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ARE NATIONAL SOCIAL PROTECTION SYSTEMS UNDER THREAT?

Observations on the recent case law of the Court of Justice

Alessandra Bosco

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Alessandra Bosco

At Notre Europe, Alessandra Bosco, an Italian national, monitors issues relating to social protection, the European employment strategy and the European social dialogue. The social issues raised by European integration have been central to her research and professional career for a number of years. In 1994, after obtaining a Master's Degree from the College of Europe in Bruges and a degree in industrial relations from LUISS university in Rome, she contributed to the preparation and follow-up of the White Paper on a European employment strategy at the European Commission. Between 1995 and 1998, she was a researcher on comparative and European social protection policies at the research institute of the European Trade Union Confederation (ETUI) in Brussels, where she carried out a number of studies for the Economic and Social Committee.

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FOREWORD

"Social security and social protection of workers" is one of the areas in which unanimity is required within the Council. The unspoken implication for the European integration process is that this is a "reserved area", part of the mysterious process whereby each State preserves its citizens' feeling of belonging to a community. All the surveys carried out have consistently confirmed that this is fundamentally supported by European public opinion.

Yet we should not jump to the conclusion that all is clear-cut. The Court of Justice, in fulfilling its duties, implicitly identifies – *a contrario* – the Union's tasks in the sphere of social protection. *A contrario*, because the proceedings are brought – through national courts – by groups which are challenging the constraints set by national social protection systems (whether private-sector operators wishing to expand the scope of their activities or social insurance beneficiaries wishing to rid themselves of national shackles). Solidarity is therefore an argument always used by the defence, never in a positive, pro-active manner, and we can hardly criticise the Court for not choosing its plaintiffs.

In recent years, it has thus had to deliver rulings in an increasing number of cases in which competition rules and the principle of free movement of goods and services were invoked to challenge national social protection systems. While the number of cases is still too limited for a clear doctrine to be inferred, a few trends can nevertheless be identified in the Community's case law to date.

The conclusions emerging from Alessandra Bosco's in-depth examination of the issue are mitigated. On the one hand, we must salute the wisdom of the Community's judges, who have managed to draw a reasonable line between economic freedom and solidarity. In the process, they have demonstrated that they had no intention of undermining each Member State's freedom to establish its social solidarity system according to its own genius and traditions.

Nevertheless, the growth in the number of proceedings requiring judges to settle issues of such significance on the basis of fairly general positive law provisions is somewhat disturbing. The ties of solidarity between members of a given society are too important an issue to be addressed indirectly, through legal proceedings. Despite the caution shown by the Court of Justice to date, we would do well not to underestimate the risks involved.

I believe the situation calls for urgent debate on the need to establish a more positive and precise definition of the concept of subsidiarity, which seems to me to be consubstantial with that of social protection. To her credit, the study carried out by Alessandra Bosco encourages us to do just that by revealing the tension between economic integration and social protection that has emerged in recent years.

Jacques Delors

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INTRODUCTION

Community case law has traditionally been a highly specialised subject and the action of the Court of Justice has been discussed only among experts on European integration. This relative lack of public debate on a crucial issue seems to be coming to an end. In recent years, the case law of the Court of Justice has been the subject of increasing interest on the part of a ever-wider range of actors concerned with developments in European integration, and has even caught the attention of a less specialised audience.

In particular, certain recent judgements on economic and social issues have been widely commented on by the European press. The relationship between economic and social aspects is giving rise to important questions as to the link between free movement – the cornerstone of the single market – on the one hand and solidarity and social ties on the other. It also raises the issue of the very direction European integration is to take, since the founding fathers initially launched a political project based primarily on an economic approach and the relation between the *sui generis* nature of Europe and the functions of the nation-State is central to any vision of this common endeavour.

Although the press attention given to the Community economic and social case law in recent years reflects increasing interest in the issues involved, the main impression one derives from this coverage is that national sovereignty in the social sphere is gradually being eroded, in particular with respect to social protection. The image of a Europe as "Trojan horse of liberalism" slipping through the borders of the welfare States often appears in comments on the activities of the Court of Justice.

In the light of these reactions, we have attempted to verify whether there was any tension between European economic integration and national control over social protection systems. Our key question was to determine whether the economic integration process initiated by the treaties was increasing pressure for a harmonisation of social protection systems. Are market forces levelling the social systems in the Member States?

We chose to focus on the Court of Justice for the purposes of this study. We are aware that this methodological option prevents us from providing an exhaustive overview since a number of other players in European integration – such as the Commission, with its communications on convergence – are excluded from the scope of our analysis. We nevertheless concentrated on the Court of Justice because it has, on a number of occasions in the past, prompted Member States to move into new policy areas by challenging substantial sections of their sovereignty. A number of its recent decisions did not go unnoticed in this respect.

Academic research has been monitoring the Court's role in the European integration process for some ten years. Yet few of these studies – such as those carried out by certain American authors (Leibfried and Pierson, 1995) – have considered its influence in the relation between economic integration and social protection. In investigating a relatively unexplored field of research, our study seeks to adopt an original angle in comparison with these other authors.

The internal market is based on the body of rules on competition and the four freedoms (free movement of goods, services, people and capital) enshrined in the treaty. In interpreting the treaty, the Court of Justice has had to rule on the relation between some of these Community

provisions and national social protection systems. We concentrated our research on the case law relating to competition and the free movement of goods and services, without considering the free movement of workers as such.

The treaty contains provisions on the free movement of workers, designed to establish a European labour market in which this production factor would be able to move freely. The Community legislator has set important social rules in this area to ensure that migrant workers are not subject to discrimination in relation to their national counterparts and that national social protection policies do not hinder mobility within the Community. However, they are relevant only to the limited fraction of the population (2%) that chooses to settle in another Member State. We therefore opted to restrict our analysis to determining what impact any tension between European economic integration and social protection might have on the majority of European citizens who have remained based in their home country.

In the first part of our study, we will look at the case law relating to competition rules. Traditionally, social protection institutions have enjoyed exclusive rights in organising solidarity within national borders. Are these national borders caving in under the pressure of competition from other Community Member States? Are we witnessing a challenge to the exclusive rights of national institutions through the application of Community competition rules?

The second part of the study is devoted to analysing the case law relating to the free movement of goods and services. A judgement of the Court of Justice on the movement of medical goods and services recently sparked a debate on "medical tourism", i.e. the possibility for European citizens to take advantage of the health systems in other Community countries. Are we confronted with an emerging "crossborder patient" phenomenon which might eventually undermine our healthcare schemes? Will the mobility of healthcare beneficiaries pit our national health systems one against the other?

Taking these questions as starting point, we propose to explore the nature of the relation between European economic integration and social solidarity, and take stock of the current situation. In this way, we hope to contribute to a debate which is central to any reflection on our common European identity.

CHAPTER I – SOCIAL PROTECTION AND COMPETITION

Preliminary remarks

Competition rules play a key role in the economic integration process started by the treaties. One of the Community's main tasks is to promote competition inside the internal market which, under Article 3 (g) EC, must not be "distorted" by undertakings and States.

As pillars of the internal market, competition rules complement the principles of free movement of goods and capital, freedom to provide services and freedom of establishment. They guarantee that the abolition of institutional obstacles to trade will not prompt undertakings and States to try and establish other barriers to economic integration. Competition law is thus intended to ensure that companies do not restore national market boundaries through concerted or abusive practices and that States do not attempt to hinder the interpenetration of economies via measures to protect their national industries. Community competition law is therefore made up of a body of rules superimposed on national law, which punishes only behaviour which is "incompatible with the common market" and which "is likely to affect trade between Member States" (Shapira *et al.*, 1994). It is a legal sphere which at first glance does not appear to have a bearing on social protection.

The underlying principle of social protection is solidarity. In all of the Union's Member States, social protection systems reflect the way in which occupational or national solidarity, depending on the country, was established to replace the traditional family or neighbourhood solidarity which the upheavals resulting from industrialisation, rural emigration and urban development had greatly undermined. In this sense, social protection is a means of socialising risks and institutionalising solidarity by establishing a redistributive community (Ferrera, 1993).

The purpose of a social protection system is thus to prevent the occurrence of a number of contingencies inherent to life – illness, unemployment, old age, to mention but a few – and provide individuals and families with remedies and financial compensation to help them cope with these contingencies when they arise (ILO, 1984). It therefore establishes solidarity among certain categories of individual facing certain risks. In all Member States of the Union, social protection is regarded as a fundamental right.

The borders of social protection systems coincide with those of the nation-State. In the Community's legal system, legislation on social protection is the preserve of the Member States. The only transfer of powers to the Community institutions has to do with the abolition of obstacles to the free movement of workers. To this end, social security coordination rules have established a number of crossovers between systems to ensure that migrant workers are not subject to discrimination – whether positive or negative – in relation to national workers[1].

These introductory comments would appear to indicate that the relation between Community competition law and national social protection law is subject to a double tension. First, between competition and solidarity, i.e. between free enterprise within a borderless market and helping individuals or groups confront the contingencies of life. Second, between

[1] The coordination rules apply to the basic legal systems. It was not until June 1998 that a Council directive included occupational pensions among the rights that workers could take with them – and then only partially – when they move. See below and chapter II.

specifically European rules aimed at removing national borders from the geo-economic map of the Union and the principles of a social pact forged within each Member State.

The opposition between competition rules and social protection rules centres on the "agents" of social protection, i.e. the bodies which organise and establish solidarity between individuals facing certain risks. It stems mainly from the fact that social protection institutions have been granted exclusive rights to manage financial benefits or benefits "in kind" (services). The history of "social" protection in Europe is closely interrelated with the history of these institutions, which were set up to establish solidarity within a community. Therein lies the essence of the social pacts, which are original and specific to each Member State. Thus, "the entire issue of applying competition law to social protection systems (whether governed by law or agreements) boils down to a single question: can the State or another entity – the social partners, qualified representatives of self-employed activities, etc. – be authorised or not to establish *solidarity* ties between the members of a given community faced with certain risks" (Dupeyroux, 1993 : 494).

To what extent do the exclusive rights established in each State run counter to competition rules? And, conversely, to what extent have solidarity considerations been taken into account in the definition of free trade? What, then, is the nature of the relation between these two areas of law? Is there a division or tension? What form of compromise has been found?

These are quite obviously questions which are at the heart of delicate social choices, i.e. the way in which our European societies have interpreted the relationship between economic and social considerations and have sought to strike a difficult balance between them. They are also questions which have marked, throughout the decades, the common European integration venture and which are now central to the definition of European identity as a whole.

In recent years, the Court of Justice has had to examine some of these questions and rule on the compatibility of national social protection provisions with Community competition law. Under the Community's unique legal system, the treaty's competition rules are directly applicable. This means that private individuals may invoke them before their national courts and gain effective rights from them. In such cases, when proceedings relating to matters of competition are brought before a national court, this court may ask the Court of Justice in Luxembourg how the Community rule is to be interpreted. In the event of a conflict with national law, the Community rule prevails. The treaty thus has a status of constitutional charter in relation to national law and the Court of Justice plays a role similar to that of a constitutional court (Dehousse, 1998).

What preliminary rulings has the Court of Justice delivered in the cases brought to date? How has it interpreted the relation between competition rules and social protection institutions, and according to what criteria?

I.1 Statutory social protection

The Community competition rules govern the behaviour of undertakings in the common market. With a view to preventing distortion of competition, Article 85[2] EC prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States. Article 86[3] EC further prohibits any abuse, on the part of one or more companies, of a dominant position within the common market. A position of monopoly or virtual monopoly may thus not be exploited in an abusive manner inside the common market.

These treaty rules apply to all undertakings, whether from the private or the public sector. Competition is therefore the rule, and it is only as an exception to this rule that adjustments can be made in the way the competition provisions are applied to accommodate undertakings entrusted with the operation of services of general economic interest (Article 90 EC)[4].

While the treaty contains no definition of the concept of undertaking, the Court has adopted a particularly extensive definition, which encompasses "*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*"[5].

Are social protection institutions undertakings? Are they engaged in an economic activity which is subject to the treaty's competition rules? Do their exclusive rights amount to abuses of dominant positions within the meaning of the treaty? These are just some of the issues on which national courts have referred requests questions to the Court of Justice when dealing with cases where private individuals challenged the monopolies of social protection institutions.

In the 1993 *Poucet and Pistre* judgement[6], the Court rejected the challenge to the monopoly of the French social security system, stating that systems belonging to the first level of social protection – i.e. statutory and compulsory protection – are not undertakings and are therefore not subject to Community competition law, where they "*pursue a social objective and embody the principle of solidarity*". To engage in an economic activity is to take part in trade. As basic social security systems are not a party to economic flows of that nature, the Court of Justice decided that they were not subject to Community competition law.

[2] Renumbered Article 81 further to the Treaty of Amsterdam.
[3] Renumbered Article 82 further to the Treaty of Amsterdam.
[4] Renumbered Article 86 further to the Treaty of Amsterdam.
[5] Case C-41/90, *Höfner*, judgement of 23.4.1991.
[6] Cases C-159 and 160/91, *Poucet and Pistre*, judgement of 17 February 1993. The cases involved two refusals to pay social security contributions. Mr Poucet and Mr Pistre claimed that the Canam and the Cancava, French funds managing a sickness insurance scheme for self-employed persons and an old age insurance scheme for craft occupations respectively, were undertakings which held and abused a dominant position, thus infringing competition rules. They demanded the right to contract an insurance with the company of their choice. Faced with a sustained and concerted refusal to pay social security contributions, the French court eventually turned directly to the Court of Justice.

Therefore, the social objective is the first exemption criterion of the concept of economic activity (Laigre, 1993)[7]. According to the Court, the social objective stems from the fact that the systems are intended to "*provide cover for all the persons to whom they apply, against the risks of sickness, old age, death and invalidity, regardless of their financial status and their state of health at the time of affiliation*". Furthermore, "*this activity is based on the principle of national solidarity and is entirely non-profit-making*".

The Court then went on to define the principle of solidarity on the basis of a number of factors: in a sickness insurance scheme, solidarity results from the fact that the financing does not depend on the state of health of members but on contributions which are proportional to the income from the beneficiary's professional activity, even though benefits are identical for all. There is therefore no "selection of risks" and solidarity is thus established between people in good and in less good health. Certain rights are also granted which are not proportional to the contributions paid. This solidarity, the Court continued, "*entails the redistribution of income between those who are better off and those who, [in the absence of such a scheme], would be deprived of the necessary social cover*". In an old-age insurance scheme, solidarity is embodied in the fact that "*the contributions paid by active workers serve to finance the pensions of retired workers*", through the technique known as pay-as-you-go. Furthermore, solidarity "*is also reflected by the grant of pension rights where no contributions have been made and of pension rights that are not proportional to the contributions paid*".

As we can see, in the *Poucet and Pistre* judgement the principle of solidarity, outlined by the Court for the first time, is the second criterion of exemption from competition rules. Thus, social security schemes "*are based on a system of compulsory contribution, which is indispensable for application of the principle of solidarity and the financial equilibrium of those schemes*".

Lastly, it is remarkable that the Court should have mentioned the concept of "*public service of social security*" – which does not appear in the treaty – and should have considered that its activity is not of an economic nature and is therefore not subject to competition law. In so doing, the Court created a new category which is not provided for in the treaty. It ruled that alongside private-sector undertakings, public-sector undertakings and the undertakings entrusted with the operation of services of general economic interest referred to in Articles 85, 86 and 90 EC, there are specific entities responsible for managing statutory and compulsory

[7] Nevertheless, the Court adopted a different line of reasoning in a 1991 judgement relating to labour law. The German national agency for employment – a public-sector undertaking – had a monopoly in the employment market for operations relating to the placement and recruitment of jobseekers. A private-sector undertaking challenged the compatibility of this monopoly with the Community competition rules. According to the Court, the national employment agency is an undertaking which is abusing its dominant position since it does not satisfy the full demand (at least in the case of one category of employee, executives, for only 28% of them find a job through the agency). In this case, the social nature of a measure is not enough to exempt it from the treaty rules. The Court did not accept the arguments of the German government, which attempted to justify the establishment of a public placement monopoly on historical grounds (see the *Höfner* case, *op. cit.*). The Court confirmed this case law in a 1997 judgement, which ruled that Italy, which prohibits all intermediary activities between demand and supply of employment even where they are not covered by public-sector placement offices, was infringing Articles 90 and 86 of the treaty (Mavridis, 1998 : 243, case C-55/96, *Job Centre*, judgement of 11.12.1997).

social security systems. And these are entities which the Community competition rules are not designed to cover (Kessler, 1997)[8].

I.2 Optional complementary social protection

The first level of social protection features institutions appointed by the State for the implementation and management of the statutory and compulsory system. As we have seen, in its *Poucet and Pistre* judgement, the Court ruled out the application of competition rules at that level.

Alongside that first level, complementary systems exist in a number of Union countries. These may be either compulsory or optional and are established by law, through collective bargaining or on the initiative of employers. Their purpose is to offer additional protection to groups of individuals facing risks relating to their occupation.

The 1995 *Coreva* judgement relating to these systems did not follow the *Poucet and Pistre* precedent[9]. For the first time, the Court referred to an organisation responsible for managing an *optional* complementary social protection system as an undertaking. In the case in point, insurance companies challenged the monopoly granted under French law to a social security fund responsible for managing a complementary retirement scheme. By deciding in the plaintiffs' favour, the Court indicated that a monopoly established under national law for the management of a complementary retirement scheme is contrary to Community law. Since the organisation involved was a social security fund, the judgement heralded the entry of competition rules in the sphere of social protection. In this sense, it reversed the approach of the *Poucet and Pistre* judgement.

What grounds did the Court give for its decision? It again based its reasoning on the principle of solidarity. It noted that the concept of solidarity was reflected in the following factors: the

[8] The *Poucet et Pistre* judgement marked a new development in the Court's case law. As we have seen, free competition is a key principle of the Community's legal system. Competition is the rule, even if exemptions may be granted under Article 90 EC since the treaty of Rome has recognised the existence of undertakings with particular tasks where they manage services described as being of general economic interest. These undertakings are subject to competition rules, but only insofar as the application of these rules does not hinder the performance of the particular tasks assigned to them. Throughout the decades of European integration, the Court of Justice has interpreted this exception to the fundamental principle of competition in a restrictive manner. A considerable body of case law has thus been established, which is tending to limit the scope of the exception in areas such as telecommunications, transport, postal services and energy. However, after the 1993 *Poucet and Pistre* judgement, the Court adopted a more flexible approach and, in a number of rulings, identified criteria to make general economic interest services more compatible with the treaty provisions. This change in the mix between free competition and general economic interest is further clarified in the following judgements in particular: *Corbeau*, relating to postal monopolies, of 19.5.1993, *Municipality of Almelo*, relating to the distribution of electricity, of 27.4.1994, *Eurocontrol*, relating to air transport, of 19.1.1994, *Cali*, relating to environmental protection, of 18.3.1997 (Caire, 1999; Mavridis, 1998).

[9] Case C-244/94, *Coreva*, judgement of 16.11.1995. According to a French commentator, the *Coreva* case presents major ambiguities for "it is never quite clear whether the reasoning of the Court of Justice – and the question of the Conseil d'Etat and observations of the plaintiffs – relate to retirement schemes or savings schemes" (Laigre, 1996a : 83). In that author's view, the Court considered the product offered by the French fund to be an individual savings product and therefore concluded that the fund's monopoly, which excluded insurance companies, was a barrier to competition. Laigre, on the other hand, believes that Coreva is a joint retirement scheme and that the Court did not fully analyse the mechanism for the generation of rights under the scheme and other characteristics. Along the same lines, see Mavridis, 1998. The question relating to the nature of the product is essential in determining the reference market involved, since a practice which may be regarded as restricting competition in one market may have no incidence in another.

fact that the contributions were not linked to the risks incurred and were proportional to income, the mechanism for granting exemption from payment of contributions in certain cases, the non-profit-making nature of the activity, etc. But in the Court's view, in the case in point "*the principle of solidarity is extremely limited in scope, which* follows *from the optional nature of the scheme*".

In other words, there is no solidarity because affiliation to the scheme is not compulsory. The compulsory nature of the affiliation thus became a *condition* for the existence of a principle of solidarity, whereas in the previous judgement it had been a logical *consequence* (Kessler, 1997). Following the ruling, the Court was criticised for not taking sufficient account of the risk-sharing factor – i.e. the pooling of risks –, irrespective of whether the scheme was optional or compulsory.

However, in its 1996 *Garcia* judgement[10], the Court came back to the *Poucet and Pistre* case law. In response to a challenge by French retailers and craftspeople to the obligation to contribute to social security schemes, the Court of Justice declared that "*social security schemes (…) based on the principle of solidarity require compulsory contributions (…). If (…) the obligation to contribute [were] removed, the schemes in question would be unable to survive.*"

These three judgements give a clear indication of the approach of the Court of Justice as regards the relationship between competition and social protection. First of all, the Court excludes the application of competition rules at the first level of social protection, which comprises the statutory systems. On the other hand, monopolistic management of an optional complementary retirement scheme is contrary to the treaty rules on competition. Complementary social protection is thus open to competition.

Obviously, the Court rules on the specific cases brought before it and answers questions relating to the particular cases dealt with by the national courts. However, we can begin to distinguish a theoretical separation between the first level, that of State-organised solidarity, and the second level, which is subject to free market competition. According to a French author, this approach could undermine traditional French approaches in that it makes no specific provision for the third sector in social solidarity (non-profit-making organisations such as mutual funds and joint bodies; see Laroque, 1997). In the same vein, other authors have indicated that it might be useful for the European legislator to clarify the distinction between social insurance and private-sector insurance, irrespective of the nature of the institutions which provide them (profit-making or not, role of the social partners, degree of dependence on the State, etc.). To reconcile risk-sharing with free market forces, these authors suggest making a distinction between establishing social protection schemes and managing

[10] Case C-238/94, *Garcia*, judgement of 26.3.1996. The case involved the link between the completion of the internal market in the insurance sector and social protection. Under Community directives which entered into force on 1 July 1994, the Community rules provide for full implementation of the freedom to provide services for insurance companies. Under these rules, insurance companies may freely provide services within the integrated Community area without prior authorisation from the national authorities in the host State. In the *Garcia* case, the national court asked the Court of Justice whether the entry into force of the "insurance" directives had implications for the obligation to contribute to the social security schemes of French persons working in commercial and crafts trades. In actual fact, the relationships between insurance companies and social security systems are governed by the directives themselves, and do not involve the question of obligation to contribute. For the Court of Justice, the case was therefore straightforward (Laigre, 1996b).

them, indicating that in their opinion the management of the schemes should be open to competition (Chassard and Venturini, 1995).

I.3 Compulsory complementary social protection

At the end of September 1999, the Court of Justice delivered three further judgements[11] on complementary retirement schemes which we believe mark a significant turning point in the Community's case law. The cases raised the issue of whether *compulsory* affiliation to a sectoral pension scheme was compatible with competition rules.

Complementary schemes are playing an increasingly important role in Europe and compulsory affiliation is customary in several Member States of the Union, such as the Netherlands, the United Kingdom, Ireland, Denmark, France and Greece. Most of these schemes were established under a collective agreement between the social partners rather than by law. In these countries, a framework law entitles the executive to make a joint agreement compulsory for the signatory parties and their members. The scheme set up is thus based on an agreement but is just as compulsory as a statutory one (Mavridis, 1998).

The cases for which the Dutch courts requested a preliminary ruling from the Court of Justice arose when three undertakings claimed that compulsory affiliation was contrary to the treaty provisions. In particular, under the Dutch system, the social partners of the various professional sectors conclude agreements which establish a single pension fund for each sector. Under law, this fund has exclusive responsibility for managing the funds and all undertakings in the sector must necessarily be affiliated to it.

We believe these cases raise two fundamental issues. Is the sectoral pension fund an undertaking, and do the competition rules therefore apply to it? And secondly, are the collective agreements between employer and employee organisations prohibited under Article 85 EC and is the national State's implementing law contrary to the competition rules applicable to undertakings?

Before analysing the question relating to the pension fund, we should take a brief look at the issues relating to collective agreements and their implementation through legal provisions, for they are central to the industrial relations systems of several Member States. They are also central to our question: under competition law, are the social partners entitled to organise solidarity among a given group of employees and is the State entitled to recognise this capacity? A negative answer to that question on the part of the Court would cast doubts over a fundamental element of the social pact in several Member States.

Confronted with these queries, the Court decided not to question choices of a fundamentally national nature. We believe it is worth highlighting its argumentation on this point, for it makes direct reference to the Community rules. First of all, although the question related to competition law, the Court broadened the scope of the analysis by indicating that "*under Article 3 EC, the activities of the Community are to include not only a `system ensuring that competition in the internal market is not distorted' but also `a policy in the social sphere'*". Article 2 EC provides that a particular task of the Community is *`to promote throughout the*

[11] Case C-67/96, *Albany*, case C-219/97, *Maastschappij*, and cases C-115/97 to C-117/97, *Brentjens*. The cases were joined (judgements of 21.9.1999). The comments below relate to the *Albany* case. Since these are recent and, in our view, particularly important cases, we will give a detailed analysis of the Court's reasoning.

Community a harmonious and balanced development of economic activities' and *`a high level of employment and of social protection'*."

Furthermore, the Court referred directly to the treaty article relating to European social dialogue, inserted further to the initial treaty revision in 1986, and to the agreement on social policy signed by the social partners in 1991, annexed under the Maastricht treaty and eventually incorporated further to the Amsterdam treaty in 1997. In this way, the Court established a direct link between the social policy objectives which the Member States set for the Community when reviewing the treaty and the Dutch case in point.

It pointed out that "*the Agreement on social policy states that the objectives to be pursued by the Community and the Member States include improved living and working conditions, proper social protection, dialogue between management and labour (…)*"[12].

It then established a direct parallel between the possibility available to the European social partners since 1991 to conclude agreements and apply jointly to the Council for their implementation, and the procedure in force in the Netherlands and in several other Member States[13]. It is worth noting that between 1995 and 1999, the European social partners did indeed sign three framework agreements and various sectoral agreements which were converted into directives by the Council.

Therefore, in response to the questions referred to it by the Dutch courts, the Court of Justice stipulated that the Community's competition law applies neither to collective agreements between the social partners nor to the laws established by the public authorities at the request of the social partners to make affiliation to a sectoral pension fund compulsory. Furthermore, it asserted that the collective agreement and Dutch law were fully compatible with the objectives and rules established by the Community in the social sphere. Thus, by considering the treaty provisions as a whole, the Court was able to recognise the national social policy rules.

We believe a similar concern for balance between economic and social considerations governed the response to the question of whether the pension fund responsible for a *compulsory* complementary pension scheme is an undertaking within the meaning of the treaty's rules on competition. As we have seen, further to the *Poucet and Pistre* judgement, competition rules do not apply to basic schemes whereas, further to the *Coreva* ruling, a body which manages an optional complementary scheme is an undertaking and is subject to these rules.

In the *Albany* judgement, the Court held that the pension fund is engaged in an economic activity in competition with insurance companies. It is therefore an undertaking within the

[12] In the Court's view, even if "*certain restrictions of competition are inherent in collective agreements (…), 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.*" Since "*such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector, [it] contributes directly to improving one of their working conditions, namely their remuneration.*"

[13] According to the Court, "*the request made to the public authorities by the organisations representing employers and workers to make affiliation to the sectoral pension fund set up by them compulsory is part of a regime established under a number of national laws, designed to exercise regulatory authority in the social sphere. Since the agreement (…) does not fall within the scope of Article 85 (…), the Member States are free to make it compulsory (…). The Agreement on social policy expressly provides that, at Community level, management and labour may apply jointly to the Council for the implementation of social agreements.*"

meaning of the treaty rules. Nevertheless, the monopoly which the public authorities have granted the fund – compulsory affiliation and the ensuing restriction of competition – is justified under the provisions of Article 90 EC relating to exceptions for undertakings *entrusted with the operation of services of general economic interest*.

The Court thus steered a middle course between the two previous cases, by not questioning the affiliation obligation while recognising the economic nature of the fund's activity. What were its grounds?

In the Court's opinion, the fund is engaged in an economic activity because, as in the *Coreva* case, it operates on a funded basis. Unlike in the *Poucet and Pistre* cases, the value of benefits depend on the financial proceeds from its investments. Furthermore, the fund's regulation provides that undertakings may be exempted from affiliation and may make other schemes available to their workers under certain conditions. According to the Court, the non-profit-making nature of the fund and its manifestations of solidarity are not sufficient to deprive it of its status as an undertaking.

However, the *pursuit of a social objective* and the *manifestations of solidarity* do justify the fund's right to exclusive management of a supplementary pension scheme under Article 90 EC. How did the Court come to this conclusion?

It began by citing Article 90 EC, and created new concepts in the process. As we have seen, Article 90 EC grants exemptions from competition rules for undertakings "*entrusted with the operation of services of general economic interest*". In the *Albany* judgement, in referring to Article 90 EC, the Court spoke of a "*particular social task of general interest*", and indicated that the exemptions provided for were designed to allow States to use certain undertakings as "*an instrument of economic or fiscal policy*". In other words, the Court suggested an extension of the concept of "service of general economic interest" according to which the States' pursuit of economic and social objectives could not be dissociated. Thus, for the first time, social considerations were put forward in the economic sphere to justify restrictions of competition.

The Court then went on to examine the Dutch complementary pension scheme. It fulfils an essential *social function*, for two reasons. The first of these has to do with the nature of the Dutch pension system. The Court pointed out that the amount of the statutory pension is, in that country, extremely limited for it is "*calculated on the basis of the minimum statutory wage*". The complementary scheme allows workers who have paid contributions for the maximum period of employment to secure a pension which, in total, is equal to 70% of the final salary. In this instance, the Court followed a line of reasoning which is gaining increasing acceptance throughout Europe, whereby complementary schemes and statutory schemes are part of the same whole. Seen from this angle, statutory and complementary pensions are indissociable means of covering against the social risk presented by ageing.

The second reason is that beyond the characteristics of the Dutch system, the Court held that the significance of the social function of complementary pensions stems directly from the Community's legislation. In June 1998, the Member States adopted a directive which included complementary pensions in the coordination mechanism of the social security systems of migrant workers[14]. In referring to this act, the Court clarified the approach of the Community

[14] Albeit partially, on account of the heterogenous nature of complementary schemes within the Union. Council Directive 98/49 of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community. See note 1 and page 3.

legislator: like statutory pensions, complementary pensions are part of the set of social rights migrant workers are entitled to take with them. They are thus part of the same whole for the migrant worker. As it had already done regarding the social dialogue, the Court thus made direct reference to Community rules.

In the Court's view, compulsory affiliation is thus justified when complementary pensions fulfil a *social function* and Article 90 EC must be understood as authorising the granting of exclusive rights to undertakings which are instruments of the *social policy* of the Member States. *A contrario*, it may be wondered whether the full application of competition rules – i.e. the abolition of compulsory affiliation – would prevent the fund from fulfilling its task.

The Court believes it would. It drew on the *Corbeau* case[15] in this connection: it is sufficient that the maintenance of these exclusive rights should be "*necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions*". According to the Court, this is the case for the fund for if affiliation were not compulsory, the "*good risks*"– young employees in good health – would leave the fund, thus triggering a rise in costs owing to the increasing proportion of "*bad risks*", to whom the fund could no longer offer pensions at an acceptable cost. Furthermore, the scheme managed by the fund presents a high level of *solidarity,* resulting in particular from the fact that contributions do not reflect the risk and from the accrual of pension rights free of charge, the discharge by the fund of arrears of contributions due from an employer in the event of insolvency and the indexing of pensions.

Thus, in the Court's view, "*such constraints render the service provided by the fund less competitive than a comparable service provided by insurance companies*". Compulsory affiliation is justified, for it is the condition which enables the fund "*to perform the tasks of general economic interest entrusted to it under economically acceptable conditions [without threatening] its financial equilibrium*".

In short, in the *Albany* case the Court of Justice had to rule on a challenge – invoking Community competition law – to national rules allowing the establishment of a supplementary pension scheme and providing for compulsory affiliation to a sectoral pension fund. In its judgements, it endorsed the national approaches by providing a general interpretation of the treaty provisions and Community rules. To this end, it examined both the competition rules and social provisions. In so doing, it established a new definition of "service of general economic interest", whereby Member States pursue both economic and social objectives. Halfway between full compliance with and full exemption from competition rules, a third way was identified for statutory complementary pension schemes, which will doubtless be raised in other cases in the future.

[15] In that 1993 judgement relating to the infringement of competition rights by the Belgian postal service monopoly, the Court upheld the principle that services of general economic interest were compatible with competition rules. Furthermore, the Court stressed that competition may be restricted if the economic balance of the undertaking risks being compromised. It even recognised, for the first time, that such an undertaking necessarily has to offset its less profitable activity sectors against its profitable activity sectors. Judgement of 19.5.1993. See note 8.

In conclusion: more competitive social protection systems or a more social competition policy?

It is only in recent years that cases touching on the issue of whether the monopolies of social protection institutions were compatible with competition rules were brought before the Court. As we have seen, the Court was asked whether social protection institutions engage in an economic activity which would include them in the scope covered by competition law, and if so whether the monopolies they have been granted are compatible with the internal market. In the cases discussed, the institutions belonged both to the first and to the second level of social protection.

While the number of these judgements may seem insufficient to be indicative of a general trend or rationale, a number of common factors can be identified. First of all, the Court classifies social protection institutions according to two main criteria: the pursuit of a social objective and the principle of solidarity (whose fundamental components it has outlined). As regards the latter principle, a number of authors have commented that solidarity exists where there is risk-sharing – i.e. where risks are pooled. This implies that the "pooled risks" must be covered by a single institution, thus excluding *a priori* any application of competition rules (Dupeyroux, 1990 and 1993; Kessler, 1997).

Secondly, the Court did not consider only competition law, but also all the other treaty provisions and Community rules. Its examination covered components of the Community's social policy and the Community legislator's options in the social sphere. It has thus demonstrated its concern for all aspects of developments in European integration.

Lastly, the Court referred to case law relating to the scope of the principle of free competition and the exemption criteria allowed for undertakings which provide services of general economic interest. It is worth noting that the Community case law has tended to extend the scope of exemptions from competition rules. This trend seems to respond to the Member States' wish that national options be recognised (Caire, 1999; Dehousse, 1998; Scharpf, 1999). In this respect, it has also generated new concepts which were not provided for by the treaty.

What is the link between social protection and competition in the light of the Community's case law? In its rulings on the cases referred to it, the Court has recognised the Member States' right to establish monopolies for their social protection institutions. National social protection borders are therefore compatible with the Community free trade area. The independence of national institutions from the internal market has been preserved and the risk of competition between social protection systems within the Community therefore seems limited.

There are two forms of coexistence between social protection legislation and Community competition rules. A separation of the two bodies of law within the first social protection level, and a compromise which does not jeopardise the monopoly of institutions within the second level.

It is mainly in France, the country in which the case was brought, that the judgement relating to the *Coreva* social security fund, which managed an optional complementary retirement scheme (or an individual savings scheme), gave rise to a policy debate. The legal doctrine is attached to the concept of social protection system and to the specific features of social

protection institutions, which have a particular status in French law and which seem to have been insufficiently taken into account in the Court's case law.

However, if we consider the impact of the Community case law on the effective organisation of the monopolies of social protection institutions within the European Union, the borders of the various welfare States do not seem to have been affected.

CHAPTER II – SOCIAL PROTECTION AND FREE MOVEMENT OF GOODS AND SERVICES

Preliminary remarks

The regional economic integration model provided for by the treaties, whose purpose is to achieve balanced and harmonious development of economic activities throughout the Member States, is based on the elimination of all restrictions to the free movement of goods (Articles 3a and 9 EC[16]), along with the abolition of obstacles to the free movement of services (Article 3c EC). Furthermore, under Article 8a of the treaty as amended by the Single European Act, the internal market comprises "*an area without internal frontiers in which the free movement of goods, persons, services (…) is ensured.*"

Free movement of goods and services supposes a system in which goods and services can move through borders without encountering any obstacle established by a Member State. Achieving these freedoms, referred to as "fundamental principles" and "essential rules" of the internal market in the Court's established case law, therefore entails removing any restrictions set by the Member States to free trade and economic enterprise.

Among the treaty provisions governing the free movement of goods, Article 30 EC[17] bans quantitative restrictions on imports between Member States. It also prohibits all measures having equivalent effect.

Likewise, Article 59 EC[18] prohibits "*restrictions on freedom to provide services (…) in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.*" Establishing this freedom entails abolishing all discrimination on the grounds of the provider's nationality.

These treaty provisions have been given a particularly broad interpretation by the Court of Justice, which has systematically taken an approach favourable to trade and enterprise. In order to ensure that all Community products would be given free access throughout the Community and that service providers would be free to operate beyond their national borders, the Court of Justice did more than merely condemn discriminatory State practices. Building on certain landmark rulings of the 1970s – *Dassonville* and *Cassis de Dijon* – the Court established the concept of direct or indirect, effective or potential, barriers to Community trade and to activities of a provider established in another Member State. This went well beyond the concept of discriminatory practice.

While the scope of free movement of goods and services is broad, exemptions from these principles were interpreted in a restrictive manner. In the case of free movement of goods, measures having equivalent effect are admissible only in the cases listed in Article 36 EC, and differences in the treatment of foreign service providers can be justified only on the grounds

[16] Renumbered Article 23 further to the Treaty of Amsterdam.
[17] Renumbered Article 28 further to the Treaty of Amsterdam.
[18] Renumbered Article 49 further to the Treaty of Amsterdam.

set out in Article 56[19]. Under the principles resulting from the *Cassis de Dijon* ruling, barriers to the two freedoms may be justified by "imperious grounds of general interest", i.e. on the basis of a broader range of requirements relating to the general interest, which must be demonstrated by the State (Shapira *et al*, 1994).

Free movement of goods and of services is therefore the backbone of the internal market and in both cases, the objective sought by the treaties and the ensuing work of the Community's judicial and legislative institutions was to achieve an advanced degree of liberalisation of economic activity and an opening up of the Community market with a view to unifying it and supporting economic growth.

Like the treaty's competition rules, the provisions relating to free movement of goods and services are directly applicable and can therefore be invoked by private individuals before their national courts with a view to having them applied within the national legal system. As the institution responsible for interpreting the treaty, the Court of Justice can be required to answer questions submitted by the national courts as to whether a national provision is compatible with Community law. If not, the Community law prevails.

It was this original feature of the Community's legal system which served as basis for the Court of Justice's finding, set out in the recent *Decker* and *Kohll* judgements[20], that the fundamental principles of free movement are applicable to social security. Thus, in the words of the advocate-general, "social security is not an island isolated from internal market freedoms". Once again, these judgements clarify the limits of State powers since the Court pointed out that, while the organisation of the social security systems is entrusted to the Member States, "the Member States must nevertheless comply with Community law when exercising those powers".

More specifically, in the rulings, the Court found that a social provision applied in Luxembourg (whereby the cost of healthcare obtained abroad could be reimbursed only if a prior authorisation to travel had been granted by the national authorities) was incompatible with Community law.

This was greeted as a "revolution" or "upheaval" in social protection – and in particular healthcare – because the *Decker* and *Kohll* judgements indirectly raise crucial questions on the relation between enforcing internal market freedoms and securing one of the most basic rights of any human being: the right to health. In addition, the debate involved the patient's freedom of choice at European level on the one hand and, on the other, such fundamental factors of national control over social protection as each Member State's power to decide on the population groups eligible for social benefits, and the principle of territoriality. The prospect of citizens freely choosing where to be treated raised fears of "medical tourism" at European level, with European citizens unhesitatingly crossing borders to take advantage of

[19] In the case of free movement of goods, Article 36 provides that measures having equivalent effect may be justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. As for freedom to provide services, Article 56 states that special treatment may be given for foreign nationals on grounds of public policy, public security or public health. Articles 36 and 56 have been renumbered 30 and 46 respectively further to the Treaty of Amsterdam.

[20] Cases C-120/96, *Decker*, and C-158/96, *Kohll*, judgements of 28 April 1998.

the healthcare systems of other countries and thus undermining the States' capacity for budgetary planning.

We will analyse the *Decker* and *Kohll* judgements and the issues they have raised in greater detail further on in this chapter. We should already point out, however, that they complement a body of established case law of the Court regarding restrictions on free movement of goods and services and can therefore be seen as the culmination of a judicial process which had started several decades earlier. How did the Court, on the basis of the economic freedoms of the internal market, arrive at the principle of a degree of free movement for patients within the Community?

II.1 Economic freedoms and healthcare

The Court's analyses of internal market freedoms have included the issue of social protection systems for a number of years. In particular, the case law relating to the scope of free movement of goods and services already covers several aspects of healthcare.

Free movement of goods entails the elimination of all State measures likely to hinder intra-Community trade, and the case law of the Court of Justice has proved crucial in specifying the scope of this freedom. In particular, the Court's work in defining the concept of "measure having equivalent effect" referred to in Article 30 EC contributed to establishing the internal market freedom and curbing national powers. And private individuals achieved new rights in the process.

The *Schumacher* and *Commission v. Germany*[21] judgements are good examples of this process. The judgements relate to the ban on imports by private individuals of medical products from another Member State. The Court of Justice found that the national provision was a barrier to free movement and laid down two principles in the process. On the one hand, medical products are a good within the meaning of the treaty. Secondly, the freedom to import medical products does not apply only to businesses but also to private individuals. The Court thus put private individuals on the same footing as economic agents such as pharmaceutical companies, thereby allowing them to purchase medical products freely for their personal use within the Community[22].

The *Luisi and Carbone*[23] judgement, relating to the concept of freedom to provide services, provides a more recent illustration of the link between the completion of the internal market and the establishment of individual rights. That landmark ruling delivered in 1984 is

[21] Case C-215/87, *Schumacher*, judgement of 7 March 1989; case C-62/90, *Commission v. Germany*, judgement of 8 April 1992. Mr Schumacher is a German national who had a supply of a pharmaceutical product bought in France posted to his home address, thus infringing a German regulation which provides that medicine may be imported only by pharmaceutical companies. The second case involves similar issues.

[22] The Court also described the principle in its *GB-INNO* judgement of 7 March 1990 (case C-362/88).

[23] Joined cases C-286/82 and C-26/83, *Luisi and Carbone*, judgement of 31 January 1984. Ms Luisi and Mr Carbone are two Italian nationals who travelled to Germany and France as tourists in 1975. During their trips, they underwent various forms of medical treatment (particularly Ms Luisi). Ms Luisi and Mr Carbone had taken with them amounts of foreign currency which exceeded the limits authorised under Italian law, and had therefore been fined by the Italian treasury. Touching on issues relating to the liberalisation of payments at a time when the free movement of capital had not yet been fully achieved, the Court declared that there could be no restriction to freedom to provide services in the passive sense, even as regards payment.

significant in two respects. First of all, it addresses the issue of the material scope of application of freedom to provide services. Article 60 EC merely provides that "*services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration*"[24]. Secondly, the Court of Justice defined a new personal scope of application of the freedom. Articles 59 and 60 EC grant the freedom only to the service *provider*. The Court expanded its scope by stating that "the freedom to provide services includes the freedom, for *the recipients* of services, to go to another Member State in order to receive a service there".

This inclusion of the recipients of services in the definition of freedom to provide services is of considerable significance for social protection systems and in particular for healthcare systems given that, in the Court's view, "*persons receiving medical treatment (…) are to be regarded as recipients of services*". Medical treatment is therefore a service within the meaning of the treaty and any citizen/consumer of medical services may seek the service freely anywhere in the Union.

The *Luisi and Carbone* ruling was subsequently confirmed by the *Grogan* judgement[25] relating to the scope of the freedom to provide services. In its judgement, the Court clarified the economic nature of medical activities and found that medical termination of pregnancy constituted a service within the meaning of Article 60 EC.

In short, the Court of Justice has strengthened the concept of free movement of goods and services, on the one hand by including medical products and services, and on the other by acknowledging the right of private individuals to travel to another Member State to receive medical products and services.

In relation to national social security systems, these case-law principles present a risk for two aspects of national sovereignty: Member States' control over the population groups receiving social benefits, and the principle of territoriality whereby benefits must be used within the country. The gradual emergence of individual rights therefore seems to be increasing horizontal interaction between national systems and making their borders less impermeable. The indirect implication is the risk of "medical tourism", i.e. intra-Community movements of people seeking to draw advantage of the health systems of other countries.

With the recent *Decker* and *Kohll* cases, an additional dimension was taken into account in the Community case law: the reimbursement of healthcare. A Luxembourg court referred to the Court of Justice a question as to whether a national social provision limiting the reimbursement of healthcare obtained abroad was compatible with the two internal market freedoms.

[24] Article 60 just indicates that "*services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons*". This "residual" definition of services therefore includes the activities of the professions, alongside activities of an industrial nature, activities of a commercial nature and the activities of craftspeople. The article was renumbered Article 50 further to the Treaty of Amsterdam.

[25] Case C-159/90, *Grogan*, judgement of 4 October 1991. In this case, an Irish court referred to the Court of Justice a question as to whether medical termination of pregnancy constituted a service within the meaning of Article 60 EC and whether a Member State prohibiting such an activity could ban the dissemination of information on opportunities to resort to providers lawfully carrying out the activity in another Member State.

Under Community law, crossborder medical care is governed by Regulation 1408/71 on the coordination of social security systems. The coordination mechanism provides for crossovers, or interfaces, between social security systems in order to ensure compliance with the principle of non-discrimination between national and foreign beneficiaries. As regards the case of patients wishing to travel for treatment abroad, Article 22 of the regulation provides that if a specific authorisation is obtained before the treatment, the social security fund will pay for the person receiving care abroad.

The system established by the coordination regulation affects the principle of territoriality in healthcare matters only to a limited extent. Under the principle, financial cover for medical care is limited to treatment provided within the national territory. All Community citizens are therefore entitled to medical care within the Member State in which they are insured, except if they forfeit the reimbursement of these expenses. They may benefit from care in other Member States without paying for it only if they obtain prior authorisation from the authorities of the insuring country.

In practice, however, the territorial limitations on access to healthcare had already been seriously dented 20 years ago by the *Pierik I* and *Pierik II* judgements[26]. In these judgements, relating to the conditions governing the granting of prior authorisation under Article 22 of the coordination regulation, the Court laid down a principle whereby the authorisation to seek treatment abroad must be granted in all cases where this will improve the medical state of the patient, irrespective of any other consideration – in particular of a financial nature. Therefore, "the sole consideration of medical criteria virtually amounted to recognising the free movement of patients" (van der Mei, 1999 : 21). Following these judgements, delivered during the 1970s, the Community legislator responded by amending Article 22 of the regulation[27].

II.2 The *Decker* and *Kohll* judgements

The *Decker* and *Kohll*[28] cases involved two Luxembourg nationals who purchased medical goods and services abroad – specifically glasses and a consultation with a dentist, in Belgium and Germany respectively – without complying with the Luxembourg statutory authorisation procedure required to obtain the reimbursement of expenses incurred abroad.

The Luxembourg health system is based on medical care funds which private individuals contribute to. Beneficiaries are free to choose their general practitioner and medical specialists. The funds operate on a reimbursement basis. Patients pay the care provider and

[26] Case C-117/77, *Pierik*, judgement of 16 March 1978, and case C-182/78, *Pierik II*, judgement of 31 May 1979.

[27] According to van der Mei, "the response of the Community legislator to the *Pierik* judgements was quite far-reaching. The right to the authorisation is not secured as regards care and medical products which are not covered by the national sickness insurance and, with respect to the medical care which is covered, insured persons are not allowed to bypass waiting lists by seeking an authorisation to be treated abroad. In short, the *Pierik* judgements had opened the door of the healthcare systems of the other Member States to patients insured under public-sector insurance schemes. But the Community legislator closed it again by amending Article 22 of Regulation 1408/71" (*ibid.*).

[28] Judgements of 28 April 1998, already mentioned.

subsequently apply for reimbursement from their sickness fund[29]. Thus, since healthcare in Luxembourg is reimbursed without prior authorisation, the two Luxembourg nationals demanded the same right for treatment obtained in Belgium and Germany.

The Court was asked for a preliminary ruling on the balance between the power of Member States to organise their own health systems and the need to exercise that power in accordance with the principles of Community law.

While pointing out that the organisation of their social security system remained the responsibility of the Member States, the Court declared that "*the Member States must nevertheless comply with Community law when exercising those powers*." The Members States therefore have considerable leeway in organising their systems, but may not use this discretionary power to infringe the treaty rules.

The substantive question the Court had to answer next was whether a prior authorisation requirement under national legislation amounted to a barrier to trade in goods and services.

In answering that question, the Court referred to the *Dassonville* judgement (measure having equivalent effect) and the *Luisi* and *Carbone* judgements (barriers to freedom to provide services) and found that the prior authorisation requirement was a barrier to the two freedoms.

In so doing, the Court set out the principle whereby the beneficiaries of social insurance may travel abroad to buy medical products and care and be reimbursed according to the rates in force in the country in which they are insured. Therefore, pursuant to the *Decker* and *Kohll* judgements, when they want to be treated abroad, citizens can choose between applying for prior authorisation under Regulation 1408/71 which, if obtained, will entitle them to *full reimbursement of the expenses incurred*, or obtaining appropriate treatment from a foreign care provider and seeking reimbursement *according to the rates of the State in which they are insured* (Mavridis, 1998b).

The Court's ruling that the prior authorisation provision was a barrier to the two freedoms was in line with previous judgements whereby medical products and services fall within the scope of the two freedoms and any citizen/consumer is entitled to travel to another Member State to obtain them[30]. The *Decker* and *Kohll* judgements added the dimension of partial reimbursement of expenses to the existing case law. In purely economic terms, this is a relative incentive to seek treatment abroad.

[29] Beyond the general distinction between national health systems (United Kingdom, Ireland, Denmark, Sweden, Finland, Italy, Spain, Greece and Portugal) and social insurance systems (Luxembourg, Germany, France, Belgium, Netherlands and Austria), three arrangements can be identified regarding healthcare provision: the reimbursement system, the contract system and the integrated systems. This diversity reflects the various relations which can be established between purchasing bodies and healthcare providers, and the relative importance of the proportion paid directly by the patient. Very often, various arrangements can be found within a given system, depending on the nature of the medical service. For instance, France and Belgium apply the same reimbursement system as Luxembourg for outpatient treatment such as glasses and dental care (EC, 1998; Bosco, 1997).

[30] According to the *Decker* and *Kohll* judgements, the overriding reasons in the general interest which can justify exemptions from the principle of free movement of goods and services include the need to preserve the financial stability of healthcare systems. Furthermore, according to the Court, Article 56 covers the objective of maintaining a piece of equipment or medical service which is essential for public health or the survival of the population in the country. These are cases where the exemptions from the free movement requirement are based on specifically social objectives.

The European health context in which these judgements are set is very diverse. As we have pointed out, there are various principles governing healthcare systems within the European Union. Certain countries, such as Luxembourg, provide for the free choice of doctor, direct payment to the care provider and total or partial reimbursement of expenses by the sickness fund. Other Member States have established different procedures. In particular, certain statutory sickness insurance schemes offer benefits in kind. Persons insured under these systems call on a care provider with which their fund has concluded a contract, and the treatment expenses are borne directly by the sickness fund. Beneficiaries who resort to providers that have not concluded such an agreement must cover the expenses themselves and are not entitled to reimbursement.

The first question left unanswered by the *Decker* and *Kohll* judgements is whether the scope of this case law is limited to reimbursement-based systems or also covers the contract-based systems which provide for benefits in kind.

Secondly, the *Decker* and *Kohll* cases involved outpatient care such as glasses and consultation of a dentist. The Court did not indicate whether the judgements also applied to medical treatment delivered in hospitals.

These were precisely the questions referred to the Court of Justice by a Dutch court in the *Geraets-Smits and Peerbooms* case[31]. The case involves two Dutch patients who sought healthcare abroad without prior authorisation. A Dutch citizen, Ms Geraets-Smits, who was suffering from Parkinson's disease, visited a specialist German clinic near the Dutch border. Mr Peerbooms, who was in a coma following a road accident, was taken to a clinic in the Austrian city of Innsbruck for emergency treatment. After having paid the medical expenses, the two Dutch nationals applied for reimbursement from their sickness fund, which refused.

Contrary to the Luxembourg system, the Dutch statutory sickness insurance scheme offers benefits in kind. The system provides for direct payment by the beneficiary's sickness fund of expenses relating to healthcare obtained from providers with which the fund has concluded a contract. These contracts are supply contracts and can be concluded with either Dutch or foreign care providers. Only if prior authorisation has been granted by their sickness fund may beneficiaries resort, free of charge, to providers not covered by an agreement within or beyond their national borders.

The Dutch court before which the proceedings had been brought referred to the Court of Justice a question on whether the prior authorisation rule in force in the Netherlands was contrary to the principle of freedom to provide services.

In the advocate-general's view, the treaty rules do not preclude the Dutch provision whereby prior authorisation is necessary to seek hospital treatment in another Member State in an institution which has not concluded a contract with the patient's sickness fund.

[31] Case C-159/99, *Geraets-Smits and Peerboom*. Conclusions of Advocate-General Ruíz-Jarabo Colomber, submitted on 18 May 2000. The Court had not yet adopted a judgement at the time of writing.

II.3 Case law implications

While, from the point of view of the beneficiary of social insurance, the *Decker* and *Kohll* rulings provided new possibilities to seek care abroad, the fact that Community nationals may choose not to follow prior authorisation procedures and still obtain a partial reimbursement of expenses implies, from the Member States' point of view, some loss of control over the crossborder population groups that may potentially benefit from treatment.

On account of its novel crossborder dimension, this recent case law of the Court of Justice triggered a debate within the Member States and the other Community institutions on the mobility of patients within the Community. The table below shows the number of people seeking and obtaining medical care beyond their national border under the prior authorisation procedure provided for by Article 22 of the regulation coordinating healthcare systems.

Country	Year	Number of authorisation applications received	Number of authorisation applications granted
Luxembourg	1998	7130	7082
Austria	Each year		850
Belgium	Each year		2000
Denmark	Each year	Between 40 and 50	Between 25 and 35
France	Between 1996 and 1999	1240 / 4 years	789 / 4 years
Sweden	Each year		20
United Kingdom	Each year	800	600

Source : Coheur *et al*., 2000

Given these figures, it is hardly surprising that the cases should have arisen in a country which has a comparatively limited medical supply and surface area such as Luxembourg, where a high proportion of the population resorts to care abroad.

Although the case of Luxembourg stands out, the number of patients from other countries resorting to crossborder care seems very limited. Policies and authorisation procedures differ from one Member State to the next. Defining them – i.e. specifying the degree of freedom in seeking care abroad – is a discretionary power of the Member States[32]. While it is important to distinguish between the number of applications and the number of authorisations actually granted, the figures available indicate that the number of applications is quite limited. One may nevertheless wonder to what extent this low degree of patient mobility might be due to the prior authorisation procedure, and how voluntary patient mobility might develop if the procedure were lifted.

Given the particular nature of these goods and services, the factors influencing the patient's choice include the quality and reputation of the provider and trust and communication between the provider and the patient. Knowledge of the treatment available abroad is also a

[32] Only in a single case may the authorisation never be withheld: where the treatment is covered by the healthcare system of the patient's State of residence but cannot be provided in time, in view of the patient's state of health and the foreseeable development of the complaint (Article 22 of Regulation 1408/71).

decisive factor in the choice of the place of treatment. The seriousness of the disease, the proximity of the place of treatment and waiting time in the home country are the other central elements.

In the light of these factors, demand for healthcare beyond national borders is clearly concentrated in border areas and involves high-technology care. Furthermore, it essentially concerns a limited section of the population: the people who have access to the necessary information to make a rational choice (Hermesse, 1999).

It is worth observing that alongside these theoretical mobility factors is a situation where, for a number of years, certain Member States have been concluding crossborder agreements to facilitate access to certain medical institutions or regions for their nationals on account of their own lack of capacity. For instance, agreements have been concluded between Belgium and the Netherlands, between Luxembourg and healthcare institutions located in neighbouring countries, and between Ireland and the United Kingdom. Furthermore, several pilot experiments in a number of border regions have been undertaken under the Interreg Community programme. Border regions account for 15% of the Community area and 10% of its population. The Interreg projects are genuine laboratories for initiatives to ease administrative procedures relating to the authorisation to obtain healthcare abroad and the conclusion of partnerships and agreements between healthcare institutions and neighbouring social security systems. According to Coheur *et al.*, "these projects reflect a desire to establish international cooperation between insurers and providers and to remove a number of obstacles to the mobility of patient by setting up instruments such as mutual recognition processes" (2000 : 72).

The figures given above admittedly relate to patients obtaining crossborder treatment under the Community coordination regulation, which allows the home State to cover expenses incurred abroad. People who wish to do so can also seek treatment abroad by covering the expenses themselves; this is the older form of medical tourism practised by a more affluent and better informed section of society, which selects the best specialists and healthcare institutions irrespective of the country they are in. However, this form of mobility has no direct impact on the budget of healthcare systems. There is therefore a risk that the debate on the threat of medical tourism in Europe prompted by the *Decker* and *Kohll* judgements might lead to confusion between what is due to European integration and what stems from pre-existing societal phenomena.

A frequently-mentioned danger is competition between health systems fuelled by the mobility of healthcare beneficiaries. Yet the budgetary planning of the Member States with respect to public health does not seem to be under threat.

In fact, if we examine the question of the expenses resulting from the Community coordination regulation in relation to public health expenditure, the only noteworthy case is again that of Luxembourg. That country's share of crossborder care in public health expenditure further to the coordination mechanism amounted to 9% in 1997, i.e. an average of EUR 116 per inhabitant. In other countries, the cost of the system was under 1% (between 0.3% and 0.5%), i.e. barely EUR 2 per inhabitant (Hermesse, 1999).

As these figures and the graph below demonstrate, the impact of patient mobility under the coordination scheme on the budget of the Member States is extremely limited.

Source : Hermesse, 1998 : 57

CONCLUSION

This study has reviewed the main features which set the Community legal order apart from other international legal systems. The near-constitutional status of Community provisions on the internal market, the role of the Court of Justice in interpreting the treaty, its dialogue with national courts and the possibility for private individuals to invoke the direct application of the treaty within their national legal systems are the pillars guaranteeing the efficiency of Community law.

Given the original nature of this legal system, the Court has been asked for preliminary rulings on issues which are at the heart of delicate social choices, since they reflect the way in which our European societies have interpreted the relationship between economic and social considerations. We believe that the referral of questions to the Court of Justice in this area betrays a tendency on the part of economic agents to resort to the judicial arena, and that this could lead to a degree of "judicialisation" of social disputes.

Certain aspects of national sovereignty in the field of social protection have thus been tested against the principles of European economic integration. We believe that the Court has taken a cautious approach in its various judgements. This is particularly obvious in its more recent rulings: these tend to give greater weight to concerns related to national choices, in accordance with the wishes of the Member States.

In the light of the answers given by the Court to the questions referred to it, we have been able to confirm that any tension between European economic integration and national control over social protection systems is still a largely theoretical issue.

Social protection provisions and Community competition law exist side by side without posing any threat to the monopolies of social institutions within national borders. The establishment of competition in the internal market has not affected the Member States' independence in organising their systems of solidarity. The free movement of goods and services within the internal market does not preclude national control of healthcare beneficiaries.

The *Pierik*, *Decker* and *Kohll* judgements involved the principle of territoriality in healthcare, under which the financial cover of medical care is limited to the national area of the Member States.

While the *Pierik* judgement led to virtually complete recognition of the free movement of patients within the European Community under the principle of full coverage of expenses, the approach taken in the more recent *Decker* and *Kohll* rulings is less clear-cut. They put forward the principle of a second means of seeking healthcare abroad, providing for a partial reimbursement of care received abroad without prior authorisation from the insuring State. In its recent judgements, the Court thus seems to have taken greater account than before of the concerns of the Member States as regards the territorial organisation of healthcare systems.

While the Court's case law has established an additional right for private individuals, this has not altered the mobility patterns of patients. Recent figures on crossborder mobility indicate that the number of people using their right to seek treatment abroad is very limited. The threat of widespread medical tourism across Europe has not yet materialised. Therefore, the relative

lifting of medical borders has not led to competition between the healthcare systems of the Member States.

We must remain cautious with respect to future developments and continue to monitor the situation in this area. Nevertheless, as things stand today, the relation between the establishment of new rights at European level and social patterns within the Member States seems to indicate that the potential of law to influence the latter is quite limited. Furthermore, the debate on medical tourism triggered by the *Decker* and *Kohll* judgements is indicative of a tendency to give the European integration process properties it does not possess.

In the light of the themes discussed, completing a Community economic area without internal borders is thus compatible with preserving the independence of national social protection systems, without the Court of Justice applying pressure for these to be harmonised. The traditional relation between citizens and their welfare State thus still remains unaffected, even in the present context of economic integration.

In conclusion, the lesson we can draw from this study is that the States and European societies still have control over both the solidarity link which unites them and the shape Europe will take in the future.

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