioration in the quality of higher education, since there were inherent limits 'in the capacity of the educational establishments to welcome them and in the staff available'.[142] In this respect, restrictions were necessary in order to safeguard the homogeneity of the system and 'to ensure wide and democratic access for the population of the French Community to quality higher education'.[143] The Court accepted that the prevention of a risk to the existence and homogeneity of a national education system could justify a difference in treatment between some students.[144] In the Belgian case, this consideration was in fact linked to the protection of public health, as all the courses concerned fell within the medical field. Accordingly, the Court decided to examine the homogeneity argument in light of Belgium's third ground of justification, relating to the protection of public health.

Belgium advanced two reasons to explain why unrestricted numbers of non-resident students could put public health at risk. First, the practical training required for medical programmes could not be provided adequately when a certain number of students was exceeded. Second, non-resident students would return to their home State after studies, which would ultimately cause a shortage of qualified medical personnel in Belgium.

The Court held that the objective of maintaining a balanced high-quality medical service open to all could in principle justify the adoption of restrictive measures. However, the measures taken had to comply with the principle of

142 *Bressol* (n 103), para 52.

143 ibid, para 52.

144 ibid, para 53. With further reference to *Commission v Austria* (n 118), para 66.

proportionality. It was for the national court to determine whether these conditions were met in the circumstances of the case, but the CJEU decided to 'provide guidance' to the national court in order to 'enable' it to give judgment.[145]

First of all, the national court had to assess if there were genuine risks for the protection of public health. It could not be ruled out a priori that a reduction in the quality of training of future health professionals could ultimately impair the quality of healthcare.[146] Also, a decrease in the number of local students in the courses concerned could result in a shortage of health professionals, thus creating problems of healthcare capacity.[147] In assessing the likelihood of those risks materialising, the referring court had to take into consideration that the link between the training of future medical specialists and the objective of protecting public health was only indirect and that the assessment would be based on 'a number of contingent and uncertain factors', taking into account the 'future development of the health sector'.[148] This meant that Member States had to be allowed to take protective measures without having to wait for the quality of education to deteriorate or the shortage of health professionals to materialise.[149] However, in order to do so, national authorities had to provide 'an objective, detailed analysis, supported by figures, … capable of demonstrating, with solid and consistent data' that the risks to public health were 'genuine'.[150]

Moreover, they also had to provide 'specific evidence' showing that the measures adopted were appropriate and proportionate for attaining the objective of the

145 *Bressol* (n 103), paras 62, 65.

146 ibid, para 67.

147 ibid, para 68.

148 ibid, para 69.

149 ibid, para 70.

150 ibid, para 71.

protection of public health.[151] In particular, it had to be demonstrated that a limitation of the number of non-resident students could 'really bring about an increase in the number of graduates ready to ensure the future availability of public health services within the French Community'.[152] In this respect, Belgium provided data from veterinary studies. Since these studies required clinical practice by each student on a sufficient number of animals, it was not possible to train more than 200 veterinarians a year; however, due to an influx of foreign students, the total number of students rose from 1233 in 1995 to 2343 in 2002. The government claimed that the situation was similar with regard to other medical and paramedical courses. In response, the Court pointed out that government analysis could not merely refer to figures concerning one or other group of students and infer that all the non-resident students would establish themselves in the State in which they resided before commencing their studies.[153] Belgium was required to provide data for each of the nine courses covered by the restrictive measures which would make it possible to determine: first, the maximum number of students who could be trained at a level which complied with the desired training quality standards; and, second, the number of graduates needed to establish themselves within the territory of the French Community in order to ensure the provision of adequate public health services.[154] Such analysis had to take into account the possibility that resident students could decide to exercise their profession abroad and, equally, that persons who had not studied within the French Community could establish themselves there later.[155]

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151 *Bressol* (n 103), para 71.

152 ibid, para 76.

153 ibid, para 73.

154 ibid, para 72.

155 ibid, para 73.

Finally, considering that access to higher education within the EU constituted the very essence of the principle of freedom of movement for students, the restrictions thereof had to be limited to what was necessary in order to obtain the objectives pursued and had to allow 'sufficiently wide' access to higher education.[156] Accordingly, the national court had to assess whether the objectives pursued could not be attained by less restrictive means, such as measures aimed at encouraging foreign students to establish in the French Community or attracting medical professionals educated abroad.[157]

Following the guidance of the CJEU, the Belgian Constitutional Court found that the relevant quotas were justified only with respect to three out of nine medical courses in question, there being a lack of evidence for the rest.[158]

(ii) Access to financial assistance

In addition to access to education, the CJEU has also developed rules concerning foreign students' access to financial assistance. Questions concerning financial assistance were raised before the CJEU as early as in 1988.[159] The Court then distinguished between, on the one hand, financial assistance intended to cover registration and other fees charged for access to education, so, for example, tuition fee loans and grants, and, on the other hand, maintenance and training grants. The principle of non-discrimination applied with regard to the former, as forming part of the conditions of access to education. But maintenance assistance fell outside the scope of

156 *Bressol* (n 103), para 79.

157 ibid, paras 77, 78.

158 A Hoogenboom 'Mobility of Students and the Financial Sustainability of Higher Education Systems in the EU: a Union of Harmony or Irreconcilable Differences?' (2013) 9 Croatian YB EL & Pol'y 15, 24 (Hoogenboom), referring to the judgment of Belgian Constitutional Court.

159 Case C–39/86 *Lair* [1988] ECR 3161, paras 23–24 (*Lair*); Case C–197/86 *Brown* [1988] ECR 3205, para 25.

the EEC Treaty and could not trigger the application of Art. 7 EEC. The Court took the position that at that stage of development of Community law, such assistance was, on the one hand, a matter of educational policy, which was not explicitly included 'in the spheres entrusted to the Community institutions' and, on the other hand, a matter of social policy, which fell within the competence of the Member States insofar as it was not covered by specific provisions of the Treaty.[160]

Things changed with the introduction of EU citizenship into the Treaty in 1993. The Court no longer had to differentiate between assistance covering tuition fees and that provided for maintenance purposes. In the landmark *Grzelczyk* judgment of 2001, the Court relied on the (then) newly introduced EU citizenship provisions and Arts. 149 and 150 EC to find that foreign students could not be refused a social security benefit in the form of a minimum 'subsistence allowance' if the nationals of the Member State in question were entitled to it.[161] In this sense, EU citizenship required that Member States show a certain degree of financial solidarity with other Member States 'in the organisation and application of their social assistance systems'.[162] Several years later, in the *Bidar* case, the Court explicitly stated that maintenance grants and loans came within the scope of the Treaty, hence, EU citizens could not be discriminated against in this area.[163] This ruling was not unqualified. The Court recognised that the degree of financial solidarity expected from the Member States did not prevent the application of restrictive measures aimed at avoiding an 'unreasonable burden' on their finances, which could arise if governments were obliged to cover the maintenance costs of students who had no link with the country of studies other than having decided to move

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160 *Lair* (n 159), para 15.

161 *Grzelczyk* (n 121), para 31.

162 ibid, para 44.

163 *Bidar* (n 139), para 42.

there for study purposes.[164] Accordingly, it was legitimate for a Member State to limit granting of financial assistance to students who had demonstrated 'a certain degree of integration into the society of that State'.[165] The existence of a degree of integration would be established if a student in question had resided in the host State for a certain length of time. The Court later accepted that a condition of five years[166] of prior residence was not excessive in that respect. By accepting the five-year residence requirement as justified, the Court might have shown deference to the political agreement of the time on the matter, as the Citizens' Rights Directive adopted in 2004 provided that the host Member State only had to provide financial assistance to those individuals who had obtained a right to permanent residence in its territory, which would normally happen after five years of lawful residence.[167]

The Court has also pronounced on the question of the portability of financial assistance available at the *home* Member State in situations of nationals leaving to study in another Member State. The seminal judgments in this area are *Morgan and Bucher* and *Prinz and Seeberger*.[168] The *Morgan and Bucher* case concerned a German rule that made financial assistance for studies abroad subject to the condition that the course of study had to represent the continuation of studies pursued for at least one year in Germany. Similarly, the more recent *Prinz and Seeberger* case concerned a German rule conditioning access to grants on the requirement of having a permanent residence in Germany for at least three years prior to commencing studies abroad. The Court held

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164 *Bidar* (n 139), para 56.

165 ibid, para 57.

166 *Förster* (n 139), para 54.

167 Council Directive (EC) 2004/38/EC [2004] on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L158/79, arts 16, 24.

168 Joined Cases C–11/06 and C–12/06 *Morgan and Bucher* [2007] ECR I–9161, para 28 (*Morgan and Bucher*); Joined Cases C–523/11 and C–585/11 *Prinz and Seeberger* (CJEU, 18 July 2013), para 30 (*Prinz and Seeberger*).

that conditions like these were likely to discourage citizens from studying abroad, owing to the costs and inconvenience that they could create.[169] It accepted that, in principle, it was legitimate for the Member States to grant assistance only to students who had demonstrated a sufficient degree of integration into the home society, in order for the home Member State to avoid an unreasonable financial burden.[170] However, the proof required to demonstrate the necessary degree of integration could not be 'too exclusive in nature or unduly favour one element which is not necessarily representative of the real and effective degree of connection between the claimant and the [Member State concerned], to the exclusion of all other representative elements'.[171] The German rules were considered to be 'too general and exclusive' in both of the aforementioned cases and, accordingly, found unnecessary for achieving the objective pursued.

Notably, in neither of the two aforementioned judgments was the Court asked to pronounce on the question of whether Member States could decide, in the first place, not to allow access to government funds to nationals studying abroad. The Court did not have to consider this question because Germany already had in place a system for exportation of student financial assistance. Yet given that the rationale behind the case law on the portability of grants is that students should not be penalised by their home Member State for exercising their right to free movement,[172] future case law is likely to make explicit that systems of financial support for education cannot discriminate between students staying in the territory of the country and those going abroad.[173]

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169 *Morgan and Bucher* (n 168), para 30; *Prinz and Seeberger* (n 168), para 32.

170 *Morgan and Bucher*, para 43; *Prinz and Seeberger*, para 36.

171 *Prinz and Seeberger*, para 37.

172 *Morgan and Bucher*, para 26; *Prinz and Seeberger*, para 28.

173 To that effect, see Case C–76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I–6849, paras 80, 81, 97–98

The Court's position in the *Morgan and Bucher* and *Prinz and Seeberger* cases seems to put into question the validity of its previous view that a requirement of five years of prior residence is not an excessive period of time for a non-national to become integrated in the host Member State for the purpose of receiving financial assistance. Admittedly, the Court's position may be stricter in relation to grants provided by the *home* Member State because the sufficient degree of integration is presumed by virtue of possessing the citizenship of the Member State concerned. Yet it cannot be excluded that the Court might opt for a more rigorous application of the test of proportionality in future cases concerning financial assistance available in the *host* Member State, for instance, by making explicit the requirement to take into account the individual circumstances of the student in question. This type of reasoning would also bring the Court closer to its approach in the patient mobility cases, where the individual circumstances of a patient are considered to be the decisive factor when granting authorisation for treatment abroad.

(c) *The Regulatory Implications of the Case Law*

(i) Principles governing cross-border education in the case law of the CJEU

It would not be incorrect to say that through its case law the Court has created rights for mobile students that were not envisaged by the Treaty, at least not until the amendments introduced by Maastricht in 1992. Art. 128 EEC, which was initially used by the Court to derive the right of access to education in other Member States, authorised the Community to lay down general principles for implementing a common

(*Schwarz*), holding that tax benefits available for education in the home State should be extended to studies in other Member States. For a comprehensive discussion, see M Dougan, 'Cross-Border Educational Mobility and the Exportation of Student Financial Assistance' (2008) 33 EL Rev 723, 730, 732–733 (Dougan).

vocational training policy. On that basis, the Court ruled that vocational training was covered by Community action, hence, the prohibition of discrimination applied with regard to access to such training. More importantly, by interpreting the term 'vocational training' broadly enough to include higher education, the Court opened the doors for EU students to study in other Member States on equal conditions with local students. It is noteworthy that the Court's position also paved the way for a wider Community policy within the field of education, leading to the adoption of the Erasmus programme in 1987, which gave students the opportunity to benefit from a period of study in an EU Member State.[174] After the Treaty of Maastricht introduced EU citizenship and a specific legal basis for education, the Court's rationale for granting rights to mobile students has changed. Students are now entitled to pursue studies in other Member States solely by virtue of being EU citizens, regardless of whether they apply for courses that are linked to their later practice of trade or profession.

The principle of equal treatment requires that tuition fees and other conditions of access to university be at the same level for all EU students; the same applies to tuition fee loans, where they exist. Differential treatment can in principle be justified by public interest objectives, but the specific measures in place will be subjected to strict judicial scrutiny. Governments have thus far advanced three main types of arguments to justify the difference in treatment between local and incoming students: the need to avoid excessive burdens on the financing of higher education, the protection of the homogeneity of higher education system and the protection of public health.

The Court's stance regarding the financial concerns remains unclear because in *Bressol* this argument was dismissed as irrelevant in the circumstances of the case:

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[174] Cort (n 90) 97; AP van der Mei, *Free Movement of Persons Within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 343. See also Case C–242/87 *Commission v Council (ERASMUS)* [1989] ECR 1425.

since Belgium financed education through a 'closed envelope' system, technically, an increase or decrease in student numbers was budget-neutral, hence, it did not entail an additional burden on finances.[175] Future case law will show whether financial concerns will be considered from a purely budgetary perspective or assessed in light of the broader objectives of the education system, such as the protection of its homogeneity or capacity to produce a sufficient number of future specialists.[176]

The concept of the homogeneity of education system typically refers to concerns regarding the quality of and access to education. These concerns are considered to be valid and in principle capable of justifying restrictive measures. However, in practice, they must be substantiated by specific evidence and accompanied by an analysis of the appropriateness and proportionality of restrictive measures.[177] Moreover, the Court takes a view that the homogeneity of higher education can be protected by recourse to non-discriminatory measures designed to counteract excessive demand for specific programmes, such as an entry examination or the requirement of a minimum grade.[178] This suggests that it might be very difficult, if not impossible, for governments to prove the necessity of quotas on foreign students on the basis of the homogeneity argument.

The third ground – protection of public health – seems to offer the strongest argument for justifying differential treatment between local and foreign students. It also comprises the homogeneity argument insofar as the problems in question concern medical and paramedical courses. The standard of proof required by the Court is

175 *Bressol* (n 103), para 50.

176 In this respect, see *Bressol*, Opinion of AG Sharpston, paras 92, 94, expressing the view that budgetary concerns should be considered as justification of a purely financial nature.

177 *Commission v Austria* (n 118), para 63.

178 *Commission v Austria*, para 61; *Bressol*, Opinion of AG Sharpston, para 105.

however high. Member States have to demonstrate – by an objective, detailed analysis, supported by solid and consistent data – that there are real risks to the protection of public health and that the restrictive measures in question are an appropriate and necessary means for counteracting those risks. Such analysis also has to account for the possibility that resident students may decide to exercise their profession abroad and, equally, that foreign professionals may establish themselves in the State concerned.

The principle of equal treatment also applies in relation to access to financial assistance for studies abroad. The host Member State is no circumstances allowed to discriminate against foreign students when granting financial aid intended to cover the tuition and other costs of access to university. However, it retains the right to restrict foreign students' access to maintenance grants until they have achieved a required level of integration into the society of that State. The Court's approach thus seems to strive for a balance between, on the one hand, ensuring that EU students' right to cross-border education does not become meaningless due to the financial hurdles associated with it and, on the other hand, avoiding the situation where student mobility would place an unreasonable burden on national budgets.

(ii) The implications of the case law: the costs of student mobility

The student mobility case law is premised on the principle that while Member States retain the power to organise and manage their education systems, in accordance with Art. 165(1) TFEU, when exercising that power, they must comply with the rules regarding EU citizens' freedom to move and reside within the territory of the EU.[179] This means that Member States are free to choose an education system based on free and unrestricted access or one that is based on controlled access, in which students go

[179] *Bressol* (n 103), para 38. See also *Schwarz* (n 173), para 86; *Morgan and Bucher* (n 168), para 24.

through a selection process, provided that foreign students are not treated less favourably than the local ones. This approach is meant to balance the interests of mobile students against the prerogative of the Member States to manage their education systems.

It will be argued that this balance has not been achieved in the case law. The Court has advanced the individual rights of students at the expense of the capacity of the Member States to control the financing of public education, maintain the desired quality of teaching and, more generally, pursue education policies that reflect national preferences and traditions.

Financial implications

The mobility of students of the extent advanced by the Court may have serious financial and structural implications for Member States' education systems, arising from the fact that countries with open access, low-threshold education policies have to provide free education to students who do not contribute to its financing.[180] Notably, these problems are experienced by all countries who 'import' foreign students, regardless of the way they finance their higher education, through a 'closed envelope' system or otherwise. Even where incoming students have to pay tuition fees, these fees will typically cover only a fraction of the total cost of education, which is heavily subsidised by governments.[181] The financial pressures become even greater when equal treatment is extended into the area of tuition and maintenance grants.[182] Ultimately, the overall costs of education enjoyed by foreign students will be borne by the taxpayers of the host Member State. Admittedly, students who after their studies enter the

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180 On this point, see *Commission v Austria* (n 118), Opinion of AG Jacobs, para 36.

181 See data cited in Hoogenboom (n 158) 43.

182 Dougan, 'Costs of Migrant Education' (n 95) 9.

employment market of the host State do provide a 'return on investment' for the latter, but that does not happen often. For instance, the data provided by Belgium in *Bressol* showed that during the period between 2003 and 2006, nearly one third of the veterinarians establishing themselves in France had obtained their diploma in Belgium.

It could be argued that the CJEU is justified in requiring a certain degree of financial solidarity among the Member States,[183] in order to ensure that the fundamental freedom of free movement of students in the EU is not merely nominal. Yet this requirement seems to be quite unfair in cases where foreign students make up more than 80 percent of the class (as is the case for certain courses in Belgian and Austrian universities). Moreover, this situation raises serious issues of equity between Member States in sharing the financial burdens of cross-border education.[184]

Systemic implications

An uncontrolled influx of foreign students may also cause systemic problems in the education sector, affecting the quality of teaching and the system's overall capacity to produce a sufficient number of graduates ready to establish in the country concerned. The CEJU seems to show a degree of sensitivity to these considerations in relation to medical courses, possibly because the protection of public health is one of the derogations from the free movement expressly authorised by the Treaty. The Court admits that the assessment of the link between the training of future health professionals and the objective of maintaining an adequate medical service on the territory involves 'a number of contingent and uncertain factors'.[185] For that reason, Member States should be allowed to take preventive measures without having to wait

183 *Grzelczyk* (n 121), para 44; *Bidar* (n 139), para 56.

184 Dougan, 'Costs of Migrant Education' (n 95) 9.

185 *Bressol* (n 103), para 69.

for either the shortage of health professionals or the deterioration of the quality of medical education to materialise.[186] However, the standard of proof required to justify taking of preventive measures seems to be virtually impossible to meet.

National authorities must submit an objective and detailed analysis, supported by figures, capable of demonstrating, with solid and consistent data, that there are genuine risks to public health. Such analysis needs also to account for the fact that after graduation some foreign students may be willing to establish themselves in the host Member State and *vice versa*. For instance, the Court was not convinced by the estimates provided by the Austrian and Belgian governments that in the absence of restrictions, the number of foreign students in certain courses would exceed the amount of available places by five or ten times.[187]

Moreover, the Court leaves governments with a lot of unanswered questions. What degree of deterioration in the quality of medical training and provision of healthcare services would allow Member States to take restrictive measures without breaching students' right to free movement? Would it make a difference if the said deterioration was sudden or gradual? And what is the period of time sufficient to show that a correlation exists between the influx of foreign students and the quality of the provision of education and healthcare in the country? It also remains unclear whether a decline in the quality of medical education alone, without there being a shortage of health specialists, would suffice to justify restrictive measures. The Court's reasoning seems to focus mainly on the shortage of specialists as the ultimate risk to be avoided, which would suggest that the decreasing quality of medical training is considered by the Court a risk worth taking for the sake of protecting students' right to pursue

186 *Bressol* (n 103), para 70.

187 *Commission v Austria* (n 118), Opinion of AG Jacobs, para 27; *Bressol*, para 57.

education across the EU.

The standard of proof is equally high when it comes to showing that discriminatory measures taken to counteract health risks comply with the proportionality requirement. Governments are required to provide specific evidence showing that discriminatory measures are the least restrictive option available capable of guaranteeing the quality of teaching and the provision of healthcare. In *Bressol*, Belgium provided figures showing that when the French Community organised an entrance exam three years in a row, only a small percentage of locals passed it. The Court however considered these figures not enough to illustrate the problem throughout the whole field of medicine. Austria found itself even in more trouble: it had discriminated against foreign students since becoming a member of the EC in 1995 and thus could not possibly collect such data. Leaving the Austrian and Belgian cases aside, it is hard to imagine how governments could conduct an analysis, other than hypothetical, that would provide for a comparative assessment of the effectiveness of the various restrictive measures *and* be backed by specific evidence.

Room for national preferences?

The Court's rigorous position is at least in part based on the conviction that there are non-discriminatory alternatives capable of counteracting excessive demand for access to specific courses, such as the establishment of an entry examination or the requirement of a minimum grade. However, there are two serious problems with these alternatives: they do not achieve the same result as discriminatory measures and, more importantly, they interfere with the autonomous right of the Member States to organise their education systems as they deem fit.

Admittedly, the suggested non-discriminatory alternatives would be effective in countering the concerns of inadequate resources and, hence, ensuring that the quality of education remains unaffected by the influx of foreign students. However, these measures would also cut to the heart of the systems based on free and open access to education. For instance, the Austrian policy of the 'widest possible public access to higher education' seeks to increase the percentage of Austrians with a higher education qualification, since it is among the lowest in the EU and the OECD.[188] In Belgium, on the other hand, any suggestions to introduce more stringent entry requirements to universities are usually met with scepticism by the general public because they are perceived as contrary to the social character of the Belgian welfare State.[189] Given this context, if either Belgium or Austria ultimately has no choice but to replace quotas on foreign students with some non-discriminatory alternatives, as proposed by the Court, the Treaty guarantee not to detract from the power of the Member States to organise their education systems independently becomes meaningless.

Moreover, in practice, no non-discriminatory alternative can ensure that a sufficient number of graduates will establish themselves in the country of study. The French Community of Belgium had already tried a system with a general entry exam in the area of veterinary science and only a limited number of Belgian nationals qualified for the entry. Moreover, nearly one third of the veterinarians establishing themselves in France during that period had obtained their diploma in Belgium. The obvious reason behind this situation is that Belgian population is approximately six times smaller than that of the bordering France. The Austrian population is almost ten times smaller than Germany's, for that matter. It seems that it will always be the case that a small country will face an influx of candidates coming from a large neighbouring country in which the same language is spoken and which employs restrictive conditions of access to

188 *Commission v Austria* (n 118), Opinion of AG Jacobs, para 26.

189 Cambien (n 102) 86–87.

education.[190] However, there is no reason whatsoever to suggest that these foreign students will be willing to remain in the country where they completed their studies after graduation.

In light of the Court's case law, the costs of having a free, open access higher education system may simply turn out to be too high for some countries. If a government decides that it does not want to limit the number of study places, it is left with a limited set of options. On the one hand, it may accept that the quality of education it provides will inevitably go down. In order to avoid this outcome, it may be forced to give financial injections to its education system, whilst bearing the consequences this decision may have on the sustainability of the public financing of education.[191] Both of these options entail sacrifices in the pursuit of a desired education policy, which seems to sit uncomfortably with the EU's commitment to respect Member States' autonomy in the field of education.

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190 Cambien (n 102) 86–87, referring to the judgment of Belgian Constitutional Court.

191 Van der Mei (n 103) 124.

3 Collective Labour Law

(a) *EU Legal Framework for Collective Labour Law*

(i) The development of EU social policy

The underlying logic of the Treaty of Rome was that a well-functioning market would bring about social progress and improve working conditions. Accordingly, the only area of social policy where EU was granted competence to enact binding legislation was the free movement of workers.[192] As regards other matters of social policy, such as employment, social security and collective labour law, the Commission was charged with the task of 'promoting close co-operation' between Member States.[193] In theory, Art. 100 EEC (now Art. 115 TFEU) was available to be used as a legal basis for harmonising Member States' labour laws in as much as the measures adopted at EU-level would 'have a direct incidence on the establishment or functioning of the Common Market'. However, this provision required a unanimous vote in the Council, which made the adoption of any kind of politically sensitive legislation unlikely.[194]

Subsequent Treaty amendments have gradually brought various aspects of social policy within the purview of EU institutions. For instance, the Single European Act introduced a new legal basis for the adoption of legislation by qualified majority voting in the area of health and safety at work.[195] The Community Social Charter, adopted in 1989, recognised rights for workers in areas such as working conditions,

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192 Treaty establishing the European Economic Community (adopted 25 March 1957, entered into force 1 January 1958) (EEC), arts 49, 51. The development of EU social policy is discussed in more detail in ch V, s 4.

193 EEC, art 118.

194 But there were some such measures, eg Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L61/26.

195 EEC, art 118a.

employee involvement and health and safety.[196] However, the Charter was not legally binding. It was not until the Treaty of Maastricht that the EU's powers in relation to social policy were considerably expanded. Eleven Member States, excluding the UK, signed an Agreement on Social Policy, which was annexed to the Treaty of Maastricht, that gave a constitutional recognition to the social partners and institutionalised their role in the Community's legislative process, previously having been reserved exclusively to EC institutions. At the same time, Community competences in employment and industrial relations were extended, allowing for qualified majority voting with respect to some of the new competences, including, inter alia, working conditions and information and consultation of workers.[197] In 1997, after the newly elected UK Labour Government decided to terminate what was loosely called the UK's 'opt-out' from the Social Policy Agreement, the Agreement was incorporated into a revised Social Chapter of the Treaty of Amsterdam. There have not been any major changes introduced into the Social Chapter since then.

(ii) Treaty framework for collective labour law

The EU's competences with regard to collective aspects of labour law remain limited. Art. 153(1)(f) states that the EU shall 'support and complement' the activities of the Member States in the representation and collective defence of the interests of workers and employers. This provision is subject to paragraph (5) of the same article, which expressly excludes the right to strike and the right of association from EU-level harmonisation. The right to collective bargaining is not explicitly listed among the

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196 Community Charter of Fundamental Social Rights of Workers (adopted 9 December 1989).

197 Protocol on Social Policy to Treaty of Maastricht on European Union [1992] OJ C191/91, Agreement on Social Policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland, art 3.

exclusions, but at the same time the Treaty provides no clear legislative basis for it.[198] In fact, Art. 156 TFEU suggests that collective bargaining is not subject to binding legislation, as it stipulates that the Commission shall 'encourage cooperation' between the Member States and 'facilitate the coordination of their action' in matters relating to, inter alia, the right of association and collective bargaining between employers and workers. Besides, collective bargaining may well fall under the 'right of association', which, together with the right to strike, is excluded from harmonisation by Art. 153(5). It is noteworthy that the possibility remains to adopt EU-level legislation on collective labour rights through the process of Social Dialogue.[199] However, the likelihood of such legislation is small, given the lack of incentives for the social partners to establish a common EU standard on collective labour rights.[200]

(b) *Collective Labour Rights in the Case Law of the CJEU*

Collective labour rights mainly come within the purview of EU law through the case law of the CJEU as potential restrictions on the free movement of businesses wishing to establish or provide services across national borders. The landmark judgments in which the Court defined the relationship between collective labour rights and EU economic freedoms are *Viking*[201] and *Laval.*[202] The principles formulated in *Viking* and *Laval*

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198 B Ryan, 'The Charter and Collective Labour Law' in TK Hervey and J Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights – a Legal Perspective* (Hart Publishing 2003) 67–68, 84–85; ACL Davies, 'Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States?' in P Alston (ed), *Labour Rights as Human Rights* (OUP 2005) 193–195 (Davies, 'Minimum Standards for Collective Labour Rights').

199 TFEU, art 155.

200 Davies, 'Minimum Standards for Collective Labour Rights' (n 198) 196, 206–207.

201 Case C–438/05 *Viking Line* [2007] ECR I–10779 (*Viking*).

202 Case C–341/05 *Laval* [2007] ECR I–11767 (*Laval*).

were further elaborated in the *Rüffert*,[203] *Commission v Luxembourg*[204] and *Commission v Germany*[205] cases and ultimately extended to legal situations concerning, more generally, conflicts between commercial interests and those of worker protection.[206] The following analyses this line of case law with the view to determining its implications for the level of worker protection in the EU and for the autonomy of the industrial relations systems of the Member States.

(i) The scope of the right to strike: *Viking* and *Laval*

Viking

Viking concerned an industrial action aimed at preventing a ferry operating company from taking advantage of a 'flag of convenience'. Viking was a Finnish company that ran ferry services between Finland and Estonia. The dispute arose when Viking sought to reflag its ship Rosella under the Estonian flag, arguably, in order to undercut the minimum wage requirement set out in the collective agreement with the Finnish Seamen's Union (FSU). Following Viking's notice about the reflagging, the FSU and the International Transport Workers' Federation (ITF) organised an industrial action, with reference to the latter's policy against 'flags of convenience'. As part of the action, the FSU announced its intention to strike, demanding that Viking would continue to comply with Finnish employment law. In the meantime, the seamen's trade union in Estonia, which was a member of the ITF, agreed not to enter into negotiations with Viking. Viking brought an action against the ITF and FSU, claiming that its

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203 Case C–346/06 *Rüffert* [2008] ECR I–1989 (*Rüffert*).

204 Case C–319/06 *Commission v Luxembourg* [2008] ECR I–4323 (*Commission v Luxembourg*).

205 Case C–271/08 *Commission v Germany* [2010] ECR I–7091 (*Commission v Germany*).

206 See Case C–515/08 *Santos Palhota and Others* [2010] ECR I–09133 (*Santos Palhota*); Case C–426/11 *Alemo-Herron and Others* (CJEU, 18 July 2013) (*Alemo-Herron*).

freedom of establishment under Art. 43 EC (now Art. 49 TFEU) had been infringed. The case was referred to the CJEU for a preliminary ruling.

The first question that the CJEU had to address was whether collective action fell within the scope of EU law. Trade unions as well as a number of intervening governments submitted that, by analogy to the CJEU's reasoning in *Albany,*[207] the right to collective bargaining and the right to strike should be excluded from the application of then Arts. 43 and 49 EC. In *Albany*, the CJEU had held that restrictions of competition were 'inherent' in collective agreements concluded between management and labour. For that reason, collective agreements had to be regarded as falling outside the scope of Art. 81 EC (now Art. 101 TFEU), since otherwise social policy objectives pursued by such agreements would be seriously undermined.[208] Trade unions argued that the same logic applied to the relationship between collective agreements and the free movement rules, but the Court disagreed. It held that, unlike in the relationship between collective bargaining and competition law, it was 'not inherent in the very exercise of trade union rights and the right to take collective action' that the fundamental freedoms would be prejudiced.[209]

The Danish and Swedish governments suggested that the right to strike should be exempted from the scope of free movement law by virtue of being a fundamental right. The Court accepted that fundamental rights, being an integral part of the general principles of Community law, constituted a legitimate interest which could justify a derogation from the free movement rules; however, that did not remove them from the ambit of EU law.[210] Fundamental rights had to be exercised within the limits of EU law

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207 Case C–67/96 *Albany* [1999] ECR I–5751 (*Albany*).

208 ibid, paras 59–60.

209 *Viking* (n 201), para 52.

210 ibid, paras 45–46, with further references to Case C–112/00 *Schmidberger* [2003] ECR I–5659, para 74

and in accordance with the principle of proportionality. This conclusion was reaffirmed by Art. 28 of the Charter, which required that the right to collective bargaining and the right to strike be exercised 'in accordance with Community law and national laws and practices'.[211]

Referring to its previous case law, the Court noted that Arts. 43 and 49 EC applied not only to the actions of public authorities, but to 'rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services'.[212] Therefore, a strike action aimed at concluding a collective agreement, which constituted a means of collective regulation, fell within the scope of Art. 43.[213] This conclusion was not altered by the fact that the EU had no competence to regulate the right of association and the right to strike, because Member States remained under an obligation to comply with Community law even in the areas which fell outside its scope of competence.[214] Moreover, Art. 43 could be invoked directly against trade unions, even though their actions were covered by the legal autonomy that they enjoyed as private law entities. In this connection, the Court explained that the effectiveness of the fundamental freedoms would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of legal autonomy by organisations not governed by public law.[215]

The Court held that trade unions' exercise of their right to strike constituted a

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(*Schmidberger*) and Case C–36/02 *Omega Spielhallen* [2004] ECR I–9609, para 35 (*Omega*).

211 *Viking* (n 201), paras 43–44, affd in *Laval* (n 202), para 91.

212 *Viking*, para 33, with further references to Case C–36/74 *Walrave and Koch* [1974] ECR 1405, para 17 (*Walrave and Koch*); Case C–415/93 *Bosman and Others* [1995] ECR I–4921, para 82 (*Bosman*); Case C–281/98 *Angonese* [2000] ECR I–4139, para 31 (*Angonese*), et al.

213 *Viking*, paras 35–37.

214 ibid, para 40, with further references to, inter alia, *Decker* (n 13), paras 22–23; *Kohll* (n 14), paras 18–19.

215 *Viking*, paras 57–61, with further references to *Walrave and Koch* (n 212), para 18; *Bosman* (n 212), para 83; *Angonese* (n 212), para 32, et al.

restriction on Viking's freedom of establishment because it was liable to make 'less attractive, or even pointless', for Viking to reflag its ship.[216] Before turning to consider whether the strike action in question could be justified, the Court made some important general observations about the nature of (then) Community law. It pointed out that the activities of the Community included not only an internal market, but also 'a policy in the social sphere', aimed at, inter alia, 'a high level of employment and of social protection'.[217] Since the Community thus had not only an economic but also a social purpose, EC fundamental freedoms had to be 'balanced against the objectives pursued by social policy', which included, inter alia, improved living and working conditions, proper social protection and dialogue between management and labour.[218]

The Court accepted that 'the right to take collective action for the protection of workers' was a legitimate interest, which in principle justified a restriction on Art. 43, and that the protection of workers was one of the overriding reasons of public interest, yet only when invoked in the circumstances where jobs or conditions of employment were 'jeopardised or under serious threat'.[219] It was unclear whether this was the case in the situation at hand, because in the course of conciliation proceedings Viking had given an undertaking that the reflagging would not involve any redundancies.[220] As regards the proportionality of strike action, the national court had to decide whether the FSU had less restrictive means at its disposal in order to bring negotiations with Viking to a successful conclusion and whether it had exhausted those means before initiating

216 *Viking* (n 201), paras 72–73.

217 ibid, para 78, citing EC, arts 2, 3(1) (now TEU, art 3(3)).

218 ibid, para 79.

219 ibid, para 77.

220 ibid, paras 82–83.

strike action.[221] The Court made it clear that the 'flags of convenience' policy alone, without evidence of a serious threat to working conditions, was insufficient to justify a restriction on Art. 43.[222]

The *Viking* judgment laid down the core principles governing the status of the right to strike in EU law. On the one hand, the Court recognised, for the first time in its case law, that the right to strike is protected as a fundamental right forming part of the general principles of EU law. Yet the exercise of that right in the context of the internal market was made subject to a test of proportionality that sets a very high threshold to justify taking of collective action. Strike action will be unlawful unless two conditions are met: one, it is aimed at protecting the terms and conditions of employment which are under serious jeopardy; two, it is taken after all the less extreme means to persuade the employer have been exhausted.

Laval

The Court's judgment in *Laval* was delivered a week after the *Viking* judgment. The case concerned a collective action aimed at obliging a Latvian construction company to sign a Swedish collective agreement applicable to the building sector. Laval, a Latvian company with a subsidiary in Sweden, won a public tender to build a school there and posted workers from Latvia to perform the job. In accordance with Swedish laws, the company attempted to negotiate the working conditions of posted workers with the Swedish building workers' trade union. Negotiations fell through, and the company signed a collective agreement with a Latvian trade union instead. The wages paid to Latvian workers on the basis of the latter agreement were 40 percent lower than their Swedish equivalent. The Swedish trade union refused to accept the validity of that

221 *Viking* (n 201), paras 87–89.

222 ibid, paras 88–89.

agreement and took collective action in the form of blocking the construction site. This action was followed by several sympathy actions, boycotting all of Laval's sites in Sweden, which led to the eventual bankruptcy of the company's Swedish subsidiary. Laval sued the Swedish trade unions, alleging that its freedom to provide services in the EU had been violated. The case was referred to the CJEU for a preliminary ruling.

The Court started off by noting that Community law did not preclude territorial application of national legislation or collective agreements relating to minimum wages; however, the application of such rules had to be appropriate and necessary for attaining the objective of the protection of posted workers.[223] In that respect, collective action taken by the Swedish trade unions had to be assessed in light of the Posted Workers Directive, which governed the situation in question.[224]

The Court observed that the objective of the PWD was to coordinate national laws in order to lay down a 'nucleus of mandatory rules for minimum protection' to be observed in the host Member State by employers who posted workers there to perform temporary work.[225] Regardless of the law applicable to the employment relationship, undertakings had to guarantee posted workers the terms and conditions of employment covering the matters listed in Art. 3(1) PWD, such as maximum work periods, minimum paid annual holidays, minimum rates of pay, health and safety at work, and several others. The Court noted that this provision had a two-fold goal. On the one hand, it ensured fair competition between local and foreign undertakings by guaranteeing the minimum level of worker protection that they needed to observe; on the other hand, it allowed posted workers to benefit from more favourable terms and

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223 *Laval* (n 202), para 57.

224 Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1 (Posted Workers Directive).

225 *Laval*, para 59.

conditions of employment applicable in the host Member State, if that was the case.[226]

The PWD itself did not define the material content of the rules listed in Art. 3(1). It authorised Member States to apply their national rules as long as they were laid down in accordance with one of the means provided for in the Directive. Collective agreements that had been declared universally applicable were listed as one of such means.[227] A universally applicable collective agreement was defined as an agreement that had to be observed by all undertakings in the geographical area and in the profession or industry concerned.[228] If Member States did not have a system for declaring collective agreements universally applicable, they were allowed to base themselves on agreements which were 'generally applicable to all similar undertakings in the industry concerned' or those which had been concluded by the most representative employers' and labour organisations at national level and applied throughout the national territory.[229]

Swedish laws made no provision for the universal applicability of collective agreements, and, according to settled practice, the rates of pay in the building sector were normally set by means of collective negotiations on a case-by-case basis 'at the place of work, having regard to the qualifications and tasks of the employees concerned'.[230] The Court considered that this method of setting wages was unacceptable because it was not provided for by the PWD[231] and, moreover, could not be regarded as establishing the *minimum* rate of pay within the meaning of Art. 3(1)

226 *Laval* (n 202), paras 74–75, 76–77, 79.

227 Posted Workers Directive (n 224), art 3(1).

228 ibid, art 3(8).

229 *Laval*, para 65, referring to art 3(8) PWD.

230 ibid, para 69.

231 ibid, paras 68, 70–71.

PWD. Therefore, Swedish trade unions could not rely on the PWD in order to impose on foreign undertakings the obligation to negotiate wages on a case-by-case basis.[232] Consequently, strike action taken to force Laval to enter into such negotiations could not be justified on the basis of the Directive.

The Court then turned to assess whether collective action could nevertheless be justified under Art. 49 EC. It held that collective action aimed at forcing foreign undertakings to sign the collective agreement for the building sector was 'liable to make it less attractive, or more difficult,' for such undertakings to carry out construction work in Sweden, and therefore constituted a restriction on the freedom to provide services.[233] This restriction could in principle be justified by the objective of the protection of workers, but it was not in the circumstances of the case. The strike action in question could not be considered as appropriate or necessary due to the uncertainties that the Swedish system of wage determination presented to Laval. The system lacked provisions that would be 'sufficiently precise and accessible' and rendered it 'impossible or excessively difficult in practice' for Laval to determine its minimum pay obligations.[234] Consequently, collective action aimed at enforcing these obligations was unlawful.

The *Laval* judgment seems to have further narrowed down the scope of exercise of the right to strike in the context of the internal market and, in addition, defined the limits of collective bargaining in situations involving the posting of workers. Strike action taken by Swedish unions was held to be unlawful because it purported to enforce an unlawful collective agreement – an agreement that was not provided for under the

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232 *Laval* (n 202), paras 70–71.

233 ibid, para 99.

234 ibid, paras 107–110.

PWD and thus made it excessively difficult for Laval to determine its minimum pay obligations. This suggests that in order to be lawful in EU law, collective action has to be aimed at defending working conditions that are laid down in accordance with the terms of the PWD.

(ii) The scope of the right to collective bargaining: *Rüffert* and beyond

Rüffert

The *Rüffert* judgment was the first one after *Laval* to clarify the limits of collective bargaining in situations involving the posting of workers. The case concerned a German law that confined the right to contract for public works to undertakings committed to pay the wages laid down in a sectoral collective agreement. The law was aimed at counteracting the distortions of competition that could arise through the use of cheap labour. A German company won a tender with the Land of Lower Saxony concerning the construction work at a prison. The company subcontracted work to a Polish service provider, which paid Polish workers less than half of the minimum wage provided for in the collective agreement applicable to the construction sector. After learning this, public authorities annulled the contract and imposed financial penalties on the Polish subcontractor. As a result, the German contractor went bankrupt. The liquidator in the bankruptcy procedure alleged that the State legislation was incompatible with Art. 49 EC. The case was referred to the CJEU for a preliminary ruling.

The CJEU found that the obligation to abide by the minimum wage requirement laid down in the collective agreement constituted a restriction on the freedom to provide services within the meaning of Art. 49 because it imposed on the service providers established in Member States where minimum rates of pay were lower 'an additional economic burden' that was liable to prohibit, impede or render less attractive the provision of their services in the host Member State'.[235] Considering whether such minimum pay obligation was justified under the terms of the PWD, the Court followed the reasoning employed in *Laval*. The collective agreement in question did not constitute a universally or generally applicable collective agreement within the meaning of Art. 3(8) PWD because it covered a limited geographical area and applied only to public sector contracts, excluding the private sector.[236] Equally, it could not be justified on the basis of Art. 49, given the absence of evidence that would show that special protection was necessary for construction workers only when employed in connection with a public works contract but not private.[237]

Commission v Luxembourg

Commission v Luxembourg arose out of the infringement proceedings brought by the Commission against Luxembourg and concerned the interpretation of the public policy exception contained in Art. 3(10) PWD. Art. 3(10) allows the application to posted workers of the terms and conditions of employment on matters other than those listed in Art. 3(1) PWD provided that the terms and conditions in question constitute provisions of public policy (*ordre public*). Luxembourg law transposing the PWD defined public policy provisions as those meeting the imperative requirements of the public interest, which effectively meant that all of its national employment protections, including the obligation to observe collective agreements, were extended to posted workers. The Commission challenged Luxembourg's definition of public policy and

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235 *Rüffert* (n 203), para 37.

236 ibid, paras 26–29. See also Case C–115/14 *RegioPost* (CJEU, 17 November 2015), suggesting that the condition requiring universal application under art 3(8) PWD does not apply to statutory pay obligations.

237 *Rüffert*, paras 39–40.

further submitted that the obligations it imposed on foreign undertakings went beyond the nucleus of mandatory rules provided for by the PWD.

The Court noted that Member States were in principle free to determine the requirements of public policy. However, when relied on as justification for a derogation from the fundamental principle of the freedom to provide services, the notion of public policy had to be interpreted strictly, hence, its scope could not be determined unilaterally by each Member State.[238] In the context of Community law, public policy could be invoked only if there was a 'genuine and sufficiently serious threat to a fundamental interest of society'.[239] Moreover, this claim had to be substantiated by 'precise' evidence that would enable the Court to determine whether the measures taken by the government were necessary and proportionate.[240]

In light of these observations, the obligation that all undertakings had to abide by 'collective labour agreements', irrespective of whether they were universally or generally applicable, could not be regarded as falling within the scope of the public policy exception.[241] Moreover, the 'actual provisions of such collective agreements themselves' could not fall under the definition of public policy 'in their entirety and for the simple reason that they derive[d] from that type of measure'.[242] The phrase 'that type of measure' seems to have referred to a measure that had been adopted by a non-State entity. Accordingly, the Court concluded that Luxembourg failed to comply with its obligations under Art. 3(1) PWD, read in conjunction with Art. 3(10) PWD.

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238 *Commission v Luxembourg* (n 204), paras 30–31, 50.

239 ibid, para 50.

240 ibid, paras 51–53.

241 ibid, para 67.

242 ibid, para 66.

Commission v Germany

The judgment of the Grand Chamber in *Commission v Germany* is the latest in the line of cases concerning the relationship between economic freedoms and collective labour rights. The case arose out of infringement proceedings against Germany and concerned the practice of local authority employers to award contracts for pension services to bodies specified in collective agreements, without a call for tenders in accordance with EU Public Procurement Directives.[243] This practice was authorised by German legislation and had the objective of enhancing the level of retirement pensions. The Commission contended that such practice was incompatible with EU public procurement rules and Arts. 49 and 56 TFEU.

The Court was first asked to consider whether the involvement of the social partners in the award of contracts for pension services placed the issue outside the scope of EU public procurement rules, by analogy to *Albany*. The Court rejected this possibility. Citing *Viking*, it held that it was not inherent in the very exercise of collective bargaining that the rules which implement EU economic freedoms in the field of public procurement would be prejudiced.[244] Conversely, unlike the obligation to comply with competition rules, the obligation to designate pension providers consistently with EU free movement rules did not affect the essence of the right to bargain collectively or undermine the objectives pursued by the social partners.[245]

Accordingly, the right to collective bargaining had to be 'reconciled' with the requirements stemming from the PPDs and comply with the principle of

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243 Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts [1992] OJ L209/1; Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114, art 26, now replaced by Council Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

244 *Commission v Germany* (n 205), para 47, with a further reference to *Viking* (n 201), para 52.

245 ibid, para 49.

proportionality.[246] In the process of reconciliation, enhancement of the level of retirement pensions had to be *fairly* balanced against the freedom of businesses to pursue cross-border activities and the value of opening-up to EU-wide competition.[247] In this respect, the Court took the view that it was possible for Germany to accommodate its social policy objectives without 'completely, and for an indefinite period,' disregarding the framework of EU public procurement rules.[248] This suggests that Germany had failed to pursue its social policy objectives in a way that would be least restrictive on business freedoms.

The German government also argued that the practice of awarding pension contracts to designated bodies was necessary to preserve the principle of solidarity, as it ensured that the selected bodies would not engage in any form of selection of interested applicants based on medical criteria. The Court dismissed this argument as well. It held that the principle of solidarity was not 'inherently irreconcilable' with the application of a procurement procedure.[249] Local authority employers were not precluded from specifying in the call for tenders the conditions to be complied with by tenderers in order to prevent the selection of workers on the basis of medical grounds.[250]

The judgment thus effectively excluded the possibility that social partners operating in the public sector could on their own accord award service contracts for occupational pensions.

(iii) Other relevant developments: *Santos Palhota* and *Alemo-Herron*

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246 *Commission v Germany* (n 205), paras 43–44.

247 ibid, para 52, with a further reference to *Schmidberger* (n 210), paras 81–82.

248 ibid, paras 53–56.

249 ibid, para 58.

250 ibid, paras 57–58.

Santos Palhota

The judgment in the *Santos Palhota* case did not concern either collective bargaining or collective action, but it is nevertheless notable because it reaffirmed the Court's position regarding the relationship between domestic labour laws and the fundamental freedoms in situations involving posting of workers. The measure under challenge was a Belgian law that required companies posting workers to its territory to submit a prior declaration of posting, including, inter alia, information about the terms and conditions of employment applicable to posted workers.[251] The declaration was registered by the Belgian authorities and the notification of its registration was sent to the employer within five working days, thereby authorising the posting of workers.[252]

The Court held that the described authorisation procedure for posting of workers constituted a restriction on the freedom to provide services because it was capable of impeding the planned posting, in particular where the services to be provided necessitated a certain speed of action.[253] On the question of justification, the Court agreed with the Belgian government that sending a prior declaration of posting was a suitable means of communicating the necessary information to the national authorities.[254] However, the requirement of registration, by virtue of which the declaration in question assumed the nature of an administrative authorisation procedure, went beyond what was necessary in order to ensure the protection of posted workers.[255] In the Court's view, a prior declaration alone, without its subsequent registration and notification, was sufficient to enable the monitoring by the authorities

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251 *Santos Palhota* (n 206), para 10.

252 ibid, para 33.

253 ibid, paras 35–36.

254 ibid, para 51.

255 ibid, para 52.

of foreign employers' compliance with the national welfare and wages legislation during the posting.

The Court's reasoning seems to be consistent with by then firmly established judicial logic that domestic labour regulations can and should be designed in a way that would cause minimum interference with the exercise of the economic freedoms. *Santos Palhota* however deserves a particular mention for the Opinion of AG Cruz Villalón delivered in the case, suggesting that the Belgian measures were indeed compatible with Art. 56 TFEU.

The starting point in AG Villalón's Opinion was that the freedom to provide services had to be interpreted 'in the light of the social provisions' introduced by the Treaty of Lisbon.[256] Among the relevant provisions, Villalón highlighted Art. 9 TFEU, which constituted a 'cross-cutting' social protection clause obliging the EU 'to 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.'[257] Notably, Art. 9 TFEU was to be read as a more detailed expression of the EU's objective to strive for a *social* market economy, laid down in Art. 3(3) TEU. Villalón also made a reference to Art. 31 of the Charter, which provided 'a minimum framework for the protection of workers' by guaranteeing to every worker the right to the working conditions that respect his or her health, safety and dignity.[258]

AG Villalón suggested that these provisions of primary social law now informed the framework of the fundamental freedoms and therefore had to be taken

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256 *Santos Palhota* (n 206), Opinion of AG Cruz Villalón, para 51.

257 ibid.

258 ibid, para 52.

into account in the application of the proportionality review.[259] Accordingly, when national social interests that warranted protection under the Treaties, such as the protection of workers, were invoked as an overriding reason justifying derogation from the fundamental freedoms, they no longer had to be interpreted strictly.[260] The Court, however, was not tempted by this proposition.

Alemo-Herron

The Court's recent judgment in *Alemo-Herron* was not decided under the Treaty articles on the freedom of establishment or the provision of services. However, thematically it fits into the present discussion because it dealt with a conflict between the collective protection of workers, on the one hand, and commercial business interests, on the other. *Alemo-Herron* and other claimants were public sector employees of the Lewisham Borough Council. Their employment contracts did not stipulate the level of pay, but instead provided that it would be determined by collective agreements concluded and periodically renegotiated by the National Joint Council for Local Government Services (NJC), which was a collective bargaining body for local authority employers and trade unions. The NJC membership was not open to private sector undertakings.

The dispute arose when the Council decided to outsource some of its activities to the private sector, as a result of which its leisure department was transferred to a private undertaking. The new employer refused to comply with the collective agreement negotiated by the NJC after the transfer on the basis that it was not party to it. The situation was governed by the UK's Transfer of Undertakings (Protection of Employment) Regulations (TUPE), which had transposed the EU rules on the transfer

259 *Santos Palhota* (n 206), Opinion of AG Cruz Villalón, para 51.

260 ibid, para 53.

of undertakings. According to the TUPE Regulations, the transferee was subject to the same contractual obligations towards the employees as were owed by the previous employer. In the interpretation of the UK courts, those contractual obligations also included 'dynamic' clauses, referring to the terms negotiated externally (such as collective agreements) and *post*-transfer. On the preliminary reference from the UK Supreme Court, the CJEU was asked to determine whether this interpretation was compatible with EU law.

The matter was governed by Directive 2001/23 regulating employees' rights in the event of transfers of undertakings, known as the Acquired Rights Directive.[261] Art. 3 ARD stipulates that the rights and obligations of the transferor arising from a contract of employment or collective agreements will be transferred to the transferee.[262] In this connection, the CJEU observed that the purpose of the Directive was not just to protect the rights of the employees in the event of a transfer, but to seek a 'fair balance' between the interests of employees and transferee employers.[263] This balance required that the transferee be in a position allowing it 'to make adjustments and changes necessary to carry on its operations' after the transfer had taken place.[264] The Court held that clauses providing dynamic contractual rights were liable to undermine this balance because they were capable of limiting 'considerably' the transferee's room for manoeuvre necessary to make the relevant adjustments and changes.[265]

This conclusion was in the Court's view supported by the Charter, whose Art.

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261 Council Directive (EC) 23/2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16 (Acquired Rights Directive).

262 ibid, arts 3(1) and (3).

263 *Alemo-Herron* (n 206), para 25.

264 ibid, paras 25–27.

265 ibid, paras 28–29.

16 protected the freedom to conduct a business, including the freedom to enter into a contract. In situations of transfer of undertakings, this freedom required that the transferee were able 'to assert its interests effectively in a contractual process … and to negotiate the aspects determining changes in the working conditions of its employees'.[266] Without the opportunity to participate in the negotiations of the working conditions, the transferee's contractual freedom was 'seriously reduced to the point that such a limitation [was] liable to adversely affect the very essence of its freedom to conduct a business'.[267] As a result, Art. 3 ARD had to be interpreted as precluding the enforceability of dynamic clauses in cases where the transferees were not provided with the possibility to participate in the post-transfer negotiation processes.

The *Alemo-Herron* judgment attracted immediate criticism. It has been suggested that the Court misconstrued the very purpose of the ARD, which was designed as a worker-protective measure and, as such, should not presuppose an act of balancing between the interests of employers and employees.[268] This view is supported by the Preamble of the Directive, which stipulates that the Directive is the Community's legislative response to the new 'economic trends' that result in 'changes in the structure of undertakings', necessitating a regime which would safeguard the rights of employees in the event of a change of employer.[269] In line with this logic, Art. 8 ARD further states explicitly that that the Directive is a minimum harmonisation measure allowing Member States to apply rules and collective agreements that are

266 *Alemo-Herron* (n 206), paras 32–33.

267 ibid, paras 34–35.

268 J Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law: Case C–426/11 *Alemo-Herron and Others v Parkwood Leisure Ltd*' (2013) 42 ILJ 434 (Prassl). See also *Alemo-Herron*, Opinion of AG Cruz Villalón, para 20.

269 Acquired Rights Directive (n 261), recitals 2–3.

more favourable to employees.

The second line of criticism relates to the balancing exercise conducted by the Court. The Court seems duly to take into account the various needs and interests of the transferee, but fails to weigh those interests against the interests of the employees. Such an exercise would require an assessment of how favouring the former may affect the protection of the latter. Also, the Court's concern about the situation of the transferees seems to be exaggerated. As AG Villalón observes in his Opinion, in the English legal system, collective agreements have no legal effect as a matter of law and are only granted force by virtue of a reference to them in a contract. Therefore, there is nothing that would prevent the parties from renegotiating the contractual clause that refers to a collective agreement.[270]

Somewhat consistently with the rest of the judgment, the Court's reading of the Charter, too, seems to be biased towards the protection of business interests. It singles out the freedom to conduct a business protected under Art. 16 CFR while completely disregarding the Charter's 'Solidarity' chapter,[271] which in its entirety is dedicated to the protection of workers.[272] Also, by doing so, it elevates a commercial freedom to the level of a seemingly absolute fundamental right.[273] This interpretation of Art. 16 seems to depart from the Court's previous case law whereby the freedom to conduct a business can be subject to restrictions, provided that they do not prevent 'a business activity from being carried out as such'.[274] Arguably, the category of permissible

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270 *Alemo-Herron* (n 206), Opinion of AG Cruz Villalón, para 36.

271 EU Charter (n 6), title IV 'Solidarity'.

272 See, in particular, art 27 on the right of information and consultation and art 28 on the right to collective bargaining.

273 S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the Improper Veneration of "Freedom of Contract". Judgment of the Court of 18 July 2013: Case C–426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*' (2014) 10 ERCL 167, 177–180 (Weatherill, 'Charter').

274 Prassl (n 268) 442–443, referring to Case C–281/11 *Sky Österreich v Rundfunk* (CJEU, 22 January

restrictions must encompass restrictions stemming from the need to protect the weaker party in the employment relationship.[275]

(c) *The Regulatory Implications of the Case Law*

(i) Principles governing the relationship between collective labour law and the free movement rules

The case law of the CJEU seems to have established that there is a clear hierarchy between EU economic freedoms and national collective labour laws. The latter are viewed as barriers to the free movement, capable of dissuading businesses operating in the internal market from exercising their freedoms of establishment and provision of services and, in exceptional cases, also infringing on their fundamental rights protected under the Charter. Accordingly, in order to be lawful, the exercise of collective labour rights in a transnational context must be justified as appropriate and necessary in light of the objective of the protection of workers.

The exercise of the right to strike has to pass a rigid proportionality review involving three conditions. First, strike action must be invoked with the objective of securing employment conditions that are under serious jeopardy. Second, those employment conditions must be laid down in accordance with EU directives implementing EU free movement rules, where applicable. Third, the exercise of the right to strike must be necessary, which means that strike action must be taken as a last resort after other, possibly less restrictive means have been exhausted.

As regards the right to collective bargaining, its permissible scope is determined according to the terms of the PWD. This means that *sectoral* collective bargaining

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2013), para 49; Weatherill, 'Charter' (n 273) 177–180, discussing CJEU consumer case law.

275 Weatherill, 'Charter' 172.

cannot be used as a means for regulating the terms and conditions of employment in situations of cross-border provision of services. Member States are only allowed to use collective agreements – for laying down the nucleus of mandatory rules of protection on matters listed in Art. 3(1) PWD – that are universally or generally applicable within the meaning of Art. 3(8) PWD, that is, observed by all similar undertakings in the geographical area and in the profession or industry concerned or concluded by the most representative worker and employer organisations and applied throughout the territory.

The scope of application of collective agreements is also affected by the Court's interpretation of the public policy exception laid down in Art. 3(10) PWD. An obligation to observe collective agreements applicable in the territory of a Member State, as such, cannot qualify as a provision of public policy. Neither can the actual rules laid down in collective agreements, at least not in their entirety, according to the Court's reasoning in *Commission v Luxembourg*. It therefore remains to be seen whether Member States may select certain specific rules contained in collective agreements – especially in those that are universally or generally applicable – that would be accepted by the Court as provisions of public policy.

In the context of EU public procurement rules, as *Commission v Germany* seems to suggest, obligations stemming from collective agreements will be set aside unless public authorities can prove that collective agreements constitute the least restrictive means for implementing the social policy objectives pursued in a given situation. In practice, this rule seems to preclude governments from delegating to the social partners the task of awarding contracts for social insurance services.

(ii) The implications of the case law for national industrial relations systems

The Court's position concerning the lawfulness of national regulatory frameworks for worker protection in the context of the free movement is somewhat in line with its case law on cross-border healthcare and education. The Court recognises that, in principle, EU law does not preclude the territorial application of national legislation or collective agreements laying down the terms and conditions of employment. Member States are also free to define the conditions of the exercise of the right to collective bargaining and the right to strike.[276] However, in exercising these competences, Member States have to comply with EU free movement rules. It will be argued that the Court's interpretation of what this compliance entails in practice significantly narrows down the scope of application of domestic worker protection standards to posted workers and threatens to undermine the national systems of industrial relations, thus endangering the level of worker protection in the EU.

First of all, the proportionality review employed to assess the legality of strike action greatly weakens the position of trade unions *vis-à-vis* foreign employers. On the one hand, the CJEU acknowledges that the organisation of collective action by trade unions must be regarded as covered by their legal autonomy. Yet it seems significantly to restrict that autonomy by narrowing down the permissible objectives of strike action to one – securing employment conditions that are under serious jeopardy. Moreover, by placing the right to strike under 'the least restrictive means' test, the Court fails to take into account the fact that the point of collective action is precisely to act out of proportion, thus causing economic harm to the employer, in order to put pressure on them to enter into collective agreement on reasonable terms.[277] The threat of recourse to strike action is often the sole bargaining tool that workers have to offset the

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276 See *Viking* (n 201), para 40.

277 ACL Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 ILJ 126, 143; KD Ewing and J Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 ILJ 2, 13 (Ewing and Hendy).

imbalance of bargaining power inherent in the employment relationship.[278] In this context, the requirement that strike action be a necessary last resort seems to go against the nature of the right to strike and risks compromising the effectiveness of collective bargaining.

Also, this test creates a climate of legal uncertainty. Trade unions can no longer rely on national law to secure the legality of collective action, while EU law makes it conditional on a case-by-case assessment of necessity in relation to EU business freedoms, something that is extremely difficult to predict.[279] At the same time, due to the horizontal direct effect of Arts. 49 and 56 TFEU, employers are handed a strong incentive to sue or threaten to sue trade unions in courts with a promise of pecuniary compensation. For instance, in the *Laval* litigation, the Laval company was awarded approximately €55,000 in punitive damages. As a result, trade unions are dissuaded from taking collective action in the first place, given the risks involved, which impairs their bargaining power and inhibits their ability to protect workers' interests.[280]

Moreover, the Court seems to, by and large, rule out collective bargaining as a means of laying down the terms and conditions of employment. Collective agreements – with the narrow exception of those that are universally or generally applicable – seem to create too much uncertainty in the legal framework for transnational provision of services and, hence, make it excessively difficult for employers to determine the

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278 T Novitz and P Germanotta, 'Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action' (2002) 18 IJCLLIR 67, 68–69.

279 C Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action' (2012) 37 ELR 117, 120–121 (Barnard); P Syrpis and T Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation' (2008) 33 EL Rev 411, 418–419 (Syrpis and Novitz).

280 For a concrete example, see *BALPA* case: International Labour Conference (99th Session) Report III (Part 1A) of the Committee of Experts 208–209 (Geneva 24 February 2010) <http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282010-99-1A%29.pdf> accessed 21 November 2013; International Labour Conference (100th Session) Report III (Part 1A) of the Committee of Experts 187 (Geneva 16 June 2011) <http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282011-100-1A%29.pdf> accessed 21 November 2013. For a discussion of *BALPA*, see Ewing and Hendy (277) 37–40.

obligations with which they need to comply. These agreements cannot therefore be justified as lawful either under the terms of the PWD, or EU public procurement rules, or Art. 56 TFEU. This situation appears to be problematic in light of the objectives of the EU, which since Maastricht include the EU's commitment to promoting social dialogue grounded in respect for the autonomy of the social partners and diversity of national industrial relations systems.[281]

By interfering with trade union activity to the extent it does, the Court challenges the viability of European systems of industrial relations, particularly in those Member States that rely on autonomous collective bargaining in the implementation of national social policy, such as the Scandinavian countries.[282] In the Scandinavian model, trade unions in principle have the exclusive responsibility to safeguard high-average, flexible levels of wages and other employment conditions for all different categories of employees.[283] In the face of the Court's case law, governments must either modify their traditional methods of social regulation or accept the fact that labour standards set by trade unions will most likely be struck down by the CJEU. A number of governments have already followed the first route,[284] which in itself raises issues of

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281 TFEU, arts 151–152; EC, arts 136, 138.

282 C Joerges and F Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 ELJ 1 (Joerges and Rödl).

283 J Malmberg, 'The Impact of the ECJ Judgments in *Viking*, *Laval*, *Rüffert* and *Luxembourg* on the Practice of Collective Bargaining and the Effectiveness of Social Action' (2010) European Parliament Directorate General for Internal Policies, 7 ff <http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24274/20110718ATT24274EN.pdf> accessed 17 June 2017 (Malmberg).

284 J Malmberg and T Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' (2008) 45 CML Rev 1115 (Malmberg and Sigeman); A Bücker and W Warneck (eds), '*Viking – Laval – Rüffert*: Consequences and Policy Perspectives' (2010) ETUI Report 111; M Blauberger, 'With *Luxembourg* in Mind … The Remaking of National Policies in the Face of ECJ Jurisprudence' (2012) 19 JEPP 109, 114–124; K Fric 'Statutory Minimum Wages in the EU 2016' (*Eurofond*, 29 January 2016) <https://www.eurofound.europa.eu/sites/default/files/statutory_minimum_wages_in_the_eu_2016.pdf> accessed 26 April 2017, discussing the growing tendency to regulate minimum wages by statutory law.

constitutional legitimacy of the Court's practice, as shall be discussed in Chapter V, in light of the lack of competence on behalf of the EU to regulate collective labour law.

Finally, the Court's position seems to reinforce the idea that social dumping is an acceptable method by which businesses can compete in the European market. The case law suggests that working conditions of migrant workers will be governed by labour standards of the least regulated Member State relevant to the situation in question, unless higher standards are able to survive the high-threshold necessity review (save for the nucleus of rules for minimum levels of protection enshrined in the PWD).[285] This position encourages regulatory competition between governments, as well as wage competition among businesses and workers.[286] While encouraging wage competition may be a valid economic policy decision, the Court's asymmetrical position threatens to override the legitimate aim of Member States wishing to maintain their chosen level of worker protection, challenges the capacity of new Member States to build their own social models and risks creating a race to the bottom in labour standards in Europe.[287] Moreover, as will be discussed in subsequent chapters, the legitimacy of judicial decision-making is strained when such extremely political choices are embedded within adjudication.

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285 S Deakin, 'Regulatory Competition in Europe after *Laval*' (2008) University of Cambridge CBR Working Paper 364/2008, 18 <http://www.cbr.cam.ac.uk/pdf/WP364.pdf> accessed 21 November 2012 (Deakin); N Hös, 'The Principle of Proportionality in the *Viking* and *Laval* Cases: An Appropriate Standard of Judicial Review?' (2009) EUI Department of Law Working Paper 2009/06, 16, 19–20 <http://cadmus.eui.eu/bitstream/handle/1814/11259/LAW_2009_06.pdf> accessed 27 July 2013 (Hös).

286 Deakin (n 285) 14–15, 20–21; Malmberg and Sigeman (n 284) 1116.

287 '*Rüffert* case: ETUC Warns that ECJ's Judgment Is Destructive and Damaging' (*ETUC*, 3 April 2008) <http://www.etuc.org/a/4830> accessed 21 November 2013.

4 Gambling

(a) *EU Legal Framework for Gambling*

(i) National legal frameworks: why regulate?

The term gambling typically refers to activities that involve wagering a stake with monetary value on something involving chance, usually a game or event, with the purpose of increasing the initial stake. Gambling activities include games of chance, games of skill and betting on competitive sport and special events. The role played by the element of chance may differ significantly between the various forms of gambling. While in the games of chance, such as bingo, lottery or slot machines, success is random and depends predominantly on coincidence or an unknown future event, in sports betting and in the games of skill, which include most card games, the elements of strategy and skill – be it mental or physical – generally play a greater role than mere chance in determining the outcome.[288]

The gambling sector is different from many other sectors of the economy in that it is highly regulated and, hence, is subject to the market forces only to a limited extent. Gambling is generally seen as a morally controversial form of entertainment, which, if unregulated, also carries considerable social costs.[289] It is considered to be highly addictive – especially among minors, poorer segments of society and other vulnerable

288 'Study of Gambling Services in the Internal Market of the European Union' (Swiss Institute of Comparative Law 2006) 6 <http://ec.europa.eu/internal_market/gambling/docs/study1_en.pdf> accessed 20 January 2015 (Swiss Institute, Study of Gambling Services).

289 For an analysis of the concept of social costs in the context of gambling, see DM Walker and AH Barnett, 'Social Costs of Gambling: An Economic Perspective' (1999) 15 J Gambling Studies 181. See also HJ Wynne and HJ Shaffer, 'The Socioeconomic Impact of Gambling: The Whistler Symposium' (2003) 10 J Gambling Studies 111; MS Kearney, 'The Economic Winners and Losers of Legalized Gambling' (2005) 58 Nat'l Tax J 281 (Kearney).

groups[290] – and is often linked to various criminal activities and illicit operations, such as fraud, money laundering and clandestine gambling.[291] The social costs associated with gambling are believed to have become even greater with an increase of online gambling platforms,[292] which make the industry more accessible and attractive.[293] A prevalent regulatory response to these issues, at least in Europe, seems to limit gambling operators' access to the market, either partially – by awarding a certain number of licences and thus allowing limited competition in the sector[294] or entirely – by monopolising the sector.[295] Some countries have also chosen to ban gambling on the Internet or prohibit certain types of online games that are more difficult to monitor, such as poker and casino games.[296]

From a purely economic point of view, however, governments have an abnormal financial interest in the profitability of the gambling industry because it generates significant revenues, derived from tax and State operation of the games of

290 Commission Recommendation 2014/478/EU on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online [2014] OJ L214/38 (Commission, Recommendation 2014/478). See also EI Grinols, 'The Hidden Social Costs of Gambling' (Center for Christian Ethics at Baylor University 2011) <http://www.baylor.edu/content/services/document.php/144584.pdf> accessed 2 February 2015.

291 J Banks, *Online Gambling and Crime: Causes, Controls and Controversies* (Ashgate Publishing Limited 2014); 'Fighting against the Manipulation of Sports Competitions' (Université Paris 1, Panthéon Sorbonne and International Centre for Sport Security Report 2014) <http://sorbonne-icss.univ-paris1.fr/presse/> accessed 1 March 2015.

292 Kearney (n 289) 28.

293 For a comprehensive account, see J Banks, 'Online Gambling and Crime: a Sure Bet?' (2012) The Ethicomp J <http://shura.shu.ac.uk/6903/1/Banks_online_gambling.pdf > accessed 13 April 2017 (Banks).

294 Commission, 'Towards a comprehensive European framework on online gambling' (Communication) COM (2012) 596 final (Commission, Communication 596/2012); Swiss Institute, Study of Gambling Services (n 288); European Parliament, 'Online Gambling, Focusing on Integrity and a Code of Conduct for Gambling' (Study) 19–20 <http://www.europarl.europa.eu/document/activities/cont/200811/20081119ATT42611/20081119ATT42611EN.pdf> accessed on 15 January 2015 (EP Study on Gambling).

295 Swiss Institute, Study of Gambling Services (n 288), xv–xvi.

296 EP Study on Gambling (n 294).

chance.[297] According to the data provided by the European Commission,[298] annual revenues of the overall EU gambling market are estimated to be around €84.9 billion, with annual growth rates of around 3%. Online gambling represents one of the fastest growing service activities in the EU, with annual growth rates of almost 15% and approximately €13 billion in annual revenues in 2015, compared to €9.3 billion in 2011.

In light of the aforementioned facts, there exists a (more sceptical) view in the literature suggesting that governments' interest in regulating gambling stems not so much from a genuine concern about the harmful effects of gambling, but rather, or equally so, from the need to counteract public perceptions about those effects, in order to gain more widespread support for the industry among the general, non-gambling public.[299] This explanation seems plausible considering that the various scientific studies on gambling conducted thus far are lacking empirical data to support any conclusive claims about the scale of the negative social effects associated with it, which, admittedly, may often be hard to measure.[300]

Accordingly, one of the central aims of State controls imposed on gambling operators is to communicate to the public that the industry is controlled and socially responsible (in addition to being extremely profitable).[301] To that end, national laws

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297 P Collins, *Gambling and the Public Interest* (Praeger Publishers 2003) 66 (Collins).

298 European Commission, 'Gambling – Internal Market, Industry, Entrepreneurship and SMEs' <http://ec.europa.eu/growth/sectors/gambling_en> accessed 13 April 2017.

299 Collins (n 297) 66.

300 For a comprehensive overview of existing studies, see F Calado and MD Griffiths, 'Problem Gambling Worldwide: an Update and Systematic Review of Empirical Research (2000–2015)' (2016) 5 J Behavioral Addictions 592. See also M Griffiths, 'Crime and Gambling: a Brief Overview of Gambling Fraud on the Internet (2010)' Internet J Criminology <http://irep.ntu.ac.uk/id/eprint/23349/1/200840_7000%20Griffiths%20Publisher.pdf> accessed 1 April 2017.

301 Collins 66. See also S Planzer, *Empirical Views on European Gambling Law and Addiction* (Springer 2014) 73–81 (Planzer).

will expressly stipulate that their objective is to protect consumers and that the profits derived from gambling will be devoted to various social causes and public interest projects, such as sport, culture, social works, or charity.[302] As a matter of fact, however, it often remains unclear what fraction of the total profits actually goes to social causes, to what extent these social causes benefit the disadvantaged segments of society, and, more generally, whether the increase in public revenue compensates for the associated social costs.[303]

(ii) EU legal framework: subsidiarity-guided approach

National regulatory frameworks for gambling can be challenged under Arts. 49 and 56 TFEU for creating unlawful restrictions on the freedom of companies operating in the EU to provide gambling services on a temporary or permanent basis in other Member States. In addition, the EU may issue directives in order to achieve the liberalisation of the gambling sector on the basis of Art. 59 TFEU or use for that purpose the functionally broad Art. 114 TFEU, authorising harmonisation of national laws for achievement of the objectives of the internal market. Apart from the general services provision and the internal market legal basis, the Treaty contains no other provision that would detail or limit Union powers with respect to the regulation of gambling. Therefore, in contrast to the rest of the policy areas under study (healthcare, education and collective labour law), there exists no controversy in the Treaties as to whether the EU has competence to regulate.

Notwithstanding the unrestricted competence, gambling services are not subject

302 Planzer (n 301) 73–81; Swiss Institute, Study of Gambling Services (n 288), xiv.

303 Collins (n 297) 85–129, esp 124; Kearney (n 289); D Miedema, 'Government – Gambling's Biggest Addict. Profligate Spending Feeds Government Gambling Addiction' (*Institute of Marriage and Family Canada*, March 2012) <http://www.parl.gc.ca/Content/SEN/Committee/411/lcjc/PDF/Briefs/C290/IMFC-1-EN.pdf> accessed 20 October 2016.

to sector-specific legislation at EU level, and the Commission has not proposed any so far. Quite the contrary, gambling services have been explicitly excluded from the scope of the Services Directive, Consumer Rights Directive and the Directive on Electronic Commerce.[304] This seems to reflect the general lack of political will or consensus among the Member States to subject gambling services to EU-level regulation. A reason behind this might be the persisting diversity in the regulatory approaches adopted by the Member States, which, in turn, reflects the variety of attitudes of their respective populations towards the social and cultural acceptability of the gambling industry.[305] At the same time, however, it seems that EU-wide action in the field could be valuable, in particular in light of the challenges to national regulatory capacity posed by Internet gambling, which by definition crosses national borders.[306]

The European Parliament, however, has expressly rejected 'any European legislative act uniformly regulating the entire gambling sector' other than a coordinated European approach that would complement national regulation.[307] The reasons underlining the EP's position relate to the social and political sensitivity of the sector. First, gambling should be considered an economic activity of a special nature because of its (potential) negative health and social impacts.[308] Secondly, competition in the

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304 Council Directive 2006/123/EC on services in the internal market [2006] OJ L376/36, art 2(2); Council Directive 2000/31/EC on electronic commerce in the internal market [2000] OJ L178/1, art 1(5); Council Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64, art 3(3).

305 Commission, Communication 596/2012 (n 294), 2.1. For a comprehensive analysis on the issue of regulatory diversity, see J Hörnle, 'Social Policy and Regulatory Models' in J Hörnle and B Zammit, *Cross-Border Online Gambling Law and Policy* (Edward Elgar Publishing 2010) 10–30.

306 A Nair 'Online Gambling: Gambling with Regulation' (2012) 3 EJLT <http://ejlt.org/article/view/165/265#_edn8> accessed 19 June 2017.

307 European Parliament, 'Resolution on online gambling in the internal market' 2011/2084(INI) (EP Resolution 2084/2011), para 11.

308 European Parliament, Committee on the Internal Market and Consumer Protection, 'Motion for a European Parliament Resolution on the integrity of online gambling' 2008/2215(INI), para 2 (Motion on Integrity of Gambling); EP Resolution 2084/2011 (n 307), recital 12; European Parliament, 'Resolution

gambling sector does not lead to a better allocation of resources, therefore, a pure internal market approach is not appropriate.[309] Thirdly, given the differences in national traditions and cultures among the Member States, any regulation of the gambling sector is subject to, and must be underpinned by, the principle of subsidiarity.[310] The above reasons seem to reiterate, to a greater or lesser extent, the position taken by the CJEU in its case law on gambling, discussed below.

Against the apparent resistance on behalf of the political actors to harmonise the sector, the initiatives taken by the Commission have been limited to incentive measures, which focus on cooperation among national regulatory authorities and the sharing of good practices for tackling common problems, identified as consumer protection, prevention of fraud and money laundering and preservation of the integrity of sports.[311] In the absence of binding measures at the EU level, national gambling laws thus come within the purview of EU law mainly through the case law of the CJEU, just like healthcare, education and collective labour law.

Judicial challenges typically arise from situations where Member States refuse, directly or indirectly, to allow foreign gambling operators to enter their markets and/or impose penalties for unauthorised gambling activities. The remainder of this section analyses this case law in order to, ultimately, determine its implications for national regulatory autonomy in the gambling sector.

(b) *Gambling in the Case Law of the CJEU*

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on online gambling in the internal market' 2012/2322(INI), preamble.

309 Motion on Integrity of Gambling (n 308), recital 2.

310 EP Resolution 2084/2011 (n 307), recital 7; Committee on the Internal Market and Consumer Protection, 'Motion on online gambling in the Internal Market' 2011/2084(INI); EP Resolution 2322/2012 (n 308), recital 29.

311 Commission, Communication 596/2012 (n 294); Commission, Recommendation 2014/478 (n 290).

(i) *Schindler, Läärä, Zenatti* – in support of regulatory discretion

Schindler

Decided in 1994, *Schindler*[312] was the first case involving gambling that came before the CJEU. It concerned a prohibition on the operation of large-scale lotteries laid down in the British legislation. Mr. Schindler was an independent lottery agent who was not permitted to market in the UK a lottery organised in Germany. He challenged the UK rules before national courts, which referred questions of EU law to the CJEU.

The first question that the CJEU had to consider was whether lotteries fell within the scope of the Treaty, namely whether the provision of lottery services was an economic activity within the meaning of Art. 60 EC (now Art. 57 TFEU). The governments which submitted observations noted that, due to their morally controversial nature, lotteries were either prohibited or subject to 'particularly strict regulation and close control by the public authorities' and were operated solely in the public interest.[313] The Court found that this was not sufficient to exclude lotteries from the scope of EU law. Even if the morality of lotteries was questionable, they were not comparable to activities involving illegal products, whose harmful nature would entail a complete prohibition under (then) Community law.[314] Lotteries were 'commonplace' and practised legally in a number of Member States, and it was not for the Court to substitute its assessment for that of the legislatures and declare otherwise.[315] Two factors seem to have been decisive for lotteries to qualify as economic activities within the meaning of EU law: first, the fact that the player pays consideration hoping to

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312 Case C–275/92 *Schindler* [1994] ECR I–1039 (*Schindler*).

313 *Schindler* (n 312), para 31.

314 ibid, para 32.

315 ibid, paras 31–32. See also, on this point, Case C–159/90 *Grogan and Others* [1991] ECR I–4685, paras 19–21, holding that medical termination of pregnancy is a service regardless of its questionable morality.

receive a prize or winning in return and, second, that lotteries are operated with a view to profit, as not all the money staked is redistributed as prizes or winnings.[316] Neither the element of chance inherent in a lottery transaction, nor the recreational aspect of lotteries, nor the use of profits thereof in the public interest alter the nature of the transaction itself or deprive it of its economic character.[317]

Having established that lotteries fell within the scope of the Treaty, the Court went on to hold, not unexpectedly, that the British prohibition on the operation of lotteries posed an obstacle to the free movement, as it was liable to impede the activities of foreign service providers.[318] The UK argued that the legislation in question was justified by a number of social policy and public order concerns, namely: consumer protection, prevention of crime, protection of public morality, restriction of demand for gambling, and the financing of public interest activities.[319] The Court held that these considerations should be viewed together, as they all related to the protection of consumers and the maintenance of order in society – both being objectives capable of justifying restrictive measures.[320]

The Commission argued that the objectives in question could have been achieved by less restrictive means, such as a multi-licence system with strict conditions and supervision. The Court rejected this argument. It held that the choice between alternative systems of regulation fell within the discretion of the Member States. In this respect, due regard was to be had to the moral, religious and cultural aspects of lotteries, as well as other types of gambling. The Court observed that lotteries involved

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316 *Schindler* (n 312), paras 33–35.

317 ibid, paras 34–35.

318 ibid, para 43.

319 ibid, paras 46, 54, 57.

320 ibid, para 58.

a high risk of crime or fraud, particularly when they were operated on a large scale. They also were an incitement to spend, which could have damaging individual and social consequences. Finally, although this could not in itself be regarded as an objective justification for restrictive measures, lotteries made a significant contribution to the financing of public interest activities, such as social works, charitable works, sport, or culture. All of the above reasons seemed to justify the general tendency to restrict, or even prohibit, the practice of gambling, thus preventing it from being a source of private profit.[321]

The specific nature of lotteries required that national authorities have a 'sufficient degree of latitude' to determine what was necessary to protect the players and maintain order in society in the context of the particular social and cultural features of each Member State.[322] Accordingly, Member States were entitled to choose the manner in which lotteries were operated, decide on the size of the stakes and the allocation of the profits yielded.[323] As a result, even a complete prohibition of a certain form of lottery was to be considered as a proportionate restriction on a fundamental freedom.

Läärä and *Zenatti*

In *Läärä*,[324] the Court was asked to pronounce on the legality of establishing monopolies in the gambling sector. The case concerned the Finnish licensing system whereby only one licence at a time could be issued to cover certain games of chance and only for the purpose of collecting funds for charity or other non-profit purposes

321 *Schindler* (n 312), para 60.

322 ibid, paras 59–61.

323 ibid, para 61.

324 C–124/97 *Läärä & Others* [1999] ECR I–6067, paras 17–18 (*Läärä*).

provided for by law. The exclusive licence to operate slot machines was granted to a public enterprise. Mr. Läärä was the head of a company that operated slot machines without a licence, who, as a result of unauthorised activities, was facing criminal charges.

Zenatti,[325] decided a month after *Läärä*, concerned the Italian licensing system. Italian legislation generally prohibited the taking of bets, but, by way of exception, allowed betting to be licensed where it was essential for the proper conduct of competitive events. Two organisations were granted special rights to take sports bets, and the profits thereof were invested in the promotion of sporting activities. Mr. Zenatti was an intermediary for a British sports betting company who ran an information exchange for the Italian customers in relation to bets on foreign sports events. The dispute arose when Zenatti was ordered by the local authorities to cease his activities. He appealed the decision before an administrative court, which referred the matter to the CJEU for a preliminary ruling. The Court was asked to assess the compatibility of the said legislation with Art. 49 EC. Since the Court's reasoning in *Zenatti* was almost identical to that employed in *Läärä*, the two judgments will be analysed together.

The list of public interest objectives advanced by governments in *Läärä* and *Zenatti* included the prevention of gambling from being a source of private profit, the avoidance of risks of crime and fraud and protection against the damaging individual and social consequences of the incitement to spend. As in *Schindler*, the CJEU considered all of the objectives together as generally relating to the protection of consumers and the maintenance of order in society. In both cases, national monopolies were found to be justified.

Following the reasoning adopted in *Schindler*, the Court held that it was in the

325 Case C–67/98 *Diego Zenatti* [1999] ECR I–7289, paras 24–25 (*Zenatti*).

discretion of the national authorities to assess whether it was necessary to prohibit certain gambling practices, totally or partially, or merely to restrict them and lay down procedures for controlling them.[326] The fact that a Member State has chosen a system of protection different from those adopted by other Member States could not affect the assessment of the need for and proportionality of the system.[327] Accordingly, national rules had to be assessed solely by reference to the objectives pursued by the Member State concerned and the degree of protection which it sought to ensure.[328]

In *Zenatti*, the Court expressly instructed the national court that judicial review should focus on the appropriateness, or suitability, of national measures. The task for the national court was to verify that the measures in question reflected 'a concern to bring about a genuine diminution in gambling opportunities'.[329] In this respect, the Court noted that the system of exclusive rights was to be considered as an appropriate means to regulate gambling because it had the advantage of confining gambling activities and the desire to gamble within controlled channels, thus preventing the risk of fraud or crime and ensuring that resulting profits would be used for public-interest purposes.[330]

In *Läärä*, the defendant argued that, given the modest size of the stakes and prizes in slot machines, in contrast to large-scale lotteries, the stated public interest objectives could have been achieved as effectively by 'less restrictive' means, such as by imposing the necessary code of conduct on operators or by taxing their activities.[331]

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326 *Läärä* (n 324), para 35; *Zenatti* (n 325), para 33.

327 *Läärä*, para 58; *Zenatti*, para 34.

328 *Läärä*, para 36; *Zenatti*, para 34.

329 *Zenatti*, para 36.

330 *Läärä*, para 37; *Zenatti*, para 35.

331 *Läärä*, paras 11, 39–41.

The Court rejected this proposition. It held that, in light of the risk of crime and fraud, the grant of exclusive rights to a single public body and the obligation imposed on it to pay over the proceeds of its operations was 'certainly more effective in ensuring that strict limits [we]re set to the lucrative nature of such activities'.[332]

Läärä and *Zenatti* made clear that the Court's reasoning in *Schindler* as regards the regulation of lotteries was equally applicable to other forms of gambling, such as slot machines and sports betting. The Court thus expressly recognised that Member States were entitled to a broad margin of discretion when regulating their gaming and betting markets. Accordingly, as long as national measures were 'genuinely' directed at realising public interest objectives, they were lawful regardless of their degree of restrictiveness.

(ii) *Gambelli* and *Placanica* – a change of course?

Gambelli

The *Gambelli* case[333] concerned the Italian legislation on betting on sporting events, already examined to an extent in *Zenatti*. The question at issue was the lawfulness of the new amendments made to the said legislation, instituting criminal penalties of up to one-year imprisonment for unauthorised collection or assistance in collecting of bets. In addition, it was argued that the legislation was incompatible with the freedom of establishment (a question which had not been raised in *Zenatti*) because the conditions for submitting tenders for the award of the required licences excluded companies whose individual shareholders could not be always identified at any given moment (i.e.

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332 *Läärä* (n 324), para 41.

333 Case C–243/01 *Gambelli and Others* [2003] ECR I–13031 (*Gambelli*).

listed companies) and required applicants to own premises in Italy.[334] These requirements were supposed to ensure the transparency of the share ownership for the purposes of crime prevention. Supposedly, only one enterprise complied with the said conditions and was thus granted an exclusive licence to organise sports betting in Italy.

Mr. Gambelli and other agents had been acting as intermediaries for a British betting company, Stanley, by assisting in collecting bets through a data transmission centre. This data transmission centre had been established lawfully, since the original version of the Italian legislation did not expressly restrict the collection of bets on foreign sporting events, leading to a development of a network of operators acting as intermediaries for foreign betting companies. Criminal proceedings were brought against Gambelli and 147 other defendants for unlicensed practices. The national court referred the case to the CJEU, expressing doubts regarding, in particular, the compatibility of the Italian measures with the principle of proportionality.[335]

The Court found that the Italian licensing system constituted a restriction on the freedom of establishment because it made it impossible for companies quoted on the stock markets of other Member States to obtain licences.[336] Also, by placing prohibitions on the actions of Italian intermediaries, it also restricted foreign bookmakers' freedom to provide services as well as Italian customers' freedom to receive those services.[337]

The public interest objectives advanced by the Italian government included the protection of players against the risk of fraud, reduction in gaming opportunities and the preservation of public order. The defendants argued that national measures were not

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334 *Gambelli* (n 333), para 27.

335 ibid, paras 21–22.

336 ibid, paras 46, 48.

337 ibid, paras 55–58.

genuinely aimed at addressing the concerns advanced by the government because Italy was not pursuing a consistent policy of limiting gaming activities. In fact, it was increasing the range of betting and gaming available and inciting people to engage in such activities by facilitating the collection of bets, in order to increase tax revenue.[338] AG Alber, who delivered an Opinion in the case, agreed with the defendants that, in light of Italy's policy to liberalise its gaming market, the restrictions in question indeed could not be justified and, moreover, the conditions for the award of licences were to be considered as discriminatory against foreign bookmakers.[339]

The Court took a more moderate position. It observed that while the restrictions arising from the Italian licensing system could be justified on the grounds of consumer protection and the need to preserve public order, they had to 'be suitable for achieving those objectives, inasmuch as they [had to] serve to limit betting activities in a consistent and systematic manner'.[340] Consequently, if a Member State incited and encouraged consumers to participate in gaming and betting to the financial benefit of the public purse, it could not invoke the need to reduce opportunities for betting as one of the justifications for restrictive measures.[341]

Since the measures in question involved severe penalties, the Court turned to assess whether they did not go beyond what was necessary in light of the objectives pursued by the government. The Court decided that the necessity requirement was not met. Three factors were taken into account in this respect: the severity of the penalties attached to the prohibition on the collection of bets (up to a year's imprisonment); the fact that the intermediaries had been lawfully constituted before the legislative

338 *Gambelli* (n 333), para 26.

339 *Gambelli*, Opinion of AG Alber, paras 94–96.

340 *Gambelli*, para 67.

341 ibid, para 69.

amendments were enacted and reasonably had considered that they were permitted to transmit bets on foreign sporting events; and that the foreign service provider in question, Stanley, was already subject to controls and penalties in the UK, where it was established.[342]

As regards the proportionality of the conditions for the award of licences, the Court made it clear that they went beyond what was necessary to combat fraud because they prevented capital companies quoted on regulated markets of other Member States from obtaining licences, whilst there were other means of checking the accounts and activities of such companies.[343] Moreover, these conditions would be considered discriminatory if it were shown that in practice they could be met more easily by Italian operators than by the foreign ones.[344]

On the face of it, *Gambelli* seems to have narrowed down the margin of discretion accorded to national authorities by previous judgments. It did so, first, by elaborating on the content of the test applied in *Zenatti* regarding the suitability of national measures. In order to be deemed suitable, restrictions must serve to limit betting activities in a consistent and systematic manner. Therefore, where a Member State pursues an expansionist gaming and betting policy, it cannot be considered genuinely to have the concern of reducing opportunities for gambling. Second, the Court seems strongly to have suggested that a rigid licensing system, especially if accompanied by criminal penalties, would be considered as a disproportionate means to combat crime and fraud.

While admittedly more principled than the previous decisions, the Court's

342 *Gambelli* (n 333), para 73.

343 ibid, para 74.

344 ibid, para 71.

reasoning in *Gambelli* might have been influenced by the particular context of the case: its extreme factual circumstances, namely the *de facto* discriminatory character of the measures, which were also accompanied by criminal sanctions; the arguments of the defendants exposing the hypocrisy of the regulatory system; the Opinion of AG Alber suggesting that the legislation was indeed discriminatory and disproportionate; and, finally, the position of the national court, which expressed specific doubts about the proportionality of the Italian policy. In light of the foregoing, the Court's ruling appears to be an expected outcome.

Notwithstanding the *Gambelli* ruling, the Italian Supreme Court ultimately decided that the Italian measures were non-discriminatory and otherwise compatible with EU law, possibly (albeit not officially) because the Italian government had in the meantime removed the provisions barring listed companies' access to the Italian market. The remaining aspects of the regulatory regime were deemed to be justified in light of the objectives of public order, as they contributed to channelling gambling into controllable systems, thus preventing its exploitation for criminal purposes.[345]

Placanica

The *Placanica* judgment followed several years after *Gambelli* and arose, once again, out of criminal proceedings against some of Stanley's intermediaries for operating without a licence.[13] The referring court expressed doubts as to the soundness of the judgment of the Italian Supreme Court in *Gambelli* and asked the CJEU specifically whether the Italian licensing system could be justified by the need to channel the games of chance into controllable systems.

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345 See Joined Cases C–338/04, C–359/04 and C–360/04 *Placanica and Others* [2007] ECR I–1891, paras 16–17 (*Placanica*); Corte di Cassazione, Sezione III penale, case no 23273/2004 (*Gesualdi*), judgment of 26 April 2004; M Bassini, 'ECJ Case Law on Gambling: How Technology Thwarts Regulatory Barriers' (*Media Laws*, 14 December 2014) <http://www.medialaws.eu/how-technology-thwarts-regulatory-barriers-the-ecj-case-law-on-gambling-and-internet/> accessed 30 January 2015.

When considering the objectives advanced by the government, this time, the Court drew a clear distinction between, on the one hand, the objective of reducing gambling opportunities and, on the other hand, insofar as the games of chance were permitted, the objective of combating criminality, which was to be achieved by channelling the activities of gambling operators into State-controlled systems. In both cases, the restrictions had to be consistent and systematic in nature. Since the Italian legislature was pursuing a policy of expanding activity in the sector, in order to increase tax revenue, the legislation could not be justified by the objectives of protecting consumers or reducing gambling opportunities.[346] However, viewed as a means of combating fraud, the policy of controlled expansion could be justified because it was consistent with the objective of drawing players away from clandestine gambling towards activities that were authorised and regulated.[347] Moreover, since authorised operators needed to represent a reliable yet at the same time attractive alternative to a prohibited activity, it was acceptable that the government offered an extensive range of games, advertised them on a certain scale and used various new distribution techniques.[348]

Placanica seems to suggest that whether the policy of expansion in the gambling sector will be justified depends on the public interest objective it is assessed against. While this policy is not consistent with the objective of consumer protection from addiction, it could successfully be defended by the need to combat crime and fraud. This logic, in turn, suggests that as long as governments are clever about how they draft their laws (and submissions to the Court), they can maintain a generally

346 *Placanica* (n 345), paras 52–54.

347 ibid, para 55.

348 ibid.

restrictive regulatory regime for gambling while at the same time expanding the supply of gambling services within the confines of State-controlled monopolies, thus maximising their revenues received from gambling.

The following two subsections intend to assess to what extent the latter assumption is true in light of the subsequent case law of the CJEU. To that end, it will be discussed, first, how the requirement of consistency laid down in *Gambelli* and *Placanica* has been elaborated in relation to different national frameworks for gambling, and, second, whether it has been applied any differently in the context of Internet gambling.

(iii) The scope of the consistency requirement

Markus Stoss

The *Markus Stoss*[349] case concerned a German policy on gambling whereby different regulatory regimes applied to different types of gambling. Sporting bets and lotteries were covered by regional monopolies, while the organisation of bets on horse racing and the operation of gaming machines and casinos were entrusted to authorised private operators. The overall regulatory framework was aimed at preventing consumers from spending and addiction to gambling.

The Court held that, in principle, the fact that some games of chance were subject to a public monopoly whilst others were subject to a licensing system could not, in itself, call into question the consistency of the whole system because different types of games had different characteristics and thus could require different forms of regulation.[350] The German system was, however, regarded as inconsistent for reasons

349 Joined Cases C–316/07, C–358/07 to C–360/07, C–409/07 and C–410/07 *Markus Stoß* [2010] ECR I–8069 (*Stoss*).

350 *Stoss* (n 349), paras 94–96.

relating to the marketing of the games. First of all, in order to maximise profits, the State monopolies carried out intensive advertising campaigns encouraging participation in gambling, thus going beyond what was necessary for the purposes of channelling consumers' desire to gamble into games that were authorised and regulated.[351] Secondly, with regard to the games that fell outside the public monopoly, such as casino and automated games, the authorities conducted or tolerated policies of expanding supply, despite the fact that these types of games involved a higher risk of addiction than those covered by public monopoly.[352] Therefore, the objective of consumer protection, which underlined the establishment of the monopoly system, could not be pursued effectively.[353]

The *Stoss* judgment clarified that the test of necessity has a role to play in reviewing the consistency of the regulatory system. Where government policies are aimed at protecting consumers from problem gambling, the marketing and advertising of the games have to be limited to the extent necessary to draw consumers away from unauthorised gambling.

Stanleybet

In *Stanleybet,*[354] the CJEU was asked to examine the legality of the Greek gambling monopoly, which was entrusted to one company, OPAP. OPAP had been for a long time owned by the State and was listed on Athens Stock Exchange in 2001. The Court used the opportunity in this case to elaborate on some of the criteria applicable to the management of public monopolies in light of the consistency requirement.

351 *Stoss* (n 349), paras 100, 103.

352 ibid, para 100.

353 ibid, para 106. See also C–46/08 *Carmen Media* [2010] ECR I–8149, paras 53, 67–68.

354 Joined Cases C–186/11 and C–209/11 *Stanleybet* [2013] OJ C71/3 (*Stanleybet*).

The government claimed that the monopoly system was justified by, inter alia, the need to combat gambling-related crime. The CJEU expressed doubts as to the system's capacity to do so effectively. It ruled that 'a measure as restrictive as a monopoly must, inter alia, be subject to strict control by the public authorities'.[355] In this respect, it referred to the view expressed by the referring court that the government's supervision of OPAP was merely superficial, as it was confined to approving the regulations governing the activities of OPAP and monitoring the procedure of the organisation of games.[356] Moreover, the company was listed on the Athens stock exchange with the State being only a minority shareholder. Accordingly, the system could not be considered as genuinely aimed at fighting crime and fraud.

The important bit of the judgment however seems to have followed after the Court's conclusion. Having suggested that the Greek policy was incompatible with EU law, the Court advised the government on two possible courses of action. First, Greece could choose to preserve the monopoly system, whilst undertaking reforms that would subject it to 'effective and strict controls by the public authorities'.[357] It was in the government's discretion to do so because, as the Court observed, the presence of free and undistorted competition in 'the very specific market of games of chance' could have 'detrimental effects' on consumers: it could lead the operators to compete with each other in making their offers more attractive, thus encouraging consumers' expenditure on gaming and increasing their risks of addiction.[358] Accordingly, a government seeking to ensure 'a particularly high level of protection' was entitled to take the view that it could tackle these risks linked to gambling with 'sufficient'

355 *Stanleybet* (n 354), para 34.

356 ibid, para 13.

357 ibid, para 46.

358 ibid, paras 44–45.

effectiveness 'only by granting exclusive rights to a single entity'.[359] Alternatively, the government could, although was not obliged to, liberalise the gambling sector by establishing a non-exclusive system of licences, provided that such reform would not hinder the level of consumer protection sought by the government (which was, again, a question that fell within the government's discretion). In the latter case, the principles of equal treatment and transparency would have to be observed. The licensing scheme had to be based on 'objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the national authorities' discretion so that it is not used arbitrarily'.[360]

The *Stanleybet* judgment showcases the regulatory ambition of the Court's judgments. In addition to offering an interpretation of EU law in the given situation, the Court seems comfortable to present the government with concrete policy propositions. However, the content of the Court's propositions seems to reaffirm that EU free movement law in no way obliges Member States to liberalise their gambling sectors. Member States are allowed to maintain their preferred methods of regulation so long as they are consistent with the public interest objectives pursued.[361]

Pfleger

The *Pfleger* case[362] concerned a challenge to Austrian monopoly on the operation of gaming machines. The referring court had expressed the view that the national system was inconsistent. In particular, it considered that the national authorities had not shown that crime and/or addiction to gambling actually constituted a significant problem

359 *Stanleybet* (n 354), paras 28–29.

360 ibid, para 47.

361 Affd, more recently, in C–336/14 *Sebat Ince* (CJEU, 4 February 2016), paras 54–55 (*Sebat Ince*).

362 Case C–390/12 *Pfleger and Others* (CJEU, 30 April 2014) (*Pfleger*).

during the period at issue, and it therefore seemed that the real purpose of the legislation was ‘a mere increase of State tax revenue’.[363] The latter was apparent from the ‘aggressive’ commercial policy carried out by the holders of the monopoly, which was characterised by excessive advertising and, hence, could not be considered as a policy of ‘controlled expansion.’[364] The CJEU held that it was the prerogative of the national court to assess whether the legislation genuinely met the public interest objectives pursued by the government in a consistent and systematic manner.[365] At the same time, however, it instructed the referring court that inability on the part of the national authorities to produce ‘studies serving as the basis for the adoption of the legislation at issue’ was not a sufficient reason to question its proportionality.[366]

The Court was also asked to assess the Austrian laws for compliance with the EU Charter. This was something new. It was argued that the enforcement aspects of the relevant laws, involving administrative and criminal sanctions, were incompatible with the freedom to conduct an occupation, the freedom to conduct a business and the right to property.[367] AG Sharpston had suggested in her Opinion that even if the national rules were *substantively* in compliance with both the internal market law and the Charter, the details of enforcement could be tested separately for compliance with the Charter alone.[368] The Court however did not find the need to conduct a separate examination. It held in passing that a measure that was found incompatible with Art. 56 TFEU would also be incompatible with the economic rights protected under the

363 *Pfleger* (n 362), paras 43, 47, 53, 55.

364 ibid, paras 16–17.

365 ibid, para 49.

366 ibid, para 51, with further references to *Stoss* (n 349), paras 70–72.

367 EU Charter (n 6), arts 15–17.

368 *Pfleger*, Opinion of AG Sharpston, paras 74, 86.

Charter.[369]

This part of the Court's reasoning is important for understanding the role of the Charter in the context of gambling and free movement law generally. The Charter appears to have no added value in the examination of the validity of national measures: if the measures in question are considered incompatible with Art. 56 TFEU, they will also be incompatible with the Charter; yet, by the same token, if they are compatible with Art. 56, they seem to be protected from a separate challenge under the Charter.

Digibet

The relatively recent *Digibet* judgment demonstrates to what extent the assessment of the system's consistency is affected by the co-existence of different regional regulatory regimes in the territory of a Member State. The case concerned the German Interstate Treaty on Gambling of 2012, which prohibited the organisation and facilitation of online games of chance, save for exceptional circumstances in the case of lotteries and sporting bets. The issue in the case however was not the substantive content of the Treaty,[370] but the fact that one Land, Schleswig-Holstein, had not adhered to it and retained a different regulatory regime. In Schleswig-Holstein, the organisation of online games of chance was authorised provided that operators fulfilled certain conditions required by law. In 2013, Schleswig-Holstein decided to join the Interstate Treaty, but the licences that had already been granted remained valid for their entire duration of six years with the possibility of extension for another four years. The system was challenged before the German Federal Court, which referred the question to the CJEU.

The CJEU held that 'even assuming that the more liberal legislation in

369 *Pfleger* (n 362), paras 59–60. See also, more recently, affd in *Digibet* (n 65), paras 24, 31–32 and Case C–98/14 *Berlington Hungary and Others* (CJEU, 11 June 2015), paras 62, 90–91.

370 The substantive aspects of the regime were considered in *Sebat Ince* (n 361).

Schleswig-Holstein may have undermined the consistency of the policy prohibiting games of chance in the other Länder, such damage to consistency was limited *ratione temporis* and *ratione loci* to a single Land'. Therefore, the legal regime in one Land could not be considered 'seriously' to affect the appropriateness of the restrictions applicable in all the other *Länder*. The Court's phrasing seems to indicate that if it had not been for the temporal and geographical limitations, the German system might not have been considered to be consistent.[371] However, this inference is far from definite, given that the Court used quite opaque language ('even assuming', 'may have') in its reasoning. More importantly, it emphasised that it was not calling into question the division of competences between the *Länder*, which was protected under Art. 4(2) TEU, obliging the EU to respect the national identities of the Member States inherent in their fundamental structures, including regional and local self-government.[372]

Digibet seems to suggest, first, that the Court is prepared to take into account Member States' domestic constitutional arrangements when assessing the compatibility of their regulatory regimes with EU law and, second, that it will turn to the amendments introduced by the Lisbon Treaty for support of this position.

(iv) The special case of Internet gambling: any measure can be justified

The final category of the Court's decisions examines the specifics of the regulation of gambling on the Internet. The judicial review of national measures in this area seems to be premised on the perception that Internet gambling is more dangerous and more difficult to control than offline gambling. Accordingly, the Court is prepared to tolerate virtually any domestic regulatory measure in place, thus reducing the requirements of

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371 *Digibet* (n 65), para 36.

372 ibid, para 34.

consistency and necessity to the very minimum.

Liga Portuguesa

Liga Portuguesa[373] was not the first case involving online gambling – *Gambelli* preceded it by almost six years; however, it produced the first judgment that examined the specifics of the regulatory framework applicable to gambling on the Internet. The case concerned Portuguese legislation that reserved the right to operate online games of chance to Santa Casa, which was a public company holding a monopoly on gambling since 1783. The monopoly system was challenged by Bwin International, which was an Austrian internet gambling company registered in Gibraltar. Bwin offered a wide range of betting and gaming services, including betting on the result of football matches in the Portuguese championship. The CJEU was asked whether the Portuguese system was compatible with Art. 49 EC.

In particular, Bwin argued that the monopoly system was not necessary because there were less restrictive means to ensure that operators would not engage in fraud and other criminal practices. The Court rejected this argument by agreeing with the government that it did not have the means to control foreign online operators as effectively as an internal operator.[374] Referring to the specific features associated with gambling via the Internet, namely the lack of direct contact between consumer and operator, the Court observed that online gambling involved 'different and more substantial' risks of fraud compared with the traditional markets for games of chance.[375] Accordingly, the mere fact that a foreign operator was already subject to controls of another Member State could not be regarded as amounting to 'sufficient

373 Case C–42/07 *Liga Portuguesa* ECR [2009] I–7633 (*Liga Portuguesa*).

374 ibid, para 68.

375 ibid, para 70.

assurance' that national consumers would be protected against the risks of fraud and crime.[376] Such conclusion was based on the fact that the authorities of the Member States of establishment of foreign operators were liable to encounter 'difficulties' 'in assessing the professional qualities and integrity of operators'.[377] Also, it could not be ruled out that an operator which sponsored some of the sporting competitions on which it accepted bets (as Bwin did) would be in a position to influence their outcome in order to increase profits.[378]

Liga Portuguesa offers a useful illustration of how the Court conducts the proportionality review of regulatory frameworks for online gambling. In this respect, it stands in marked contrast with the *Gambelli* judgment. While in *Gambelli* the Court's conclusions about the (lack of) necessity of the Italian restrictions on foreign operators' access to the market were largely based on the fact that these operators were subject to statutory conditions and controls in their State of establishment,[379] this argument seems to be irrelevant in *Liga Portuguesa*. Quite the contrary, the Court takes the view that, at least in the context of online gambling (and perhaps also in relation to sports betting), Member States may not have the general capacity to assess the professional qualities and integrity of operators established in their territories, hence, other Member States are entitled to subject them to their own regulatory systems, however rigid they are.

Ladbrokes

Ladbrokes[380] concerned Dutch legislation which regulated gambling through the

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376 *Liga Portuguesa* (n 373), para 69.

377 ibid.

378 ibid, para 71.

379 *Gambelli* (n 333), para 74.

380 Case C–258/08 *Ladbrokes International Ltd* [2010] ECR I–4757 (*Ladbrokes*).

system of exclusive licences for each of the games of chance authorised. Offering of games of chance on the Internet was prohibited. De Lotto, a non-profit foundation governed by private law, held a licence for the organisation of several games, which included sports-related prize competitions. The monopoly held by De Lotto was challenged by two British companies, Ladbrokes International and Ladbrokes Betting, which organised sports-related games on their Internet site and other betting activities via telephone. The referring court asked the CJEU specifically whether the Dutch system was compatible with the Court's interpretation of Art. 49 EC in the *Gambelli* judgment.

The government declared that the monopoly system was aimed at combating fraud and curbing addiction to games of chance. Having observed that De Lotto was allowed by law to introduce new games and promote them by means of advertising, the Court noted that it was, in principle, difficult to reconcile the objective of protecting consumers from gambling addiction with a policy of expansion in the gambling sector. In this respect, a fair balance had to be drawn between, on the one hand, a demand for a controlled expansion of authorised games in order to make them attractive for the public (for the purposes of combatting fraud) and, on the other hand, the need to reduce as far as possible consumer addiction to such games.[381] The policy of expansion could not be regarded as consistent, unless 'the scale of unlawful activity was significant and the measures adopted were aimed at channelling consumers' propensity to gamble into activities that were lawful'.[382] For instance, this requirement would not be met if advertising campaigns stimulated active participation in gambling by depicting major winnings in glowing colours or by trivialising gambling, or giving it a positive

381 *Ladbrokes* (n 380), paras 32, 37.

382 ibid, paras 29–30.

image.[383] The CJEU suggested that the Dutch policy was internally consistent, as clandestine gambling in the Netherlands had been increasing and the advertising policy adopted by the authorities was 'sensible and balanced in content'.[384]

Examining the necessity of the Dutch legislation, the Court reasserted the view taken in *Liga Portuguesa* that governments were not obliged to trust the controls applicable to online gambling operators in other Member States.[385] Given the substantially higher risk of fraud that customers encounter engaging in games of chance accessible via the Internet, the fact that gambling operators were subject to regulations in another Member State did not necessarily provide sufficient assurance that consumers would be protected against the risks of fraud and crime. Accordingly, it was immaterial to the assessment of proportionality of the Dutch legislation that the Ladbrokes companies held licences in the UK and were subject to its anti-fraud legislation.

Finally, the CJEU was also asked to assess the proportionality of the sanctions attached to the contested measures, in particular, an injunction imposed on the *Ladbrokes* companies blocking access to their websites. The Court held that there was no need to determine whether the injunction was compatible with the principle of proportionality. Sanctions and penalties were to be considered as implementing measures intended to ensure effective compliance with the legislation and thus could not be regarded as imposing additional restrictions on the market.[386]

The *Ladbrokes* judgment brought some important clarifications regarding the Court's position on the application of the consistency and necessity requirements in the

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383 *Ladbrokes* (n 380), paras 29–32.

384 ibid, paras 31, 34–35.

385 ibid, paras 53–55. See also Case C–203/08 *Sporting Exchange & Others (Betfair)* [2010] ECR I–4695.

386 *Ladbrokes*, paras 43–45.

context of online gambling. Where the governments set out to pursue both the objective of preventing gambling addiction and the fight against crime, national courts will have to determine whether the policy of expansion in the sector can be reconciled with the need to curb addiction to gambling. Such reconciliation is possible if the scale of unlawful activity is significant and the measures adopted are designed to channel consumers' propensity to gamble into activities that are lawful.

The test of necessity, on the other hand, does not seem to play any significant role: first, because governments are entitled to disregard in their entirety the quality and control checks applicable to gambling operators in other Member States; and, second, because sanctions instituted to enforce the substantive rules will not be checked for proportionality separately from those rules. The above findings seem to suggest that the *Gambelli* and *Placanica* judgments may no longer be good law.

(c) *The Regulatory Implications of the Case Law*

(i) Principles governing the regulation of gambling in EU law

Since its first judgments, the Court has established that gambling activities, regardless of their form or platform (online or offline), fall within the scope of the definition of services under Art. 57 TFEU. Accordingly, national rules which prohibit or limit the provision of gambling services that are authorised in other Member States are considered to be a restriction on the freedom of establishment and of provision of services.[387] At the same time, the Court recognises that Member States enjoy broad discretion when regulating their gaming and betting markets, which in turn means that measures restricting gambling can in principle be justified in light of the various public

[387] *Gambelli* (n 333), paras 46, 48, 56–57, 59.

interest considerations and that they will not be subjected to proportionality review in its full force.

The rationale behind the Court's granting of a broad regulatory discretion to national authorities lies in the peculiar nature of the gambling sector. Gambling does not abide by the market rules. Given the scale of earnings and potential winnings, it involves a high risk of fraud, money laundering and other criminal practices.[388] Furthermore, it incites consumers to spend, which may have damaging individual and social consequences. As a result of the controversy of the issues involved, legislation on gambling displays significant moral, religious and cultural differences between Member States, with one common tendency being to restrict, or even prohibit, gambling activities, in order to prevent them from being a source of private profit.

Accordingly, in light of the diversity in national regulatory approaches and in the absence of EU-wide harmonisation, it is for each Member State to determine, in accordance with its own scale of values as well as social and cultural features, what is required to protect the players and maintain order in society.[389] States can impose a complete or partial prohibition on gambling, create a system of non-exclusive licences, establish a monopoly on games of chance, or opt for a combination of these regimes. For instance, a Member State seeking to ensure a particularly high level of protection may take the view that the only way it can tackle the risks connected with the gambling sector effectively is by granting exclusive rights to a single entity controlled by the authorities.[390]

The Court has so far accepted most of the grounds invoked as justifications for

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388 *Läärä* (n 324), para 37; *Zenatti* (n 325), para 35.

389 *Schindler* (n 312), para 61.

390 *Stanleybet* (n 354), para 29.

restrictive measures, except for those of a purely economic, fiscal or protectionist nature.[391] The list of objectives deemed legitimate by the Court includes: the maintenance of the public order[392] and social order,[393] prevention of fraud, money laundering and other criminal activities,[394] prevention of incitement to squander money on gambling[395] and of the damaging individual and social consequences thereof,[396] protection of moral and cultural aspects of society,[397] and prevention of gambling from being a source of private profit.[398] Due to the substantive overlap between these various objectives, they are typically placed in one of the two categories – the protection of consumers or the maintenance of public order. All of the aforementioned objectives however seem to serve the same purpose, that is, to protect consumers either from gambling addiction or from criminal and fraudulent practices.

To be justified in light of the legitimate public interest objectives, national measures must comply with the principle of non-discrimination and satisfy the requirement of proportionality.[399] An example of a discriminatory rule would be a requirement for the operators to have their seat in the Member State where services are provided.[400] The test of proportionality – the way it is applied in the context of gambling – mainly focuses on the suitability, or appropriateness, of the restrictive

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391 For examples of failed attempted justification grounds, see Planzer (n 301) 63–66.

392 *Läärä* (n 324), para 31.

393 *Schindler* (n 312), para 58.

394 ibid, para 60; *Läärä*, para 32; *Zenatti* (n 325), para 30.

395 *Stoss* (n 349), paras 20–22, 70; *Stanleybet*, paras 23, 29.

396 *Schindler*, para 60; *Zenatti*, paras 30, 35.

397 *Schindler*, para 60.

398 *Placanica* (n 345), para 54.

399 *Gambelli* (n 333), para 65.

400 *Gambelli*, para 71.

measures. National rules will be deemed suitable for ensuring the attainment of the objective pursued if they genuinely reflect a concern to attain it in a consistent and systematic manner.[401] The fact that games of chance are subject to different legal regimes – some being prohibited and some subject to monopoly or a licensing system – cannot in itself affect the consistency of the whole system because various games have different characteristics and may require different forms of regulation.[402] However, if restrictions on the games that pose greater risk to consumers are milder than on other games, consistency is jeopardised. It is not entirely clear whether the co-existence of different regulatory regimes among the constituents of a federal State undermines the consistency of the overall gambling policy. The answer seems to depend on the extent of discrepancies between the local regimes, but if those discrepancies are temporary, the consistency will not be affected.[403]

It has been suggested earlier that the same regulatory rules could be upheld in light of the objective of combatting crime but fail the consistency requirement in the context of consumer protection. However, when Member States invoke both the prevention of gambling addiction *and* the fight against fraud or crime, which they normally do, these objectives will be considered together. In this situation, national courts will have the task to determine whether public authorities have drawn a fair balance between demand for the controlled expansion of authorised games, in light of the objective of combatting fraud and crime, and the need to reduce as far as possible consumer addiction to such games.[404] In order for this balance to be struck, the marketing policy adopted by the authorities should be commensurate to the level of

401 See eg *Gambelli* (n 333), para 67; *Liga Portuguesa* (n 373), paras 59–61; *Stanleybet* (n 354), para 27.

402 *Stoss* (n 349), paras 94–96.

403 *Digibet* (n 65), paras 34–36.

404 *Ladbrokes* (n 380), para 32.

unauthorised gambling in the territory, and the advertising of games should be sensible and limited to what is necessary to channel the players' desire to gamble into activities that are lawful and regulated.[405]

The role of the necessity review is minimal. In the first place, national authorities are not required to justify why they have chosen one regulatory model over another, perhaps a less restrictive one, because such choice falls within their margin of discretion. The proportionality of the system is assessed solely in the framework of the objectives and the level of protection pursued by public authorities. Accordingly, if the authorities decide to monopolise the sector, they need to make sure that, as pointed out above, they expand the supply of games of chance and advertise them insofar as is necessary to protect consumers from addiction and criminal behaviours on the part of the operators. If States opt for a licensing system, the procedure for granting licences must comply with the principle of proportionality: it needs to be transparent and based on objective, non-discriminatory criteria, capable of circumscribing administrative discretion.[406] For instance, if Member States exclude listed companies from the tendering process, such practice would be deemed disproportionate in light of the objective of combatting crime because there are other, less restrictive means of checking the accounts and activities of such companies.[407] Yet the extent to which this rule applies in the context of online gambling remains uncertain, since the standard of the necessity review in those cases seems to be lower.[408] Finally, the necessity of the enforcement aspects of the contested rules will not be assessed on an individual basis. Therefore, if the substantive rules are justified and proportionate, the sanctions attached

405 *Ladbrokes* (n 380), paras 29–31, 34–35.

406 *Stanleybet* (n 354), para 47.

407 ibid, para 74.

408 *Liga Portuguesa* (n 373), para 69; *Ladbrokes*, paras 53–55.

to them will be too, even if they involve criminal penalties.[409]

(ii) National regulatory autonomy is protected

Overall, CJEU case law on gambling seems to be based on the premise that the specific nature of the gambling market makes its liberalisation undesirable and thus justifies regulatory intervention targeted at controlling the associated social risks. The position adopted by the Court, in turn, suggests that EU free movement law is capable of accommodating social and public policy concerns expressed in national gambling rules. While this position is welcome from the perspective of national regulatory autonomy, it is prone to overlook regulatory laws that are, in fact, inconsistent with the objectives of consumer protection and may serve as a cover for protectionism.

Rationale for the national margin of discretion

At the core of the Court's approach, there lies the recognition that Member States have broad discretion when regulating their gaming and betting markets. The basis for this discretion seems to be two-fold: one, the religious and cultural aspects linked to gambling and, two, its socially and financially harmful consequences for the individual and society. In particular, the Court holds that the presence of undistorted competition in this very specific market would lead the operators to compete with each other in making their offers more attractive than their competitors and in that way would encourage consumers' expenditure on gaming and increase their risk of addiction.[410] Moreover, the free market would be incapable of preventing fraud, money laundering, and other criminal practices conducted by the operators against consumers.

The conceptual basis for the Court's approach is not immune to challenge. As

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409 *Ladbrokes* (n 380), paras 43–45; *Pfleger* (n 362), paras 59–60.

410 *Stanleybet* (n 354), para 45.

has been pointed out earlier, academic literature advances a multitude of reasons why Member States regulate gambling. The belief that market forces and general negligence laws are inadequate to protect consumers is just one of those reasons, others suggesting that the need to regulate gambling stems from the political sensitivity of the sector, namely that it generates significant public revenue yet is widely perceived as dangerous and immoral. The moral judgment seems also to be reflected in the case law of the Court, which has endorsed the view consistently put forward by Member State governments that gambling is a platform for 'squandering' money and, as such, should not be accepted as a source of private profit.[411] Finally, while the Court expressly excludes the possibility that financial arguments can serve as a valid ground of justification, it does seem to take into consideration the financial implications of its decisions for national budgets, which is evident, in particular, from its tolerance towards policies of expansion in the gambling sector.[412]

The foregoing goes to show that the Court is prepared to take into account a wide range of considerations advanced by Member States in order to justify deference to national regulatory authorities. This in turn suggests that the Court treats Member States policy choices in the gambling sector with particular sensitivity.

The scope of discretion

The discretion accorded to national authorities manifests itself in various ways, but first and foremost, in choosing the specific regulatory model, from a complete prohibition of gambling activities to a non-exclusive licensing system. Member States' choices are however not unlimited. If the authorities decide to establish a monopoly on games of

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411 For a detailed account of the morality aspect in CJEU case law, see Planzer (n 301) 73–81.

412 *Gambelli* (n 333), Opinion of AG Alber, para 126. See also V Yanchev, 'Between the Hammer and the Hard Place: European Gambling Regulation in the Post-Santa Casa Era' (2012) 23 EBL Rev 213, 222 (Yanchev).

chance, they must exercise effective and strict controls over it. If, on the other hand, they opt for a more liberal model, such as a licensing system, they must ensure that it is transparent and non-discriminatory. In both cases, the requirements that public authorities must comply with seem to be oriented towards form, or procedure, rather than the content of national choices.

Accordingly, the proportionality review seems to be aimed primarily at counteracting protectionism rather than controlling the degree by which national rules restrict the free movement of companies operating in the European gambling market. This is evidenced by the minimum application of the test of necessity and the low standard of proof employed by the Court. As already pointed out, Member States are not required to show why an alternative, less restrictive regulatory model would not be feasible in the particular case, and the fact that systems of protection differ from one Member State to another is immaterial when assessing their proportionality.

The *Gambelli* and *Placanica* decisions seem to provide a narrow exception where the necessity test plays an important role. The conditions governing tender procedures for the grant of licences for the operation of games of chance cannot contain a blanket exclusion of companies quoted on the regulated markets. The authorities have to examine whether there are no other means of checking the accounts and activities of gaming operators for reliability. Apart from this specific circumstance, Member States are not required to trust the controls of other Member States or open up their markets to foreign operators just because they are subject to statutory regulation in their Member State of establishment. The reason behind this view is, very generally, 'the difficulties liable to be encountered' by EU Member States when assessing the professional qualities and integrity of operators established in their territory.[413] This approach seems

413 S Planzer, '*Liga Portuguesa* – the ECJ and its Mysterious Ways of Reasoning' (2009) 11 ELR 372

to depart from the major part of the Court's case law on the freedom to provide services, where judicial inquiry focuses on eliminating situations that would make cross-border operators face double regulatory burden.[414]

Moreover, the Court's reasoning seems to be incoherent, as it does not question in the same manner the difficulties that may be encountered by the State-controlled monopolies when regulating gambling on the Internet.[415] There is no compelling basis (at least the Court provides none) to assert that a public monopoly will be more effective in this respect than a certified private operator. In order to make that determination, the principle of necessity laid down in *Gambelli* would at least require that national authorities take into consideration the anti-fraud regulations applicable to the EU's licensed operators, keeping in mind that these regulations are aimed specifically at ensuring a high level of integrity, transparency and traceability over online gaming transactions.[416]

Finally, although the Court states that justifications invoked by Member States must be accompanied by an analysis of the proportionality of restrictive measures, the standard of proof required is low. The study conducted by Bogaert and Cuyvers concludes that the burden of proof almost appears to be reversed, with foreign operators having to prove that the system is not consistent instead of the other way around.[417] This conclusion seems compelling considering that the Court often endorses abstract, unsubstantiated government submissions, such as, that online gambling

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(Planzer, '*Liga Portuguesa*').

414 Yanchev (n 412) 223.

415 See eg *Stoss* (n 349), paras 40, 84–87.

416 A Bujalski, 'ECJ Victory for Portuguese Gaming Monopoly' (2010) 16 CTLR 30; Yanchev (n 412) 224–229.

417 S van den Bogaert and A Cuyvers, '"Money for Nothing": The Case Law of the EU Court of Justice on the Regulation of Gambling' (2011) 48 CML Rev 1175, 1191, 1204–1206 (Bogaert and Cuyvers).

market presents unique and greater dangers compared to other forms of gambling and other markets of the economy; that foreign gambling operators cannot effectively be supervised and controlled by their States of establishment; and that national measures in fact can achieve the multitude of objectives they pursue.[418] The Court even gives explicit instruction to national courts that the absence of studies on the part of the authorities supporting the adoption of particular legislative measures is immaterial for the assessment of the proportionality of those measures.[419] The ultimate problem with the Court's approach seems to be that while some of these assertions may well be true, they are rarely backed by empirical evidence, yet they often inform the Court's position on the questions of law that decide the outcome of the case, such as the standard of proportionality review.

Questioning the consistency of EU gambling rules

The test of consistency underpinning the Court's case law, by definition, is not construed to liberalise or dismantle national regulatory frameworks, but is rather targeted at identifying policies that are internally incoherent and may therefore be masking protectionism. However, because of the way it is interpreted by the CJEU, the consistency requirement may be inapt to achieve its very purpose. The threshold for meeting this requirement seems to be low. One thing that is clear is that a policy that expands and actively promotes activities in the gambling sector cannot be reconciled with the objective of consumer protection. However, when in addition to consumer protection, States are also aiming to reduce the scale of unauthorised gambling, the same policy of expansion will be tolerated despite its apparent conflict with the

418 Bogaert and Cuyvers (n 417) 1191, 1204–1206; *Liga Portuguesa* (n 373), paras 70–72; Planzer, '*Liga Portuguesa*' (n 413) 379–380.

419 See *Stoss* (n 349), paras 70–72; *Pfleger* (n 362), para 51.

objective to protect players from spending and problem gambling. In this respect, public authorities will have to show that unlawful activity in their gambling market is significant, and the measures adopted are designed to channel consumers' propensity to gamble into activities that are lawful and regulated. Alternatively, the authorities may choose to refer exclusively to the objective of combating crime, thus avoiding the limitations that consumer protection requirements impose on the marketing of gambling.[420] In the latter case, Member States will only have to demonstrate that the problem of clandestine gambling is real and serious enough to necessitate a more substantial expansion of the regulated gambling market.[421] In a way, it almost seems that the Court's case law provides governments with guidelines on how to draft legislation in order to avoid scrutiny under EU law.

A restricted judicial approach at EU level means that national courts are granted a lot of leeway when applying the Court's interpretations to the facts of the case. National courts are the ones to assess whether national legislation genuinely meets the consumer protection and public order concerns in light of the level of protection sought by domestic authorities.[422] They are also the ones to determine whether national measures strike an appropriate balance between, on the one hand, the expansion of the sector, aimed at channelling gambling into controllable systems, and, on the other hand, the reduction of opportunities to gamble, aimed at preventing problem gambling. In this respect, Bogaert and Cuyvers observe that often the roles of the CJEU and national courts get reversed, with the CJEU duly following the observations and suggestions of

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420 Cf *Placanica* (n 345) and *Stoss* (n 349).

421 *Ladbrokes* (n 380), paras 29–30.

422 *Läärä* (n 324), para 36; *Zenatti* (n 325), para 34; *Stanleybet* (n 354), para 28; *Liga Portuguesa* (n 373), paras 57–59.

the referring court.[423] In *Stoss*, for example, the Court endorsed the referring courts' suggestion that the system was not consistent and systematic,[424] whereas in a factually similar situation in *Ladbrokes*, it reached an opposite conclusion following the view of the Dutch court, even though the consistency of the system in that case was disputed by some of the parties.[425] Where the national court does not provide its assessment on the question of consistency, the CJEU either allows the restriction or refers the ultimate decision back to the national court.[426] Academics suggest that the Court's self-restraint is not isolated from political considerations, as a more aggressive intervention might upset gambling arrangements in much of the EU and encourage further litigation, thus creating a risk of depriving Member States of a significant source of revenue.[427]

Institutional deference to national courts also suggests that the CJEU is prepared to accept variations in the application of its case law in different jurisdictions. An empirical study conducted by the Swiss Institute of Comparative Law reveals that domestic courts in some Member States, including Germany, Italy, Sweden and the Netherlands, are more likely to dismiss government justifications for restrictive regimes if public gambling operators extensively advertise their services or regularly introduce new games. The Dutch and French courts, on the other hand, hold a position whereby the increase in the supply of games is not considered inconsistent with an otherwise restrictive gambling policy, as it serves as a countermeasure against illegal

423 Bogaert and Cuyvers (n 417) 1204. See also *Schindler* (n 312), paras 47–48; *Stanleybet* (n 354), para 13; *Pfleger* (n 362), para 49.

424 *Stoss* (n 349), paras 20, 25, 39, 100, 106; Bogaert and Cuyvers 1204.

425 *Ladbrokes* (n 380), paras 13, 38.

426 Bogaert and Cuyvers 1204–1205.

427 Bogaert and Cuyvers 1209. See also T Tridimas, *The General Principles of EU Law* (2nd ed, OUP 2007) 207; Yanchev (n 412) 227.

gambling.[428] These discrepancies in the implementation of the Court's decisions have even led to suggestions that the Court should provide the referring courts with more detailed guidance, leaving less room for interpretation.[429]

Overall, the implications of the Court's case law for national regulatory autonomy in the gambling sector seem to be relatively insignificant, especially if compared to implications for the healthcare, education and industrial relations systems. As a result of the broad regulatory discretion accorded to the Member States, even policies that are not entirely consistent with the objectives pursued by the governments can survive the scrutiny of the CJEU, especially if they are accompanied by a positive endorsement from the referring court. Whichever the decisive factor – the moral objections, real and perceived social risks or the financial aspects – the CEJU is prepared to delegate the ultimate choices to national legislative, administrative and judicial authorities. Therefore, as long as the national regulatory system works adequately within its own frame of reference, virtually every rule will be considered as a lawful exception to the economic freedoms.

428 Swiss Institute, Study of Gambling Services (n 288), xxxiii.

429 M Diaconu, R Buckley and A Ziegler (eds), *International Trade in Gambling Services* (Kluwer Law International 2010) 195.

III. Comparative Analysis: Common and Contrasting Patterns in the Free Movement Case Law

This chapter conducts a comparative analysis of the Court's reasoning employed in the judgments concerning the four policy areas under study (healthcare, education, collective labour law, and gambling) in order to, first, understand the reasons behind the differences in the substantive implications of the case law discussed in Chapter II and, second, establish the background for the analysis of this case law from the constitutional perspective in Chapter V. Then, the chapter turns to discuss what the author identifies as the quasi-legislative effects of the Court's judgments, and, in particular, how these judgments influence the power dynamic between the Court and the EU's legislative institutions.

A comparative analysis of the Court's legal reasoning reveals one central common pattern – a consistently generous interpretation of the scope of the free movement rules. As regards the first three policy areas, healthcare, education and collective labour law, this interpretation also suggests that the free movement rules reach further than the EU's (explicit) legislative competence. The judicial review in all of the analysed areas is predominantly focused on the justification of national measures. At this stage, the biggest contrasts appear between, on the one hand, judgments concerning healthcare, education and collective labour law and, on the other, judgments concerning gambling.

1 The All-Encompassing Scope of the Treaty

The CJEU adopts an extremely broad interpretation of the Treaty free movement rules when faced with the question whether a national measure or practice falls within the scope of the Treaty. This is true for each of the policy areas that form the subject of the present inquiry. The Court normally begins its judgments with the same formula. It recognises that, in the absence of EU-level harmonisation, Member States retain the competence to regulate the healthcare, education, labour law, or gambling matters in question, but in exercising that competence, they nevertheless need to comply with EU law, in particular the free movement rules.[1] The free movement rules – expressed either in the form of the economic freedoms or the principle of non-discrimination, or the concept of EU citizenship (or sometimes all of these) – do not however have general application. Certain conditions must be fulfilled for any of these rules to apply. Yet the Court tends to rather easily conclude that the required conditions are fulfilled and, hence, the situation in question falls within the scope of free movement.

The following analysis demonstrates that the Court's broad reading of the scope of free movement law is often incoherent and lacks solid support in the text of the Treaty.

(a) *The Economic Nature of Public Healthcare*

The entire case law of the CJEU granting rights to patients to cross-border healthcare is premised on the finding that public healthcare constitutes a service within the meaning of Art. 57 TFEU. Art. 57 provides that the main criterion for a particular activity to qualify as a service under EU law is remuneration. This brings private provision of

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1 On this point, see L Azoulai, '"Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 EJLS 192, arguing that the Court's use of this formula leads to what the author calls 'totalisation' of EU law.

healthcare under the definition. The Court however extends the application of Art. 56 TFEU also to healthcare provided under national social security schemes. The basis for this approach seems to be the pecuniary nature of the transaction between the patient and the foreign healthcare provider, as the patient pays directly for the treatment obtained in another Member State. The fact that the costs of the treatment are subsequently reimbursed by the social security scheme of the patient's Member State of affiliation is immaterial to the overall assessment of the situation. In that connection, it is sufficient that hospitals functioning within social security schemes ultimately receive consideration for the treatment they provide from the sickness insurance funds or other managing bodies. This money represents remuneration and indicates that the hospital is engaged in an activity of an economic character. Finally, the economic character of public healthcare does not change depending on the specific type of health service, inpatient or outpatient, or the specific type of statutory cover, be it reimbursement, benefit-in-kind or national health service.

The Court's conclusions are based primarily on the economic relationship between the service provider and the recipient within the State which provides treatment. However, they disregard the social policy relationship between the citizen and their national welfare system in the patient's State of affiliation, which is the necessary precondition for receiving any type of medical service abroad.[2] Curiously, this relationship is taken into account in the education cases in support of the Court's finding that public education is not a service within the meaning of Art. 57. The Court holds that when managing its education system, the State is fulfilling duties towards its own population rather than engaging in a gainful activity. This function is reflected in

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[2] Case C–158/96 *Raymond Kohll* [1998] ECR I–1931, para 21; Case C–157/99 *Geraets-Smits Peerbooms* [2001] ECR I–5473, paras 53–58; Case C–372/04 *Yvonne Watts* [2006] ECR I–4325, para 90. M Dougan, 'Fees, Grants, Loans And Dole Cheques: Who Covers The Costs Of Migrant Education Within The EU?' (2007) 1 J Contemporary Eur Research 4, 20.

the fact that education is predominantly financed from the public purse. The fact that students contribute to the operating expenses of the system by paying tuition cannot alter this conclusion.[3]

The Court's reasons for excluding education from the scope of Art. 56, by and large, apply to the healthcare sector. Healthcare provided in the framework of social security is aimed at protecting the public interest and therefore is heavily subsidised by the State and delivered on the basis of solidarity as opposed to a profit-making basis. The amount of tax or insurance paid by patients does not even remotely reflect the value of healthcare services. Therefore, the fact that, technically, patients pay for the treatment received from the provider established in another Member State (for which they are later reimbursed) should not affect the characterisation of public healthcare as a predominantly social activity.

(b) *Vocational Training, University Education and EU Citizenship*

The Court's interpretation of the scope of the Treaty appears to be equally expansive, if in different ways, in education cases. The Court has used two Treaty provisions to derive individual rights for mobile students – the prohibition of discrimination on the basis of nationality and, after the entry into force of the Maastricht Treaty, EU citizenship.

For the principle of non-discrimination to apply, the situation in question has to fall within the scope of application of the Treaties. The EEC Treaty, in force at the time when the first judgments concerning education were delivered, did not foresee any powers for the EEC in the field of education, with the exception of vocational training. Art. 128 EEC contained a vague stipulation that the Commission would lay down

3 Case C–263/86 *Humbel* [1988] ECR–5365, paras 18–19; Case C–109/92 *Wirth* [1993] ECR I–6447, para 15.

general principles for implementing a common vocational training policy that would contribute to the economic objectives of the Community. The primary economic objective referred to in Art. 128 concerned the advancement of the European labour market through dealing with worker mobility issues, such as the transnational transfer of vocational qualifications. On that basis, the CJEU ruled in *Gravier* that Art. 128 encompassed any form of education which prepared for a qualification for a particular profession, trade or employment, even if the training programme included an element of general education.[4] Essentially, the Court considered that access to cross-border education fell within the scope of Community law by virtue of its indirect link to the labour market. Such access was likely to promote the free movement of workers by enabling them to obtain the necessary qualifications in the Member States whose education programmes included their desired subjects. Needless to say, the phrasing of Art. 128 does not seem to indicate that this provision was intended to cover general education as a constituent element of the free movement of workers and a means of advancing the European labour market. Neither does it seem to have foreseen a role for the Community in regulating higher education policies.[5] Against this background, reliance on Art. 128 for deriving rights of cross-border access to education for European students appears to be strained and unconvincing.

The entry into force of the Maastricht Treaty provided the Court with an explicit basis for its case law by introducing EU citizenship and a legal basis for Community action in education. The Court thus no longer needed to distinguish between general education and one that prepared for a profession or employment (although in practice this distinction never mattered). However, more importantly, the

4 Case C–293/83 *Gravier* [1985] ECR 593, paras 30–31.

5 See also EEC, arts 2 and 3.

Court used the concept of EU citizenship further to expand the EU's interference in national education systems. Pursuant to Art. 8(a)(1) EC, EU citizenship granted nationals of EU Member States the right to move and reside freely within the territory of the Union. The Court read this provision as embedding a 'fundamental status of EU citizens', which, interpreted along with the principle of non-discrimination, guaranteed nationals of EU Member States equal treatment irrespective of their nationality when they found themselves in the same circumstances. Such equal treatment extended to situations where EU citizens were applying for financial support for education in another Member State. As a result, educational maintenance grants and loans, previously having been outside the scope of the Treaty, were brought within its scope.

It has been pointed out above that the Court never considered public education to be a service within the meaning of Art. 57 TFEU. Ultimately, the fact that the Court employed different legal bases in cases involving healthcare and education did not have much effect on the development of the case law. Mobile patients and mobile students seem to have been granted comparable amplitude of rights to access foreign healthcare and education systems respectively. This may be an indication that the Court interprets the Treaty in a result-driven way: where bringing a measure within the scope of the economic freedoms seems to be too far-fetched, the Court will come to virtually the same result through the principle of non-discrimination or the concept of EU citizenship, both formulated broadly enough in the Treaty to be susceptible to an expansive interpretation by the CJEU.

(c) *The Regulatory Effects of Collective Labour Rights*

The Court's case law on collective labour rights is remarkable in two aspects: for the finding that activities of trade unions fall within the scope of Arts. 49 and 56 as potential restrictions on the economic freedoms and that both articles have horizontal direct effect, hence can be invoked against trade unions in private disputes.

The Court does not accept that collective bargaining should be excluded from the scope of free movement law by analogy with the *Albany* case, where it held that collective bargaining fell outside the scope of competition law because the two interests were inherently incompatible. In the Court's view, it is not inherent in the very exercise of trade union rights that EU fundamental freedoms will be prejudiced.[6] At the same time, the free movement rules do not affect the essence of trade union rights in a manner equivalent to competition rules.[7] The latter statement may be plausible. The provision of services on a temporary or permanent basis in another Member State does not in itself undermine trade union activity, leaving aside the Court's interpretation of the relationship between the two. However, the claim that it is not inherent in the exercise of trade union rights that the fundamental freedoms will be prejudiced seems to be inaccurate. The definition of 'restriction' adopted by the Court is extremely broad and encompasses any measure or practice liable to make the free movement 'less attractive'.[8] Therefore, as long as an undertaking wishes to provide services in a Member State that offers a higher level of worker protection than the undertaking's home Member State, the legal environment of the host Member State will always be 'less attractive', as it takes away the undertaking's competitive advantage of using cheap(er) labour. In this context, it does seem to be inherent in the exercise of collective bargaining and the right to strike that, in practice, the economic freedoms will be prejudiced.

6 Case C–438/05 *Viking Line* [2007] ECR I–10779, para 52; Case C–341/05 *Laval* [2007] ECR I–11767, para 86; Case C–271/08 *Commission v Germany* [2010] ECR I–7091, paras 45–47.

7 *Commission v Germany* (n 6), para 49.

8 For an account on non-discriminatory restrictions in CJEU case law, see L Daniele, 'Non-Discriminatory Restrictions to the Free Movement of Persons' (1997) 22 EL Rev 191.

Moreover, the free movement rules can be invoked in courts directly against trade unions, since, in the Court's view, limiting the application of free movement rules to acts of public authorities might create inequality in their application across the EU and thus compromise their effectiveness.[9] So, on the one hand, the Court recognises that trade unions are private actors, whose actions are covered by legal autonomy and governed by private law. Yet, on the other, it equates them to States in terms of their regulatory role and responsibility in complying with EU free movement rules.[10] In doing so, it extends the vertical direct effect of the Treaties to quasi-horizontal situations, which, as discussed in Chapter II, may have serious implications for the autonomy of collective bargaining and the capacity of trade unions to defend their members' interests.

(d) *Gambling as an Economic Activity*

Since *Schindler*, governments have argued that gambling activities should be excluded from the scope of application of the free movement rules due to their morally controversial nature. The Court however took the view that, even if the morality of the gambling services was questionable, they were not comparable to activities involving illegal products, whose harmful nature would entail a complete prohibition under Community law. They were commonplace and practised legally in many Member States, and it was not for the Court to substitute its assessment for that of the legislatures and declare otherwise.[11]

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9 *Viking* (n 6), paras 33–34, 59–61.

10 J Malmberg and T Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' (2008) 45 CML Rev 1115, 1130–1131; L Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation' (2008) 45 CML Rev 1335, 1343–1346.

11 Case C–275/92 *Schindler* [1994] ECR I–1039, paras 31–32.

The Court distinguishes two factors that determine the economic nature of gambling services: one, the fact that the player pays consideration hoping to receive a prize or winning in return; and two, that gaming and betting services are operated with a view to profit, as not all the money staked is redistributed as prizes or winnings.[12] Neither the element of chance inherent in the transaction, nor the recreational aspect of gambling activities, nor the use of profits thereof in the public interest can alter the nature of the transaction itself or deprive it of its economic character.

The Court's reasons for concluding that gambling falls within the scope of the Treaty as an economic activity seem to be plausible, which however cannot be said about the rest of the areas under study. Overall, comparative analysis suggests that the Court interprets the scope of free movement in a consistently expansive manner, thereby prompting the need for public authorities (and other regulatory actors) to establish justification for the adopted measures. This empowers the EU, and specifically the Court, to decide what is allowed and what is not across a very wide range of areas of national policy.

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12 *Schindler* (11), paras 33–35.

2 The Varying Degrees of Proportionality Review

Since the Court's interpretation of the scope of the Treaty is extremely broad, and the threshold for a measure to qualify as a restriction is generally extremely low, any national measure that may potentially discourage a patient, student or an undertaking from exercising their freedoms of movement will have to be justified as proportionate in light of the legitimate objectives pursued. The extent to which States will be allowed to maintain restrictive laws and practices will depend upon the degree to which they can justify them. The justification stage thus becomes the focal point of the Court's analysis.

The Court has so far accepted most of the grounds advanced by Member States as *in principle* capable of justifying a barrier to free movement. However, Member States are required to prove that a particular ground is valid in the circumstances of the case and that the restrictive measures that have been taken are appropriate and necessary. It is exactly at this stage of judicial inquiry that major differences can be observed in cases concerning, on the one hand, healthcare, education and collective labour law and, on the other, gambling.

(a) *Healthcare: Detailed Guidelines from the CJEU*

The Court generally accepts that the requirement of prior authorisation for receiving hospital treatment in other Member States is a reasonable and necessary measure, considering the need for planning and control of costs of hospital care. However, the Court will closely scrutinise the specific conditions attached to the grant of authorisation. These conditions need to be justified by overriding reasons of general interest and have to comply with the test of proportionality, which encompasses a procedural and a substantive review.

The procedure for granting authorisations must be designed in a way that would circumscribe national authorities' discretion, which could potentially negate the effectiveness of EU free movement rules. It must be fair, objective and subject to review, and the scope of the covered treatment must be defined in terms that do not discriminate between national and foreign healthcare providers.[13] The substantive review focuses on the interpretation of the conditions for the grant of prior authorisation. Authorisation cannot be refused if equally effective treatment in the patient's home country is not available within a medically justifiable time. As previously discussed, the Court's interpretation of what constitutes a medically justifiable time focuses on the individual situation of the patient rather than the broader objectives of the healthcare system. A refusal to grant prior authorisation cannot be based merely on the existence of government-mandated waiting lists. In determining the waiting time that is medically justifiable, national authorities must take into account all the circumstances that help to determine the seriousness of the medical condition of the relevant patient. Therefore, where the delay arising from the waiting lists appears to be excessive having regard to an objective medical assessment of the state of health and the clinical needs of the patient, virtually no consideration advanced by the government is capable of justifying the refusal to grant prior authorisation in such a case.

(b) *Education: Emphasis on the Standard of Proof*

The Court holds that students' right to access higher education in other Member States constitutes the very essence of the free movement of students in the EU and that limitations thereto can only be accepted exceptionally. Accordingly, the Court's application of proportionality will be heavily focused on the standard of proof required

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13 *Smits and Peerbooms* (n 2), para 94; *Watts* (n 2), para 116.

to support the adoption of restrictive policies.

On the one hand, the Court appears to be receptive to Member States' concerns regarding the structural problems associated with the influx of foreign students (the homogeneity argument). Yet concerns alone are not enough. They must be substantiated by specific evidence and accompanied by an analysis of the appropriateness and proportionality of restrictive measures.[14] In the case of medical education, this will require that, in the first place, Member States provide 'solid and consistent' data proving that the influx of students poses genuine risks to public health.[15] Essentially, this data needs to demonstrate that the future provision of healthcare in the territory of the Member State concerned is likely to hurt because of the diminished training capacity of health specialists. Such analysis also has to account for the possibility that foreign students may decide to establish themselves in the State where they complete their studies. The standard of proof required seems to be extremely high, considering that the link between education and the protection of public health is only indirect and depends on a variety of contingent and uncertain factors, as expressly recognised by the Court itself.[16]

Specific evidence is also required to support the analysis of the appropriateness and necessity of a particular measure. Member States must provide various data and assessments showing that a limitation of the number of non-resident students can *really* bring about an increase in the number of graduates ready to ensure the future availability of public health services within the territory. Moreover, since the Court tends to emphasise that there may be non-discriminatory alternatives available for the

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[14] Case C–147/03 *Commission v Austria* [2005] ECR I–5969, para 63.

[15] Case C–73/08 *Bressol and Chaverot* [2010] ECR I–2735, para 71.

[16] ibid, para 69.

Member States to counteract the potential problems caused by high numbers of foreign students, Member States will need to demonstrate that discriminatory measures are the least restrictive option available.

(c) *The Redefined Scope of Collective Labour Rights*

The proportionality review seems to be equally if not more vigorous in labour law cases. It is premised on a view that in the process of achieving social policy objectives, in particular, the objective of worker protection, States (and other actors) should choose the means that are least restrictive of economic freedoms.

Accordingly, strike action must be invoked with the objective of securing employment conditions that are under serious jeopardy, and those conditions must be laid down in accordance with EU secondary legislation, where applicable. In addition, it must be taken as a last resort after other, possibly less restrictive means have been exhausted. Collective bargaining, on the other hand, is generally not considered as an appropriate or necessary method for regulating working conditions in cross-border situations unless it produces universally or generally applicable collective agreements. The system allowing sectoral collective bargaining is viewed by the Court as insufficiently precise and accessible for businesses to be able to determine their obligations as employers.

The Court's approach to collective labour rights seems to depart from the rest of its fundamental rights case law, concerning conflicts between the free movement rules and the exercise of civil and political rights. The Court normally considers the exercise of a fundamental right as a self-standing legitimate objective capable of justifying a restrictive effect on the free movement. It does not look at some broader public policy goals behind the fundamental right concerned.[17] As a result, the Court's standard of review is more restricted and focuses on the suitability, or appropriateness, of the exercise of a fundamental right rather than its necessity.[18] By contrast, collective labour rights seem to be perceived merely as one of the means for achieving the objective of the protection of workers, which somewhat explains why their exercise is subject to close judicial scrutiny.

(d) *Gambling: Focus on Consistency*

As a result of the Court's recognition that Member States enjoy broad discretion in regulating their gaming and betting markets, the proportionality review focuses on checking national rules for consistency rather than necessity. National authorities are not required to justify why they have chosen one regulatory model over another, perhaps a less restrictive one, because such choice falls within their margin of discretion. The fact that one system of protection differs from a system adopted by other Member States has no bearing on the assessment of the need for or proportionality of the more restrictive system. The language of 'the least restrictive means' does not even appear in the Court's reasoning.

The review is aimed at ensuring that the system is internally coherent and consistent. Accordingly, if the authorities decide to monopolise the sector, they must exercise effective control over the monopoly, ensuring that the expansion of the gambling sector is commensurate to the scale of unauthorised gambling in the territory, in line with the purpose of channelling consumers' propensity to gamble into activities

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17 See Case C–112/00 *Schmidberger* [2003] ECR I–5659; Case C–36/02 *Omega Spielhallen* [2004] ECR I–9609; Case C–244/06 *Dynamic Medien* [2008] ECR I–505; Case C–208/09 *Sayn-Wittgenstein* [2010] ECR I–13693. These judgments will be discussed in ch VI.

18 *Schmidberger* (n 17), paras 78–81; *Omega* (n 17), paras 37–39.

that are lawful and regulated. If, on the other hand, the authorities opt for a more liberal model, such as a licensing scheme, they must ensure the transparency and the non-discriminatory character of the scheme.

Moreover, Member States are not required to open up access to their markets to foreign operators just because they are subject to statutory regulation in their Member State of establishment. The reason behind this view is generally 'the difficulties liable to be encountered' by EU Member States in assessing the professional qualities and integrity of operators established in their own territory. This approach seems to sit in marked contrast with the Court's healthcare case law. The Court has consistently dismissed as unfounded governments' concerns about the quality of foreign healthcare provision, on the basis that there exists an EU regulatory framework for the mutual recognition of professional qualifications.[19] In that connection, it must be noted that apart from some guiding principles adopted by the Council,[20] EU law contains neither a set of common quality standards applicable to the healthcare providers established within the EU, nor a mechanism for controlling the observance of the standards in force in the Member States. Accordingly, the EU's legal framework governing the quality of healthcare rests on the mutual recognition of national standards and controls.[21] However, the Commission observes that there remain 'extensive national differences' in the quality of professional training and the medical skills and competencies of

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19 Case C–120/95 *Nicolas Decker* [1998] ECR I–1831, para 43; *Kohll* (n 2), para 48. See also Council Directive 2013/55/EU amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) 1024/2012 on administrative cooperation through the Internal Market Information System [2013] OJ L354/132.

20 Council, 'Council Conclusions on Common values and principles in European Union Health Systems' [2006] OJ C146/1.

21 Council Directive 2005/36/EC on the recognition of professional qualifications [2005] OJ L255/22. See also J Sylvest and C Adamsen, 'The Impact of the European Court of Justice Case Law on National Systems for Cross-Border Health Services Provision' (2007) Briefing Note, DG Internal Policies of the Union, 8 <http://www.europarl.europa.eu/RegData/etudes/note/join/2007/382184/IPOL-IMCO_NT(2007)382184_EN.pdf> accessed 20 May 2015

healthcare professionals.[22] Against this background, there seems to be no reason why Member States should place a high degree of trust in the effectiveness of foreign regulations in the healthcare sector, but not in the gambling sector.

The standard of proof required in the gambling cases also appears to be extremely low in comparison to the Court's student mobility case law. The Court often endorses abstract, unsubstantiated claims advanced by governments, such as that: the online gambling market presents unique and greater dangers compared to other forms of gambling and other markets; foreign gambling operators cannot effectively be supervised and controlled by their States of establishment; or that national measures can actually achieve the objectives they have set out to pursue. Admittedly, some of these claims may be difficult to substantiate with empirical evidence. For instance, it is hard to measure the extent of gambling addiction caused by online gambling or to estimate the comparative effectiveness of the various measures employed to that end. One could speculate that this is exactly the reason why the Court holds that the absence of studies provided on behalf of the authorities is immaterial in establishing the validity of government submissions.[23] Yet the Court will not hesitate to dismiss the same type of claims as unsubstantiated when advanced in the student mobility cases. In fact, it will insist that governments provide specific figures and estimations showing that an influx of foreign students is likely to affect the quality of medical training to the extent of ultimately jeopardising the provision of healthcare in the territory of the Member State concerned. Arguably, these connections may be empirically impossible to prove, otherwise than by reference to a limited budget available to education. That does not,

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22 Commission, 'Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare' COM (2008) 414 final, Explanatory Memorandum, 11 (Proposal for PRD).

23 See Joined Cases C–316/07, C–358/07 to C–360/07, C–409/07 and C–410/07 *Markus Stoß* [2010] ECR I–8069, paras 70–72; Case C–390/12 *Pfleger and Others* (CJEU, 30 April 2014), para 51.

however, seem to be enough to convince the Court to soften its stance.

The comparative analysis reveals that although the Court is consistent in its broad reading of the scope of the Treaty, it applies proportionality review with varying intensity. When faced with national gambling rules, the Court exercises deference towards national regulatory choices and accepts them insofar as they reflect a genuine concern on behalf of the authorities to protect consumers from gambling addiction and fraud, even where that genuine concern is not backed by much evidence. By contrast, in cases concerning healthcare, education and collective labour law, the inquiry focuses on establishing the necessity of the regulatory measure in question, and the Court provides national courts with detailed guidelines to that end: from suggesting that there may be (hypothetical) less restrictive alternatives available in a given situation, to providing EU law definitions of certain key concepts (medical necessity), to instructing the courts on the standard of proof and the type of evidence that is admissible. The guidelines provided by the Court often clearly lead to a conclusion that the national measures in question cannot be justified.

3 The Quasi-Legislative Effects of the Case Law

It is further argued that, as a result of the combination of two factors, the high standard of judicial review and the constitutional sensitivity of the policy areas concerned, the free movement case law is prone to produce quasi-legislative regulatory effects, thereby modifying the pre-existing relationship between the EU's legislature and the judiciary.

(a) *What Constitutes a Quasi-Legislative Judgment?*

The term 'quasi-legislative' is normally used to describe the rule-making authority granted to public administrative bodies in the exercise of their statutory powers.[24] However, quasi-legislative functions are also inherent in judicial law-making. This is particularly true of supreme and constitutional courts, which are entrusted by law with the responsibility to interpret the law rather than just apply it to the legal dispute at hand.[25] This enables the courts to produce rules creating generally applicable rights and obligations. In the context of EU law, the responsibility to interpret the Treaties is conferred upon the CJEU, which has the task to 'ensure that in the interpretation and application of the Treaties the law is observed'.[26] The Court exercises this jurisdiction in three main ways: by reviewing the legality of acts of EU institutions (actions for annulment or failure to act); ensuring that Member States comply with their obligations under EU law (infringement proceedings); and delivering an interpretation of EU law at

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24 See eg T Volgy, 'The Role of the "Outsider" in Quasi-Legislative Systems: The Potential Utility of a Legislative Model' (1973) 27 Int'l Org 85; KW Saunders, 'Interpretative Rules with Legislative Effect: an Analysis and a Proposal for Public Participation' (1986) 1986 Duke LJ 346.

25 This topic is further explored in AHY Chen and MP Maduro, 'The Judiciary and Constitutional Review' in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) ch 8; A Gramper, 'Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters' (2015) 4 CJICL 423.

26 TEU, art 19.

the request of national courts (preliminary reference procedure).[27] Cases involving the questions of legality of Member State action normally arise out of preliminary reference procedure – like the majority of the judgments analysed in this thesis – and some out of infringement proceedings. Both routes require that the Court deliver an interpretation of EU law, either in order to enable the national court to resolve the dispute at hand or directly to rule on the rights and obligations of the Member States in light of the relevant provisions of EU law.

Owing to the broad framing of Art. 19 TEU, the exercise by the Court of its interpretative authority necessarily entails a degree of autonomy and discretion,[28] which makes it almost inevitable that its judgments will vary to some extent in terms of their mode of reasoning, specificity and (intended) normative scope.[29] But what makes a judgment deserve the label of quasi-legislative? In this respect, it should be noted that, by virtue of being predominantly of an interpretative nature, *all* of the Court's judgments tend to produce certain regulatory effects extending beyond the narrow scope of application to the circumstances of a particular case. Yet some seem to be more likely to produce what is referred to in this thesis as *quasi-legislative* regulatory effects.

Quasi-legislative judgments can be distinguished by their peculiar rhetoric. They will be drafted in a manner more akin to legislation than a judgment and thus, in addition to deciding a particular point of law, will lay down generally framed rules and

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27 TFEU, arts 258–260, 263, 269. See also TFEU, arts 265 and 268.

28 See eg K Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' (Lenaerts) in M Adams et al (eds), *Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 13–18.

29 See eg T Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9 ICON 737, offering a classification of the Court's rulings according to degrees of specificity into the outcome, guidance and deference cases (Tridimas, 'Constitutional Review').

principles of wider application.[30] The quasi-legislative character of a judgment may stem, on the one hand, from the specificity and prescriptive detail of judicial reasoning. The *Altmark* judgment (to be further discussed in Chapter IV of this thesis) is often given as a prominent example of that type of judgment, as it prescribes concrete criteria that Member States must comply with in order to ensure the compatibility with EU law of State subsidies granted to undertakings providing public services.[31] On the other hand, the detail of the judgment may simply be a sign of an interpretation of law that is carefully tailored to the particular facts of the case.[32] In fact, regulatory ambition may lie exactly in the laconic brevity and abstraction of judicial reasoning, especially where this type of reasoning masks a possible lack of consensus among the members of the Court as regards the details of the principle that is being (newly) developed.[33] A good illustration of this tendency is offered by the *Zambrano* judgment, where the Court famously ruled that EU citizens must not be deprived of 'the genuine enjoyment of the substance of their rights as Union citizens', without elaborating on what this requirement generally entails.[34] In light of the foregoing, it is suggested that two other

[30] J Komarek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 AJCL 149 (Komarek), discussing the 'legislative' method of reasoning in the CJEU and other constitutional courts of continental law tradition. See also M Bobek, 'The Court of Justice of the European Union' (Bobek) in D Chalmers and A Arnull (eds), *Oxford Handbook of European Union Law* (OUP 2015) 154 (Chalmers and Arnull). For an account describing features characteristic of 'legislated law', see J Gardner, 'Some Types of Law' in J Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 54–65.

[31] Case C–280/00 *Altmark* [2003] ECR I–7747, paras 77–82, referred to in Tridimas, 'Constitutional Review' (n 29) 754. For other prominent examples of quasi-legislative judgments, see eg C–6/90 and C–9/90 *Francovich v Italy* [1991] ECR I–5357, paras 30–46; Joined Cases C–46/93 and C–48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I–1029, paras 20–58.

[32] See eg the Court's elaborate reasoning in Case C–42/07 *Liga Portuguesa* ECR [2009] I–7633, discussed in ch II, s 4(b)(iv). Outside the confines of the present analysis, see Case C–456/02 *Trojani* [2004] ECR I–7573, paras 13–46*,* discussed in Komarek (n 28) 153. See also Tridimas, 'Constitutional Review' (n 29) 750–751.

[33] For a discussion on how disagreements among the judges may influence the language of CJEU judgments, see Tridimas, 'Constitutional Review' (n 29) 753–754; Bobek (n 30) 170–172; on the impact of differences in the judges' legal culture, see FG Mancini and D Keeling, 'Language, Culture and Politics in the Life of the European Court of Justice' (1995) 1 Colum J Eur L 397, 399–403.

[34] Case C–34/09 *Ruiz Zambrano* [2011] ECR I–1177, paras 41–45, discussed in T Tridimas, 'The ECJ and

factors may assist in identifying the quasi-legislative character of a judgment: the standard of judicial review and the sensitivity of the legal issue concerned. Notably, these factors may not necessarily explain all of the Court's case law, but they seem to be highly relevant when the judgment concerns policy areas that fall outside the explicit legislative competence of the EU.

The correlation between the standard of review and a quasi-legislative character of a judgment is almost self-explanatory: the closer national measures are scrutinised, the less space there is left for Member State action in the area, and the more likely that space will be occupied by the rules and principles developed by the CJEU. The spectrum of the Court's standard of review can in theory range from complete deference to strict scrutiny. By and large, this spectrum is illustrated by the comparative analysis conducted in the preceding section, which demonstrates how in judgments concerning healthcare, education and collective labour law, judicial interpretation not only decides the outcome of the case, but also lays down what could be considered a generally applicable regulatory framework meant to govern the matter concerned – be it access to medical treatment abroad, admission of foreign students to higher education institutions or the parameters of collective regulation of labour in transnational situations. By contrast, in the gambling case law, the Court not only leaves ample space for the national court solving the case at hand, but also, more generally, sends a signal to that court about the proper standard of review to be applied with regard to the national regulatory measures in question. By doing so, through its judgments, the Court effectively sanctions the right of the Member States to make autonomous decisions in the area (of gambling) as a matter of EU primary law.

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the National Courts: Dialogue, Cooperation, and Instability' in Chalmers and Arnull (n 30) 409–410. For an example from the Court's early jurisprudence, see eg Case C–8/74 *Dassonville* [1974] ECR 837, paras 4–9.

Accordingly, Member States may choose to continue acting alone or decide to take a concerted action together with other Member States at the EU level.

The regulatory effects associated with the particular standard of judicial review certainly are going to be more pronounced if the issue at stake is a sensitive one, which typically will be the case if the policy area involved falls outside the EU's (explicit) legislative competence. In this connection, it has been demonstrated in Chapter II that a strict judicial review in light of the free movement law will have the effect of subjecting national social policies to EU-wide deregulation. Admittedly, even in this case, Member States retain the possibility of re-regulating the areas concerned through the adoption of legislation at the EU level, using one of the functionally broad Treaty bases for that purpose. Yet the way in which this theoretical possibility plays out in practice is a different matter, as discussed below.

It will be argued that, through generating quasi-legislative regulatory effects in constitutionally sensitive areas of national policy, the Court's judgments create an unusual inter-institutional dynamic between the EU's judiciary and its legislative institutions (Commission, Council and the Parliament), where the latter are either prevented from acting at all or left with a limited choice of legislative options, essentially confined to those reaffirming and codifying the Court's case law. The discussion starts with an introduction of certain concepts of EU law that are key for understanding the scope of the quasi-legislative capacity of the Court's case law in the framework of the Treaties. The remainder of the analysis demonstrates with concrete examples the ways in which this quasi-legislative capacity plays out in practice and, in particular, how this affects the relationship between the Court and the EU's legislative institutions.

(b) *The Scope of EU Law, Competence and Legal Basis*

As discussed in Chapter II with regard to each area under study, the EU only has *competence* to carry out actions to support, coordinate or supplement the actions of the Member States in healthcare,[35] education[36] and collective labour law,[37] excluding the adoption of binding legislation. As these limitations, in the conventional view, mainly concern the EU's legislative institutions, the Court holds that a lack of the legislative competence on behalf of the EU does not remove the matter from the *scope of EU law*, which in turn means that the various regulatory laws and practices of the Member States nevertheless have to comply with the free movement rules laid down in the Treaty and interpreted by the CJEU.

Similarly, a distinction should be made between the existence of a competence for the EU's action and the *legal basis* for such action. To illustrate, a competence has not been conferred on the EU to issue binding legislation in the areas of healthcare, education and collective labour rights. Yet that does not, in practice, preclude the EU's legislative intervention in these areas. The Treaty contains a number of functionally broad legal bases that are not confined to a specific policy area and can be used to regulate any matters that fall (loosely) within the framework of the internal market, provided that certain conditions are met. The legal bases relevant for the present analysis are Arts. 114 and 352 TFEU, and, to a lesser extent, Arts. 50, 59 and 21 TFEU.

Art. 114 TFEU authorises the EU to adopt harmonising measures that have the objective of improving the conditions for the establishment and functioning of the internal market where no other specific legal basis applies. The measures enacted pursuant to Art. 114 must contribute to the elimination of existing or likely obstacles to

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[35] TFEU, arts 6(a), 168.

[36] TFEU, arts 6(e), 165.

[37] TFEU, arts 4(2)(b), 153(1) and (5), 156.

the exercise of fundamental freedoms or to the removal of appreciable distortions of competition likely to arise from the diverse national rules.[38] As long as these conditions are met, the EU legislative institutions can rely on Art. 114 even when the decisive factor for the legislative intervention is a policy concern not related to the functioning of the internal market *per se*, such as, for instance, the protection of public health or the protection of consumers.[39] This makes the scope of Art. 114 rather broad in practice.[40]

In comparison to Art. 114, Arts. 50 and 59 TFEU could be considered as the more specific legal bases for adopting measures concerned with the functioning of the internal market. Art. 50 authorises the adoption of directives in order to attain the 'freedom of establishment as regards a particular activity', whereas Art. 59(1) is aimed at the liberalisation of a specific service. The broadest of the three, Art. 21 can be utilised in order to facilitate the exercise of the right for EU citizens to move and reside freely within the territory of the EU, subject to the limitations and conditions laid down in the Treaties and secondary legislation and where the Treaties have not otherwise provided the EU legislature with the necessary powers in this respect.[41]

Recourse to Art. 352 TFEU may be had as a last resort. This provision lays

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38 Case C–376/98 *Germany v Parliament* [2000] ECR I–08419 (*Tobacco Advertising*), paras 83–84, 95, 106; Case C–491/01 *British American Tobacco and Imperial Tobacco* [2002] ECR I–11543, paras 60–61 (*BAT*); Case C–380/03 *Germany v Parliament* (*Tobacco Advertising II*) [2006] ECR I–11573, paras 37–38, 41; Case C–210/03 *Swedish Match* [2004] ECR I–11893, paras 29–30 (*Swedish Match*).

39 See eg *Tobacco Advertising* (n 38), para 88; *BAT* (n 38), para 62; Joined Cases C–154/04 and C–155/04 *Alliance for Natural Health* [2005] ECR I–6451, para 30; Case C–58/08 *Vodafone* [2010] ECR I–4999, para 36.

40 For academic discussion on this topic, see D Wyatt, 'Community Competence to Regulate the Internal Market' in M Dougan and S Currie, *Fifty Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009); S Weatherill, 'The Limits of Legislative Harmonisation Ten Years after *Tobacco Advertising*: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 Germ LJ 827.

41 For the interpretation of this clause by the CJEU, see Case C–413/99 *Baumbast* [2002] ECR I–07091, paras 85–86, 91. For academic commentary, see eg P Craig and G de Burca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015) ch 23.

down a 'flexibility clause' that empowers the EU to take action in cases where no other Treaty article provides the necessary powers, but Union action is necessary, in the context of its policies, to attain one of its objectives. There are two limitations to the use of this provision: the envisaged action must not entail harmonisation measures where the Treaties exclude such harmonisation; and it must not lead to the EU's competences being extended beyond those provided for by the Treaties. Other conditions qualifying the use of Art. 352 include a unanimous vote in the Council and the duty bestowed on the Commission to inform national parliaments of its proposals, in accordance with the procedure for monitoring subsidiarity.[42]

The following analysis builds on the relationship among the described concepts of the scope of EU law, the competence of the EU and the legal basis for EU action. It seeks to demonstrate how this relationship works out in practice in light of the Court's free movement case law concerning, in particular, the areas of healthcare, education and collective labour law, with an emphasis on the implications of the case law for the power dynamic between the EU's legislature and the judiciary. The argument is based primarily on the analysis of three legislative measures of the EU, or proposals, whose adoption has been influenced by the CJEU: the draft Monti II Regulation, the Patients' Rights Directive, and the Social Security Regulation of 1971.

(c) *The Court Pre-empts Legislative Action*

Proposed on the basis of Art. 352 TFEU, the draft Monti II Regulation was intended to provide a legislative response to the Court's interpretation of the relationship between the exercise of the fundamental freedoms and the right to strike.[43] Although the draft

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42 See TEU, art 5(3); TFEU, art 352(2); P Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge 2012).

43 Commission, 'Proposal for a Council Regulation on the exercise of the right to take collective action

contained a provision explicitly stating that it was not reversing the case law of the CJEU, it did seem to endeavour to correct it by explicitly recognising the general equality between the fundamental rights and fundamental freedoms in EU law.[44] Specifically, the Proposal stated that 'the exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms.'[45] The proposal also highlighted the need for the national courts to strike a fair balance in the process of reconciliation of both legal values. Monti II thus appears to have established a double proportionality review as a means of striking an equitable balance between the exercise of the right to strike and the fundamental freedoms,[46] thus deviating from the sort of balance between the two values adopted by the CJEU in *Viking* and *Laval*. Monti II was eventually withdrawn, at least officially, following the objections raised by national parliaments regarding a breach of subsidiarity and the lack of EU legislative competence to regulate collective labour rights. In fact, it was the first time that national parliaments had triggered the "yellow card" mechanism established by the Lisbon Treaty.[47]

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within the context of the freedom of establishment and the freedom to provide services' COM (2012) 130 final (Monti II). For a commentary on Monti II by its drafters, see The Adoptive Parents, 'The Life of a Death Foretold: The Proposal for a Monti II Regulation' in M Freedland and J Prassl (eds), *EU Law in the Member States:* Viking, Laval *and Beyond* (Hart Publishing 2014) (The Adoptive Parents) 95 ff.

44 Monti II (n 43), arts 3.4.2, 3.4.4 and Explanatory Memorandum, 10 <ec.europa.eu/social/BlobServlet?docId=7480&langId=en> accessed 20 May 2105.

45 Monti II (n 43), art 2.

46 This approach was proposed by AG Trstenjak in *Commission v Germany* (n 6), Opinion of AG Trstenjak, paras 81, 84, 188–189, 215, discussed at length in ch VI, s 2(b).

47 M Goldoni, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation' (2014) 10 EuConst 90.

The fate of Monti II shows that the Court's judgment may have the effect of pre-empting any meaningful legislation at the EU level. The more controversial the judgment, the more likely that this will be the case. Monti II sought to achieve a more equitable balance in the relationship between the economic freedoms and the right to strike, in this way departing from the position adopted by the Court. However, not surprisingly, the proposal raised some controversial reactions from the stakeholders. The European Trade Union Confederation rejected the Proposal, claiming that it was too restrictive of the right to strike, while Business Europe, an association representing more than 20 million European companies, was against it for an opposite reason: Monti II was less favourable to employers than the Court's case law. Finally, protecting the national interests, 12 parliaments showed it the "yellow card", claiming that the Proposal violated the principle of subsidiarity and unlawfully interfered with national systems of industrial relations.[48]

Due to the objections raised by national parliaments, the Commission was required to review the Proposal and eventually withdrew it. However, the proposal died not because there were real concerns over subsidiarity – after all, the draft dealt with the interpretation of the free moment rules in *cross-border* situations. As the Commission admitted in a formal letter addressed to the national parliaments in response to the raised objections, Monti II was withdrawn because it was 'unlikely to gather the necessary political support' to enable its adoption.[49] Therefore, although the adoption of Monti II had been in theory enabled by Art. 352, the lack of consensus between the stakeholders and the lack of political will to support the EU's interference

48 For a detailed account, see I Cooper, 'A Yellow Card for the Striker: How National Parliaments Defeated EU Strikes Regulation' (2013) Network of European Union Centres for Excellence, 5 <http://euce.org/eusa/2013/papers/12g_cooper.pdf> accessed 20 May 2015 (Cooper).

49 Cooper (n 48) 15; The Adoptive Parents (n 43) 96, 99.

in national industrial relations systems resulted in the eventual withdrawal of the proposal. Ironically, the rulings of the CJEU that had triggered the whole process remained unchanged.

On the other hand, the heated debate over Monti II in a way was much ado about nothing. Even if adopted, the regulation could not in reality have replaced the Court's particular interpretation of the free movement rules. Judicial interpretation of primary law is superior to legislation, national or EU-wide, and remains intact as long as the Treaty remains unamended. In other words, the rules developed in *Viking* and *Laval* would have continued to apply, as a matter of law, even if Monti II had gained a unanimous vote. The only possible scenario where Monti II could have had real impact is if the Court were willing to temper its position as a sign of deference to the political consensus and perhaps provoked too by the grant of binding force to the Charter. It is however difficult to estimate how likely this outcome would have been, especially considering that the Court has in the past gone against the express wishes of the legislature even where the legislation in question had gained unanimous support in the Council. The latter phenomenon is discussed below.

(d) *The Court Prevents Legislative Overturn*

Another way in which the Court has shaped the institutional dynamic is through interpreting existing EU legislation to arrive at a meaning that serves the objectives of free movement. The Court's interpretation of Art. 22(2) of Regulation 1408/71 offers a primary example of this tendency.

(i) Regulation 1408/71 and cross-border access to healthcare

The objective of Regulation 1408/71 was to establish rules on the coordination of national social security systems.[50] The original wording of the Regulation accorded Member States a considerable margin of discretion in making decisions regarding the grant of authorisation to receive medical treatment abroad. It stipulated that the authorisation could not be refused in a circumstance where the treatment in question could not be provided for the person concerned within the territory of their State of residence. This provision was unqualified by references to either the timing or effectiveness of the treatment. As such, it gave a lot of leeway to the national healthcare authorities to assess whether, in principle, they were capable of providing the treatment in question.

The Court got the opportunity to deliver its interpretation of Art. 22(2) in the *Pierik* cases,[51] concerning a Dutch national who went to Germany to receive hydrotherapy treatment. The patient's request for reimbursement was refused because hydrotherapy was not among the types of treatment covered by the Dutch health insurance. The Court held that the intention of the Regulation was to give the medical requirements the decisive role in the decision of competent authorities to grant or refuse the authorisation for treatment abroad. Therefore, authorisation could not be refused when the foreign treatment was considered 'necessary and effective', even if it was not offered in the health package of the State of insurance.[52]

The Court's judgments in *Pierik* received an immediate political response at the EU level. Worried about the implications of these judgments for their healthcare budgets, Member States 'corrected' the Court's interpretation of Art. 22(2) by adopting

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50 Council Regulation (EEC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2, preamble.

51 Case C–117/77 *Pierik* [1978] ECR 825 (*Pierik I*); Case C–182/78 *Pierik II* [1979] ECR 1977 (*Pierik II*).

52 *Pierik I* (n 51), para 26; *Pierik II* (n 51), paras 12–13.

unanimously several important amendments to the Regulation.[53] Art. 22 was amended to include a provision expressly stating that the authorisation could not be obtained for treatment that was not among the benefits provided for by the legislation of the patient's Member State of residence.[54] If this condition was fulfilled, the prior authorisation could not be refused where the patient could not be given adequate treatment in their State of affiliation within the time normally necessary for obtaining such treatment, taking account the patient's state of health and the probable course of the disease.[55] The latter condition effectively reiterated the requirements laid down by the Court in *Pierik II*.[56] In addition, a new recital was introduced in the preamble of the Regulation, which, referring to the practical 'experience' of its implementation, emphasised the importance of extending 'the discretionary power of an institution of a Member State … in granting or refusing authorisation'. Evidently, the purpose of the overall amendments was to reinstate national authorities' prerogative to make decisions about public healthcare without interference into the process by the CJEU.

In later judgments, the Court did not challenge the political agreement on the scope of treatment covered by Art. 22. Yet it did sustain an expansionist interpretation of this provision, first, by giving a Europeanised meaning to the terms that were key in defining the scope of the benefits package[57] and, second, by providing an extremely

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53 See Council Regulation (EEC) 2793/81 amending Regulation (EEC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community and Regulation (EEC) 574/72 fixing the procedure for implementing Regulation (EEC) 1408/71 [1982] OJ L122/14, art 22(2) (Reg 2793/81), discussed in AP van der Mei, *Free Movement of Persons Within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 254–256; V Hatzopoulos, 'Actively Talking to Each Other: the Court and the Political Institutions' in B de Witte, E Muir and M Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013) 135.

54 Reg 2793/81 (n 53), preamble and art 22(1).

55 ibid.

56 *Pierik II*, paras 9–12.

57 *Smits and Peerbooms* (n 2), para 94.

detailed interpretation of the 'medical necessity' criterion, as discussed in detail in Chapter II. In doing so, the Court narrowed down, once again, the margin of discretion bestowed upon the Member States by Regulation 1408/71. Moreover, in the *Watts* judgment, the Court ruled that there was 'no reason which seriously justifie[d] different interpretations' of 'undue delay' depending upon whether the context was Art. 22 of Regulation 1408/71 or Art. 49 EC.[58] In this way, the Court effectively elevated its interpretation of EU secondary law to the status of EU primary law.

The foregoing goes to show how the intentions of the drafters of Regulation 1408/71 have been shaped and moulded by the Court in order to fit the logic of the free movement rules. Despite political resistance, the Court has drastically changed the meaning of Art. 22 of Regulation 1408/71, turning it into an EU-wide binding obligation requiring Member States to reimburse the costs of medical treatment received abroad to all patients whose condition is serious enough to necessitate treatment. Moreover, by basing this interpretation on both the Regulation and the Treaty, the Court has effectively precluded the possibility of it being overturned by a legislative amendment.

(ii) Other examples

Regulation 1408/71 is not an isolated example of an expansive, market-oriented judicial interpretation of EU law. Consider the widely discussed Posted Workers Directive. It has been interpreted by the Court as a *maximum* harmonisation measure as regards the employment and working conditions of posted workers, whilst up until then having been commonly perceived as a *minimum* harmonisation Directive establishing

[58] *Watts* (n 2), paras 60, 62, 68.

the floor of rights for those workers.[59] The terms of the Directive itself suggest this interpretation. Art. 3(7) explicitly states that paragraphs 1 to 6 – which set out the core of the working conditions applicable to posted workers – 'shall not prevent application of terms and conditions that are more favourable to workers'.[60] In addition, Recital 22 of the preamble emphasises that the Directive is 'without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions'. However, notwithstanding these stipulations, the Court concluded in *Laval* and affirmed in subsequent judgments that the level of protection to be guaranteed to posted workers by the PWD was limited, in principle, to the nucleus of the minimum rules provided for in Art. 3(1) PWD.[61]

The Court followed a similar pattern when interpreting EU Public Procurement Directives and the Acquired Rights Directive. For instance, despite the fact that Directive 2004/18 expressly authorised the introduction of social policy clauses in public tenders, the CJEU concluded in *Commission v Germany* that the relevant provision did not, however, cover application of collective agreements.[62] In *Alemo-Herron*, the Court came to the conclusion that the ARD, widely interpreted as a measure providing the minimum worker protections in the event of transfer of undertakings,[63] required a fair balancing of the interests of businesses, on the one hand,

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59 Case C–346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I–1989, Opinion of AG Bot, para 83; J Malmberg, 'The Impact of the ECJ Judgments in *Viking*, *Laval*, *Rüffert* and *Luxembourg* on the Practice of Collective Bargaining and the Effectiveness of Social Action' (2010) European Parliament Directorate General for Internal Policies, 3–5 ff; Malmberg and Sigeman (n 10) 1116.

60 Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, art 3.

61 *Laval* (n 6), para 81.

62 Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114, preamble, recital 46 and art 26; *Commission v Germany* (n 6), paras 53–56. See also *Rüffert* (n 59), para 39, reiterating substantially the same position without expressly basing it on the PPDs.

63 Council Directive (EC) 23/2001 on the approximation of the laws of the Member States relating to the

and workers, on the other.[64] However, this balance resulted in prioritising the former over the latter. Clauses referring to applicable collective agreements were considered to be unlawful because they placed too much burden on the transferee undertaking, thus inhibiting its ability to adjust to changes resulting from the transfer.[65]

In the context of cross-border access to education, the Court's interpretation of the Treaty on matters covered by EU secondary law has served to create socio-economic rights for mobile students. The *Grzelczyk* judgment established that the combined force of EU citizenship and the principle of equal treatment required that Member States hosting foreign students grant them the right to social assistance as long as they could demonstrate a certain degree of integration into the society of the host Member State.[66] As a result, economically inactive persons, in principle, were granted access to the welfare system of the host Member States. Notably, *Grzelczyk* went against an express EU-level legislative consensus whereby economically inactive people – such as students, pensioners and people out of work – residing in other Member States had no access to the welfare benefits there, and their right of residence itself was conditional on the possession of sufficient financial resources.[67]

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safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16, preamble and art 8. See also Case C–426/11 *Alemo-Herron and Others* (CJEU, 18 July 2013), Opinion of AG Cruz Villalón, para 20; J Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law: Case C–426/11 *Alemo-Herron and Others v Parkwood Leisure Ltd*' (2013) 42 ILJ 434, 444–445; S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the Improper Veneration of "Freedom of Contract". Judgment of the Court of 18 July 2013: Case C–426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*' (2014) 10 ERCL 167, 170.

64 Acquired Rights Directive (n 63), art 3(1) and (3); *Alemo-Herron* (n 63), paras 25–27.

65 *Alemo-Herron*, paras 28–29.

66 See eg Case C–184/99 *Rudy Grzelczyk* [2001] ECR I–6193, paras 44–46. See, specifically on maintenance grants, Case C–209/03 *Dany Bidar* [2005] ECR I–2119, paras 57–59.

67 Council Directive (EEC) 90/364 on the right of residence [1990] OJ L180/26, preamble, recital 4, art 3; Council Directive (EEC) 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28, preamble, recital 4, art 3; Council Directive (EEC) 93/96 on the right of residence for students [1993] OJ L317/59, preamble, recitals 10 and 11, art 4.

Furthermore, the logic of the *Grzelczyk* judgment was later transposed into the CRD.[68] The drafting history of the Directive suggests that this issue attracted heated political debate between, on the one hand, Commission and Parliament, advocating for the interests of students, and, on the other hand, the Council, determined to protect the financial interests of the Member States.[69] Ultimately, this debate was won by the Commission, which, crucially, had made its case by relying on the Court's case law. This goes to show that the Court's judgments are not only capable of offsetting the existing legislative choices, but may also predetermine or at least influence the content of future legislation on the matter. The latter aspect is discussed next.

(e) *The Court Predetermines the Content of Legislation*

The example of the Patients Rights Directive demonstrates that the legislative measure that has the greatest likelihood of being successfully adopted at EU level will be one that essentially replicates the Court's case law.

The adoption of the PRD has been seen by some as a significant step marking the EU's involvement in the domestic healthcare policies of the Member States.[70] Adopted on the basis of Arts. 114 and 168 TFEU, the Directive harmonises national rules on reimbursement of costs of cross-border healthcare. Its adoption was long anticipated and came five years after an unsuccessful attempt by the Commission to

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68 See Council Directive (EC) 2004/38/EC [2004] on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L158/79, art 24, recitals 3, 10. But see Case C–333/13 *Elisabeta Dano* (CJEU, 11 November 2014), suggesting that, at least on the issue of cross-border access to social security, the CJEU has become more cautious and attentive to the political mood.

69 For a detailed overview of the drafting process, see F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' (2010) 17 JEL & Pol'y 1128, 1139–1143.

70 W Sauter, 'Harmonisation in Healthcare: the EU Patients' Rights Directive' (2011) TILEC Discussion Paper 2011-030 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1859251> accessed 20 May 2015 (Sauter, 'Harmonisation').

include healthcare services in the Services Directive.[71] The reason why healthcare was excluded from the Services Directive was the objection by the health policy stakeholders to the largely economic logic embedded in the Directive. It was argued that the country of origin principle enshrined in the Commission's initial proposal[72] was not an appropriate means to regulate the healthcare sector, which by its nature necessitated a high level of regulatory intervention and control by national governments.[73]

The legislative proposal dedicated specifically to cross-border healthcare was meant to provide a comprehensive legal framework on matters of cross-border healthcare, whilst also striking a balance between the economic and social dimensions pertaining to the sector.[74] Not incidentally, the Commission's proposal was ambitiously entitled a directive on 'Patients' Rights', suggesting the creation of EU-wide rights to patients – a concept supposed to be much broader in scope than simply the reimbursement of the costs of cross-border medical treatment.[75] The ambition of the Directive is also evidenced by the reference in the preamble and Art. 5 to the 'overarching values' common to the health systems across Europe – universality, access to good quality care, equity, and solidarity. These values, which are based on the

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71 Council Directive 2006/123/EC on services in the internal market [2006] OJ L376/36, preamble, recital 23, art 2(2)(f).

72 ibid, art 16.

73 'Recommendations on Health Services and the Internal Market' (*European Health Policy Forum*, 26 May 2005) 15, <http://ec.europa.eu/health/archive/ph_overview/health_forum/docs/recom_health_services.pdf> accessed 20 May 2015. For an in-depth discussion, see W Gekiere, R Baeten and W Palm, 'Free Movement of Services in the EU and Health Care' in E Mossialos et al (eds), *Health Systems Governance in Europe: The Role of European Union Law and Policy* (CUP 2010) 487–504.

74 Proposal for PRD (n 22), Explanatory Memorandum, 2; Commission, 'Consultation regarding Community action on health services' (Communication) COM (2006) 1195/4; European Parliament, Committee on the Internal Market and Consumer Protection, 'Motion for a European Parliament Resolution on the impact and consequences of the exclusion of health services from the Directive on services in the internal market' 2006/2275(INI).

75 Sauter, 'Harmonisation' (n 70) 8–9.

conclusions produced by the Council,[76] are to be observed by national authorities in providing cross-border treatment.[77]

Yet, despite an ambitious title and some aspirational value rhetoric, in reality the Directive did not do much more than codify the rules already developed in the case law of the CJEU, simply adding to the legal certainty of the current regulatory regime via the transparency of legislation, as opposed to the relative opacity of case law. The Directive did not create, nor was intended to create, any new rights for patients. The Explanatory Memorandum and the Preamble to the Directive both stipulate that the objective of the Directive is to provide sufficient clarity about the rights to be reimbursed for healthcare provided in other Member States in order to enable patients to exercise those rights in practice.[78] Recital 8 expressly states that the Directive intends 'to achieve a more general, and also effective, application of principles developed by the Court of Justice on a case-by-case basis.'[79] In line with this promise, a number of the provisions of the PRD are qualified by references to the case law of the CJEU, such as, 'in accordance with the principles established by the Court of Justice' or 'according to the constant case-law of the Court of Justice'.[80]

The provisions regarding the reimbursement of the healthcare costs incurred abroad seem to replicate the rules developed by the Court, often even their exact wording. For example, Art. 7 obliges the Member States of affiliation to cover the costs of cross-border healthcare up to the level of the costs that would have been assumed by

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76 Council Conclusions on Health Systems (n 20).

77 Council Directive 2011/24/EU on the application of patients' rights in cross-border healthcare [2011] OJ L88/45, recital 12, art 5.

78 Proposal for PRD (n 22), Explanatory Memorandum, 7; Patients' Rights Directive (n 77), preamble, recital 10, art 1(1).

79 Patients' Rights Directive, preamble, recital 8.

80 ibid, preamble, recitals 10, 12, 27, 38, 40, 42, 44, 46, art 1(1).

the Member State of affiliation had this healthcare been provided in its territory, without exceeding the actual costs of healthcare received. Art. 8 establishes the general validity of a prior authorisation requirement for intramural care and lays down the procedural and substantive requirements applicable to prior authorisation, in accordance with the case law of the CJEU.

The so-called new elements introduced by the Directive – those going beyond the rules developed by the CJEU – mainly concern the procedural guarantees aimed at ensuring that the cross-border system is effective in practice. The relevant rules include provisions on access to information, transparency of procedures, coordination of safety and quality of treatment, and information exchange through the national contact points and the E-Health system.[81] Accordingly, Member States are required to provide healthcare quality and safety standards, to ensure patients' access to the information necessary for making informed choices regarding their healthcare, to put in place a complaints procedure for seeking remedies, to respect patients' privacy when processing personal data, and others. One could argue that these procedural guarantees are anyway required under the free movement law, but at least the Directive makes them concrete. Otherwise, the PRD does not seem to do much more than give a legislative expression to the rules that have already been in force for a while by virtue of the Court's case law.

The above goes to show that the Court's quasi-legislative judgments have the capacity to encroach to a considerable extent upon the scope of the EU's legislative activity. This inter-institutional dynamic becomes especially problematic when the Court's judgments promote a deregulatory approach in the areas underpinned by social policy and solidarity concerns. In these cases, the rules developed by the Court often

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[81] Patients' Rights Directive (n 77), see eg arts 4–5, 9(1) 6, 10, 14–15; Proposal for PRD (n 22), Explanatory Memorandum, 11–12, 17–20.

remain ‘unremedied’ for various reasons: the lack of political consensus in light of the sensitivity of the matter (Monti II); the general resistance against further EU involvement in the area (the PRD); and, crucially, the fact that the Court can at any time reinterpret EU legislation in a way that serves the purposes of market integration (Regulation 1408/71). The described dynamic also appears to be problematic from the perspective of the constitutional distribution of powers among the EU institutions – a question that continues to be discussed further in Chapter V of this thesis.

IV. SOCIAL POLICY IN THE FRAMEWORK OF COMPETITION LAW: CASE LAW DEVELOPMENTS AND IMPLICATIONS FOR THE SCOPE OF NATIONAL REGULATORY AUTONOMY

This chapter considers developments in the case law of the CJEU and the General Court in the area of competition law with the view to assessing the implications of this case law for the regulatory autonomy of the Member States.

The Chapter is divided into five sections, four of them covering the relevant legal developments in the policy areas under study and the last one concluding. Thematically, each of the first four sections begins by considering whether and, if so, in what way, the EU Treaty framework for competition law applies or may apply to healthcare, education, collective labour law, and gambling. Then, it moves to the analysis of the seminal cases decided at the EU level in each of those areas or discusses the absence thereof. The Chapter concludes with an overall assessment of the regulatory implications – real and potential – of EU competition law for Member State action in the areas under study, while considering them in light of the CJEU free movement case law discussed in Chapters II and III.

1 Healthcare

(a) *EU Legal Framework for Competition in the Healthcare Sector*

(i) The relationship between public healthcare and competition law

At the outset, the provision of public healthcare seems to be inherently incompatible with the application of competition rules. As discussed previously in Chapter II in relation to EU free movement rules, healthcare in European countries is grounded in the principle of social solidarity, whereby access to healthcare is guaranteed to all patients according to their medical needs and regardless of ability to pay. Such universal access is accordingly ensured through high levels of government intervention. By contrast, competition law is based on the premise that markets functioning under conditions of undistorted competition are best suited to achieve economic efficiency and maximise consumer choice.[1] The premise underlying the logic of competition law thus seems to be incompatible with the pursuit of the values of solidarity that underpin the provision of public healthcare. Moreover, in practice, because of the lack of commercial incentives in the healthcare sector, a competitive market is simply unable to guarantee affordable and uninterrupted provision of healthcare that would be available to all on equal basis.[2] In light of this, governments normally allow for only a limited degree of competition in the sector.

However, the role of competition in the healthcare sector has become more

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1 T Prosser, 'EU Competition Law and Public Services' (Posser) in E Mossialos et al (eds), *Health Systems Governance in Europe: The Role of European Union Law and Policy* (CUP 2010) (Mossialos et al) 315, 317.

2 For a comprehensive analysis of the relationship between healthcare and competition, see AJ Culyer, 'The Normative Economics of Health Care Finance and Provision' (1989) 5 Oxford Rev Econ Pol'y 34, 48; A McGuire, P Fenn and K Mayhew, 'The Assessment: the Economics of Healthcare' (1989) 5 Oxford Rev Econ Pol'y 1 ff; E Mossialos and J Lear, 'Balancing Economic Freedom against Social Policy Principles: EC Competition Law and National Health Systems' (2012) 106 Health Pol'y 127, 127; W Sauter, 'The Impact of EU Competition Law on National Healthcare Systems' (2013) 38 EL Rev 457, 462–463.

prominent in the last few decades. This development is linked to the fact that healthcare is getting increasingly expensive, owing to, in particular, the rising life expectancy and technological advancements in medicine. In an attempt to control the rising costs, European governments have been experimenting with market-based reforms in the sector, thus shifting away from the provision of healthcare based predominantly on the principle of social solidarity.[3] In the process of these various reforms, the healthcare functions that are traditionally associated with the State have been increasingly outsourced to the private sector, often limiting the role of the State to the organisation and financing of national healthcare, which is then administered and delivered by quasi-public or private bodies. The resulting competition in the management and provision of healthcare is meant to achieve better overall efficiency of the operation of national healthcare systems without having to allocate additional funds to healthcare budgets.

(ii) The relevance of EU competition law for national healthcare systems

Substantive aspects

From the point of view of EU law, introduction of market principles in the provision of public healthcare triggers the application of EU competition rules, in this context designed to prevent anticompetitive practices from negatively affecting the EU's healthcare market. EU competition rules will apply provided that an operator involved in the management or provision of healthcare falls within EU law definition of an undertaking.

The TFEU does not provide for a definition of an undertaking, but it has been

3 TS Jost, D Dawson and A den Exter, 'The Role of Competition in Health Care: a Western European Perspective' (2005) 31 J Health Pol, Pol'y & L 687; W Sauter, 'The Impact of EU Competition Law on National Healthcare Systems' (2013) 38 EL Rev 457.

developed in the case law of the CJEU. An undertaking is an entity that is engaged in an economic activity, which in turn is defined as any activity consisting in offering goods and services on a given market.[4] This definition is functional in nature: any entity – public or private, profit-making or non-profit – may be considered to be an undertaking regardless of its legal status in national law as long as it is engaged in an economic activity.[5] Moreover, activities of an economic nature and those of a social nature can co-exist within the same sector and even be provided by the same operator.[6] In fact, this practice is fairly common in the healthcare sector, where undertakings providing healthcare of a social nature often act in competition with each other. Therefore, understanding the exact elements of the definition of an undertaking becomes crucial in order to determine to what extent public healthcare falls within the scope of EU competition law.

Art. 101 TFEU prohibits 'undertakings' from concluding agreements and engaging in other concerted practices which 'affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market.' These practices can take the form of agreements to fix prices, to limit sources of supply or to require supplementary contract terms extraneous to the essential agreement. Art. 102 TFEU prohibits the abuse of dominance in the market, which occurs when one undertaking or more enjoy a dominant share of a particular market and distort competition by exploiting their market power to eliminate

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4 Case C–118/85 *Commission v Italy* [1987] ECR 2599, para 7 (*Commission v Italy*); Case C–35/96 *Commission v Italy* [1998] ECR I–3851, para 36.

5 Case C–41/90 *Höfner and Elser* [1991] ECR I–1979, para 21; Case C–205/03 *FENIN* [2006] ECR I–6295 (*FENIN*), Opinion of AG Maduro, para 10; Posser (n 1) 319.

6 Commission, 'Green paper on services of general interest' (Communication) COM (2003) 270 final, 44 (Commission, 'Green paper on services of general interest').

competition.[7]

In principle, competition law applies only to market operators and not to the Member States themselves, with an exception of the rules on State aid, to be discussed in the following sections. However, if a State ratifies a decision taken by an undertaking or acts as a *de facto* economic operator, competition rules will apply.[8] In this respect, Art. 106(1) TFEU prohibits Member States from enacting or maintaining in force any measure contrary to competition rules (Arts. 101 and 102 TFEU) with regard to public undertakings and undertakings accorded special or exclusive rights.

Enforcement aspects

EU competition rules are enforced on two levels: by the EU institutions, namely the European Commission and EU courts, at the EU level and the national competition authorities at the Member State level. The Commission is accorded a central role in the application and enforcement of competition law.[9] It has the power to investigate alleged breaches of EU competition rules and adopt binding decisions, which can be appealed to the General Court and, on points of law, further to the CJEU. The role of the NCAs in the process has increased after reforms at the EU level to modernise the enforcement of competition law, owing to the overload of complaints pending before the Commission.[10] As part of these reforms, the Council adopted Regulation 1/2003/EC (the Modernisation Regulation), which is aimed at promoting the decentralised enforcement of EU competition law through the NCAs. The Regulation delegates the

7 For examples of types of abuse, see J Lear, E Mossialos and B Karl, 'EU Competition Law and Health Policy' in Mossialos et al (n 1) 337, 359 (Lear, Mossialos and Karl)

8 *Commission v Italy* (n 4), paras 7–8, 11.

9 TFEU, art 105.

10 L Hancher and W Sauter, *EU Competition and Internal Market Law in the Healthcare Sector* (OUP 2012) (Hancher and Sauter, *Healthcare Sector*) 252.

authority to apply and enforce competition law to NCAs, while shifting the Commission's focus to sector-wide investigations and the coordination of the work of the NCAs.[11] The Commission however retains the right to take a case from an NCA at any point if it finds it necessary.

NCAs have the obligation to apply EU competition rules in cases where trade between Member States may be affected – the latter condition is usually met without difficulty.[12] Otherwise, they will apply national competition rules, which typically replicate the content of Arts. 101 and 102 TFEU, as a result of the process of spontaneous harmonisation in the field.[13] Accordingly, NCAs are required to follow the interpretations of the key concepts of EU competition law provided by the Commission and EU courts, such as the definition of an undertaking and the criteria for the application of Art. 106(2), to be discussed in the following subsections.[14]

The aim of the remainder of this section is to determine the extent to which EU competition rules can accommodate national healthcare frameworks. To that end, two main questions will be examined: first, the circumstances in which competition rules apply to the healthcare sector, and, second, the degree to which Member States are allowed to depart from these rules. The first question focuses on the definition of an undertaking developed by the CJEU, as the basic condition for applying EU competition rules. The second question examines the concept of a service of general economic interest (SGEI), which provides for the possibility to derogate from EU

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11 Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, arts 3, 5, 11–12.

12 See eg Case C–280/00 *Altmark* [2003] ECR I–7747, paras 77–82; Case C–172/03 *Heiser v Finanzamt Innsbruck* [2005] ECR I–1627, paras 32–35.

13 H Vedder, 'Spontaneous Harmonisation of National (Competition) Laws in the Wake of the Modernisation of EC Competition Law' (2004) 1 Comp L Rev 5.

14 JW van den Gronden and W Sauter, 'Taking the Temperature: EU Competition Law in Health Care' (2011) 38 LIEI 213 (Gronden and Sauter).

competition rules.[15] The following does not intend to provide an exhaustive analysis of EU competition case law involving every aspect of healthcare. It rather focuses on those judgments and administrative decisions that inform the answers to the two aforementioned questions concerning the extent of application of EU competition rules to national healthcare systems.

(b) *The Definition of an Undertaking*

There seem to exist slight differences in the Court's interpretation of the concept of undertaking in relation to, on the one hand, healthcare providers, such as hospitals, and, on the other hand, bodies managing, or administering, healthcare, such as the sickness funds and the providers of health insurance. The two categories of bodies will be discussed separately.

(i) Healthcare service providers

Pavlov

In *Pavlov*,[16] the CJEU had to consider whether a collective supplementary pension scheme set up by a national organisation of medical specialists and made compulsory by public authorities for the entire sector could lead to a restriction of competition, in breach of Arts. 81 and 82 EC (now Arts. 101 and 102 TFEU).

The CJEU held that self-employed medical practitioners constituted individual undertakings for the purposes of competition law because they engaged in an economic activity, defined broadly as 'any activity consisting in offering goods and services on a

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15 MT Karayigit, 'Under the Triangle Rules of Competition, State Aid and Public Procurement: Public Undertakings Entrusted with the Operation of Services of General Economic Interest' (2009) 30 ECLR 542.

16 Joined Cases C–180/98 and C–184/98 *Pavlov* [2000] ECR I–6451 (*Pavlov*).

given market'.[17] This condition was fulfilled in the case at hand because medical specialists performed services in the market for specialist medical services, received remuneration for these services and assumed the financial risks that were associated with their professional activity.[18] Neither the complexity and technical nature of their services nor the fact that their professional practice was regulated altered the latter conclusion.[19]

The Commission contended that the medical specialists were not acting as undertakings because they were themselves the end users of the supplementary pension scheme that they had set up. The Court disagreed. It held that in those circumstances, medical specialists were exercising functions 'closely linked to the practice of [their] profession', thus had to be considered to be acting as undertakings.[20] The decision to set up a pension scheme in itself was found to be compatible with competition rules because the cost of the scheme had only a 'marginal and indirect' influence on the final cost of the medical services offered; hence, it did not appreciably restrict competition within (then) the common market.[21]

Glöckner

The *Glöckner* case[22] concerned the alleged abuse of dominance stemming from the grant by public authorities of an exclusive right to provide patient transport services (ambulance services) to several non-profit organisations. In Germany, the provision of ambulance services was a remunerated activity offered by various operators, whilst in

17 *Pavlov* (n 16), para 75.

18 ibid, para 76.

19 ibid, para 77.

20 ibid, para 79.

21 ibid, paras 95–97.

22 Case C–475/99 *Ambulanz Glöckner* [2001] ECR I–8089 (*Glöckner*).

the Land of Rheinland-Pfalz it was reserved to medical aid organisations providing emergency transport.

The Court found that these organisations constituted undertakings because they were providing services for remuneration on the market for ambulance services, and their activities 'ha[d] not always been, and [we]re not necessarily, carried out by such organisations or by public authorities'.[23] In this connection, the Court pointed out that Ambulanz Glöckner – a private undertaking and the claimant in the proceedings – had provided both emergency and non-emergency ambulance services in the past. The authorities argued that some providers of ambulance services might have been less competitive as the result of the public service obligations that they were bound by in comparison to other providers without similar obligations. The Court agreed, but found this circumstance immaterial to the classification of an activity as economic.[24]

The *Pavlov* and *Glöckner* judgments have established that an entity would be considered an undertaking for the purposes of application of EU competition rules as long as it was engaged in the provision of goods and services on the market. *Glöckner*, in addition, has specified that a market for particular services would be deemed to exist if those services were not 'necessarily' carried out by public entities.

Yet a mere theoretical possibility of competition does not seem to be enough for an activity in question to be classified as an economic one. Otherwise, virtually every activity carried out by public operators would fall within the scope of competition law, as most of them could in principle be carried out by private operators.[25] AG Maduro suggests that the decisive factor in these circumstances is that the activity in question is

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23 *Glöckner* (n 22), para 20.

24 ibid, para 21.

25 *FENIN* (n 5), Opinion of AG Maduro, para 12; J Baquero Cruz, 'Beyond Competition: Services of General Interest and European Community Law' in G De Búrca (ed) *EU Law and the Welfare State. In Search of Solidarity* (OUP 2005) 169, 183 (Baquero Cruz, 'Beyond Competition').

carried out under market conditions, that is, with the objective of capitalisation rather than on the basis of solidarity. If the criterion of capitalisation is met, a market for the activity is deemed to exist, even where the legislation in force prevents competition from emerging.[26]

(ii) Healthcare managing bodies

The majority of the Court's case law concerning the definition of an undertaking in the health sector concerns bodies managing healthcare, which are the bodies that provide health insurance for publicly defined coverage and/or otherwise manage and administer the provision of public healthcare. Sometimes, however, bodies charged with the management of healthcare also engage in its provision, which complicates their classification as undertakings, as shall be discussed below.

Poucet and Pistre

In a landmark judgment in the joined *Poucet and Pistre* cases,[27] the Court laid down the criteria that qualify an activity as social as opposed to economic in EU competition law. The cases concerned the French social security system, which reserved the monopoly on national social insurance for the French social insurance funds. Considering whether these funds constituted undertakings, the Court drew a distinction between entities engaged in economic activities and those engaged in activities of a social nature and governed by the requirements of solidarity.[28] The latter type of activities were to be excluded from the scope of EU competition law.

The principle of solidarity required the redistribution of income between those

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26 *Pavlov* (n 16), para 75; *Glöckner* (n 22), para 19; *FENIN* (n 5), Opinion of AG Maduro, para 13.

27 Case C–159/91 and C–160/91 *Poucet and Pistre* [1993] ECR I–637, paras 19–21 (*Poucet and Pistre*).

28 ibid, paras 19–21.

who were better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover.[29] It was manifested, in particular, in the compulsory membership in social insurance schemes and the statutory nature of benefits, which bore no relation to the amount of contributions.[30] As the French schemes fulfilled these criteria, the funds managing them could not be considered as undertakings.[31]

Subsequent judgments elaborated on the application of the criteria of solidarity in the context of insurance schemes that were less straightforward than the French schemes because they encompassed elements of competition or were not set up by public authorities.

AOK

The *AOK* judgment,[32] adopted more than ten years after *Poucet and Pistre*, concerned the collective practice of the German sickness funds of setting maximum fixed amounts payable for some prescription medications. Pharmaceutical companies claimed that this practice was incompatible with Art. 81 EC (now Art. 101 TFEU). The issue at hand thus concerned the specific activities of the sickness funds as opposed to, more generally, the nature of the schemes that they managed.

The Court however first pronounced on the overall nature of the schemes in question. It observed that the German health insurance funds fulfilled an exclusively social function by providing medical cover to insured persons irrespective of their financial position and their state of health. The schemes that they managed were

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29 *Poucet and Pistre* (n 27), para 10.

30 ibid, paras 8–9, 18.

31 ibid, paras 10, 12.

32 Joined Cases C–264/01, C–301/01, C–354/01, and C–355/01 *AOK Bundesverband* [2004] ECR I–2493 (*AOK*).

founded on the principle of solidarity. They provided for a nearly universal coverage, offered to their members identical statutory benefits and implemented a risk equalization system (manifesting solidarity among the schemes themselves), whereby insurers with less burdensome risk profiles contributed to the financing of the funds that insured the more expensive risks.[33]

The German system also had a distinctive characteristic whereby the amount of benefits did not depend only on the income of the insured party, but also on the contribution rates set by the insurance funds. This meant that the insurance funds had some latitude in setting the rates and engaged in a degree of competition with each other in order to attract customers. The Court held that the element of competition among the funds contributed to the sound management of the insurance schemes, encouraging their effectiveness and saving of costs, which was in the interest of the proper functioning of the German social security system.[34] As such, it did not call into question the overall nature of the funds' activities.

The Court then went on to consider whether, regardless of their overall social nature, the sickness funds also engaged in economic operations, which could be assessed for compliance with EU competition rules. In this connection, the Court found it necessary to examine whether the collective setting of maximum contributions towards the cost of prescription medications was linked to the funds' functions of an exclusively social nature. The Court held that this was in fact the case because the determination of the fixed prices of pharmaceuticals was one of the obligations imposed upon the funds by law, which provided detailed guidelines to that end. Moreover, the government exercised control over the whole process, to the extent that

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33 *AOK* (n 32), paras 35–36.

34 ibid, para 56.

where the funds were unable to adopt fixed maximum amounts, the government would take their place and determine those amounts itself. This set of circumstances indicated that the obligation of fixing prices was 'integrally connected' with the funds' social tasks.[35]

The *AOK* judgment is important for two reasons. First, it shows that the existence of a degree of competition with regard to the activities of the sickness funds is not a decisive factor in establishing whether they constitute undertakings. As long as the principle of solidarity is observed and the social functions of the funds are predominant, their overall social character remains intact. Second, the sickness funds may nevertheless be considered as undertakings in relation to some of their activities, namely those that cannot be viewed as integrally connected with their principal social function within the statutory health insurance scheme. The character of those individual activities will be determined by reference to the legislative framework that governs them and the degree of State control involved.

FENIN

In *FENIN*, the CJEU was asked specifically whether the managing bodies of schemes that were predominately based on solidarity could qualify as undertakings in situations where they purchased goods or services on competitive markets. The case concerned the alleged abuse of dominance by organisations managing the Spanish National Health System (SNS), which collectively accounted for 80% of the purchases of medical goods and equipment in Spain. The abuse of dominance manifested, the claimants argued, in systematic delay in payments to suppliers of medical goods and equipment. In addition to managing the Spanish health insurance system, the SNS organisations

[35] *AOK* (n 32), paras 58–59, 61.

were also responsible for providing healthcare services to its members. It was not contested – at least not until the appeal stage – that the respective organisations were not acting as undertakings in the provision of healthcare services, since they offered services free of charge on the basis of universal coverage and were funded through social security contributions.[36] The question before the Court was whether the SNS organisations could qualify as undertakings with respect to their purchasing activity.

Following the ruling of the Court of First Instance delivered in the case, the CJEU held that:

> there was no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.[37]

Accordingly, even though purchasing goods on the market could on its own constitute an economic activity, it did not if those goods were not subsequently offered on the market but instead used to provide healthcare services of a social character.

In *FENIN,* the Court appears to have assumed the social character of the purchasing activity solely by virtue of its link with the subsequent provision of social healthcare, without performing a separate assessment of the character of the purchasing itself. This position appears to be a step back from the *AOK* judgment, which highlighted the need to conduct an individual assessment of the character of the various activities of an otherwise social entity in order to determine whether it was acting as undertaking in relation to some of them.

FENIN also seems to sit in tension with the *Pavlov* judgment. In *Pavlov*, the membership of medical practitioners in a pension fund was found to be an economic

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36 *FENIN* (n 5), para 8.

37 ibid, para 26.

activity because it was closely linked to their professional practice, which was economic in nature. In *FENIN*, the purchasing activity of the SNS, which was arguably economic in nature, was classified as social by virtue of its link to the (assumed) solidarity-based provision of healthcare. It follows from the above that the character of the individual activities of the body in question will be determined by reference to the character of what is seen as its principal activity.

BetterCare

BetterCare[38] was decided before *FENIN*, but by the UK's national competition authority – the Office of Fair Trading. BetterCare, a provider of private residential and nursing care, complained that North and West Trust was abusing its dominant position by purchasing services at an excessively low price. The NHS Trusts are organisations that form part of the NHS in each of the four nations of the United Kingdom. They perform a double function: they purchase healthcare services from private providers and, in some cases, also provide these services themselves, thus entering into competition with private providers.[39] At the time of the complaint before the OFT, the CJEU had not yet ruled on the specific issue of contracting out, therefore, the UK's competition authorities had to decide themselves whether publicly funded but privately provided care was covered by EU competition law.

The UK's Competition Appeal Tribunal adopted what seems to be a broad reading of the definition of an undertaking. It considered that despite the Trust's social functions, it operated 'using business methods' and, in doing so, was acting as an undertaking. The contracts that it concluded to purchase services from private

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38 *BetterCare Group Ltd v Director General of Fair Trading* [2002] CAT 7, [2002] CompAR 299 <http://www.catribunal.org.uk/238-570/1006-2-1-01-BetterCare-Group-Limited.html> accessed 14 October 2015 (*BetterCare*).

39 Lear, Mossialos and Karl (n 7) 234, 345.

healthcare providers took place ‘within a business setting’ and represented ‘commercial transactions’.[40] The CAT noted that this conclusion could have been different if the Trust was merely purchasing services without providing them itself. However, that was not the case. The Trust was not just contracting with public and private parties, but was itself active as a market participant providing healthcare and, hence, was in a position to restrict competition. On the merits, the OFT found that the Trust had not engaged in any abuse of dominance because it did not have discretion to set prices, which had been set by government bodies.

At the outset, the CAT’s conclusions seem to be difficult to reconcile with the *FENIN* judgment. *FENIN* seems to suggest that the purchasing of medical goods and services associated with the subsequent provision of public healthcare should be regarded as non-economic in nature. By contrast, in *BetterCare*, the same type of purchasing associated with the subsequent provision of public healthcare is regarded as economic. In this respect, it should be noted that the CAT found it relevant that while purchasing care services from a private provider, the Trust itself provided those services, and although they were public services, the Trust was in competition with *Bettercare*. This type of activity would arguably qualify as economic, in line with the Court’s reasoning in *Glöckner.* In *FENIN,* on the other hand, the CJEU was not asked to consider – at least not until the appeal stage – whether the provision of medical care by the Spanish health service organisations was economic in nature.[41] Accordingly, the Court assumed, just like the CFI had, that it was not, in light of the overall social character of the Spanish health insurance system. However, it is noteworthy that the Court also had the option to return the case to the CFI for reassessment on this point

40 *BetterCare* (n 38) 66.

41 See Case T–319/99 *FENIN v Commission* [2003] ECR II–357, paras 38–39; *FENIN* (n 5), paras 18, 20–21.

and, in fact, AG Maduro had suggested that the Court should do so. Yet it chose not to.

AG2R

In *AG2R*,[42] the Court clarified the criteria for an entity to be considered an undertaking in the context of insurance schemes that are complementary to the compulsory insurance system. The social partners had set up a collective supplementary health insurance scheme in the French bakery sector and entrusted its management to AG2R Prévoyance, which was a non-profit type of insurance company created and managed by the social partners and governed by the French Social Security Code. In accordance with this code, the affiliation to the scheme was made compulsory by public authorities at the request of the social partners. The Court was asked to consider, inter alia, whether the decision of the social partners, which was subsequently ratified by public authorities, was liable to place AG2R in a dominant position in breach of Art. 102 TFEU.

The Court first established that AG2R pursued a social objective and was based on the principle of solidarity. The social character of AG2R was reflected in that it operated on a non-profit basis, provided compulsory supplementary social protection for all employees within a particular economic sector and had no influence over the level of benefits, which were determined by the social partners.[43] The insurance scheme that it managed embodied a high degree of solidarity because it was financed by fixed-rate contributions, which bore no relation to the risk insured and the level of benefits.[44]

The overall social character of AG2R was not however sufficient to preclude its activities from being classified as economic in the given circumstances. The Court

42 Case C–437/09 *AG2R Prévoyance* (2011) ECR I–00973 (*AG2R*).

43 ibid, paras 43–44.

44 ibid, paras 47–52, 78.

found it necessary to examine the extent to which AG2R was subject to State control.[45] It noted in this connection that the Social Security Code allowed the social partners to select any body for managing the health insurance scheme concerned, including a commercial insurance company.[46] AG2R was chosen on the basis of financial and economic considerations from among other undertakings with which it was in competition on the market for insurance services.[47] Moreover, AG2R enjoyed a margin of negotiation concerning the terms of its appointment, which in turn might have had repercussions on the (nature of the) functioning of the scheme as a whole.[48] The above circumstances led the Court to conclude that the State control was lacking, hence, AG2R constituted an undertaking and was engaged in an economic activity.

The *AG2R* judgment seems to suggest that in cases where private actors, such as the social partners, are involved in the selection of the insurance body, particularly in the context of complementary health insurance, a sufficient degree of State control over the selection process and the subsequent operation of the selected body becomes the necessary precondition for it not to be considered an undertaking.

(iii) Evaluation of the case law

Three criteria seem to be critical in order for an entity operating in the healthcare sector to be considered an undertaking within the meaning of EU law: the social character of its activities, the observance of the principle of solidarity and State control over the selection and operation of the entity in question.

Healthcare providers are considered undertakings insofar as they engage in the

45 *AG2R* (n 42), paras 45–46.

46 ibid, paras 61–62.

47 ibid, para 65.

48 ibid, para 64.

provision of goods and services in a market where competition is possible. If the legislation in force prevents competition from emerging, it needs to be assessed whether the activity in question is undertaken with the objective to make profit, in accordance with the *Glöckner* judgment. Should that be the case, competition is deemed possible, hence, the activity in question is of an economic nature. In order to be classified as non-economic, the provision of healthcare must be organised on the basis of financial solidarity and exclude any provision on market terms.

Bodies entrusted with the management of compulsory health insurance schemes will fall outside the scope of competition law provided that they pursue an exclusively social function and operate in accordance with the principle of solidarity. Accordingly, they must not seek profit and provide universal medical coverage to all members irrespective of their financial position or state of health. The insurance schemes that they manage must be based on the principle of financial solidarity, which is manifested in the compulsory and redistributive character of the scheme.

The *AOK* and *FENIN* judgments seem to suggest that a limited amount of competition in the activities of the managing bodies does not bring them within the scope of competition rules, as long as the social functions that they carry out are predominant. The latter is determined by reference to the nature of the principal activity of the body in question. Accordingly, if funds are involved in price-fixing, and this task is bestowed upon them by law, they retain their exclusively social character. Similarly, if they are engaged in the purchasing of goods and services on the market, the nature of the purchasing activity will depend on whether the subsequent use of the purchased goods amounts to an economic activity. This test seems to offer more freedom of action to bodies managing the NHS systems in particular, whereas they often combine the social provision of healthcare with the commercial purchasing of goods and services on the market.[49]

As regards the supplementary schemes of insurance, especially those set up with the involvement of private parties, for instance, the social partners, the overall social character of the scheme will not be sufficient for its managing body to fall outside the definition of an undertaking. The degree of State control becomes the decisive criterion. According to the Court's reasoning in *AG2R*, State control has to be manifest in two stages: the selection of the managing body in question and the subsequent exercise of its functions.[50] This appears to suggest that bodies operating in a public environment are more likely to be exempted from the application of competition rules than privatised bodies providing similar services.[51]

Overall, competition rules will be more likely to apply with regard to the provision of healthcare as opposed to its management because healthcare services are normally provided for consideration – even if ultimately compensated for by the government – and often involve participation by private entities in addition to public ones, thus creating a market for healthcare services. As regards the managing bodies, on the other hand, the Court seems prepared to assume the social character of at least the compulsory health insurance schemes. It also recognises that in the process of performing their social functions, managing bodies can (and most likely will) participate in some economic activities without compromising their overall social character.

The case law, however, lacks clarity as regards the classification of the individual activities of the managing bodies. The application of the undertaking criteria

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49 Gronden and Sauter (14) 220.

50 On the latter condition, see also *AOK* (n 32), paras 58–59, 61.

51 Gronden and Sauter 221.

in these situations seems to vary, at least slightly, from case to case, as illustrated by the apparent lack of coherence among the *Pavlov*, *AOK* and *FENIN* judgments and exemplified by the *BetterCare* decision of the OFT. This lack of clarity may well be inevitable, given the absence of any precise definition of an undertaking in the Treaty. Yet more precision on the part of the Court would be desirable in order to ensure consistency in the future development of competition law in the healthcare sector.

(c) *The SGEI Exception*

(i) The SGEI exception in competition law

Treaty framework

An SGEI is an EU law concept that provides governments with the possibility to protect their healthcare systems from the reach of EU competition and State aid rules in situations where bodies involved in the management and provision of healthcare are regarded as undertakings. Art. 106(2) TFEU provides that '[u]ndertakings entrusted with the operation of services of general economic interest … shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'. Accordingly, where an entity that is found to constitute an undertaking acts in a manner that is inconsistent with EU competition rules but is entrusted with the operation of an SGEI, it will be exempted from the application of those rules to the extent necessary for the fulfilment of the public service obligations assigned to it.

Having been in operation since 1957,[52] the Treaty exception for SGEIs

[52] For a detailed account on art 90 EEC, see D Edward and M Hoskins, 'Article 90: Deregulation and EC Law: Reflections Arising from the XVI FIDE Conference' (1995) 32 CML Rev 157.

represents a compromise among the drafters between two competing interests: the pursuit of the competitiveness in the region, on the one hand, and the need to protect public enterprises and public services, on the other.[53] The role of SGEIs seems further to be strengthened by the Treaty of Lisbon, which enshrines the pursuit of a '*social* market economy' as an objective of the Union and moves the EU's commitment to undistorted competition to Protocol 27 on the Internal Market.

The concept of SGEIs appears in the Treaty multiple times, namely in Arts. 14 and 106(3) TFEU and Art. 36 of the Charter. Art. 14 TFEU, drawing on the former Art. 16 EC, recognises SGEIs as one of the Union's shared values aimed at promoting social and territorial cohesion in the Union. Accordingly, Art. 36 of the Charter recognises access to SGEIs as a fundamental right. In addition, Art. 14 TFEU introduces a new legal basis allowing the adoption of regulations at EU level for laying down the principles and conditions for providing, commissioning and funding SGEIs. Finally, Art. 106(3) TFEU (former Art. 86(3) EC) authorises the Commission to adopt directives and decisions to clarify the meaning and scope of the SGEI exception contained in paragraph (2) of the same article.

Notably, none of the aforementioned provisions of the Treaty provides a definition of an SGEI. This responsibility rests predominantly within the competence of the Member States, in accordance with the principle of subsidiarity.[54] However, the TFEU contains a protocol (Protocol No 26) that specifies the principles governing the protection to be afforded to SGEIs at the EU level. Protocol No 26 highlights the diversity of SGEIs in Europe, resulting from the geographical, social and cultural

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53 W Sauter, *Public Services in EU Law* (CUP 2014) 20 (Sauter, *Public Services*).

54 Commission, 'White paper on services of general interest' (Communication) COM (2004) 374 final, 7.

differences and preferences of the Member States.[55] In light of this diversity, it recognises 'the essential role and the wide discretion' of national authorities in commissioning and organising SGEIs. The Protocol also refers to what could be considered as the key values underpinning the EU's conception of SGEIs: a high level of quality, safety and affordability, equal treatment of users, and universal access.

The Commission has attempted to clarify the definition of an SGEI in its Communication on the quality framework for services of general interest, which, inter alia, provides guidance on the requirements applicable to the designation of services as SGEIs. SGEIs are defined as economic activities that have been identified by public authorities as producing outcomes in the overall public good, which would not be supplied by the market without public intervention or would be supplied under different conditions in terms of quality, affordability and access.[56] The definition provided by the Commission is formulated broadly and does not seem to interfere with the 'wide discretion' accorded to Member States in this context, whose assessment of whether a service could be supplied under market conditions will only be checked by the Commission for manifest error.[57]

Case Law

The following analysis is meant to demonstrate how the relationship between SGEIs and EU competition rules has been interpreted by the CJEU. It focuses on two aspects defining this relationship: the criteria which qualify a service as an SGEI in EU law and the standard of judicial review employed by the Court to assess the validity of the

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55 Protocol No 26 to TFEU on services of general interest [2008] OJ C115/308.

56 Commission, 'A quality framework for services of general interest in Europe' (Communication) COM (2011) 900 final, 3.

57 Commission, 'European Union framework for State aid in the form of public service compensation' (Communication) COM [2012] OJ C8/15, art. 2(2) (Commission, Framework for State aid 2012).

national concepts of SGEIs. The analysis returns to the *Glöckner* and *AG2R* judgments that have been discussed earlier in the context of the concept of undertaking.

Glöckner

In *Glöckner*, the Court found that the German legislation reserving the provision of patient transport services to medical aid organisations amounted to a grant of a special or exclusive right, creating a dominant position within the meaning of Art. 90(1) EEC (now Art. 106(1) TFEU). Consequently, the Court was asked to assess whether the scope of the exclusive rights granted to these organisations was proportionate in light of the objectives related to the pursuit of a task of general economic interest, in accordance with Art. 90(2) EEC (now Art. 106(2) TFEU).[58]

The CJEU found that medical aid organisations were indeed entrusted with an SGEI because they had an obligation to provide a permanent standby service of transporting patients in emergencies at uniform rates and on similar quality conditions, without regard to economic profitability of each individual operation.[59] However, the exclusive rights granted to these organisations also covered non-emergency patient transport services, which were not subjected to any PSOs and had been previously provided in market conditions. The Court held that the monopoly to operate all rather than just emergency patient transport services would be considered necessary if it enabled medical aid organisations to perform their SGEI tasks in economically acceptable conditions, or conditions of economic equilibrium.[60] In this regard, the Court observed that the provision of emergency transport services required costly investments in equipment and qualified personnel. In order to protect the universal

58 *Glöckner* (n 22), para 16.

59 ibid, para 55.

60 ibid, paras 57, 61.

coverage from being put under pressure, it needed to be financed by the revenues gained on the non-emergency transport market. The exclusive right to operate all patient transport services was therefore necessary in order to offset the costs of emergency services by revenue from non-emergency transport.[61]

Moreover, without the extension of exclusive rights to the non-emergency market, the possibility could have been open to private operators to concentrate on more profitable journeys, leaving the medical aid organisations with non-emergency transport in remote, less profitable areas. This situation could have affected the degree of economic viability of the SGEI provided by the medical aid organisations and would risk jeopardising the quality and reliability of that service.[62] Therefore, unless it were established that the medical aid organisations were 'manifestly unable' to meet the demand for patient transport services at all times, the extension of exclusive rights was justified and necessary.[63]

The proportionality review employed by the Court in *Glöckner* seems to allow the grant of a broader scope of exclusive rights (thus authorising a broader restriction on competition) than is strictly necessary for the provision of the SGEI in question. The extension of exclusive rights to profitable markets is permitted in situations where it is not feasible to discharge the PSOs concerned in economically acceptable conditions without cross-subsidy from other parts of the business. Notably, in considering what constitutes economically acceptable conditions, the Court takes into account the importance of maintaining the same 'quality and reliability' of the service.

AG2R

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61 *Glöckner* (n 22), para 53.

62 ibid, paras 58–61.

63 ibid, para 62.

The more recent *AG2R* judgment clarified what constitutes 'economically acceptable conditions' in the provision of SGEIs. In this case the Court had to consider whether the grant by the social partners of an exclusive right to AG2R to provide supplementary health insurance in the French bakery sector was compatible with Art. 106 TFEU.

It was argued that there existed less restrictive means that would allow AG2R to fulfil its SGEI mission of providing social insurance without endangering the fund's financial balance. For instance, the scheme could have introduced a mechanism authorising exemptions from affiliation.[64] The Court however noted that Art. 106(2) did not require that the financial balance or economic viability of the undertaking entrusted with the operation of an SGEI be threatened. It was sufficient that, in the absence of the exclusive rights at issue, it would not be possible for the undertaking to perform its tasks under 'economically acceptable' conditions.[65] In the circumstances of the case, a compulsory affiliation that did not allow for exemptions was necessary in order to avoid a situation where AG2R could end up with an increasing share of bad risks, which could impair its ability to offer cover of the same quality at an acceptable price.[66]

AG2R is also notable for extending the scope of SGEIs beyond the public domain. It should be recalled that the French law did not oblige the social partners to arrange for the supplementary healthcare insurance. Rather, it provided for the possibility of administrative ratification by the authorities of the decision made autonomously by the social partners. Moreover, as discussed previously, AG2R was afforded room for negotiation of the terms of its mission. This suggests that SGEIs in

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64 *AG2R* (n 42), para 75.

65 ibid, para 76.

66 ibid, para 77.

the healthcare sector can be derived from obligations laid down in private (collective) agreements, at least where they are approved by the State.[67]

(ii) The SGEI exception in State aid law

Treaty framework and beyond

In order to ensure the continuity and stability in the provision of SGEIs, undertakings entrusted with an SGEI mission are often granted financial support by public authorities. This practice is rather common in the healthcare sector, where the grant of subsidies and other forms of financial support to providers of public healthcare may be indispensable for guaranteeing universal and affordable access to medical care. Yet such financial support may also trigger the application of EU State aid rules.

Art. 107(1) TFEU provides that 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, insofar as it affects trade between Member States, is incompatible with the internal market. The concept of aid encompasses not only positive benefits, such as subsidies, but also measures which mitigate the charges normally included in the budget of an undertaking, such as tax exemptions or lower social contributions.[68] A failure to notify a State aid to the Commission or its implementation before the Commission's approval is given renders the State aid in question unlawful.

However, the aid that is granted to undertakings as compensation for the additional costs they incur when providing SGEIs is not considered State aid because these undertakings do not enjoy any real advantage for the purposes of application of

67 Gronden and Sauter (n 14) 213, 232–233.

68 Case C–6/97 *Italy v Commission* [1999] ECR I–2981, para 15; Case C–126/01 *Gemo SA* [2003] ECR I–13769, Opinion of AG Jacobs, para 92.

Art. 107.[69] The leading judgment on this matter is *Altmark*, which concerned compensation awarded to an undertaking providing regional transport services in Germany. In *Altmark*, the Court introduced a legal test to determine whether the financial support granted to an undertaking entrusted with an SGEI constitutes a State aid or a compensation for the performance of the service in question. The test consists of four cumulative conditions:[70]

1) The recipient undertaking must be charged with clearly defined PSOs;
2) The parameters for compensation must be established in advance in an objective and transparent manner;
3) The compensation cannot exceed what is necessary to cover the costs incurred in the discharge of the PSOs in question, taking into account relevant receipts and reasonable profit;
4) Where the provider of the SGEI is not chosen pursuant to a public procurement procedure, the level of compensation must be determined on the basis of an analysis of the costs that would have been incurred by a typical, well-run undertaking.

Compensation which meets these conditions is exempted from EU State aid rules and is also presumed to be compatible with Art. 106(2) TFEU, since *Altmark* encompasses the (less rigorous) requirements applicable to the grant of exclusive rights under Art. 106(2).[71] If, however, one of the four conditions is not fulfilled, the compensation in question will be subject to EU State aid rules. This outcome is not unusual in practice because the four-part test can be rather difficult to meet. For instance, the very nature

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69 Case C–53/00 *Ferring SA* [2001] ECR I–9067, para 27.

70 *Altmark* (n 12), paras 88–93.

71 Case T–289/03 *BUPA v Commission* [2008] ECR II–81 (*BUPA*), discussed further in this section.

of an SGEI implies that public procurement procedures will often not be followed in selecting the provider, which makes meeting the fourth *Altmark* condition especially problematic.[72] However, in cases where not all of the conditions are met, the aid may nevertheless be eligible for the SGEI exception contained in Art. 106(2), which applies to State aids under the conditions that are substantially the same as those laid down by the Court in the context of competition rules.

In an attempt to clarify the set of rules applicable to compensations granted in relation to the provision of SGEIs,[73] the Commission has adopted a package of hard and soft law measures under Art. 106(3) aimed at providing guidance to the Member States on how to design their SGEI schemes in compliance with State aid rules. The package of measures titled the *Altmark* package[74] was adopted in 2005 and renewed in 2011.[75] It provides a legal framework for compensations granted to undertakings providing SGEIs which do not meet one or more of the conditions laid down in the

72 W Sauter, 'The *Altmark* Package Mark II: New Rules for State Aid and the Compensation of Services of General Economic Interest' (2012) 33 ECLR 307 (Sauter, '*Altmark* Package Mark II').

73 Commission, 'The Application of EU State Aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation' (Staff Working Paper) SEC (2011) 397, 5.

74 The package includes: Commission Decision 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 L312/67; Commission, 'Community framework for state aid in the form of public service compensation' (Communication) COM [2005] OJ C297/4; Commission Directive 2005/81/EC amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings well as on financial transparency within certain undertakings [2005] OJ L312/47.

75 The reformed package includes: Commission Decision 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 (Commission Decision on public service compensation 2011); Commission, Framework for State aid 2012 (n 57); Commission, 'On the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest' (Communication) COM (2012) C8/4 (Communication on State aid for SGEIs); Commission Regulation (EU) 360/2012 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 (*De minimis* Regulation). For academic accounts discussing these measures, see W Sauter, 'Services of General Economic Interest and Universal Service in EU Law' (2008) 33 EL Rev 167; W Sauter and J van de Gronden, 'State Aid, Services of General Economic Interest and Universal Service in Healthcare' (2011) 32 ECLR 615; Sauter, '*Altmark* Package Mark II' (n 72).

Altmark judgment but are eligible for exemption under Art. 106(2). Accordingly, these compensations are exempt from the obligation of prior notification to the Commission. The rationale underlining this framework is to avoid excessive administrative burdens in relation to aids which pose relatively little risk of distortion of competition.[76]

The *Altmark* package that is currently in force provides a block exemption to a broad category of SGEIs, including all hospital care and all medical and long-term care, and a number of other social services.[77] In order to benefit from a block exemption, the undertaking concerned has to be entrusted with the operation of an SGEI within the meaning of Art. 106(2) TFEU. This requires an official act of entrustment which would specify the following: the nature and the duration of the relevant PSOs, the undertaking and territory concerned, the nature of any exclusive or special rights assigned to the undertaking, the parameters for calculating, controlling and reviewing the compensation, and the arrangements for avoiding and repaying any overcompensation.[78] In substance, the amount of compensation must not exceed what is necessary to cover the costs incurred when discharging the PSOs, taking into account the relevant receipts and a reasonable profit.[79] The above conditions, in principle, reiterate those formulated by the CJEU in the *Altmark* judgment, whilst omitting the last one relating to the efficiency of operation of the undertaking concerned.

Case law

The following discussion focuses on two landmark cases in the area of State aids, which illustrate the application of the *Altmark* criteria to aids granted for the provision

[76] Commission Decision on public service compensation 2011 (n 75), recital 11.

[77] ibid, art 2(b) and (c).

[78] ibid, art 4.

[79] ibid, art 5.

of SGEIs in the healthcare sector. The cases in question are *BUPA* and *IRIS-H hospitals*.

BUPA

The *BUPA* case, decided by the CFI (now replaced by the GC), concerned the Irish risk equalisation system (RES) for private medical insurance (PMI), which was supplementary to the tax-based public insurance system. It covered 50% of the population and was dominated by VHI, a State-owned undertaking and a former monopolist in the sector for private health insurance. Private insurance companies were obliged by law to participate in a risk equalisation scheme whereby insurers whose risk profile was healthier than the average market risk profile had to pay compensation to insurers with a less healthy risk profile.

BUPA was a private health insurer that filed a complaint with the Commission claiming that the payments under the Irish RES constituted State aid, which placed VHI in an advantageous position. The Commission upheld the Irish scheme under both Art. 87(1) and Art. 86(2) EC (now Arts. 107(1) and 106(2) TFEU). It considered that the scheme was designed to provide compensation for the fulfilment of the SGEI obligations, which, in turn, was necessary to ensure the stability in the market of private health insurance.[80] The Commission's decision was however adopted before the CJEU's judgment in *Altmark*. BUPA challenged this decision before the CFI contesting, inter alia, the existence of an SGEI, in the first place, and the necessity and proportionality of the RES. The CFI was asked to review the Commission's decision in light of the *Altmark* criteria.

The existence of an SGEI

80 *BUPA* (n 71), paras 41, 43–46.

The Court held that, in the absence of a ‘precise and complete’ definition of SGEIs in EU law or any competence attributed to the Commission in that respect, Member States had a wide discretion to define what they regarded as SGEIs and determine the nature and scope of SGEI missions. This discretion was not unlimited. EU law contained certain minimum criteria that needed to be satisfied in order to comply with Art. 86(2). Those criteria included the presence of a public act of entrustment with an SGEI mission and the universal and compulsory nature of that mission.[81] Member State compliance with these criteria was however limited to checking for a manifest error of assessment.[82]

The two criteria were found to be met in the case. In this connection, the Court clarified that the entrustment with an SGEI mission did not necessarily require a grant of special or exclusive rights – such grant was merely an instrument that enabled or facilitated the performance of an SGEI. In the Irish RES case, the SGEI mission was to be derived from national legislation, which laid down certain PSOs that private insurers had to comply with.[83] The PSOs in question included: the community rating obligation, which required to provide same insurance rate for all; the obligations of open enrolment and of lifetime cover; and the obligation to provide minimum benefits above a certain level. These obligations restricted the commercial freedom of private insurers to an extent going ‘considerably beyond ordinary conditions of authorisation to exercise an activity in a specific sector’ and, therefore, amounted to SGEI obligations.[84]

As regards the criterion regarding the universal and compulsory nature of the service, the Court noted that an SGEI did not need to constitute a universal service in

81 *BUPA* (n 71), para 181.

82 ibid, paras 166–167.

83 ibid, paras 179, 182, 201.

84 ibid, para 182.

the strict sense, which would require it to meet the needs of the entire population or be supplied throughout the national territory.[85] Services that had only a limited territorial or material scope and benefited only a relatively limited group of users could still be considered universal, provided that they were compulsory in nature.[86] The applicants argued that the Irish system for PMI did not meet this criterion because it was optional in nature: it provided insurance that was complementary to the compulsory public health insurance, and the coverage it offered ranged from basic to luxury, the latter being priced at the highest rate. A service of this kind could not be regarded as compulsory for the purposes of qualifying as an SGEI.

In this respect, the Court clarified that the compulsory nature of the service had to be understood as meaning that the service in question was offered in compliance with the PSOs governing its provision. The fact that some potential users could not have the financial resources to enjoy the service did not affect its nature, insofar as the service was offered at uniform and non-discriminatory rates and on similar quality conditions for all customers.[87] The PSOs laid down in the Irish legislation regarding open enrolment, community rating and lifetime cover served to ensure that the latter requirements would be observed.[88]

The necessity and proportionality of the RES

BUPA also argued that the Irish RES did not meet the third *Altmark* condition, requiring that compensation be necessary, because the relevant payments made on the basis of the risk differential bore no relation to the actual costs incurred by the insurer

85 *BUPA* (n 71), paras 186, 187, 203.

86 ibid, para 188.

87 ibid, paras 188, 203.

88 ibid, paras 191–194, 201.

as a result of paying the insurance claim.

The Court approached the question of necessity, first, by offering some preliminary observations regarding the role of judicial review in the context of State aids. It noted that the assessment of the costs incurred in discharging the SGEI mission depended on a range of complex economic facts and calculations and for that reason fell within the discretion enjoyed by the Member States.[89] The role of the review exercised by the Commission and the courts was not to substitute their assessment for that of the national authorities but rather to control for manifest error. This role amounted to an assessment of whether the compensation was necessary in order for the SGEI concerned to be performed in economically acceptable conditions, or whether it was 'manifestly inappropriate' by reference to the objective pursued.[90] The Court also pointed out that this assessment applied *mutatis mutandis* to the proportionality review performed under Art. 86(2).[91]

The RES was held to be necessary and appropriate because it deterred the insurers from active risk selection (for example, by means of selective marketing, benefit design or quality of service), which could have destabilised the equilibrium and the proper functioning of the community rated PMI market and thus undermine the very achievement of the PSOs concerned.[92] The scheme was also proportionate in the strict sense because, first, it was only activated when certain percentages of risk differential were reached and, second, it provided a ceiling that limited payments between the insurers to the level strictly necessary for neutralising the differential

89 *BUPA* (n 71), paras 179, 182, 201, 220.

90 ibid, paras 222, 266, 268–269.

91 ibid, para 224.

92 ibid, paras 276, 279, 292–293.

between their risk profiles.[93] In doing so, it compensated for the costs incurred in covering bad risks in excess of the market average.

Notably, as BUPA had pointed out, the third *Altmark* condition also required that it be possible to determine the actual costs incurred in discharging the PSOs, taking into account the relevant receipts and a reasonable profit. The Court observed that the Irish RES could not strictly fulfil this requirement because it operated in a way that was radically different from the compensation system in *Altmark*. Yet this condition would be met as long as the compensation mechanism was consistent with the 'purpose' and 'spirit' behind it, and the compensation was calculated on the basis of parameters which were 'specific, clearly identifiable and capable of being controlled' (which is in substance the second *Altmark* condition).[94] Accordingly, it was not required that the receipts were taken into account in a system of compensation which operated independently of receipts. What mattered was that the RES was designed to compensate the insurers for the financial consequences of complying with the PSOs which prevented them from setting premiums according to the risk insured and from rejecting bad risks. Therefore, the RES was compatible with the purpose and spirit of the third *Altmark* condition even in the absence of a direct relationship between the amounts actually paid by an insurer following a particular claim and the compensation granted under the risk equalisation scheme.

The efficiency of operation

The fourth *Altmark* condition required the level of compensation to be determined according to the standard of an efficient undertaking. The Court recognised that this condition, too, could not be applied strictly because of the specificity of the Irish

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93 *BUPA* (n 71), paras 47, 179, 182, 201, 220, 235.

94 ibid, para 237.

compensation scheme. However, the overall purpose of the fourth *Altmark* condition suggested that it would be met as long as the equalisation of risks did not lead to offsetting any costs that might have resulted from inefficiency on the part of the insurers.[95] This condition was met in the case of the Irish RES.

The *BUPA* judgment is remarkable for the degree of discretion it allows to Member States in the context of SGEIs. This discretion presupposes a highly restricted review, as a result of which the CFI readily concluded that the Commission had not erred in finding that all of the *Altmark* conditions had been fulfilled, even though the Commission's decision had been adopted prior to the *Altmark* judgment and thus could not possibly follow it.

Most notably, the restricted review led the CFI to accept that a service could be considered universal for the purposes of qualifying as an SGEI even if it covered only part of the population, involved selective schemes and price discrimination (luxury cover) and only supplemented a truly universal public provision. As long as the undertaking was under an obligation to accept all customers, even if half of the population could not afford the service, it was performing an SGEI.[96] This conception of a universal service seems to depart from the requirement of a high degree of solidarity applicable to social insurance schemes in the case law of the CJEU.[97]

IRIS-H hospitals

The *IRIS-H* judgment[98] delivered by the GC is the first one – and, so far, the only one – concerning the application of State aid rules to the hospital sector. The Court was asked

95 *BUPA* (n 71), para 249.

96 W Sauter, 'Casenote on Case T–289/03, *BUPA v. Commission*' (2009) 46 CML Rev 269, 281.

97 As regards supplementary insurance, see *AG2R* (n 42), paras 47–52, 74.

98 Case T–137/10 *CBI v Commission* (GC, 7 November 2012) (*IRIS-H*).

to review a decision adopted by the Commission[99] concerning the grant by the Belgian authorities of an *ex post* compensation for budget deficits to five public hospitals, identified collectively as the IRIS-H. The compensation was granted in accordance with the financing measures adopted by public authorities in 1995, intended to cover the costs of certain social services provided by Brussels' public hospitals. The applicants argued that the said measures went beyond the financing envisaged in the Belgian federal law, applicable to both public and private hospitals, and thus constituted State aid. Belgian authorities argued that the IRIS hospitals performed certain SGEIs that were additional to the basic hospital mission carried out equally by public and private hospitals. These additional services entailed special costs, which had to be compensated through deficit financing.

Commission's decision

The Commission conducted a preliminary investigation into the case and decided not to raise any objections to the Belgian measures. It found that the disputed financing measures constituted State aid, which was, however, compatible with the internal market under Art. 106(2) TFEU, in accordance with the rules laid down in the *Altmark* package of 2005. The IRIS hospitals were considered to be undertakings since the health services they provided were also carried out by other institutions, including private hospitals. The remainder of the Commission's analysis focused on the first and the last of the *Altmark* conditions because the plaintiff disputed, in particular, the existence of the PSOs that would be specific to IRIS-H and the efficiency of the compensation mechanism adopted by the authorities.

The Commission found that the IRIS hospitals were entrusted with the PSOs

99 *CBI v Belgium* (Case NN 54/2009) Commission Decision 8120/2009/EC [2010] OJ C74/1 (Commission *IRIS-H* decision).

additional to those imposed on all public and private hospitals because they had a duty to provide every patient, whatever their origin, circumstances, culture, beliefs and medical complaints, with every type of hospital service and maintain a full range of hospital services at every location operated by the IRIS-H network.[100] They also had to make their services available to both French and Dutch speaking population of the region of Brussels, which required having a sufficient number of bilingual staff, with the estimated annual costs at €4 million. Private hospitals, on the other hand, were not subjected to equivalent PSOs: they were free to define the categories of patients they admitted for (post-emergency) treatment, to choose to practise one or more specialties and otherwise freely organise their activities.

Most of the PSOs entrusted to IRIS-H had a basis in the Belgian law on social security services and the strategic plans set out by the IRIS framework body. In this respect, the Commission recalled that, according to the case law of EU courts, PSOs could be derived from different legal acts or the general legal context, thus suggesting that the condition requiring an act of entrustment should be interpreted broadly.

Then, the Commission turned directly to the last *Altmark* condition. It found that the evidence was lacking in order to determine whether the compensation was calculated according to the standard of an efficient undertaking. As a result, the fourth condition had not been met, and the Belgian measures were held to constitute State aid.[101]

However, the aid measures could nevertheless be justified under Art. 106(2) TFEU provided that the compensation was necessary for the provision of the SGEI in question. The Commission noted that national authorities enjoyed a broad margin of

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100 Commission *IRIS-H* decision (n 99), recitals 25, 149 and, more generally, 137–157.

101 ibid, recitals 159–162, 163.

discretion in determining the compensation of the costs involved, but they were required to specify the parameters of the compensation scheme in order to enable the Commission to determine whether the compensation awarded was in line with what was necessary. In this connection, the Commission observed that the Belgian laws had set out clear criteria for compensation provided to IRIS-H and for control of overcompensation.[102] The compensation was designed to offset the budget deficits of IRIS-H and was calculated on the basis of the average costs of a group of comparable hospitals. Overcompensation was precluded by the existence of criteria for fixing definitive hospital deficits after preliminary payments were made. The method of calculation of compensation adopted by the Belgian authorities, in the Commission's view, was unlikely to result in over-compensation; if anything, it could have led to under-compensation.[103] Accordingly, the aid provided to IRIS hospitals was declared compatible with the internal market.

The ruling of the GC

On the appeal, the GC annulled the decision adopted by the Commission, ruling that the Commission should have opened a formal investigation procedure in order to gather additional information and allow the complainants to submit observations.

The Court found that the Commission had failed to conduct an in-depth examination of the content of any purported special obligations imposed on IRIS hospitals that would justify further funding to their benefit.[104] The Court was unconvinced by the Commission's finding that the obligation to look after any patient in any circumstances was specific to IRIS-H. It found that it could not be maintained in

102 Commission *IRIS-H* decision (n 99), recitals 207–211.

103 ibid, recital 177.

104 *IRIS-H* (n 98), paras 133, 156, 159, 168–169.

the circumstances of the case that private hospitals had the freedom lawfully to refuse patients according to their ideological, philosophical or religious beliefs, or their situation of poverty, without breaching the principle of non-discrimination, which formed part of Belgian and EU law. [105]

The Court also found deficiencies in the Commission's examination of the necessity of the compensation. In particular, the Commission failed to distinguish between the final compensation and the preliminary advance payments granted to IRIS-H. The Court agreed that the general funding scheme had set out clear parameters for calculating the hospitals' deficits and was capable of preventing over-compensation. However, no comparable provisions could be identified as regards the advance payments scheme. Moreover, the Belgian laws allowed for a considerable delay between advance payments and the eventual fixing of the definitive deficit, in some cases amounting to as much as 10 years.[106] Accordingly, it could not be excluded that IRIS hospitals would be placed at a temporary advantage, which on its own required a separate assessment for compatibility with EU State aid rules.

Apart from ruling on the merits of the case, the Court made some broader observations regarding the application of State aid rules to the hospital sector. It noted that a strict reading of the *Altmark* criteria was unsuitable in this context because hospital sector lacked a 'competitive and commercial dimension' in comparison to other sectors of the economy,[107] as a result of which even high levels of compensation for the provision of hospital services did not necessarily lead to a greater distortion of competition in the market. Moreover, judicial review had to respect the responsibilities

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105 *IRIS-H* (n 98), paras 150–151.

106 ibid, para 256.

107 ibid, paras 87, 89.

of the Member States for the organisation and delivery of healthcare in their territories, in accordance with Art. 168(5) TFEU.[108] Accordingly, the criteria laid down in *Altmark* had to be applied flexibly, focusing on the purpose and spirit of that judgment and in a manner adapted to the particular facts of the case.[109] Against this background, the purpose of EU State aid rules was to ensure that the parameters selected by the Member States for calculating compensation for the provision of hospital services were defined in such a way as to preclude any abusive recourse to the concept of SGEIs.[110]

Notably, after the re-examination of the case, the Commission adopted a decision in 2016 reaffirming the lawfulness of the IRIS-H compensation scheme.[111]

(iii) Principles governing the provision of SGEIs in the healthcare sector

In the absence of a precise definition in EU law of what constitutes an SGEI, Member States are accorded broad discretion in defining the nature and scope of SGEIs. This discretion is limited by two criteria that need to be satisfied by every mission involving the provision of SGEIs: the presence of an act of a public authority entrusting the undertakings concerned with an SGEI mission and the universal and compulsory nature of that mission. Admittedly, sector-specific legislation may offer more detail regarding the applicable conditions,[112] but there has been none to date in relation to the healthcare sector.

EU institutions do not seem to accord much value to a formal act of entrustment

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108 *IRIS-H* (n 98), para 92.

109 ibid, para 86, with reference to *BUPA* (n 71), para 160.

110 ibid, para 191.

111 *CBI v Belgium* (Case SA.19864 (ex 2009/NN54)) Commission Decision 2016/2327/EU [2016] OJ L351/68.

112 See eg Council Directive (EC) 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55, art 3, listing PSOs in electricity supply.

as such. SGEI missions are often derived from a general regulatory framework – national legislation, contractual acts emanating from a public authority or collective agreements – that subjects the operators of SGEIs to certain PSOs. It is also not required that each of the operators involved be entrusted with an SGEI mission by an individual act or granted a special or exclusive right in that respect. Accordingly, compensation for services may be granted to an unlimited number of operators without there being a need for notification to the Commission.

The obligation to provide a *universal* service is derived from the compulsory nature of the service rather than its material or geographical scope. This condition requires that SGEI operators provide the service in question to any user requesting it at uniform conditions, which are accordingly derived from the relevant PSOs attached to the provision of the SGEI concerned.

The test of proportionality may be employed in two stages of the review: in assessing the necessity of a special or exclusive rights granted to SGEI providers under Art. 106(2) and in determining the compatibility of compensation with the third and, in part, fourth *Altmark* conditions. The interpretation of the test in both instances is based essentially on the same criteria and is grounded on the premise that Member States have broad discretion in the matter.

An SGEI can incorporate any restrictions on competition necessary for the undertaking concerned to be able to carry out the PSOs imposed on it in economically acceptable conditions, whilst taking into account the importance of maintaining the quality, reliability and affordability of the SGEI. This justifies the grant of monopoly rights that are broader in scope than is strictly necessary for the provision of the SGEI in question. In such cases, the extension of exclusive rights serves to offset the costs of the often-unprofitable provision of the SGEIs. However, *Glöckner* makes clear that the extension of rights will not be justified if the operator in question is unable to meet the demand in the profitable section of the market.

In State aid cases, the proportionality review seems to be predominantly procedural. As demonstrated by *BUPA* and *IRIS-H,* the third *Altmark* condition is applied flexibly. The compensation provided will be considered as necessary as long as the calculation mechanism is not manifestly inappropriate for offsetting the additional costs associated with the provision of an SGEI. Insofar as the compensation is calculated on the basis of parameters that are specific, clearly identifiable and capable of being controlled (the second Altmark criterion), this condition seems to be satisfied. The fourth *Altmark* condition is met as long as the compensation concerned does not cover the costs incurred due to inefficient operation of SGEIs. Overall, the review seems to be aimed at preventing situations where an undertaking would be compensated for *any* losses that it might incur irrespective of whether they actually relate to the operation of an SGEI.[113]

(d) *The Implications of the Case Law: (Still) Defining the Reach of Competition Law*

EU competition and State aid law in principle respects the prerogative of the Member States to define their health policies and manage their healthcare systems independently from the EU's interference, in accordance with Art. 168(5) TFEU. Yet some important aspects of the overall legal framework still lack clarity and legal certainty, thus making it difficult in practice for the national authorities and healthcare operators to determine their respective rights and obligations.

113 M Klasse, 'The Impact of *Altmark*: The European Commission Case Law Responses' in E Szyszczak and JW van de Gronden (eds), *Financing Services of General Economic Interest, Legal Issues of Services of General Interest* (T.M.C. Asser Press 2013) 42.

What counts as an undertaking?

The concept of an undertaking seems to be interpreted expansively with regard to the providers of healthcare but restrictively with regard to bodies managing healthcare. Providers will most likely be caught by the definition because they normally offer medical goods and services on the market. This would not however be the case if health care services are delivered by bodies that are controlled by the State and are obliged to treat all patients free of charge. In this scenario, as AG Maduro points out, healthcare is organised exclusively on the basis of solidarity, and therefore there can be no question of market forces being involved.[114] This interpretation does not seem to be very helpful because, in practice, the provision of healthcare is rarely purely social or economic. Ever more frequently, healthcare is provided by entities which have mixed public and private funding and/or provide services to both public and private patients.[115] The case law, as it stands today, is unable to offer any conclusive answers as regards the extent to which these hybrid bodies fall within the scope of application of EU competition law.

Bodies managing healthcare fall under the definition of an undertaking insofar as they do not operate in accordance with the principle of solidarity. When assessing the role of solidarity in a health insurance scheme, great importance is attached to the ability of the managing bodies to influence the level of benefits. This suggests that the NHS bodies operating in the Beveridge system are likely to be more immune from the application of EU competition rules than the sickness funds in the Bismarck system. This is so because in NHS systems, the precise levels of benefits are normally

114 *FENIN* (n 5), Opinion of AG Maduro, para 31.

115 For seemingly conflicting interpretations of the case law on this issue, see Communication on State aid for SGEIs (n 75) art 2.1.1, para 12; L Hancher and W Sauter, 'One Step Beyond? From Sodemare to DocMorris: The EU's Freedom of Establishment Case Law Concerning Health Care' (2010) 47 CML Rev 117, 123–124, 126–127 (Hancher and Sauter, 'From Sodemare to DocMorris').

determined by the government, whereas in Bismarck systems, the insurance funds are given some room for autonomy in this respect.[116] These differences illustrate how a seemingly uniform definition of an undertaking applicable throughout the EU may in practice affect the regulatory systems of the Member States in varying degrees.

Another set of problems arises from situations where the managing bodies also provide healthcare services or otherwise engage in market activities, for example, by purchasing medical goods and services, fixing maximum prices payable for pharmaceuticals or competing with each other for clients in their role as health insurers. The *AOK* and *FENIN* judgments seem to suggest that a limited amount of competition in the activities of these bodies does not bring them within the scope of competition rules provided that their social functions are predominant, which in turn is determined by reference to the principal activity of the body in question.

This test, however, might be difficult to apply in practice, as it effectively presupposes an inquiry into the relative weight of the various functions assigned to the body managing healthcare, with a view to distinguishing between its principal and ancillary functions. In addition, the *AOK* judgment suggests that in situations where it is possible to dissociate the various activities from each other, the operator in question could be considered as an undertaking in relation to some of its activities but not others. In light of this complexity, NCAs and national courts are likely to face difficulties when having to determine the exact circumstances in which the element of competition will be sufficient to bring the body managing healthcare under the definition of an undertaking. This problem is exemplified by the tension between the *FENIN* and *Bettercare* decisions.

A similar problem concerns supplementary schemes of insurance, particularly

116 Hancher and Sauter, *Healthcare Sector* (n 10) 232–233.

those set up with the involvement of private parties, such as the social partners. In this situation, neither the overall social character of the scheme nor its adherence to the principle of solidarity will be sufficient to determine the nature of the activity. The decisive criterion will be the degree of State control exerted on the insurance fund in question. Due to the lack of case law on this matter, it remains unclear what degree and form of control by the State is required for a fund *not* to be considered an undertaking. Yet one thing is clear. In light of the continuing liberalisation of the healthcare sector, which inevitably means decreasing State control over (often private) healthcare operators, it becomes more probable that even systems that are predominantly based on solidarity will be caught by this test.[117]

The uncertain scope of the SGEI exception

In principle, the concept of SGEIs seems to provide a viable safeguard from EU competition and State aid rules overreaching into national healthcare systems. This is manifested by the fact that EU law review, be it administrative or judicial, is limited to checking for manifest error in the assessment performed by national authorities. Accordingly, as discussed earlier, the criteria concerning the definition and designation of SGEIs are applied flexibly, and the test of proportionality is principally aimed at precluding abusive recourse to the concept of SGEIs. However, due to the multiple sources of authority on the matter, it remains unclear how flexibly EU courts, Commission and the NCAs are going to apply the relevant rules in a particular case.

There already appear to be divergences in the interpretative approaches of the actors involved. For instance, in the two *Altmark* packages, the Commission adopts a close reading of the *Altmark* judgment and thus provides detailed guidelines regarding

[117] Gronden and Sauter (n 49) 221.

both the assignment of an SGEI mission as such and the subsequent calculation of compensation for discharging it.[118] Yet, in practice, the Commission seems to interpret its own rules rather flexibly. In *IRIS-H*, for example, it derives the relevant PSOs from the general legal context rather than a specific act of entrustment and accords national authorities broad discretion in determining the compensation of the costs associated with the provision of SGEIs. Apart from that, it often applies the conditions laid down in *Altmark* selectively.[119] In *IRIS-H*, in particular, it only examined two out of four.

The GC, on the other hand, is explicit that a strict reading of the *Altmark* judgment is unsuitable in the context of public healthcare. In line with this logic, it seems to apply the *Altmark* test in a modified version, especially as regards the third and fourth of the *Altmark* conditions. The third condition, requiring compensation to be necessary, is effectively reduced to a requirement to have clear and transparent parameters for calculating compensation, which is in effect the second *Altmark* condition. The fourth condition, the efficient undertaking comparator, is reinterpreted to require mainly that a compensation mechanism be neutral with respect to inefficiencies of operation.[120] It is quite possible that the flexibility exercised by the GC has also influenced the approach of the Commission when deciding cases on the matter.

The CJEU, for its part, has not yet had the opportunity to rule on the compatibility of State aids in the healthcare sector. The potential implications of this situation are not insignificant. Currently, the guiding judgment on the matter is *BUPA*.

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118 Commission Decision on public service compensation 2011 (n 75), arts 4 and 5, discussed in ch IV, s 1(c)(ii).

119 For examples of selective application of the *Altmark* conditions, see L Hancher, 'This Won't Hurt a Bit: the Commission's Approach to Services of General Economic Interest and State Aid to Hospitals' (2012) TILEC Discussion Paper 21012-012, 15 <https://pure.uvt.nl/ws/files/1449936/SSRN_SGEI_hospitals.pdf> accessed 15 June 2017.

120 T Hervey, 'If Only It Were So Simple: Public Health Services and EU Law' in M Cremona (ed), *Market Integration and Public Services in the European Union* (OUP 2011) 206–207.

Yet the fact that it has been decided by the GC suggests that the rules and principles established thus far (and applied by the Commission) may be modified or even overturned by the CJEU. It remains to be seen whether the CJEU will follow the flexible approach adopted by the GC or stick to a more rigorous application of the conditions it had set out itself in *Altmark.* On the one hand, based on CJEU judgments in *Glöckner* and *AG2R*, the Court seems to be prepared to accommodate differences in national conceptions and methods of organisation of SGEIs in the healthcare sector. On the other hand, the Court appears to require a higher degree of solidarity in relation to health insurance schemes than the GC did in *BUPA*, for example. In light of the foregoing, the direction that EU law developments concerning SGEIs in the healthcare sector will take in the future remains unclear.

In the meantime, the number of complaints addressed to the NCAs has been steadily increasing since the modernisation of enforcement of EU competition law, which seems to indicate that the reforms at the EU level have generated pressure for national litigation. In these circumstances, it is almost certain that, in the absence of a judgment by the CJEU clarifying EU rules on the matter, litigation at the national level is likely to produce a variety of interpretations of the existing legal framework, thus creating uneven impacts on the national healthcare systems of EU Member States.

2 Collective Labour Law

One of the central functions of collective bargaining is to eliminate the kind of competition among workers and employers that is based on labour costs, namely wages and working conditions. This function may be seen as problematic from the point of view of competition law for two reasons. First, trade unions representing the entirety or the majority of the workforce in a given sector could be seen as monopolies, abusing their dominant position by compelling an employer to sign a collective agreement requested by the union. Second, collective agreements may restrict competition in and of themselves, since by their very nature they fix the 'price' of labour and other 'trading conditions', thus acting in breach of Art. 101(1) TFEU, which prohibits cartels, agreements and other concerted practices that distort competition in the internal market.[121]

Labour law, on the other hand, views the role of collective bargaining via trade unions from a completely different perspective. Collective bargaining is seen as the most effective, and often the sole, tool for defending workers' interests because it serves to offset the inequality of the negotiating power inherent in the employment relationship. For that reason, the right to collective bargaining is protected under a number of international and regional human rights instruments and is often granted recognition in national constitutions, either explicitly or under the umbrella of freedom of association.[122]

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121 S Evju, 'Collective Agreements and Competition Law. The *Albany* Puzzle, and *Van der Woude*' (2001) 17 IJCLLIR 165, 165–167. See also EurWork, 'Competition Law and Collective Agreements' (*Eurofond,* 2011) <http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/competition-law-and-collective-agreements> accessed 16 September 2016.

122 See ILO Convention (No 98) concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (adopted 01 July 1949, entered into force 18 July 1951) 96 UNTS 257; European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, art 11; European Social Charter (adopted 18 October 1951, entered into force 26 February 1965) ETS 35, art 6; International Covenant on Economic, Social

The following discussion examines the relationship between collective bargaining and EU competition law with the view to assessing how this relationship, as interpreted by the CJEU, affects the autonomy of national systems of industrial relations. In particular, the analysis focuses on CJEU case law concerning the compatibility of collective agreements with Art. 101(1) TFEU.

(a) *The* Albany *Exemption*

In the *Albany* case, the CJEU for the first time pronounced on the relationship between collective agreements and EU competition rules. The collective agreement in question established an occupational pension scheme for undertakings in the textile sector in the Netherlands. The affiliation to the scheme was made compulsory for the entire sector by an order of the Dutch Minister of Social Affairs. Albany, a textile company, sought an exemption from the scheme and was refused. It claimed before the national court that mandatory affiliation to the scheme violated Art. 85 EEC (Art. 101 TFEU). The CJEU used this opportunity to clarify whether, and if so, in what circumstances, a collective agreement between management and labour fell outside the scope of Art. 85 EEC.

The Court began by making some preliminary observations about the place of collective bargaining within the framework of the Treaties. It noted that the activities of the Community included not only a 'system ensuring that competition in the internal market is not distorted' but also 'a policy in the social sphere', with a particular task of promoting 'a harmonious and balanced development of economic activities' throughout

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and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 8; European Social Charter (Revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS 163, art 6; EU Charter (n 6), art 28. For an overview of the regulation of collective bargaining in European countries, see KD Ewing, 'Economic Rights' in M Rosenfeld and M Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (1st edn, OUP 2012) 1036, 1046–1048.

the Community and 'a high level of employment and of social protection'.[123] In that connection, both the right of association and collective bargaining had been given express recognition in Arts. 117 to 120 EEC (now corresponding to Arts. 151–159 TFEU).[124] Moreover, the Agreement on Social policy attached to the Treaty (corresponding to Arts. 151 and 154 TFEU) explicitly referred to the objective of social dialogue and collective bargaining as one of the Community's objectives.[125]

In light of these observations, the Court went on to hold that

> It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.[126]

Accordingly, the agreements concluded in the context of collective negotiations in pursuit of such objectives, 'by virtue of their nature and purpose', had to be regarded as falling outside the scope of Art. 85(1) EEC.[127] As the purpose of the collective agreement in question was to guarantee a certain level of pension for all workers in the sector, in this way contributing to improving one of their working conditions, namely remuneration, the agreement was considered to fall outside the scope of Art. 85.[128]

The *Albany* judgment shows the Court's sensitivity to the collision of competition law and labour law. It thus establishes an exemption, albeit narrowly

123 Case C–67/96 *Albany* [1999] ECR I–5751, para 54.

124 ibid, para 55–58; Protocol on Social Policy to TEU [1992] OJ C191/91, Agreement on Social Policy, arts 1 and 4.

125 *Albany* (n 123), paras 55–58.

126 ibid, paras 59–60.

127 ibid, para 60.

128 ibid, paras 63–64.

construed, from EU competition rules for collective agreements.[129] To be excluded from the scope of Art. 101 TFEU, a collective agreement must satisfy two conditions: it must have been concluded in the framework of collective negotiations (nature of the agreement) and with a view to improving conditions of work and employment (social purpose). It has been suggested by several AGs in cases that followed *Albany* – although never explicitly discussed by the Court – that the condition regarding the social purpose of the agreement is also subject to the principle of proportionality. Accordingly, collective agreements that do not pursue a genuine social objective of the improvement of conditions of work and employment or go beyond what is necessary to achieve that objective would be considered incompatible with EU competition rules.[130]

While having introduced an exemption for collective agreements, *Albany* did not touch upon the question of the legal situation of the vast category of workers that are self-employed. The requirement relating to the nature of the collective agreement seems to suggest that the exemption does not apply if the agreement in question covers self-employed persons, as opposed to employees. If that is the case, the self-employed will be regarded as 'undertakings', and agreements concluded between them will qualify as agreements aimed at price-fixing.

The latter distinction has particular relevance for the media, art and entertainment sectors, which all attract significant numbers of self-employed workers providing services as independent contractors. As members of professional associations rather than trade unions,[131] technically, these workers would be excluded from the

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129 Affd in Joined Cases C–115/97, C–116/97 and C–117/97 *Brentjens' Handelsonderneming BV* [1999] ECR I–6025, para 57; Case C–219/97 *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer en Havenbedrijven* [1999] ECR I–6121, para 47. See also *Pavlov* (n 16) para 67; Case C–222/98 *Hendrik van der Woude* [2000] ECR I–7111, para 22 (*Van der Woude*); *AG2R* (n 42), para 29.

130 See eg *Van der Woude* (n 129), Opinion of AG General Fennelly, paras 19, 28–32; Case C–271/08 *Commission v Germany* [2010] ECR I–7091, Opinion of AG Trstenjak, paras 58–59, 61.

131 See eg *Pavlov* (n 16), paras 75–76, 83–89.

Albany exemption and thus deprived of a necessary protection against competition rules.[132] The case law on this issue is however far less clear-cut, as illustrated by the following analysis of the Court's recent judgment in *FNV Kunsten Informatie en Media*.

(b) FNV Kunsten Informatie en Media: *the Situation of the Self-Employed*

The *FNV Kunsten Informatie en Media* case[133] concerned a Dutch collective agreement concluded between a trade union representing musicians and an organisation representing orchestras. Dutch laws provided that collective agreements could be concluded on behalf not only of employees, but also service providers who were members of trade unions. The collective agreement in question laid down minimum fees not only for substitute musicians hired under an employment contract, but also for those carrying out their activities under a contract for professional services (the self-employed substitutes). The Dutch NCA held that the trade union was acting as an association of undertakings and the agreement in question constituted a price-fixing scheme. On appeal, the case was referred to the CJEU.

In line with the reasoning employed in *Albany*, the Court considered whether, by virtue of its purpose and nature, the agreement concerned could qualify for an exemption from Art. 101(1) TFEU. The Court expressed doubts about the 'nature' of the agreement in particular, noting that a collective agreement concluded by an employees' organisation on behalf of self-employed service providers could not be

132 C Rubiano and S Ravid, 'Collective Bargaining and Competition Law: a Comparative Study on the Media, Arts and Entertainment Sectors' (2013 International Federation of Musicians) <http://www.fim-musicians.org/wp-content/uploads/fim_study_competition.pdf> accessed 16 September 2015, 10, 41.

133 Case C–413/13 *FNV Kunsten Informatie en Media* (CJEU, 4 December 2014) (*FNV Kunsten Informatie en Media*).

regarded as constituting the result of a collective negotiation between employers and employees.[134] Service providers had to be considered undertakings within the meaning of EU law because they offered services for remuneration on a given market and performed their activities as independent economic operators in relation to their principal.

However, the Court observed that workers often opted for a legal status of a 'self-employed' for tax, administrative or organisational reasons, which in turn made it extremely difficult to draw the line between an employee and a self-employed person. Therefore, service providers who *in fact* found themselves in a situation comparable to that of employees should be regarded as 'false self-employed'.[135] This category included persons who did not determine independently their own conduct on the market and were instead dependent on and subordinate to their principal.[136] This type of self-employed person would qualify as an employee for the purposes of the *Albany* exemption.

An employee, or a worker, within the meaning of EU law, the Court recalled, was someone who: a) performed services for remuneration under the direction of another person as regards the time, place and content of work; b) did not share the employer's commercial risks; and c) for the duration of services, formed an integral part of that employer's undertaking.[137] The classification of a person as self-employed under national law had no bearing on that person's status as an employee within the meaning of EU law if their independence was merely notional, thereby disguising an

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134 *FNV Kunsten Informatie en Media* (n 133), paras 29–30.

135 ibid, para 31.

136 ibid, para 33.

137 ibid, paras 31–36.

employment relationship.[138] The task for the national court was therefore to ascertain whether the substitute musicians were 'false self-employed' in this sense, whilst taking into account their relative flexibility (or lack of it) in determining their working hours and the place and manner of taking part in the rehearsals and concerts.[139]

(c) *The Implications of the Case Law: a Conditional Immunity from EU Competition Law*

The case law of the CJEU has clarified one of the central questions regarding the relationship between EU competition law and collective labour law – the conditions for the compatibility of collective agreements with the prohibition of anticompetitive agreements enshrined in Art. 101(1) TFEU. A collective agreement will be excluded from the scope of Art. 101 if it is concluded in the framework of collective negotiations, pursues the objective of improving conditions of work and employment and, arguably, does not go beyond what is necessary in the pursuit of that objective.

The condition requiring the agreement to be concluded in the framework of collective negotiations is applied flexibly. Accordingly, the self-employed service providers who find themselves performing the same activity as the employer's employed workers under comparable conditions will fall within the exemption. To determine whether that is the case, national courts will need to consider the nature of the contractual relationship between the self-employed and the employer and assess whether various factors revealing the degree of independence from the employer and flexibility in terms of working conditions allow that person to be classified as an independent service provider.

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138 *FNV Kunsten Informatie en Media* (n 133), paras 35–36.

139 ibid, para 37.

It is yet to be seen what role the principle of proportionality may play in the application of the *Albany* exemption in light of the various factual circumstances that may arise. The question of proportionality may prove to be decisive in determining the ultimate scope of the exemption, especially considering that in the free movement case law the standard of proportionality review employed by the Court is particularly high in the context of collective bargaining.[140] Against this background, the *Albany* exemption should not be regarded, at least not yet, as an expression of a consistent principle.

140 See, in particular, *Commission v Germany* (n 130).

3 Education

EU competition law thus far has had little direct influence on national education systems. One reason behind this is that the provision of public education, in contrast to public healthcare, is not regarded by the CJEU as an economic activity within the meaning of Art. 57 TFEU.[141] It is for this reason that the Court's entire case law on student mobility is based on the principle of non-discrimination and EU citizenship rather then the economic freedoms. It would follow that providers of public education services do not constitute undertakings within the meaning of EU law and therefore are excluded from the application of EU competition rules. However, the principles derived by the Court in the free movement case law are not automatically transposable into the area of competition law and *vice versa*, as demonstrated, in the context of the present study, by *FENIN*, as regards the economic status of hospital services, and *Albany*, as regards the status of collective bargaining in the internal market.[142] Accordingly, the Court's finding that education services are non-economic in nature in the context of free movement law must not be considered absolute and in no way suggests that national education systems are immune from the application of EU competition law.

Moreover, in the last few decades, European countries have been increasingly introducing market elements into their education systems: from charging higher fees, as opposed to a nominal charge, to applying business methods in the management of universities, to increasing reliance on private establishments in the provision of education.[143] As a result of these reforms, education, like healthcare, has been gradually

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141 See eg Case C–263/86 *Humbel* [1988] ECR–5365, paras 18–19. See also discussion in ch III, s 1(b).

142 This issue is discussed in more detail further in ch IV, s 5.

143 See eg N Alexiadou, 'Privatising Public Education Across Europe – Shifting Boundaries and the Politics of (Re)claiming Schools' (2013) 4 Education Inquiry 413; F Adamson, B Astrand and L Darling-

brought within the purview of competition law. Insofar as education services are offered on the market (potentially) in competition with other providers, they constitute economic activities. The Court has already found this to be the case with regard to organisation of university courses for remuneration,[144] provision of education by private schools[145] and teaching activities conducted by an individual for a higher education institution in another Member State.[146]

Although no cases have yet been decided at the EU level regarding the application to education services of competition rules, this situation is likely to change in the future, especially now that cases of this sort are already being dealt with by the NCAs. For instance, the UK's OFT found in 2005 that fifty of the country's fee-paying schools, having a status of charitable organisations in national law, have infringed the prohibition of cartels under Chapter I of the Competition Act by engaging in a practice of fixing prices for the education services that they provided.[147] Since Chapter I prohibition in substance is equivalent to Art. 101 TFEU, the described practice of the UK schools may well have been challenged on the basis of EU law and decided by the Commission and EU courts, provided that a potential effect on inter-State trade was established.

The applicability to the education sector of Arts. 102 and 107 TFEU is just as likely. One could consider a situation where governments grant special rights or

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Hammond (eds), *Global Education Reform: How Privatization and Public Investment Influence Education Outcomes* (Taylor & Francis 2016); H Gunter et al (eds), *New Public Management and the Reform of Education: European Lessons for Policy and Practice* (Routledge 2016).

144 Case C–153/02 *Valentina Neri* [2003] ECR I–13555, para 39.

145 See Case C–76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I–6849, discussed in ch II, s 2(b)(ii).

146 Case C–281/06 *Jundt v Finanzamt Offenburg* [2007] ECR I–12231. For a detailed discussion, see A Gideon, 'Higher Education Institutions and EU Competition Law' (2012) 8 Comp L Rev 169 (Gideon).

147 OFT Decision CA98/05/2006 *Exchange of information on future fees by certain independent fee-paying schools*, 20 November 2006.

financial support to universities in order to conduct research in a specific area, ensure teaching of certain programmes or courses in the public interest or lower tuition fees in order to provide wider access to education. In these circumstances, the universities involved are acting as undertakings.[148] Accordingly, the special rights granted to them would need to be justified under Art. 106(2) TFEU and, if accompanied by compensation, would have to comply with the *Altmark* conditions.

In light of the foregoing, it is almost impossible that national education systems can escape scrutiny for compliance with EU competition law. It remains to be seen how questions relating to the relationship between education and competition law will be approached by the Commission and EU courts. But it is not unreasonable to assume that EU institutions will be flexible and show deference to the policy choices made by national authorities, in accordance with the model of reasoning employed in the healthcare cases. Also, it could not be excluded that the Court might explore the possibility of employing the *Albany* exemption to protect agreements between public authorities providing education, although, admittedly, there is no sign (so far) that the Court is keen to do this.

148 To that effect, see *Pavlov* (n 16), para 75; *Glöckner* (n 22), paras 19–20; *FENIN* (n 5), Opinion of AG Maduro, para 13.

4 Gambling

The extensive body of EU gambling case law has been based exclusively on EU free movement rules, namely the freedoms of establishment and of provision of services. However, national gambling sectors also raise a number of questions of competition law, especially in light of the on-going reforms of liberalisation in EU Member States, as is the case with healthcare and education. The most prominent among those questions is the abuse of dominance by State-owned gambling monopolies, acting as undertakings in the market for gambling services,[149] or monopolies that often retain their special or exclusive powers after the change of their legal status from public to private.[150] Similarly, where certain operators are given favourable treatment through financing measures, such as special taxation regimes, State aid rules may be triggered.[151]

Unlike in the context of healthcare, collective labour law or (potentially) education, the exception for SGEIs provided in Art. 106(2) TFEU is unlikely to serve as a viable justification for gambling monopolies because gambling services by their nature do not constitute services of general interest. Admittedly, national laws that limit competitiveness in the gambling market are indeed aimed at protecting the general interest, to which the Court has been extremely sensitive in the free movement case law. However, gambling operators themselves are not normally entrusted with any PSOs that would embody considerations of public interest or social solidarity. Even where national laws stipulate that a fraction of profits derived from gambling will be

149 See eg facts of Case C–42/07 *Liga Portuguesa* ECR [2009] I–7633; Case C–258/08 *Ladbrokes* [2010] ECR I–4757.

150 See eg facts of Joined Cases C–186/11 and C–209/11 *Stanleybet* [2013] OJ C71/3.

151 E Szyszczak, '*Zeturf*: Competition and the Survival of Gambling Monopolies?' (2012) 3 JECL & Pract 42.

dedicated to the funding of various causes of public interest, the relevant operators are not obliged to provide any of their services in a 'universal and compulsory' manner, which could make them less competitive in comparison to other actors on the market. Accordingly, they do not engage in any loss-making activities in the general interest that would justify the grant of special or exclusive rights.[152] In fact, quite the contrary, gambling services are provided for profit and, as discussed in Chapter II, are tolerated (and often even endorsed) by public authorities exactly because of their capacity to generate significant public revenue, notwithstanding the associated social costs.

The CJEU has not itself addressed the question concerning the applicability of Art. 106(2) to gambling monopolies, but this possibility has in the past been expressly rejected by several Advocates General, who would consider, albeit in brief, that a licence to operate gambling services could not be regarded as containing a public mandate to provide an SGEI.[153] The Commission seems to hold a position similar to that of the AGs, as illustrated by its recent decision concerning the compatibility with State aid rules of a French parafiscal tax on online horse race betting. In this case, France argued that the tax was necessary to finance an SGEI mission conferred on horse racing companies, consisting of 'improvement of the equine species and the promotion of horse breeding'. The Commission rejected this argument, holding that the activity which the SGEI in question served to support was not 'general' in nature, as required by the very definition of the SGEI, because it concerned a specific sector of horse breeding. Ultimately, the Commission decided that the French scheme was compatible with the internal market under the exception provided for in Art. 107(3)(c)

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152 I Platis, 'The Greek Betting State Monopoly: a Case for EU Fundamental Freedoms, EU Competition Law or Both?' (2014) HREL 85, 101 (Platis).

153 C–124/97 *Läärä & Others* [1999] ECR I–6067, Opinion of AG La Pergola, para 30; Case C–67/98 *Diego Zenatti* [1999] ECR I–7289, Opinion of AG Fennelly, fn 30.

TFEU, which authorises State aid intended to facilitate the development of certain economic activities carried on for the benefit of the sector as a whole, with the purpose of promoting technical progress, and improving the quality, competitiveness and productivity of the businesses.[154]

It is noteworthy that the exemption enshrined in Art. 106(2) TFEU applies not only to undertakings providing SGEIs, but also those having the character of a revenue-producing monopoly. In order to be classified as a revenue-producing monopoly, a gambling monopoly would need to be established for the purpose of collecting money for the State and its concession should be motivated by reasons of exploiting gambling as a particular source of revenue on behalf of that State.[155] Considering that part of the revenues received from gambling activities go to the public budget and are subsequently used to finance public causes, it would seem more plausible that gambling monopolies could be justified, to an extent at least, by the exception granted to revenue-producing monopolies.[156] This defence might however in turn trigger application of Art. 37 TFEU, which requires that Member States adjust State-controlled monopolies so as to ensure the observance of the principle of non-discrimination on the basis of nationality. The applicability of Art. 37 to the gambling sector would be limited, as this provision is confined to the free movement of goods rather than services.[157] As such, it would only cover those aspects of gambling that involve the sale of goods, such as the distribution of lottery tickets or slot machines. Judicial review

154 See *Amélioration de l'espèce équine et promotion de l'élevage* (Case 34/2010) Commission Decision 2014/19/EU [2014] OJ L/14/17, recital 9.2. See also *Duties for Online Gaming in the Danish Gaming Duties Act* (Case 35/2010) Commission Decision 2012/140/EU [2012] OJ L/68/3, holding that the Danish tax system differentiating between online and land-based gambling operators is justified under art 107(3)(c) TFEU.

155 Platis (n 152) 101.

156 S Planzer, *Empirical Views on European Gambling Law and Addiction* (Springer 2014) 41–42.

157 See Case C–155/73 *Giuseppe Sacchi* [1974] ECR 409, para 10.

under Art. 37 would potentially involve the type of considerations regarding the rights of foreign gambling operators as in the analysis conducted in light of Arts. 49 and 56 TFEU, thus likely producing similar outcomes to the Court's free movement case law.

It follows from the above that Member States do not have too much room to justify their gambling monopolies by recourse to the exception granted to SGEIs. And yet it seems unlikely that the Court would be rigorous in reviewing the validity of national gambling monopolies in light of EU competition rules. Doing so would arguably compromise the Court's light-touch approach employed in the free movement cases, which is based on the recognition of a broad margin of discretion to be accorded to public authorities in the regulation of national gambling markets. Even if the Court is not obliged to follow this approach in competition cases, there seems to be no reason why it would choose to depart from it. Accordingly, it is suggested that the Court's review of national gambling measures for compliance with EU competition law will not introduce any significant changes to the present landscape of Member States' regulatory frameworks.

5 The Regulatory Implications of EU Competition Law

Three main themes can be brought out in the context of assessing the implications of EU competition law for the scope of national regulatory autonomy in the policy areas under study: the restricted standard of review, problems with legal certainty and the quasi-legislative effects of the case law. The latter themes shall be discussed in light of comparable issues arising out of free movement law.

It will be argued that EU competition law, as interpreted by the CJEU, seems to be more sensitive than free movement law to national social policy and solidarity concerns. However, the present legal framework still lacks internal coherence and clarity and therefore cannot ensure the level of legal certainty necessary for the Member States and other actors involved to determine their exact rights and obligations in the context of EU competition law. This problem is exacerbated by the existence of multiple sources of interpretation of the existing rules, which in turn suggests that EU competition law is almost inevitably going to create diverse impacts on the regulatory policies of EU Member States in the areas of healthcare, collective labour law and potentially education.

(a) *The Standard of Review*

In comparison to the free movement law, EU competition law, at least as applied in relation to healthcare and collective labour law, appears to be better suited to accommodate social interests embedded in national public policies because of the weight it accords to the principle of social solidarity.

Solidarity informs the classification of an activity as economic in the first place and plays a decisive role in defining the scope of exemptions from competition and State aid rules. Competition law applies only insofar as bodies involved in the management and delivery of public services are considered undertakings.[158] This would be the case if their activities are organised in accordance with an objective of capitalisation, thus indicating that market provision is possible. Yet, even if found to constitute undertakings, these bodies – such as, for example, public hospitals that are in competition with private healthcare providers – can nevertheless be exempted from the application of competition rules if they are entrusted with the provision of SGEIs.[159]

In this respect, the CJEU's approach is markedly different from that employed in the context of the free movement rules, where the way in which an activity is organised at the national level seems to have no bearing on the application of the freedom to provide services under Art. 56 TFEU. The judicial assessment of the nature of an activity focuses narrowly on the existence of a monetary transaction between, on the one hand, the patient and foreign healthcare provider and, on the other hand, public hospitals and the national social security system. It is immaterial to the overall assessment of the situation that the patient is subsequently compensated for the costs of the treatment received or that domestic hospitals are funded by means of public taxation.[160] As a result of these different approaches, the provision of healthcare that is free of charge and financed through social security contributions may be an economic activity for the purposes of Art. 56 TFEU, but it does not necessarily follow that bodies which provide that type of healthcare are subject to competition law.[161]

Even where they are, EU law review of public services will respect the prerogative of the Member States to designate and manage what they regard as SGEIs

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158 For situations where competition law does not apply, see eg *Poucet and Pistre* (n 27), paras 8–12; *FENIN* (n 5), paras 8–26.

159 See eg *IRIS-H* (n 98).

160 See Case C–157/99 *Geraets-Smits Peerbooms* [2001] ECR I–5473, para 58; Case C–372/04 *Yvonne Watts* [2006] ECR I–4325, paras 89, 91.

161 *FENIN* (n 5), Opinion of AG Maduro, para 56; Baquero Cruz, 'Beyond Competition' (n 25) 183.

and thus will be limited to checking for a manifest error in their assessment. Accordingly, the proportionality review is aimed at avoiding an abusive recourse to the concept of SGEI rather than scrutinising the substantive policy choices of national governments. It is designed to accommodate monopolies that are larger than strictly necessary for the provision of an SGEI, insofar as they can ensure adequate provision of all the services covered by the grant of exclusive rights. In relation to State aids, proportionality is aimed at preventing situations where an undertaking would be compensated for losses unrelated to the provision of an SGEI. The review thus focuses on the procedural fairness of compensation schemes. Accordingly, the compensation provided will be considered necessary unless the calculation mechanism is shown to be manifestly inappropriate for offsetting the additional costs incurred as a result of operating an SGEI.

The exemption from competition rules granted to collective agreements seems to be phrased more narrowly than that granted for the provision of public services: it applies specifically in the context of Art. 101 TFEU and in relation to those agreements that are aimed at improving employment and working conditions. The language of national discretion does not appear in the Court's reasoning, although it allows for some flexibility by extending the *Albany* exemption to situations where unions negotiate on behalf of the 'false self-employed'. Moreover, this exemption is considerably broader than the permissible scope of collective bargaining in the context of Arts. 49 and 56 TFEU, where recourse to collective agreements for the protection of workers is lawful only insofar as it can be shown that there exist no other, less restrictive methods at the disposal of trade unions or national governments. This difference in the treatment of collective bargaining seems to stem from a different order of priorities set by the Court in free movement law and competition law respectively. In free movement, the legal certainty necessary for businesses to operate across national borders is prioritised over the collective regulation of employment and working conditions, whilst in competition law, the value of collective bargaining is prioritised over the prohibition of anti-competitive agreements.[162]

The Court's overall softer stance in applying competition law to social policy might be explained by two considerations. The first one is related to the possibility of derogation from the rules in question. It could not be excluded that the Court tends to define the scope of economic activity more widely in free movement law because it offers an open-ended list of grounds for justification of restrictive measures. The available scope for justification in competition law is generally narrower. It does not provide for a category equivalent to 'overriding reasons of public interest', or 'mandatory requirements',[163] apart from the specific considerations of public interest included in the concept of SGEI.[164] Yet this claim is not unqualified. Some of the Court's judgments, in particular, *Wouters* and *Meca-Medina*,[165] suggest that the Court already allows general derogations from competition law justified by non-economic factors at least in certain circumstances. This approach seems to be functionally aligned to the category of public interest objectives in the free movement law.[166] Moreover, the distinction between the two areas of internal market law is further narrowed down when in the free movement case law the Court applies the proportionality review, as it

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162 Cf eg Case C–341/05 *Laval* [2007] ECR I–11767, paras 107, 110 and *Albany* (n 123), paras 59–60.

163 First applied in Case C–120/78 *Cassis de Dijon* [1979] ECR 649, para 8.

164 In support of this argument, see Hancher and Sauter, 'From Sodemare to DocMorris' (n 115) 129–130.

165 Case C–309/99 *Wouters* [2002] I–1577, paras 97–110; Case C–519/04 P *Meca-Medina v Commission* [2006] ECR I–6991, paras 42–45, 47.

166 This aspect of the two judgments is discussed in S Weatherill, *The Internal Market as a Legal Concept* (OUP 2017) 107–109.

often does,[167] in a way that leaves very little room for Member States to justify their regulatory actions.

The second consideration concerns differences in the material scope and the normative force of each set of rules. Competition rules are, by and large, designed to control the conduct of private operators rather than the practices of the public sector. As such, they are formulated as precisely-defined prohibitions, which allow only for limited exceptions and are accompanied by an elaborate mechanism of enforcement. Accordingly, if applied rigorously, competition rules, by their very design, have the potential to encroach into national social structures to a larger extent than the free movement rules.[168] However, this point no longer holds in light of the evolution of the free movement law in the case law of the CJEU. After all, if the Court's position is moving towards more horizontal direct effect of the free movement rules, as exemplified by *Viking* and *Laval*, while at the same time narrowing down the scope of justifications available to governments, as exemplified by *Watts* and *Bressol*, then the material scope as well as the normative force of free movement law seem to become comparable to that of competition law.

(b) *Legal (Un)certainty*

Despite in principle being capable of accommodating national social solidarity concerns, the rules developed by EU judicial and administrative institutions are not (yet) sufficiently clear or coherent in order to provide national authorities with comprehensive guidance as regards the extent to which domestic public policies can be

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167 See eg *Laval* (n 162), para 110; *Watts* (n 160), paras 62, 68, 113, 119–120, 123; Case C–73/08 *Bressol and Chaverot* [2010] ECR I–2735, paras 67–76.

168 See D Damjanovic, 'The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy' (2013) 50 CML Rev 1685, 1703, illustrating this problem by the example of liberalisation of public utilities at the EU level, further discussed in G Monti, *EC Competition Law* (CUP 2007) 440–452.

protected from the reach of competition rules.

The main set of problems relates to the definition of an undertaking, the importance of which should not be underestimated, as it forms the basis for establishing whether EU competition law applies to the situation in question in the first place. In order *not* to be caught by the definition of an undertaking, the entity in question needs to pursue a social objective and be organised on the basis of financial solidarity. The practical application of these principles is not uncomplicated. For instance, when an insurance scheme is set up by the social partners, as in *Albany* or *AG2R*, the criterion that will determine the nature of the scheme will be that of State control over the scheme, which is supposed to limit the autonomy of both the social partners and the fund selected to manage the scheme in question. However, the question regarding the degree and form of the State control required in this context has not been specified by the CJEU, which, admittedly, is hard to do. This question is therefore likely to become subject to assessment on a case-by-case basis.

Similarly, it remains unclear what degree of solidarity is sufficient to offset the effect of employing market principles in the operation of the entity entrusted with an SGEI. The Court expressly leaves open the possibility that insurance funds and other bodies managing healthcare may qualify as undertakings with respect to those of their activities which are organised on the basis of capitalisation.[169] Yet, at the same time, the Court recognises that a body in question can retain its overall social character even if it operates in a degree of competition with other bodies or engages in the purchasing of goods and services on market terms. Due to the decentralised enforcement of competition law, the described ambiguities surrounding the definition of an undertaking are likely to produce different legal outcomes in different jurisdictions, as

169 See *AOK* (n 32), para 58.

exemplified by – albeit not limited to[170] – the *FENIN* and *Bettercare* decisions.

With regard to collective labour law, the principal issue concerns the role of proportionality in determining the scope of the *Albany* exemption. The Court has never employed the proportionality analysis, at least not explicitly, in either *Albany* or cases that followed. It could be argued that proportionality was implicitly employed when the Court ruled in *FNV Kunsten Informatie en Media* that the *Albany* exemption covers collective agreements negotiated on behalf of the self-employed *insofar* as they perform services in conditions of subordination to the employer. Notably, the extent to which this exemption will be capable of protecting the self-employed will depend on the national judicial approaches to the question of subordination in the relationship of employment, which in turn may be contingent on the factual circumstances of the cases that will come before national courts. Moreover, given the relatively small amount of case law in this area, it is not implausible that the CJEU may at some point decide to resort to the test of proportionality in a more explicit manner. Should that be the case, the application of proportionality review in light of Art. 101 will most probably result in the narrowing down of the exemption granted to collective agreements, thus bringing their legal status closer to that accorded to them in the context of the free movement rules.[171]

(c) *The Quasi-Legislative Effects*

Notwithstanding the contrasting standards of review, the Court's interpretation of the

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170 See *FENIN* (n 5), Opinion of AG Maduro, para 20, comparing different definitions of undertaking adopted by Member States.

171 See, in particular, *Commission v Germany* (n 130). For accounts discussing trends of convergence between free movement and competition law, see K Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and Competition' (2001) 38 CML Rev 613; J Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Hart Publishing 2002) ch 6.

competition rules ultimately displays the same regulatory patterns as the free movement case law. The Court lays down rules of constitutional importance to the Member States, which in turn provoke further litigation and, insofar as political consensus can be achieved, result in eventual codification of the relevant judgments in EU-level legislation. The following analysis illustrates this pattern by two examples: the EU regulatory framework for SGEIs and the scope of collective bargaining in the context of Art. 101 TFEU.

With regard to SGEIs, the *Altmark* judgment deserves a particular mention. *Altmark* set the foundations for the application of EU State aid rules to the healthcare sector. While the judgment itself did not concern healthcare, it has inspired a number of EU acts (the two *Altmark* packages), administrative decisions (*IRIS-H*) and court judgments (*BUPA*) that transplanted the conditions laid down in *Altmark* into the healthcare sector. Certainly, since adjustments needed to be made, taking into account the specificity and sensitivity of the healthcare sector, both the Commission and the GC have interpreted *Altmark* flexibly and thus modified some of the conditions laid down in the original judgment. Regardless, this process has produced what could be regarded as a set of distinctive EU rules of general application that now govern the provision of public healthcare services in the Member States.

The described developments that followed the delivery of the *Altmark* judgment display a familiar institutional dynamic, already identified in the context of the free movement case law.[172] The process starts with the Court laying down an interpretation of Treaty internal market rules in relation to the areas of national policy that are, in principle, constitutionally protected from the EU's legislative interference. Owing to the detail and the framing nature of judicial interpretation, the rules laid down in the

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172 See ch III, s 3.

relevant judgments produce quasi-legislative effects, modifying the pre-existing legal position of the Member States and other actors operating within their jurisdictions. Then, in an attempt to clarify and make more transparent the (new) legal framework established by the Court, the rules and principles formulated in its judgments get codified by the EU's legislative institutions. Ultimately, the codified rules (or the uncodified case law) are, in effect, transposed into the legal systems of the Member States.

The regulatory implications of the *Albany* judgment are not dissimilar, if less obvious. In this case, the Court formulated an important exemption for collective agreements from competition law, yet suggested that this exemption was not absolute. The judgment attracted an immediate reaction from the interested parties, on both the judicial and the legislative level. On the one hand, due to the brevity of the Court's reasoning, it has invited further litigation, motivated by the need for clarification of the scope of the exemption, in particular, in light of the varying circumstances of cases that may arise before national courts (as in *FNV Kunsten Informatie en Media*). On the other hand, the judgment in itself has created scope for potential EU-level legislative action that would clarify the rules developed by the Court (as was the case with *Altmark*). Action at the EU level in this situation may not be fruitful, considering the political sensitivity of the issues surrounding collective bargaining and corresponding constitutional constraints enshrined in Arts. 153(5) and 156 TFEU. Should that be the case, the Court's rulings will, however, remain the ultimate normative authority on the matter.

The examples of *Altmark* and *Albany* suggest that further regulation of the matter at the EU level might be equally determined either by the detail of the judgment or by the lack of it. The former will typically lead to EU-level legislative action that will codify the rules laid down by the Court. The latter is more likely to encourage further litigation,[173] which may ultimately lead to legislation, especially at the point when the case law will have developed enough to provide sufficient detail. Admittedly, the particular regulatory outcomes of the Court's judgments may not necessarily be negative from the Member States' point of view. In fact, both *Altmark* and *Albany* have contributed to clarifying the limits of the reach of EU internal market rules, reaffirming the scope of Member State regulatory prerogatives in the areas of high political and constitutional sensitivity, which is a positive development in itself. Yet it is remarkable that these types of policy developments stem from the EU's judiciary rather than a political agreement at EU legislative level, which, in turn, hints about the importance of self-awareness on the part of the Court as regards the potential implications of its judgments. This issue is further developed in the remaining chapters of the thesis.

173 On this point, see T Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability' in D Chalmers and A Arnull (eds), *Oxford Handbook of European Union Law* (OUP 2015) 409–410.

V. THE CONSTITUTIONAL IMPLICATIONS OF THE CASE LAW OF THE CJEU

This chapter builds on the comparative case law analysis conducted in the previous chapters and examines the Court's judicial practice involving the four areas under study in terms of compliance with the constitutional principles governing the division of competences and powers in the EU. Following the introductory section, which describes the role of the CJEU in the process of European integration, the Chapter goes on to argue that the exercise by the Court of its judicial powers in the context of the internal market is not consistent in light of the principles governing both the vertical and the horizontal division of competences in the EU.

In particular, because of the Court's expansive interpretation of the scope of the free movement rules, its case law on healthcare, education and collective labour law sits in tension with the principle of conferral. The latter case law, unlike the case law on gambling, is also incompatible with the principles of subsidiarity and proportionality because it deprives Member States of any meaningful degree of regulatory discretion and advances the deregulatory element of the internal market at the cost of the values of social solidarity whose protection falls within that national discretion. Similarly, on the horizontal level, the case law infringes the principle of institutional balance because it creates an inter-institutional dynamic, to some extent described in Chapter III of this thesis, whereby the EU's legislative institutions are effectively deprived of their legislative prerogative, making the Court the ultimate lawmaker on the matters concerned.

1 The Court's Role in the EU's Integration Process

The process of EU integration is characterised by the interaction between positive and negative integration – a dynamic that is typical to the operation of integrated economic areas.[1] Negative integration, by and large, refers to the process of removing national laws and practices that pose obstacles to free movement and competition within the EU. It is based on the provisions of the Treaty that are normally formulated as prohibitions and are capable of direct judicial application. Accordingly, negative integration is predominantly driven by the CJEU, which under Art. 19 TEU possesses the exclusive power to interpret the Treaties. The internal market case law, consisting of the interpretation of Treaty free movement and competition rules, represents one of the largest segments of so-called negative law.

Positive integration refers to common European policies that determine the conditions under which national markets operate. These policies are grounded on the provisions of the Treaty that are not normally directly enforceable, but instead provide legal bases for the adoption of EU-level legislation. The term 'positive law' encompasses legislative measures (Regulations, Directives, Decisions) adopted, typically, in the ordinary legislative procedure by the EU's legislative bodies – the Council and Parliament acting jointly on a proposal made by the Commission.[2]

In principle, negative and positive law are meant to complement each other. For instance, when the Court finds a national measure incompatible with EU law, the legislature is invited to adopt a common EU measure to fill in the gap, if the adoption

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1 For a landmark account, see J Tinbergen, *International Economic Integration* (Elsevier 1954). As regards European integration, see J Pinder, 'Positive Integration and Negative Integration: Some Problems of Economic Union in the EEC' (1968) 24 Wld Today 88.

2 The term 'legislative measures' here refers to both legislative and non-legislative acts, such as Commission decisions, provided that they are legally binding on the Member States.

of a common rule is deemed necessary.[3] This however happens rarely in practice. In a more common scenario, where the Court finds market restrictions stemming from national measures justified, and hence compatible with EU law, the EU's legislature retains the right to replace them with a common legislative standard.[4] When either of the elements in this process, the judiciary or the legislature, is not working properly, asymmetries may occur.

In fact, the EU's integration process has been characterised as inherently asymmetric since the early years of the EEC, owing to the dualism between supranational Community law, which includes judicial law-making, and intergovernmental European policy-making.[5] The said dualism, a term coined by Weiler, refers in particular to the period of integration when the asymmetry between negative and positive law was most pronounced as a result of the unanimity requirement that governed the process of adoption of EU legislation. Even today, when most of the EU legislation is passed by the majority vote, the EU's legal order remains biased towards negative integration. It is so because although qualified majority vote is easier to assemble than unanimity, it still requires a high degree of consensus among the political actors involved, whereas negative law does not require, nor depend on, the

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3 See eg Commission, 'Communication from the Commission concerning the Consequences of the Judgment Given by the Court of Justice on 20 February 1979 in Case 120/78 ("*Cassis de Dijon*")' (Communication) COM (1980) OJ C256/2; M Van Empel, 'The 1992 Programme: Interaction between Legislator and Judiciary' (1992) 19 LIEI 1.

4 L Gormley, 'Free Movement of Goods and EU Legislation in the Court of Justice' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 48; A Stone Sweet, 'The European Court of Justice' in P Craig and G de Búrca (eds), *Evolution of EU law* (2nd edn, OUP 2011) (Craig and de Búrca, *Evolution of EU Law*) 121, 147–148. For a critical account on EU consumer law *acquis*, see S Weatherill, 'The Consumer Rights Directive: How and Why a Quest for "Coherence" Has (Largely) Failed' (2012) 49 CML Rev 1279.

5 J Weiler, 'The Dual Character of Supranationalism' (1981) 1 YEL 267. See also E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 AJIL 1; J Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403 (Weiler, 'Transformation of Europe'); FW Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in G Marks et al (eds), *Governance in the European Union* (SAGE Publications 1996) (Scharpf, 'Integration') 15; FW Scharpf, 'Community and Autonomy: Multi-Level Policy-Making in the European Union' (1994) 1 JEPP 219, 219–220 (Scharpf, 'Community and Autonomy').

political will or agreement on EU level, stems directly from the rules contained in primary law and is directly judicially enforceable.

The Court's case law and contribution to the EU's integration process have been widely acclaimed for progressiveness in developing a number of important principles of EU law, most notably supremacy and direct effect,[6] (conditional) mutual recognition,[7] equal treatment,[8] and the protection of fundamental rights,[9] which all provided a necessary impetus for the EU's integration process.[10] This case law had special significance in the so-called stagnation periods in the 1960s and 1970s, when unanimous voting in Council was the norm for adopting legislative measures,[11] and consensus on the European political arena was lacking.[12] This context has led many scholars to conclude that judicial developments produced in the course of negative integration have been both inevitable and indispensible.[13]

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6 Case C–26/62 *Van Gend & Loos* [1963] ECR 1 (*Van Gend & Loos*); Case C–6/64 *Costa v E.N.E.L.* [1964] ECR 585 (*Costa v ENEL*).

7 For concrete examples of the practical significance of mutual recognition: Case C–120/78 *Cassis de Dijon* [1979] ECR 649; Case C–261/81 *Walter Rau* [1982] ECR 03961; Case C–178/84 *Commission v Germany* (*'Beer Purity'*) [1987] ECR 1227; Case C–198/89 *Commission v Greece* [1991] ECR I–727; Case C–470/93 *Mars GmbH* [1995] ECR I–01923.

8 See seminal judgment in Case C–43/75 *Defrenne v Sabena II* [1976] ECR 455 (*Defrenne*).

9 See eg Case C–4/73 *Nold v Commission* [1974] ECR 491; Joined Cases C–402/05 P and C–415/05 P *Kadi v Council* [2008] ECR I–6351.

10 For literature discussing these developments, see T Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21 EL Rev 199 (Tridimas); A Stone Sweet and JA Caporaso 'From Free Trade to Supranational Polity: The European Court and Integration' in W Sandholtz and A Stone Sweet, *European Integration and Supranational Governance* (OUP 1998) 64–71; S Weatherill, 'Activism and Restraint in the European Court of Justice' in P Capps, M Evans, S Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing 2003); H de Waele and A van der Vleuten, 'Judicial Activism in the European Court of Justice – the Case of LGBT Rights' (2011) 19 Mich St J Int'l L 639.

11 See eg EEC, arts 100, 101, 235. See seminal judgment in *Cassis de Dijon* (n 7).

12 Weiler, 'Transformation of Europe' (n 5); FG Mancini, 'The Making of a Constitution for Europe' (1989) 26 CML Rev 595, 612; H Rasmussen, 'Towards A Normative Theory of Interpretation of Community Law' (1992) U Chi Legal F 135, 137; H de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 12 EuR 3 (Waele).

13 A Arnull, *The European Union and its Court of Justice* (2nd ed, OUP 2006) 77; M Shapiro, 'The

Yet the role played by the Court has not been perceived uncontroversially. The Court has been on numerous occasions accused of overstepping the limits of judicial propriety or unduly interfering with the sovereign powers of the Member States,[14] and some of its judgments continue to be labelled as activist,[15] thus suggesting they lack legitimacy.[16] As the debate stands today, there seem to be valid reasons for both the support and the criticism of the Court's practice, which is reflected in the persisting academic divide on the matter.[17] The bottom line, however, seems to be that in a half-century's worth of case law, one can find judgments supporting either of the above-mentioned positions, and that is to be expected given the reactive, ad-hoc nature of judicial law-making. The problem with the judicial activism debate therefore seems to

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European Court of Justice' in Craig and de Búrca, *Evolution of EU Law* (n 4) 321–332; Tridimas (n 10); K Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in M Adams et al (eds), *Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) (Adams et al) 13–18.

14 In support of this position, see eg H Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policymaking* (Martinus Nijhoff Publishers 1986) (Rasmussen, *On Law and Policy*); P Neill, *The European Court of Justice: A Case Study In Judicial Activism* (European Policy Forum 1995) (Neill); Scharpf, 'Community and Autonomy' (n 5).

15 For a valuable collection of contributions unpacking the concept of activism in various contexts, see B de Witte, E Muir and M Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013).

16 For early examples, see eg *Van Gend & Loos* (n 6); *Cosa v ENEL* (n 6); Case C–11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; C–6/90 and C–9/90 *Francovich v Italy* [1991] ECR I–5357. For some recent examples, not including the case law analysed in this thesis, see Case C–144/04 *Mangold v Helm* [2005] I–09981; Joined cases C–402/07 and C–432/07 *Sturgeon v Air France SA* [2009] ECR I–10923; Case C–34/09 *Ruiz Zambrano* [2011] ECR I–1177; Case C–399/11 *Stefano Melloni* (ECJ, 26 February 2013); Case C–140/12 *Peter Brey* (CJEU, 19 September 2013). For a multi-faceted discussion on the legitimacy of CJEU case law, see Adams et al (n 13).

17 For directly opposing accounts, see: Rasmussen, *On Law and Policy* (n 14) v M Cappelletti, 'Is the European Court of Justice "Running Wild"?' (1987) 12 EL Rev 3 and J Weiler, 'The Court of Justice on Trial – a Review of Hjalte Rasmussen: On Law and Policy in the European Court of Justice' (1987) 24 CML Rev 555; Neill (n 14) v Tridimas (n 10) and J Temple Lang, 'Has the European Court of Justice Been Involved in "Judicial Legislation"?' (2011) 96 SJT 299 <http://svjt.se/svjt/2011/299> accessed 13 May 2017 (Temple Lang); T Harley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 12 LQR 95 (Hartley) v A Arnull, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 LQR 411 (Arnull, 'Reply to Hartley'); FW Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 J Com Mar St 645 (Scharpf, 'European Social Model') v J Baquero Cruz, 'The Socioeconomic Model of the European Union: Stuck with the Status Quo' in G Amato et al (eds), *Génèse et Destinée de la Constitution Européenne – Genesis and Destiny of the European Constitution* (Bruylant 2007) 1105 and, more generally, HW Micklitz and B de Witte (eds) *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012).

be that the majority of the criticisms and appraisals of the Court are not based on a comprehensive analysis of the case law.[18] Furthermore, positions diverge depending on the employed method of interpretation of the Treaties – textual[19] or teleological[20] – and the choice of the point of comparison, whether it is a national (constitutional) court,[21] an international court,[22] or a *sui generis*, quasi-political institution.[23] As a result, both sides of the debate appear to be right, if often unfairly selective with regard to the case law and methods that they use.

This thesis does not aim to assess the extent to which the Court has furthered or should further negative integration. In fact, such a task might be practically impossible to accomplish, as it would require an analysis of over fifty years of judicial developments in EU law. Moreover, an inquiry of that breadth might not be helpful, as it is rather unlikely that the Court's entire practice can be explained by a single theory. Accordingly, while fitting into the broad framework of the judicial activism debate, the present inquiry focuses on a slightly different yet equally important question. It explores the direction of negative integration taken by the Court, namely, its unique

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18 For an overview of the academic discussion of this problem, see Waele (n 12) 13–15.

19 See eg Rasmussen, *On Law and Policy* (n 14); Neill (n 17); Hartley (n 17).

20 See eg Tridimas (n 10); Temple Lang (n 17); Arnull, 'Reply to Hartley' (n 17).

21 See eg A Donner, 'The Constitutional Powers of the Court of Justice of the European Communities' (1974) 11 CML Rev 27; FG Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in DM Curtin and D O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T.F. O'Higgins* (Butterworth 1992) 25–32; FG Mancini, 'The United States Supreme Court and the European Court of Justice' in V Staats (ed) *Democracy and Constitutionalism in the European Union* 163, 166 (European Communities Studies Association 2000).

22 See eg KJ Alter and LR Helfer, 'Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice' (2010) 64 Int'l Org 563.

23 A-M Burley and W Mattli, 'Europe before the Court: a Political Theory of Legal Integration' (1993) 47 Int'l Org 41; A Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) Yale Law School Faculty Scholarship Series 70 <http://digitalcommons.law.yale.edu/fss_papers/70> accessed 12 May 2017; D Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (OUP 2015) (Sindbjerg Martinsen).

emphasis on the economic, deregulatory dimension of integration as opposed to the social, market-correcting dimension, with the view to determining the constitutional implications of the Court's choices. This inquiry builds on the comparative analysis of CJEU case law conducted in the preceding chapters, involving the intersection between internal market rules and national regulatory measures in four policy areas, three of which (healthcare, collective labour law and education) in principle fall outside the regulatory competence of the EU.

In light of the foregoing, this chapter argues that in the process of furthering negative integration in the internal market, the CJEU has altered the constitutional balance of competences within the EU, on both the vertical and horizontal level (Sections 2 and 3), and established an ill-conceived asymmetric relationship between the economic and social values of the Union (Section 3).

2 Implications for the Vertical Division of Competences

This section discusses the case law analysed in Chapters II–IV in light of the constitutional principles governing the existence and exercise of EU competences – conferral, subsidiarity and proportionality. It demonstrates through the comparative analysis of the Court's reasoning that its interpretation of internal market law displays varying degrees of respect for the principles of conferral, subsidiarity and proportionality. The argument is based predominantly on the analysis of the free movement law because the Court's competition case law, to date, has involved only two policy areas out of four under the present study (healthcare and labour law), thus falling short of providing sufficient data in order to conduct a meaningful comparative analysis.

It is submitted that, first of all, the Court's interpretation of the scope of application of the free movement rules in the areas of healthcare, education and labour law sits in tension with the principle of conferral because it is unjustifiably expansive in light of the text and objectives of the Treaty. Secondly, the Court's standard of review of those measures and practices that fall within the scope of free movement is internally inconsistent, taking into consideration that it is employed in areas of comparable political and constitutional sensitivity. It displays a strict-scrutiny approach in relation to the areas of healthcare, education and labour law and, unlike in the gambling case law, reduces the scope of national regulatory autonomy in these areas to an extent that is incompatible with the principle of subsidiarity. In doing so, it also advances the deregulatory element of the internal market to the point of undermining the social values whose protection falls within the scope of national regulatory autonomy, thus infringing the principle of proportionality.

(a) *The Existence of EU Competence: Implications for the Principle of Conferral*

(i) The principle of conferral in theory

While having been in operation since the origins of the European Community, the principle of conferral was expressly enshrined in EU primary law in the Maastricht Treaty and later reinforced by the Lisbon reforms.[24] It is spelled out in Art. 5(2) TEU and requires that the Union act only within the limits of the competences conferred upon it by the Member States, and 'competences not conferred upon the Union in the Treaties remain with the Member States'. The principle of conferral therefore governs the existence of Union competences, which are further classified under Arts. 2–6 TFEU into exclusive, shared, and supplementary.

Pursuant to Arts. 2(5) and 6 TFEU, the prohibition for the EU to interfere in the competences reserved to the Member States extends to areas falling within the category of the EU's supplementary, or complementary, competences. These are the areas where the Union has only been granted competence 'to carry out actions to support, coordinate or supplement' Member State action, excluding the possibility of adopting binding EU legislation. The list of areas includes the protection and improvement of human health, education and vocational training, and social policy, except for the aspects of social policy belonging to competences that are *shared* with the Member States.[25] As an internal market service, gambling falls within the category of shared competences under Art. 4 TFEU, giving the EU an unrestricted mandate to supersede Member State action in this area. The Treaties contain no other provision that would

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24 TEU, arts 4(2) and 5(1); TFEU, arts 2–6.

25 TFEU, art 4(b).

limit the EU's competence to regulate gambling.

The sector-specific legal bases for healthcare, education and labour law, on the other hand, reiterate and make more concrete the limitations expressed in the principle of conferral. Art. 168 TFEU provides the EU with complementary competences in the area of public health, excluding the option of harmonisation, and obliges the EU to 'respect the responsibilities of the Member States for the definition of their health policy and the organisation and delivery of health services and medical care'. Art. 165(1) TFEU charges the EU with a duty to 'contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action'. However, any EU action in the field must be taken while fully respecting the responsibilities of the Member States and therefore excludes any harmonisation of national laws or regulations.[26] Similarly, Art. 153(1) TFEU stipulates that the EU shall support and complement the activities of the Member States in inter alia the representation and collective defence of the interests of workers and employers. This provision is subject to paragraph (5) of the same article, which expressly excludes the right to strike and the right of association from EU-level harmonisation. The right to collective bargaining is not explicitly listed among the exclusions, but the Treaty provides no clear legislative basis for it,[27] and Art. 156 suggests that collective bargaining is not subject to binding legislation by stating that in matters relating to collective bargaining, the Commission shall encourage cooperation between Member States and facilitate the coordination of their action. Also, collective

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26 See also TEU, art 6; TFEU, art 165(4).

27 B Ryan, 'The Charter and Collective Labour Law' in TK Hervey and J Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights – a Legal Perspective* (Hart Publishing 2003) 67–68, 84–85 (Ryan).

bargaining may well fall under the ‘right of association’,[28] which together with the right to strike is excluded from harmonisation.

The general and sector-specific definitions of the principle of conferral thus seem to preclude interference by the EU into the areas of healthcare, education and collective labour law going beyond non-binding recommendations.

(ii) The principle of conferral in practice

The way the principle of conferral operates in practice, rather than in theory, is less clear-cut because, owing to the asymmetry in the relationship between negative and positive law, described earlier, Member States must comply with internal market law even in the areas that in principle fall outside the EU’s legislative competence. This asymmetry is exacerbated by the broad wording of the internal market rules and, consequently, the broad scope of the judicial mandate to interpret them. Accordingly, the Court holds a position whereby although, in the absence of EU-level harmonisation, Member States retain the competence to regulate the matters in question, when exercising that competence, they nevertheless need to comply with the free movement and competition rules. This would suggest that the limits placed on EU action in sectoral legal bases do not apply to the directly enforceable EU internal market rules and that the principal of conferral is limited to legislative conferral.

Yet even this conclusion is not entirely correct – as will be demonstrated further in this chapter – because the logic underlining the scope of judicial application of internal market law also extends to EU legislative action. The CJEU holds that Art. 114 TFEU, the internal market legal basis, allows the adoption of legislative measures that have as their primary objective a matter unrelated to the advancement of the internal

[28] See eg *Demir and Baykara v Turkey* (2009) 48 EHRR 54, holding that collective bargaining is an integral part of freedom of association.

market, even if the Union has not been accorded competence to regulate this matter in a binding way.[29] The foregoing suggests that EU law can legitimately encroach, through both the judicial and legislative route, into the areas falling outside the scope of its legislative competences to the extent that such interference stems from the exercise of the competences that the EU does possess.[30]

Whilst apt to create some tensions of a constitutional nature, the Court's broad reading of internal market law in principle seems to be justified. The *effet utile* of EU law as well as its integration process might be hindered if the whole range of areas, such as healthcare, education and collective labour law,[31] were a priori excluded from the reach of the free movement and competition rules.[32] However, the problem with the principle of conferral seems to be neither the flexibility inherent in its application nor the existence of overlap between the EU's conferred and supplementary competences, most notably, the internal market rules, on the one hand, and Arts. 153, 165 and 168, on the other; it is rather the *degree* of overlap between the two determined by the Court. It is further argued that the Court overstretches the principle of conferral by adopting an interpretation of the scope of application of free movement rules that is often incoherent and goes beyond both the textual and the teleological reading of the Treaty.[33]

29 This is discussed in more detail in ch III, s 3(b).

30 For this argument advanced in relation to EU legislative practice, see S Weatherill, 'The Limits of Legislative Harmonisation Ten Years after *Tobacco Advertising*: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 Germ LJ 827 (Weatherill, 'Limits of Legislative Harmonisation').

31 For examples of other constitutionally sensitive areas, see: TFEU, arts: 84 (crime prevention); 113 (tax); 147(1) (employment); 165(1) (sport); 166(1) (vocational training); 167(1) (culture); 195(1) (tourism).

32 This argument is further considered in L Azoulai, '"Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 EJLS 192, 211–214.

33 Cf eg *Van Gend & Loos* (n 6) and Case C–283/81 *CILFIT v Ministry of Health* [1982] ECR 3415, para 20 against Case C–50/00 *P UPA v Council* [2002] ECR I–6677, para 44, suggesting that the CJEU alternates between the textual and teleological interpretations of the Treaty, although the latter method is considered to be prevailing. For a comprehensive discussion, see G Conway, *Limits of Legal Reasoning*

As discussed in the comparative analysis conducted in Chapter III, the CJEU adopts an extremely broad interpretation of the Treaty provisions when faced with the question whether a national measure or practice falls within the scope of the Treaty. In the context of patient mobility, the Court extends the application of Art. 56 TFEU to healthcare provided under national social security schemes, viewing it as an activity of an economic character within the meaning of Art 57 TFEU. In doing so, the Court focuses on the pecuniary nature of the transaction between the patient and the foreign healthcare provider, while completely disregarding the social policy relationship between the citizen and the national welfare system within the patient's State of affiliation, notwithstanding that this relationship is the necessary precondition for receiving any type of medical service abroad. As discussed in Chapter IV, this case law stands in contrast to the Court's approach in competition law, where the solidarity elements and social values underpinning the provision of healthcare are taken into account in the assessment of whether the provider in question is engaged in an economic activity for the purposes of application of competition law.[34]

In the context of education, as discussed in detail in previous chapters, the Court created individual rights for mobile students, at least initially, on the basis of Art. 128 EEC concerning vocational training, despite the fact that this provision did not foresee any role for the Community in regulating higher education policies. Yet the Court considered that access to higher education fell within the scope of vocational training, and hence the scope of Community law, by virtue of having an indirect link to the labour market. The scope of EU citizenship has been interpreted in an equally expansive way. For the Court, Union citizenship constituted a 'fundamental status of

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(CUP 2012) ch 1, esp 21–26.

34 See eg Case C–205/03 *FENIN* [2006] ECR I–6295, paras 8, 26.

EU citizens', which, in combination with the principle of non-discrimination, guaranteed EU citizens equal treatment irrespective of their nationality, extending to situations where students were applying for financial assistance in their chosen State of studies. Not only did this finding bring the question of cross-border access of economically inactive persons to social security schemes within the scope of the Treaty, but it also went against an explicit EU legislative consensus on the matter.[35]

By its broad reading of EU citizenship in the context of access to education, the Court seems to have ignored other crucial amendments introduced into the Treaties in 1992. The new legal basis for education (Art. 126 EC) stressed that Community's role in education was complementary in nature and limited to encouraging cooperation between Member States. An almost identical stipulation was added to Art. 127 EC as regards vocational training. Moreover, the Treaty made explicit the principles of conferral and subsidiarity, which were supposed to clarify the division of competences between the EC and the Member States. The Maastricht reforms have been widely interpreted as signifying an attempt by the Member States to curtail the Community's ambitions in the area of education, as well as in other politically sensitive policy areas.[36] Yet the Court focused exclusively on those Treaty amendments which justified broadening the scope of freedom of movement and, as a result, the scope of its own law-making powers – a question that is further discussed in Section 3 of this chapter.

In the case law concerning collective labour rights, the Court found that trade union activity, which is governed by the principle of autonomy, fell within the scope of

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35 See Council Directive (EEC) 90/364 on the right of residence [1990] OJ L180/26, preamble, recital 4, art 3; Council Directive (EEC) 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28, preamble, recital 4, art 3; Council Directive (EEC) 93/96 on the right of residence for students [1993] OJ L317/59, preamble, recitals 10 and 11, art 4.

36 M Dougan, 'Fees, Grants, Loans And Dole Cheques: Who Covers The Costs Of Migrant Education Within The EU?' (2007) 1 J Contemporary Eur Research 4, 6.

Arts. 49 and 56 TFEU because of its capacity to create obstacles to the exercise of the freedoms of establishment and of provision of services. This finding elucidates the problem with the Court's definition of a restriction, which is remarkably broad and encompasses any measure or practice liable to make the free movement 'less attractive'.[37] Notably, this definition departs from the Court's approach in the free movement of goods case law, where non-discriminatory, market-correcting measures that restrict businesses' commercial freedom are not considered as obstacles to the free movement.[38] Moreover, this definition seems to be ill-suited to apply to collective labour rights, as their exercise by nature is aimed exactly at restricting the commercial freedom of the employer in order to protect the employees, who are the weaker party in the employment relationship. As a result, as long as an undertaking wishes to provide services in a Member State that offers a higher level of worker protection than the undertaking's home Member State, the legal environment of the host State will always be 'less attractive', as it takes away the undertaking's competitive advantage of using cheap(er) labour. This situation has important constitutional consequences because, as Wyatt points out, by holding that collective action could amount to a restriction on the freedom of establishment, the Court implies that national rules on strike action can be regulated under the Treaty's chapter on establishment, namely Art. 50(1) TFEU. By doing so, the Court sends a signal to the Commission that it has the legitimacy to disregard the exclusion in Art. 153(5) of EU regulation of strike action even by a unanimous vote.[39] This effectively expands the legislative competences of the EU.

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37 Case C–55/94 *Reinhard Gebhard* [1995] ECR I–4165, para 37; Case C–341/05 *Laval* [2007] ECR I–11767, para 99.

38 Joined cases C–267/91 and C–268/91 *Keck and Mithouard* [1993] ECR I–6097, albeit the Court is not consistent in its approach, as illustrated by Case C–333/14 *Scotch Whisky Association* (CJEU, 23 December 2015).

39 D Wyatt, 'If the Court of Justice Ignores the Principle of Conferral Simply Because It Can, How Do We Fix the Problem?' (14th Jean Monnet Seminar in EU Law, Dubrovnik, 17–23 April 2016)

In conclusion, by broadly defining the scope of the free movement rules and expanding the categories of restrictions covered by the fundamental freedoms, the Court diminishes the practical significance of the principle of conferral and places Member States in a position where their regulatory policies can be judicially challenged and will need to be justified as appropriate and necessary in light of the objectives they pursue. Moreover, it also opens up the possibility for matters reserved for the regulatory prerogative of the Member States to be addressed at the EU's legislative level under the functionally broad legal bases authorising the adoption of internal market measures: Art. 50(1) on establishment, Art. 59(1) on services, Art. 114 on the internal market, and Art. 21(2) on citizenship. Thus, it appears that once the internal market rules are triggered, the legislative dimension of the principle of conferral is also called into question and, depending on further action on behalf of the EU legislative institutions, may become devoid of any practical force. This is to be discussed at length in Section 3 of this chapter.

(b) *The Exercise of Conferred Competences: Implications for Subsidiarity and Proportionality*

Irrespective of the question of compliance with the principle of conferral, the EU is obliged to *exercise* the competences conferred upon it consistently with the principles of subsidiarity and proportionality.[40] This concern becomes particularly important when the judicial exercise of internal market competences involves constitutionally and politically sensitive policy areas, such as the ones forming the subject of this study, not least because the principle of conferral does not seem to serve as an effective safeguard

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<http://www.biicl.org/event/1124> accessed 20 August 2016, para 27.

40 TEU, arts 5(3) and (4).

against the EU's interference. In this connection, it will be argued that the Court's interpretation of the free movement rules in healthcare, education and collective labour law cases, unlike in the gambling cases, reduces the scope of national regulatory autonomy to an extent incompatible with the principle of subsidiarity and encourages deregulation of social policy at the national level to an extent incompatible with the principle of proportionality.

(i) Subsidiarity

The normative requirements of the principle of subsidiarity

Pursuant to Art. 5(3) TEU, subsidiarity must be observed when the EU exercises its non-exclusive competences, free movement law being among them.[41] The areas of healthcare, education and collective labour law, since they belong to the EU's supplementary competences, fall within this category as well. The principle of subsidiarity authorises intervention by the Union 'only if and insofar as' the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, 'by reason of the scale and effects of the proposed action'.[42] As such, subsidiarity requires that policy decisions should be taken as closely as possible to citizens.

The TEU is silent on the application of this principle to the Court, and therefore some argue that it was never meant to limit the judicial interpretation of the Treaties.[43] Yet there is nothing in the Treaties to suggest this, and the wording of Art. 5 TEU clearly states that the principles of subsidiarity and proportionality apply when the

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41 TFEU, arts 4 and 6.

42 TEU, art 5(3).

43 G Davies, 'Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 CML Rev 6 (G Davies, 'Subsidiarity').

Union exercises its competences through its institutions.[44] Accordingly, as a principle addressed to EU institutions, the CJEU being one of them, subsidiarity should also guide the interpretation and application of EU law.[45] Certainly, in the conventional view, Art. 5 TEU is meant to govern the EU law-making processes and is thus directed at the EU's legislative institutions acting together in their law-making capacity. Yet, even if so, the principle of subsidiarity should apply equally to the Court, considering that its case law often produces extensive quasi-legislative effects with potentially irreversible implications, as demonstrated in Section 3 of Chapter III.

A rationale behind the principle of subsidiarity is the desire to preserve the distinctive national political, social or cultural identities of the Member States, insofar as this is compatible with effective problem solving.[46] To that end, subsidiarity governs the conditions to be fulfilled for the EU to act ('only if') as well as the extent of that action ('insofar'). It imposes a two-fold test to justify action on EU level: Member States alone must be unable to achieve the objectives of the action in question; and if Member States are capable of acting alone, action by the EU will be justified only if the objectives of the proposed action can be better achieved at Union level 'by reason of [its] scale and effects'. Essentially, to pass the test of subsidiarity, EU-level intervention must carry with it an added value.

The principle of subsidiarity has also been interpreted in the case law of the

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44 GA Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Colum L Rev 331, 337, 400–402 (Bermann).

45 For academic literature supporting this view, see: T Schilling, 'Subsidiarity as a Rule and a Principle' (1994) 14 YEL 203 (Schilling); Bermann (n 44), esp 337, 400–402; G de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36 J Com Mar St 217; T Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50 J Com Mar St 267.

46 ET Swaine, 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice' (2000) 41 Harv Int'l LJ 58, 54–55 (Swaine), referring to European Council in Edinburgh, 'Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union' (1992) Conclusions of the Presidency SN 456/92, Annex 1 to part A. See also Case C–233/94 *Germany v Parliament* [1997] ECR I–02405, Opinion of AG Léger, paras 88, 150, 152–53.

CJEU. However, in the Court's interpretation, subsidiarity, as a legal rather than a political principle,[47] means nothing more in practice than a competence review. In the context of Art. 114 TFEU, for instance, the Court holds that as long as harmonisation of any sector is justified by reference to the objectives of the internal market, subsidiarity is complied with.[48] This test is circular and virtually impossible to breach once the competence is shown to exist because the objectives and the scale of EU action, especially if to be achieved through harmonisation as a legislative technique, will always be intrinsically pan-European and, accordingly, will create pan-European effects, thus making it worthwhile to act at the EU level.[49] According to the principle of subsidiarity thus construed, the case law analysed in this thesis is likely to comply with it because it fulfils the required pan-European objective by facilitating free movement in the territory of the EU: patients who are in need of medical treatment may obtain it abroad without undue delays, students are granted access to foreign universities on equal conditions with nationals, and workers get employment opportunities across Europe, while businesses accrue similar advantages when establishing or providing services abroad.

It is, however, submitted that such a narrow interpretation of the principle of subsidiarity departs from the express wording of Art. 5(3) TEU and fails to achieve its main objective, that is, to determine whether action on EU level is more advantageous than no action at all or action by individual Member States. This failure results from the

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47 On the political dimension of subsidiarity, see I Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU' (2006) 44 J Com Mar St 281; P Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge 2012).

48 See eg Case C–491/01 *British American Tobacco* [2002] ECR I–11543, paras 180–183; D Wyatt, 'Subsidiarity: Is It Too Vague to Be Effective as a Legal Principle?' in K Nicolaidis and S Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union* (European Studies at Oxford 2003) 92, <https://www3.law.ox.ac.uk/themes/iecl/pdfs/whoseeurope.pdf> accessed 5 July 2016 (Wyatt, 'Subsidiarity'); Weatherill, 'Limits of Legislative Harmonisation' (n 30) 19.

49 Wyatt, 'Subsidiarity' (n 48) 88.

fact that the Court's test does not assess the necessity of the particular exercise of the EU internal market competences in light of the potential impact of such exercise on national regulatory autonomy.[50] Arguably, this requirement is implied in the reference to the 'scale and effects' of EU action. As Weatherill convincingly argues, subsidiarity at its core requires an inquiry into 'whether even if the EU's objectives are advanced by and best achieved by the proposed measure, it is nevertheless important enough to override objections rooted in the worth of national diversity and autonomy'.[51] Certainly, one would normally not expect a court (any court) to make these sorts of policy judgments openly. The real problem is, however, not that the Court fails to do so, but rather that it pushes free movement law so far that tensions with subsidiarity are created.

The observance of subsidiarity in the case law

The Court's lack of compliance with subsidiarity becomes evident when comparing the different standards of the proportionality review it employs to assess the legality of national measures in the areas of healthcare, education and labour law, on the one hand, and gambling, on the other. Whilst judgments concerning the former three areas display a close-scrutiny approach, the case law on gambling exemplifies a mild review, which is grounded in respect for the regulatory discretion of national authorities. This suggests that the Court's reasoning in cases involving healthcare, education and collective labour law fails to consider the necessity of a particular interpretation (and

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50 For an argument that subsidiarity requires to limit the reach of internal market rules to what is strictly necessary, see Schilling (n 45) 247–255; Bermann (n 44) 400–403; M Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12 ELJ 503, 523 (Kumm). See also argument advanced by Germany in Case C–415/93 *Bosman and Others* [1995] ECR I–4921, para 72. On conceptualising subsidiarity as competence-proportionality, see G Davies, 'Subsidiarity' (n 43); as federal proportionality, see R Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?' (2009) 68 CLJ 525.

51 Weatherill, 'Limits of Legislative Harmonisation' (n 30). See also Bermann (n 44) 337, 390–403; Kumm (n 50).

application) of the free movement rules in light of its scale and effects on the scope of national regulatory autonomy, thus departing from the requirements of subsidiarity.

Virtually every judgment concerning gambling is premised on the recognition of the subsidiary nature of EU law and the subsidiary role of the Court itself in supervising the regulatory choices of national authorities. Accordingly, the Court holds that each Member State is entitled to a margin of discretion to determine, in accordance with its own scale of values as well as social and cultural features, what is required to protect consumers and maintain order in society:[52]

> [D]etermination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation which the Court, in paragraph 61 of *Schindler*, recognised as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.[53]

As a result of the margin of appreciation accorded to national authorities, the Court's proportionality review focuses on checking national rules for consistency rather than necessity. This means that the Court will not question the validity of each and every rule or aspects of implementation thereof as long as the regulatory system as a whole appears to be logically defensible. As a result of a mild review, as discussed in Chapter II, not only public authorities, but also national courts are granted considerable room for discretion when applying the Court's interpretations to the facts of the case. This in turn produces final judgments at the national level that are tailored to the specific domestic context of the Member State concerned.[54]

By contrast, the Court's case law involving healthcare, education and collective

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52 Case C–275/92 *Schindler* [1994] ECR I–1039, paras 59–61.

53 *Schindler* (n 52), para 61; C–124/97 *Läärä & Others* [1999] ECR I–6067, para 35; Case C–67/98 *Diego Zenatti* [1999] ECR I–7289, para 33.

54 This point is discussed in detail in ch II, s 4(c)(ii).

labour law does not even remotely resemble the language employed in the judgments concerning gambling, as demonstrated in Chapter III through the comparative analysis of the Court's reasoning. Here, the Court takes an active role and provides detailed guidelines to national courts on how to apply the test of proportionality in the circumstances of the case, from suggesting that there may be (hypothetical) less restrictive alternatives available in a given situation,[55] to providing EU law definitions of certain key concepts ('medical necessity', for example), to instructing the courts on the standard of proof and the type of evidence that is admissible.[56] The guidelines provided by the Court often clearly lead to a conclusion that national measures in question cannot be justified.

Arguably, it is almost inherent in a necessity-focused proportionality review that it is going to be incompatible with the requirements of subsidiarity. The emphasis on a measure's necessity presupposes a type of inquiry that intrinsically prioritises individual interests over (and often at the expense of) the broader objectives of the system,[57] which typically embody national regulatory prerogatives meant to be protected by the principle of subsidiarity. For instance, in the context of the present analysis, the 'medical necessity' test sets aside social solidarity concerns as the predominant criterion in making decisions regarding the supply of public healthcare. In a similar vein, the 'quota-necessity' test applicable to public decision-making in matters of access to higher education makes it extremely difficult for governments to

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55 See eg Case C–271/08 *Commission v Germany* [2010] ECR I–7091, paras 53–56; Case C–147/03 *Commission v Austria* [2005] ECR I–5969, para 61; Case C–73/08 *Bressol and Chaverot* [2010] ECR I–2735, para 78, Opinion of AG Sharpston, para 105.

56 See esp *Bressol* (n 55), paras 72–73, 76.

57 For a thoughtful discussion of the problems arising from judicial review of social policies, see G Davies, 'The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare' in M Ross and Y Borgmann-Prebil, *Promoting Solidarity in the European Union* (OUP 2010) 106–122 (G Davies, 'The Price of Letting Courts Value Solidarity').

maintain education models based on open and free access whilst also preserving the same level of quality of higher education, that is, without giving financial injections to their systems. Finally, a case-by-case assessment of the necessity of trade union action undermines the autonomy of collective bargaining, thus calling into question the very foundations underlying the operation of industrial relations systems.

The foregoing goes to show that, as an inevitable consequence of a necessity-based inquiry, the Court deprives Member States of a meaningful degree of their regulatory autonomy. In doing so, it departs from the principle of subsidiarity, which would require taking into account, as suggested, through the application of the proportionality review, the implications of its judgments for the scope of that autonomy. Moreover, the apparent contrast with the standard of review employed in the gambling case law suggests that the Court *is* capable of respecting the requirements of subsidiarity, and yet it disregards them in relation to the areas of healthcare, education and collective labour law – except, through a different (competition law) route, in *Albany* and indirectly *Altmark*.

(ii) Proportionality

The normative requirements of the principle of proportionality

The Court's case law seems to depart from the requirements of proportionality because it establishes a relationship between economic and social values in EU law that is detrimental to the protection of the latter. The principle of proportionality, laid down in Art. 5(4) TEU, requires that the 'content and form of Union action' does not go beyond what is necessary to achieve the objectives of the Treaty.[58] It is inextricably linked to subsidiarity: while subsidiarity generally concerns the propriety of EU-level action (the

58 TEU, art 5(4).

EU shall act 'only if'), proportionality defines the degree and scope of that action.[59] However, the two principles also seem to overlap because the subsidiarity assessment also encompasses the elements of the degree and scope of EU action (the EU shall act 'insofar as').

In this sense, both principles seem to be aimed at ensuring that the EU regulatory intervention is not disproportionately intrusive into: a) the scope of national regulatory autonomy, b) the values protected within that scope of autonomy. A way to distinguish the two principles is by viewing subsidiarity as primarily concerned with the protection of the national autonomy as such, whereas the proportionality inquiry, more specifically, checks whether the regulatory means employed to pursue a particular policy objective at the EU level do not infringe excessively on the legal interests protected at the national level.[60] Besides, proportionality becomes of central importance when matters at hand fall within the EU's exclusive competences (for example, competition law), where subsidiarity does not apply.

The CJEU holds that proportionality, when applied in the context of EU legislative action, requires that the act in question not exceed what is appropriate and necessary for achieving the objectives pursued by the measure in question.[61] Therefore, 'when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued'.[62] Proportionality also binds the judicial interpretation of the Treaties. According to the long-established practice of the CJEU, proportionality is employed as

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59 Swaine (n 46) 1.

60 Kumm (n 50) 523.

61 Case C–331/88 *Fedesa and Others* [1990] ECR 1–4023, paras 13, 41 (*Fedesa*); Case C–84/94 *UK and Northern Ireland v Council* [1996] ECR I–5755, para 57.

62 *Fedesa* (n 61), paras 13, 41; Case C–265/87 *Hermann Schräder HS Kraftfutter GmbH* [1989] ECR 2237, para 21.

the central principle guiding the interpretation of Treaty internal market rules. In this line of case law, the Court however uses proportionality solely for assessing the lawfulness of the national regulatory measures in light of EU internal market rules, without in the same way assessing the proportionality of its particular interpretation of the internal market rules in light of the interests protected at the national level. In this connection, it should be noted that, apart from the broad wording of the prohibitions laid down in the free movement provisions, there is nothing in the Treaty to suggest, at least not explicitly, that the requirements of proportionality apply in such an asymmetrical manner. Therefore, the Court would at least be expected to take into consideration the effects of its judgments on the non-market interests protected nationally.

The observance of proportionality in the case law

It is argued that the review performed by the Court with regard to the measures adopted in the areas under study here shows a pattern of reasoning that seems to depart from the requirements of proportionality. As discussed above, the Court promotes an often-aggressive deregulatory approach, leaving little or no space for justification of national measures, thus creating tensions with both subsidiarity and proportionality. As regards compliance with proportionality in particular, the aspect of the Court's reasoning that seems to indicate the lack thereof is the standard of proof required to justify restrictive measures. It illustrates the degree to which the Court advances the objectives of the internal market in relation to the various public and social interest considerations invoked by Member State governments.

Not unexpectedly, the standard of proof appears to be particularly high in cases involving healthcare, education and collective labour law. The language that the Court uses in *Bressol* offers a good illustration of this point:

> The reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments. […] Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to public health.[63]

Furthermore, the Court tends to emphasise the existence of (often hypothetical) non-discriminatory alternatives that can help counteract the problems identified by governments, such as, in the case of education, an entry exam or a minimum grade requirement. Accordingly, Member States have to prove that their chosen measures are the least restrictive option capable of achieving the objectives pursued. Arguably, this sort of judicial interpretation of the free movement rules is far from 'the least onerous' one, as it shows little consideration on the part of the Court of the 'disadvantages' caused to Member States' national interests.

By contrast, when faced with the national regulatory rules on gambling, the Court accepts them insofar as they reflect a genuine concern on behalf of public authorities to protect consumers from gambling addiction and fraud. Member States are not required to prove that their chosen system of protection is the least regulatory one:

> [t]he mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure.[64]

Moreover, the standard of proof required to demonstrate that the regulatory system is internally consistent is extremely low. The Court often endorses abstract, unsubstantiated arguments advanced by governments, such as that, the online gambling market presents unique and greater dangers compared to other forms of gambling and other markets, foreign gambling operators cannot effectively be supervised and

63 *Bressol* (n 55), para 71.

64 *Läärä* (n 53), paras 36, 58; *Zenatti* (n 53), para 34.

controlled by their States of establishment, or that national measures will in fact achieve the aims they pursue.[65] The Court even gives explicit instruction to national courts that the absence of studies on the part of the authorities supporting the adoption of particular legislative measures is immaterial for the assessment of the proportionality of those measures.[66] The Court's ready acceptance of these claims is remarkable, considering that it will not hesitate to dismiss the same type of claims as unsubstantiated in cases concerning patient and student mobility and collective labour rights.[67]

The sharp contrast between the standards of review employed by the Court with regard to the areas of healthcare, education and collective labour law, on the one hand, and gambling, on the other, begs the question of whether there are compelling reasons to distinguish gambling as a unique policy area that would require a more deferential approach on the part of the Court. The Court's position on gambling seems to be premised on the recognition that the gaming and betting market is too politically sensitive and complex to be subjected to the full force of the free movement rules. Accordingly, judicial review will be aimed at counteracting overt protectionism rather than controlling the degree by which national rules restrict the free movement of companies operating in the EU's gambling market. In this respect, it is noteworthy that the reasons justifying regulatory action in the gambling sector are remarkably similar to those that governments put forward in cases concerning healthcare, education and

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[65] Case C–42/07 *Liga Portuguesa* [2009] ECR I–7633, paras 70–72; S Planzer, '*Liga Portuguesa* – the ECJ and its Mysterious Ways of Reasoning' (2009) 11 ELR 372, 372; S van den Bogaert and A Cuyvers, '"Money for Nothing": The Case Law of the EU Court of Justice on the Regulation of Gambling' (2011) 48 CML Rev 1175, 1191, 1204–1206.

[66] Joined Cases C–316/07, C–358/07 to C–360/07, C–409/07 and C–410/07 *Markus Stoß* [2010] ECR I–8069, paras 71–72; Case C–390/12 *Pfleger and Others* (CJEU, 30 April 2014), para 51.

[67] See eg *Commission v Austria* (n 55), para 66; Case C–120/95 *Nicolas Decker* [1998] ECR I–1831, para 43; Case C–158/96 *Raymond Kohll* [1998] ECR I–1931, para 48; Case C–319/06 *Commission v Luxembourg* [2008] ECR I–4323, paras 51–53; *Commission v Germany* (n 55), paras 53, 56–58. This issue is discussed in detail in ch III, s 2(d).

collective labour law. They are underpinned by considerations of social solidarity and the need to protect vulnerable groups, while also emphasising the political sensitivity of the sector concerned. Moreover, as discussed earlier in this chapter and has been recognised by the Court itself, the areas of healthcare, education and collective labour law seem to require additional sensitivity for constitutional reasons: unlike gambling, the three areas, by and large, fall outside the EU's legislative competence. Therefore, it appears that the rationale for judicial deference in relation to the areas of healthcare, education and collective labour law may be even stronger than in the case of gambling. In light of the foregoing, there seems to be no valid general reason why the Court would differentiate between the four policy areas by employing standards of review that are on the opposite ends of the spectrum of intensity.

3 Implications for the Horizontal Balance of Powers

It has been suggested in the preceding section that by adopting an expansive interpretation of the scope of the Treaty, the Court also expands the law-making competences of the EU. Paradoxically, while doing so, the Court at the same time narrows down the margin of discretion available to the EU's legislative institutions. Section 3 argues that this practice amounts to an infringement of the principle of institutional balance, which governs the distribution, or separation, of powers among the EU's institutions.

(a) *The Legal Parameters of the Principle of Institutional Balance*

The principle of institutional balance requires that EU institutions act within the scope of the powers conferred upon them by the Treaties (positive obligation) and not encroach on the powers assigned to other institutions (negative obligation). This principle is specific to the EU, but the concept itself is inspired by the principle of the separation of powers applicable to the national legal orders.[68] However, contrary to the national system of the separation of powers, the aim of the distribution of powers at the EU level is specifically to ensure that the balance between the EU institutions established in the Treaty is maintained, as opposed to protecting individuals against the abuse of power by those institutions.[69] So, in a real sense, institutional balance seems to be a matter of protecting the terms of the conferral of competence upon the EU's institutions.

The principle of institutional balance has been enshrined in the Treaties since

68 J-P Jacqué, 'The Principle of Institutional Balance' (2004) 21 CML Rev 383, 384 (Jacqué); G Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17 ELJ 304.

69 Jacqué (n 68). See also Case C–282/90 *Industrie-en Handelsonderneming Vreugdenhil BV v Commission* [1992] ECR I–1937, paras 20–21.

the creation of the EEC, whose Art. 4(1) stipulated that the tasks entrusted to the Community shall be carried out by its institutions, which 'shall act within the limits of the powers conferred upon [them] by this Treaty'. The current version of this provision, Art. 13 TEU, maintains the wording almost identical to the original and adds that '[t]he institutions shall practise mutual sincere cooperation'. Art. 13 TEU and its predecessors have been interpreted in the case law of the Court and discussed in the academic literature mainly in the context of the distribution of powers between the legislative organs of the EU – Commission, Council and the Parliament.[70] The content of the principle was fleshed out by the Court as early as in 1958 in the *Meroni* judgment,[71] where the Court was asked to decide to what extent EU institutions may delegate their tasks to regulatory agencies. The Court held that the delegation of powers 'can only relate to clearly defined executive powers, the use of which must be entirely subject to the supervision of the [delegating authority]'.[72] It ruled that the balance of powers was characteristic of the institutional structure of the Community and required of its institutions to pursue Community goals whilst acting 'within the limits of their respective powers'.[73] The Court later elaborated on this principle in the *Chernobyl* case,[74] which concerned a challenge brought by the European Parliament against a Council Regulation which had been allegedly adopted using the wrong legal basis, thus failing to involve the Parliament through the cooperation procedure. At that time, the

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70 P Craig, 'Democracy and Rule-Making within the EC: An Empirical and Normative Assessment' (1997) 3 ELJ 105; Y Devuyst, 'The European Union's Institutional Balance After the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed' (2008) 39 Geo J Int'l L 249, 306–308; B Smulders and K Eisele, 'Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon' (2012) College of Europe, Department of European Legal Studies Research Paper 04/2012 <http://aei.pitt.edu/39285/> accessed 10 January 2016.

71 Case C–9/56 *Meroni v High Authority* [1958] ECR 133 (*Meroni*).

72 *Meroni* (n 71), para 152.

73 ibid.

74 Case C–70/88 *Parliament v Council* [1990] ECR I–2041 (*Chernobyl*).

Treaties did not contain a provision allowing the Parliament to bring an action for annulment in this situation. Regardless, the Court ruled that:

> The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.[75]

Accordingly, the Parliament was held to have *locus standi* so that it could defend its Treaty-assigned prerogatives, which in itself speaks to the normative force of the principle of institutional balance.

If institutional balance is meant to ensure that EU institutions do not exceed the scope of their powers, the question then is how one determines the outer limit of the powers of the CJEU, in particular, in relation to the powers of the EU legislative institutions. It has been pointed out earlier that the Court's jurisdiction under Art. 19 TEU is formulated extremely broadly, which suggests that the Court enjoys a degree of discretion and autonomy when performing its interpretative functions. AG Trstenjak has suggested in the *Audiolux* case that judicial discretion should be limited by the requirement to respect the rule-making role of the EU legislature. In the circumstances of *Audiolux*, this required that the Court exercise 'the necessary self-restraint in developing general principles of EU law which might possibly run counter to the legislature's aims'.[76] More generally, the Court was not supposed to 'assume the role of the Community legislature if a gap in the law [could] be filled by the Community legislature'.[77] Of course, the Court has never adopted this view.

75 *Chernobyl* (n 74), paras 21–22, 26–27.

76 C–101/08 *Audiolux* [2009] ECR I–9823.

77 ibid, para 107. See similar suggestions advanced in relation to areas already covered by EU legislation in P Craig, *EU Administrative Law* (2nd ed, OUP 2012) 519–520 (Craig, *EU Administrative Law*); P Syrpis, 'EU Secondary Legislation and Its Impact on Derogations' in P Koutrakos, N Shuibhne and P Syrpis

The restrictive approach suggested by AG Trstenjak might not be suitable for defining the limits of judicial action at the EU level. Given the breadth of the Court's mandate under Art. 19 TEU and the breadth of the legislative mandate under the functional legal bases,[78] a degree of overlap between the powers of the two institutions seems to be both inevitable and constitutionally justified. After all, the Court, as the interpreter of the Treaty, lays down the principles that guide the EU legislature in the adoption of legislative acts.[79] This is illustrated by the Court's judgment in *Brasserie du Pêcheur*, where the Court ruled that the principle of institutional balance did not prevent it from recognising the existence in Community law of a general right of compensation for breaches of that law, even in the absence of Community legislation on the matter.[80] Therefore, when measuring the parameters of institutional balance, the goal seems to be to determine the point when the guidance provided by the Court to EU legislative institutions amounts to a breach of the appropriate balance of powers between the judiciary and the legislature.

As a minimum requirement, it would appear to be unacceptable for the Court to extend its powers to the detriment of the legislative prerogative because such practice would create a legal situation that the principle of institutional balance exactly aims to prevent.[81] The Court itself appears to endorse this view by holding that institutional balance requires that 'the practice of [one institution] cannot deprive the other

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(eds), *Exceptions from EU Free Movement Law* (Hart Publishing 2016) 287–292.

78 See ch III, s 3 for a detailed discussion.

79 See eg Sindbjerg Martinsen (n 23) 67–71, covering legislative developments in discrimination law following *Defrenne*.

80 Joined Cases C–46/93 and C–48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I–1029, paras 24–27; K Lenaerts and A Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002) 35, 46 (Lenaerts and Verhoeven).

81 Jacqué (n 68) 384.

institutions of a prerogative granted to them by the treaties themselves'.[82] Accordingly, Art. 13 TEU should be read as preventing the type of exercise of judicial powers of interpretation that would nullify the legislative discretion accorded to the EU legislative institutions. Otherwise, the result would be the Court substituting itself for the political decision maker, thus infringing the principle of institutional balance.[83]

Building on the analysis conducted in Section 3 of Chapter III, it will be argued that the Court's exercise of its interpretative authority in the areas under study infringes the principle of institutional balance because it creates an inter-institutional dynamic which deprives the legislature of its constitutional law-making prerogative. It does so in two ways in particular: by reducing the choice of legislative options to a minimum inadequate to remedy the case law in any meaningful way and by neutralising the legal effect of existing legislation.

(b) *The Inadequacy of the Legislative Options*

In line with the logic underlining the relationship between negative and positive law, EU-level legislative action complements judicial interpretation of the Treaties. It can be taken in order to replace the disputed national standard with a European one, or to clarify the Court's interpretation of the law or even correct it, provided that political consensus is achieved. This logic, however, does not apply when the matter in question concerns a constitutionally sensitive area of national policy, such the areas of healthcare, education and collective labour law. It will be demonstrated that in this context, the range of available legislative options is simply inadequate for

82 Case C–149/85 *Wybot v Faure* [1986] ECR 2391, para 23.

83 See Lenaerts and Verhoeven (n 80) 45–46, referring to cases in which the Court refuses to make judgments on issues falling within the ambit of political decision-making: Case C–109/75 R *National Carbonising Company Limited v Commission* [1975] ECR 1193, para 8; Case C–415/85 *Commission v Ireland* [1988] ECR 3098, paras 8–9; Case C–249/96 *Grant v South-West Trains Ltd* [1998] ECR I–621, paras 35–36, 47–48.

counteracting the quasi-legislative effects of the Court's case law.

For the most part, this inadequacy is presupposed by the political sensitivity of the area in question and the resulting diversity of national regulatory approaches, which make it challenging to propose – presumably using Art. 114 TFEU as the legal basis – an EU-wide legislative standard that would reflect the concerns of all, or at least the majority, of the Member States of the EU. Just like the case law, a uniform legislative standard is likely to produce varying effects on national regulatory systems, arguably having the greatest impact on Member States with strong welfare systems as opposed to the more liberal States. For example, Member States vary greatly in the ideological underpinning and institutional organisation of their industrial relations systems.[84] Accordingly, any harmonisation of national laws concerning collective bargaining or the right to strike would have a great, most likely undesirable, impact on countries with strong industrial relations models (such as Sweden and Germany), whilst countries with weaker structures or statutory regulation of employment would not experience much impact.[85] The variations in these impacts would be even more pronounced in the education sector. To date, the consequences of the Court's student mobility case law have been experienced by a relatively small number of Member States, those having open access, low-threshold education policies. This makes it difficult to envision a common regulatory measure that would provide clear advantages for countries like Belgium and Austria without imposing unnecessary and undesirable costs on the systems of the rest of the Member States. Moreover, as regards the provision of public

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84 The Adoptive Parents, 'The Life of a Death Foretold: The Proposal for a Monti II Regulation' in M Freedland and J Prassl (eds), *EU Law in the Member States:* Viking, Laval *and Beyond* (Hart Publishing 2014) 95 ff.

85 D Schiek et al 'EU Social and Labour Rights and EU Internal Market Law' (European Parliament DG for Internal Policies 2015) <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOL_STU(2015)563457_EN.pdf> accessed 10 January 2016 (EP Study, 'EU Social and Labour Rights').

services more generally, in both education and healthcare sectors, the adoption of a uniform standard may create excessive financial burdens on the poorer Member States, such as most of the Southern and Eastern European countries, and especially the recent members – Croatia, Bulgaria and Romania. This situation can only be avoided if the uniform standard is based on the lowest common denominator, but that kind of standard would merely maintain the *status quo*.

Another set of constraints stems from the voting rules. In the areas of high political sensitivity, achieving the required qualified majority in Council voting is a challenge – a problem that Scharpf refers to as the 'joint decision trap'.[86] Member States with more liberal regimes or smaller budgets can always gather enough votes to veto legislative initiatives that would impose more demanding social regulations. This resistance is likely to be supported by national populations, which typically favour the continuation of existing systems of social protection and therefore tend to resist major structural changes. As Scharpf puts it, rather poetically:

> [v]oters in Britain simply could not accept the high levels of taxation that sustain the generous Swedish welfare state; Swedish families could not live with the low level of social and educational services provided in Germany; and German doctors and patients would unite in protest against any moves toward a British-style National Health Service.[87]

This problem is well illustrated by the protracted history of adoption of the PRD. The Commission's attempt to include healthcare services in the Services Directive was unsuccessful despite five years of negotiations on the matter, and the watered-down version of the proposal, the current PRD, did not do much more than codify the rules already developed in the case law of the CJEU. Another example is the Commission's *Altmark* package. In *Altmark,* the Court set out a four-part test to determine whether the

86 FW Scharpf, 'The Joint-Decision Trap Revisited' (2006) 44 J Com Mar St 845; Scharpf, 'Integration' (n 5); Scharpf, 'Community and Autonomy' (n 5).

87 Scharpf, 'European Social Model' (n 17) 652.

financial support provided to an undertaking performing an SGEI constitutes compensation for performance of that service rather than State aid. In response, the Commission adopted a package of measures under Art. 106(3), which created a generally applicable framework for compensations granted to SGEIs that do not meet all the *Altmark* criteria but would be considered as aid compatible with the internal market under Art. 106(2). The language of the Commission's Decision on SGEIs largely reiterated the *Altmark* judgment, omitting just one of the conditions out of the four-fold test adopted by the Court.[88] Both examples – the PRD and *Altmark* – illustrate how the rules elaborated by the Court end up being almost automatically transposed into EU-level legislation, arguably because negotiating the matter at the political level may prove to be too cumbersome and time-consuming.

Moreover, as a consequence of the reforms introduced by the Lisbon Treaty, national parliaments now have a practical tool to prevent unpopular legislation from being passed. The Protocol on the application of the principles of subsidiarity and proportionality provides national parliaments with the right to object to a legislative proposal and even challenge it before the CJEU if they consider that the principle of subsidiarity has not been observed.[89] The objections by the national parliaments may at times manifest the general lack of agreement in the Council rather than a genuine concern about subsidiarity (or competence more generally). For example, the Monti II draft was formally withdrawn due to the objections raised by the national parliaments, alleging a breach of subsidiarity stemming from the lack of EU legislative competence

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88 See Commission Decision 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 L312/67, replaced by Commission Decision 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.

89 Protocol No 2 to TFEU on the application of the principles of subsidiarity and proportionality [2008] OJ C115/206, arts 6–8.

to regulate collective labour rights. However, the Commission withdrew the proposal not because there were, in its view, true concerns over subsidiarity – after all, the draft dealt with the interpretation of the free movement rules in cross-border situations. Monti II was withdrawn because it was 'unlikely to gather the necessary political support' to enable its adoption.[90]

Finally, harmonisation as a legislative technique may not be suited to solve the problems created by the case law. For instance, as suggested in Chapter II, what is necessary for patient mobility to be fully effective is an EU budget for cross-border healthcare. A similar solution could be fitting in the case of cross-border education. However, as these types of legislative measures do not entail harmonisation of national laws, the appropriate legal bases to be used would be the sectoral ones, yet they explicitly exclude the option of binding measures. Notably, innovative legislative solutions could be adopted on the basis of Art. 352 TFEU, as it empowers the EU to take action in cases where no other Treaty provision provides the necessary powers. However, the conditions for relying on Art. 352 are strict. The measures proposed require unanimity in the Council, they must not entail harmonisation where it is excluded by the Treaty and must not lead to the Union's competences being extended beyond those provided for by the Treaties. And even where a competence can be shown to exist in principle, any meaningful initiative on behalf of the Commission can easily be trumped by a single veto, given the sensitivity of the issues concerned.

(c) *The Impossibility of a Legislative Reversal*

Often, the effects of the case law cannot be corrected by any type of legislation, even if

[90] I Cooper, 'A Yellow Card for the Striker: How National Parliaments Defeated EU Strikes Regulation' (2013) Network of European Union Centres for Excellence, 15; The Adoptive Parents (n 84) 96, 99.

the political agreement is reached and the measure in question is adopted. As has been discussed in Chapter III, where the Court interprets EU primary law, a Treaty change is necessary to reverse its interpretation. In the majority of cases, this will require a unanimous agreement among 28 Member States and subsequent ratification in accordance with their national constitutional provisions.[91] Given the cumbersome nature of the amendment procedure and the great uncertainty about its eventual success, this task may prove impossible to achieve in practice,[92] especially when the question concerns a politically sensitive issue.

The problem is that the Court's internal market case law for the most part constitutes interpretation of EU primary law. As such, it can at any point override a legislative consensus on the matter. In fact, it has done so in the past on multiple occasions. In *Grzelczyk*, for instance, the Court ruled that EU citizenship requires the Member States hosting foreign students to grant them the right to social assistance, as later specified, as long as the student in question is able to demonstrate a certain degree of integration into the society of the host Member State.[93] This ruling by the Court went against the then-prevailing EU-level legislative consensus on the matter, whereby economically inactive people, such as students residing in other Member States, had no access to welfare benefits in the host Member States, and their right of residence itself was conditional on the possession of sufficient financial resources.[94] And yet, ultimately, the Court's interpretation of the scope of EU citizenship in *Grzelczyk* was

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91 TEU, art 48.

92 Waele (n 12) 15–16.

93 Case C–184/99 *Rudy Grzelczyk* [2001] ECR I–6193, paras 44–46; Case C–209/03 *Dany Bidar* [2005] ECR I–2119, paras 57–59.

94 See Community directives on residence listed in n 35. See also Case C–333/13 *Elisabeta Dano* (CJEU, 11 November 2014), suggesting that, at least on the issue of access to social security, the CJEU has become more cautious and attentive to the political mood.

transposed into the CRD,[95] notwithstanding Treaty limitations on EU competences in the field of social security.[96]

Similarly, the Court can nullify EU legislative choices by 'reading' the provisions of existing secondary legislation in light of the Treaties. By doing so, the Court elevates (its interpretation of) secondary law to the status of primary law, thus making it immune to a legislative overturn. The primary example of this pattern is the PWD, whose consistent interpretation in light of Arts. 49 and 56 TFEU reduced to the minimum the worker protection dimension of the directive. The Court followed the same pattern of reasoning when interpreting EU legislation on public procurement and on transfer of undertakings.[97] In the latter case, in particular, the Court went even further, by demonstrating that it was prepared to strengthen its position by reference to the Charter. In *Alemo-Herron*, this led to an interpretation of the ARD that effectively prioritised the freedom of contract over the right to collective bargaining.[98] Another prominent example is Regulation 1408/71, whose interpretation in light of Art. 56 TFEU resulted in taking away of the margin of discretion that national health authorities were entitled to when making decisions about the financing of medical treatment received abroad.[99] In the aforementioned situations, a possibility remains that, in the event of a legislative reversal of the case law, the CJEU would defer to the

95 See Council Directive (EC) 2004/38/EC [2004] on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L158/79, arts 14(3), 24, recitals 3, 10, discussed in F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' (2010) 17 JEL & Pol'y 1128, 1139–1143.

96 TFEU, arts 48, 153(4).

97 See *Commission v Germany* (n 55), paras 53–56; Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114, preamble, recital 46, art 26; See also a similar argument made in EP Study, 'EU Social and Labour Rights' (n 85) 27–28, 31–36.

98 Case C–426/11 *Alemo-Herron and Others* (CJEU, 18 July 2013).

99 Case C–372/04 *Yvonne Watts* [2006] ECR I–4325, paras 60, 62, 68.

legislature, thus showing respect for the political agreement.[100] Yet, as the legislative history of Regulation 1408/71 suggests, the Court will not do so without a compelling reason.[101]

Where legislative choices are undermined by judicial interpretation, Member States retain the option of resorting to soft law mechanisms, such as the OMC, which allows the adoption of a variety of measures that do not necessarily need to follow the Court's case law. The OMC is normally employed to deal with matters that are not dealt with (or meant to be dealt with) by binding measures, especially in situations where imposition of uniform solutions would be undesirable due to the diversity among domestic regulatory regimes.[102] The most prominent examples of areas governed by the OMC are the European Employment Strategy and the coordination of Member States' economic policies. In these areas, the OMC offers a tempting alternative to binding legislation because it does not require the same drafting precision and is an easier route by which to reach consensus. Sometimes it is even preferred to hard law because of its reflexive nature and the leeway in implementation it offers to the Member States.[103] Yet the effectiveness of the OMC is fairly limited in practice precisely because it is not meant to replace binding rules. For that reason, the OMC appears unsuitable for addressing the problems that arise from judicial interpretation of the Treaties. At the end of the day, if binding measures are not capable of off-setting the effects of the Court's case law, the OMC, consisting predominantly of incentive measures, will be

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100 This is proposed by Craig, *EU Administrative Law* (n 77) 519–520.

101 Discussed in ch III, s 3(d)(i). See also P Syrpis, 'The Relationship Between Primary and Secondary Law in the EU' (2015) 52 CML Rev 461, suggesting that the Court is not consistent in deferring to secondary legislation.

102 Craig, *EU Administrative Law* (n 77) 198–203, 218.

103 See eg D Ashiagbor, 'Evaluating the Reflexive Turn in Labour Law' in A Bogg et al (eds) *The Autonomy of Labour Law* (Hart Publishing 2015).

even less, if at all, capable of doing so.

In conclusion, the Court's case law could be said to shape the balance of powers between the EU's judiciary and legislature in three ways. First, it leaves the legislature with a limited choice of regulatory options, neither of which can adequately address the issues raised by the case law. This situation results from a combination of two factors: constitutional constraints on EU action, reflected in the limited availability of the legislative bases, and the difficulty of achieving an EU-wide political agreement (consider the Monti II draft). Second, where the political consensus is reached, the scope and content of legislative action are predetermined by the Court's interpretation of primary rules (consider the examples of the PRD and the Commission's *Altmark* Package). Third, where a legislative measure is already in place, its judicial interpretation in light of the Treaties often renders EU-level political choices devoid of practical force and makes this new interpretation immune from subsequent legislative amendment (consider the examples of Regulation 1408/71, the PWD and the ARD).

As a result, the EU legislature is in these circumstances barred from any meaningful degree of autonomous action. This inter-institutional dynamic is problematic from the point of view of both the vertical and the horizontal division of competences in the EU because it makes the Court *de facto* the ultimate lawmaker in policy areas that, in the first place, were supposed to stay within the prerogative of the national legislative bodies. This situation has broader implications for the EU's democratic legitimacy, as it minimises the role of the elements of participation and representation of interests in the process of EU decision-making.[104] In effect, it sanctions decision-making on an *ad-hoc* basis, borne out of litigation, by a body lacking expertise to be making highly sensitive, socio-economic policy choices, *and* in

104 See TEU, arts 10–11. See also Case C–138/79 *SA Roquette Fréres v Council* [1980] ECR 3333, para 33; Lenaerts and Verhoeven (n 80) 45–46.

the absence of a sophisticated mandate provided by the Treaty.[105]

[105] For academic discussion on these various issues, see C Newdick, 'Citizenship, Free Movement, and Healthcare: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43 CML Rev 1645; ACL Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 ILJ 126, 143; G Davies, 'The Price of Letting Courts Value Solidarity' (n 57); EP Study, 'EU Social and Labour Rights' (n 85) 89; J Ziglinski, 'Europe's Passive Virtues: The Margin of Appreciation in EU Free Movement Law' (PhD thesis, European University Institute 2016) 218–250 (Ziglinski), discussing the issues of representation and expertise in CJEU law-making.

4 An Argument against Inherent Constitutional Asymmetry

It could be (and has been) argued that the apparent market bias in the judicial interpretation of the Treaties – and hence constitutional implications thereof – are rooted in the Treaties themselves, which favour not only negative integration over the positive, but also economic and individual interests over social and collective ones.[106] Section 4 entertains this argument and tests it against an analysis of the historical development of the Treaties, focusing on the relationship between the economic and social dimensions embedded in the Treaties. It submits that none of the EU treaties seem to have intended to establish a constitutional hierarchy between the two dimensions, and that since the creation of the EEC, the project of market integration has always been seen as a central instrument for achieving a broader mission of the advancement of the welfare of the European people.

(a) *The Origins: the Social Dimension of the EEC*

The EU's commitment to social values has been enshrined in the Treaties since the creation of the EEC. The preamble of the EEC had ambitiously set out 'to lay the foundations of an ever closer union among the peoples of Europe' and 'ensure the economic and social progress of their countries' by eliminating the barriers which divided Europe, and to work for 'the constant improvements of the living and working conditions of their peoples'. Art. 2 stipulated that the objectives of the Community were to be attained by means of establishing a common market and progressively approximating the economic policies of the Member States. To that end, the Treaty laid

106 See eg Scharpf, 'European Social Model' (n 17), esp 646–567; P Craig, 'Competence and Member State Autonomy: Causality, Consequence and Legitimacy' in HW Micklitz and B de Witte (n 17); S Reynolds, 'Explaining the Constitutional Drivers behind a Perceived Judicial Preference for Free Movement over Fundamental Rights' (2016) 53 CML Rev 643.

down rules prohibiting a range of measures that could restrict trade or distort competition in the common market.[107]

The freedom of movement of workers was an important component of the common market. Art. 48 granted workers the right to move freely within the EU for the purposes of employment and guaranteed them equal treatment in comparison to nationals of the host Member States with regard to employment, remuneration and other conditions of work and employment. In that connection, the Community was given a competence to coordinate Member States' social insurance systems and legislate to facilitate the free movement of workers.[108] Moreover, Art. 119 EEC (157 TFEU) enshrined the principle that men and women should receive equal pay for equal work. The grant of equal treatment for workers and the principle of equal pay were intended to prevent regulatory competition in labour standards (on certain grounds, at least) that could lead to social dumping.[109]

Art. 117 of the Treaty's Chapter on Social Policy asserted the Community's commitment 'to promote improved working conditions and an improved standard of living for workers'. The Community's competences in the area of social policy were however confined to the adoption of incentive and co-operation measures in matters including, inter alia, employment, social security and vocational training, which in itself manifested an unwillingness on the part of the Member States to transfer to the Community any sovereign powers in the field of social policy.[110] At the same time,

107 EEC, arts 16, 30, 34, 52, 59, 85–86, 92, 95; respectively, TFEU, arts 28, 34, 35, 49, 56, 101–102, 107, 110.

108 EEC, art 51.

109 EP Study, 'EU Social and Labour Rights' (n 85) 22; C Barnard, 'The Economic Objectives of Art 119' in T Hervey and D O'Keeffe (eds), *Sex Equality Law in the European Union* (Wiley 1996) 321–334.

110 EEC, art 118. See also J Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Hart Publishing 2003) 1–6, 10 (Kenner); EP Study, 'EU Social and Labour Rights' (n 85) 21.

such transfer of powers was not considered necessary. Art. 117 EEC expressly stipulated that the anticipated social advantages of the Community were expected to ensue from the establishment of the common market and approximation of national laws.[111]

The language of the EEC suggests that, overall, social welfare was seen as a desired and natural consequence of market integration from the very origins of what is now the EU.[112]

(b) *Treaty Reforms: a Gradual Expansion of the Social Dimension*

Progressive Treaty reforms subsequently expanded EC competences in the social policy domain. The SEA brought health and safety at work into the scope of the Treaty, allowing the Council to adopt, by qualified majority, directives aimed at improving occupational health and safety and thus preventing social dumping as the internal market expanded.[113] It also introduced a horizontal clause requiring that measures adopted in the process of harmonising the single market would take as a base a high level of health protection.[114] With regard to the collective aspects of labour law, it entrusted the Commission with the task of developing dialogue between management and labour at European level and provided for a possibility of adopting EC-wide

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111 See EEC, art 117.

112 For support of this view, see: International Labour Organization, Group of Experts, 'Social Aspects of European Economic Co-operation' (1956) 74 Int'l Lab Rev 99 (Ohlin Report); PH Spaak, *Rapport des chefs de delegation aux Ministres des Affaires Etrangères* (1956 Intergovernmental Committee on European Integration 19–20, 60–61 (Spaak Report); P Davies, 'The Emergence of European Labour Law' in W McCarthy (ed), *Legal Intervention in Industrial Relations: Gains and Losses* (Blackwell 1993) 313–359, 322–323; Kenner (n 110) 2–6; D Schiek, 'A Constitution of Social Governance for the European Union' in D Kostakopoulou and N Ferreira (eds), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (CUP 2016) 17–47.

113 EEC, art 118a.

114 EEC, art 100a.

collective agreements.[115] Finally, in 1989, the Community adopted the Social Charter, which stipulated that 'the same importance must be attached to the social aspects as to the economic aspects' of the single market.[116] Although the Charter was not legally binding, since its adoption, it has informed a number of Community policies and legislation, being frequently referred to in Community legal instruments and the judgments of the Court.[117]

The Treaty of Maastricht took a step further in deepening the social dimension of the EU. It created Union citizenship and legal bases for EU higher education and healthcare policies, albeit limited to adoption of non-binding measures and subject to the principle of subsidiarity. Notably, some of these reforms, such as the creation of the legal basis for education, might have been driven by the Court's case law, discussed in previous chapters. Maastricht also modified the list of objectives of the Treaty, which now included the pursuit of a high level of social protection.

On the inter-governmental level, eleven Member States (excluding the UK) signed an Agreement on Social Policy, which was annexed to the Protocol on Social Policy of the Treaty of Maastricht. The Agreement strengthened the role of the social partners in the Community legislative process. It imposed a legal obligation on the Commission to facilitate social dialogue and consult social partners on the possible direction of Community action and on the content of proposals in the social policy field.[118] In addition, it stipulated that the agreements negotiated by the social partners at

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115 EEC, art 118b.

116 Community Charter of Social Rights, preamble.

117 Ryan (n 27) 10, referring to L Betten, 'The EU Charter of Fundamental Rights: a Trojan Horse or a Mouse?' (2001) 17 IJCLLIR 151.

118 Protocol on Social Policy to TEU [1992] OJ C191/91, Agreement on Social Policy, art 3.

the Community level could be adopted as binding legislation.[119] The Agreement also extended Community competences to a wider range of social policy matters, including working conditions, information and consultation of workers, social inclusion, and equality between men and women in the workplace. With respect to some of the new competences, the Agreement allowed for qualified majority voting, on the basis of which several important social policy measures were adopted.[120] After the newly elected UK government decided to terminate its 'opt-out', the Social Policy Agreement was incorporated into the revised Chapter on Social Policy of the Treaty of Amsterdam. The Treaty of Amsterdam also introduced guidelines for the coordination of national employment policies, as a response to EU measures on coordination of Member States' economic policies.

This historical overview of the Treaties seems to suggest that the initial thinness of the social policy provisions in the EEC was premised on a consensus that the creation of a single market would not require a comprehensive harmonisation of national social policies.[121] This, in turn, determined the nature of the development of EU social policy, which could be described as incremental and which progressively deepened as the market integration in the region was intensifying.

(c) *The Court's Contribution*

In an important way, the CJEU proved to be instrumental in advancing the EU's social

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119 Agreement on Social Policy (n 118), arts 3, 4.

120 See eg Council Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting [1994] OJ L254/64; Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145/4; Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work [1997] OJ L14/9.

121 D Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) 19 ELJ 303.

policy beyond the seemingly narrow Treaty framework. A particular mention ought to be given to the *Defrenne* case of 1975,[122] in which the Court was asked to give a preliminary ruling on the interpretation of the equal pay principle, enshrined in Art. 119 EEC (now 141 TFEU). This provision had not been implemented by any of the Member States apart from France, which paved the way for its introduction into the Treaties in the first place, and was widely considered to be of an aspirational nature. Mrs Defrenne was a Belgian air hostess who sued her employer in a labour court on the ground that she was being paid less than her male colleagues. The Court found this to be a breach of Art. 119.

The Court explained that Art. 119 EEC had a double aim. First, it sought to prevent a situation in which undertakings established in States which had implemented the principle of equal pay would suffer a competitive disadvantage in intra-Community competition as compared with undertakings established elsewhere. Second, the provision formed part of the social objectives of the Community, which was not merely an economic union, but was at the same time intended to ensure social progress and seek the constant development of the living and working conditions.[123] This double aim, at once economic and social, showed that the principle of equal pay formed 'part of the foundations of the Community'.[124]

Moreover, the Court held that Art. 119 was directly applicable and had horizontal direct effect,[125] which meant that the obligation of equal pay, in addition to binding public authorities, extended to all agreements intended to regulate paid labour

122 *Defrenne* (n 8).

123 ibid, paras 8–10.

124 ibid, para 12.

125 JA Winter, 'Direct Applicability and Direct Effect Two Distinct and Different Concepts in Community Law' (1972) 9 CML Rev 425.

collectively and to contracts between individuals.[126] This finding was remarkable because Art. 119 was, and remains, explicitly addressed only to Member States. *Defrenne* was the first judgment where the Court pronounced on the horizontal dimension of direct effect in relation to social policy (it had already done so for competition law).

The value of *Defrenne* lies in that the Court for the first time in its jurisprudence acknowledged the salience of the social dimension of the Treaty. The judgment became the driving force for some major legislative developments in EU anti-discrimination law.[127] Moreover, the principle of equal treatment was further expanded beyond the confines of equal pay and gender equality. The new Art. 19 EC of the Treaty of Amsterdam conferred on the EC the competence to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

The upshot of *Defrenne* was, however, that, indirectly, it also strengthened the economic dimension of Community law because it opened up the possibility that some of the common market rules would be granted horizontal direct effect. Moreover, in the relative absence of concrete, enforceable social policy rules in the Treaty, rights of a social nature could not benefit from the direct effect the way that the economic freedoms did. As a result, EU social policy was for the most part developed in secondary legislation and so depended on reaching a political consensus. The principal counterweight to the internal market rules therefore stemmed from the protections embedded in the national social models, which provided justification for Member State derogations from the free movement and competition rules.

126 *Defrenne* (n 8), paras 24, 39.

127 For a detailed account, see Sindbjerg Martinsen (n 23) 67–71.

(d) *The Treaty of Lisbon: Social Dimension Reinvigorated*

The social dimension of the internal market has been once again reinforced by the Treaty of Lisbon, which strengthened the EU's commitment to strive for a Union whose quest for economic growth is balanced against sustaining social progress. Art. 2 TEU (formerly Art. 2 EEC) encompasses a wide range of social objectives among the objectives of the EU, from the pursuit of a social market economy to concrete commitments to full employment, social justice and solidarity, among others.[128] The reference to undistorted competition has been moved from Art. 3(1)(g) EC to Protocol No 27 on the internal market and competition and thus no longer appears in the main text of the Treaty.

The Treaty has also introduced a number of new provisions of primary social law aimed at informing the framework of EU law and policy. For example, the horizontal social clause enshrined in Art. 9 TFEU requires that the objectives of social protection and employment, education and training and human health be mainstreamed into EU policies. Moreover, Art. 6 TEU integrates into the Treaties the Charter of Fundamental Rights, thus elevating a number of social rights to the same normative level as the internal market rules. Art. 14 of the Charter guarantees to everyone the right to education, Art. 35 – the right to healthcare, and the whole of title IV ('Solidarity') of the Charter is dedicated to social protection. As important as these developments are, the power of the Charter alone should not be overestimated, since the CJEU tends to interpret it in a way that either adds nothing to the existing protection of social rights in the EU[129] or, in exceptional cases, favours commercial

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128 TEU, art 2(3).

129 Case C–438/05 *Viking Line* [2007] ECR I–10779, paras 43–44; *Laval* (n 37), para 91; *Commission v Germany* (n 55), paras 38–44; Case C–390/12 *Pfleger and Others* (CJEU, 30 April 2014), paras 59–60.

rights over the social ones.[130]

However, the Treaty also imposes an obligation on the EU to accede to the ECHR.[131] Although the prospect of an imminent accession seems to be less realistic in light of the Court's Opinion 2/13,[132] a delay in expected accession, in turn, increases the relevance of the Charter as the main instrument of fundamental rights protection in the EU. Notably, the Charter incorporates a number of Convention rights, whose interpretation in EU law must not fall short of the standard of protection accorded to them by the ECHR.[133] Accordingly, the CJEU is now put under pressure to ensure the EU's compliance with fundamental rights from both the national courts and the ECtHR.[134]

Finally, the Treaty strengthens the role of the principle of conferral in the EU. Art. 6 TFEU clarifies the delimitation of the EU's competences by classifying them into exclusive, shared and supplementary. Art. 4(2) TEU stipulates that the Union shall respect the essential State functions of the Member States and their national identities, inherent in their fundamental political and constitutional structures. This provision is a revised version of what was originally Art. F(1) TEU of the Treaty of Maastricht, which was phrased more generally, referring to the EU's duty to respect 'the national identities of its Member States'. The CJEU has not yet pronounced at greater length on the concept of national identity enshrined in Art. 4(2), and, therefore, the exact

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130 *Alemo-Herron* (n 98), paras 30–35.

131 TEU, art 6(2).

132 Case C–2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (CJEU, 18 December 2014) (Opinion 2/13).

133 EU Charter, art 52(3).

134 To this effect, see BVerfG, judgment of 29 May 1974, 37 BvR 271 (*Solange I*) and BVerfG, judgment of 22 October 1986, 73 BvR 339 (*Solange II*). For some recent signs that the CJEU is taking seriously the protection of fundamental rights, at least the civil and political ones, see Joined Cases C–293/12 and C–594/12 *Digital Rights Ireland Ltd* (CJEU, 8 April 2014); Case C–131/12 *Google Spain SL* (CJEU, 13 May 2014).

parameters of this clause remain unclear.[135] Member States' national constitutional courts, on their part, have generally interpreted Art. 4(2) as imposing an additional limit on the reach of EU competences, rooted in the value of national constitutional diversity.[136] This limit, moreover, should encompass a requirement that the EU accord to the Member States sufficient space for those policy choices that shape the economic and social conditions affecting the lives of their citizens, such as fiscal and social policy choices.[137] This idea shall be returned to in Chapter VI.

The overall Treaty framework suggests that despite an unequal distribution of EU competences across the economic and social domains, the EU is obliged to regulate the internal market in a way that would not undermine the pursuit of its social objectives, which, on their part, are placed on constitutional parity with the economic freedoms, at least since the reforms introduced in Lisbon.[138] Accordingly, the EU's internal market law should be interpreted in light of the EU's non-economic values,[139] something that the Court has systematically failed to achieve in relation to national social policies, as demonstrated in Chapters II and III.

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135 For academic discussion on the meaning of art 4(2) and the case law thereon, see M Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' (2014) 33 YEL 298; T Konstadinides, 'Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse' (2015) 34 YEL 127; G van der Schyff, 'Exploring Member State and European Union Constitutional Identity' (2016) 22 EPL 227.

136 For a comprehensive overview, see M Wendel, 'Lisbon before the Courts: Comparative Perspectives' (2011) 7 EuConst 96, 131–136.

137 BVerfG, judgment of 30 June 2009, 2 BvE 2/08 (*Lisbon*).

138 See eg EP Study, 'EU Social and Labour Rights' (n 85) 78.

139 ibid. See also D Damjanovic, 'The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy' (2013) 50 CML Rev 1685, 1716–1717.

VI. Rebalancing the EU by Rebalancing the Court

Building on the argument advanced in Chapter V that the degree of the Court's interference with national regulatory autonomy is neither dictated nor justified by the reading of the Treaties, and that the Court's case law lacks firm conceptual constitutional (Ch. V) and substantive (Chs. II, III and IV) grounds, this chapter proposes a solution aimed at restoring the balance of competences and powers within the EU and thus ameliorating the tensions that the Court's case law has created.

The Court is invited to reflect on the recent constitutional developments of EU law brought about by the Treaty of Lisbon and, given the room for interpretative manoeuvre it enjoys in fulfilling its mandate, to relax the standard of judicial review in relation to national measures that in principle fall outside the EU's legislative competence.

1 The Conceptual Basis for a Relaxed Judicial Review

Conceptually, the proposition for a more relaxed judicial review rests on the combination of several constitutional principles, discussed in Chapter V, governing the division of competences and powers within the EU: conferral, subsidiarity and proportionality, respect for national identity, and institutional balance. None of these principles on its own is decisive in determining the legitimacy of judicial interpretation of internal market law, and none of them is a rule rather than a principle. However, for reasons of legal certainty and clarity, this chapter primarily focuses on subsidiarity and proportionality, as the principles to be reinforced into the practice of the CJEU. It is suggested that these two principles in particular should govern the exercise of the Court's judicial authority because they are capable of being effectively operationalized in the context of the internal market, as will be demonstrated throughout this chapter.

To ensure that the principle of subsidiarity is observed, in accordance with Art. 5(3) TEU, the Court is invited to reflect on the subsidiary nature of EU law and, accordingly, advance the objectives of the internal market whilst taking into account the implications of its decisions for the scope of Member States' regulatory autonomy in areas falling within the ambit of the EU's shared and supplementary competences. Apart from the policy areas analysed in this thesis, this approach should be extended to other constitutionally sensitive areas, such as crime prevention, culture and tourism, sport, civil protection, and tax. Subsidiarity would require the Court to show more deference to domestic actors – legislative, administrative and judicial – by according them a margin of discretion (or margin of appreciation) in their actions. The exact breadth of the margin of discretion would depend on the peculiarities of the national context in question, while taking into account the level of protection pursued by the government. This would allow the Court to preserve the diversity of the regulatory models of the Member States. In certain cases, subsidiarity could also justify an exemption of the matter from the purview of EU internal market law, as illustrated by the *Albany* decision, discussed in detail further in this chapter.

In a similar vein, the principle of proportionality should ensure that the Court's interpretation of internal market rules does not interfere excessively with competing non-market values that are protected at the national level. To that end, the CJEU would be expected to strike a fair balance in the reconciliation of the two sets of values. This could be achieved through conducting a two-fold inquiry into their relationship: in addition to the proportionality review employed to assess the lawfulness of restrictions on free movement and competition, the Court would need to assess whether a particular interpretation (and application) of the free movement and competition rules is necessary for the achievement of the objectives of the internal market in light of the restrictive effect that such interpretation may have on the protection of legitimate interests advanced by the Member States. Further details of this approach are spelled out in the following section.

2 A Relaxed Judicial Review in Practice: a Choice of Interpretative Techniques

In practical terms, as briefly mentioned above, judicial review can be relaxed by employing a set of techniques, or methods, of judicial interpretation, all of which are already to be found in the internal market case law of the CJEU. Chapter VI focuses on three interpretative techniques that could be considered as particular expressions of the principles of subsidiarity and proportionality in the form of judicial reasoning. The techniques in question are the doctrine of margin of appreciation, the fair balance (or double proportionality) approach and exemption from the application of EU law. Each of the three techniques represent a different point in the spectrum of intensity of judicial review, from complete deference (exemption), to a grant of more room for national manoeuvre (margin of appreciation), to an equitable weighing of competing legal interests (fair balance). Most significantly, all of them entail a review less intense than the Court normally performs in relation to national regulatory measures in the areas of healthcare, education and collective labour law.

(a) *The Margin of Appreciation*

The doctrine of margin of appreciation, in the European context most renowned for its application in the case law of the ECtHR, is a doctrine of judicial deference whereby national actors are accorded by international courts some room for manoeuvre in fulfilling their international obligations.[1] In the framework of the ECHR, this doctrine

[1] See eg *The Belgian Linguistic case* (No 2) (1968) 1 EHRR 252 (*Belgian Linguistic*), para 10; *Handyside v UK* (1976) 1 EHRR 737, para 48; *Branko Tomašić and Others v Croatia* App no 46598/06 (ECtHR, 15 January 2009), para 74 (*Branko Tomašić and Others*). For academic discussion, see Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 EJIL 907; 'Margin of Appreciation – an Overview of the Strasbourg Court's Margin of Appreciation Doctrine' (*Open Society Justice Initiative*, April 2012) <http://www.opensocietyfoundations.org/sites/default/files/echr-reform-margin-of-appreciation.pdf> accessed 20 August 2016 (Open Society, 'Margin of Appreciation'); D Spielmann, 'Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2015) 14 CYELS 381.

expresses the recognition by the ECtHR that the Convention has only a subsidiary role in protecting human rights, the primary responsibility lying with the national authorities; hence, it will be interpreted differently in different member States, given their divergent legal and cultural traditions.[2] Differences in interpretation are tolerated because national authorities are considered to be better positioned than an international judge to decide on the necessity of a particular restriction of the exercise of a fundamental right. When determining the breadth of the margin of appreciation, the ECtHR usually takes into account a number of factors relevant to the circumstances of the case, such as the nature of the right, the aim pursued by the contested measure and the degree of European consensus regarding the regulation of the matter in question.[3] For instance, the margin will be wider when there is no consensus among the Contracting Parties 'either as to the relative importance of the interest at stake or as to the best means of protecting it'.[4] The ECtHR will also be more lenient when national authorities are required to strike a balance between competing private and public interests or conflicting Convention rights.[5]

In the EU's legal framework, the CJEU employs the doctrine of margin of appreciation (frequently referred to as margin of discretion), in two main circumstances: when performing the judicial review of EU legislative acts[6] and when

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2 *Belgian Linguistic* (n 1), para 10; *Handyside* (n 1), para 48; *Branko Tomašić and Others* (n 1), para 74; Open Society, 'Margin of Appreciation' (n 1).

3 See *S and Marper v UK* App Nos 30562/04 and 30566/04 (ECtHR, 4 December 2008), para 102, providing an overview of the relevant factors. For a comprehensive analysis of these factors, see J Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 12 ELJ 80 (Gerards), advocating for a systematic use of a 'doctrine of deference' by EU courts on the basis of ECtHR model.

4 *Evans v UK* (2007) 41 EHRR 21, para 77; *Schalk & Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010), para 98.

5 ibid; *Chassagnou v France* (1999) 29 EHRR 615, para 113.

6 On legislative discretion, see S Weatherill, 'The Limits of Legislative Harmonisation Ten Years after *Tobacco Advertising*: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 Germ LJ 827.

assessing the compatibility of national regulatory frameworks with EU law, most notably internal market law. In the latter case, the CJEU does not seem to have a single theory as regards the set of circumstances in which the doctrine applies. Nor does it adopt the methodology of the ECtHR, at least not openly. Typically, the Court invokes this doctrine in relation to issues and areas of national policy that are constitutionally, politically or socially sensitive, which is often considered to be reflected in the diversity of the regulatory approaches employed by the Member States.[7] This suggests that, just like in the framework of the ECHR, margin of appreciation in EU law constitutes a concrete application of the principle of subsidiary in judicial practice.

In light of the foregoing, it is submitted that the CJEU should employ the doctrine of margin of appreciation in cases concerning the interpretation and application of internal market law to policy areas predominantly reserved by the Treaties to national competence, such as the areas under study in this thesis. Examples from the Court's own internal market case law will be utilised in order to demonstrate how and in what circumstances this doctrine can be extended to the areas of healthcare, education and collective labour law. The segments of the case law selected for the analysis concern: (i) the free movement of healthcare providers; (ii) the regulation of SGEIs in competition law; and (iii) the exercise of fundamental rights in the context of free movement.

(i) Free movement

It is suggested that the Court could use its case law concerning the free movement of healthcare providers as a model for extending the application of margin of appreciation

[7] N Shuibhne, 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law' (2009) 34 EL Rev 254; Gerards (n 3). For a comprehensive recent study of the circumstances in which margin of appreciation is invoked in CJEU free movement law, see J Ziglinski, 'Europe's Passive Virtues: The Margin of Appreciation in EU Free Movement Law' (PhD thesis, European University Institute 2016) 57–105 (Ziglinski).

to situations involving patients' access to cross-border healthcare.

The Court's standard of review in cases concerning the free movement of healthcare providers is in principle equivalent to that employed in the context of the free movement of gambling operators.[8] In both cases, the review is premised on the recognition that the particular political and social sensitivity of the sector, be it healthcare or gambling, requires a broad margin of discretion to be granted to the national authorities in determining the level of protection they wish to pursue and choosing the means to attain it.[9] Accordingly, the judicial inquiry focuses on the suitability, or appropriateness, of the restrictive measures, reducing the test of necessity to the minimum.[10] National rules will be deemed suitable for ensuring the attainment of the objective pursued if they genuinely reflect a concern to attain it in a consistent and systematic manner. This also includes a procedural requirement to design regulatory frameworks in a way as to adequately circumscribe the exercise of national authorities' discretion, in order to prevent arbitrary decision-making. This requirement would not be met if, for instance, the system in question conditions the entry to the market of new healthcare providers on a discretionary assessment of the needs of that particular market.[11]

The above approach stands in contrast to the Court's approach in cases concerning cross-border access to healthcare, where, as discussed at length in previous chapters, the Court's review focuses on the necessity of national regulatory measures.

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8 Covered in detail in ch II, s 1(b)(iii).

9 Case C–70/95 *Sodemare* [1997] ECR I–3395, para 27; Case C–141/07 *Commission v Germany* [2008] ECR I–6935, para 51; Case C–169/07 *Hartlauer* [2009] ECR I–1721, paras 29–30; Joined cases C–570/07 and C–571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I–04629, para 44.

10 On necessity, see Case C–496/01 *Commission v France* [2004] ECR I–2351, paras 68–70; Case C–140/03 *Commission v Greece* [2005] ECR I–3177, paras 34–35, noted in ch II, s 1(b)(iii).

11 *Hartlauer* (n 9), paras 55, 57–71.

How could one explain these differences in the intensity of review? An argument could be made that the right for patients to access healthcare, as part of the free movement of persons, is more valuable than a purely economic right of healthcare providers to access foreign markets. This in turn justifies why the free movement of the former is protected to a greater degree than the latter. To that effect, the Court holds that the right of EU nationals to move and reside in other Member States constitutes the 'very essence' of the principle of freedom of movement guaranteed by the Treaty and that limitations thereof can only be accepted exceptionally.[12]

One would assume that the ultimate objective behind this approach is an effective protection of the rights of EU citizens. Yet the Court falls short of achieving it. By narrowly focusing on the perceived individual benefits of the free movement, the Court neglects the broader implications of such free movement for national systems of social protection. However, as Chapters II and V have demonstrated, the proper functioning of these systems is essential for ensuring the protection of the rights of all the citizens, not just mobile ones. As regards healthcare in particular, it ensures that the most vulnerable groups of patients are not deprived of the necessary treatment in favour of patients with less urgent medical needs. In these circumstances, a systemic perspective that would lower the Court's standard of review should be taken into account in cases involving the free movement of persons.

Moreover, the distinction between persons and businesses in the healthcare cases looks even less plausible in light of the Court's wider case law analysed in this thesis. For instance, the Court employs a strict-scrutiny approach in cases concerning collective labour rights. Yet the reasons behind this approach have little to do with the empowerment of the individual. Quite the contrary, the Court seems to empower the

12 See eg Case C–147/03 *Commission v Austria* [2005] ECR I–5969, para 70; Case C–73/08 *Bressol and Chaverot* [2010] ECR I–2735, para 79.

businesses operating in the EU, often at the expense of the protection of workers' rights. One might speculate that the Court is thus implicitly promoting the free of movement of workers through increasing opportunities for employment abroad. Yet this assumption would be unwarranted, given that the *Viking* and *Laval* line of cases have never been considered in light of the Treaty provisions on the free movement of workers. This suggests that the Court's primary concern is the advancement of the free movement as such, regardless of who the beneficiaries of this free movement may be.

Against this background, marked differences in the standards of judicial review in cases concerning the free movement of patients, on the one hand, and healthcare providers, on the other, do not seem to be justified. Accordingly, it is suggested that in future cases concerning patients' access to cross-border healthcare, if the criteria that determine the waiting time for treatment at home (assuming that this treatment is sufficiently effective) are non-discriminatory, and the procedures for granting authorisation to receive treatment abroad are fair, objective and transparent, national 'restrictions' stemming from government-mandated waiting lists would be justified.[13]

(ii) Competition

As discussed in Chapter IV, the Court seems to show more sensitivity to national social interests in the area of competition law. EU competition and State aid rules apply to national social security systems only insofar as the principle of solidarity does not predominate in them. The proportionality review employed in relation to SGEIs in the healthcare sector departs from the premise that it is the prerogative of the Member States to organise and manage the provision of public healthcare and, in doing so, they should be accorded a margin of discretion.

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13 To this effect, cf Case C–157/99 *Geraets-Smits Peerbooms* [2001] ECR I–5473, para 90; *Hartlauer* (n 9), para 64.

Accordingly, restrictions on competition resulting from the grant of exclusive rights or financial support to undertakings providing SGEIs do not have to be minimised to what is strictly necessary for the provision of an SGEI in question. National measures will be compatible with EU law insofar as they enable the carrying out of the PSOs concerned in economically acceptable conditions, while also taking into account the importance of maintaining the quality, reliability and affordability of the services in question. Similarly, the compensation provided for the provision of SGEIs is considered to be proportionate as long as it does not cover the costs caused by the inefficiencies of the operation of an SGEI. This will be assessed by checking whether national procedures in place are not manifestly inappropriate for offsetting the additional costs incurred as a result of a public service provision. Insofar as the compensation is calculated on the basis of parameters that are specific, clearly identifiable and transparent, this requirement will be met. The overall standard of judicial review suggests that public services in the healthcare and (potentially) education sectors are in principle protected from the deregulatory effect of EU competition law.

It was discussed in the concluding section of Chapter IV that the Court may be justified in being more cautious when applying competition rules to the public domain due to the fact that competition law is primarily meant to control private practices, although, notably, this distinction becomes less relevant with the increasing application of horizontal direct effect in free movement law. The bottom line, however, is that both competition law and free movement law are dedicated to the protection of the internal market. This does not mean that they are the same in their detailed scope, nor that the legal interests at stake should be interpreted in exactly the same way. It should mean, however, that the two sets of rules do not lead to conflicting outcomes, as they seem to at the moment.[14] This could be achieved if the Court adopted a coherent standard of judicial review in light of both sets of rules, based on the recognition that Member States are entitled to a margin of appreciation in regulating matters whose constitutional sensitivity is recognised by the Treaties. The primary examples of such matters are the provision of public services in the sectors of healthcare and education. In this way, the Court would protect national regulatory systems from the potentially damaging deregulatory effects of the free movement law and ensure an effective observance of the principle of subsidiarity across its entire internal market case law.

(iii) Fundamental rights

The starting point of the Court's review in cases concerning conflicts between the free movement rules and the exercise of fundamental rights seems to be the recognition that Member States have a wide margin of discretion when choosing the level of protection to be accorded to fundamental rights and later balancing that protection against the exercise of economic freedoms. Proportionality review is thus mainly focused on assessing the suitability and reasonableness of Member State decisions.[15] This case law offers a useful illustration of why (and how) the doctrine of margin of appreciation could be applied in relation to either of the areas under the present study, but particularly collective labour rights.

Omega: *the protection of a fundamental right as a self-standing objective*

The landmark case concerning the application of margin of appreciation in relation to fundamental rights is *Omega*. The case concerned a German order prohibiting the

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14 Cf *Smits and Peerbooms* (n 13), para 58 against Case C–205/03 *FENIN* [2006] ECR I–6295, paras 8–26; Case C–341/05 *Laval* [2007] ECR I–11767, paras 107, 110 against Case C–67/96 *Albany* [1999] ECR I–5751, paras 59–60.

15 For an explicit use of the term 'reasonable', see Case C–112/00 *Schmidberger* [2003] ECR I–5659, para 93.

operation of games that involved simulated killing, on the basis that such games constitute an affront to human dignity, the protection of which is guaranteed in Art. 1(1) of the German Constitution. The Court was asked to determine to what extent the exercise of the right to human dignity could justify derogation from the free movement rules.

The Court held that the protection of fundamental rights fell within the 'public policy' ground of justification, which, in line with the settled case law, had to be interpreted strictly and thus relied on only if there was a genuine and sufficiently serious threat to a fundamental interest of society.[16] Moreover, measures restricting the free movement of services could be considered as justified 'only insofar as those objectives [could not] be attained by less restrictive measures.[17] Notably, up to this point, the Court's reasoning resembles that employed in *Commission v Luxembourg* in the context of the public policy exception provided in Art. 3(10) PWD.[18] But then it changes.

The Court notes that since 'the specific circumstances' for recourse to the concept of public policy could vary 'from one country to another and from one era to another', national authorities have to be allowed a margin of discretion within the limits imposed by the Treaty.[19] Making a reference to its gambling case law, the Court emphasises that the need for, and proportionality of, national measures are not put into question merely because one Member State has chosen a system of protection different

16 Case C–36/02 *Omega Spielhallen* [2004] ECR I–9609, para 30.

17 ibid, para 36.

18 Case C–319/06 *Commission v Luxembourg* [2008] ECR I–4323, paras 30–31, 50.

19 ibid, para 31. See also, Case C–41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337, para 18, where margin of appreciation is applied for the first time in the context of public policy derogation from free movement law.

from that adopted by another Member State.[20] German rules correspond to the level of protection of human dignity which the national constitution seeks to guarantee and thus have to be regarded as justified and necessary in the circumstances of the case.[21]

As pointed out earlier in Chapter III, this approach seems to be remarkably different from the Court's review of collective labour rights. In principle, this difference could be explained by the fact that collective labour rights are seen by the Court merely as a means for achieving the objectives of worker protection rather than the ends in themselves, whose protection could justify the restrictive effect on the fundamental freedoms. As such, they are placed under a rigorous proportionality review. By contrast, in the fundamental rights cases, as illustrated by, but not confined to, *Omega*, fundamental rights are treated as self-standing legal interests, whose level of protection – to be chosen by the Member States – effectively determines the level of intensity of the Court's proportionality review.[22] This seems to suggest that while formally referring to collective labour rights as fundamental, the Court does not accord them the same legal weight as to the rights of civil and political nature.[23] This difference in treatment, however, cannot be justified in light of the Court's recognition that both collective bargaining and the right to strike form part of the general principles of EU law together with other fundamental rights.[24] Moreover, both of these rights are protected under the Charter, which, crucially, does not differentiate between civil and political rights and those of a social nature in terms of either their legal status or the

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20 *Omega* (n 16), paras 37–38, with further references to, inter alia, C–124/97 *Läärä & Others* [1999] ECR I–6067, para 36; Case C–67/98 *Diego Zenatti* [1999] ECR I–7289, para 34.

21 *Omega*, para 39.

22 See eg Case C–244/06 *Dynamic Medien* [2008] ECR I–505, paras 44, 49; *Schmidberger* (n 15).

23 For an in-depth analysis, see V Velyvyte, 'The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence' (2015) 15 HRLR 73, 87–90.

24 See Case C–438/05 *Viking Line* [2007] ECR I–10779, paras 43–46; *Laval* (n 14), para 91.

level of protection that they warrant.[25]

Sayn-Wittgenstein: *the protection of national identities*

The *Sayn-Wittgenstein* judgment is noteworthy for the Court's reliance on the national identity clause enshrined in Art. 4(2) TEU as a legal basis for the grant of margin of appreciation. The case concerned Austrian law on the abolition of the nobility, prohibiting the acquisition, possession or use of a title of nobility. The claimant in the case argued that this law was incompatible with the freedom of movement guaranteed to the citizens of the EU under Art. 21 TFEU, while the government maintained that the said law implemented the constitutional principle of equality of all Austrian citizens.

In line with *Omega*, the Court held that although derogations from the free movement should be interpreted strictly, Member States were to be granted a margin of appreciation when defining the scope of public policy, which meant that they were entitled to choose a system of protection which differs from the ones in other Member States.[26] Moreover, in accordance with Art. 4(2) TEU, the EU was obliged to respect the national identities of its Member States. In the context of Austrian constitutional history, this identity included the status of the State as a Republic, expressed in the law on the abolition of the nobility, which had to be taken into consideration when striking a balance between legitimate interests and the right of free movement of persons in EU law.[27] It followed that the Austrian prohibition of the use of titles of nobility was proportionate in light of the objective of protecting the constitutional principle of equal

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25 EU Charter, art 28. For academic discussion, see eg C Semmelmann, 'The European Union's Economic Constitution under the Lisbon Treaty: Soul-Searching among Lawyers Shifts the Focus to Procedure' (2010) 35 EL Rev 516, 524–528.

26 Case C–208/09 *Sayn-Wittgenstein* [2010] ECR I–13693, paras 86–87, 91–92. See also *Dynamic Medien* (n 22), paras 81–82.

27 *Sayn-Wittgenstein* (n 26), paras 83, 92.

treatment.

Sayn-Wittgenstein suggests that the national identity clause will influence the Court's analysis of the measure's proportionality, which means that a claim to margin of appreciation thus can be strengthened by reference to Art. 4(2) TEU. Notably, the potential of Art. 4(2) should not be overestimated, as it can only be invoked in relation to a 'fundamental' aspect of Member States' national identities,[28] the assessment of which is in turn subject to supervision by the Court.[29] Yet, at the same time, it cannot be denied that this clause recognises the importance of the diversity of national constitutional and political structures of the Member States *as an EU value*. As such, it should inform the Court's perception of the breadth of the concept of public policy and of other legitimate interests capable of justifying derogations from the free movement.[30]

The Court, on its part, seems to be well aware of this recognition. Accordingly, it extends the scope of Art. 4(2) TEU beyond the relatively narrow question of constitutional fundamental rights to include, for instance, national linguistic identities.[31] It should be recalled that Art. 4(2) has also been invoked in the *Digibet* case, discussed

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28 For a strict interpretation of what qualifies as fundamental within the meaning of Art. 4(2) TEU, see M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 ELJ 262, 297–298; A von Bogdandy and S Schill, 'Overcoming Absolute Privacy: The Respect for National Identity under the Lisbon Treaty' (2011) 48 CML Rev 1417, 1430–1440.

29 Case C–62/14 *Gauweiler (OMT)* (CJEU, 16 June 2015), Opinion of AG Cruz Villalón, paras 59–61. See also N Shuibhne, 'Primary Laws: Judging Free Movement Restrictions after Lisbon' in P Koutrakos, N Shuibhne and P Syrpis (eds), *Exceptions from EU Free Movement Law* (Hart Publishing 2016) 312–318 (Shuibhne, 'Primary Laws'), discussing this point.

30 In support of this interpretation, see Case C–213/07 *Michaniki AE* [2008] ECR I–9999, Opinion of AG Maduro, paras 31–33. See also M Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' (2014) 33 YEL 298; D Thym, 'The Constitutional Dimension of Public Policy Justifications' in Koutrakos, Shuibhne and Syrpis (n 29) 179–189.

31 Case C–391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I–3787; Case C–202/11 *Anton Las* (CJEU, 16 April 2013). For an overview of accounts arguing that the scope of Art. 4(2) TEU is not limited to strictly constitutional norms, see G van der Schyff, 'Exploring Member State and European Union Constitutional Identity' (2016) 22 EPL 227, 232–234.

in Section 4 of Chapter II.[32] In this case, the Court found that the consistency of the German regulatory framework for gambling was not affected by differences in the regional regimes within the country because the division of competences between the *Länder* was protected under Art. 4(2) TEU.

Digibet suggests that Art. 4(2) has a potentially broad scope of application. Evidently, it can be used to protect Member States' choice to regulate in a decentralised manner, thus allowing the co-existence of divergent substantive policy outcomes across national territory. Arguably, the same logic should apply to regulation at the EU level. Art. 4(2) should be construed as intended to accommodate divergencies in the substantive national policy choices across the territory of the EU provided that those choices are at the heart of a State's national constitutional or political identity. Accordingly, Art. 4(2) could play an important role in extending the doctrine of margin of appreciation to the areas of healthcare, education and collective labour law, in particular, because Member State policy choices in these areas typically embody their national social identities, whose constitutional sensitivity is, moreover, expressly recognised by the Treaties.

(b) *Fair Balance*

As a technique of judicial reasoning, the act of balancing has a key function in solving conflicts between competing legal interests in the jurisprudence of national constitutional and international human rights courts.[33] This technique is not unfamiliar to the EU legal system. It has been employed in the case law of the CJEU, in the

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32 See Case C–156/13 *Digibet and Albers* (CJEU, 2 June 2014).

33 SA de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 Utrecht L Rev 169, with a further reference to S Gardbaum, 'Limiting Constitutional Rights' (2007) UCLA L Rev 24.

opinions of Advocates General and in corresponding EU legislative initiatives. It is not unlikely for the fair balance approach to be employed together with the doctrine of margin of appreciation: where a margin of appreciation is granted, national administrative and judicial authorities are delegated the right to perform the balancing exercise between the competing values concerned. It will be demonstrated in the following discussion that the technique of balancing is particularly suited to ensure the observance of the principle of proportionality in the exercise of the EU's judicial competences because it limits EU-level judicial interference with the interests protected at the national level to what is necessary in light of the objectives of the internal market.

(i) Fair balancing in *Schmidberger* and *Commission v Germany*

In order to understand the details and scope of the fair balance approach, the *Schmidberger* case deserves a particular mention. *Schmidberger* was the first case in the history of the CJEU where the protection of fundamental rights, namely the freedoms of expression and of assembly, was invoked as a justification for restricting EU economic freedoms. The case concerned a permission granted by the Austrian government to close a national motorway in order to allow a demonstration against the levels of pollution caused by heavy traffic. The CJEU ruled that economic freedoms and fundamental rights were values of equal importance in EU law and could both be subject to restrictions, and that the task for the national authorities was therefore to strike a fair balance between the two.[34] Moreover, the Court added that national authorities were to enjoy a 'wide margin of discretion in the balancing exercise', which

[34] *Schmidberger* (n 15), paras 77–81.

suggests that the two approaches go hand in hand.[35]

The balancing exercise required that in addition to assessing the lawfulness of national measures in light of the free movement of goods, the Court assess the effect of the free movement on the exercise of the fundamental rights in question. The Court noted that freedom of expression and freedom of assembly could be subject to certain limitations justified by objectives in the public interest, as long as those limitations were in accordance with the law, motivated by legitimate aims and necessary in a democratic society, and proportionate to the legitimate aim pursued.[36] However, interference with these fundamental rights could not go as far as to impair their very substance.[37] For that reason, the Court rejected the proposition of the Austrian national court that freedom of assembly could have been exercised in a manner less restrictive on free movement, for example, by holding the demonstration next to the motorway or limiting its duration. It explained that, first, the choice of appropriate means fell within the 'wide margin of discretion' accorded to the Member States and, second, the imposition of stricter conditions on the exercise of the rights concerned could have deprived the environmental action of a substantial part of its scope.[38]

The Court's reasoning in *Schmidberger*, too, stands in contrast with the standard of review it employs in relation to collective labour rights, in particular, the right to strike. Notably, in *Schmidberger*, the Court seems to be particularly concerned with protecting the effectiveness of the environmental action, whilst in *Viking* and *Laval*, it finds the strike actions in question disproportionate precisely because of their effectiveness, which the Court sees as a failure on the part of trade unions to choose a

35 *Schmidberger* (n 15), paras 82–89.

36 ibid, para 79.

37 ibid, paras 80, 89–90.

38 ibid, paras 90–91, 93.

course of action that is 'least restrictive' on the economic freedoms. Moreover, the necessity review is applied directly to the actions of trade unions rather than governments, thus denying the trade unions the autonomy they enjoy as bodies governed by private law. The apparent paradox of this situation is that trade unions, despite their status as private actors, seem to be treated like States in terms of their regulatory role and responsibility in complying with EU free movement rules,[39] yet, in contrast to governments in *Schmidberger*, *Omega* and other human rights cases, they are given no margin of discretion in their actions.[40]

Considering that collective labour rights are recognised as fundamental rights in EU law and protected under the Charter, the CJEU would be expected to afford them the level of protection analogous to that accorded to fundamental rights of civil and political nature. This proposition is not new to the Court. In fact, it has been advanced by AG Trstenjak in her Opinion in *Commission v Germany*[41] and in the failed Monti II draft proposed by the Commission,[42] which was in part based on the said Opinion of AG Trstenjak. Referring to *Schmidberger*, AG Trstenjak highlighted the need to adopt a symmetrical approach to the reconciliation of economic freedoms and social rights: '[i]n the case of a conflict between a fundamental right and a fundamental freedom, both legal positions must be presumed to have equal status' and a 'fair balance' between them must be sought.[43] The exact boundary between the two legal values is to

39 *Viking* (n 24), paras 34–37, 64–65; *Laval* (n 14), para 98.

40 J Malmberg and T Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' (2008) 45 CML Rev 1115, 1130–1131; L Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation' (2008) 45 CML Rev 1335, 1343–1346, 1350–1351.

41 Case C–271/08 *Commission v Germany* [2010] ECR I–7091, discussed in ch II, s 3.

42 Commission, 'Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services' COM (2012) 130 final, discussed in ch IV, s 3 and ch V, s 3.

43 *Commission v Germany* (n 41), Opinion of AG Trstenjak, paras 81, 188, 192–195.

be drawn by conducting a double proportionality review:[44]

> it must be determined whether, having regard to all the circumstances of the case, fundamental freedoms may justify a restriction on the fundamental right to bargain collectively. . . or, conversely, whether those fundamental rights demand that the scope of those fundamental freedoms and the secondary law based thereupon must be limited.[45]

Despite a promising rhetoric, the conclusions reached by AG Trstenjak did not reflect a symmetrical application of the proportionality review. Trstenjak concluded that the right to collective bargaining was not capable of justifying the restriction on Arts. 49 and 56 of the TFEU because it was 'possible to conceive of [a less restrictive] alternative scheme compliant with Community law' to achieve the social objectives pursued.[46] Arguably influenced by the Opinion of AG Trstenjak, the Court, for the first time in its case law on collective labour rights, also emphasised the importance of striking a '*fair* balance' between social and economic interests at stake. Enhancement of the level of retirement pensions for workers had to be fairly balanced against the attainment of business freedoms to pursue cross-border activities.[47] The balancing process adopted by the Court was, however, asymmetrical and favoured commercial interests over collective labour rights. Following Trstenjak's Opinion, the Court concluded that it was possible for Germany to accommodate its social policy objectives without completely disregarding the framework of EU public procurement rules.[48]

A proper application of the balancing test would require a genuine two-fold enquiry into the relationship between economic freedoms and collective labour rights. So, for instance, in the case of the right to strike, the proportionality review currently

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44 *Commission v Germany* (n 41), Opinion of AG Trstenjak, para 189.

45 ibid, para 84.

46 ibid, para 215.

47 *Commission v Germany* (n 41), para 52.

48 ibid, paras 53–56.

employed by the Court would need to have an additional dimension whereby the Court would assess whether the exercise of the freedom of establishment or freedom to provide services – for example, in the form of asking for an injunction to restrain strike action – is appropriate and necessary for the achievement of the economic objectives of the Union in light of the impact it has on the right to strike.[49]

A fair balance approach would ensure the observance by the Court of the principle of proportionality enshrined in Art. 5(4) TEU because, as Barnard puts it, it would limit both economic freedoms and collective labour rights, but only insofar as each could be optimised without undermining the essence of the other.[50] Applied in combination with the doctrine of margin of appreciation, it would also require that the act of balancing itself be primarily performed by the national authorities and supervised by national courts, with guidance by the CJEU.[51] The increased role of national authorities would not only ensure that the constitutional limits of EU action are respected, but would also guarantee that decisions affecting the most sensitive areas of national policy are adopted by actors that are most familiar with the context and implications of these decisions.

(ii) *Santos Palhota and Others*: the role of the Lisbon reforms

The argument for relaxing the Court's standard of review of national measures of worker protection has been gaining increasing support in light of the reforms brought about by the Treaty of Lisbon. In this respect, the Opinion of AG Villalón delivered in

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49 This suggestion has been advanced in C Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action' (2012) 37 ELR 117, 124. See also P Syrpis, 'Reconciling Economic Freedoms and Social Rights – The Potential of *Commission v Germany* (Case C–271/08, Judgment of 15 July 2010)' (2011) 40 ILJ 222, 226.

50 Barnard (n 49) 122–124.

51 For a comprehensive analysis of what margin of appreciation entails for the distribution of tasks between the CJEU and national courts, see Ziglinski (n 7) 107–146.

Santos Palhota and Others[52] just weeks after the Opinion of AG Trstenjak in *Commission v Germany*, deserves a special mention. Taking the view that fundamental freedoms had to be interpreted in light of the Lisbon reforms, AG Villalón advocated for a relaxed proportionality review of national legal interests that were protected under the Treaties:

> 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, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality.[53]

This paragraph seems to reflect the spirit of the propositions advanced in this chapter. Effectively, it suggests that non-market interests which have a legal expression in the Treaties stand on par with the fundamental freedoms and therefore require the Court to make the necessary adjustments to its proportionality review so that to accommodate the protection of those interests. AG Villalón places a strong emphasis on the reforms brought about by the Treaty of Lisbon as providing the legal basis for the suggested approach.

The Lisbon reforms should certainly be seen as an incentive for the Court to re-evaluate the position it has maintained thus far as regards the protection of non-market values in the free movement law. These reforms should not, however, be regarded as the legal basis or, more specifically, the sole legal basis justifying the reversal of the Court's case law. Crucially, the primary basis for such a reversal lies in the constitutional sensitivity of a range of policy areas that have thus far been affected by EU internal market law in the absence of a sophisticated mandate for the EU – and

52 Discussed in ch II, s 3.

53 Case C–515/08 *Santos Palhota and Others* [2010] ECR I–09133, Opinion of AG Cruz Villalón, para 53.

even less so, the Court – to regulate those areas. Moreover, as demonstrated in Section 4 of Chapter V, historically, the framework of the Treaties has always included an economic and a social dimension, requiring, as recognised by the CJEU itself, that economic freedoms under EU free movement rules be balanced against the social policy objectives.[54] In this respect, the Lisbon Treaty does not introduce anything substantially novel; rather, it seems only to make more express the need to protect the non-market values in EU law.[55]

(c) *Exemption*

Exemption from the application EU law is the last of the three interpretative techniques proposed in this chapter. It could be considered as the strongest form of expression of the principle of subsidiarity and, as such, could justify the removal of certain matters from the purview of internal market law in exceptional circumstances.[56] This proposition builds on the Court's *Albany* judgment, discussed in Chapter IV, where the Court held that collective agreements must be regarded as falling outside the scope of Art. 101 TFEU since otherwise the social policy objectives pursued by such agreements would be undermined.[57]

The *Albany* exemption could potentially be applied in relation to domestic policies and practices that appear to be in inherent contradiction with the deregulatory

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54 *Viking* (n 24), paras 78–79; *Laval* (n 14), paras 104–105.

55 On this point, see S Weatherill, 'Justification, Proportionality and Consumer Protection' in Koutrakos, Shuibhne and Syrpis (n 29) 253–257 and Shuibhne, 'Primary Laws' (n 29) 307–310, both showing how the Court already 'mainstreams' non-economic considerations in some of its pre-Lisbon free movement case law.

56 See, in this respect, the interpretation of judicial subsidiarity by T Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50 J Com Mar St 267.

57 *Albany* (n 14), paras 59–60.

aspect of the EU's internal market rules, either competition or free movement.[58] This argument has been advanced in *Viking*, *Laval* and *Commission v Germany* by trade unions and a number of Member States, who argued that, by analogy with *Albany*, the rights to collective bargaining and collective action should be excluded from the application of Arts. 49 and 56 TFEU. The Court however refused to do so. It explained that, unlike in the relationship between collective bargaining and competition law, it was not inherent in the very exercise of trade union rights that EU fundamental freedoms would be prejudiced.[59] At the same time, the free movement rules did not affect the essence of trade union rights in a manner equivalent to competition rules.[60]

The Court's assumption that there is no inherent conflict in the exercise of trade union rights and the fundamental freedoms is neither convincing nor accurate. Notably, the definition of a restriction on the free movement adopted by the Court is extremely broad and encompasses any measure or practice liable to make the free movement 'less attractive'. Accordingly, as has been previously pointed out, as long as an undertaking wishes to provide services in a Member State offering a higher level of worker protection than the undertaking's home Member State, the legal environment of the host State will always be less attractive, as it takes away the undertaking's competitive advantage of using a cheaper labour force. Therefore, in systems that rely on trade unions for the regulation of working conditions, it does indeed seem to be inherent in the exercise of collective bargaining and the right to strike that the economic freedoms will be 'prejudiced'. Notably, this conflict is created by the Court itself through broadly defining the category of restrictions. Yet this circumstance does not change the

58 See A Bogg, '*Viking* and *Laval*: the International Labour Law Perspective' in M Freedland and J Prassl (eds), *EU Law in the Member States:* Viking, Laval *and Beyond* (Hart Publishing 2014) 68–72, advocating for exemption from free movement law for collective labour rights.

59 *Viking* (n 24), para 52. See also *Laval* (n 14), para 86; *Commission v Germany* (n 41), paras 45–47.

60 *Commission v Germany*, paras 47, 49.

outcome, which is that the two competing interests appear to be, by (the Court's) definition, in an inherent conflict.

By the same token, it seems to be inherent in the exercise of the economic freedoms that whenever there is a conflict between them and collective labour rights, the social policy objectives pursued via the exercise of collective labour rights will be undermined. This situation is predetermined by the Court's rigorous application of the necessity review. *Commission v Germany* offers a useful illustration in this respect. In this case, the Court held that, unlike the obligation to comply with competition rules, obligation to designate pension providers in compliance with EU free movement rules did not affect the essence of the right to collective bargaining or undermine the objectives pursued by the social partners.[61] In particular, there was nothing in the public procurement directives to preclude a local authority employer from specifying in the call for tenders the conditions to be complied with by tenderers in order to prevent the selection of workers for insurance purposes on the basis of medical grounds.[62]

Certainly, public authorities always have the option of selecting insurance funds by themselves rather than delegating this choice to the social partners. Taken to its logical conclusion, this argument would equally suggest that in cases like *Albany* and *AG2R*, the objective of providing the desired insurance cover for the workers in question could have been successfully achieved by the State acting alone, without the inevitable distortion of competition arising from the conclusion of anticompetitive agreements by the social partners. Yet in *Albany* and *AG2R*, the Court chose not to follow this route because it took the view that doing so would have undermined the prerogative of trade unions to regulate conditions of work and employment through the

61 *Commission v Germany* (n 41), para 49.

62 ibid, paras 57–58.

process of collective bargaining. However, this was exactly the effect that the application of public procurement rules had on the right to collective bargaining in *Commission v Germany* – collective agreements were precluded from being used as a method of regulating worker protection issues.

The above analysis goes to show that the interpretation of an 'inherent conflict' adopted by the Court is unfairly selective and incoherent. At the same time, however, if the existence of an inherent conflict between internal market rules, on the one hand, and nationally protected interests, on the other, were determined on the basis of how the Court interprets the concept of restriction and the test of proportionality, the category of measures that would be *inherently* in conflict with internal market rules may be extremely difficult, if at all possible, to define, as it could potentially encompass any regulatory measure. Therefore, in order for the method of exemption from EU law to become a workable technique of judicial interpretation, the Court would need to define its proper scope, but in a manner qualitatively different from its attempt to do so in *Commission v Germany*. Admittedly, it is far from certain whether this task would be possible to accomplish in practice, given the *ad-hoc*, reactive nature of judicial law-making. In fact, it might be more appropriate (and effective) for further decisions in this area to be made by the EU's legislative institutions, with an expectation that the Court will not invalidate these decisions through a market-biased Treaty interpretation. However, in the current state of the law, the exemption formulated in *Albany* does not seem to be capable of providing a coherent and reliable general exemption from internal market rules for certain types of national practices.

3 Interim Conclusion

The reinforcement of the principles of subsidiarity and proportionality into the Court's practice would bring about a more relaxed judicial review of national measures in the areas of particular constitutional and political sensitivity, thus according more room for autonomous decision-making by the Member States. Three techniques of judicial interpretation could be employed to that end – margin of appreciation, fair balance and exemption. Margin of appreciation would be particularly suited to protect Member States' national social identities, embedded, in particular, in their healthcare, education and industrial relations systems. The fair balance technique, employed with regard to collective labour rights, would bring the Court's case law in line with the Treaty recognition of the equal value of the EU's economic and social dimensions. Finally, the exemption from the scope of application of EU law could apply to aspects of public policy that are in inherent contradiction with the deregulatory dimension of the internal market. However, the exemption technique is unlikely to serve as a viable defence against the reach of internal market law unless its proper scope is (re)defined in EU legislation and 'upheld' by the Court in its future case law.

A relaxed judicial review would also alter the institutional balance of powers between the EU's judiciary and the legislature. By showing deference to national regulatory choices, the Court would give more space to the EU legislature to address the issues concerned under the functionally broad legal bases. At the same time, in the absence of detailed regulatory guidelines on behalf of the Court, legislative intervention would become less likely as there would be no pressing need to remedy or, as often is the case, codify the Court's case law. Problems that are politically sensitive, yet require common solutions, could instead be addressed by EU-level soft law initiatives or by taking intergovernmental action, thus maintaining an appropriate degree of respect for the regulatory autonomy of the Member States.[63]

[63] For examples of such measures taken in the gambling sector, see Council of Europe Convention on the Manipulation of Sports Competitions (adopted 18 November 2014) CETS 215; Commission, 'Towards a comprehensive European framework on online gambling' (Communication) COM (2012) 596 final; Commission Recommendation 2014/478/EU on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online [2014] OJ L214/38.

VII. Conclusion

Building on the comparative analysis of CJEU case law involving areas of national policy of comparably high constitutional and political sensitivity, this thesis sought to determine the constitutional implications of the exclusive authority to interpret EU internal market law conferred upon the CJEU.

The thesis found that the exercise by the Court of its interpretative authority in the areas under study – healthcare, education, collective labour law, and gambling – varies in terms of its effects on the regulatory autonomy of the Member States depending on whether domestic measures are assessed in light of free movement or competition law. EU competition law, at least as interpreted in relation to healthcare and collective labour law, appears to be better suited to accommodate social interests embedded in national public policies because of the weight it accords to the principle of social solidarity.

The Court's free movement case law, on the other hand, generally displays a more aggressive deregulatory approach. As a result, the Court's judgments are prone to produce quasi-legislative effects that influence the content of national social policies and thus create tensions of a substantive and constitutional nature. From the constitutional perspective, this case law displays varying degrees of respect, across the four areas under study, for the principles governing the vertical division of competences in the EU – the principles of conferral, subsidiarity and proportionality. First, the Court's interpretation of the *scope of application* of the free movement rules in relation to the areas of healthcare, education and collective labour law, which are in principle excluded from the EU's regulatory competence, sits in tension with the principle of conferral because it is unjustifiably expansive and often incoherent in light of the text and the overall objectives of the Treaty.

Second, the Court's *standard of review* of national measures and practices that fall within the scope of free movement in the areas under study is inconsistent in light of the principles of subsidiarity and proportionality. Whilst judgments concerning healthcare, education and labour law display a close-scrutiny approach, focused on the requirement to prove the necessity of a particular regulatory measure, the case law on gambling exemplifies a mild review, limited to assessing the overall consistency of national regulatory systems. The apparent contrast in the respective standards of review suggests that the Court fails to consider the implications of its judgments for the scope of national regulatory autonomy in the areas of healthcare, education and collective labour law. In doing so, it departs from the principles of subsidiarity and proportionality: the former – by depriving Member States of any meaningful degree of regulatory discretion, the latter – by advancing the deregulatory element of the internal market to the point of undermining the values of social solidarity whose protection falls within that discretion.

On the horizontal level, the Court's case law distorts the constitutional balance of powers between the EU's legislature and the judiciary by creating an inter-institutional dynamic that effectively deprives the EU's legislative institutions of their law-making prerogative. It does so in three main ways. First, it reduces the choice of legislative options to a range inadequate to remedy the issues raised by the case law. This situation results from a combination of two factors: constitutional constraints on EU action, reflected in the limited availability of the legislative bases, and the difficulty of achieving an EU-wide political agreement, given the sensitivity of the matters at hand. Second, where the political consensus is reached, the Court predetermines the scope and content of legislative action through its detailed interpretation of EU primary rules. Third, where a certain legislative measure is already in place, its judicial interpretation in light of the Treaties neutralises its effect and makes this new interpretation immune from subsequent legislative amendment. The described inter-institutional dynamic is also problematic from the point of view of the vertical division of competences because it makes the Court *de facto* the ultimate lawmaker in policy areas that were supposed to stay within the prerogative of the national legislative bodies in the first place.

The thesis proposed a solution aimed at restoring the balance of competences and powers within the EU and thus easing the tensions created by the case law. It invited the Court to reflect on the recent constitutional developments in EU law brought about by the Treaty of Lisbon and, given the room for interpretative manoeuvre it enjoys in fulfilling its mandate, to relax the standard of judicial review in relation to national measures that in principle fall outside the EU's legislative competence. This could be achieved through a set of techniques of judicial interpretation which are already to be found in the Court's internal market case law and which seem to manifest themselves as particular expressions of the principles of subsidiarity and proportionality in judicial practice. The techniques in question are the doctrine of margin of appreciation, the fair balance (or double proportionality) approach and exemption from the scope of application of EU law.

Whilst having a positive impact on the vertical division of competences between the EU and the Member States, a relaxed judicial review would also alter the existing institutional balance of powers between the EU's judiciary and the legislature. By showing deference to national regulatory choices, the Court would give more space to the EU legislature to address the issues concerned at the EU level, provided that political consensus is reached. At the same time, in the absence of detailed regulatory guidelines stemming from the case law of the Court, legislative intervention would become less likely as there would be no pressing need to remedy or, as often is the case, codify the Court's judgments.

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