

Social Services of General Interest (SSGI)

Study commissioned by the
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and Consumer Protection 2008

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BUNDESMINISTERIUM FÜR
ARBEIT, SOZIALES UND
KONSUMENTENSCHUTZ

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Abbreviations

AG	Advocate General
Art	Article
BGH	German Federal Court of Justice
BlgStenProtNR	Enclosures to the steno notes from the National Council (lower house of the Austrian parliament)
BVergG	Austrian Federal Procurement Act
CFI	European Court of First Instance
e.g.	for example
EC	Treaty Establishing the European Community
ECJ	Court of Justice of the European Communities
ECR	European Court Reports (Report of Cases Before the Court of Justice and the Court of First Instance)
EEA Agreement	Agreement on the European Economic Area
f ff	and following
FN	footnote
FS	Festschrift
GWB	German Act Against Restraints on Competition
i.a.	inter alia
JBl	Juristische Blätter (legal periodical)
JES	Journal of European Studies
JTDE	journal des tribunaux droit européen
KG	Austrian cartel court (court of first instance in competition matters)
KOG	Austrian appellate cartel court
NPO	non-profit organisations
OGH	Supreme Court of Austria
OJ	Official Journal of the European Union
OLG	Austrian Regional Court of Appeal
par.	Paragraph
SD	Services Directive
SGEI	services of general economic interest
SGI	services of general interest
SSGI	social services of general interest
VfGH	Austrian Constitutional Court
VfSlg	Report of rulings and major decisions of the Austrian Constitutional Court
VwGH	Austrian Administrative Court
VwSlg	Report of rulings and decisions of the Austrian Administrative Court
WuW	Wirtschaft und Wettbewerb (Journal for German and European competition law)
ZfV	Zeitschrift für Verwaltung
ZVR	Zeitschrift für Verkehrsrecht

0. Introduction and distinction

The concept of social services of general interest has no legally binding definition, neither at national nor at Community levels. Also in scientific literature the concept is taken to mean different things. This is why a distinction is needed.

What kind of social services will be addressed below?

In its meanwhile numerous Opinions on this issue the European Commission identifies a number of common organisational characteristics that should qualify social services.¹

They include:

- Operation on the basis of the solidarity principle, which is required, in particular by the non-selection of risks or the absence, on an individual basis, of equivalence between contributions and benefits. However, the principle of solidarity cannot be a characteristic exclusive to social services. In many instances, such services operate on the principle of supply and social welfare. Especially welfare services are only granted to the needy and/or after having assessed the need in question.²
- Quality assurance and quality control are of special importance to social services in general.
- They should be flexible and personalised integrating the response to differing needs in order to guarantee fundamental human rights and protect the most vulnerable.
- Frequently they are not for profit, based on donations and finance thus part of their activity.
- They include the participation of voluntary workers, although as a rule many segments of the social sector typically use professionally trained workers whose activities can be supported by voluntary workers.
- They are strongly rooted in local cultural traditions.
- This often finds its expression in the proximity between the provider of the service and the beneficiary, enabling the taking into account of the specific needs of the latter. A personal and continuous relationship between beneficiaries and service providers is required for certain services. They include nursing services but also any kind of longer-term personal care services, such as palliative care and probation services, drug counselling or rape crisis centres.³
- There is an asymmetric relationship between providers and users of social services that cannot be assimilated with a normal supplier/consumer relationship and requires the participation of a financing third party.

It is obvious that no final catalogue can be inferred from these characteristics. But in pragmatic terms, and for the purpose of this study, the following services and areas are used as examples:

- Youth welfare, youth support, youth protection

¹ European Commission, Social Services of General Interest, questionnaire, introductory remarks, 2 f.

² expressly mentioned by Social Protection Committee, Social Services of General Interest, feedback report to the 2006 questionnaire

³ expressly mentioned in Social Services of General Interest, replies to the questionnaire by the Republic of Austria, Vienna, January 2007

- Civil defence, emergency and disaster management
- Firefighting and ambulance service
- Social housing
- Care services in residential care and nursing homes
- Social-medical service (as opposed to health services)
 - such as care to individuals suffering from psychological disorders or addiction
- Assistance to the homeless
- Childcare facilities
- Services to encourage the inclusion of people with special needs
- Probation services

This list is primarily based on the replies given by the Austrian⁴ and other national delegations to a questionnaire communicated by the European Commission on this issue and, as such, is based on empirical evidence.

Social services in a wider sense would also include social security systems. This is why this study will also examine in greater detail ECJ case-law on this matter.⁵

⁴ Social Services of General Interest, replies to the questionnaire by the Republic of Austria (FN 3).

⁵ see Joined Cases C-159/91 and C-160/91, *Poucet and Pistre*, ECR 1993, I-637; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband*, ECR 2004, I-2493; and Case C-205/03 P, *FENIN*, ECR 2006, I-6295.

I. Analysis of underlying primary law

1. Fundamental freedoms

1.1. Boundaries between economic and non-economic activities

The rules on the internal market are applied to activities of an economic nature only. Social services could be of such a nature, but need not always and necessarily qualify as such. This is why the relevant criteria used in case-law and practice are to be presented analytically to facilitate distinction. Analysis will be followed by an overview table of the state of Community case-law as it stands at present.

1.1.1. *The concept of undertaking*

Both the Community rules on competition and the Community rules on State aid use the basic concept of undertaking in respect of the personal scope of application. Meanwhile a considerable body of case-law on this concept has been established by the European Court of Justice. The ECJ holds that the legal status of the entity in question is irrelevant. An undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed.⁶ This signifies that, in principle, also a legal entity under public law or a non-profit organisation can be undertakings within the meaning of the EC Treaty. Although, by definition, social entities are not profit-oriented, this will not, *per se*, exclude them from being deemed an undertaking unless other characteristics come into play. Undertakings can also be entities without any direct and payable exchange of services between the entity and its 'customer'. Under Community case-law hospitals may be regarded as undertakings even if the economic relations between patients and hospitals are managed by a third party, i.e. the patients' health insurance scheme, within a system of benefits in kind.⁷ This has been countered with the argument that the main structural principles regulating the provision of medical services are part and parcel of social security systems and their organisation and do not come under the fundamental economic freedoms guaranteed by the EC Treaty, as those involved cannot determine the contents, type and extent of any service nor its remuneration.

AG *Dámaso Ruiz-Jarabo Colomer* agreed with these arguments.⁸ He focused on the fact that the Dutch social insurance system only knew flat rates and subsidies that covered a mere part of the actual costs of hospitalising patients. In the light of these circumstances the benefits in kind were not provided for remuneration and thus were no services within the meaning of Art 50 EC. Moreover, in the *Poucet and Pistre* case, the Court of Justice had concluded that the sickness funds, or the organisations involved in the management of the public social security system, 'fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions'. According to this ruling, the system would be comparable to those social security systems under which the operators of such systems provided themselves with funds and staff under contracts defining hours of work and salaries in advance. This was similar to national education systems, which the Court of Justice had excluded from the scope of the freedom to provide services.⁹

⁶ Case C-41/90, *Höfner and Elser*, ECR 1991, I-1979, par. 21.

⁷ Case C-157/99, *Smits and Peerbooms*, ECR 2001, I-5473, par. 53 ff.

⁸ Conclusions in Case C-157/99, *Smits and Peerbooms*, ECR 2001, I-5473, par. 42 ff.

⁹ Case 263/86, *Humbel*, ECR 1988, 5375, par. 20; and Case C-109/92, *Wirth*, ECR 1993, I-6447, par. 19.

However, the Court of Justice has not followed the argument of its Advocate General.¹⁰ It refers to its settled case-law, under which medical activities fall within the scope of Art 50 EC, there being no need to distinguish in that regard between care provided in a hospital environment and care provided outside such an environment.¹¹ The specific nature of certain services could not result in such services being excluded from the elementary freedom to provide services. Moreover, certain medical services, such as those provided across borders, are indeed paid by the patients directly.

This leads one to infer that a social security system operating with benefits in kind is not, *per se*, excluded from being an economic activity. This signifies that a service that is not directly paid by the beneficiary may also be considered an economic activity.

So if neither the legal status, nor the not-for-profit nature, nor the lack of direct exchange of services, can exclude an entity from being an undertaking, what criteria need to be used to define the personal scope of application?

Under prevailing jurisprudence the only criterion would be that of whether the activity of the entity in question is of an economic or non-economic nature. Hence the internal market and competition rules need to be applied whenever industrial, craft or commercial activities are carried out with the aim of offering goods or services on any given market.¹²

1.1.2. Sovereign activities (*imperium*)

The concept of undertaking thus excludes activities resulting from the exercise of sovereign powers, i.e. activities that are reserved to the State and are thus of a non-economic nature. Incontestably, this would include the core area of sovereign powers, such as protecting domestic and external security, justice administration and maintaining external relations.¹³ However, also powers such as those relating to the control and supervision of air space, or the control and supervision of maritime ports to combat pollution, are typically those of a public authority according to case-law.¹⁴ But this core area is interpreted in very restricted terms in practical application and jurisprudence. Hence, as a rule, social services may not be regarded as *imperium*. There might be exceptions, such as when social services are tightly linked to traditionally public services so that they must be included into the core body of sovereign powers. Examples could be psychiatric treatment in the execution of sentences or, maybe, probation services monitored by criminal courts.

Since distinction depends on the nature of the activity rather than on the legal status under which it is performed, these activities are deemed to be of a non-economic nature even

¹⁰ judgment in Case C-157/99, *Smits and Peerbooms*, ECR 2001, I-5473, par. 47 ff.

¹¹ judgments in Joined Cases 286/82 and 26/83, *Luisi and Carbone*, ECR 1984, 377, par. 16; Case C-159/90, *Society for the Protection of Unborn Children Ireland*, ECR 1991, I-4685, par. 18, concerning distribution of information on clinics carrying out voluntary terminations of pregnancy; and Case C-158/96, *Kohll*, ECR 1998, I-1931, par. 29 and par. 51.

¹² Case C-222/04, *Cassa di Risparmio di Firenze*, ECR 2006, I-289, par. 108; Case C-35/96, *Commission v Italy*, ECR 1998, I-3851, par. 36; Joined Cases C-180/98 – C-184/98, *Pavel Pavlov and Others*, ECR 2000, I-6451, par. 75.

¹³ See also Communication from the Commission on services of general interest, OJ 2001 C17/4, par. 28; and Herzig Wettbewerbs-, beihilfen- und vergaberechtliche Fragen von Non-Profit-Organisationen, in *Studiengesellschaft für Wirtschaft und Recht*, Das Recht der Non-Profit-Organisationen (2006) 97, 100.

¹⁴ Case C-364/92, *Eurocontrol*, ECR 1994, I-43; par. 31; Case C-343/95, *Diego Cali & Figli*, ECR 1997, I-1547, par. 22.

when some of them are carried out by private State-commissioned organisations or other outsourced entities. This is of significance in the area of regulatory law where regulators have been established under a private legal status. But, as a rule, their regulatory activity will not come under competition law because of their non-economic nature. By the same token, independent entities which do not offer any goods and services on the market but focus on controlling and organising public demand for social services cannot be qualified as undertakings. This would include entities such as *Fonds Soziales Wien* whose activity of 'purchasing' social services would have to be considered as being an activity of the City of Vienna. Unless this activity is subject to competition law (see below), even the *Fonds* itself is not deemed to be an undertaking.

Activities of a non-economic nature are also performed by municipalities or associations of municipalities whenever they grant licences to private undertakings in the social sector.¹⁵ But they may be subject to public procurement rules.¹⁶ Finally, the combination of sovereign powers and entrepreneurial activity may be seen as violating competition rules, for instance when a municipality, in exercising its sovereign powers, distorts competition in favour of its own local undertaking.¹⁷

1.1.3. Other non-economic activities

Basic social security schemes are probably the most important segments within the social sector which, according to case-law, are excluded from competition law for failing to be of economic nature. In the *Poucet and Pistre* case the Court of Justice denied for the first time that they were undertakings.¹⁸ It referred to three characteristics: first, the social objective of managing public social security schemes; second, the principle of national solidarity ensuring statutory services irrespective of the level of financial contributions based on an equalisation system; third, the activities are not for profit. These criteria have been further developed by the ECJ in later judgements in that the social objective and non-commercial purpose are only one way of referring to the non-economic nature of a social security system, but they cannot prevent them of their status as undertakings. The key criterion is the principle of solidarity based on compulsory affiliation and, more specifically, on the absence of any direct link between the contributions paid and the benefits granted.

According to case-law also the services of national education systems at schools and universities cannot be classified as economic activities provided they are financed, essentially, out of public funds. Whereas education provided by profit-oriented entities and financed, essentially, out of private funds does classify as economic activity.¹⁹

Aside from the distinction cases decided by Court rulings, it is often difficult to draw a clear boundary line between economic and non-economic services. The European Commission appears to be aware of this problem and avoids the compilation of any catalogue of non-economic services, although the issue goes beyond competition law and has become more acute in recent lawmaking projects. For instance the Commission's State aid monitoring

¹⁵ Case 30/87, *Bodson*, ECR 1988, 2479, par. 18; Case C-231/03, *Coname*, ECR 2005, I-7287, par. 12, not yet published in ECR.

¹⁶ See details under I.4.

¹⁷ see *Kokott* in Conclusions, Case C-134/03, *Viacom Outdoor*, ECR 2005, I-1167, par. 81.

¹⁸ Case C-159/91 and C-160/91, *Poucet and Pistre*, ECR 1993, I-637.

¹⁹ Case C-109/92, *Wirth*, ECR 1993, I-6447, par. 14.

approach is that services of general interest are services of an economic nature. Also the Services Directive distinguishes between economic and non-economic activities.²⁰

Although we cannot expect the Court or the Commission to provide an exhaustive list and authoritative clarification, more recent Commission documents include a number of hints on where the Commission draws the boundary line. The Communication from the Commission on services of general interest²¹ explains that activities conducted by organisations performing largely social functions, which are not profit-oriented and which are not meant to engage in industrial or commercial activity, will normally be excluded from the Community competition and internal market rules. In the opinion of the Commission, this takes into account several non-economic activities of organisations such as trade unions, political parties, churches and religious societies, consumer associations, learned societies, charities as well as relief and aid organisations.²²

Basically, one has to concur with this view. However, inclusion in this listing is no *carte blanche*, i.e. it does not mean that the activity of an entity mentioned here will never be measured against the yardstick of Community law provisions.²³ Exemptions only refer to the non-economic core activity of the entity in question. Whenever it also engages in gainful activities outside its political, scientific or social remit, these commercial activities will definitely be subject to Community rules. In the said Communication the Commission makes express reference to this fact, but adds that application of Community rules would respect in particular the social and cultural environment in which the relevant economic activities take place.

As a rule, this would be based on Art 86(2) EC, which states that undertakings entrusted with the operation of services of general economic interest are only subject to competition rules insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.²⁴

²⁰ for details see section I.1.3 below.

²¹ Communication from the Commission on services of general interest, OJ 2001 C 17/4; see also the Commission Services' Explanatory Note for deliberations on the Services Directive, Council Document 10865/04 of 26-6-2004, retrievable from http://ec.europa.eu/internal_market/services/docs/services-dir/notes/explan-note-activities_en.pdf

²² Communication on services of general interest (FN 21) par. 30.

²³ as already argued by *Herzig* (FN 13) 102.

²⁴ for details see section I.2.4 below.

1.1.4. Overview of the current state of Community case-law concerning distinction between economic and non-economic activity²⁵

Examples of economic activities

The provision of emergency transport and patient transport even when such transport is provided by not-for-profit organisations²⁶

Employment procurement even when such activity is performed by public agencies²⁷

Exercise of control by a banking foundation which owns controlling shareholdings in a banking company, if such control goes beyond the exercise of rights of a shareholder or member, even if such activity is not for profit.²⁸

Provision of tax advice and assistance helping taxpayers meet their tax liabilities and facilitating the duties incumbent on tax authorities, even if such assistance is provided by legal persons established by employers or trade unions and licensed by the State.²⁹

Medical activities (such as dental treatment³⁰, termination of pregnancy³¹), there being no need to distinguish in that regard between care provided in a hospital environment and care provided outside such an environment.³² The fact that the patient need not pay for the medical service and/or costs are reimbursed by a sickness insurance system will not exempt such activity from being of an economic nature in legal terms.³³

Not-for-profit nature does not preclude classification as an economic activity:³⁴

The activity of a non-profit-making organisation which manages an old-age insurance scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation in keeping with the rules laid down by the authorities in particular with regard to conditions for membership, contributions and benefits. Even if such an organisation is non-profit-making, and the scheme it administers exhibits certain limited features of

²⁵ We wish to thank MMMag. Rainer Palmstorfer for his invaluable assistance in compiling this overview.

²⁶ ECJ Case C-475/99 *Ambulanz Glöckner*, ECR 2001, I-8089, par. 20.

²⁷ ECJ, Case C-41/90, *Höfner and Elser*, ECR 1991, I-1979, par. 21; Case C-55/96, *Job Centre coop*, ECR 1997, I-7119, par. 21-25.

²⁸ ECR, Case C-222/04, *Cassa di Risparmio di Firenze*, ECR 2006, I-289, par. 111-125.

²⁹ ECJ, Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl*, ECR 2006, I-2941, par. 63.

³⁰ ECJ, Case 158/96, *Kohll*, ECR 1998, I-1931, par. 29.

³¹ ECJ, Case C-159/00, *Grogan*, ECR 1984, 377, par. 18.

³² ECJ, Case C-157/99, *Smits and Peerbooms*, ECR 2001, I-5437, par. 53; Joined Cases C-286/82 and 27/83, *Luisi and Carbone*, ECR 1984, 377, par. 16.

³³ ECJ, Case C-157/99, *Smits and Peerbooms*, ECR 2001, I-5437, par. 58.

³⁴ Conclusions AG *Jacobs* of 1-12-2005, Case C-5/05, *Joustra*, ECR 2006, I-11075, par. 84; Conclusions of AG Maduro of 10-11-2005, Case C-205/03, *FENIN*, ECR 2006, I-6295, par. 14; ECJ, Case C-244/94, *FFSA*, ECR 1995, I-4013, par. 21; Case C-157/99, *Smits and Peerbooms*, ECR 2001, I-5437, par. 50-52.

solidarity which are not comparable with the features that characterise compulsory social security schemes, it nevertheless carries on an economic activity in competition with life assurance companies.³⁵

The activity of a pension fund charged with the management of a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector, to which affiliation has been made compulsory by the public authorities for all workers in that sector, and which is independent in deciding about the level of contributions paid and pension entitlements granted, and applies the principle of capitalisation.³⁶

Medical activities are economic activities even if such activities are not for profit.³⁷

Owing to their sovereign character the following activities are non-economic:

Air navigation safety services as they are connected to the exercise of powers relating to the control and supervision of air space which are typically those of a public authority³⁸

An anti-pollution surveillance with which a body governed by private law has been entrusted by the public authorities in an oil port of a Member State, as such an activity is connected with the exercise of powers relating to the protection of the environment which are typically those of a public authority, even where port users must pay dues to finance that activity³⁹

The allocation, by auction by the national regulatory authority responsible for spectrum assignment, of rights such as rights to use frequencies in the electromagnetic spectrum with the aim of providing the public with mobile telecommunication services, as the authority exclusively carries out the activity of controlling and regulating the use of the electromagnetic spectrum which has been expressly delegated to it, even if the issuing of the licences in question gives rise to a payment.⁴⁰

Funding of functions belonging to the tasks of public safety and security or their related infrastructure⁴¹

Maritime traffic control and safety⁴²

³⁵ ECJ, Case C-244/94, *FFSA*, ECR 1995, I-4013, par. 21.

³⁶ ECJ, Case C-67/96, *Albany International*, ECR 1999, I-5751, par. 85; Joined Cases C-115/97 to C-117/97, *Brentjens' Handelsonderneming BV*, ECR 1999, I-06025, par. 85 f; Case C-219/97, *Maatschappij Drijvende Bokken BV*, ECR 1999, I-6121, par. 75 f.

³⁷ Case C-157/99, *Smits and Peerbooms*, ECR 2001, I-5437, par. 50-52.

³⁸ ECJ, Case C-364/92, *SAT/Eurocontrol*, ECR 1994, I-43, par. 30.

³⁹ ECJ, Case 343/95, *Porto do Genova*, ECR 1997, I-1547, par. 22-25.

⁴⁰ ECJ, Case C-369/04, *Hutchison 3G and Others*, ECR 2007, I-5247, par. 43; ECJ, C-284/04, *T-Mobile Austria*, ECR 2007, I-5189, par. 44-46.

⁴¹ See also Commission Decision of 7-3-2007, State aid no. N 619/2006, *Germany – development of Augsburg airport*, par. 24, retrievable from: http://ec.europa.eu/community_law/state_aids/transport-2006/n619-06.pdf.

Standardisation activities and related research and development activities⁴³

Organisation, finance and enforcement of measures executing sentences⁴⁴

Finance and monitoring of railway infrastructure investment⁴⁵

Army and police activities⁴⁶

⁴² Commission Staff Working Document, Frequently asked questions in relation with Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, and of the Community Framework for State aid in the form of public service compensation, SEC(2007) 1516 final, 10.

⁴³ CFI T-155/04, *Selex*, ECR 2006, II-4797, par. 69 and 82.

⁴⁴ Working paper (FN 18) 10.

⁴⁵ Commission Decision of 7-6-2006, State aid no. N 478/2004, *Ireland - State guarantee for capital borrowings by Coràs Iompair Eirann (CIÈ) for infrastructure investment*, par. 24-31, retrievable from: http://ec.europa.eu/community_law/state_aids/transport-2004/n478-04.pdf.

⁴⁶ Working paper (FN 18) 10.

Owing to their exclusive social nature the following activities are non-economic:

The management of compulsory social insurance schemes by entities which fulfil an exclusively social function and perform a non-profit oriented activity based on the principle of national solidarity and thus provide benefits bearing no relation to the amount of the contributions, but, in the discharge of their duties, the bodies in question cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits⁴⁷.

Courses provided in certain institutes which form part of the education provided under the national education system and are fully or mainly financed from public funds, since the State, in establishing and maintaining such a national education system, which is, as a general rule, funded from the public purse and not by pupils or their parents, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields.⁴⁸

Despite their social nature the following activities are economic:

The activity of a pension fund which operates in accordance with the principle of capitalisation, which is in competition with insurance companies, and which is charged with the management of a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector, to which affiliation has been made compulsory by the public authorities for all workers in that sector.⁴⁹

The management of an old-age insurance scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation in keeping with the rules laid down by the authorities in particular with regard to conditions for membership, contributions and benefits, even where this scheme is managed by a non-profit-making organisation.⁵⁰

Hospital services, even when they are provided free of charge under the applicable sickness insurance scheme.⁵¹

⁴⁷ Joined Cases C-159/91 and C-160/91, *Poucet and Pistre*, ECR 1993, I-637, par. 15 and 18; C-218/00, *Cisal*, ECR 2001, I-691, par. 43-46; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK*, ECR 2004, I-2493, par. 51-57; C-355/00, *Freskot*, ECR 2003, I-5263, par. 78 f.

⁴⁸ Case 263/86, *Humbel and Edel*, ECR 1988, 5365, par. 17 f; Case C-109/92, *Wirth*, ECR 1993, I-6447, par. 15 f; C-318/05, *Commission v Germany*, ECR 2007, I-6957, par. 68;

⁴⁹ Case C-67/96, *Albany International*, ECR 1999, I-5751, par. 81 – 84; Joined Cases C-115/97 to C-117/97, *Brentjens' Handelsonderneming BV*, ECR 1999, I-6025, par. 80–87; Case C-219/97, *Maatschappij Drijvende Bokken BV*, ECR 1999, I-6121, par. 70–77.

⁵⁰ Case C-244/94, *Fédération française des sociétés d'assurance and Others*, ECR 1995, I-4013, par. 22.

⁵¹ Case C-157/99, *Smits and Peerbooms*, ECR 2001, I-5437, par. 47-59.

1.2. Scope of restrictions and grounds of justification

1.2.1. Discriminatory rules

In principle, social services fall within the scope of fundamental freedoms, especially the freedom of establishment and the freedom to provide services.

This signifies that, in principle, the providers of social services from other Member States may invoke the Treaty freedoms whenever they are confronted with restrictions and limitations in the take-up or pursuit of an activity in Austria. The catalogue of potentially infringing restrictions is very large indeed. First and foremost it includes rules that tend to put foreign undertakings at a disadvantage vis-à-vis domestic operators. Nationals of other Member States should be able to use their right to free establishment under the conditions laid down for home nationals. Any discrimination of other EC nationals on grounds of their nationality is prohibited. Art 43 EC thus includes a ban on discrimination. An unlawful distinguishing criterion is nationality.

Ascertaining whether there is any inequality of treatment as defined by Community law is thus easy. One would have to examine whether in any given case another (or no) provision would be relevant if the individual in question were a national of the State against which he invokes the ban on discrimination. If so, this would be unlawful discrimination. As long as the national provision is expressly based on the examined criterion of nationality, subsumption poses no problem. These factual circumstances are referred to as direct or overt discrimination. In this context Art 43 EC can be seen as a special form of the general prohibition of discrimination on grounds of nationality as stipulated in Art 12 EC. Any such discrimination is prohibited. The only point that is disputed here is whether overt discrimination in itself is illegal, i.e. whether the ban is absolute, or whether grounds of justification may be put forward.⁵²

However, it is also a case of discrimination on grounds of nationality where differentiation, although on the basis of another criterion, has exclusionary effects coinciding with those of discrimination by nationality and lead in fact to the same result. According to prevailing opinion and settled case-law, such indirect or covert forms of discrimination are also prohibited. However, indirect discrimination may be open to justification. This signifies that one has to check whether the rule in question is justified on objective grounds.

Frequently national legislations distinguish by the duration of residence in their territory rather than by nationality. Although, in formal terms, such provisions do not distinguish between national and non-nationals, they may have an exclusionary effect coinciding with that of discrimination by nationality. They are classical examples of covert discrimination in that it is evident that home nationals can meet residence requirements on a regular basis, whereas non-nationals will be able to do so only to a much lesser extent.⁵³

This leads to the conclusion that also in the social sector distinction by residence cannot be used, *ipso iure*, for non-cash subsidies and benefits in kinds. Such an approach would have to be substantiated by factual grounds. This can be illustrated by an example from the health sector. In the *Ferlini* case the Court of Justice had to rule on a Grand-Ducal Regulation under which scales of fees for medical and hospital expenses differed depending

⁵² see *Eilmansberger/Herzig/Jaeger/Thyri*, *Materielles Europarecht* (2005) par. 192 with other references.

⁵³ see also more recent case-law, such as Case C-456/05, *Commission v Germany*, judgment of 6-12-2007, not yet published in ECR. Or also *Eilmansberger/Herzig/Jaeger/Thyri* (FN 52) par. 193 with references

on whether they concerned patients affiliated to the national social security scheme or to other patients.⁵⁴ In that specific case the plaintiff was an official of the European Communities and not covered by the Luxembourgish scheme. The Court held that his discrimination was of an indirect nature based on nationality. Whereas the great majority of those affiliated to the Sickness Insurance Scheme common to the institutions of the European Communities and not to the national social security scheme, although in receipt of medical and hospital care given in Luxembourg, are nationals of other Member States, the overwhelming majority of nationals residing in Luxembourg are covered by the national social security scheme. Such differentiation could be justified only if it were based on objective considerations which were independent of the nationality of the persons concerned and proportionate to the objective legitimately pursued. Since no arguments were raised in this respect before the Court of Justice it was clear that the difference in treatment constituted discrimination on the ground of nationality prohibited under Art 12 EC.

National residence clauses are not only of relevance to those in receipt of services but may also be of relevance to those providing the services. For instance, there have been discussions on the issue regarding the selection of contract doctors and the definition of ranking guidelines by medical chambers. As they are issued by professional organisations, such rules would be part of the State sector. This also implies the invocation of the fundamental freedoms. In addition, such rules concern the right to take up and pursue activities as self-employed persons within the meaning of Art 43 EC and will thus fall within the scope of the freedom of establishment. Hence such rules have to be examined on whether they are based on strictly factual grounds. This also applies to the question of whether language-based selection criteria are permissible under Community law. German language requirements could be interpreted as covert discrimination to the disadvantage of nationals of other Member States. However, such language skills can usually be justified in respect of social services as, for reasons of general interest, communication with beneficiaries and also, if necessary, with public contracting bodies and administration authorities is generally indispensable.⁵⁵

The group of discriminatory rules concerning the take-up and pursuit of professional activities in a wider sense also includes the principles established by case-law to be applied in recognising diplomas and certificates of qualification. The landmark decision in this context has been the Court's ruling in the *Vlassopoulou* case.⁵⁶ The ruling clarifies that, in the absence of Community rules for coordinating the training and the conditions of access to any occupation that is subject to admission, the Member States continue to be entitled to make such admission dependent on the certification of specific knowledge whose level may be largely defined by the Member States themselves. However, the host State must not disregard the knowledge and qualifications already obtained by the applicant in another Member State. Rather, it is required under Art 43 to take into account the diplomas, certificates and other credentials obtained by the person concerned to pursue the same occupation in another Member State and examine to what extent the knowledge and qualifications attested by these diplomas correspond to those required by the rules of the host State.⁵⁷

⁵⁴ Case C-411/98, *Ferlini*, ECR 2000, I-8081.

⁵⁵ But the Court of Justice appears to be willing to use extraordinarily strict criteria for examining justification. See Case C-506/04, *Wilson*, ECR 2006, I-8613, par. 71 ff.

⁵⁶ Case C-340/89, *Vlassopoulou*, ECR 1991, I-2357.

⁵⁷ see also *Eilmansberger/Herzig/Jaeger/Thyri* (FN 52) par. 197 ff.

1.2.2. Indistinctly applicable rules

The fundamental freedoms are also affected by indistinctly applicable measures, which concern domestic and foreign providers alike, but which hinder, restrict or make less attractive the take-up or pursuit of an activity.⁵⁸

In practical terms, any restrictions in the number of providers will be of key relevance to the social sector. Public authorities tend to restrict the number of providers for organisational, qualitative and, more specifically, for financial reasons (e.g. supply-induced demand). This may take on the form of a *numerus clausus* (fixed number of providers; such as contract doctors accepted by social health insurance schemes; or restricted number of pharmacies), restrictions by quality criteria, or needs analyses under which market access must not jeopardise the continued existence of currently available facilities. All these restrictions are to be seen as unlawful restrictions of Treaty freedoms. As far as the freedom to provide services is concerned, this is inferred from the fact that a provider is entitled to provide services in his country of origin under the rules applicable in that country, and that the use of any additional rules of the country of destination would lead to a typical case of double control, which would constitute a greater burden on the cross-border provision of services than on the domestic provision of services. Therefore it does not come as a surprise that the Court of Justice also regards indistinctly applicable rules on needs testing as being subject to the freedom to provide services.⁵⁹

A more differentiated approach may be adopted for the freedom of establishment. In cases of cross-border establishment, providers leave their country of origin to take up their permanent establishment in the country of establishment. In so doing, and as a rule, they are no longer subject to the rules of their country of origin but to the rules of their new country of destination. Any undesired double regulatory burden so typical of cross-border situations will no longer apply. Hence the national provision in question will, as a rule, not be such that it disadvantages non-nationals from other Member States or constitutes a greater burden on cross-border procedures of establishment than on comparable national procedures of establishment. Since the fundamental freedoms only remove obstacles to the internal market and thus only focus on national policies that could restrict cross-border economic exchange, this could be a rationale for excluding such national measures from the freedom of establishment scope and not regard them as restrictions.⁶⁰

This theoretical approach has already been expressed in concrete terms in respect of the free movement of goods. In the *Keck* case⁶¹ the Court of Justice made it clear that Art 28 EC is not intended to generally enhance the sale of goods but only to remove those restrictions that would specifically hinder trade between Member States. The so-called selling arrangements are excluded from the scope of Article 28 EC as long as they affect in the same manner, in law and in fact, the marketing of domestic products and of products from other Member States.⁶²

⁵⁸ Case C-55/94, *Gebhard*, ECR 1995, I-4165, par. 37.

⁵⁹ Case C-255/04, *Commission v France*, ECR 2006, I-5251, par. 29.

⁶⁰ Detailed development of this thought in *Eilmansberger*, *Zur Reichweite der Grundfreiheiten des Binnenmarkts*, JBl 1999; 345, 355 ff; as well as *Eilmansberger*, *Die Bedarfsprüfung im Krankenanstaltenwesen*, in *Deutsch-Österreichische Sozialrechtsgespräche 2008* (in print).

⁶¹ Joined Cases C-267/91 and C-268/91, *Keck*, ECR 1993, I-6097.

⁶² Joined Cases C-267/91 and C-268/91, *Keck*, ECR 1993, I-6097, par. 16.

In the context of the freedom to provide services and the freedom of establishment the Court of Justice uses a formula that differs from the one applied in the *Keck* ruling. The criterion used by the Court is whether the national measure would be such that it hinders the exercise of these two freedoms or makes them less attractive.⁶³ However, in applying this formula the Court of Justice appears to have followed the *Keck* logic in some instances.

Thus the Court of Justice decided in the *Pfeiffer* case that such national measures were to be seen as relevant restrictions of access to certain activities in the country of establishment which operated, in law and in fact, to the detriment of undertakings whose seat was in another Member State, and it confirmed that the challenged prohibition under national law of using a certain trade name was contrary to the Treaty as such a restraining order was liable to constitute an impediment to the realisation by those undertakings of a uniform advertising concept at Community level.⁶⁴ In the *Cipolla* case the Court of Justice decided that the freedom to provide services would conflict with the application of national rules which had the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State, and considered it basically possible that this could also apply to any national scale of lawyers' fees which deprived lawyers established in another Member State of the possibility, by requesting fees lower than those set by the scale, of competing more effectively with lawyers established on a stable basis in the Member State concerned.⁶⁵

That greater difficulties in providing services across borders than within a Member State are a relevant criterion also within the context of the freedom of movement and the freedom to provide services is substantiated by the fact that the Court judges national restrictions on carrying out any work (e.g. required entry on the trades register) by whether this is a case of freedom to provide services or of freedom of establishment.⁶⁶ The rationale behind this differentiated approach can only be that, as a rule, provisions concerning certain occupational activities or skilled trade work constitute an equal burden on established domestic and foreign undertakings and are thus not suited to specifically restrict any cross-border procedures of establishment, while the application of rules concerning the performance of work to undertakings which want to be active in the Member State in question only occasionally and temporarily will frequently be under a comparably greater burden, especially so when such restrictions on carrying out work subjects such service providers to a double regulatory burden.

1.2.3. *Special case: needs test*

The situation is different for needs testing. Rules on needs assessment involve very serious restrictions that are not limited to situations where specific services are subjected to specific rules and are thus only meant to define the way in which services are rendered or which requirements are to be met for providing or using such services. In respect of such restrictions, and based on the above considerations, one could argue convincingly that the defining criterion should be whether restrictions hinder the cross-border provision of services

⁶³ e.g. Case C-19/92, *Kraus*, ECR 1993, I-1663, par. 32; Case C-299/02, *Commission v Netherlands*, ECR 2004, I-9761, par. 15; Case C-140/03, *Commission v Greece*, ECR 2005, I-3177, par. 27; Case C-55/94, *Gebhard*, ECR 1995, I-4165, par. 37.

⁶⁴ Case C-255/97, *Pfeifer*, ECR 1999, I-2835, par. 19 f.

⁶⁵ Case C-94/04, *Cipolla*, ECR 2006, I-11421, par. 57 ff.

⁶⁶ For instance, the requirement of entry on a trades register as such is unobjectionable (and thus compatible with the freedom of establishment) in the opinion of the ECJ, but the same is not true for undertakings which intend to provide services in the host Member State only on an occasional basis (incompatible with the freedom to provide services); Case C-58/98, *Corsten*, ECR 2000, I-7919, par. 45

in terms of establishment or in other terms, or whether they hinder the provision or use of the services in general (without any greater difficulties for cross-border transactions).⁶⁷

Needs assessment requirements, however, will always be a particularly grave restriction of activity, namely an access barrier which might close the domestic market to providers from other Member States. The indistinct nature of the rule, i.e. the fact that the same also applies to domestic operators of hospitals, is in our eyes in itself not enough to overrule objections to such a measure under establishment criteria. Such restrictions of the freedom of establishment are definitely covered by the above formula, under which the exercise of these two freedoms must not be hindered or made less attractive.⁶⁸

Also in the context of the free movement of goods Article 28 EC is deemed applicable to such rules barring access to markets, even where they are absolutely neutral. Already in the *Keck* case the Court of Justice held that rules relating to selling arrangements would not come within the scope of free movement of goods provided that the application of such rules to the sale of products from another Member State was not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products.⁶⁹

Hence any rules potentially barring all access to the market are likely to be subject to a greater need for justification also under the freedom of establishment regime.⁷⁰ It will probably not suffice to argue that the rule equally hinders, in law and in fact, nationals from the Member State in question and nationals from other Member States. The Court of Justice argues along these lines also in the case *Mc Quen* concerning provisions of national law which reserve certain activities to certain categories of professions and thus prohibit other self-employed individuals and/or undertakings from exercising this activity (and thus create an obstacle to establishment) in that it rules that such a restriction on freedom of establishment, irrespective of its non-discriminatory nature, may only be permissible if subject to overriding reasons which may justify the restriction.⁷¹

This is why one has to assume that the Court of Justice will also subject needs test rules to freedom of establishment considerations. By the way, this is also the subject of a pending procedure for a preliminary ruling in the case *Hartlauer*⁷² on corresponding provisions in the Austrian hospitals law. In this case also the VwGH appears to presume in its submitted decision that this is a rule which may hinder the exercise of this freedom or make it less attractive.⁷³

1.2.4. Justification for overriding reasons relating to the public interest

If a measure under national law is seen to be a restriction on fundamental freedoms, this does not mean that it is *per se* forbidden under Community law. Rather one will have to examine under which conditions such a rule can be justified for overriding reasons relating to the public interest and can thus be maintained. According to case-law the ECJ recognises the

⁶⁷ in this sense also *Runggaldier*, *Bedarfsprüfung für private Ambulatorien aus verfassungsrechtlicher und europarechtlicher Sicht*, FS Krejci (2001) 1653, 1667

⁶⁸ Same argument in *Eilmansberger*, *Bedarfsprüfung* (FN 60).

⁶⁹ Joined Cases C-267/91 and C-268/91, *Keck*, ECR 1993, I-6097, par. 17.

⁷⁰ See also *Lafontaine*, *National Law on Pharmacies and its Non-Application by a Member State's Public Authorities – DocMorris again leading the way to accomplish Freedom of Establishment*, JES 2006, 301, 314

⁷¹ Case C-108/96, *Mac Quen*, ECR 2001, I-837, par. 25 f.

⁷² Case C-169/07, *Hartlauer*, OJ 2007 C 155/8.

⁷³ as further elaborated by *Eilmansberger*, *Bedarfsprüfung* (FN 60) with added references.

necessity of restrictions for the benefit of services of general interest, as far as there is evidence for a real need for public services and as far as such a service would not be sufficiently delivered in free competition. However, the concrete rule must be necessary, proportionate to secure the intended objective and based on objective and non-discriminatory criteria known in advance to the undertakings concerned. Case-law rulings on health services may be used to make inferences about the social sector. In respect of health services the Court of Justice has already held in several cases that the objective of maintaining a balanced medical and hospital service open to all may even fall within the derogations on grounds of public health under Art 46(1) EC, in so far as it contributes to the attainment of a high level of health protection.⁷⁴ Moreover, the Court of Justice has repeatedly held that securing the financial balance of a social security system constitutes in itself an overriding reason in the general interest.⁷⁵ If the restricting rules contribute to the attainment of these recognised objectives under Community law, they may be justified. For this purpose one needs to apply very stringent criteria of proportionality to prove that the rule in question does not restrict internal market rules more than necessary to attain the objectives in question. Authoritative clarification will frequently only be provided by ECJ rulings, a situation which burdens this sector with a great many unresolved questions concerning compliance of such rules with Community law. It would thus be advisable to consider how an act of secondary law could clarify the situation.

For this purpose it will become necessary to define, as precisely as possible, the objectives to be attained by a restricting rule. The rules to be examined in the *Hartlauer* case⁷⁶ can be used as an example. The criteria to be developed by the Court of Justice for testing justification will have to be transferred, *mutatis mutandis*, to other areas of the social sector as well. The rule's objectives of providing comprehensive and high-quality medical services to the population, and controlling the resultant financial burden on the public purse, are still too general to serve as a basis for proportionality testing. The following sub-objectives could be pursued with this rule.⁷⁷

For one thing, the rule is intended to protect the continued existence of public health services and/or, in the wider sense, publicly financed institutions providing health services; this is linked to the objective of controlling the financial burden generated by the healthcare system in that any protection against competition in favour of publicly funded institutions should ensure efficient use of public resources in this area. This protection of continued existence and against competition may also be seen in the context of the objective of ensuring territorial coverage of medical services to the population.

Finally, any needs test rule may also make an additional contribution towards controlling the financial burden incurred by public authorities in healthcare. The limitation of medical service delivery thus achieved, and/or the orientation of such delivery on existing demand thus made possible, might prevent the development of mainly supply-induced demand and thus limit the funding requirements for subsidising medical services in general (prevention of supply-induced demand).

⁷⁴ Case C-158/96, *Kohll*, ECR 1998, I-1931, par. 50; Case C-157/99, *Smits and Peerbooms*, ECR 2001, I-5473, par. 73; Case C-358/99, *Müller-Fauré*, ECR 2003, I-4509, par. 67; Case C-444/05, *Stamatelaki*, ECR 2007, I-3185, par. 31.

⁷⁵ Case C-158/96, *Kohll*, ECR 1998, I-1931, par. 41; Case C-157/99, *Smits and Peerbooms*, ECR 2001, I-5473, par. 72; Case C-358/99, *Müller-Fauré*, ECR 2003, I-4509, par. 73; Case C-444/05, *Stamatelaki*, ECR 2007, I-3185, par. 30.

⁷⁶ request for a preliminary ruling, pending as Case C-169/07, *Hartlauer*, OJ 2007 C 155/8.

⁷⁷ Same argument in *Eilmansberger*, *Bedarfsprüfung* (FN 60) with added references.

This is why the question needs to be raised whether any protection of continued existence and against competition in respect of all these institutions is appropriate and, above all, also necessary to achieve both objectives, namely that of controlling the costs and ensuring territorial coverage and high quality of health services; or conversely: whether any unlimited authorisation of profit-making institutions (as in the *Hartlauer* case of dental clinics) is actually suited to jeopardise the continued existence of the said public health services or, in the wider sense, of publicly financed providers of health services.

In respect of the beneficiaries of demand-oriented restrictions admissible under Community law, the Court of Justice has recognised in several cases that Member States have a justified interest in accurately planned hospital service delivery.⁷⁸ In the *Smits and Peerbooms* ruling the Court of Justice explains that the number of hospitals, their geographical distribution, the mode of their organisation and the equipment with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning must be possible. For one thing, such planning seeks to achieve the aim of ensuring that there is sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned. For another thing, it assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources. Such wastage, as ruled by the ECJ, is all the more damaging because it is generally recognised that the hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for healthcare are not unlimited, whatever the mode of funding applied.⁷⁹ A largely comparable situation may be invoked for major parts of the social sector. Advocate General *Tesouro* has already argued in the *Kohll* case that ensuring full utilisation of domestic hospitals would be admissible under precisely these aspects and that restrictions on the cross-border provision of services could thus be justified.⁸⁰

For this purpose it would, however, be necessary to prove empirically that the unlimited authorisation of private profit-making institutions would indeed create a situation which, although not jeopardising the continued existence of public providers, would greatly affect their economic operations since the ensuing kind of cherry picking would prevent them from generating important types of revenue, or since under-utilisation of the resources they are obliged to provide would fail to sufficiently cover staff and equipment overheads. But one needs to be aware that the ECJ is likely to use stricter criteria for empirical evidence of these correlations than the ones used by the VfGH for comparable cases and under the aspect of protecting fundamental rights within Austria.⁸¹

1.2.5. *Obligation to take a specific legal form favouring non-profit-making operators*

A last example of various types of possible restrictions on fundamental freedoms would be that of reserving activities to non-profit-making operators. Sometimes the Member States create rules under which certain activities, especially those in the social sector, are reserved for not-for-profit organisations. This excludes profit-making undertakings from providing the same services in this market. Foreign undertakings regard this as a classical restriction on activities in the internal market. The European Court of Justice, as far as one

⁷⁸ see also *Windisch-Graetz*, *Einwirkungen des Europäischen Gemeinschaftsrechts auf das österreichische Krankenanstaltenrecht*, ZfV 2002, 734, 745.

⁷⁹ Case C-157/99, *Smits and Peerbooms*, ECR 2001, I-5473, par. 76 ff; recently also Case 372/04, *Yvonne Watts*, ECR 2006, I-4325, par. 108 ff.

⁸⁰ Case C-158/96, *Kohll*, ECR 1998, I-1931, par. 57 ff.

⁸¹ see VfSlg 15.456; and also *Eilmansberger*, *Bedarfsprüfung* (FN 60).

can see, has only once delivered an opinion on this issue. This was in the *Sodemare* case. It concerned a Lombardy Regional Law under which the running of nursing establishments was reserved to non-profit providers. Profit-making undertakings were thus excluded. Advocate General *Fennelly* saw this to be an inadmissible discrimination against foreign providers. In his opinion, most charitable endeavour in the sector of care for the elderly followed the principle of 'charity begins at home' and took place at national, regional or local level. This was certainly the case in Lombardy, as all of the private contracting homes were run by bodies based in the Region. Thus, one was permitted to presume that non-Italian companies would be unwilling to assume a non-profit-making legal form in order to operate in Lombardy.⁸² The ECJ did not uphold this opinion, and rightly so. It held that the fact that profit-making undertakings could not automatically participate in the implementation of a legal system of social welfare was not liable to place profit-making companies from other Member States in a less favourable factual or legal situation than profit-making companies from the Member State in which they are established. It also held that, as Community law stood at present, a Member State might, in the exercise of the powers it retained to organise its social security system, consider that attainment of the objectives pursued by a social welfare system of this kind necessarily implied that the admission of private operators to that system as providers of social welfare services was to be made subject to the condition that they were non-profit-making.⁸³ The exact dogmatic interpretation of this formulation remains open. But one may presume that the Court of Justice would deem such restrictions justified on social grounds.⁸⁴ The reasons given for this decision are, however, very curt and leave little room for transferring the stated principles to other situations. This again leads to much legal uncertainty which might be addressed by a clarifying act of secondary law.

1.3. Impact of the Services Directive

1.3.1. On the relationship between Directive and primary law

Largely incorporating and codifying the corresponding principles of case-law, Directive 2006/123/EC (Services Directive, SD)⁸⁵ requires the Member States to examine their entire legal systems for any of the specific restrictions mentioned in the Directive. For this purpose distinction is made between rules on permanent establishment of the service provider in the host State (freedom of establishment for providers) and rules on the temporary take-up of an activity (freedom of provision of services). The freedom to provide services chapter shall not apply to services of general economic interest (Art 17(1)). Since social services, for the most part, fall within this category they will only be subject to SD provisions on the freedom of establishment. These require Member States to conduct an extensive horizontal screening of national legal systems for compliance with SD provisions and stipulate comprehensive obligations of information and reporting to the European Commission. This concerns rules at both the federal and the laender level. Facts that need to be reported are those concerning requirements, bans, conditions or restrictions included in the legal or administrative rules, in administrative case-law rulings or rules of professional associations. The SD's added value in relation to existing case-law, except for Art 14, mainly consists not so much in any substantive exacerbation of the existing *acquis* but rather in aspects of procedural law: before that any obstacles to the provision of services could only be addressed by the Commission on a case-by-case basis through a usually lengthy *ex-post* EC infringement procedure, or by affected providers before national courts and through procedures for a preliminary ruling. The Services Directive now permits an *ex ante*

⁸² AG *Fennelly*, Conclusions, Case C-70/95, *Sodemare*, ECR 1997, I-3395, par. 35.

⁸³ Case C-70/95 *Sodemare*, ECR 1997, I-3395, par. 32 f.

⁸⁴ for monograph see *Eicker*, Grenzüberschreitende gemeinnützige Tätigkeit (2004).

assessment (no more actual infringement is required) conducted by the Member States and then reviewed by the Commission and the ECJ.

1.3.2. *Scope of the Directive*

The derogations from the scope of the Directive, which were heatedly debated during the decision-making procedure and resulted in a widening of permitted derogations, are thus only of contingent significance in terms of substantive law. They only release the Member States from their *ex ante* control and reporting requirements, but they do not release them from applying primary Community law. In the latter instance individual cases will continue to be examined *ex post*.

Areas not covered by the SD are first the non-economic services. The above-mentioned distinction between economic and non-economic services is thus also of direct relevance for the application of the SD. What is unclear in this context is the meaning of Art 2(2)(a). It expressly excludes non-economic services of general interest from the scope of the Directive. But anyway, services within the meaning of the SD are only those provided for remuneration under Art 50 EC.⁸⁶ Services qualified as non-economic according to case-law have thus, in analogy to primary law, never been covered by the SD. The derogation under Art 2 is therefore only a clarification.

The situation is different for certain types of health and social services. As a rule, they will have to be seen as services of an economic nature and will thus be subject to primary law. However, they are expressly exempted from the SD. First and foremost, they include healthcare services irrespective of their private or public form of organisation and their type of funding. In the opinion of the Commission⁸⁷ healthcare covers healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health. This means that services which are provided in Austria in the form of nursing care or social-medical services are provided outside the classical healthcare sector. Certain forms of social services are also excluded, such as those related to social housing, childcare and support of families and persons permanently or temporarily in need. They are, however, only excluded to the extent that they are provided by the State itself, by providers which are mandated by the State, or by charities recognised as such by the State. The Commission goes on to explain that the notion of charities recognised as such by the State includes churches and church organisations⁸⁸. This, however, should not be seen as final restrictions. Profit-making entities definitely fall within the scope of the SD. This makes distinction very difficult, whenever a Member State does not distinguish between public services and profit-making services, while subjecting the service as such to specific rules. In such a case adjustments to SD requirements under Community law would only be necessary for profit-making providers. If this is bound to favour non-profit providers, the Member State concerned could use constitutional arguments unless there are factual grounds for differentiation.

⁸⁵ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376/36 (hereinafter SD)

⁸⁶ see definitions in Art 4(1).

⁸⁷ see Handbook on implementation of the services directive, retrievable from: http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf (10-06-2007) 13.

⁸⁸ Handbook (FN 87) 14.

1.3.3. *Substantive content of law*

The provisions of the SD apply to all other services of an economic nature which are not expressly exempted. In this context we have to distinguish between forms of restriction that are absolutely inadmissible and forms of restriction that can be justified for overriding reasons relating to the public interest.

The former are summarised as prohibited requirements in Art 14. For the latter, distinction is to be made between requirements existing on 28-12-2006 and new ones introduced after this cutoff date. In respect of existing requirements Member States need only inform the Commission and explain why they consider that those requirements comply with the conditions set out in the SD, whereas new requirements have to be notified to the Commission and may only be promulgated if no objections have been raised (see Art 15(5) ff SD).

Requirements that are absolutely prohibited include nationality requirements, residence requirements, but according to Art 14(5) also the case-by-case application of an economic test. This is why needs tests can only be maintained in areas not covered by the SD. Prohibition is absolute and, unlike the other requirements according to Art 15, will not depend on an evaluation of justification. However, the last sentence of Art 14(5) clarifies that this prohibition of economic tests does not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest. The Commission appears to relate this exemption only to territorial planning requirements which do not pursue economic aims and quotes as examples the protection of the environment, including urban environment, or the safety of road traffic.⁸⁹ It is true that, according to case-law, reasons of a purely economic nature, such as the protection of certain market participants or maintenance of specific market structures, are not admissible as reasons for justification. Limiting this provision to urban planning considerations would, however, be too narrow in scope. Especially in the social sector, as far as it is covered by the SD, one could argue with reasons such as social policy objectives, protection of those in receipt of services, or maintenance of the social security systems' financial balance.

Requirements that are not absolutely prohibited, but need to be examined for their necessity and proportionality under Art 15, are for instance the obligation to take a specific legal form, requirements which relate to the shareholding of a company, requirements fixing a minimum number of employees, or fixed minimum or maximum tariffs. This signifies that rules intended to reserve certain social sector activities to non-profit entities need to be notified to the Commission and evaluated for their necessity.⁹⁰ It remains to be seen whether the Commission uses the rather large room for discretion introduced by the ECJ in the *Sodemare* case,⁹¹ all the more so as the Advocate General held that discriminatory effects could not be excluded.⁹² A Community act of law on services of general interest might create legal certainty.⁹³

Finally, reference should be made to Art 9 of the SD. This Article subjects any form of authorisation scheme to separate reporting requirements. Under the SD an authorisation

⁸⁹ as argued by the Commission in its Handbook (FN 87) 36.

⁹⁰ Handbook (FN 87) 39.

⁹¹ a Commission Services' Working Paper, SEC(2007) 1514, 11, par. 2.7, talks of the necessity of a case-by-case examination.

⁹² This view is not shared here. See section I.2.5 above.

⁹³ for more details see section II.2 below.

scheme means any procedure under which a provider is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof.⁹⁴ Such schemes may in future be maintained only if they are non-discriminatory and justified by an overriding reason relating to the public interest.

2. Competition law

2.1. Current situation and problem description

Another important gate where Community law enters national law is that of competition rules laid down by the EC Treaty. The provision of social services is frequently organised, coordinated or otherwise influenced by government entities or by entities for which the State traditionally takes particular responsibility. As far as this may affect competition in the social sector, such conduct might, under certain circumstances, be subject to antitrust rules under Art 81 EC.

Another typical characteristic of the social sector is that certain social services, such as probation services, assistance services to refugees, etc., are basically only required by public entities. If these service-demanding entities act as entities which control the markets (markets that need to be appropriately defined), the requirements of Art 82 EC need to be observed. Examples would be the enforcement of unreasonable prices or business conditions⁹⁵ or discriminatory conditions that would place individual providers at a competitive disadvantage.⁹⁶

2.2. Social entities as undertakings within the meaning of competition law

Application of competition rules will depend on compliance with a number of characteristics irrespective of the special provisions of Art 86(2) EC. The definition of the concept of undertaking is of key importance in this context. The supply and demand behaviour of public entities will come under competition rules whenever it concerns economic activities. The problem is similar to that of providing a distinction for the fundamental freedoms.⁹⁷ Moreover, the Court of Justice ruled in its most recent case-law⁹⁸ that also the demand-side behaviour of public entities that engage in non-economic activity on the supply side would be exempt from the scope of competition rules. The criteria used by the ECJ are of great relevance to the social sector.⁹⁹

Previous considerations in this study have addressed the circumstances under which the *provision* of any given service should be seen as an economic activity. This is different from the issue of whether also the *demand* for any given service (or merchandise) may in itself constitute an economic activity and thus be subject to competition law. This can be of

⁹⁴ see Art 4(6) SD.

⁹⁵ for more details see *Eil* 24 ff with added references

⁹⁶ see *Eilmansberger* (FN 95) Art 82 par. 35 ff with references.

⁹⁷ see also section I.1 above.

⁹⁸ Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband*, ECR 2004, I-2493; and Case C-205/03 P, *FENIN*, ECR 2006, I-6295. for more see *Krajewski/Farley*, Non-economic activities in upstream and downstream markets and the scope of competition law after *FENIN*, ELR 2007, 109; critique (“detrimental effect on social welfare”) *Roth*, commentary on *FENIN* judgment, CMLR 2007, 1131, 1140, also invoking national case-law contrary to German and UK competition law.

⁹⁹ see for instance Case C-475/99 *Ambulanz Glöckner*, ECR 2001, I-8089.

practical relevance in situations where a supplier wants to invoke abuse of dominant market position under Art 82 EC by a purchaser with strong market position.

No doubt this will be possible whenever the purchaser also engages in economic activity by offering goods and services on the market. However, according to case-law, there needs to exist a connection between economic activity and the goods and services demanded. For instance, in the *Pavlov* case the ECJ qualified payment of contributions to an occupational pension fund for self-employed medical specialists as an economic activity and argued that payment of contributions was closely connected with the exercise of the profession of such specialists.¹⁰⁰

The question now is how to assess the demand-side dominance of entities under antitrust law if these entities do not act as undertakings on the supply side. For one thing, this concerns the demand-side activity of public authorities when the latter procure services on the market needed to fulfil their public tasks. It is typical of the social sector that its services are frequently only demanded by public entities. Just think of youth welfare services or certain social and healthcare services. If one answered the application of competition rules in the affirmative, providers could refuse, by invoking Art 82 EC, to accept unfair prices forced upon them by public entities with a dominant market position.¹⁰¹

This question is of major importance to statutory health insurers. As explained above, they are not active as undertakings in their relationship to insurees according to Community case-law. The question now arises whether providers of services, such as dealers of medicines, can invoke competition rules vis-à-vis insurers.¹⁰²

This has remained unclear for a long time in Community case-law. According to national law in a number of Member States the procurement behaviour of non-undertakings is subject to national antitrust legislation.¹⁰³ Also German courts regularly examine the purchasing activity of public authorities based on the provisions of the German Act Against Restraints on Competition (GWB).¹⁰⁴

However, in terms of Community antitrust law, the CFI and, upholding its decision, later also the ECJ took an opposite stance. In the legal opinion of the CFI the activity of purchasing as such is not an economic activity. It would be incorrect, when determining the nature of that procurement activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put by the purchaser. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased

¹⁰⁰ Joined Cases C-180/98 – C-184/98, *Pavel Pavlov and Others*, ECR 2000, I-6451, par. 79.

¹⁰¹ See for instance decision of the UK Competition Commission Appeal Tribunal in *BetterCare v The Director of Fair Trading* Case no. 1006/2/1/01 [2002] Competition Appeal Reports 299. The North & West Belfast Health & Social Services Trust was obliged under law to provide healthcare and housing services for senior citizens. It owns homes, some of which are run by private undertakings. One of these undertakings, BetterCare, complained that the N&W had abused its dominant position as single purchaser of its services by forcing down prices.

¹⁰² see also *Herzig*, Prinzipien und Zielsetzungen des europäischen Wirtschaftsrechts, in *Grillberger/Mosler*, Europäisches Wirtschaftsrecht und soziale Krankenversicherung (2003) 47, 56 ff.

¹⁰³ see supporting evidence by AG *Poiares Maduro*, Conclusions, Case C-205/03 P, *FENIN*, ECR 2006, I-6295, par. 23 ff. for differing developments of this issue in case-law under Community and national antitrust law see *Dreher*, Der neue Einfluss des europäischen Kartellrechts - der Unternehmensbegriff als Beispiel, WuW 2004, 473; see also *Lange*, Unternehmensbegriff und staatliches Wirtschaftshandeln in Europa, WuW 2002, 953 with references and further elaborated by Herzig (FN 13) 58.

¹⁰⁴ as last done by OLG Düsseldorf, decision of 22-05-2002, Verg 6/02, WuW Verg 658; OLG Düsseldorf, judgment of 12-5-1998, U (Kart) 11/98 - *Löschfahrzeuge*, WuW DE-R 150.

goods amounts to an economic activity. Consequently, an organisation which purchases goods not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market.¹⁰⁵ Although without stating any detailed reasons, the ECJ shared the view of the European Court of First Instance and the effects this would entail¹⁰⁶ and finally also affirmed the CFI judgement.¹⁰⁷

In the wake of the judgement last mentioned also the Austrian appellate cartel court (KOG) revised its previous case-law¹⁰⁸ and decided that health insurance funds, when purchasing medical services and medicaments on the private market, are not to be deemed undertakings within the meaning of the Austrian Antitrust Act (*Kartellgesetz*), as these services are provided in a non-economic capacity also in respect of insurees.¹⁰⁹

According to current case-law concerning both European and Austrian antitrust law the procurement activity of public authorities or NPOs, if connected to their non-economic activity, does not fall within the scope of European competition law.

However this outcome could be challenged by referring to the potentially considerable effects such a bundling of demand by public authorities or other strong buyers – such as statutory social insurance institutions – may have on the market.¹¹⁰ This is why German case-law uses such demand activity's high potential of jeopardising competition as grounds for including procurement activities into the scope of the GWB. In its established case-law the BGH stresses that the idea underlying the GWB is to cover, in the interest of free competition, all undertakings which have a dominant market position and maintain fixed prices. It would therefore conflict with this intended purpose if legal entities under public law were specifically exempted from such rules, as their privileged position could influence and upset, to a particularly high degree, free competition and thus the fundamentals of the economic system.¹¹¹

However, one must point out in this context that the potential of influencing free competition cannot in itself be any relevant criterion for defining the concept of undertaking. If this concept is to be defined by the degree by which an economic activity can distort competition, this characteristic would lose any distinctive effect of its own. Such an approach would make the concept of undertaking largely obsolete.

2.3. Granting special or exclusive rights to social entities

As a rule, Member States have a vital interest in maintaining the permanent provision of social services at all points in their territory in compliance with (minimum) standards defined by them. If these services are to be rendered in a competitive market environment, it may become necessary to take regulatory measures to ensure performance of services of general interest. Such a regulatory approach can consist in financing compensation for

¹⁰⁵ Case T-319/99, *FENIN v Commission*, ECR 2003, II-357, par. 36 f.

¹⁰⁶ Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband*, ECR 2004, I-2493, par. 58.

¹⁰⁷ Case C-205/03 P, *FENIN*, ECR 2006, I-6295, par. 26.

¹⁰⁸ KOG 15-12-2003, 16 Ok 12/03.

¹⁰⁹ KOG 14-6-2004, 16 Ok 5/04.

¹¹⁰ as argued by *Koenig/Kühling* in *Streinz*, TEU/TEC (2003) Art 86 par. 13 with references; *Roth/Ackermann* in *Frankfurter Kommentar*, vol. 5 (EC antitrust law), fundamental issues Art 81(1) TEC par. 39; as here *Eilmansberger* (FN 95) before Art 81 par. 27; *Herzig* (FN 13) 105.

¹¹¹ according to BGHZ 36, 91, 102. See also BGH WuW/E BGH 675, BGH WUW/E BGH 1423.

services which cannot be provided in the market. This raises State aid considerations and is thus of relevance under Community law.¹¹² On the other hand regulatory interventions may also involve special or exclusive rights granted to those providing services of general interest and intended to enable them to offer their services to the extent desired by public authorities.

Granting special or exclusive rights within the meaning of Art 86(1) EC is not in itself incompatible with competition rules under Community law. However, a Member State will be in breach of Community law, or more precisely, of Art 82 EC

- if the undertaking concerned has been accorded a dominant position within the market, and
- if this undertaking, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses.¹¹³

An undertaking has a dominant position within the market if this enables the undertaking concerned to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers. As a rule, such a privileged position will not exist whenever there are many providers active on the market concerned. However, the situation may be assessed differently if these operators are only a few associations (also legal entities under public law), all the more so if their activities – as is often the case in the social sector – are coordinated and guided by requirements under public law. From an economic point of view, as is appropriate to antitrust law, one could ask the question whether these associations, and the members they are composed of, constitute an economic unit irrespective of their legal independence. But even if one assumes that these associations are independent of each other, this will not fully exclude the possibility of a dominant position within the market. Under European antitrust law a dominant position may also be held by several undertakings. The question of whether any collective dominant position exists is to be answered in the affirmative whenever the individual entities concerned are connected by such economic links that they present themselves as a collective entity vis-à-vis their competitors or patients.¹¹⁴ However, the links must be such that the undertakings concerned adopt a uniform conduct on the market. These would include both contractual¹¹⁵ and structural ties, for instance in the form of personal links at management level¹¹⁶.

As far as the second of the above conditions is concerned, an abuse of dominant position according to case-law includes situations where the entity holding such a dominant position prevents competitors or third parties from providing the services it performs on the market in question. In the *Ambulanz Glöckner* case the ECJ made clear that the adoption of a legislative measure, the application of which involved prior consultation on whether there was any need for the service applied for authorisation, could constitute such an act of restriction.¹¹⁷ This is also logical since a needs test, as the one involved in this case, is an

¹¹² for details see I.3.5 immediately below.

¹¹³ see Joined Cases C-180/98 – C-184/98, *Pavel Pavlov and Others*, ECR 2000, I-6451, par. 127; and Case C-475/99, *Ambulanz Glöckner*, ECR 2001, I-8089, par. 39 f.

¹¹⁴ see Joined Cases C-395/96 and C-396/96, *Compagnie Maritime Belge Transports and Others v Commission*, ECR 2000, I-1365, par. 39.

¹¹⁵ see Joined Cases C-395/96 and C-396/96, *Compagnie Maritime Belge Transports and Others v Commission*, ECR 2000, I-1365, par. 45; Commission Decision 1999/329/EC, *P&I Clubs*, OJ 1999 L 125/12, par. 122 .

¹¹⁶ for more details see Case T-228/97, *Irish Sugar v Commission*, ECR 1999, II-2969, par. 51 f.

¹¹⁷ Case C-475/99 *Ambulanz Glöckner*, ECR 2001, I-8089.

effective instrument in the hands of the dominant entity for keeping competitors away from the market.

However, meeting the discussed conditions will not in itself result in any infringement of Community competition rules. This has to be joined by other circumstances, such as proven influence on trade between the Member States and dominant position on a substantial part of the common market. Owing to the usually small-scale organisation and local nature of social sector services this will frequently not be the case so that competition rules cannot be applied for lack of relevance to the internal market. Trade between Member States, according to case-law, is affected by a measure which prevents an undertaking from establishing itself in another Member State with a view to providing services there on the market in question.¹¹⁸ The Court of Justice held that there was no need to prove any actual effect; it would suffice to invoke potential effects.¹¹⁹ The effect in question, however, must be ‘appreciable’ and not just minimal.¹²⁰ Hence social services which are usually provided at a local level need additional characteristics to entail the application of competition rules. One would have to provide evidence that international providers could have a potential interest in entering the market. Any cross-border context may also arise simply because the protected provider is located close to this border.¹²¹ Also, it will be difficult to prove a dominant position held by Austria on a substantial part of the common market. Although the Court of Justice includes substantial parts of a Member State, such as southern Germany, or larger constituent states, such as the Land of Rheinland-Pfalz,¹²² this case-law cannot easily be transferred to Austrian *laender* simply because of their size. Market interventions by *laender*-level legislation, as is often the case in Austria owing to the terms of reference accorded to the *laender* in the social sector, could thus be seen as falling outside the scope of Art 82 EC for lack of meeting this size criterion.

If, however, the conditions quoted so far are fulfilled, a last criterion for assessment would be justification under Art 86(2) EC, since as a rule social services are services of general economic interest.

Art 86(2) EC in conjunction with (1) permits Member States to grant to undertakings entrusted with the operation of services of general economic interest exclusive rights which may be contrary to the rules on competition, in so far as restraints on competition or even the exclusion of any competition by other economic operators is necessary to ensure performance of the particular tasks assigned to the undertakings through such exclusive rights.¹²³

According to case-law one would have to examine whether such restraints on competition are necessary to enable the holder of an exclusive right to perform his task in the general interest and under economically acceptable conditions. The latter wording signifies a change in case-law. Whereas the ECJ and, following its example, also the Commission held until the end of 1980 that non-compliance with Treaty provisions was needed to provide such services at all¹²⁴, the Court now examines to what extent it is necessary to give preference to the undertaking concerned to enable it to perform its task under economically acceptable^{125 126}

¹¹⁸ see judgment in Case 161/84, *Smits and Peerbooms*, ECR 1986, 353, par. 26.

¹¹⁹ Case C-41/90, *Höfner and Elser*, ECR 1991, I-1979, par. 32.

¹²⁰ see Case C-306/96, *Javico*, ECR 1998, I-1983, par. 16.

¹²¹ see for instance Opinion of AG *Jacobs*, Conclusions, Case C-475/99, *Ambulanz Glöckner*, ECR 2001, I-8089, par. 168.

¹²² see again Case C-475/99 *Ambulanz Glöckner*, ECR 2001, I-8089, par. 35; and section I.5.

¹²³ see Case C-320/91, *Corbeau*, ECR 1993, I-2533, par. 14.

¹²⁴ see for instance *Koenig/Kühling* (FN 110) Art 86 par. 58 with added references.

¹²⁵ Case C-320/91, *Corbeau*, ECR 1993, I-2533, par. 16.

conditions. Despite this more relaxed yardstick strict criteria need to be applied in respect of the suitability and proportionality of the measure. But it should be noted that, alongside environmental issues, the social sector has been amongst the special areas where Art 86(2) EC has been successfully invoked in case-law and practical application.¹²⁷

The starting point of such an examination must be the premise that the obligation on the part of the undertaking entrusted with that task to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned.¹²⁸ This is necessary in the ECJ's opinion to prevent any kind of cherry picking. Undertakings could be tempted to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors.¹²⁹ However, a very strict yardstick needs to be applied in this context. Especially one has to prove that the grant of a special right does not result in an over-compensation of the burden necessary for providing the SGEIs. This is why the criteria developed by case-law for State aid (see directly below) also need to be used for questions of competition law.

2.4. Significance of special legislation for SGEIs in primary law

In broad terms, social services constitute services of general interest. They are usually of an economic nature and basically subject to internal market rules. However, the Treaty includes a number of special rules for services of general economic interest to address the specificities of the social sector. The significance of Art 86(2) EC has already been discussed above.

According to current case-law Art 16 EC has in itself no regulatory function in this context. It does not establish any rights of its own but underlines the importance of derogations in favour of services of general economic interest as a fundamental value principle of Community law.¹³⁰ The European Court of Justice, as far as one can see, has not yet used this provision. In a number of conclusions of advocates general, however, we do find formulations referring to the emphasis Art 16 EC places on the specificity of services of general economic interest.¹³¹ At the same time they underline that this cannot be seen as a restriction on the scope of Art 86(2) EC but rather as a guideline for its interpretation.¹³²

This applies equally to Art 36 of the Charter of Fundamental Rights. Also in respect of this provision the advocates general justly state that it underlines the importance and weight

¹²⁶ Joined Cases C-147/97 and C-148/97, *Deutsche Post AG*, ECR 2000, I-825, par. 49.

¹²⁷ see *Idot*, L'intérêt général: limite ou pierre angulaire du droit de la concurrence? JTDE 2007, 225 par. 27.

¹²⁸ Case C-320/91, *Corbeau*, ECR 1993, I-2533, par. 16 and 17; Case C-475/99, *Ambulanz Glöckner*, ECR 2001, I-8089, par. 57.

¹²⁹ as also argued by *Koenig/Kühling* (FN 110) Art 86 par. 59.

¹³⁰ see AG *Alber*, Conclusions, Case C-340/99, *TNT Traco*, ECR 2001, I-4109, par. 94.

¹³¹ AG *Jacobs*, Conclusions, Case C-126/01, *GEMO*, ECR 2003, I-13769, par. 124, AG *Jacobs*, Conclusions, Case C-475/99, *Ambulanz Glöckner*, ECR 2001, I-8089, par. 175; AG *Alber*, Conclusions, Case C-340/99, *TNT Traco*, ECR 2001, I-4109.

¹³² AG *Poiaras Maduro*, Conclusions, Case C-205/03 P, *FENIN*, ECR 2006, I-6295, par. 35.

attributed by the Member States to SGEIs.¹³³ But they do not see Art 36 as an independent criterion for claiming rights.

This legal situation will not be changed substantially by the Lisbon Treaty either. Also the new Protocol on Services of General Interest¹³⁴ dovetails with this regulatory framework. The Protocol clarifies the common values guiding the work of the European Union when shaping and organising services of general interest. It stresses the essential role and the wide discretion of national, regional and local authorities in this area. This, essentially, corresponds to current case-law but can be understood as a clarification and substantiation of such case-law by primary law. Introducing a new law-making competence into the Treaty, the provision under Art 16(3) EC definitely creates change over the status quo (see also section II.1 below).

3. Community rules on State aid

Social services are largely funded by public authorities either in full or in part. Such flows of funding are potentially subject to European State aid monitoring requirements. The scope of elements of State aid results in a situation where potentially the entire network of financial relations between public authorities and social entities are likely to be subject to State aid monitoring, which would enable the Commission to considerably influence the organisation of this area. This legal finding, however, is in stark contrast with the practical application of law by the Commission. It is a fact that State aid does not feature prominently on this area's agenda. This may have to do with the Commission's lack of interest so far to examine, *ex officio* and in greater detail, the funding relations between public authorities and the social sector under aspects of State aid. Moreover, legal considerations would have to include, alongside the concept of State aid in the narrower sense, also other elements of Art 87 ff EC and related secondary law on State aid. They provide a number of references which may have the effect that elements of State aid are not subject to State aid monitoring requirements.¹³⁵

3.1. Social entities as beneficiaries of State aid

The EU's monitoring regime aims to prevent distortive effects on competition by State aid within the single market. Owing to this economic purpose it only covers aid which is designed to favour an *undertaking*. As in competition law, the decisive factor is whether the entity that receives an advantage from the measure engages in an economic activity no matter what legal status it has chosen. Practice and case-law concerning State aid¹³⁶ are justly based to a large extent on the concept of undertaking developed by jurisprudence in respect of Art 81 EC. This is why reference is made to the discussion of the issue in previous sections of this study. Since the concept of undertaking is equally important in State aid and in competition rules, it flows from this that the not-for-profit nature of an entity as such does not preclude classification as an economic activity also in terms of Community rules on State aid. For instance, the Commission has examined under aspects of State aid a system of non-profit private sickness insurers in the Netherlands. This is logical since, according to competition-related case-law on sickness insurance schemes, such private health insurers of 'the second pillar' are engaged in economic activity, and since only basic social security schemes of 'the first pillar' are exempted from this provision as decided in the *Poucet and Pistre* case. By the

¹³³ AG Alber, Conclusions, Case C-340/99, *TNT Traco*, ECR 2001, I-4109; and AG Jacobs, Conclusions, Case C-126/01, *GEMO*, ECR 2003, I-13769.

¹³⁴ OJ 2007 C 306/158.

¹³⁵ see Herzig (FN 13) 106.

¹³⁶ Case C-222/04, *Cassa di Risparmio di Firenze*, ECR 2006, I-289, par. 107 ff.

same token one will have to regard social entities as undertakings if and when they engage in economic activity.

3.2. New versus existing State aid

Another reason for the low number of State aid litigation in the social sector could be found in the fact that many of Austria's funding systems already existed prior to accession to the Community (and the EEA Agreement). In terms of existing subsidies they are not subject to any ban. The Commission could only address them, *ex officio*, with the aim of proposing pertinent measures to the Member State concerned. There is no obligation to notify such existing State aid.

It would, however, be premature to qualify for simply this reason any measures taken prior to accession as existing aid *per se*. According to case-law any change in the competitive situation where aid has been granted may turn an existing into a new State aid without necessarily requiring any changes to the subsidy agreement. This could be of relevance to entities which were not faced with much competition within the historical context of the originally promised subsidies, and which have meanwhile adopted a more market-oriented approach in their activities owing to changes in the competitive environment. Fundamental reforms concerning the organisation of social services or the funding of hospitals could result in major parameters of the competitive environment being so changed.

3.3. De Minimis Regulation

There is no obligation to notify subsidies of less than EUR 200,000 granted to an undertaking over a period of three years as this does not constitute aid liable to distort competition. This provision is set forth in the so-called De Minimis Regulation.¹³⁷ This can be of major importance to the social sector owing to the usually small-scale organisational setting within which social services are provided.¹³⁸

3.4. Cross-border implications

Art 87 EC is only applicable if aid affects or threatens to affect trade between Member States and competition. The Commission appears to prefer a more generous standard in respect of services of general interest. As stated in a Commission Services' Non Paper¹³⁹, the Commission's concern is to focus on cases that could have a significant impact on trade between Member States. This is indeed illustrated by a number of current practice examples. In its decision on the *Dorsten leisure pool*¹⁴⁰ the Commission concluded that the measure did not affect trade between Member States as the amenity was primarily used by the inhabitants of the town of Dorsten and the surrounding area. A similar stance is adopted in the *Irish hospitals* decision.¹⁴¹ Here the Commission argues that the effect of the measure in question is to serve local hospitals which suffer from a clear undercapacity, and it can be considered not

¹³⁷ Commission Regulation (EC) no 1998/2006 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, OJ 2006 L 379/5.

¹³⁸ Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, OJ 2001 L 10/33.

¹³⁹ European Commission, Non Paper – services of general economic interest, published at: http://europa.eu.int/comm/competition/state_aid/others/1759_sieg_en.pdf, par. 53.

¹⁴⁰ State aid N 258/2000, *Leisure pool Dorsten*, press release IP/00/1509.

¹⁴¹ State aid N 543/2001, *Capital allowances for Irish hospitals*, par. 20, Commission Letter to the Member State retrievable from http://europa.eu.int/comm/secretariat_general/sgb/state_aids/comp-2001/n543-01.pdf

to create complexes which will attract customers from other Member States. Hence there is no effect on cross-border trade.¹⁴² Other examples are summarised in the Annex.

3.5. Services of general interest assessed in terms of State aid considerations

If social services cannot be provided under market conditions, public authorities will have to intervene by granting compensation to ensure operation of services of general interest. In so doing, the Member States enjoy wide discretionary powers in defining this general-interest role. The Commission will only challenge cases of obviously excessive use of such discretionary powers.

The assessment of State aid criteria in financing compensation were the subject matter of a controversial debate which led to a landmark decision by the ECJ in the *Altmark Trans* case. The Court of Justice concludes that such compensation will escape classification as State aid and thus will not be subject to notification if four cumulative conditions are satisfied:¹⁴³

1. The recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;
2. the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;
3. the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations; and
4. where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred in discharging those obligations.

In response to this ruling the Commission has adopted a whole set of measures primarily composed of an exemption decision¹⁴⁴ and a new Community framework for services of general interest¹⁴⁵. This policy package largely incorporates the ECJ's *Altmark* criteria, but goes beyond this ruling in one major aspect. According to the ECJ decision, compensation can only escape classification as State aid in a particular case if it has been subject to a public procurement procedure, or if compensation does not exceed the costs which a typical undertaking, well run and adequately equipped, would have incurred in such a case. Hence the Court of Justice uses a hypothetical comparative undertaking of average efficiency to arrive at a hypothetical net cost level. This criterion creates substantial pressure on public authorities to ensure efficient service delivery and choose efficient contract undertakings. Whoever needs more subsidies than the hypothetical comparative undertaking is in receipt of aid that is subject to approval by the Commission.

In its policy package the Commission makes no use of the option outlined by the Court Justice, namely to examine more closely or even refuse to approve compensation which fails to comply with these hypothetical net costs. Rather, the policy package only requires

¹⁴² for other examples see section I.5.

¹⁴³ Case C-280/00, *Altmark Trans*, ECR 2003, I-7747, par. 88 ff.

¹⁴⁴ Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the 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, OJ 2005 L 312/67.

¹⁴⁵ Community framework for State aid in the form of public service compensation, OJ 2005 C 297/4.

fulfilment of the first three *Altmark* criteria and excludes over-compensation unless the amount exceeds what is necessary to cover the costs incurred, taking into account reasonable profit for discharging those obligations. Benchmarking is not required.

In procedural terms the policy package makes distinctions. Under the exemption decision any public service compensation which is below certain threshold levels and meets the above criteria will not be subject to notification. This mainly applies to compensation of less than EUR 30 million to undertakings with an annual turnover of less EUR 100 million, as well as to compensation to hospitals and social housing undertakings irrespective of the amounts involved. Any other compensation must be notified to the Commission but will be approved if it meets the Community framework criteria. Finally this *Altmark* package includes an amendment to the Transparency Directive which clarifies that companies receiving compensation and operating on both public service and other markets must have separate accounts for their different activities, so that the absence of over-compensation can be checked.¹⁴⁶

4. Public procurement rules

Public procurement rules can be of relevance to the social sector in two respects. For one thing, social entities may be considered public contracting bodies under certain circumstances. Their procurement system would then be subject to Community rules applicable to public procurement. For another thing, the social sector depends on public contracts in many instances. This raises the question about the circumstances which require such contracts to be subject to public procurement procedures and about any specificities to be observed.

4.1. Social entities as public contracting bodies

Beyond the narrower group of territorial entities, the personal scope of Austria's Federal Procurement Act (BVerG 2006) also includes entities having a particularly close relationship with the State. This is supposed to ensure that all public entities whose procurement conduct could be guided by criteria other than economic criteria are subject to public procurement rules.

§3(1)(2) BVerG 2006 is *sedes materiae* in this respect. Alongside the requirement of partial legal capacity, this provision links the concept of public contracting body to two cumulative requirements: The entity must have been established for the specific purpose of performing tasks in the general interest of a non-industrial or non-commercial nature. Plus there must be some form of government influence on the entity, either because the entity is for the most part financed from the public purse or because its activity or that of its executive bodies is subject to State supervision.

4.1.1. Needs in the general interest, not having an industrial or commercial character

The concept of needs in the general interest, not having an industrial or commercial character, is, to some extent, related to the concept of undertaking and to the distinction between economic and non-economic activity. Many of the criteria discussed above can be quoted in this context. However, there is no complete overlap between the two concepts. If an

¹⁴⁶ Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ 2005 L 312/47.

entity engages in a non-economic activity, this may be indicative of the application of public procurement rules to the entity's procurement behaviour if this coincides with a close relationship to the State. But it may well be that the entity operates within a setting where competition and public procurement rules apply in a cumulative fashion. This is typically the case in "mixed" undertakings which also perform economic activities in addition to general-interest tasks not having an industrial or commercial character. They will be subject to public procurement law also in respect of their economic activity.¹⁴⁷

The concept of needs in the general interest, not having an industrial or commercial character, constitutes an open-ended catalogue of activities which pursue the public interest in a wider sense. They include the construction of social housing, the supply of accommodation in student homes, or the provision of therapy to patients under social insurance schemes. The same will have to be presumed for wide areas of social services, such as welfare and assistance facilities, hospitals, rehabilitation centres, ambulance services, old-age homes, etc.¹⁴⁸

However, such an activity must also be performed cumulatively in a non-industrial or non-commercial manner. Here, too, we have a parallel to the concept of non-economic activity when for instance the ECJ holds that a non-industrial or non-commercial activity exists whenever needs are met otherwise than by the availability of goods or services in the marketplace.¹⁴⁹ As with the concept of undertaking here, too, although the other way round, the not-for-profit nature will be indicative of the non-industrial or non-commercial character of the activity but will not in itself constitute such a character. Case-law also requires the existence of significant competition and examines whether the entity concerned is faced with competition in the marketplace.¹⁵⁰

Another important element for assessing the industrial or commercial character of the activity finally concerns the question whether the entity must bear the economic risk of its economic activity. If in the event of an economic crisis public authorities will act as lenders of last resort to recapitalise such an entity, this may be indicative of a situation where the entity needs not fully operate under market conditions and thus performs an activity having a non-industrial or non-commercial character.¹⁵¹

4.1.2. *Government influence*

An entity meeting needs in the general interest, not having an industrial or commercial character, will only become a public contracting body if it is also under the influence of the State. Existence of such an influence under BVergG, in agreement with EU Directives, is to be answered in the affirmative whenever the entity is for the most part financed from the public purse or the State can exert influence on the entity's management through supervisory powers or the composition of its executive bodies.

¹⁴⁷ Case C-44/96, *Mannesmann*, ECR 1998, I-73, par. 29 ff.

¹⁴⁸ as also argued by *Holly*, *Soziale Dienste und Vergaberecht*, in *Dimmel*, *Das Recht der Sozialwirtschaft* (2007) 165, 172; see also *Herzig* (FN 13) 113 ff.

¹⁴⁹ Case C-360/96, *BFI Holding*, ECR 1998, I-6821, par. 50; Joined Cases C-223/99 and C-260/99, *Agora*, ECR 2001, I-3605, par. 37.

¹⁵⁰ Case C-360/96, *BFI Holding*, ECR 1998, I-6821, par. 49; Joined Cases C-223/99 and C-260/99, *Agora*, ECR 2001, I-3605, par. 38; Case C-373/00, *Truley*, ECR 2003, I-1931, par. 61. This has caused a controversial debate in Austria on the activity of low-profit building associations.

¹⁵¹ a case-law example would be Case C-18/01, *Korhonen*, ECR 2003, I-5321, par. 55.

In the social sector basically all these options may apply. For instance, when public authorities devolve general-interest tasks to organisations or associations, the divested entity retains its public contract-awarding status as long as it is controlled by public authorities. Some general form of State supervision, such as through the supervisory powers of competent Austrian bodies (*Vereinspolizei* in this case), will not be enough to substantiate sufficient government influence. But one will have to presume sufficient government influence whenever the entity in question is subject to control by the Court of Audit. This can be inferred from the fact that it features on the list of Annex III to Directive 2004/18/EC.¹⁵² This list, however, only has declaratory effect. Also entities not subject to control by the Court of Audit may meet the criteria of public contracting bodies.

Of special significance at first sight is the condition under which public financing is to be regarded as for the most part. In quantitative terms, this requirement is met whenever more than half of its activity is so financed.¹⁵³ There are quite a few social entities which are economically dependent on public authorities in this way. However, an entity meeting needs in the general interest, not having an industrial or commercial character, will not automatically become a public contracting body if it exceeds this funding threshold. Under the rationale underlying this provision, the requirement of an entity being financed for the most part by the State or its management being subject to supervision by the State refers to types of entities which are particularly dependent on public contracting bodies and are thus put on an equal footing with them under public procurement rules. This is why also case-law applies a restrictive interpretation. Public funding only refers to payments which finance or support the activities of the entity in question and are not made in consideration for specific services, whereas amounts paid by public authorities in consideration for specific contract services provided by the entity are not taken into account. Although even the latter contractual relationship may also make the body concerned dependent on the contracting authority, this is analogous to the dependency that exists in normal commercial relationships formed by reciprocal contracts freely negotiated between the contracting parties. It is thus of a quality that differs from that generated by a 'pure' subsidy or grant. In the case in question the Court of Justice classified as public financing the grants paid to the *University of Cambridge* to finance teaching and research activities of the university. The position is quite different in the case of sums paid in consideration for contractual services provided by the university, such as the execution of particular research work or the organisation of scientific seminars and conferences, since the contracting authority has in fact an economic interest in providing the service.¹⁵⁴

This permits to draw conclusions as to the kind of funding framework to be established by the State in respect of social services. If the intended subsidies are linked to tangible and identifiable service delivery by the NPO, the resultant services of the NPO and their finances need not be subjected to public procurement rules.

4.2. Social entities as public contractors

4.2.1. Obligation to conduct a public procurement procedure

If the State enters into service relationships with providers by purchasing social services from them, as a rule it will have to conduct a public procurement procedure whenever this is a payable exchange of services. This will primarily concern healthcare and

¹⁵² OJ 2004 C 134/114, 179..

¹⁵³ Case C-380/98, *Cambridge*, ECR 2000, I-8035, par. 30.

¹⁵⁴ Case C-380/98, *Cambridge*, ECR 2000, I-8035, par. 24.

social services. Under Community rules applicable to public procurement they are classified as so-called non-priority services subject to only a very lean public procurement regime.

No formal public procurement procedure needs to be conducted if compensation for the service demanded by public authorities is not paid by the latter but by third parties which also bear the economic risk of the activity in question. Just think of a kindergarten operated on the basis of contributions paid by the parents. In terms of public procurement law, this could be a service concession agreement (§8 BVergG 2006). Such agreements do not fall within the scope of the Community law applicable to public procurement. Case-law maintains that the contracting entities concluding them are, none the less, bound to comply with Treaty rules which imply an obligation of ensuring adequate transparency also in respect of service concessions.¹⁵⁵ This is why §11 BVergG 2006 stipulates that, in principle, such contracts must be awarded under a procedure involving several undertakings. The situation might be different in special emergency cases.¹⁵⁶ There must be a sufficient degree of advertising, and the procedure must comply with the principles of free and fair competition. The principle of transparency will have to be met by ensuring adequate notice of the tender. Official documents basically recommend publication on the Internet.¹⁵⁷ Awarding a contract informally without any tender notice directly to a chosen undertaking is only permitted for concessions having a contract value of less than EUR 40,000. However, there is no specific protection awarded under public procurement law for any infringements of the transparency principles mentioned. Any remedy in this context has to be sought in an action before an ordinary court of law.

4.2.2. *Contracts freely awarded to an in-house entity*

According to §10(7) BVergG 2006 a public contracting body may, without conducting any public procurement procedure, entrust social services to an entity which, though formally distinct, is closely related in organisational and procurement terms. The exact criteria for in-house entity exception to apply are very complex and cannot be addressed in detail here.¹⁵⁸ Basically the following criteria must be met:

- The public contracting body must exercise supervision over the social entity as it does over one of its own offices. Such control must exist not only at the time when the contract is awarded but across the entire duration of the contract.
- The activity of the social entity must be performed primarily for the public entity which holds its shares. Any other activities must be secondary in nature only.

4.2.3. *Reservations favouring non-profit bidders*

Administrative and social law in a number of Member States may include rules under which certain services are reserved to non-profit-making entities. For instance, under Italian regional legislation, costs incurred in providing social welfare services of a healthcare nature are reimbursed subject to the condition that the social entity providing these services is non-profit-making. This, in effect, excludes profit-making entities – also those from other Member States – from taking up such an activity. The Court of Justice has held that under freedom of

¹⁵⁵ see Case C-324/98, *Telaustria*, ECR 2000, I-10745; and Case C-231/03, *Coname*, ECR 2005, I-7287.

¹⁵⁶ see the following Austrian documents: 1171 BlgStenProtNR XXII.GP, 33

¹⁵⁷ 1171 BlgStenProtNR XXII.GP, 34

¹⁵⁸ for more details see *Holoubek/Fuchs*, Vergaberecht, in *Holoubek/Potacs*, Handbuch des öffentlichen Wirtschaftsrechts (2007²) 791, 843 ff with added references; for introduction to the issue see also *Eilmansberger/Herzig/Jaeger/Thyri* (FN 52) par. 702 ff.

establishment considerations this is permissible and has argued that a Member State may do so in the exercise of the powers it retains to organise its social security system.¹⁵⁹

The question arises whether an analogous approach favouring non-profit organisations might be permissible also in public procurement contexts. This will have to be answered, in effect, in the negative.¹⁶⁰ Restrictions through the definition of contract awarding criteria can be ruled out. The public contracting body is basically free to also use social criteria in its award decision, provided that they are non-discriminatory, do not confer an unrestricted freedom of choice on the authority, and are expressly mentioned in the contract documents or the tender notice.¹⁶¹ But care must be taken that the award criterion applied relates to the service which is the subject-matter of the contract.¹⁶² Hence for any service to be reserved to non-profit entities one would have to prove a connection between the not-for-profit nature and the quality of the service offered. This will hardly be possible. Justification on structural health policy grounds, as can be quoted in the context of fundamental freedoms, can be ruled out for procurement procedures. The contracting authority may only be guided by economic considerations when awarding a contract, and general health policy objectives are not part of such considerations. For the same reason the Court of Justice has recently restricted the option of pursuing social policy objectives by means of procurement law, for instance by requiring a declaration that the collective agreements will be complied with.¹⁶³

Also it will not be possible to consider them in the definition of qualification criteria. Unlike award criteria they are not related to the contract but to the undertaking.¹⁶⁴ But also qualification may only be demanded from an undertaking to the extent justified by the subject-matter of the contract. The BVergG 2006 refers to this fact already in the legal definition. §2(2)(c) clarifies that qualification criteria need to be in agreement with the content of the service in question. Accordingly, §70(2) BVergG 2006 provides that proof of qualification may only be required to the extent justified by the subject-matter of the contract. Restricting bidders to non-profit entities would thus require proof that this restriction is suited to assess the quality of the undertaking in respect of the service demanded. This will hardly be possible for the reasons already mentioned in the context of award criteria.

There is one exception to the above result under an express provision of law for sheltered workshops or integration enterprises. These are undertakings where the majority of employees are people with disabilities who cannot perform a job under normal circumstances. Based on Art 19 of Directive 2004/18/EC¹⁶⁵, §21 BVergG explicitly provides for a restriction of bidders. Any notice required by law will have to make reference to this restriction accordingly.

¹⁵⁹ Case C-70/95, *Sodemare*, ECR 1997, I-3395, par. 32 f.

¹⁶⁰ The same conclusion was reached by the Commission in a Commission Staff Working Document, SEC(2007) 1514; 11, par. 2.7.

¹⁶¹ see Case C-448/01, *Wienstrom*, ECR 2003, I-14527, par. 33.

¹⁶² see for instance Case C-448/01, *Wienstrom*, ECR 2003, I-14527, par. 67. See also Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001) 566 final; see now also ECJ in Case C-346/06, *Rüffert*, judgment of 3-4-2008, not yet published in ECR.

¹⁶³ Case C-346/06, *Rüffert*, judgment of 3-4-2008, not yet published in ECR.

¹⁶⁴ for more details concerning this distinction see *Dullinger/Damjanovic*, Eignungs- und Zuschlagskriterien, in *Griller/Holoubek*, Grundfragen des Bundesvergabegesetzes 2002 (2004) 159, 165 f.

¹⁶⁵ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114.

5. Comparison of case-law on cross-border implications under competition, internal market and public procurement law¹⁶⁶

5.1. General principles

Competition law (Art 81, 82 and 87 EC) ¹⁶⁷		Fundamental freedoms	Public procurement law ¹⁶⁸
<i>Influence on trade and competition between Member States</i>	<i>Substantial part of the common market (Art 82 EC)</i>	<i>Cross-border element</i>	<i>Cross-border interest (potential bidders)</i>
<p>Mere suitability suffices: in this sense ECJ Case 22/78, <i>Hugin v Commission</i>, ECR 1979, 1869, par. 17; Case 19/77, <i>Miller v Commission</i>, ECR 1978, 131, par. 15; Case 234/84, <i>Belgium v Commission</i>, ECR 1986, 2321, par. 22; Case C-219/95 P, <i>Ferriere Nord v Commission</i>, ECR 1997, I-4411, par. 19f; CFI Case T-613/97, <i>UFEX</i>, ECR 2006, II-1531, par. 158; Case T-259/02, <i>Raiffeisen Zentralbank AG</i>, ECR 2006, II-5169, par. 162ff.</p> <p>The decisive criterion is not the individual Treaty clause but the Treaty in its entirety (or also the Treaty bundle): in this sense ECR Case 193/83, <i>Windsurfing International v Commission</i>, ECR 1986, 611, par. 96f; Case C-214/99, <i>Neste Markkinointi Oy</i>, ECR 2000, I-11121, par. 25.</p> <p>Especially so in economic sectors which are typically engaged in cross-border competition: in this sense ECJ Case 172/80, <i>Züchner v Bayerische Vereinsbank</i>, ECR 1981,</p>	<p>Entire Member State: ECJ Case C-260/89, <i>ERT</i>, ECR 1991, I-292, par. 31; Case C-241/91 P i.a., <i>RTE</i>, ECR 1995, I-743, par. 70; Case C-203/96, <i>Dusseldorp</i>, ECR 1998, I-4075, par. 60; Case C-462/99, <i>Connect Austria</i>, ECR 2003, I-5197, par. 79.</p> <p>Part of a Member State may suffice: ECJ Case 40/73, <i>Suiker Unie and Others v Commission</i>, ECR 1975, 1663, par. 448 (South Germany); Case 22/78 <i>Hugin v Commission</i>, ECR 1979, 1869, par. 19 (London); Case C-209/98, <i>Sydhavnens Sten & Grus</i>, ECR 2000, I-3743, par. 64 (Copenhagen).</p> <p>Specific entities may form a substantial part of the common market, for instance because of the scope of their activity, especially in freight haulage and the importance of such transport for imports and exports in the Member State</p>	<p>In general this element is given a broad interpretation.</p> <p>Future or potentially cross-border implications suffice: ECJ Case C-191/97, <i>Deliège</i>, ECR 2000, I-2549, par. 58 (the possibility of partaking in sports competitions in another Member State suffices); ECJ Case C-254/98, <i>TK-Heimdienst Sass GmbH</i>, ECR 2000, I-151, par. 26 (country's own national challenges domestic rule, potential impediment of market access for market participants from other Member States suffices); ECJ Case C-36/02, <i>Omega</i>, ECR 2004, I-9609, par. 21 (German authority issues prohibition order against German undertaking, but that order is capable of restricting the future development of contractual relations (supply and franchise contracts) with parties from other Member States); ECJ C-293/02</p>	<p>It suffices that there is the possibility for undertakings from other Member States to be indirectly affected by a public contract, even though the situation has no cross-border implications, such as an undertaking operating also internationally, or a market being not entirely uninteresting to foreign undertakings: ECJ Case C-87/94, <i>Commission v Belgium</i>, ECR 1996, I-2043, par. 33; Case C-458/03, <i>Parking Brixen</i>, ECR 2005, I-8585; conclusions of AG Kokott of 13-3-2008, Case C-454/06, , par. 114.</p> <p>Cross-border interest can only be excluded under special circumstances, such as in cases of minimal economic importance of the contract or specific regional character: ECJ Case C-69/88, <i>Krantz</i>, ECR 1990, I-583, par. 11; Case</p>

¹⁶⁶ We wish to thank MMag. Andrea Herzog for her invaluable assistance in compiling this overview.

¹⁶⁷ see also Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101/81.

¹⁶⁸ see also Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ 2006 C 179/2.

<p>2021, par. 18; Case C-305/89, <i>Italy v Commission</i>, ECR 1991, I-1603, par. 26; Commission Decision of 17-1-1995, OJ 1995 L 159/21.</p> <p>Also undertakings which operate only locally and are not involved in exports (exports by undertakings from other Member States are reduced): in this sense ECJ Case 102/87, <i>France v Commission</i>, ECR 1988. 4067, par. 19; Case C-278/92, <i>Spain v Commission</i>, ECR 1994, I-4103, par. 40ff; Case C-88/03, <i>Portugal v Commission</i>, ECR 2006, I-7115, par. 91 (selective local aid); CFI Case T-288/97, <i>Regione Friuli Venezia Giulia</i>, ECR 2001, II-1169, par. 51.</p> <p>Also not excluded for relatively small amount of aid and relatively small size of the undertaking receiving such aid: in this sense ECJ Case C-142/87, <i>Belgium v Commission</i>, ECR 1990, I-959, par. 43; Case C-278/92 i.a., <i>Spain v Commission</i>, ECR 1994, I-4103, par. 40f; CFI Case T-214/95, <i>Vlaams Gewest v Commission</i>, ECR 1998, II-717, par. 48f.</p>	<p>concerned: Commission Decision 94/119/EG, <i>Port of Rodby</i>, OJ 1994 L 55/52; ECJ Case C-179/90 <i>Porto di Genova</i>, ECR 1991, I-5889 par. 15; Case C-242/95, <i>GT-Link</i>, ECR 1997, I-4449, par. 36f; Case C-163/96, <i>Pretura circondariale di La Spezia</i>, ECR 1998, I-533, par. 26 (port); CFI Case T-128/98, <i>Paris airports</i>, ECR 2000, II-3929, par. 152 (airport); ECJ Case C-395/96 P <i>Compagnie maritime belge</i>, ECR 2000, I-1365, par. 47; Commission Decision 92/213/EEC, <i>British Midland</i>, OJ 1992 L 96/34 (transport route).</p>	<p><i>Jersey Produce Marketing Organisation</i>, ECR 2005, I-9543 (potential restriction on exports under a purely regional levy); similar ECJ Case C-72/03 <i>Carbonati Apuani</i>, ECR 2004, I-8027.</p> <p>For services it suffices for a recipient to cross the border (principle of 'passive' freedom to provide services): ECJ Case C-286/82 i.a., <i>Luisi & Carbone</i>, ECR 1984, 377, par. 10; Case C-198/89, <i>Commission v Greece (tourist guide)</i>; ECR 1991, I-727, par. 9; Case C-180/89, <i>Commission v Italy, (tourist guide)</i>, ECR 1991, I-709, par. 8; Case C-154/89, <i>Commission v France (tourist guide)</i>, ECR 1991, I-659, par. 9; ECJ Case C-224/97, <i>Ciola</i>, ECR 1999, I-2517.</p>	<p>C-44/98, <i>BASF</i>, ECR 1999, I-6269, par. 16; Case C-431/01, <i>Mertens</i>, ECR 2002, I-7073, par. 34; Case 231/03, <i>Coname</i>, ECR 2005, I-7287, par. 20.</p> <p>Circumstance suffices that cross-border interest cannot be excluded: ECJ Case 87/94, <i>Commission v Belgium</i>, ECR 1996, I-2043, par. 33; Case C-458/03, <i>Parking Brixen</i>, ECR 2005, I-8585; par. 55; Case C-380/05, <i>Centro Europa 7 Srl</i>, judgment of 31-1-2008, par. 66f.</p>
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5.2. Social services: cross-border implications answered in the affirmative

Competition law (Art 81, 82 and 87 EC) ¹⁶⁹		Fundamental freedoms	Public procurement law ¹⁷⁰
<i>Influence on trade and competition between Member States</i>	<i>Substantial part of the common market (Art 82 EC)</i>	<i>Cross-border element</i>	<i>Cross-border interest (potential bidders)</i>
<p>Operating a compulsory social-insurance scheme by a single entity constitutes influence on trade between Member States as foreign insurers will thus be kept from offering a complete pension scheme as a cross-border service: ECJ Case C-67/96 <i>Albany</i>, ECR 1999, 5751, par. 48ff.</p> <p>A regional electricity distributor holding a non-exclusive concession for the distribution of electricity in the territory covered by the concession prohibits local electricity distributors, by means of an exclusive purchasing clause, from importing electricity for public supply purposes. In spite of the regional character of this setting it is necessary for the assessment of cross-border implications to include all contractual relationships between producers, regional electricity distributors and end-users. These contractual relationships may have the cumulative effect of compartmentalising the national market (but may be exempted from the scope of competition law under Art 86(2) EC): ECJ Case C-393/92 <i>Municipality of Almelo</i>, ECR 1994, I-1477,</p>	<p>A public employment agency engaged in the business of employment procurement may be regarded as occupying a dominant position in terms of an undertaking vested with a legal monopoly, provided that the area of the Member State covered by the monopoly represents a substantial part of the common market: ECJ Case 41/90 <i>Höfner</i>, ECR 1991 I-1979, par. 28f.</p> <p>In any case a substantial part of the common market is formed by the area of a Member State in respect of the collection, carriage and distribution of mail: ECJ Case 320/91, <i>Corbeau</i>, ECR 1993, I-2533, par. 9; in this sense also Case C-147/97, <i>Deutsche Post AG</i>, ECR 2000, I-825, par. 57.</p> <p>Ambulance services – if the dominant position involves the entire Land of Rheinland-Pfalz, this position, owing to the large surface area of the Land of almost 20,000 sqkm and a</p>	<p>The decisive criterion is that hospital treatment is carried out in another Member State. The fact that the national health insurer is requested to reimburse the costs of care is irrelevant: in this sense ECJ Case C-157/99, <i>Smits and Peerbooms</i>. ECR 2001, I-5473, par. 69; Case C-385/99, <i>Müller-Fauré</i>, ECR 2003, I-4509, par. 40ff; Case C-372/04, <i>Watts</i>, ECR 2006, I-4325, par. 89ff; in this sense also dental treatment in another Member State: ECJ Case C-158/96, <i>Kohll</i>, ECR 1998, I-1931, par. 35; refusal of reimbursement of the cost of spectacles bought in another Member State: ECJ Case C-120/95 <i>Decker</i>, ECR 1998, I-1831, par. 34.</p> <p>Deductibility of attendance fee paid to private school – cross-border implications also apply when parents live and work in one Member State and only child crosses border to attend school: ECJ Case C-76/05, <i>Schwarz</i>, ECR 2007, I-6849; in this sense also refusal of tax exemption for teaching on grounds of</p>	<p>Cross-border interest in any case when transferring the publication of telephone directories to a private undertaking under a service concession. Despite the non-applicability of the Public Procurement Directive an obligation of ensuring a sufficient degree of advertising is imposed on the contracting authority (it cannot be excluded that foreign bidders are interested): ECJ Case C-324/98 <i>Teleaustria AG</i>, ECR 2000, I-1074, par. 60f.</p> <p>Cross-border interest in the award of a concession for the management of a public gas-distribution service of a municipality since it is not possible to exclude interest in obtaining that concession by an undertaking established in another Member State: ECJ Case C-231/03 <i>Coname</i>, ECR 2005, I-7287, par. 17.</p> <p>Cross-border interest is also</p>

¹⁶⁹ see also Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101/81.

¹⁷⁰ see also Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ 2006 C 179/2.

<p>par. 35ff.</p> <p>It is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services may none the less have an effect on trade between Member States, since, where a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State: ECJ Case C-280/00 <i>Altmark Trans</i>, ECR 2003, I-7747, par. 77f.</p> <p>For aid in areas of theatre, dance, music and audiovisual activities with comparatively high (international) diffusion it cannot be excluded that such aid has a certain effect on intra-Community trade: Commission Decision N 340/2007, <i>Aid for theatre, dance, music and audiovisual activities</i>, OJ 2007 C 206/01.</p> <p>Capability of affecting trade between Member States does not depend on the local or regional character of the services supplied or on the scale of the field of activity concerned; medical practitioners specialising in dentistry are competing with medical practitioners from other Member States: ECJ Case C-172/03 <i>Heiser</i>, ECR 2005, I-1627, par. 33.</p>	<p>population of roughly four million (above that of some Member States), concerns a substantial part of the common market: ECJ Case C-475/99 <i>Ambulanz Glöckner</i>, ECR 2001, I-8089, par. 38.</p>	<p>such teaching being performed at a university located in another Member State: ECJ Case C-120/95 <i>Jundt</i>, judgment of 18-12-2007, par. 53.</p> <p>Social benefits (child raising allowance) – the cross-border element remains applicable to a frontier worker even when a German citizen moves to another Member State while retaining his employment relationship in Germany: ECJ Case C-212/05 <i>Hartmann</i>, ECR 2007, I-6303, par. 20.</p> <p>Gambling for charitable purposes – provided that at least one of the service providers may be established in another Member State where the service is provided (restriction justifiable): ECJ Case C-67/98 <i>Zenatti</i>, ECR 1999, I-7289, par. 24.</p>	<p>answered in the affirmative for a cooperation agreement for providing postal services which are not reserved, in this concrete case the annual payment for this service was only EUR 12,020.42. The mere fact that the Community legislature considered that the strict special procedures laid down in the directives on public procurement are not appropriate in the case of public contracts of small value does not mean that those contracts are excluded from the scope of Community law ECJ Case C220/06, <i>Asociación Profesional de Empesas v Administración General del Estado</i>, judgment of 18-12-2007, par. 72; in this sense also ECJ Case C-59/00, <i>Vestergaard</i>, ECR 2001, I-9505, par. 19; ECJ Case C-264/03, <i>Commission v France</i>, ECR 2005, I-8831, par. 33.</p>
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5.3. Social services: cross-border implications answered in the negative

Competition law (Art 81, 82 and 87 EC) ¹⁷¹		Fundamental freedoms	Public procurement law ¹⁷²
<i>Influence on trade and competition between Member States</i>	<i>Substantial part of the common market (Art 82 EC)</i>	<i>Cross-border element</i>	<i>Cross-border interest (potential bidders)</i>
<p>No relevant effect on trade and competition between Member States contrary to Community law is generated by a decision by the members of a profession to set up a pension fund entrusted with the management of a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all members of the profession: ECJ Case C-180/98 <i>Pavlov</i>, ECR 2000, 6451, par. 90ff.</p> <p>Restriction on trade between Member States is to be denied for public grants paid to a local swimming pool having a catchment area of roughly 50 km: Commission Decision N 258/00 <i>Leisure pool Dorsten</i>, OJ 2001 C172/14, 16.</p> <p>No intra-Community implications concerning public grants for the construction, extension and refurbishment of national (in this case Irish) hospital buildings. Commission Decision N 543/01, <i>Capital allowances to Irish hospitals</i>, OJ 2002 C 154/3, 4</p>	<p>No substantial part of the common market may be formed by small and distinct, highly local (regional) markets; such as local markets for ready-mixed concrete in France and the UK; Commission Decision of 16-12-1997, COMP/M.1030, <i>LaFarge v Redland</i>; or by certain local gas supply markets, Commission Decision of 25-11-1996, IV/M.713, <i>RWE v Thyssengas</i>; distinct local retail markets Commission Decision of 25-11-2000, COMP/M.1684, <i>Carrefour v Promodès</i>.</p> <p>A market may, under special circumstance, not be considered a substantial part of the common market if the national market concerned is by tradition accessible to foreign competition only to a very limited extent: in this sense Commission Decision of 24-04-1997, IV/M. 894, <i>Rheinmetall/British Aerospace/STN Atlas</i>; Commission Decision of 19-06-1998 IV/M.1153, <i>Krauss-Maffei/Wegmann</i>.</p>	<p>Employment procurement – in a situation where a German recruitment consultant is in litigation with a German undertaking over the procurement of a German national for a post in this undertaking, the consultant cannot invoke any cross-border implications as defined by the freedom to provide services: ECJ Case 41/90 <i>Höfner</i>, ECR 1991, I- 1979, par. 35ff; in this sense also Case 52/97, <i>Debauve</i>, ECR 1980, 833, par. 9; Case C-134/95, <i>USSL</i>, ECR 1997, I-195, par. 19.</p> <p>There is no cross-border element under the freedom to provide services if a company which, having established itself in a Member State in order to run old people's homes there, provides services to seniors from other Member States, since the nationals of these other Member States go to the old people's homes to stay there permanently or for an indefinite period. Hence they are no longer residents of</p>	<p>Award of a public contract, without a prior contract notice, to the postal service pursuant to which those entitled under various social benefit schemes could collect their payments from post offices. The Commission has failed to provide the necessary evidence that would establish that such a service, despite its specific character, is of certain cross-border interest. <i>A priori</i> such services have no cross-border interest: ECJ Case C-507/03, <i>Commission v Ireland</i>, judgment of 13-11-2007, par. 33.</p> <p>A contract on issuing press releases for federal departments, including grant of access to an existing news archive, may have, in the circumstances of the case, no cross-border interest since a large part of the services required display specific references to the Member State in question and also to purely regional events in that country: case not yet decided, see conclusions of AG Kokott</p>

¹⁷¹ see also Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101/81.

¹⁷² see also Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ 2006 C 179/2.

<p>Subsidies allocated for the construction of service areas for road haulage vehicles in Tenerife cannot affect trade between Member States: Commission Decision NN 29/02, <i>Spain – Aid for the installation of service areas on Tenerife</i>, OJ 2003 C 110/14.</p> <p>Restriction on trade between Member States is to be denied concerning subsidies for regional theatre productions which, owing to their language-specific characteristics, have no international diffusion and whose catchment area is limited to about 50 km: Commission Decision N 257/2007, <i>subsidies for theatre productions</i>, OJ 2007 C 173/1; in this sense also Commission Decision N 448/2005, <i>Theatre, musical and dance</i>, OJ 2006 C 89/6.</p>		<p>another Member State. ECJ Case C-70/95 <i>Sodemare</i>, ECR 1997, I-3395, par. 36ff.</p>	<p>of 13-3-2008, Case C-454/06, <i>presstext Nachrichtenagentur</i>, par. 114.</p>
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II. Need for legal policy action and requirements for a possible legal instrument on social services of general interest

1. Legal basis

If Community lawmakers are to take action on the issue of social services the Treaty has to provide some legal basis for them to act within the limits of the powers conferred upon them by this Treaty.

De lege lata Art 86(3) EC would be the first option, as it gives the Commission the power to address appropriate directives or decisions to Member States for the purpose of regulating services of general economic interest.¹⁷³ However, case-law of the Court of Justice concerning reliance on this provision in liberalising telecommunication markets¹⁷⁴ shows that Art 86(3) EC cannot be used as a general legislative basis for regulating services of general interest. This is why the Commission later suggested taking further steps of liberalisation on the basis of Art 95 EC, which has led to greater involvement of the European Parliament under the co-decision procedure.

De lege ferenda Art 16(3) EC (=Art 14(3)) of the Treaty of Lisbon creates a suitable legal basis. Under this provision the European Parliament and the Council may adopt regulations relating to services of general economic interest wherein they establish the principles and set the conditions for their operation. Ordinary legislative procedure is to be applied for this purpose. But Art 16 EC links this legal basis with specific requirements which limit Community lawmaking powers, while also according wide discretionary powers. For one thing, the principles and conditions, particularly economic and financial conditions, are to be such that they enable SGEIs to fulfil their missions. For another thing, a legal act according to Art 16 EC must not prejudice the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services. This has to be borne in mind when defining the contents for such a legal act. Certain guidance can be sought from primary law provisions. The ‘principles and conditions, particularly economic and financial conditions’ mentioned in the Treaty certainly also include rules relating to the funding of services of general interest and the granting of special or exclusive rights to ensure operation of services of general interest. Hence the legal act could be used to better define certain aspects of these areas. In addition, a legal act on the basis of Art 16 EC would also be a suitable instrument for clarifying a number of horizontal questions raised in the first part of this paper.

2. Details on the contents of such a possible legal act

2.1. The distinction between economic and non-economic activities

As pointed out in the first part, distinction between economic and non-economic activities is still subject to very unclear criteria. Case-law can only provide very rough outlines. This has led to considerable legal uncertainty especially in the social sector. This could be remedied by a new legal act providing clear distinction. This would have the major advantage of lifting questions of distinction to a political level, i.e. have the European Parliament and Council decide in an ordinary legislative procedure.

¹⁷³ for the possibilities and limits of the Commission’s lawmaking powers see *Cruz*, *Beyond Competition: Services of General Interest and European Community Law*, in *de Burca*, *EU Law and the Welfare State* (2005) 169, 198 ff with added references.

¹⁷⁴ Joined Cases C-271/90, C-281/90 and C-289/90, *Spain v Commission*, ECR 1992, I-5833.

Alongside the social nature of an activity, other criteria for distinction could be the majority involvement of volunteers, donation-based funding of the activity, local character of the service provided, small-scale organisation and regional nature of the entity concerned, etc. The not-for-profit nature of an entity as such could not be used as a criterion as, according to case-law, this does not preclude classification as an economic activity. Distinction, as to be provided by such a legal instrument, would also have to include existing case-law of the ECJ. Education services and social security services would have to be left out in terms of codification of case-law. This could also be the right place for a more precise distinction and definition of these areas. This would also have the advantage of ensuring legal certainty in future. Case-law of the Court of Justice is based on current Community law applicable at the time of judgment and, for this purpose, also relates to situations in the Member States that are subject to change across time. In particular the current developments in the tertiary education sector illustrate that market orientation plays an increasingly important role. This would not preclude change in future case-law decisions. Inclusion in a legal act could clarify the situation.

One could raise objections to this proposal by arguing that the distinction between economic and non-economic activities is based on elements of the EC Treaty and thus on primary law. They cannot be changed by an act of secondary law. Rather, the interpretation of primary law is within the sole competence of the ECJ. However, the ECJ's existing practice of distinguishing between economic and non-economic services has to make do without any definition and value judgment provided by Community lawmakers. The Court of Justice has thus been forced to introduce judge-made law in order to make such a distinction in view of the situation in the Member States. This inevitably entails a value judgment on which types of services should be provided within and which outside the market. Now if such a distinction is provided by Community lawmakers at the political level through a legal act still to be created, obviously the European Court of Justice would in future rely on these Community definitions as long as this legal act does not exceed the bounds of primary law established by jurisprudence.

2.2. Definition of *de minimis* thresholds

As already explained, social services are frequently provided at local and regional levels within small-scale economic structures with little turnover. In many cases, national rules in this area will thus have only little potential to influence the pattern of trade between Member States or distort competition, and they will hardly be able to erect any access barriers of relevance which might close the domestic market to providers from other Member States. Unrestricted application of Community law to these kinds of social services might thus lead to a major regulatory burden with no perceptible additional benefit for the internal market. This is also taken into account by Community law which provides derogations for economic transactions that have no potential for burdening the internal market. However, the constituent elements to be used in this context vary by area of Community law and are also subject to differing interpretations by the Court of Justice.¹⁷⁵ Here, too, clarification will only be achieved by providing a more precise definition under secondary law. This could be done by a legal act according to Art 16 EC. Better definition might include quantifiable turnover thresholds below which entities are not required to comply with State aid and public procurement rules. By the way, this corresponds to the approach already adopted by the

¹⁷⁵ for an overview of the key criteria developed by case-law see section I.5.

Commission in its *Altmark* package for State aid. Such an approach could also be included in a future legal act as a general rule for social services.

2.3. Rules of relevance to the internal market

It is incumbent on the Court of Justice alone to interpret the fundamental freedoms of the common market by case-law. Thus the options of limiting the rights granted by the EC Treaty are few. Still it would be conceivable to provide clarification, which is to be reviewed by the Court of Justice, as to the kind of conditions under which the unrestricted application of fundamental freedoms could call into question the proper operation of services of general interest. For this purpose one could specify and codify the reasons for justification used by the Court of Justice in relation to social services. A starting point could be case-law on health services.¹⁷⁶ One could clarify that any substantial threat to the financial balance of social security systems constitutes an overriding reason in the general interest which may justify certain restrictions. The ECJ has highlighted the need to control the costs that may arise by supply-induced demand, and to prevent, as far as possible, any wastage of financial, technical and human resources. Such grounds of justification developed by case-law can be included in an act of law to ensure better definition.

Clarification also needs to be provided for obligations to take a specific legal form favouring non-profit-making operators. The Court of Justice held in the *Sodemare* case that, *as Community law stood at present* (highlighted in italics by the authors), a Member State might, in the exercise of the powers it retained to organise its social security system, consider that attainment of the objectives pursued by a social welfare system necessarily implied that the admission of private operators to that system as providers of social welfare services was to be made subject to the condition that they were non-profit-making.¹⁷⁷ Since the current standing of Community law is to be illustrated by a legal act under Art 16 EC, Community lawmakers will be well advised to clarify this definition of the Court of Justice.

2.4. Rules of relevance to competition and State aid

The focus of State aid and competition rules will be on the treatment of public service compensation. They will have to be examined under Art 86(2) EC, as well as under Art 87 EC, but they are subject to the same criteria in both cases. The parameters established by case-law and later in the 'Monti package' cause a number of practice problems that are not irrelevant, especially so in the social domain. They primarily concern all the four criteria defined by the Court of Justice in the *Altmark* case.¹⁷⁸ Just take the nature and requirements concerning the official mandate given to providers (entrustment condition). They are still unclear, as far as the social sector is concerned, and need to be defined in greater detail by an act of law. Moreover, there may be situations, also and in particular for social services, where it is difficult to calculate *ex ante* the parameters necessary for compensation. This, too, could be taken into account by introducing a special rule for social services which would not impose such an *ex ante* evaluation approach. Special problems are caused by the requirement that the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred. Unless social entities operate in a competitive environment, such a *tertium comperationis* will be hard to come by. Case-law has already addressed this issue in *Chronopost*¹⁷⁹. The CFI re-

¹⁷⁶ see section I.2 above.

¹⁷⁷ Case C-70/95, *Sodemare*, ECR 1997, I-3395, par. 32. See also section I.2 above.

¹⁷⁸ see section I.3 above.

¹⁷⁹ Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, *Chronopost*, ECR 2003, I-6993.

examined the problem in the recent *BUPA*¹⁸⁰ case. A new legal act could appropriately address this special constellation, which will be of great significance, also and in particular, for social services.

The option of introducing special threshold levels within the meaning of a *de minimis* rule has already been mentioned above.

2.5. Public procurement issues

As explained, social services are subject to only a very lean public procurement regime. Nevertheless the question arises whether the rules on awarding public contracts take sufficient account of the specificities of the social sector. The ‘in-house’ option of providing such services appears to be too restrictive in scope. Rigid jurisprudence in this area makes it almost impossible for public contracting bodies to have services provided by divested entities if the latter are supposed to get contracts from other public authorities as well. This may well result in major rationalisation predictions failing to materialise. The problem has caused a revision of rules for in-house procurement in the Regulation on public passenger transport services^{181, 182}. A similar thrust could be given to a legal act under Art 16 EC by introducing general rules for the provision of social services by ‘in-house’ entities. In addition, the above Regulation on public passenger transport services has also widened the scope for direct awards of contracts without competition. A similar approach might be considered for social services. Last but not least enhanced tendering requirements for social services run the risk of giving highly profitable services to the private sector, while the non-profit bidders will have to make do with unprofitable services. This problem is exacerbated by the fact that public procurement law does not provide any option, save under the special rule for sheltered workshops, to restrict contract awarding to non-profit entities.¹⁸³

2.6. Definition of universal-service obligations

2.6.1. Definition of contents

Based on its genesis Art 16 EC is closely connected with the definition of universal-service obligations. Already under Declaration no. 13 on the Treaty of Amsterdam the provisions of Article 7d (now Art 16 EC) are to be implemented with full respect for the jurisprudence of the Court of Justice, *inter alia* as regards the principles of equality of treatment, quality and continuity of public services.

This stipulation is now reaffirmed – with legally binding force – in the Treaty of Lisbon under the annexed Protocol on services of general interest. This Protocol sets out the common values underpinning Union policies for SGIs; such values also include a high level of quality, safety and affordability of such services, while ensuring equal treatment, universal access and upholding user rights. This appears to express a general legal thought which is also found in Art 36 of the Charter of Fundamental Rights. Under this provision the European Union respects the access to services of general interest in order to promote social and

¹⁸⁰ Case T-289/03, *BUPA*, judgment of 12-2-2008, not yet published in ECR.

¹⁸¹ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) nos 1191/69 and 1107/70, OJ 2007 L 315/1.

¹⁸² see also *Kahl*, Die neue Public Service Obligations (PSO)-Verordnung, ZVR 2008, 83, 85 f.

¹⁸³ see section I.4.2.3 above.

territorial inclusion. These references illustrate that any legal act to be adopted on the basis of Art 16(3) EC apparently needs to contain universal-service obligations as well.

This may surprise at first sight. In classical terms universal-service obligations are included in acts of secondary Community law, if sectors are to be liberalised which have not been subject to competition so far. Examples would be the Community *acquis* in the telecommunications sector¹⁸⁴, the gas¹⁸⁵ and electricity¹⁸⁶ Directives, as well as the Directive on postal services.¹⁸⁷ This is logical, since only the opening up of a market to competition makes it necessary to lay down universal-service obligations. In a competitive market environment the services previously provided by monopolies implicitly or explicitly under a political mandate need to be defined and funded by public authorities. Such a general mandate to liberalise services of general interest can certainly not be inferred from Art 16 EC alone. Also internal market, competition and State aid rules do not impose a general liberalisation obligation and leave it to the Member States to decide on the organisation and operation of services of general interest. This raises the question why universal-service obligations should be laid down under Community law without being accompanied by simultaneous steps of liberalisation.

For one thing one could answer that, although Community law fails to impose any direct legal obligation of liberalisation, the rules on the internal market, on competition and on State aid may move certain areas, and also those of the social sector, closer to a market environment both in economic and in indirect terms. In view of these developments it makes sense to secure the provision of SGIs through universal-service obligations under Art 16 EC.

Moreover, one must not overlook that Art 16 EC includes a dual mandate imposing obligations not only on the Community but also on the Member States. Already now and independently of any obligations under Community law, social services in many Member States are being offered within a market environment and purchased by public authorities on these markets. Universal-service obligations are called for in areas of the social sector which are faced with competition. The exact scope of such obligations will, as a rule, have to be defined by the Member States. This is also underlined by the Protocol on services of general interest which highlights the essential role and the wide discretion of national, regional and local authorities in this area. Also the method of law-making used for the above liberalisation Directives takes this into account by providing, as a rule, a general framework for universal-service obligations to be defined in greater detail by the Member States. Nevertheless it would be conceivable that a general act of law on SGEIs might also contain minimum requirements for universal-service obligations. This follows from the objective under Art 36 of the Charter of Fundamental Rights, but also from the said Protocol, which deems a high level of universal-service obligations to be among the common values of the European Union to be pursued by that Union and not only by the Member States.

¹⁸⁴ see also *Szysczak*, *The Regulation of the State in Competitive Markets in the EU* (2007) 143.

¹⁸⁵ Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ 2003 L 176/57.

¹⁸⁶ Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ 2003 L 176/37.

¹⁸⁷ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ 1998 L 15/14, later Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, OJ 2008 L 52/3.

2.6.2. Access and affordability; continuity; contractual and pre-contractual obligations

If a legal act under Art 16 EC is to include universal-service obligations in conformity with the existing *acquis*, they could be used to guarantee access to such services of a certain quality and at an affordable price for all people irrespective of their economic, social or geographic situation. Directive 97/33/EC¹⁸⁸ gives a precise definition of the Community concept of universal-service obligations, which relates to a defined minimum set of services of specified quality which is available to all users independent of their geographical location and, in the light of specific national conditions, at an affordable price. The new package of rules on electronic communication even includes a special Directive on universal services.¹⁸⁹

Another aspect of universal services is the right to individual access to such services. This notion is also expressed in Art 36 of the Charter of Fundamental Rights. For instance, Directive 2002/22/EC¹⁹⁰ sets forth that all reasonable requests for connection to the public telephone network and access to the publicly available telephone service must be met by at least one undertaking. This also involves requirements as to the quality of the connection provided.

The aspect of affordable prices may also result in universal-service obligations covering measures of price formation and price fixing. This includes rules aimed at ensuring that those on low incomes or with special social needs are not prevented from accessing or using the service. Literature describes this as the 'social *force majeure*' principle designed to protect vulnerable parties.¹⁹¹ For instance the Directive concerning common rules for the internal market in natural gas¹⁹² requires that there be adequate safeguards to protect vulnerable customers, including appropriate measures to help them avoid disconnection. The regulatory density of requirements concerning access and affordability varies by act of Community law. The Commission presumes that the definition of universal services and thus the details of Community law requirements should basically fall within the competence of Member States.¹⁹³ Nevertheless there are a number of acts of Community law which contain very specific requirements for universal services. An example would be the ones under Directive 2002/22/EC concerning the organisation of ISDN services, the publication of directories covering all listed telephone subscribers, emergency services and very detailed billing rules for service providers. Also the Postal Services Directive sets out very detailed requirements on the quality of services to be provided.¹⁹⁴

Among the typical universal-service obligations we also find continuity of service. The Commission defines such continuity as being the obligation of the service provider to ensure permanent supply of the service to the public. The Postal Services Directive specifies that postal services shall not be interrupted or stopped except in cases of *force majeure*.

¹⁸⁸ Directive 97/33/EC of the European Parliament and of the Council on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), OJ 1997 L 199/32.

¹⁸⁹ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ 2002 L 108/51.

¹⁹⁰ see Art 4 of the Directive (FN 189).

¹⁹¹ *Wilhelmsson*, Services of General Interest and Private Law, in *Rickett/Telfer*, International Perspectives on Consumers' Access to Justice (2003) 165.

¹⁹² see Art 3(3) of the Directive (FN 185).

¹⁹³ See also White Paper on services of general interest, COM(2004) 374 final, par. 5.

¹⁹⁴ see also *Szysczak* (FN 184) 247 f.

Moreover, emergency services are defined which have to continue service also in cases of network failure.

The concept of universal services finally also includes measures of consumer protection, especially in terms of pre-contractual and contractual information requirements. An example would be the Natural Gas Directive, which sets out very detailed rules concerning the contents of contracts concluded with customers. The Postal Services Directive, for its part, obliges Member States to take steps to ensure that users are regularly given sufficiently detailed and up-to-date information by the universal service provider(s) regarding the particular features of the universal services offered, with special reference to the general conditions of access to these services as well as to prices and quality standard levels. Moreover, such information is to be published in a suitable manner.

What is common to all universal-service obligations is that they generally do not accord any enforceable rights to individuals. As a rule, the obligations are addressed to the Member States. Also Art 36 of the Charter of Fundamental Rights cannot be interpreted as a basis for claiming directly enforceable rights for individuals to access these services. Hence enforcement of such requirements for universal-service obligations under Community law will primarily remain the responsibility of the Commission. This is why the relevant Directives usually specify comprehensive information requirements, while the Commission – in the event of infringements of the substantive contents of the Directive – may take recourse to the EC infringement procedure. This would also be the avenue suggested for specifying such obligations in a legal act under Art 16 EC.

Executive summary

I. Analysis of underlying primary law

The study starts out from an analysis of primary law underlying services of general interest. References in Community law are mainly found in the fundamental freedoms of the internal market, in European competition law (Art 81f EC), in State aid law, as well as in requirements of public procurement law.

1. Fundamental freedoms

As a rule, social services are to be deemed economic activities and are thus subject to the fundamental freedoms of the internal market. Exceptions to this rule might relate to those areas where services are provided not for profit, free of charge and solely by volunteers. Derogations favouring services linked to public authority are likely to be applicable only in marginal areas, such as for probation services monitored by criminal courts. But the situation is quite different for basic social security schemes. According to case-law they are expressly not subject to competition rules as these entities are not to be considered undertakings.

In principle, the providers of social services from other Member States may invoke the fundamental freedoms whenever they are confronted with restrictions and limitations when taking up and performing an activity in Austria. The catalogue of potentially infringing restrictions is very large indeed. It includes restrictions on the number of providers in the form of a *numerus clausus* (fixed number of providers; such as contract doctors accepted by social health insurance schemes; or restricted number of pharmacies), restrictions by quality criteria, or needs analyses under which market access must not jeopardise the continued existence of currently available facilities. This also includes restrictions and privileges for the benefit of non-profit entities.

All these restrictions are to be seen as unlawful restrictions of Treaty freedoms. But this does not mean that they are *per se* prohibited under Community law. Rather one will have to examine in each case under which conditions such rules can be justified for overriding reasons of general interest and can thus be maintained. According to case-law the ECJ recognises the necessity of restrictions for the benefit of services of general interest, as far as there is evidence for a real need for public services and as far as such a service would not be sufficiently delivered in free competition. However, the concrete rule must be necessary, proportionate to secure the intended objective and based on objective and non-discriminatory criteria known in advance to the undertakings concerned. Case-law rulings on health services may be used to make more detailed inferences about the social sector.

A number of social services is also covered by the new Directive on services in the internal market. Its provisions on the freedom of establishment largely incorporate primary law as it stands at present, i.e. no real additional potential for liberalisation can be expected from this Directive in substantive terms. However, it must be noted that needs analyses are permitted only to a very limited extent within its scope. But there is a major difference in terms of procedural law. The Directive requires an extensive horizontal screening concerning requirements under its scope and stipulates comprehensive obligations of notifying the European Commission.

2. Competition law

Another important gate where Community law enters national law is that of competition rules laid down by the EC Treaty. The provision of social services is frequently organised, coordinated or otherwise influenced by government entities or by entities for which the state traditionally takes particular responsibility. As far as this may affect competition in the social sector, such conduct might, under certain circumstances, be subject to antitrust rules under Art 81 EC.

Another typical characteristic of the social sector is that certain social services, such as probation services, assistance services to refugees, etc., are basically only required by public entities. If these service-demanding entities act as entities which control the markets (markets that need to be appropriately defined), the requirements of Art 82 EC need to be observed which prohibit any abuse of a dominant market position. However, invoking Art 82 EC vis-à-vis public entities is not possible whenever their activities are of a non-economic nature. According to more recent ECJ case-law this also applies to the demand-side behaviour of public entities if they engage in non-economic activity on the supply side.

However, competition rules basically need to be considered for and against social entities that engage in economic activity. Owing to the usually small-scale organisation and local nature of social sector services it will frequently not be possible to prove the necessary implications for the internal market. Similarly, this also applies to State aid and public procurement rules. Related case-law rulings and the requirements they entail are summarised in a separate horizontal chapter (section I.5).

Finally, there is also the option of using Art 86(2) EC to account for the specificities of social services. This provision exempts, under certain circumstances, services of general economic interest from the scope of competition rules. Exclusive or special rights granted to social entities to enable them to fulfil their missions can thus be justified invoking this provision (section I.2.3).

The substantive contents of Art 86(2) EC are not changed by the general provisions of Art 16 EC, nor by its new wording under the Treaty of Lisbon, nor by the new Lisbon Protocol on services of general interest. But the above legal acts underline the special importance attributed by Community law to services of general interest (section I.2.4). The same applies to Art 36 of the Charter of Fundamental Rights concerning access to services of general economic interest, which should be given legally binding force by the Lisbon Treaty.

3. Rules on State aid

Social services are largely funded by public authorities either in full or in part. Such flows of funding are potentially subject to European State aid monitoring requirements. Here, too, the *de minimis* rules and the need for intra-Community implications provide guidance for exempting social services from the scope of State aid under specific circumstances.

Community law requirements for compensation paid for services of general economic interest have been defined in greater detail by the ECJ in its *Altmark Trans* decision and have then been the subject matter of legislative action by the Commission in the so-called 'Monti package'. According to these definitions compensation will escape classification as State aid and thus will not be subject to notification if four cumulative conditions are satisfied: The recipient undertaking must actually have public service obligations to discharge, and the

obligations must be clearly defined; the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner; the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations; and, finally, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred in discharging those obligations.

In its policy package the Commission makes no use of the option outlined by the Court Justice, namely to examine more closely or even refuse to approve compensation which fails to comply with hypothetical net costs. Rather, the policy package only requires fulfilment of the first three *Altmark* criteria and excludes over-compensation unless the amount exceeds what is necessary to cover the costs incurred, taking into account reasonable profit for discharging those obligations. Benchmarking is not required.

4. Public procurement rules

Public procurement rules can be of relevance to the social sector in two respects. Social entities may be considered public contracting bodies under certain circumstances. This is the case whenever they perform tasks in the general interest of a non-industrial or non-commercial nature and are under the influence of the State.

If the State enters into service relationships with providers by purchasing social services from them, as a rule it will have to conduct a public procurement procedure whenever this is a payable exchange of services. This will primarily concern healthcare and social services. Under the Community's public procurement system they are classified as so-called non-priority services subject to only a very lean public procurement regime.

No formal public procurement procedure needs to be conducted if compensation for the service demanded by public authorities is not paid by the latter but by third parties which also bear the economic risk of the activity in question. In terms of public procurement law this could be a service concession, and case-law maintains that the contracting entities concluding them are bound to comply with Treaty rules which imply an obligation of ensuring adequate transparency.

A public contracting body may, without conducting any public procurement procedure, if this is so warranted, buy social services from an entity which, though formally distinct, is closely related in organisational and procurement terms. Awarding contracts under this in-house entity exception are subject to very strict rules according to case-law, which have turned out to frequently impede the organisation of administrative cooperation by divestment.

Public contracting parties are also subject to very tight rules when they want to privilege non-profit entities over profit-making undertakings in a public procurement procedure.

II. Need for legal policy action and requirements for a possible legal instrument on social services of general interest

Based on the outcomes and conclusions of the first part, the second part of the study explores the question whether and to what extent circumstances which are specific to the social sector should be addressed in a special legal act on social services of general interest. *De lege ferenda* Art 16(3) EC of the Treaty of Lisbon would create a suitable legal basis for such an act.

In our opinion, it could include the following aspects:

- More precise criteria for distinction between economic and non-economic services
- Horizontal definition of *de minimis* threshold levels for services of general economic interest under State aid and public procurement law
- Clarification as to the kind of conditions under which the unrestricted application of fundamental freedoms could call into question the proper operation of services of general interest, especially by summarising the grounds of justification developed by case-law in respect of social services
- Clarification concerning the admissibility of obligations to take a specific legal form favouring non-profit-making operators
- A separate regime on the treatment of public service compensation which accounts for circumstances which are specific to the social sector
- Special rules concerning the award of contracts for social services: revised rules for in-house procurement; wider scope for direct awards of contracts without competition
- Definition of universal-service obligations
 - o Obligation to guarantee access to such services of a certain quality and at an affordable price for all people irrespective of their economic, social or geographic situation
 - o Right to individual access to such services
 - o Measures of price formation or price fixing to ensure that those on low incomes or with special social needs can access the service
 - o Obligation of continuity to ensure permanent supply of the service
 - o Measures of consumer protection and pre-contractual and contractual information requirements

