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DEPARTMENT OF
EUROPEAN LEGAL STUDIES

Research Paper in Law 06 / 2011

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European Legal Studies
Etudes Européennes Juridiques

RESEARCH PAPERS IN LAW

6/2011

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The concept of 'economic activity' in the EU Treaty: From ideological dead-ends to workable judicial concepts

Vassilis Hatzopoulos*

I. Introduction

The economic rules, or put more ambitiously, the economic constitution of the Treaty,[1] only apply to economic activities. This general principle remains valid, even if some authors strive to demonstrate that certain Treaty rules also apply in the absence of an economic activity,[2] and despite the fact that non-economic (horizontal) Treaty provisions (e.g. principle of non-discrimination, rules on citizenship) are also applicable in the absence of any economic activity.[3] Indeed, the exercise of some economic activity transcends the concepts of 'goods' (having positive or negative market value),[4] workers (even if admitted in an extensive manner),[5] and services (offered for remuneration).[6] It is also economic activity or 'the activity of offering goods and services into the market'[7] that characterises an 'undertaking' thus making the competition rules applicable. Further, it is for regulating economic activity that Article 115 TFEU, Article 106(3) TFEU and most other legal bases in the TFEU provide harmonisation powers in favour of the EU. Last but not least, Article 14 TFEU on the distinction between services of general economic interest (SGEIs) and non-economic services of general interest (NESGIs), as well as Protocol n. 26 on Services of General

* The final version of this article will be published in the European Business Law Review, 2012 (forthcoming).

[1] Amongst the most prominent supporters of the idea that the EU Treaties may be seen as an economic constitution, see Joerges, C., 'A Renaissance of the European Economic Constitution?' in Neergard, U., Nielsen, R., and Roseberry, L. (eds), *Integrating Welfare Functions into EU Law* (Copenhaguen: DJØF Publishing, 2009) 29-52; see also, on a more pessimistic tone, Joerges, C., 'What is left of the European economic constitution?: A melancholic eulogy' (2005) 30 *EL Rev* 461-89, also available at http://www.iue.it/PUB/law04-13.pdf (last accessed on 28/11/2011); Baquero-Cruz, J., *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Oxford/ Portland: Hart Publishing, 2002).

[2] Odudu, O., 'Economic Activity as a Limit to Community Law' in Barnard, C., and Odudu, O. (eds), *The Outer Limits of EU Law* (Oxford/ Portland: Hart Publishing, 2009) 225-43.

[3] See also the Commission Staff Working Document SEC (2006) 516, 'Annex to the Communication on Social Services of General Interest in the EU (COM (2006) 177 final)', s. 1.1.1; more recently see Report COM (2010) 630/4, 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights'.

[4] For an example of goods having negative market value see e.g. Case C-2/90 *Commission v Belgium (Walloon Waste)* [1992] ECR I-4431.

[5] Such as e.g. in Case C-292/89 *Antonissen* [1991] ECR I-745; of course the recent surge of citizenship case law somehow alleviates this 'economic' vision of the free movement of persons; on this case law see, among many Besson, S. and Utzinger, A., 'Introduction: Future Challenges of European Citizenship: Facing a Wide-Open Pandora's Box' (2007) 13 *ELJ* 573-90; and Epinay, A., 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship' (2007) 13 *ELJ* 611-22.

[6] Even if remuneration is admitted in an extensive manner as e.g. in Joined cases C-51/96 and C-191/97 *Christelle Deliège v. Ligue Francophone de Judo e.a.* [2000] ECR I-2549; Case C-157/99 *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; and Case C-281/06 *Jundt* [2007] ECR I-12231.

[7] Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295, para 25.

Interest (SGIs) confirm the constitutional significance of the distinction between economic and non-economic: a means of dividing competences between the EU and the member states.

The distinction between economic and non-economic activities is fraught with legal and technical intricacies – the latter being generated by dynamic technological advances and regulatory experimentation. More importantly, however, the distinction is overcharged with political and ideological significations and misunderstandings and, even, terminological confusions.[8]

Economic theory offers helpful classifications, but is much less clear about the actual content of each one of the proposed categories. A basic distinction drawn is between private and public goods (although the term 'goods' typically refers to services, in the economic sense of the term). Public goods are distinguished from ordinary (private) goods, because they have two special features: a. they are *non-rivalrous* in consumption in the sense that, once produced, an infinite number of consumers can enjoy them without increased production cost or diminished enjoyment by other consumers; moreover, b. they are *non-excludable*, in the sense that the producer cannot prevent non-purchasers from enjoying the benefits of the services produced. Therefore, there is not sufficient interest by private providers to supply such services, as they fear they would not be able to reap the full benefit of their investments.[9] Hence, the state steps in and offers such services, usually financed through general taxation. Typical examples of public services could be the police, national security, road safety, emergency services, refuse collection and management.

A further category has been devised, standing between public and private goods and is termed 'merit goods'.[10] These are services which are so meritorious that the state holds that, if they were left to market forces alone, the level of their consumption would be too low, because their price would be too high; hence, it intervenes in order to obtain a higher level of consumption. This is achieved through heavily subsidizing or offering such services free of charge, financed by tax revenue or compulsory contributions. Typical examples of such services are health and education.[11] The above economic classifications, however, have barely made it into any legal instrument.

In view of the abovementioned difficulties in delineating economic from non-economic activities and of the core importance that, nonetheless, such distinction has for the application of EU law, the present study's ambition is to raise two basic questions: 'are activities economic or non-economic depending on the set of EU rules applicable' and 'what are the

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[8] In the context of the EU, see already Mortelmans, K., 'The Common Market, the Internal Market and the Single Market: What's in a market?' (1998) 35 *CML Rev* 101-36.

[9] See eg Stiglitz, J., *Economics of the Public Sector* (London: WW Norton, 2000) 128-9; and more recently, Kaul, I., Grunberg, I., and Stern, M.A., 'Defining Global Public Goods' in Kaul, I., Grunberg, I., and Stern, M.A. (eds), *Global Public Goods: International Cooperation in the 21st Century* (Oxford: OUP, 1999) 2-19.

[10] Musgrave, R.A., 'A Multiple Theory of Budget Determination' 1997 (17) *FinanzArchiv* 331-43, also available at http://autoren.mohr.de/fa/musgrave_budget_ determination.pdf (last accessed on 28/11/2011).

[11] For a recent and interesting discussion of this classification under the realm of the state aid rules, see Fiedziuk, N., 'Towards a More Refined Economic Approach to Services of General Economic Interest' (2010) 16 *Eur P L* 271-88.

criteria used for defining the scope of application of EU law to activities of an ambiguous nature?'.

II. Single or multiple definitions of 'economic'

A. In favour of a single approach

Several arguments may be put forward in favour of a unitary approach of the concept of economic activity.

Pure logic requires that any term should have the same meaning irrespective of the context in which it is being used; indeed, this is the very advantage of alphabetical writing over older – contextual – writings, where the meaning of the worlds used had to be inferred from the context.[12] To put it more bluntly, an apple is an apple, irrespective of whether we look at it wearing blue, green or red lenses.

The Treaty logic also clearly militates in favour of a single definition of the term 'economic activity'. Indeed, if the Treaty rules have a common finality and if some coherence exists between the various Treaty provisions, then it would defeat the purpose to use the same terms as having different meanings in the various contexts. Such divergent interpretations would also run counter to the principle of coherence enshrined in Article 7 TFEU.

There is a further, textual, argument against a differential interpretation of the term 'economic activity' under the internal market and the competition rules, respectively. If internal market and competition rules could be thought to stand on parity and independently from each other, the Lisbon Treaty has clearly subdued the latter to the former: undistorted competition has disappeared, as such, from the aims of the EU (Articles 3(3) TEU and 3(1)b TFEU) and has been relegated to Protocol 27, according which 'the internal … market includes a system ensuring that competition is not distorted'.[13] Therefore, competition law is, henceforth, part of a broader concept of 'internal market' and may not possibly command a different interpretation of the same terms.

The Court, already in the foundational competition law cases, such as *Consten v Grundig*,[14] has expressly acknowledged that the ultimate aim of the competition rules is to make sure that private undertakings are not allowed to 'frustrate the most fundamental objections (sic) of the Community'. Similarly, in the first German ambulance case, *Glöckner*, where the applicability of the competition rules was at stake, the Court held that 'in the case of services, that effect [on trade justifying the applicability of Article 101 TFEU], may consist, as the Court has held, in the activities in question being conducted in such a way that their effect is to partition the common market and thereby restrict freedom to provide services, which

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[12] Havelock, E., 'The Alphabetical Mind: A Gift of Greece to the Modern Word' (1986) 1 *Oral Tradition* 134-150, also available at http://journal.oraltradition.org/files/articles/1i/6_havelock.pdf (last accessed on 28/11/2011); and more extensively, by the same author, *The Literate Revolution in Greece and its Cultural Consequences* (Princeton, N.J.: Princeton University Press, 1981).

[13] Emphasis added.

[14] Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 429, English Special Edition 299.

constitutes one of the objectives of the Treaty'.[15] Also at the level of justification, the Court draws clear parallels between the internal market and the competition rules. In *Freskot*,[16] the Court based itself on the competition case law according to which activities characterised by solidarity are not subject to the competition rules and used it to set aside the internal market rules. Last but not least, in *Wouters*,[17] confirmed by *Meca Medina*,[18] the Court held that the overriding reasons of general interest available to member states in order to justify restrictions to the free movement rules, may also serve to justify anti-competitive conduct.

On the basis of all the above, it must be concluded that the concept of economic activity is unitary and has the same content under both internal market and competition law, a view shared by numerous authors including the present.[19]

B. In favour of a dual approach

In several recent cases the Court has held the rules on the internal market to be applicable, while holding competition rules inapplicable, and vice versa. The first case clearly accounting for such a dichotomy has been the Court's judgment in *Meca Medina*,[20] on appeal from the General Court. In this judgment, which raised the question whether the competition rules applied on the International Olympic Committee's decisions on admissible doping levels, the Court quashed the first instance judgment on the ground that (para 31)

> 'even if those [anti-doping] rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity (Walrave & Koch and Donà), that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC [101 & 102 TFEU] nor that the rules do not satisfy the specific requirements of those articles'.

If *Meca Medina* stands for the idea that the inapplicability of the free movement rules does not exclude the applicability of competition rules, *Viking* confirms that the same applies vice versa. In this judgment the Court held that (para 53)

> 'the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances'.[21]

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[15] Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089, para 49.
[16] Case C-355/00 *Freskot AE v. Elliniko Dimosio* [2003] ECR I-5263.
[17] Case C-309/99 *Wouters* [2002] ECR I-1577.
[18] C-519/04 P *David Meca-Medina and Igor Majcen v. Commission of the European Communities* [2006] ECR I-6991.
[19] Idot, L., 'Concurrence et libre circulation: Regards sur les derniers développements' (2005) *Revue des Affaires Européennes* 391-409, at 370; and more recently, Neergaard, U., 'Services of General (Economic) Interest: What Aims and Values Count?' in Neergaard, U., Nielsen, R., and Roseberry, L. (eds), *Integrating Welfare Functions into EU Law* (Copenhagen: DJØF Publishing, 2009) 191-224.
[20] See above n 18.
[21] This finding has been repeated by the Court in few more occasions, such as in *Kattner* and in *Commission v Germany (old age pensions)*.

This disjunction between the two sets of rules has been outlined and explained by AG Maduro in his opinion in *FENIN* in the following terms:[22]

> 'the scope of freedom of competition and that of the freedom to provide services are not identical. There is nothing to prevent a transaction involving an exchange being classified as the provision of services, even where the parties to the exchange are not undertakings for the purposes of competition law. As stated above, the Member States may withdraw certain activities from the field of competition if they organise them in such a way that the principle of solidarity is predominant, with the result that competition law does not apply. By contrast, the way in which an activity is organised at the national level has no bearing on the application of the principle of the freedom to provide services'.

On the basis of the above developments, several commentators have put forward the idea that the concept of economic activity differs under the internal market and the competition rules, respectively.[23]

The above idea, however, goes well beyond the positions ever expressed by the Court or its Advocate Generals. Indeed, in the excerpts above (and in all other occasions in which the Court or its AGs have dissociated internal market from competition rules) they reason in terms of the *scope* of the respective Treaty freedoms, not in terms of a differential concept of *economic activity* itself.

It is submitted, therefore, that the above idea fails to identify a fundamental distinction, never abandoned by the Court, between, on the one hand, the concept of economic activity which is one and the same for all the Treaty freedoms and, on the other hand, the scope of application of these sets of rules, which differs substantially in many ways.[24]

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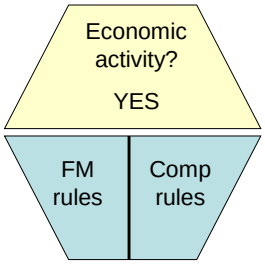
[22] AG Maduro, opinion in Case C-205/03P *FENIN* [2006] ECR I-6295, para 51, fn omitted.

[23] See e.g. Odudu, O., 'Economic Activity as a Limit to Community Law' in Barnard, C. and Odudu, O. (eds), *The Outer Limits of EU Law* (Oxford/ Portland: Hart Publishing, 2009) 225-43; see also Schweitzer, H., 'Competition Law and Public Policy: Reconsidering an uneasy Relationship: The Example of Article 81' EUI Law Working Paper No. 30/2007, also available at http://cadmus.eui.eu/dspace/bitstream/1814/7623/3/LAW-2007-30.pdf, (last accessed on 28/11/2011), at 3; see also Case C-205/03P *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission of the European Communities* [2006] ECR I-6295 (AG).

[24] For which see below section IV.

- Distinction between
  - the nature of the activity: Political Q dealt with by the political institutions (the Commission)
  - the conditions for the application of the different Treaty rules: legal question dealt with by the CJEU



The above distinction which, to my eyes, already corresponds to the positivist approach followed by the Court, has also its normative merits: its second limb allows the Court important leeway to determine the scope of the Treaty rules, while leaving the more political first limb to the political process. Indeed, the distinction of the economic from the non-economic is not a question for the judiciary, but rather corresponds to fundamental political and societal choices. Therefore, bodies enjoying democratic legitimacy should be given a lead in relation to this question.

III. Exploring the contours of the concept of 'economic'

A. The political debate

The distinction between the economic and the non-economic is a very delicate task, corresponding to basic political and societal choices. It has been answered in different ways by different political systems, and, more strikingly, by different countries supposedly following the same political system. Therefore, health as a commodity, largely accepted us such in the US, would be shocking to most, if not all, Europeans (at least few years ago), while waiting lists for patients, largely in use in the UK, would appear intolerable to most Scandinavians. The EU, at first glance, lacks both the technical means and the political legitimacy to participate in this discussion.

Increasingly, however, as the EU's competences expanded beyond the pure economic sphere, the EU institutions felt the need to circumscribe the debate, essentially taking place at the national level. In this direction, and in order to affirm its autonomy, the EU first 'unrolled' its own terminology and, less successfully, also tried to specify the content of the various terms used.

Therefore, the term 'services of general economic interest' existing in (what is now) Article 106(2) has been re-invented in the early nineties, later to be opposed to 'non-economic

services of general interest'. This dichotomy has been turned into a three-prong distinction, since 'social services of general interest' came to occupy the middle field. In parallel with the re-invention of Article 106(2) and of SGEIs, the concept of 'universal service' has been introduced by several texts of secondary legislation. As if the terminology were not already confusing enough, the Court in its seminal judgment in *Altmark*[25] also revived the term 'public service obligations', which had fallen into oblivion, then repealed, together with its bearing Regulation 1191/69.[26]

The above varied terminology is symptomatic of the lack of clear concepts in the definition of economic and non-economic services.

Each one of the above terms has been used inconsistently, by different users (depending on their ideological background) at different times (depending on the accepted perception of the scope of the internal market rules). In this last respect it is worth noting that the Commission in its successive Communications[27] has consistently repeated its attachment to the autonomy of member states to organise their non-economic services, while at the same time, defining those in an increasingly restrictive manner. This tendency has been presented in a brilliant manner by D. Damjanovic and B. de Witte and need not be reproduced here.[28] As it was to

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[25] Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747; further on this judgment, see in subsection B(5)d below.

[26] Council Regulation 1191/69/EEC on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway [1969] OJ English Special Edition I, p. 276, as amended by Council Regulation 1893/91/EEC amending Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway [1991] OJ L169/1); now repealed by the European Parliament and Council Regulation 1370/2007/EC on public passenger transport services by rail and by road [2007] OJ L315/1.

[27] Communication COM (1996) 443 final, 'Services of general interest in Europe' [1996] OJ C281/3; Communication from the Commission, 'Services of General Interest in Europe' [2001] OJ C17/4; COM (2001) 597 final, 'Report to the Laeken European Council- Services of General Interest'; Communication COM (2002) 331 final, 'A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest'; this has been further elaborated by the Commission Staff Working Document SEC (2004) 866, 'Horizontal evaluation of the performance of network industries providing services of general economic interest'; COM (2002) 636 final, 'Report from the Commission on the state of play in the work on the guidelines for state aid and services of general economic interest (SGEIs)'; Green Paper COM (2003) 270 final, 'on Services of General Interest'. See also the Report on the ensuing consultation (SEC (2004) 326); White Paper COM (2004) 374 final, 'Services of general interest'; Community framework for State aid in the form of public service compensation [2005] OJ C297/4; Communication COM (2007) 725, 'Services of general interest, including social services of general interest: a new European commitment'; Communication COM (2011) 146 final, Reform of the EU State Aid Rules on Services of General Economic Interest, together with its SEC (2011) 397 document; the Commission has dedicated a webpage on this topic where all relevant documents are posted, see http://ec.europa.eu/services_general_interest/index_en.htm (last accessed on 28/11/2011).

[28] Damjanovic, D., and de Witte, B., 'Welfare values and welfare integration under the Lisbon Treaty' in Neergaard, U., Roseberry, L., and Nielsen, R. (eds), *Integrating welfare functions into EU law: From Rome to Lisbon* (Copenhagen: DJØF Publishing, 2009) 53-94; it is true that these authors do not reason exclusively on the basis of the Commission's activity, but i. a big part of their analysis does concern this institution, and ii. in its Communications, the Commission is supposed to be describing the state of the law as it results from the practice of all the institutions– therefore, the article is fully relevant in order to understand and assess the content of the Commission-originated soft law.

be expected, this lack of clear definitions has nurtured voluminous legal and political science commentary.[29]

Today, it is possible to identify several sources of EU law where the distinction between SGEIs and NESGIs, or more generally, between economic and non-economic activities is being discussed. At the level of primary law, next to the (perennial) Article 106 TFEU, the Lisbon Treaty has added three more references to the above distinction. Article 14 TFEU concerns exclusively SGEIs, which it recognises as being part of the shared values of the Union which should, nonetheless, be 'without prejudice' to the Treaty rules on public undertakings (106 TFEU) and state aids (93 and 107 TFEU). In the second paragraph of Article 14 TFEU, the EU legislature is given a legal basis to regulate SGEI provision, 'without prejudice to the competence of Member States'. The EU's attachment on high quality SGEIs and on access thereto is being confirmed by Article 36 of the EU Charter of Fundamental Rights. Protocol 26 recognises, for the first time, SGIs (as opposed to SGEIs) as a legal category.

At the level of secondary legislation, two series of legal instruments dealing with SGEIs may be distinguished. First, (even though the term used is 'universal service') there are all the sector-specific Directives on the re-regulation of the network industries: electronic communications, energy, postal services etc. The solutions adopted in each one of them vary considerably, at least in three respects. First and foremost, there is the delimitation of competences, of whether it is for the member states or the Union to define the precise conditions of universal service. Secondly, the question of how universal service is financed: in transport, state funding may be used, subject to transparency obligations; in energy, EU funding could also be made available; in the field of postal services, it is through the maintenance of limited exclusivity that universal service is to be funded; in electronic communications, it is through mutual compensation or through the creation of a fund. Thirdly, it should be noted that not only the actual definition but also the main characteristics of universal service may be altered from one sector to the other. Next to these sector-specific texts, the Services Directive is supposed to apply to SGEIs in a horizontal, and yet limited,

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[29] For the most important recent official initiatives in the field, see the relevant Commission webpage, at http://ec.europa.eu/services_general_interest/index_en.htm (last accessed on 28/11/2011). A normative analysis of the topic is offered in the excellent contributions contained in the edited volumes by Krajewski, M., Neergard, U., and van de Gronden, J. (eds), *The Changing Legal Framework for Services of General Interest* (The Hague: TMC Asser Press, 2009); van de Gronden, J. (ed), *EU and WTO Law on Services: Limits to the Realization of General Interest Policies within the Services Markets?* (Alphen aan den Rijn: Kluwer Law International, 2009); Neergaard, U., Nielsen, R., and Roseberry, L. (eds), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (Copenhagen: DJØF Publising, 2009); Potvin-Solis, L. (ed), *La Libéralisation des Services d'Intérêt Economique Général en Réseau en Europe* (Bruxelles : Bruylant, 2010) ; Louis, J.V. and Rodriguez, S. (eds), *Les Services d'Intérêt Economique Général et l'UE* (Bruxelles: Bruylant, 2006); Bauby, P., Coing, H., and de Toledo, A. (eds), *Les Services Publics en Europe: Pour une Régulation Démocratique* (Paris: Publisud, 2007); see also Cox, H., Fournier J., and Girardot, M. (eds), *Les Services d'Intérêt Economique Général en Europe: Régulation, Financement, Evaluation, Bonnes Pratiques* (Paris: CEEP/ CIRIEC, 2000); and more recently, Eckert, G., 'La distinction entre les services d'intérêt général économique et les services d'intérêt général non-économiques' in Potvin-Solis, L. (ed), *La libéralisation des services d'intérêt économique général en réseau en Europe* (Bruxelles: Bruylant, 2010) 3-21.

manner. Last but not least, there is the entire body of the Commission's soft law, briefly discussed above.

From all the sources mentioned above, three common lines may be drawn. First, there is the issue of pre-emption: to the extent that the way to secure SGEI, universal service etc., is being foreseen by EU legislation, member states' free hand to impose restrictions on the relevant activities is limited. Second, in the absence of EU legislation, the distinction between economic and non-economic activity fundamentally remains an issue for the member states to decide, subject, however, to the Court's control of manifest error.[30] Third, and most importantly, it may be observed that contrary to states, which put into place (educational, healthcare etc.) *systems*, EU reasoning is made on the basis of specific *services* cherry-picked among other similar (but more marketable) services, from within the *systems* set by the states. It is submitted that this opposition between the member states reasoning in terms of *systems* and the EU reasoning in terms of *services* is quintessential for understanding the tensions accruing between the two legal orders in relation to the provision of SGEIs.

B. The judicial solutions reached

From the above brief analysis it becomes clear that distinguishing economic from non-economic activities is a polyphonic exercise, both in terms of the actors involved and in terms of the views expressed and of the way the distinction is being put to work in the different fields. It is not surprising, therefore, that only rarely does the Court reach a conclusion as to the nature of the activity involved.

According to the Court's case law there are two basic characteristics which render an activity non-economic: the exercise of public authority, involving what may be termed as 'strategic services'; and the expression of social solidarity, involving social services. Examples in the first category may be cited in relation to communal funeral services,[31] mooring services in ports,[32] air traffic control,[33] anti-pollution surveillance.[34] Private security services, however, are not, according to the Court strategic services and are fully subject to the Treaty rules,[35] the same as the labelling and the control of ecological products.[36] The confines of the second category are even less clear, as it is very difficult to know when any given activity embodies

[30] Case T-289/03 *BUPA* [2008] ECR II-81, para 166; see also *ibid*, para 168, where it is stated that 'the control which the Community institutions are authorised to exercise over the use of the discretion of the Member State in determining SGEIs is limited to ascertaining whether there is a manifest error of assessment'.

[31] Case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* [1988] ECR 2479.

[32] Case C-49/89 *Corsica Ferries France* [1989] ECR 4441.

[33] Case C-364/92 *SAT Fluggesellschaft mbH v. Eurocontrol* [1994] ECR I-43; Case C-481/07P *Selex Sistemi Integrati SpA. v Commission* [2009] ECR I-2207.

[34] Case C-343/95 *Diego Calì & Figli Srl v. Servizi ecologici porto di Genova SpA (SEPG)* [1996] ECR I-1547.

[35] See e.g. Case C-114/97 Commission v. Spain (private security) [1998] ECR I-6717; Case C-355/98 Commission v. Belgium (private security) [2000] ECR I-1221; Case C-283/99 *Commission v. Italy (private security)* [2001] ECR I-4363; Case C-171/02 *Commission v. Portugal (private securities)* [2004] ECR I-5645; Case C-189/03 *Commission v. Netherlands (private security firms)* [2004] ECR I-5645; Case C-514/03 *Commission v Spain (private security)* [2006] ECR I-963.

[36] Case C-393/05 *Commission v Austria (ecological labelling)* [2007] ECR I-10195; Case C-404/05 *Commission v Germany (ecological labelling)* [2007] ECR I-10239.

'enough' solidarity for it not to qualify as economic.[37] According to the Court, the organisation of primary pension schemes is outside the market,[38] the same as statutory insurance against work accidents,[39] mandatory indemnity systems for farmers[40] and running homes for the elderly.[41] The same is not true, however, for the organisation of second and third pillar (complementary and voluntary) pension schemes,[42] or the operation of ambulance services.[43] In order to ascertain whether an activity is sufficiently connected to the exercise of public authority, the Court examines its nature, its aim, and the rules to which it is subject.[44]

The case law is more abundant concerning solidarity, but it is not always easy to know in advance how much strong the solidarity element of an activity needs to be, for it not to qualify as economic.[45] From a relatively long series of judgments concerning essentially pension and healthcare funds,[46] it follows that elements which would point to a non-economic activity, include:[47] (a) social objective pursued, (b) compulsory nature of participation/contribution, (c) contributions paid being related to the income of the insured person, not to the nature of the risk covered, (d) benefits accruing to insured persons not being directly linked to contributions paid by them, (e) benefits and contributions being determined under the control or the supervision of the state, (f) strong overall state control, (g) funds collected being redistributed, and not capitalized and/or invested, (i) cross-subsidization between different schemes, and (j)

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[37] See Hervey, T., '"Social Solidarity": A Buttress against Internal Market Law?' in Shaw, J. (ed), *Social Law and Policy in an Evolving EU* (Oxford: Hart Publishing, 2000) 31-47; see also Dougan, M., 'Expanding the Frontiers of EU Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?' in Barnard, C. and Odudu, O. (eds), *The Outer Limtis of EU Law* (Oxford/ Portland: Hart Publishing, 2009) 119-65; generally on the issue of solidarity, see also Houtepen, R. and Ter Meulen, R., 'New Types of Solidarity in the European Welfare State' (2000) 8 *Health Care Analysis* 329-40; White, J., 'Rethinking Transnational Solidarity in the EU' (2003) 20 *Perspectives* 40-57; and on a more philosophical tone, see recently the edited volume by Karagiannis, N., *European Solidarity* (Liverpool: LUP, 2007).

[38] Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

[39] Case C-218/00 *Cisal di Battistello Venanzio & C. Sas v. Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [2002] ECR I-691; Case C-350/07 *Kattner Stahlbau GmbH* [2009] ECR I-1513.

[40] Case C-355/00 *Freskot AE* [2003] ECR I-5263.

[41] Case C-70/95 *Sodemare SA* [1997] ECR I-3395.

[42] Case C-67/96 *Albany* [1999] ECR I-5751, C-155-157/97 *Brentjens* [1999] ECR I-6025, and C-219/97 *Drijvende* [1999] ECR I-6121.

[43] Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089; Case C-160/08 *Commission v Germany (ambulance services)* [2010] ECR nyr.

[44] See Case C-343/95 *Cali* [1997] ECR I-154, paras 22-23, and the AG opinion in this same case, paras 41-42.

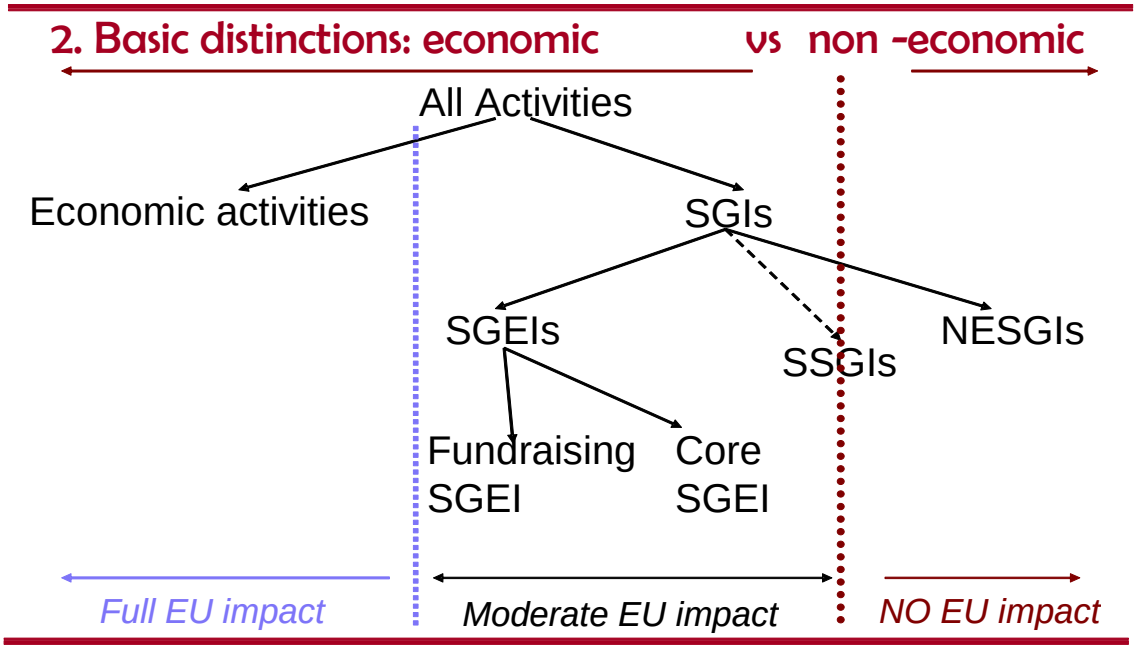
[45] See, in this respect, Neergaard, U., 'In Search of the Role of "Solidarity" in Primary Law and the Case Law of the ECJ' in Neergaard, U. Nielsen, R., and Roseberry, L. (eds), *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives* (Copenhagen: DJØF Publishing, 2010) 97-138; Ross, M., 'The Value of Solidarity in European Public Services Law' in Krajewski, M., Neergard, U., and van de Gronden, J. (eds), *The Changing Legal Framework for Services of General Interest* (The Hague: TMC Asser Press, 2009) 81-99.

[46] Cited for the most in n 38 to 42, above; on these three cases see Idot, L., 'Droit Social et droit de la concurrence: confrontation ou cohabitation: A propos de quelques développements récents'(1999) 9:11 *Europe* 4-8; Case C-218/00 *Cisal* [2002] ECR I-691; Case T-319/99, *Federación Española de Empresas de, Tecnología Sanitaria (FENIN) v. Commission*, [2003] ECR II-357, upheld by the Court in Case C-205/03P *FENIN* [2006] ECR I-6295; Case C-355/00 *Freskot* [2003] ECR I-5263; Joined cases C-264/01, C-306, 354, 355/01 *AOK* [2004] ECR I-2493.

[47] Note that these are broadly the same, but taken from the reverse side, to the ones used to identify contracting entities in the sense of public procurement law (see under subheading IV.a).

non-existence of competitive schemes offered by private operators.[48] None of these elements seems to be decisive on its own and, indeed, many of them may be criticized. In particular, requirements (a), (b), (f), and (i) above have all been accused for failing to account for the diversity of social systems in the EU and for countering modernization and rationalization efforts.[49]

The above findings may be summarised in the following graph.



While the vast majority of activities qualify as being economic and are fully subject to the EU rules, the ones which require some attention are brought under the umbrella category of SGIs. SGIs may be economic (SGEIs), in which case they are subject to a ‘‘limited’ application of EU law, or non-economic (NESGIs), in which case they evade the application of EU law altogether. Between the two categories, social services (SSGIs), without being qualified as economic are increasingly subject to pressure from the EU rules. With the exception of a few cases, however, the boundary between SGEIs and NESGIs is shifting and unpredictable. If the Commission and the Court have the tendency to encroach upon the scope of NESGIs and to hold the EU rules applicable to an ever increasing number of SGIs,

[48] For a more detailed analysis of those criteria, see Hatzopoulos, V., ‘Health law and policy: the impact of the EU’ in de Burca, G. (ed), *EU Law and the Welfare State: In Search of Solidarity* (Oxford: OUP, 2005) 123-60. For a critical view of the Court’s meddling with social funds, see also Kessler, F., ‘Droit de la concurrence et régimes de protection sociale: un bilan provisoire’ in Kovar, R., and Simon, D. (eds), *Service public et Communauté Européenne: entre l’intérêt général et le marché, Vol. I,* (Paris: La documentation française, 1998) 421-46, at 430, where further reference to other commentators.

[49] Hervey, T., ‘“Social Solidarity”: A Buttress against Internal Market Law?’ in Shaw, J. (ed), *Social Law and Policy in an Evolving EU* (Oxford: Hart Publishing, 2000) 31-47, also available at http://aei.pitt.edu/2294/01/002338_1.PDF.

two countervailing movements should be acknowledged: first, the quality of SGEI provision is a consideration increasingly taken into account by the EU Institutions, capable of setting aside the EU rules; second, ever since the judgment in *Corbeau*,[50] and even more clearly so under the *Glöckner* case law,[51] the EU Institutions are ready to allow special rules, such as exclusive rights, not only in favour of activities which themselves qualify as SGEIs (core SGEIs), but also in favour of purely economic activities which, nonetheless, serve to finance some SGEI (fundraising SGEIs).

IV. Substituting more technical criteria in order to define the scope of application of EU law

In view of the fluidity of the above distinctions, and of their political salience, the Court in the vast majority of cases where it is called to decide on the applicability of the EU rules on the various activities, does not enter at all the slippery slope of distinguishing between the economic and the non-economic. Instead, it uses several other, more technical criteria, in order to determine to which extent EU law shall apply – if at all – to any given activity.

In order to test the above hypothesis, the following analysis scrutinizes, step by step, the reasoning of the Court under both internal market and competition rules. Indeed, the cases brought before the Court are decided on the basis of answers to six basic questions, out of which the nature of the activity is only one: (a) the nature (public/private) of the body at the origin of the measure, (b) the nature (economic/non-economic) of the activity, (c) the object of the measure (regulating an economic activity/non-economic activity, such as sport etc.), (d) the existence of mitigating factors to the violation of the EU rules (morality, rule of reason, *de minimis* etc.), (e) the applicability of exceptions (expressly provided by the Treaty or judge-made), and (f) the applicability of Article 106(2).[52]

Not all the questions are dealt with in every single case, nor are they always formulated in the above sequence, nor, even, in comparable terms. Led by judicial economy, the Court gives priority to the question(s) offering the most credible solution, in view of the specifics of each case, with the least judicial effort. Very few are the cases, if any, where all the questions are raised by the Court. Taken together, however, the various cases may be systematized, offering a blueprint of the Court's approach, susceptible of universal application. Indeed, it could be said that the first two criteria (a and b, above) serve to qualify the existence of a violation of EU law, the second two criteria (c and d, above) serve to disqualify the existence of a violation, while the last two (e and f, above) serve as exceptions – general and special, respectively – to the application of the Treaty rules.

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[50] Case C-320/91 *Corbeau* [1993] ECR I-2562.
[51] Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089.
[52] Article 106(2) is a Treaty exception and could well be integrated in category (e), but is being kept distinct, since it is the only Treaty provision specifically aimed at 'setting aside' services which require some protection from market forces.

In order for the argument to be more accurate, and thus more convincing, the general internal market law (free movement rules) is distinguished from the more specific public procurement rules, while the competition rules concerning private conduct (Articles 101 and 102) are distinguished (whenever necessary) from the ones on state aid (Article 107). Moreover, Article 106(2), instituting an express exception in consideration of the nature of the activities concerned, is distinguished from other grounds for exception. These tests are briefly presented in the following paragraphs.[53]

A. Nature of the body subject to the rules

1. Free movement

For the free movement rules to apply, the principle is simple: only public entities, central or decentralized, are subject to them. This, however, has been extended in two directions. *First*, entities created, run or else controlled by the state are assimilated to it, irrespective of their legal nature. Therefore, a development body established by the state,[54] an informal trade Council,[55] as well as a private society entrusted with special rights[56] have all been held to be subject to the internal market rules. *Secondly*, entities, even private in nature, which exercise *de jure* or *de facto* some regulatory activity need also respect the internal market rules: sports associations or federations,[57] professional associations,[58] insurance funds,[59] trade unions[60] and even automobile associations.[61]

2. Public procurement

Public procurement rules and principles only apply to contracting authorities or, in the broader terms used in Directive 2004/17,[62] to contracting entities. The same is true about the 'procurement principles' devised by the Court's case law and based on transparency (also

[53] For a comprehensive view of the various test, refer to the table in annex.
[54] Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443.
[55] Case 249/81 *Commission v. Ireland (buy Irish)* [1982] ECR 4005.
[56] Joined Cases 266 and 267/97 *R v. Royal Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers and others* [1989] ECR 1295.
[57] Case 36/74 *Walrave and Koch* [1974] ECR 1405; Case 13/76 *Gaetano Donà v. Mario Mantero* [1976] ECR 1333; Case C-415/93 *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others, and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman* [1995] ECR I-4921; Joined cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549; Case T-313/02 *Meca-Medina* [2004] ECR II-3291.
[58] Case 292/86 *Gullung v. Conseil de l' ordre des avocats du barreau de Colmar* [1988] ECR 111; Case C-309/99 *Wouters* [2002] ECR I-1577; Case C-506/04 *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg* [2006] ECR I-8613; Joined cases C-94 & 202/04 *Federico Cipolla v. Rosaria Fazari, née Portolese and Stefano Macrino and Claudio Capopart v. Roberto Meloni* [2006] ECR I-11421.
[59] See, among several cases, Case C-158/96 *Köhll* [1998] ECR I-1931; Case C-157/99 *Smits-Peerbooms* [2001] ECR I-5473, and all the recent case law concerning the free movement of patients.
[60] Case C-438/05 *Viking* [2007] ECR I-10779; Case C-341/05 *Laval* [2007] ECR I-11767.
[61] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio* [2008] ECR I-4863.

referred to as 'the transparency case law').[63] Contracting entities are the state and its sub-divisions, as well as 'bodies governed by public law': these are bodies which i. have legal personality, ii. are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and iii. are financed for the most part, are subject to management supervision or have an administrative, managerial, or supervisory board, whose majority is appointed by the state or its sub-divisions.

Condition (iii) which is the one directly concerned with the *nature of the entity*, is in fact very similar to the test followed for the application of the internal market rules: irrespective of the legal nature of the entity concerned, the rules apply to the extent that the entity's conduct can be attributed to the state. Through a highly technical body of case law, the Court has considerably extended the reach of the procurement rules, by stretching the concept of contracting authorities/entities.[64]

3. Competition and state aids rules: nature of body irrelevant

The application of competition rules, both those concerning private conduct and those on state aid depends on the qualification of the entities concerned (acting or beneficiaries) as 'undertakings'. Such qualification is independent of the legal nature of the entity concerned. In its seminal judgment in *Höfner,* the Court held that

'in the context of competition law […] the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed'.[65]

In subsequent cases, the Court further explained that the entity concerned need not be a profit making undertaking, but may as well be a non-profit making body.[66]

Therefore, contrary to the internal market rules, where the *nature of the entity* is the only (free movement) or the main (public procurement) criterion on which their application rests, for competition rules, such nature is completely irrelevant.

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[62] European Parliament and Council Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1.

[63] For this case law, see ch 6 below; See also Hatzopoulos, V., and Stergiou, H., 'Public Procurement for Healthcare Services: From Theory to Practice' in van de Gronden, J., Krajewski, M., Neergaard, U., and Szyszczak, E. (eds), *Health Care and EU Law* (The Hague: TMC Asser Press, 2011) 413-452.

[64] See Sauter, W., and Schepel, H., *State and Market in EU Law: The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge: CUP, 2009) 51-55.

[65] Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, para 21. A somehow more helpful definition was offered in the early ECSC Case 19/61 *Mannesman AG v. High Authority of the ECSC* [1962] ECR 357, para 371 and Joined Cases 17/61 & 20/61 *Klöckner-Werke AG and Hoesch AG v. High Authority of the ECSC* [1962] ECR 325, para 341: 'an undertaking is constituted by a single organisation of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim'.

[66] See e.g. Case C-244/94 *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs (FFSA) v. Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, para 21.

4. General assessment of the nature of the entity criterion

From the above, it becomes clear that the nature of the entity is of absolute importance for free movement rules, as non-public measures are a priori excluded from their scope; it is of relative importance for the public procurement rules, as state control/financing constitutes one important criterion (out of three) for their applicability; and it is of no importance at all for the competition rules. Therefore, an important difference in the scope of application of the relevant rules stems from this first criterion used by the Court.

B. Nature of the activity

1. Free movement

As stated above, the nature of the entity involved is critical for the application of free movement rules. The nature of the activity only comes into play in the form of an exception; or two.

Article 45(4) TFEU provides an exception to the free movement of workers in the public service. At the same time, Article 51 TFEU expressly foresees that the right of establishment and (in combination with Article 62 TFEU) the free provision of services, do not apply to activities which are related to the exercise of official authority in the host state. These exceptions have been interpreted in a restrictive manner.

The concept of public service has been held to be a concept of EU law, confined to activities (not entire posts)[67] which involve substantial participation in the state's effort to exercise its functions and/or to safeguard the general interest, thus requiring a special relationship of allegiance to the state.[68] Similarly, the concept of public authority under Article 51 TFEU has been restricted to activities genuinely involving the exercise of authority and legally binding decisions – not mere preparatory or other collateral functions.[69] Moreover, the position of the Court has shifted from previous case law, and it would seem that civil aspects of public authority, such as the registration of contracts, births, marriages, and wills does not amount, in the absence of any power of decision-making or of coercion, to the exercise of public authority.[70]

Next to these Treaty provisions whereby the application of the free movement rules may be sidestepped on grounds of public authority, a second ground seems to be put forward by the

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[67] Case C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori* [2006] ECR I-2941, para 47; Case C-173/94 *Commission v. Belgium (employment in the public service)* [1997] ECR I-3265, and Case 290/94 *Commission v. Greece (employment in the public service)* [1996] ECR I-3285.

[68] See also Sauter, W., and Schapel, H., 2009, n 64 above, at 61; see also, among many, Case 225/85 *Commission v. Italy (employment in the NRC)* [1987] ECR 2625; Case C-4/91 *Annegret Bleis v. Ministère de l'Education Nationale* [1991] ECR I-5627; Case C-473/93 *Commission v. Luxembourg (employment in the public service)* [1997] ECR I-3207.

[69] See e.g. Case C-404/05 *Commission v. Germany (organic agricultural products)* [2007] ECR I-10239; Case C-393/05 *Commission v. Austria (organic agricultural products)* [2007] ECR I-10195.

[70] See Case C-52/08 *Commission v Portugal (notaries)* [2011] ECR nyr and Case C-53/08 *Commission v Austria (notaries)* [2011] ECR nyr, partly reversing Case C-405/01 *Collegio de Oficiales de la marina mercante Espanola* [2003] ECR I-10391.

Court: solidarity. Solidarity is a ground for disapplying the Treaty rules essentially in the field of competition law, along the lines discussed earlier in the present article. It has been used by the Court in order to exclude the application of the free movement in cases such as *Sodemare*, *Freskot* and, more recently, *Piatowski;*[71] such use is distinct from solidarity as yet another overriding reason of public interest serving to justify restrictive measures.[72]

2. Public procurement

As stated above, the nature of the activity pursued constitutes one out of the three tests for identifying a 'contracting authority/entity' (the other two being the existence of legal personality and state control). Therefore, technically, it is integrated in the first question, that of the nature of the entity. In this framework, however, the issue of the activity pursued is always treated separately. Indeed, according to Article 1(9) of the Public Procurement Directive,[73] the first condition for identifying a body governed by public law is that it is 'established for the specific purpose of meeting needs in the general interest, *not having an industrial or commercial character'*.[74]

Three remarks need be made in respect of the nature of the activities which make an entity qualify as a contracting entity.[75]

First, the fact that some competition by private undertakings may or does actually exist, does not automatically rule out the possibility that such activities are offered by the public entity in the general interest.[76] It is only when the entity in question 'operates in normal market conditions, aims to make a profit, and bears the losses associated with the exercise of its activity' that the Court is satisfied that it is not going to take economically unsound decisions; only then will the Court leave the entity unconstrained by the public procurement rules.[77] It should be noted, already here, that the very same conditions, of profit seeking and, more

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[71] Case C-70/95 *Sodemare* [1997] ECR I-3395; Case C-355/00 *Freskot* [2003] ECR I-5263; Case C-493/04 *L.H. Piatkowski v. Inspecteur van de Belastingdienst grote ondernemingen Eindhoven* [2006] ECR I-2369.

[72] Hervey, T., '"Social Solidarity": A Buttress against Internal Market Law?' in Shaw, J. (ed), *Social Law and Policy in an Evolving EU* (Oxford: Hart Publishing, 2000) 31-47, also available at http://aei.pitt.edu/2294/01/002338_1.PDF (last accessed on 28/11/2011); she observes that the same ambivalence of solidarity is also true in relation to the competition rules, since e.g. in *Albany,* the Court found that the activity in question did not possess sufficient solidarity features to be brought altogether outside the scope of the Treaty, but could, nonetheless, justify an exception under Art 106(2) TFEU (Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751).

[73] European Parliament and Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

[74] See e.g. Case C-360/96 *BFI Holding BV* [1998] ECR I-6821, paras 50-1, and Case C-18/01 *Korhonen* [2003] ECR I-5321, para 47.

[75] Further on this issue, see Bovis, C., *EC Public Procurement: Case law and Regulation* (Oxford: OUP, 2006) ch 7; Arrowsmith, S., *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2005) ch 5.

[76] C-18/01 *Korhonen,* n 74 above, paras 43-4, where the Court gives two reasons for such a finding: first, that even if there is competition, a body financed or controlled by the state may nonetheless be guided by non-economic considerations; secondly, that it is hard to imagine any activities that could not in any circumstances be carried out by private undertakings.

[77] *Ibid*, para 51.

decisively, of cost bearing, are also used by the Court – in reverse – in order to determine the existence of undertakings.[78]

Secondly, if the entity's activities are partly 'in the general interest' and partly within the market, the entity is subject to the procurement rules even for contracts which relate to its purely competitive activities. This 'infection' or 'contamination' theory,[79] has been introduced by the Court in *Mannesmann* and confirmed ever since.[80]

Thirdly, contrary to the definition of SGEIs, or of the concept of solidarity, for which the Court tries to put forward its own set of criteria and to control *in extremis* the choices made by the member states,[81] member states seem to have a free hand in deciding the activities which they keep under their responsibility, thus subjecting them to the procurement rules: their objective is not to constrain the member states' choices concerning the services they offer to their population, but rather to make sure that, while providing those services for their citizens, member states respect the principles of objectiveness, transparency, and equal treatment.

In other words, *regulation* by the state is always presumed to have some impact on economic activity and is, thus, subject to the free movement rules – unless some direct connection to the exercise of public authority can be shown. *Economic dealings* of the state, on the other hand, are either within the market, in which case the competition rules do, in principle, apply to them; or they operate in the pursuance of the general interest, in which case the public procurement rules apply to them. Neither qualification excludes altogether the application of EU law, and, therefore, there is no teleological argument for favouring on or the other qualification.

The above observations demonstrate that the notion of serving needs of general interest, for the purposes of public procurement, is much wider than the notion of the exercise of public authority, for the purposes of the free movement rules. In economic terms, it could be said that the former corresponds to 'merit goods' while the latter is confined to a restrictive vision of 'public goods'.

3. Competition and state aid rules

It has been briefly explained above that for the application of the competition rules, the nature of the entity involved is completely irrelevant. What does count, on the other hand, is the activity pursued. Such activity should satisfy two requirements to qualify as economic. *First*, it should consist 'in offering goods and services in a given market'. Buying into a market does not, on its own, qualify as an economic activity, if such purchase is not connected to a

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[78] See e.g. C-309/99 *Wouters* [2002] ECR I-1577, paras 48-49.

[79] For the use of the term 'infection', see Sauter, W., and Schepel, H., *State and Market in EU Law: The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge: CUP, 2009), at 54; however, the term 'contamination' seems to be describing more accurately the legal situation.

[80] Case C-44/96 *Mannesmann Anlagenbau* [1998] ECR I-73, para 26, subsequently confirmed ia in Case C-373/00 *Truley* [2003] ECR I-1931, para 56, and Case C-18/01 *Korhonen*, n 74 above, para 58.

[81] For the control by the Court of the concept of SGEI put forward by the member states, see the analysis in A(3)a(iv) above.

commercial activity.[82] *Secondly*, the entity offering goods and services should be bearing the financial risks of the activity[83] – an activity which need not be pursued for profit,[84] but which is 'capable of being carried on, at least in principle, by a private undertaking with a view to profit'.[85] This last condition is interpreted in an extremely wide manner, the criterion used being that the activity in question 'has not always been and is not necessarily' exercised outside the market.[86] It has been observed in this respect that 'it is not actual competition or even potential competition that is relevant, but hypothetical competition'.[87]

The above two conditions make for a very extensive concept of 'undertaking', made even broader by the Court's expansive view of the concept of 'associations of undertakings' contained in the Treaty.[88]

The two boundaries to the scope *ratione materiae* of competition rules, stemming from the nature of the activity pursued, have been discussed above:[89] activities bearing the mark of public authority and activities which embody the principle of solidarity. Both the exercise of public authority and of solidarity functions transform an otherwise economic activity into a non-economic one.

Furthermore, the Court has developed a theory of 'severability' in the field of competition law whereby

> 'since the Treaty provisions on competition are applicable to the activities of an entity which can be severed from those which it engages as a public authority, the various activities of an entity must be considered individually and the treatment of some of them as powers of a public authority does not mean that it must be concluded that the other activities are not economic.'[90]

The existence and precise scope of a theory of severability is, however, unclear: albeit commonly used in cases involving the activities of public authorities, this theory has been resisted (admittedly only on procedural grounds) by the Grand Chamber of the Court in *FENIN* in relation to solidarity activities.[91]

4. General assessment of the activity criterion

It is clear from the above that in all four fields of law examined, the qualification of an activity as economic or non-economic follows the same basic pattern: activities are presumed to be

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[82] See e.g. a highly authoritative, although thoroughly disputed, judgment in Case C-205/03 P *FENIN* [2006] ECR I-6295, para 25; for this judgment see, among many, Krajewski, M. and Farley, M., 'Non-economic activities in upstream and downstream markets and the scope of competition law after *FENIN*' (2007) 32 *EL Rev* 111-24.
[83] See e.g. Case C-309/99 *Wouters,* n 58 above, paras 48-9.
[84] Case C-244/94 *FFSA* [1995] ECR I-4013, para 21.
[85] Case C-364/92 *SAT Fluggesellschaft mbH v. Eurocontrol* [1994] ECR I-43, para 9.
[86] Case C-41/90 *Höfner* [1991] ECR I-1979, para 22.
[87] Sauter, W., and Schapel, H., 2009 n 64 above, at 82.
[88] See e.g. Case C-309/99 *Wouters* [2002] ECR I-1577, paras 48-49.
[89] In the relevant section concerning the nature of the body involved.
[90] T-155/04 *SELEX Sistemi Integrati* [2006] ECR II-4797 para 54; and before that, see Case C-82/01 P *Aéroports de Paris v. Commission of the European Communities* [2002] ECR I-9297, paras 75*seq*.
[91] One of the arguments put forward by the plaintiffs, and ignored by the Court, was that the Spanish SNS was not only providing services to the population for free, but was in parallel engaging into the commercial provision of healthcare, in particular to the attention of foreign nationals; see C-205/03 P *FENIN* [2006] ECR I-6295, para 9.

economic, unless they are shown to be connected either to the exercise of public authority, or to solidarity: the identification of an activity entailing public authority or solidarity functions will exclude the application of the free movement and the competition rules, but at the same time, will trigger that of the public procurement ones.

The concept of public authority which serves to exclude the application of the rules on free movement (under Art 51 TFEU), and on competition (under the above-mentioned case law of the Court) seems to be having common grounding. Similarly, the concept of solidarity seems to be unique and its effects on the application of the various sets of rules are comparable. Moreover, both concepts are concepts of EU law and subject to review by the CJEU.

In addition, the requirement that *undertakings* bring goods/services *into* the market fits perfectly with the opposite requirement that *contracting entities* operate *outside* the market. An entity which buys (without selling) into the market, and then, offers goods or services (free of charge) to the population, is not an undertaking;[92] it is, nonetheless, subject to the public procurement rules. Similarly, the condition that an undertaking should bear the risks of its own operations, combines well with the idea that entities which shift their risks to the state are subject to the procurement rules.[93]

Therefore, a systemic coherence seems to be emerging from the application of the above concepts: the free movement and competition rules apply whenever there is a market, in order to ensure competition *in* the market. The procurement rules apply whenever the exercise of authority, solidarity, or other state functions exclude competition from the market; they are destined to secure competition *for* the market. By the same token, it seems *prima facie* that any given entity is either an undertaking or a contracting authority, but never both.

The devil, however, is in the detail: while the solidarity argument has been extensively tested as a means of excluding the application of the competition rules, it has only rarely been used in the same way under the free movement rules;[94] 'needs of general interest' and, consequently, the concept of contracting entity, have been interpreted in too wide a manner in the field of public procurement; while on the competition end, 'undertaking' has also been interpreted very widely, especially in view of a. the fact that even hypothetical competition is enough, and b. the uncertainties of the theory of 'severability' (i.e. the idea that the same entity may qualify as an undertaking for some of its activities and as a public authority for others).

Such differences account for the fact that several entities may, at the same time, be subject to competition *and* public procurement rules. This is especially true for entities engaged in the provision of services broadly associated to the general interest, such as healthcare.[95] This,

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[92] *Ibid*.

[93] See the discussion in subsection B(2)b above.

[94] As noted above, in the free movement case law, solidarity is essentially expressed through the 'financial equilibrium' ORPI; see also the discussion under subheading B(5) below.

[95] See on this issue, Hatzopoulos, V., 'Public procurement and state aid in national healthcare systems' in Mossialos, E., Permanand, G., Baeten, R., and Hervey, T. (eds), *Health Systems Governance in Europe: the role of EU law and policy* (Cambridge: CUP, 2010) 381-420; Hatzopoulos, V., 'Financing national health care in a transnational environment: the impact of the EC internal market' (2009) 26 *Wisconsin Int L J* 761-804; more generally, on the topic, see Bovis,

however, seems to be an undesirable outcome, as the two sets of rules should be mutually exclusive. From a systemic viewpoint, it has been shown that they are deemed to cover different situations and to achieve different outcomes (competition *in* the market *v.* competition *for* the market). The two qualifications are supposed to be opposites: 'the exercise of an economic activity' is the criterion for identifying an undertaking, while, on the other hand, a contracting entity is one which 'does not pursue an activity of economic or commercial nature'. One of the fundamental principles of market economy is that economic operators should be free to contract with whomever they wish:[96] any given entity should not, it is submitted, be subject simultaneously to free competition and to the restrictive and time-consuming rules on public procurement.

C. The object of a measure

The third question examined by the Court has to do with the object of any given measure. There is great controversy in legal literature whether measures restricting trade should be tested only as to their object, or also as to their effect. Under WTO law, despite strong voices in favour of looking solely at the object of measures, [97] effects are also taken into account.[98]

In the EU, ever since the foundational free movement judgments, in *Dassonville, Van Binsbergen, Reyners, Cassis de Dijon* etc.,[99] it has become clear that what matters, at least at the qualification stage, are the effects of measures. This has led to judicial excesses, denounced by several authors,[100] and even by the Court itself, notably in *Keck* – and more

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C., 'The Conceptual Links Between State Aid and Public Procurement in the Financing of Services of General Interest' in Krajewski, M., Neergard, U., and van de Gronden, J. (eds), *The Changing Legal Framework for Services of General Interest* (The Hague: Asser Press, 2009) 149-70; Bovis, C., 'Financing Services of General Interest in the EU: How do Public Procurement and State Aids Interact to Demarcate between Market Forces and Protection?' (2005) 11 *ELJ* 79-109.

[96] This 'freedom to deal' is known in competition law as the 'Colgate doctrine' from the US Supreme's Court judgment in *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

[97] Regan, D., 'Judicial Review of Member-State Regulation of Trade within a Federal or Quasi-federal system: Protectionism and Balancing, Da Capo' (2001) 99 *Michigan L Rev* 1853-902; see also Regan, D., 'What Are Trade Agreements For?: Two Conflicting Stories Told by Economists, with a Lesson for Lawyers' (2006) 9 *J Int Economic L* 951-88; and more recently, in the EU context, Regan, D., 'An Outsider's View of *Dassonville* and *Cassis de Dijon*: On Interpretation and Policy', in Poiares Maduro, M., and Azoulai, L. (eds), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010) 465-73.

[98] For a discussion of the relevant case law see, among many, Leroux, E., 'Eleven years of GATS case law: What have we learned?' (2007) 10 *J of Int Economic L* 749-93; Ortino, F., 'Treaty interpretation and the WTO appellate body report in US-Gambling: A critique' (2006) 9 *J of Int Economic L* 117-48; and Leitner, K., and Lester, S., 'WTO dispute settlement from 1995 to 2005: A statistical analysis' (2006) 9 *J of Int Economic L* 219-31.

[99] Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837, Case 33/74 *Johannes Hervicus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, Case 2/74 *Jean Reyners v. Belgian State* [1974] ECR 631, Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

[100] For most 'classic' criticism, see Case C-145/88 *Torfaen Borough Council v. B & Q plc* [1989] ECR I-3851 (AG); White, E.L., 'In Search of the Limits to Article 30 of the EEC Treaty (1989) 26 *CML Rev* 235-80; Mortelmans, K., 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?' (1991) 28 *CML Rev* 115-36.

explicitly by AG Tesauro in his opinion in *Hünermund*[101] Legal doctrine has come up with various theories in order to re-center the EU's focus on measures which are truly restrictive of trade: discrimination, *de minimis* rule, remoteness, double burdens, to state but a few; [102] the recent 'rediscovery' of 'market access' as the defining criterion is yet an expression of this need.[103]

The Court for its part, has indicated that the object of the measures brought to it is to be taken into account, in a negative manner; in two ways: either to set a (rebuttable) presumption of not being capable of hindering trade, where their object is to regulate selling arrangements,[104] or to exclude measures from its scrutiny all together, when they are alien to the regulation of economic activity. It is this latter category which is of interest here.

1. Free movement

The most explicit expression of the idea that some regulations are, by nature, alien to the exercise of economic activity, is the Court's judgment in *Deliège*, concerning sporting rules. In this judgment, the Court held that

'the Treaty provisions concerning freedom of movement for persons do not prevent the adoption of rules or practices [imposing restrictions] for reasons which are not of an economic nature, which relate to the particular nature and context of such [activity].[105]

Or, put differently, 'those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity'.[106] Therefore, the subject matter of the measures brings them outside the scope of the free movement rules, to the extent that limitations thereto are 'inherent' in the nature of the measures.[107]

2. Public procurement

For the procurement rules to apply, there needs to be a contract. This is expressed by the criterion of constituting a 'contracting authority', i.e. the requirement that the awarding entity has legal personality (the other two being state control and the pursuance of some activity in

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[101] Joined cases C-267 & 268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097; opinion of AG Tesauro of 27 October 1993 in case C-292/92 *Hünermund* [1993] ECR I-6787.

[102] For a recent restatement of the relevant literature and some further thoughts, see Spaventa, E., 'The Outer Limits of the Treaty Free Movement Provisions: Some Reflections on the Significance of *Keck*, Remoteness, and *Deliège*' in Barnard, C. and Odudu, O. (eds), *The Outer Limits of EU Law* (Oxford/ Portland: Hart Publishing, 2009) 245-69; for a more detailed discussion of the various tendencies, see ch 3 below.

[103] See Barnard, C., 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 *Cambridge L J* 575-606; on a more critical tone, however, see on a more critical tone, Snell, J., 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *CML Rev* 437-72; yet for the view that the market access criterion is no more than a return to the *Dassonville* formula see Gormley, L., 'Free movement of goods and their use – What is the use of it?' (2010) 33 *Fordham Int'l L.J.* 1589-628.

[104] C-267 & 268/91 *Keck,* n 101 above.

[105] Joined cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para 43.

[106] C-519/04 P *David Meca-Medina and Igor Majcen v. Commission of the European Communities* [2006] ECR I-6991, para 31.

the general interest)[108]. If a public entity entrusts another public entity with the execution of a given mission, there is no contract between two different legal persons; the situation is closer to the concept of delegation. What is more, public money is not infused into the market, but remains within the instances of the state and the situation has thus no relevance for EU law.

The way member states organize, merge or else restructure their services, in order to fulfil their obligations towards their citizens, is 'cuisine interne' and need not be constrained by the formal procurement rules. According to the Court's judgment in *Teckal* and subsequent case law, such 'in-house' arrangements are not caught by the procurement rules and principles. The 'in-house' doctrine, introduced with great circumspection in the early Court judgments,[109] has been consolidated and its scope has been extended by the recent judgments in *ASEMFO v. Tragsa* and, more importantly, *Coditel.*[110] The technicalities of the 'in-house' doctrine need not retain us here.[111] What is important, however, is that this doctrine stands for the idea that the organizational/operational arrangements adopted by member states in order to discharge their obligations towards their citizens are, by their nature, alien to the procurement rules. Just like sporting rules above, such arrangements are not caught by the free movement rules, although they do affect the market, because their primary aim is different and they are indispensable for the attainment of such an aim.

3. Competition and state aids rules

In the 'trilogy' cases concerning supplementary pension funds,[112] the Court invented yet another use for solidarity, apart from the (dis)qualification of economic activity.[113] The question put to the Court was whether sector-specific collective agreements making affiliation compulsory to a single fund per sector, infringed competition rules. The Court found that the pension schemes in question were not impregnated enough by solidarity and held the funds

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[107] C-51/96 and C-191/97 *Deliège*, n 57 above, para. 64.

[108] See more under subheading B(1)b above.

[109] See e.g. Case C-26/03 *Stadt Halle and RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-1; Case C-458/03 *Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-8612; Case C-410/04 *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v. Comune di Bari and AMTAB Servizio SpA* [2006] ECR I-3303.

[110] Case C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo) v. Transformación Agraria SA (Tragsa) and Administración del Estado* [2007] ECR I-2999; Case C-324/07 *Coditel Brabant SA v. Commune d'Uccle and Région de Bruxelles-Capitale* [2008] ECR I-8457.

[111] For a recent account of all the relevant case law, see Frenz, W., and Schleissing, P., 'The Never Ending Story of "In-house" Procurement' in Krajewski, M., Neergard, U., and van de Gronden, J. (eds), *The Changing Legal Framework for Services of General Interest* (The Hague: TMC Asser Press, 2009) 171-87; Kaarresalo, T., 'Procuring in-house: the impact of the EC procurement regime' (2008) 17 *Public Procurement L Rev* 242-54; see also the various contributions in Comba, M., and Treumer, S. (eds), *The In House Providing in European Law* (Copenhagen: DJØF Publishing, 2010).

[112] Case C-67/96 *Albany* [1999] ECR I-5751, C-155-157/97 *Brentjens* [1999] ECR I-6025, and C-219/97 *Drijvende* [1999] ECR I-6121, respectively. On these three cases, see Idot, L., 'Droit Social et droit de la concurrence: confrontation ou cohabitation: A propos de quelques développements récents'(1999) 9:11 *Europe* 4-8.

[113] For which see the analysis under subheading B(2)c above.

to qualify as undertakings.[114] It accepted, however, that the agreements concluded between employers and employees, making affiliation compulsory lied outside the scope of Article 101 TFEU.[115] In order to reach this conclusion, the Court referred to the *nature* and to the *purpose* of the agreements. For the former, the Court held that such agreements were the fruit of social dialogue, a form of negotiation enshrined in the EU Treaty (Article 152 TFEU). As for the latter, i.e. the purpose of the agreement, the Court found that it contributed directly to improving one of the employees' working conditions, namely, their remuneration.[116] The Court explained that

> 'It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) [now 101(1) TFEU]'.[117]

In these judgments, again, the idea is clearly expressed that agreements, the *nature and purpose* of which are primarily non-economic, are not caught by the Treaty economic rules (here, rules on competition), even if they do have restrictive effects; at least to the extent that such restrictive effects are 'inherent' to the measures. [118]

4. General assessment of the object of the measure

From the above, it becomes clear that next to the nature of the entity and of the activity pursued, the 'nature and object' of the measure/agreement involved are also taken into account. In other words, the Court recognizes that in some circumstances, even if the effects of a measure/agreement do restrict the application of EU rules, the object of such measure/agreement serves to obliterate the restrictive effects. In this sense, it may be said that the Court does follow an idiosyncratic reverse 'object and effects doctrine', whereby a *positively valued object* serves to legitimise *negatively valued effects*; subject to a strict test of proportionality, expressed through the condition that restrictions should be 'inherent' in the measure.

D. Mitigating factors – threshold of interference

Measures/agreements which are in breach of Treaty rules are, occasionally, left unscathed. This is because the level of interference they cause is not intolerable. This may be the case either because its effects are too minor (*de minimis*) or too uncertain (remoteness); or because the interference is necessary for the achievement of some other objective internal (ancillary restrictions) or external (rule of reason) to the measure/agreement examined.

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[114] For the criteria used to determine whether there is sufficient solidarity, see in subsection B(2)c above.
[115] Case C-67/96 *Albany* [1999] ECR I-5751, para 64, C-115-117/97 *Brentjens* [1999] ECR I-6025, para 61, and C-219/97 *Drijvende* [1999] ECR I-6121, para 51.
[116] See e.g. C-115-117/97 *Drijvende* [1999] ECR I-6162, paras 49-50.
[117] *Ibid,* para 46.
[118] Although subsequent judgments have restricted the scope of the above case law, the principle remains intact; see Joined Cases C-180-184/98 *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, para 69; Case C-438/05 *Viking* [2007] ECR I-10779, para 52.

It is not the place here to elaborate on these theories, as each of these would require separate monographs. Very briefly, however, it may be shown how they all serve the same function, as part of the wider discussion on the economic/ non-economic activity conundrum.

a. Free movement

The Court, while defining the concept of restriction in an extensive way has nonetheless, provided 'escape routes' through which national measures forego its scrutiny. In this way, the Court consciously mitigates the intensity of its own control over national measures, thus allowing member states some leeway to pursue their regulatory choices, without being subject to a strict test of necessity and proportionality. These various escape routes are inherent in the definition of the concept of 'restriction' and constitute the topic of detailed and knowledgable analyses by other authors.[119]

b. Public procurement

The same objective as above is openly followed in the field of public procurement, in more than one way. *First*, the Procurement Directives apply to operations, the economic value of which is higher than a given threshold. Thresholds differ depending on the object of procurement (goods and services on the one hand, construction on the other), on whether the purchasing authority belongs to the central or decentralized administration, and on the activity concerned by the operation, utilities being subject to different thresholds; they are regularly revised. Thresholds clearly stand for a *de minimis* principle. *Secondly*, utilities procurement is subject to different (more flexible) rules than the ones applicable to the other sectors. *Thirdly*, even within traditional sectors, different services are listed in different annexes, and are, thus, subject to different rules. Therefore, for example, rail and water transport, as well as education, healthcare, and social services (all enumerated in annex IIB of the 'general Directive') are only subject to the 'light' procurement regime, namely the use of objective standards in the tendering documents and post-award publicity. *Fourthly*, the Directives only cover classic procurement procedures, to the exclusion of concession contracts and Public Private Partnerships. All the above arrangements leave member states with quite some leeway to organize the provision of services they deem 'sensible', outside the strict constrains of the procurement regime– but still subject to the procurement principles. [120]

c. Competition rules– private conduct

Several factors within the definitions of Articles 101 and, to a lesser extent, 102 TFEU operate as 'mitigating factors'.

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[119] See, in this respect, the ch by Enchlemeier St., in the present book; see also, recently, Lianos, I., 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of "Economic" Integration' (2010) *EBL Rev* 705-60; Barnard, C., 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 *Cambridge L J* 575-606; Davies, G., 'Process and Production Method-based Trade Restrictions in the EU' (2008) 10 *CYEL* 69-97;.

[120] For which, see the discussion in ch 5 below.

In Article 101(1) alone, well before the question of an exemption by virtue of Article 101(3) is ever raised, there are at least two doctrines which limit the scope of application of the Treaty. Article 101(1) prohibits agreements etc. 'which have as their object or effect the prevention, restriction or distortion of competition within the common market'. The EU Courts and the Commission have been interpreting the above condition flexibly, by clearing collusive conduct which, on balance, is more beneficial than detrimental to competition. This practice is comparable to the American 'rule of reason' doctrine and indeed, has been qualified as such within the EU framework.[121] An issue which is highly disputed in EU legal doctrine is whether the balancing exercise imbued by the rule of reason also encompasses non-economic considerations; such debate has been nurtured by some isolated judgments of the Court, such as *Wouters* and *Meca-Medina.*[122]

Furthermore, next to the 'rule of reason' (or as part of it),[123] the Courts and the Commission have also developed the doctrine of 'ancillary restraints': restrictions which are strictly necessary to the achievement of the main purpose of the agreement and proportionate thereto, are admitted. This doctrine is of particular importance in the area of mergers, and has also been enshrined in successive Commission Notices.[124]

Furthermore, a *de minimis* doctrine has been introduced into EU competition law by the ECJ already in 1969 and has been fleshed out by successive Commission Notices.[125]

Moreover, the concept of concerted practice has, to some extent, been limited by the theory of oligopolistic interdependence.[126]

Similarly, in the framework of Article 102 TFEU, which prohibits the abuse of dominance, both the concept of dominance and that of abuse are flexible ones, subject to various – often pro-monopolistic – interpretations.[127] Dominance is questioned by the doctrine of contestability.[128]

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[121] The issue of the precise content and scope of the rule of reason doctrine cannot be tackled here. See, however, Joliet, R., *The Rule of Reason in Antitrust Law: American, German and Common Market Laws in Comparative* (The Hague: Martinus Nijhoff, 1967); Fasquelle, D., *Droit américain et droit communautaire des ententes: Etude de la règle de raison* (Paris: Joly, 1993); and more briefly, Steindorff, E., 'Article 85 and the Rule of Reason' (1984) 21 *CML Rev* 639-46; Korah, V., 'The Rise and Fall of Provisional Validity: The Need for a Rule of Reason in EEC Antitrust' (1981) 3 *Northwestern J Int L and Business* 320-57; see *contra* Whish, R., and Surfin, B., 'Article 85 and the Rule of Reason' (1987) 7 *YEL* 1-38; Black, O., 'Per Se Rules and Rules of Reason: What Are They?' (1997) 3 *Eur Competition L Rev* 289-94.

[122] For reasons of coherence, these cases will be examined in more detail under subheading B(5)c below, despite the fact that they are technically part of an expanded 'rule of reason' doctrine.

[123] For a thorough presentation of the various doctrinal positions, see Werden, G., 'The Ancillary Restraints Doctrine' Paper presented in the ABA 54th Antitrust Law Spring Meeting (2006), also available at http://www.abanet.org/ antitrust/at-committees/at-s1/pdf/spring-materials/2006/werden06.pdf (last accessed on 28/11/2011).

[124] For the one currently in force, see Commission Notice on Restrictions Directly Related and Necessary to Concentrations [2005] OJ C56/24.

[125] Case 5/69 *Franz Völk v. S.P.R.L. Ets J. Vervaecke* [1969] ECR 295; See also the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C 368/13.

[126] Hall, R., and Hitch, C., 'Price Theory and Business Behaviour' (1939) 2 *Oxford Economic Papers* 12-45; Stigler, G., 'The Kinked Oligopoly Demand Curve' (1947) 55 *J of Political Economy* 431-39; Osborne, D. 'A Duopoly Price Game' (1974) 41 *Economica* 157-75; Bhaskar, V., 'The Kinked Demand Curve: A Game-Theoretic Approach' (1988) 6 *Int J of Ind Organization* 373-84.

[127] See, in general, Joliet, R., *Monopolization and Abuse of a Dominant Position* (The Hague: Martinus Nijhoff, 1970).

Abuse, for its part, may be proven against by the existence of some objective justification and/or on efficiency grounds,[129] despite the existence of some 'special responsibility' on the charge of dominant undertakings.[130]

d. Competition rules – state aid

The *de minimis* principle is even more solidly embedded into state aid law, than in Article 101 TFEU, since it is instituted through a formal Regulation.[131] Further, the Commission practice of Notices, Communications as well as block and individual exemptions has prompted several authors to talk of a 'rule of reason' in the application of Article 107(1).[132]

More importantly, however, the Court has offered states a powerful instrument for sidestepping the application of the state aid rules altogether: the *Altmark* judgment.[133] The net effect of the *Altmark* rules is that money transfers to undertakings entrusted with a mission of general interest do not qualify *at all* as being aids.[134] This is quite distinct from being exempted by virtue of either Articles 107(2) and (3) or Article 106(2) TFEU; the difference does not only lie at the conceptual/theoretical level, but also at the practical/procedural one: such fund transfers need not be notified to the Commission.

e. General assessment of the mitigating factors

The techniques used and the doctrines developed in the various areas of the law may correspond to different legal necessities and economic realities, but they can all influence the economic/non-economic divide. The remoteness doctrine may allow states to keep their less mercantilistic regulations away from EU scrutiny. The rule of reason, the contestability theory, the doctrine of oligopolistic interdependence, and other notions in the field of competition law may offer precious instruments in order to moderate the impact of the relevant rules on economic sectors which had previously been considered as non-economic (such as e.g. network-bound activities).

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[128] The most vocal promoters of the theory of contestable markets being Baumol, W.J., Panzar, J., and Willig, R., *Contestable Markets and the Theory of Industry Structure* (San Diego: Harcourt Brace Jovanovich, 1982). See also Bork, R.H., *The Antitrust Paradox: A Policy at War with Itself* (New York: Free Press, 1993).

[129] See Albors- Llorens, A., 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC' (2007) 48 *CML Rev* 1727-61; Lowenthal, P.J., 'The Defence of "Objective Justification" in the Application of Article 82' (2005) 28 World Competition 455-77; also Vickers, J., 'Abuse of Market Power' (2005) 115:504 *Economic J*, F244-F261.

[130] For the existence of special responsibility, see Case 322/81 *NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities* [1983] ECR 3461, para 57; Case T-51/89 *Tetra Pak Rausing SA v. Commission of the European Communities* [1990] ECR II-309, para 23; Case T-111/96 ITT *Promedia NV v. Commission of the European Communities* [1998] ECR II-2937, para. 138.

[131] Commission Regulation 69/2001/EC on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid [2001] OJ L10/30.

[132] Bartosch, A., 'Is there a need for a Rule of Reason in European State aid law?: Or how to Arrive at a Coherent Concept of Material Selectivity?**'** **(**2010) 47 *CML Rev* 729-52.

[133] Case C-280/00 *Altmark* [2003] ECR I-7747; for this judgment and all its implications, see the discussion under subheading B(5)d below.

[134] The four *Altmark* conditions have been further softened by the General Court in Case T-289/03 *BUPA* [2008] ECR II-81.

From a normative point of view, all the above instruments serve the same function: they prevent the application of the respective EU rules, thus mitigating their impact on the regulatory freedom of states and contractual autonomy of undertakings. They operate *ex ante*, when the respective scope of action of the EU and its member states is defined. In this, they are different from exceptions, which operate *ex post*, once it has been determined that the EU rules are, in principle, applicable. Such distinction, however, is not always crystal clear in relation to the competition rules.

E. General exceptions

All four categories of rules examined here are subject to exceptions, express or judge-made. This is not the place to develop a general theory of exceptions to the Treaty rules. It is, however, useful to briefly examine how such exceptions may be used in order to draw the line between economic and non-economic activities.

1. Free Movement

The express exceptions of Articles 36, 45(3), and 52 TFEU to the free movement rules allow derogations to, subject to proportionality review, for measures which are justified on public policy, security, and health grounds. Therefore, state measures connected to the core state functions, irrespective of whether they qualify as economic or not, are excluded from the Treaty rule by virtue of an express exception. Although express exceptions have been overall interpreted in a restrictive way by the Court, public health has been considerably expanded in the last years.[135] Therefore, even if the provision of social healthcare services has been qualified as an economic activity, restrictions thereto have been upheld, ia on public health grounds.

Moreover, among the overriding reasons of public interest (ORPIs), the 'financial balance' justification offers yet another ground for upholding national measures which are necessary for maintaining economically non-viable activities, such as healthcare, social security, and the like.[136]

2. Public procurement

For the exceptions, exclusions, and graduations applicable to the procurement regime, reference should be made to the developments in the previous section.

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[135] See, among many, Hatzopoulos, V., 'Financing national health care in a transnational environment: the impact of the EC internal market' (2009) 26 *Wisconsin Int L J* 761-804..

[136] In general, for judge-made exceptions to the free movement of services, including services of a non-economic nature, see Fernandez Martin, J.M. and O'Leary, S., 'Judicial exceptions to the Free Provision of Services' in Andenas, M. and Roth W.H. (eds), *Services and Free Movement in EU Law* (Oxford: OUP, 2002) 163-95.

3. Competition rules – private conduct

Article 101(3) TFEU formally introduces exceptions to the application of Article 101(1) TFEU. However, to the extent that these are intended to cover conduct already falling under 101(1), they are of little help in the distinction between economic and non-economic activities.

More interesting for the purposes of the present study is the broad 'rule of reason' approach developed by the Court, encompassing not only considerations of economic welfare, but more generally, reasons of general interest. This rule of reason approach does not take place within Article 101(3) TFEU, but in the framework of Article 101(1) TFEU and technically results in Article 101 TFEU being inapplicable as a whole. Therefore, it should be dealt with in the previous section, together with other 'mitigating factors'. The reason why it is presented here is because of the nature of the reasons which are taken into account: they would qualify as ORPIs under the free movement law.

This broad 'rule of reason' approach has been launched by the Court in *Wouters,*[137] concerning a Dutch rule precluding lawyers from founding integrated firms with accountants. The Court, after having found that all the usual conditions for the application of the competition rules were present, held that some agreements or decisions of associations of undertakings may fall outside Article 101(1) TFEU, in view of their 'context':[138] the objective of securing the sound administration of justice and of protecting consumers could justify restrictions to competition. Further on, in the same judgment, the Court found that exactly the same reasons could justify an eventual violation to the free movement rules concerning establishment and services. In other words, the Court held that the ORPIs related to professional ethics etc. – already recognized as such since the very *Van Binsbergen* case[139] – which serve to *justify* restrictions to the free movement also serve to *exclude* altogether the application of the competition rules.

This remarkable judgment stood isolated for some time, until it was confirmed and expanded by *Meca-Medina,* a case in which the International Olympic Committee's rules on doping had been qualified as a decision of an association of undertakings. The Court confirmed that in the framework of Article 101(1), the context of the collusion needs to be taken into account, referring in particular to the objectives of the conduct examined: in this case, it was 'the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport'.[140] The Court further explained that the concomitant restrictive effects should be tested as to whether they are 'inherent' (ie necessary) and proportionate to the objectives pursued.[141]

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[137] C-309/99 *Wouters* [2002] ECR I-1577.
[138] *Ibid,* para 97.
[139] Case 33/74 *van Binsbergen* [1974] ECR 1299.
[140] C-519/04 P *Meca-Medina* [2006] ECR I-6991, para 43.
[141] *Ibid,* para 42.

The above cases stand for the idea that, not only do the ORPIs recognized under free movement law also apply as a rule of reason in the framework of Article 101(1), but also that they are subject to the well-known conditions of necessity and proportionality.

d. State aid rules

Article 107(2) deems to be compatible with the common market state aid which either has a social character or compensates for natural disasters.[142] Article 107(3) foresees categories of aids which may be approved by the Commission, on an individual basis: a, for areas facing special difficulties, b. for the promotion of projects of European interest,[143] c. for certain economic activities or areas, d. for culture and heritage, and e. other exceptions specified by the Council on a proposal from the Commission. Moreover, the Commission, upon delegation from the Council,[144] has adopted block exemption Regulations (BERs) concerning aid to small and medium sized enterprises (SMEs),[145] training aid,[146] aid for employment,[147] and national regional investment aid.[148] Therefore, states do have the opportunity to fund activities which are not viable in strictly commercial terms and to obtain individual exemptions.

F. Services of general economic interest as an exception: Article 106(2) TFEU

Article 106(2) TFEU is no more than yet another exception to the Treaty rules. By the same token, however, it has historically been the first and still is the only Treaty provision introducing a material rule in favour of activities which, while being of an economic nature, should not be fully subject to market forces. This is why it is being examined separately. Despite the fact that Article 106 TFEU is located within the Treaty rules on competition, it has been constantly understood by the Court – in accordance with its wording – to offer an exception to all Treaty rules.

1. Free movement

The Court has held that Article 106(2) TFEU may justify restrictions to Article 37 TFEU, on the prohibition of commercial monopolies in relation to the free movement of goods.[149] Further, the Court held that also restrictions to Article 56 TFEU may be justified by virtue of Article

[142] There is also a third ground, which, however, is likely to be repealed after 2014: aid justified by the unification of Germany.
[143] A possibility mostly used to curb the effects of the 2008 financial crisis; see in more detail, Gebski, S., 'Competition First? Application of State Aid Rules in the Banking Sector' (2009) 6 *Competition L Rev* 89-115.
[144] Council Regulation 994/98/EC on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid [1998] OJ L142/1.
[145] Commission Regulation 70/2001/EC on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises [2001] OJ L10/33.
[146] Commission Regulation 68/2001/EC on the application of Articles 87 and 88 of the EC Treaty to training aid [2001] OJ L10/20.
[147] Commission Regulation 2204/2002/EC on the application of Articles 87 and 88 of the EC Treaty to State aid for employment [2002] OJ L 337/3.
[148] Commission Regulation 1628/2006/EC on the application of Articles 87 and 88 of the Treaty to national regional investment aid [2006] OJ L302/29.
[149] Case C-157/94 *Commission v. Netherlands (electricity import exclusivity)* [1997] ECR I-5699.

106(2) TFEU. This was expressly stated for the first time in *Corsica Ferries France,*[150] and expressly confirmed in *Deutsche Post.*[151]

2. Public procurement

Given that public procurement rules and principles specifically apply to 'public' services, not provided within normal market conditions, Article 106(2) should, in principle, not allow for exceptions thereto. Indeed, the special nature of the activity is already taken into account when an entity qualifies as 'contracting authority', thus making the procurement rules applicable in the first place. It would seem redundant, or even counter-productive, that this same element be considered again in order to set aside the procurement rules.

Ambulanz Glöckner,[152] an isolated case where the Court had implied that non-emergency ambulance services could be awarded without tender if they served to finance the costly emergency services recently, seems abandoned in *Commission v. Germany (old-age insurance)*:[153] the Court confirmed that no activity in itself justifies an exemption from the procurement rules and principles.

3. Competition rules – private conduct

Article 106(2) was clearly intended to justify exceptions to the competition rules and, expectedly, this is the area in which it has been applied most.

In a number of cases, the Court has positively applied Article 106(2) TFEU, holding that an exclusive or special right was required for the undertaking in question to perform the universal services under economically acceptable conditions.[154] This body of case law was initiated with the judgment in *Corbeau*, where the Court clarified that the 'effet utile' of Article 102 TFEU did not preclude member states from attributing exclusive rights, to the extent 'necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights (sic)'.[155]

Corbeau was considered to be a breakthrough case. Not only did it put a brake to the liberalization/deregulation frenzy of its era, but it also legitimized the award of exclusive rights further than what was strictly necessary: the holder of the exclusive rights was entitled to 'have the benefit of economically acceptable conditions'.[156] It introduced, however, an important limitation: 'the exclusion of competition is not justified as regards specific services

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[150] Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949.
[151] Joined cases C-147 & 148/97 *Deutsche Post* [2000] ECR I-825.
[152] C-455/99 *Glöckner* [2001] ECR I-8089.
[153] Case C-271/08 *Commission v. Germany (old-age insurance)* [2010] nyr.
[154] In all these cases, the Court accepted the argument that the exclusive right protected the undertaking in question against the risk of cream-skimming, leaving them with the least profitable services. See Case C-320/91 *Corbeau* [1993] ECR I-2533, Case C-393/92 *Almelo* [1994] ECR I-1477; Case C-67/96 *Albany* [1999] ECR I-5751; Joined cases C-147 & 148/97 *Deutsche Post,* n 151 above*,* Case C-244/94 *FFSA* [1995] ECR I-4013.
[155] Case C-320/91 *Corbeau* [1993] ECR I-2533, para 14.
[156] *Ibid,* para 16; in later Commission texts, it was explained that this included not only return on capital, but also reasonable benefit (see Dec 2005/842 [2005] OJ L312/67; as well as the

dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the [holder of the exclusive rights]'.[157] This 'severability' test was expressed in quite restrictive terms in this case, though its actual application was left to the national court.

The *Corbeau* conditions have been further eased, to the benefit of member states, in *Glöckner*, in two ways. *First*, in this case, concerning emergency and non-emergency ambulance services, the Court itself applied the severability test less restrictively: it was easily satisfied that the two kinds of services were not severable and that both could be reserved to the benefit of same undertaking.[158] *Secondly*, the Court, for the first time, admitted that the SGI justifying the award of special/exclusive rights is not just any (rudimentary or minimal) service, but may be characterized by 'quality and reliability'.[159]

d. Competition law – State aid

Since the state aid rules do provide for both activity- and area-specific exceptions (Articles 107(2) and (3) TFEU), for which the Commission may issue block exemption regulations and since the Council may create further exceptions to 107(1) TFEU, the utility of Article 106(2) TFEU is not altogether clear in the area of state aids. This notwithstanding, the Court in *FFSA*, concerning ia a tax brake in favour of the French La Poste, held Article 106(2) TFEU to offer a valid ground for exception to the application of Article 107 TFEU.[160] This was confirmed by subsequent judgments[161] and has been officially acknowledged by the Commission in its Community Framework for State Aid.[162] According to this last document, state aid under Article 106(2) TFEU need be notified and may be declared compatible by the Commission.

The need for notification is one important point which differentiates Article 106(2) TFEU from the *Altmark* case law. In counterpart, it has been put forward that the Article 106(2) TFEU exception is more lenient than *Altmark* in that it does not need to meet the fourth *Altmark* condition, i.e. the efficient cost criterion.[163] It should be noted that given the generous interpretation of *Altmark* by the General Court in *BUPA,* the above distinction may be of limited importance. In any case, both these grounds for disapplying the state aid rules are

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Community Framework for State Aid in the Form of Public Service Compensation [2005] OJ C297/4.

[157] *Ibid,* para 19.

[158] Case C-455/99 *Glöckner* [2001] ECR I-8089, para 60.

[159] *Ibid,* para 61.

[160] Case T-106/95 *FFSA* [1997] ECR II-229, para 178.

[161] Case T-46/97 *Sociedade Independente de Comunicação (SIC) SA v. Commission of the European Communities* [2000] ECR II-2125; Case C-332/98 *French Republic v. Commission of the European Communities (CELF)* [2000] ECR I-4833; Joined cases C-83/01 P, 93 & 94/01 P *Chronopost SA, La Poste and French Republic v. Union française de l'express (Ufex), DHL International, Federal express international (France) SNC and CRIE SA* [2003] ECR I-4777.

[162] Framework, 2005, n 156 above.

[163] See Fiedziuk, N., 'Towards a More Refined Economic Approach to Services of General Economic Interest' (2010) 16 *Eur P L* 271-88, at 277. It is reminded that the four *Altmark* conditions are: a) entrustment of a service of general interest to a given undertaking, b) upfront transparent calculation of cost, c) no overcompensation and d) no compensation for inefficiencies.

further distinguished from the Article 107(2) and (3) TFEU exceptions, to the extent that the more refined economic approach introduced by the 2005 State Aid Action Plan only apply to the latter.[164]

e. General assessment of Article 106(2)[165]

It has been demonstrated that Article 106(2) has come to be applied in all four sectors under study. For one, it has been shown that its application in the field of public procurement is superfluous, if not counter-productive, and should remain marginal. Further, to the extent that the 'financial equilibrium' ORPI is developed within free movement law, it is unclear what role is left, if any, for Article 106(2) TFEU. Thirdly, in the field of state aid, where non-economic considerations may be taken into account already in the context of the Treaty-based exceptions (Articles 107(2) and (3) TFEU), and where the *Altmark exclusion* operates broadly along the same lines as Article 106(2) TFEU *exception,* the functions left for Article 106(2) TFEU remain elusive. Even in the area primarily contemplated by Article 106(2) TFEU, that of competition law, its usefulness could be questioned, especially in view of the existence of other mitigating factors and the recognition of a broader rule of reason, in *Wouters* and *Meca-Medina*.[166]

It is true that nowadays, after the entry into force of the Treaty of Lisbon, with Article 16, Protocol No. 26 and the Charter having binding force (henceforth: the triple constitutionalisation of SGIs), Article 106(2) may be source of more problems than it resolves. Until such time, however, as the above new provisions are interpreted by the Court and applied by the Commission, Article 106(2) offers welcome, no matter how imperfect, legal predictability.

V. Conclusion

Three points emerge from the above.

First, from an institutional point of view, the analysis has shown that a clear antagonistic relationship may be identified between the Commission on the one hand, and the member states on the other. Indeed, it has been observed that, starting with the 1996 Communication on SGIs, the Commission has steadily moved the borders between the economic and the non-economic sphere in favour of the former. It was also noted that liberalization of the network based industries and the effort, coordinated at the EU level, to secure 'universal service' have awakened consciousness of the importance of SGIs and of the need to adopt a coherent regulatory approach toward them. This explains an apparent contradiction: the more the process of liberalization advances and the Commission pushes, through soft law, to the direction of increasing the scope of application of the Treaty rules, the more the member

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[164] *Ibid*.

[165] The analysis here is broadly based on Davies, G., 'What does Article 86 actually do?' in Krajewski, M., Neergard, U., and van de Gronden, J. (eds), *The Changing Legal Framework for Services of General Interest* (The Hague: TMC Asser Press, 2009) 51-67.

[166] See the analysis under subheading IV(c) above.

states tend to recognize an EU competence in this field to act also through hard law. In other words, Commission's activity in this field increases awareness of the problems raised and offers conceptual tools (mainly the distinction between SGI and NESGI) which allow for the adoption of more binding texts and b) puts the pressure on member states to 'repatriate' from the Commission to the Council (and the European Parliament) competences which traditionally belong to member states. In this game the Court has acted in a way of a referee and, although verbally promoting an expansive vision of the EU (and its own) competences, materially, it has regularly upheld member states' choices in respect of the organization of SGI. It is interesting to note, however, that the Court's activity is perceived in an uneven manner by public opinion and the media: while judgments like *Viking* and *Laval* attract great attention (essentially as being over-intrusive), pronouncements of equal importance which recognize member states' leeway to organize their social sphere, such as *Glöckner, Altmark* or *BUPA,* only receive limited coverage. Against the above background, the effects of the triple constitutionalization of SGIs in the Lisbon Treaty, in particular of the clear reserve in favour of member states in relation to NESGIs (Protocol No. 26) and the express competence of the EU in relation to SGEIs (Article 14(2) TFEU) still need to materialize.

Secondly, for all the heated theoretical debates concerning the economic/non-economic divide, it has been shown above that, the Court only rarely goes down this slippery slope. Faced with situations and/or services where the applicability of EU rules is uncertain, the Court rather refers itself to a series of six criteria out of which the nature of the activity is only one; all the others are more technical and, thus, more susceptible of judicial appreciation. This is not to say that the Court always applies these more technical criteria in a coherent manner; these criteria, however, allow the Court to resolve everyday disputes without being constantly exposed to the intricacies and uncertainties of the political debate. In doing so, the Court itself has developed judicial tools which allow it to set aside EU law whenever the activity and/or the objective served so requires: solidarity as a means of setting aside or creating inroads to internal market and competition rules, *Corbeau* etc as a means of justifying special and exclusive rights, *Altmark* etc as a means of allowing for state subsidies are just few instruments whereby the Court accommodates non-economic activities within EU law.

Thirdly, the above analysis highlights that EU-minded people or Institutions need not militate in favour of an expansive vision of 'economic'. If it is true that genuinely non-economic activities carried out by the state fall outside the scope of EU law, it is also undisputable that, as soon as these same (non-economic) activities are to be awarded to some non-state actor, EU rules/principles on public procurement become applicable. Therefore, stressing the concept of 'economic' is neither necessary nor conducive for promoting EU orthodoxy.

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