



# **EUI Working Papers**

**LAW 2008/34**

Welfare Integration through EU Law:  
The Overall Picture in the Light of the Lisbon Treaty

Dragana Damjanovic and Bruno De Witte



EUROPEAN UNIVERSITY INSTITUTE  
DEPARTMENT OF LAW

*Welfare Integration through EU Law:  
The Overall Picture in the Light of the Lisbon Treaty*

**DRAGANA DAMJANOVIC AND BRUNO DE WITTE**

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

The author(s)/editor(s) should inform the Law Department of the EUI if the paper is to be published elsewhere, and should also assume responsibility for any consequent obligation(s).

ISSN 1725-6739

© 2008 Dragana Damjanovic and Bruno De Witte

Printed in Italy  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy

<http://www.eui.eu/>  
<http://cadmus.eui.eu/>

## **Abstract**

The authors present a synthetic view of the evolution of the impact of EU law on the provision of welfare services in the member states of the EU. They distinguish, in this regard, between the core welfare services, in which the impact of EU law is more recent and less important, and the services provided by public utilities, where EU law has had a major transformative impact for many years now. In recent years, however, the distinction between the two categories becomes more blurred. The paper also discusses the likely impact of the Lisbon Treaty, if and when it enters into force, on welfare integration through EU law

## **Keywords**

welfare state – provision of services – European Court of Justice – competition law - treaty reform



***Welfare Integration through EU Law:  
The Overall Picture in the Light of the Lisbon Treaty***

Dragana Damjanovic and Bruno De Witte

**I. Introduction: Two types of welfare services**

In our paper we will take a broad view of the notion of welfare services, in line with the approach adopted by the organizers of this conference.<sup>1</sup> This broad notion of welfare services covers two rather different categories: the *core welfare services*, which are traditionally and still today mainly provided by the public sector,<sup>2</sup> and the *services provided by public utilities* which used to be, in most countries, State monopolies but are now largely liberalised and can be considered as the ‘outer ring’ of the welfare state.<sup>3</sup> The first category covers the core social services, namely social assistance to the poor (both through benefits in kind and benefits in cash) and social security schemes which provide protection in case of sickness, invalidity, old age, unemployment or parenthood (supplemented by family-supporting services in general), as well as public health care and public education; whereas the second category covers public broadcasting, basic telecommunications services, basic postal services, electricity and gas, public transport, waste disposal, water and sanitation, etc. To adopt a broad notion of welfare services covering both these categories, as recommended by the project directors, is useful for two reasons. On the one hand, because there is no clear-cut and watertight distinction between the two categories; for example, some people might argue that public broadcasting belongs in the category of core welfare services rather than in that of the public utilities; and on the other hand, because the two categories used to be rather neatly separated in terms of the impact of EC law, whereas today the

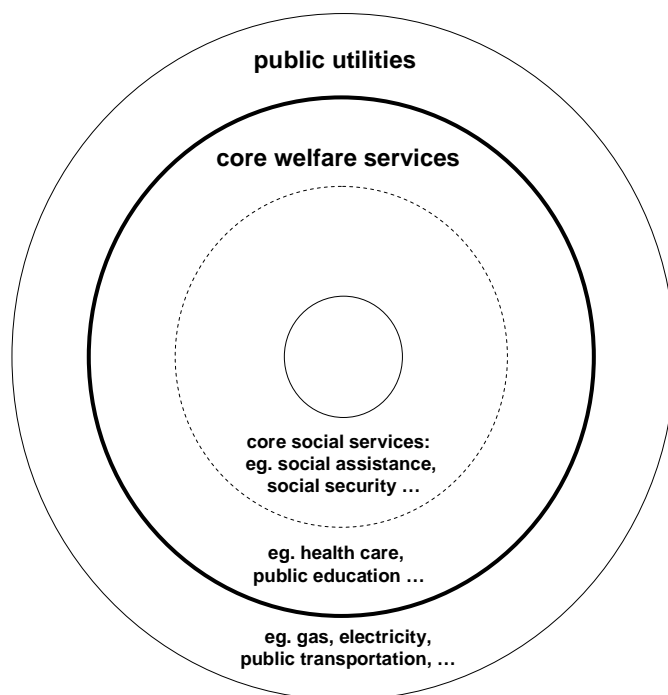
---

<sup>1</sup> A first version of this paper was presented at a conference organized at the Copenhagen Business School in August 2008. A revised version of the paper will be published as a chapter in: U.Neergaard, R.Nielsen and L.M. Roseberry (eds), *Integrating Welfare Functions into EU Law – From Rome to Lisbon* (2009).

<sup>2</sup> Contracting out of core welfare services to private entities becomes, however, increasingly usual in Europe, in particular in the field of social assistance through benefits in kind (i.e. in the field of social services according to the categorization of the Commission). In such cases it is (in contrast to a true private provision by the market) however still the public sector that orders and finances these services. In more detail see the Commission staff working document: Frequently asked questions concerning the application of public procurement rules to social services of general interest, SEC (2007) 1514. In addition, the provision of core welfare services by the public sector is typically also complemented by the provision of additional services on a for profit basis by the private sector: eg private health insurance, private pension schemes, etc. The latter will not be considered here as welfare services, but as commercial services.

<sup>3</sup> See Leibfried/Starke, 2008, at 176.

distinction is getting more blurred, which in itself is an interesting feature of the process of Europeanization of welfare services.



*graph: two types of welfare services: public utilities & core welfare services*

Closely related to these welfare services, particularly in the context of discussions of the “European social model(s)” are labour market regulation including institutional arrangements for the social partners (the social dialogue) and equality policies. In this paper, we will leave aside these contiguous functions of the welfare state, even though we recognize that the distinction between redistributive welfare policy (provision of welfare services) and regulatory welfare policy (labour law and promotion of equality)<sup>4</sup> has become very relative and tenuous these days. In one respect though, redistributive and regulatory welfare policy still differ fundamentally from each other, namely in the degree to which they are subject to European integration. In the areas of labour law and equality (or non-discrimination), the European Union is today empowered with very far reaching explicit competences, of which it has also already made extensive use by adopting a wide range of directives on employment rights,<sup>5</sup> by providing a framework for activities between the social partners (the social dialogue) at EU-level,<sup>6</sup> and by playing a pioneering role in enacting activist equality policies.<sup>7</sup> In these areas EU welfare integration has in fact reached a very high level. The Lisbon Treaty would only

<sup>4</sup> On this distinction see in particular Majone, 1993.

<sup>5</sup> For a very good overview of the development of these competences (in particular Art 137 TEC, enabling the EU to issue minimum harmonization standards) and the various legislative measures so far enacted under these provisions see Leibfried, 2005.

<sup>6</sup> Art 138, 139 TEC. On EU corporatist social policy see Falkner, 1998.

<sup>7</sup> Equality policy is sometimes claimed (with some exaggeration) to be the true European social policy, a territory unclaimed by national social policy, see Schiek, 2008, at 33.



provide some adjustments in this respect, the most important of which are the passage to qualified majority voting for the adoption of non-discrimination legislation, and the newly binding character of the Charter of Fundamental Rights, which contains a number of equality and employment rights. One can say that the European Union's legitimacy to deal with these policy matters is now firmly established, even though there may be bitter disputes on the content of the measures to be adopted.

Not so with the provision of welfare services. They raise very specific problems and controversies in the European context and the European Union's legitimacy to deal with them is disputed and uneven.

First, these policy fields typically require - and in this respect they differ from the employment and equality policies<sup>8</sup> - some sort of public funding. The EU for the time being does not possess a social budget. The European Social Fund, established under Art 146-148 TEC<sup>9</sup> plays only a very marginal redistributive role, considering that its budget is rather small and that it primarily serves the objectives of European cohesion policy rather than welfare objectives *per se*. The task to set aside public funds for the provision of welfare services and hence also to decide how to spend them (the social allocation decision) consequently remains primarily within the responsibility of the Member States.

Secondly, the provision of welfare services by the Member States touches in various ways on the core European economic aim to establish and maintain an internal market. On the one hand, labour mobility, as an essential part of the internal market, very much depends on whether welfare services are provided on equal terms to nationals and EU migrants alike. On the other hand, market closure (which is still at least partly an essential feature of the organisational structure of the national welfare systems) stands in direct opposition to the central principles of openness and competitiveness on which the European internal market is founded.

Finally, the provision of welfare services by the Member States also impinges on the future direction of the integration process, in particular on the project to move the European Union from a primarily economic community to a truly political union. Part of this project, at least for some of its supporters, is to introduce greater cross-European homogeneity in the national organisational structures of welfare provision, which are traditionally based on very strong national traditions and on the principle of territoriality.

The aim of this paper is to explore which new answers and solutions the Lisbon Treaty provides for the complex issues of welfare provision within the EU and to what extent the Lisbon Treaty recognizes new welfare *values* and opens up new avenues for welfare *integration*. In order to understand the implications of the Lisbon Treaty changes, we will first sketch the broad outlines of the current European legal framework under which the policies governing the provision of welfare services and the rights of access operate. As this current framework has been established in a piecemeal process, step by step,

---

<sup>8</sup> These can be described in this context as policies typically „burdening third parties only [...] by-passing the burden on public budgets and relying mainly on legal strategies“, see Leibfried, 2005, at 256, who actually describes US anti-discrimination policies, but this description equally fits EU labour laws and equality policies.

<sup>9</sup> Not modified by the Lisbon Treaty: see Art 162-164 TFEU.

with different actors playing different roles at each of those stages, we will first start with the original conception embodied in the EEC Treaty, followed by an outline of how the legal framework gradually changed and expanded to what it is now and a discussion of the current state of affairs (part II), and only then move on to the analysis of the new welfare-related provisions in the Lisbon Treaty (part III).

## II. The current EC legal framework for the provision of welfare services

### A. *The original conception of the EEC Treaty*

The provision of welfare services within Europe was an important issue already during the 1956 negotiations leading to the Treaties of Rome and the creation of the European Economic Community. What we call in this paper welfare services were being considered, at the time, under two different headings and were dealt with, in the Treaty text, in two different ways.

The provision of the core welfare services (mainly social assistance, social security and implicitly also health care and public education) was discussed in the context of drafting the “Social policy” title of the Treaty, together with labour law and gender issues. The provision of the other services - what we have termed in this paper the public utilities - was dealt with under the Treaty chapter “Rules on competition”, and these services were called “services of general economic interest”<sup>10</sup>, a concept which was going to have a long and controversial history until the present day.

As regards the *core welfare services*, the compromise reached in 1956 – after pretty intense debates, displaying very different thoughts and views on whether and to what extent the Community should engage in social policy matters at all<sup>11</sup> - was basically not to provide for any genuine European policy activity in these fields, and to deal with them only insofar as necessary to make the European economic project (the common market) work. At the time, that necessity seemed to arise essentially in order to ensure the equal treatment of Community workers for work-related welfare benefits, in particular social security protection, based on the view that such social guarantees constitute essential prerequisites for the very exercise of the free movement of workers. Accordingly, the only explicit Community legislative competence in the field of social policy laid down in the Treaty of Rome was to be found outside the actual title on social policy, but instead was inserted among the free movement of workers provisions, where Art 51 EECT (now Art 42 TEC)<sup>12</sup> provided that the Council, acting unanimously, shall

---

<sup>10</sup> In Art 90 EECT (now Art 86 TEC).

<sup>11</sup> In detail Falkner, 1998, at 55ff; see also Scharpf, 2002, at 646: “*Mollet, supported by French industry, had tried to make the harmonization of social regulations and fiscal burdens a precondition for the integration of industrial markets.*”

<sup>12</sup> Art 51 EECT reads as follows: “The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States.” The definition of this competence has not been modified till today, although it is now exercised through

enact measures to ensure that the member states' social security schemes do not inhibit labour mobility. Apart from Art 51 EECT, Art 100 EECT (now Art 94 TEC) and Art 235 EECT (now Art 308 TEC) provided in a more general way a "back door for social policy harmonization at the EC level"<sup>13</sup>, whenever such harmonisation would be functional for the achievement of market integration, to be decided through a unanimous Council vote (as was the case also under Article 51)<sup>14</sup>. The title on social policy itself (Art 117-128 EECT) appeared, on the other hand, more like a "confirmation of the MS' responsibilities" in this policy area: "to bear witness of the will to include some social policy provisions yet without empowering the EEC to act"<sup>15</sup>, except for some minor aspects such as equal pay for both sexes (Art 119), equivalence between paid holiday schemes (Art 120) and the establishment of a European Social Fund (Articles 123-128). Health care and education were not mentioned in the EEC Treaty at all and thus clearly considered at that time to be within the exclusive responsibility of the Member States.

As to the *services provided by public utilities*, the compromise which was reached when drafting the Treaty of Rome was to treat them as special economic activities (named, in Art 90 EECT, services of general economic interest), which shall in principle (and here was the difference with the core welfare services) be part of the EC common market building project. So, they became a field of activity of the EC.<sup>16</sup> However, the relevant common market provisions (the competition and free movement rules) were not to apply fully to them but only in so far as the application of these rules would not obstruct the performance, in law or in fact, of the specific general interest task inherent in these services - which is, in short, universal provision of the relevant services (telecommunication, energy, water, etc) of a specified quality and at affordable prices.<sup>17</sup> This Article, read in combination with Art 222 TEC (Art 295 EECT) which safeguards the national systems of property ownership, was for a long time (until the late 1980s) conceived by most people as leaving the organization and provision of these public services within the full control of the Member States, since the exclusive provision of public utility services through State monopolies was traditionally perceived to be both necessary and efficient in achieving the general interest goals in the relevant sectors.<sup>18</sup>

The original socio-economic model of the European Community as laid down in the Treaty of Rome could thus be described in a nutshell as follows. The well-being of the citizens is to be safeguarded in Europe by different mechanisms operating at different levels. The European Community contributes to it by promoting economic growth stemming from a common and competitive market, the establishment and functioning of which is the Community's primary task.<sup>19</sup> The Member States, from their side, continue

---

the codecision procedure. See Art 42 EC Treaty in its current version.

<sup>13</sup> Falkner, 1998, at 58.

<sup>14</sup> Therewith creating a situation described by Scharpf, 1988, as the "joint decision trap".

<sup>15</sup> Falkner, 1998, at 57.

<sup>16</sup> As explicitly laid down in Art 90 para 1 EECT (Art 86 para 1 TEC).

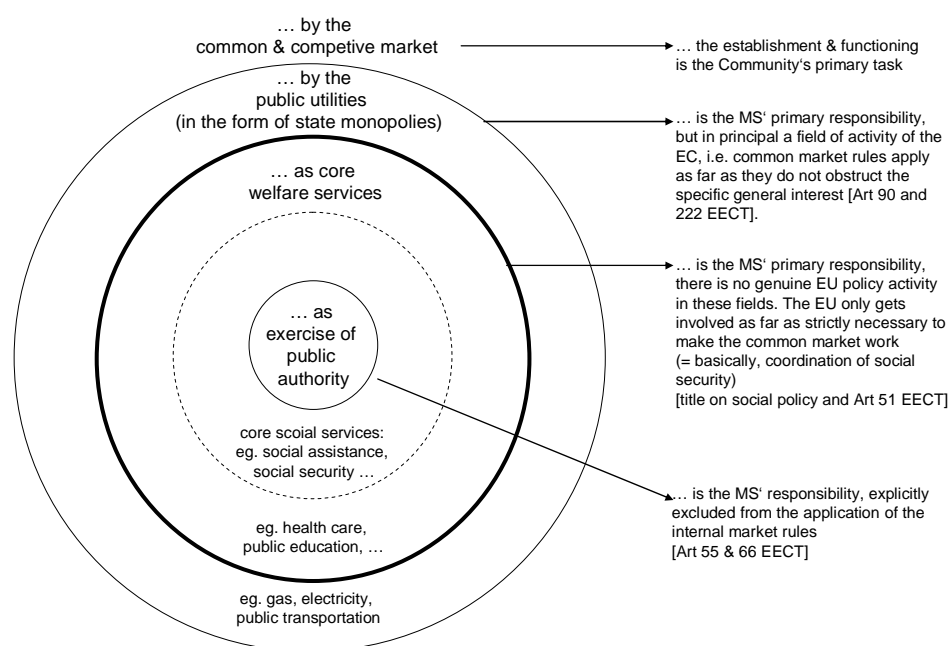
<sup>17</sup> The task of the public utilities is in so far also a slightly different one from the core welfare services (the latter being provided not at affordable prices but rather irrespectively of the means of the recipients of the services). See in more detail below II.B.2.

<sup>18</sup> For the traditional economic concepts of public utilities and the various revisions of these concepts see Phillips, 1985, at 35-65.

<sup>19</sup> The common and competitive market is thus not regarded as an objective in itself, but as an

to provide specific welfare services within their social policy systems and their health and education systems (the 'core' of the welfare state), and also through their public utilities (the 'outer ring' of the welfare state), and all these are regarded to be within their primary responsibility. The Community only gets involved in these policy fields as far as strictly necessary for the functioning of the common market. Welfare integration at EC level was thus originally conceptualized as being related directly to the creation of a common market, as a precondition for the free movement of workers, or as a way of improving the efficiency of the provision of public services. True welfare values and social policy objectives outside the framework of the common market were practically not included in the original Treaty.

**Provision of services ...**



*graph: original conception of the EEC Treaty*

**B. Development of EC law on the provision of welfare services**

In this section of the paper, we will seek to trace the main phases of the development of European integration in the field of welfare provision after 1958 and until today. We will distinguish seven different phases in this evolution, which occurred in roughly chronological order, and represent different ways in which welfare services were impacted by the European integration process. This historical survey is, by the nature of things, very schematic.

---

instrument to safeguard the well-being (welfare) of all, based on the economic theory that under perfect competition and with no market failures the market economy is the most efficient system that a society can use to allocate its scarce resources. For the basics of this theory, see Samuelson and Nordhaus, 2005, 3-43.

*1. Core welfare services: coordination under the free movement of workers provisions*

On the basis of the Treaty provision on coordination of social security (Art 51 EECT), Regulation 3/58<sup>20</sup> was put in place almost immediately after the EECT came into force, but became of true practical relevance only in its adapted version of Regulation 1408/71<sup>21</sup>, which followed shortly after the adoption of Regulation 1612/68<sup>22</sup> with which free movement of workers was firmly institutionalized in the EC. Both these pieces of EC legislation included concrete provisions on cross border access to welfare services within the EU. Regulation 1408/71 basically prescribed that the migrant worker has social security rights equal to the residence state's own nationals as well as a right to export acquired social security benefits, so as to ensure that someone who moves and settles to work in another MS will not be discriminated in terms of social security protection.<sup>23</sup> Regulation 1612/68 guaranteed the same "social and tax advantages" to non-national workers as to the nationals of the state (Art 7.2), as well as the same access to vocational training, (social) housing and education for the children. In enacting these rules, the EC legislator initially just meant to confer some limited rights of European cross border welfare provision, in particular only to a limited group of EU citizens ("the workers"). This Community interest was balanced with the MS' primary competence in social policy matters and with the negative impacts such an opening to non-nationals might have on the MS welfare budgets. So, EC integration of the provision of core welfare services took place only to the extent necessary to ensure the free movement of workers.

However, the European Court of Justice took, early on, a very broad approach to these provisions. It first established the fundamental rule that this legislation only facilitated the exercise of the rights conferred directly by the Treaty rather than actually creating these rights.<sup>24</sup> It then continuously extended both the personal and the substantive scope of these provisions. It construed the term worker as broadly as possible, to include basically any economically active person, and applied the principles on cross border access to virtually all welfare benefits, whereas they were originally intended only to cover the benefits attached in some way to the contract of employment.<sup>25</sup> Based on the same rationale – namely the non-discriminatory access to core welfare services as an indispensable precondition for effectuating the free movement of workers within the EC

---

<sup>20</sup> Regulation (EEC) No 3/58 of the Council of 25 Sep 1958 concerning social security for migrant workers, OJ 1958 L 30/561.

<sup>21</sup> Regulation (EC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ 1971 L 149/2 (and implementing Regulation No 574/72 of 21 March 1972, OJ 1972 L 74/ 1); amended by Regulation 631/2004 of 31 March 2004, OJ 2004 L 100/1 and repealed and replaced by Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ 2004 L 166/1. Council Regulation 1408/71 however remains in force for certain purposes (see Art 90 Regulation 883/2004).

<sup>22</sup> Regulation (EEC) No 1612/68 of the Council of 15. October 1968 on freedom of movement for workers within the Community, OJ 1968 L 257/2, amended by Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 38/1.

<sup>23</sup> In detail Sindbjerg Martinsen, 2005.

<sup>24</sup> See Craig/de Burca, 2008, at 774.

<sup>25</sup> On the extensive interpretation of these provisions by the ECJ, see Craig/de Burca, 2008, at 743-781; Giubboni, 2007, at 363-365; Spaventa, 2007, at 1-33; Van der Mei, 2003.

– the Court used the general non-discrimination clause of Art 12 EC to ensure the cross-border access to higher education within the EU, prohibiting any discrimination against foreign students, in particular as regards registration and tuition fees.<sup>26</sup>

The EC legislator followed the extensive interpretation adopted by the Court in European cross-border welfare matters and gradually codified the extended welfare rights of the economically active migrant citizens by adopting various amendments of the Regulations 1408/71<sup>27</sup> and 1612/68 and issuing various other legislative acts, as e.g. Directive 90/366 on the right of residence for students<sup>28</sup> - a process which finally culminated in the adoption of Directive 2004/38 on the rights of movement and residence of EU citizens<sup>29</sup> and the new Regulation 2004/883 on the coordination of social security systems<sup>30</sup>, which consolidated and updated most of the secondary legislation adopted so far in relation to the free movement of workers. The European Commission played a substantial role in this process, by typically trying, in its legislative proposals, to take welfare integration even a step further than the ECJ did<sup>31</sup>, thereby imposing pressure on the Council and the Parliament to widen the scope of welfare integration.

Thus, integration of the provision of core welfare services was carried much further than originally intended by the drafters of the Treaty of Rome, but it was still confined to workers or at any rate to economically active persons. It remained clearly linked to the concept of an “economic activity” as the basis and justification for access to welfare benefits under the EC Treaty also for non-nationals, requiring the latter to contribute in some form to the economic life of the host community and thus, at least indirectly, also to the MS public resources from which they benefit.<sup>32</sup>

To sum up this first phase of the development of EU welfare integration: it takes the form of the cross-border coordination of the provision of core welfare services in general (social security, social assistance, education, ...), which means that it is decided at the EC level to whom (in the intra-European context) welfare services are to be

---

<sup>26</sup> See Case C-293/83, *Gravier* and Case C-24/86, *Blaizot*; various other cases followed, in which the ECJ also prohibited the imposition of quotas on the numbers of foreign students entitled to attend national educational establishments, and discriminatory requirements relating to the secondary education diplomas required for entry into higher education (see recently Case C-157/03, *Commission v. Austria*). The Court however so far did not grant a right to equal treatment also with regard to social assistance for students (i.e. the access to core welfare benefits in this context), see Case C-39/86, *Lair* and Case C-197/86, *Brown*, but see also the new developments brought about by the Court’s judgment in Case C-209/03, *Bidar*. For an overview of all these developments see Dougan, 2005, 946. See also below at II.B.6.

<sup>27</sup> The amendments of EU social security coordination were also based on Art 308 EC Treaty, allowing for this social instrument to be extended beyond a literal interpretation of its treaty basis (Art 51 EECT, for this see FN 12). Sindbjerg Martinsen, 2005, at 90.

<sup>28</sup> Council Directive 93/96 of 29 October 1993 on the right of residence for students, OJ 1993 L 317/59.

<sup>29</sup> FN 22.

<sup>30</sup> FN 21.

<sup>31</sup> See for example the proposal from 1998 of the Commission for the modernization of the Regulation 1408/71, COM (1998) 779, illustrated by Pennings, 2005.

<sup>32</sup> In the words of Dougan and Spaventa, 2005, at 190: “*a direct contribution to the economic life of the host community enables the foreign workers to overcome the exclusive nature of the group identity, and to benefit from the assimilation model as regards access to (even non-contributory, non-employment related) social benefits.*”

provided, whereby the potential scope of beneficiaries (at this stage at least) is limited in principle to the economically active persons residing in another MS. This first stage has been described in the literature as the supranational assimilation model,<sup>33</sup> guaranteeing equal treatment between Community nationals and the State's own nationals, thus significantly increasing the potential scope of beneficiaries of the national welfare systems, but without otherwise questioning the competence of each Member State to organize its welfare systems.

## *2. Public utilities: "welfare integration" through the universal service model)*

The Member States' traditional structures of welfare provision through public utilities (typically state monopoly bodies) remained untouched by EC law virtually until the late 80s. The telecommunications sector was the first of the various network industries traditionally run by state monopolies to be challenged under the internal market rules (i.e. the competition and free movement of goods and services provisions) on the basis of Art 90 para 2 EECT (now Art 86 para 2 ECT). This started a relentless process of reform which fundamentally transformed not only the telecommunications sector but the whole field of the public utilities. This process reached its greatest force at the end of the 90s and is still ongoing today.<sup>34</sup>

This process was – like the progressive extension of European cross border access to core welfare services before – triggered by an active Court of Justice, which promoted a very pro-competitive reading of Art 86 para 2 ECT, first established in the course of the transformation of the telecommunications industry, and substantially elaborated and refined in numerous other cases later on.<sup>35</sup> The Court basically ruled that Art 86 para 2 ECT does not per se allow monopoly rights<sup>36</sup> and clarified that, read in conjunction with Art 82 ECT, the granting of such rights by the Member States may qualify as an infringement of the competition rules and thus also fall under the judicial competence of the EU. Furthermore, it adopted a strict proportionality test in its assessment:<sup>37</sup> exclusive rights, as exceptions to the general rules of competition and free movement, must be indispensable for the proper performance of the general interest, and whoever argues for the need of such exceptions (normally the State that grants the exclusive right) has to prove this necessity. Finally, by confirming the Commission's competence to single-handedly issue directives under Art 90 para 3 EECT (now Art 86 para 3 ECT) to enforce the competition rules,<sup>38</sup> the Court paved the way for a series of 'liberalisation

---

<sup>33</sup> See Dougan and Spaventa, 2005, at 189; and referring to them Giubboni, 2007, at 365.

<sup>34</sup> At present, there is a vivid debate on the opening of the local public transportation sector, see the UITP Activity Report 2007 (at <http://uitp.org/mos/brochures/42-en.pdf>). For the European discussion on the water and sanitation sector see eg. Finger, Allouche and Luís-Manso (ed.), 2007; (at <http://uitp.org/mos/brochures/42-en.pdf>).

<sup>35</sup> For a synthetic view of the evolution in the case law, see Baquero Cruz, 2005.

<sup>36</sup> Contrary to the position taken by most Member States at the time. See the arguments of the French Government in the Case C-202/88, *French Republic v Commission* (concerning the liberalization of the telecoms terminal equipment segment).

<sup>37</sup> This has, in the meantime, been elaborated in many other cases, though the application by the Court has not always been uniform. Various readings of the principle have coexisted and/or have alternated. See Maillo, 2007, 606-611.

<sup>38</sup> C-188/80, *France, Italy and UK v the Commission*.

directives' adopted by the Commission between 1988 and 1998 which obliged the Member States to eliminate step by step the existing exclusive rights in the telecommunications sector.<sup>39</sup> With regard to telecoms, it was thus clearly the European Court of Justice in cooperation with the European Commission that set the main impulses for reform by de-structuring the traditional MS systems and thereby in fact "forcing" the political actors to put in place a new regime for the provision of telecommunication services. That new regime was put in place by the numerous harmonization directives based on Article 95 EC which were adopted by the Council and the Parliament in parallel with the adoption of the liberalisation directives of the Commission.<sup>40</sup>

This approach, in particular the use of Art 86 para 3 ECT by the Commission in order to liberalize an entire sector, was only applied to the telecommunications industry. The reform of the other public utilities (e.g. energy, postal services, railways), which soon followed the telecom sector, was put in place entirely (i.e. both the liberalisation and the re-regulation steps) by the Council and the Parliament on the basis of Art 95 ECT. As the recent examples of the water industry and the local transportation sector show, the emergence of a broad political consensus at EC level in fact plays a decisive role for the actual realization of reform processes of the public utilities. Still, the developments in the telecommunications industry have vividly shown the potential impact of Art 86 ECT can have (if carried to its ultimate consequences) on the organisational structure of national welfare provision, once a given welfare service is qualified as a service of general economic interest in the sense of that Treaty article.

The new structures for welfare provision put in place by the European legislator in these formerly public and now liberalized sectors can be described – in very general terms – as follows: the provision of goods and services in these areas is now primarily effectuated by an open competitive market, which came to be seen as the best mechanism to ensure universal coverage of the population by the respective services at affordable prices. It is only on a subsidiary basis – i.e. in case the competitive market forces would not produce a satisfactory service – that "special public regulations" (a kind of regulatory safety net) are adopted to fill out such possible gaps in the universal coverage in the form of special "service of general interest obligations". These may take various forms, but their main structural parameters – as to who has to provide which services, under which conditions, through which funding mechanism – are to a certain extent defined by the EC, for each of the sectors, in the relevant secondary legislations and further elaborated by the Commission in its various Communications on Services of General Interest.<sup>41</sup> The classical form is the "universal service model"<sup>42</sup>, which was

---

<sup>39</sup> For an overview Larouche, 2000, 35-60.

<sup>40</sup> On the liberalisation process in European telecommunications and the roles taken by the ECJ, the European Commission and European legislator therein, see Conant, 2002, 95-121.

<sup>41</sup> See the Commission's Communications on services of general interest from 1996: COM (96)443; 2001: COM (2001/C17/04) and 2007: COM (2007)725; as well as the 2003 Green Paper: COM (2003)270 and the 2004 White Paper: COM (2004)374. For an overview, see Prosser, 2005, at 153-173.

<sup>42</sup> Put in very general terms, it guarantees that certain (basic) services are provided throughout the territory *at affordable tariffs* and on certain conditions, irrespective of the profitability of the individual operations. In detail the model varies from sector to sector and is a dynamic one which needs to be updated regularly according to the technological, economic and social changes in society.



adopted in the telecommunications industry in a pretty detailed manner through a special universal service directive based, again, on Art 95 ECT.<sup>43</sup>

The way in which welfare integration occurred in the public utilities was thus very different from the coordination model established in relation to cross-border provision of the core welfare services. The liberalizing and harmonizing (or re-regulating) measures based on the competition and internal market rules substantially transformed the whole system of welfare provision traditionally used by the Member States in these areas: from provision by public monopoly undertakings to provision primarily by an open competitive market accompanied by a regulatory safety net (“the universal service model”). This universal service model, established at the European level, essentially just guarantees the universal coverage of certain services at affordable prices, that is, against an adequate remuneration. The former public undertakings used to also provide certain services to the citizens irrespective of their means (i.e. in the way the core social welfare services are typically provided, as for example the distribution of energy at reduced tariffs to consumers with special social needs). This was seen as an inherent part of the universal coverage task, of the “corporate social responsibility as a public undertaking”.<sup>44</sup> But today this most typical welfare function of the public utilities plays only a very subordinate role in the universal service model designed at EC level. The relevant EC rules only enable the MS (if at all) to guarantee also the provision of such core welfare services within the liberalized public utility sectors, but they do not oblige them to do so (not even in the form of minimum standards) and, to that extent, no positive harmonization occurs. The experience so far has shown that it is very difficult for the Member States to find adequate alternatives to their ‘old’ public undertaking model in order to pursue these core social welfare services through public utilities operating in a competitive environment.<sup>45</sup>

### *3. Developments in EC primary law in relation to welfare services*

The developments in EC case law and secondary legislation in the field of welfare provision in the 80s and 90s have subsequently also been reflected at the level of EC primary law. In line with the coordination model developed by the ECJ as regards European cross border provision of core welfare services, the ‘social integrationist’ view – according to which it is necessary to deepen the social dimension of European integration – became politically prevalent in the late 1980s. It resulted first in the drafting of the 1989 Charter of Fundamental Social Rights of Workers<sup>46</sup>, and a few years later the European Social Agreement, which was an inherent part of the Social

---

<sup>43</sup> Directive 2002/22/EC, OJ 2002 L 108/51.

<sup>44</sup> The provision of such services was however not specified as a right, but mostly left within the discretion of the national authorities.

<sup>45</sup> See in particular for the energy sector the Commission Communication COM (2007)386 of 5. July 2007, *Towards a European Charter on the rights of Energy Consumers*,. For the telecommunications sector see Prosser, 2005, at 187.

<sup>46</sup> The legal form was only a non-binding ‘solemn declaration’, which was adopted in December 1989 by all EC governments except the UK, and it explicitly mentioned that the implementation of the Charter must not lead to a broadening of the competences of the Community. Cf. the current debate on the EU Charter of Fundamental Rights (in particular concerning its social rights) presented below in section III.A.

Protocol annexed to the 1992 Treaty of Maastricht,<sup>47</sup> substantially extended the EC competences in social policy, primarily in the fields of labour law, the social dialogue and the equality policies, but also in the field of welfare provision. With Maastricht, the titles on health care, education and cultural policy were included for the first time in the EC Treaty. No law-making powers were granted to the Community in these areas (unlike what happened in the field of labour law) but more modest powers to complement and coordinate national policies in these fields. These Treaty amendments were accompanied by a considerable extension of the general description of the EC's tasks in the first part of the Treaty (Art 2 and 3 TEC), leading to the inclusion of some true "social values" at EC primary level. The Union citizenship clause, also introduced by the Maastricht Treaty, was at that time generally perceived to be just of a symbolic nature, with no legal effects of its own, merely codifying the rights to move and reside freely within the Union which had already been enacted by the residence directives before.<sup>48</sup>

Maastricht has been described as the high water mark of the '*welfare integrationist tide*'<sup>49</sup>. After that, the Member States moved back to a more cautious and restrictive approach, in particular in the policy fields relating to welfare provision.<sup>50</sup> Since then they have been more concerned to strengthen their sovereignty within these policy fields than with developing the social dimension of the European integration process. This cautious approach to EC welfare integration is still clearly predominant today. To a large extent it can be explained as a reaction of the Member States to the fundamental changes brought about by EC law (in particular, the internal market project) in their public utility sectors. So, the main concern of the national governments in the Amsterdam and Nice Treaty reforms was to fine-tune the provisions on health, education, culture and social security, by trying to clarify the limitations of the EC powers in these fields more precisely, by confirming and amplifying the various prohibitions of harmonization which had first been introduced in the Treaty at Maastricht, and by emphasizing over and over again that any Community action in these fields should fully respect the responsibilities of the Member States.

In the same reactive vein, the Member State governments introduced a new Article 16 on the services of general economic interest into the EC Treaty at Amsterdam. The new Treaty provision emphasized the fundamental value of these services in the European Union and expressly lays down a shared responsibility of the Union and the Member States in guaranteeing that the SGEIs are able to fulfil their special missions. The article is framed in a way that has provoked controversies ever since as to the actual meaning and significance of this provision. In the judgements of the ECJ this Article has received virtually no attention so far.<sup>51</sup>

---

<sup>47</sup> This later became, after the Amsterdam Treaty, the amended version of the title on social policy of the EC Treaty.

<sup>48</sup> Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ 1990 L 180/26; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ 1990 L 180/28; Council Directive 93/96/EEC (FN 28).

<sup>49</sup> Kleinman, 2002, at 90.

<sup>50</sup> Whereas in labour law and equality law, EC competences were extended further also after Maastricht.

<sup>51</sup> Ross, 2007, 1070-1075.

#### *4. Extending EC welfare integration by coordination under the free movement of services provisions: the case of health care*

Notwithstanding the fact that the Member State governments had, in Maastricht and Amsterdam, expressed their aversion against EC regulatory interventions in their core welfare services, the ECJ decided soon after the Amsterdam Treaty came into force to considerably extend the scope of welfare integration through coordination. It did so using two different legal constructions: first under the free movement of services provisions in respect of the national health systems, and secondly under the Union citizenship clause (in combination with the non-discrimination principle) in respect of core welfare services in general.

To start with the former: with its judgements in *Kohll and Decker* in 1998<sup>52</sup> the Court for the first time qualified also health care services provided within a social/public insurance system as economic services to the patients that come within the scope of the free movement of service provisions.<sup>53</sup> On this basis it then established as a rule<sup>54</sup> that principally all Union citizens are entitled, as service recipients on a temporary visit, to access health care in another Member State which is to be financed by the patients' home social security/public insurance system. Therewith the Court extended the possibility to export healthcare benefits within the EU beyond what was allowed under Regulation 1408/71<sup>55</sup> and vigorously promoted intra-European cross border access to health care in general.

Under Regulation 1408/71 cross border health care provision to any Union citizen, also those just visiting, was to be provided and financed by the home social security/public insurance systems only in very special cases: firstly, when the condition of urgency of the treatment was met and secondly, when a prior authorisation from the patient's competent social security/public insurance institution had been given.<sup>56</sup> Adopting a rather surprising interpretation of these provisions, the Court came to the conclusion that they do not exhaustively regulate the conditions of cross-border access to health services, but that a separate right for patients to receive these services without prior authorization and obtain reimbursement by their home social security/public insurance system at the tariffs in force at home, arose directly under the EC Treaty free movement of service provisions.<sup>57</sup> Following up on this, it then set out to define in a series of cases on patient mobility the main principles governing intra-European cross border access to health care services, thereby progressively adjusting and widening the conditions originally laid down by the EC legislator in Regulation 1408/71. In doing so, the Court in fact also formulates all the crucial parameters (as to the scope, the conditions and the funding)<sup>58</sup> of the cross border provision of the services themselves.

---

<sup>52</sup> Cases C-158/96 and C-120/95.

<sup>53</sup> This has been much debated, see eg Koutrakos, 2005; very critical Newdick, 2006.

<sup>54</sup> This rule is, however, subject to limitations justifiable under the usual proportionality test of free movement of services law.

<sup>55</sup> See FN 21.

<sup>56</sup> See Art 22 Regulation 1408/71(FN 21).

<sup>57</sup> See also Hatzopoulos, 2005, at 126-127.

<sup>58</sup> As to the scope: cross border health care covers all treatments which are regarded 'normal' according to international medical science standards; as to the conditions: it has to be provided if it cannot be obtained within a medically reasonable time frame from the 'home' health security system; as to the

The European Commission has now, after lengthy internal consultations and repeated delays, published a proposal for a directive on patients' rights in cross-border healthcare, in which it has codified and implemented all the principles developed by the ECJ.<sup>59</sup> What is striking about this initiative is the internal market wording in which it is framed. As the proposed directive is based on Article 95 TEC, the Commission states that its primary objective is the “establishment and functioning of the internal market” (i.e. an internal health care market) and “to ensure a more general and effective application of these internal market rights of the patients in practice” (i.e. the right to cross border health care)<sup>60</sup>.

To sum up, welfare integration in the field of health care is achieved by coordination. In this respect, it substantially differs from the field of public utilities (which are subject to liberalisation and re-regulation), and is closer to the developments under the free movement of workers provisions. Like with the latter, coordination is based on the needs of the internal market, but unlike them, the entitlement to cross-border access is not granted as the precondition of a well-functioning internal market, but more as an element of the market itself. Thereby, welfare integration by coordination under the free movement of services provisions also goes far beyond the welfare integration level achieved under the free movement of workers provisions. It goes beyond the concept of the economic activity (encompassing all Union citizens, also those just temporarily visiting another EU country) and it determines not only to whom, but also under which conditions the services are to be provided. However, unlike what happens in the public utilities field, this type of welfare integration remains limited to cross-border situations. It does not, therefore, radically transform the MS systems but “just” makes them Euro-compatible for certain limited aspects.

##### *5. Welfare integration by coordination under the Union citizenship chapter?*

Based on the Union citizenship chapter, introduced in 1992 by the Maastricht Treaty and initially perceived to be merely of a symbolic nature, the ECJ started to develop cross border access to core welfare services separately from the traditional internal market rationale, that is, without reference to whether the service is either a precondition for the building of the internal market or an element of the internal market itself. Taking the European citizenship perspective, it rather views cross-border access as a precondition for the building of the European Union as a political union, and as a precondition of the rights of Union citizens to move around and reside freely within the European Union.<sup>61</sup>

Its line of argument is as follows: Anyone who has exercised the rights of movement and/or residence finds him/herself for that reason alone within the material scope of the

---

funding: it has to be financed by the ‘home’ health security system up to the level which would have been provided for the medical treatment within the national boundaries. Finally, the ECJ also defined the procedural requirements under which the decision has to be made on the entitlement to such cross border health care services (objectivity and impartiality, easy accessibility, fair remedies and the like). See in particular Cases *Kohll and Decker* (FN 52), C- 157/99, *Peerbooms*, C-385/99, *Müller-Fauré* and C-372/04, *Watts*.

<sup>59</sup> COM(2008) 414 of 2 July 2008.

<sup>60</sup> See at 4.a) of the explanatory memorandum of the proposal (p.6), FN 59.

<sup>61</sup> Case C-413/99, *Baumbast*.

Treaty and can claim simply on that basis not to be discriminated under Art 12 TEC.<sup>62</sup> This means that now in principle any Union citizen can claim equal treatment in access to welfare services in another MS, whereas before these welfare services had been considered, in the absence of a link to an economic activity, to fall outside the material scope of the Treaty and therewith also outside the scope of the non-discrimination principle - as the Court had affirmed for example in relation to assistance given to students for maintenance and for training,<sup>63</sup> or to the award of a pension for civilian war victims<sup>64</sup>. Today, due to the introduction of Union citizenship there is no more

*“inherent’ limit to the possibility to invoke the right to equal treatment [...], there cannot be any benefit or rule which is excluded a priori from the scope of the treaty.”<sup>65</sup>*

At the same time, though, the Court has often found restrictions of these rights to be legitimate under the proportionality test of the non-discrimination principle. Especially when it comes to the award of welfare benefits also to Union citizens who are not economic migrants, the Court so far tends to accept national provisions which reserve these welfare benefits to those Union citizens who fulfil certain durational residence conditions. By having resided already for a certain length of time in the host Member State, they are able to demonstrate a degree of integration into the host society, which entitles them to benefit from its social solidarity in the form of welfare benefits. Thereby, the Court remains largely in line with the regulatory framework agreed by the EU political actors when enacting Directive 38/2004 on free movement<sup>66</sup>, namely that non-economically active foreign Union citizens are only entitled to welfare benefits once they have resided lawfully for a continuous period of five years in the host State (that is, when they obtain the status of a permanent resident citizen), and that within the first five years of residence the foreign citizens have to be able to provide for themselves and the members of their families, i.e. they have to be covered by sickness insurance in respect of all risks in the host Member State and have to have sufficient resources to avoid becoming a burden on the social assistance system of that State during that period of residence (the “*sufficient resources*” and “*sickness insurance*” conditions).<sup>67</sup> However, in some recent cases<sup>68</sup> the Court has shown to be willing also to challenge these conditions and limitations imposed by EU secondary legislation, by qualifying some of them as disproportionate interferences with the Treaty right of Union citizenship, so that the Member States must adjust and correct these conditions.

To conclude, on the basis of the Union citizenship chapter in combination with the non-discrimination principle, the Court decouples its approach to welfare integration by coordination for all welfare services (not only health care) from the concept of an

---

<sup>62</sup> Art 12 provides for prohibition of discrimination on grounds of nationality only within the scope of application of the treaty.

<sup>63</sup> Case C-209/03, *Bidar*.

<sup>64</sup> Case C-9/78, *Gillard*, Case C-207/78, *Even*.

<sup>65</sup> Spaventa, 2008, at 28.

<sup>66</sup> FN 22.

<sup>67</sup> For the development of the ECJ case law on Union citizenship, see Spaventa, 2008.

<sup>68</sup> E.g. Case C-138/02, *Collins*, in which the Court ruled that job seekers are to be provided with non-contributory social benefits, even if they are not yet residing for a period of five years in the foreign state (as laid down in Art 7 Directive 38/2004), but have genuinely sought work in the host state for a reasonable period (which might be far less than five years).

economic activity, and extends the right to cross border access to social welfare in principle to all Union citizens residing in another Member State. But it does not (yet) take welfare integration to its fullest extent. It is very cautious in really entitling all Union citizens to cross-border access on this basis, being aware that the

*“psychological web of fraternal responsibility which justifies and supports public welfare provision, especially when it comes to non-contributory benefits and services funded from general taxation,”*<sup>69</sup>

might not be strong enough to catch also the foreigner who does not contribute to the economic life of the host community. It usually accepts broad restrictions by the Member States, which exclude the non-economically active migrant citizens from access to welfare benefits, as being proportionate under the indirect discrimination test. In adopting this cautious attitude, the Court recognizes that

*“transnational solidarity as regards Community citizens who are economically inactive cannot but remain conditional and, in particular, can only be affirmed to the extent that it does not jeopardise the vitality of national welfare systems”.*<sup>70</sup>

Welfare integration under Union citizenship, thus, has mainly had the consequence to bring these issues of access by all Union citizens to welfare benefits in the host country within the material scope of the Treaty, to make them subject to the EU non-discrimination principle and to the competence of the ECJ. Therein also lies the crucial change brought about with the introduction of Union citizenship, or to be more precise, with its interpretation by the ECJ as the basis for directly effective rights: that it is now largely in the hands of the European Court to decide how far welfare integration on this basis will develop in the future and how much of a ‘political union’ this may create.

#### *6. Blurring the line between the core welfare services and the public utilities - the qualification of core welfare services as SGEIs by the Commission*

Looking finally – to close the circle at where we started – at the two policy fields of the public utilities and the core welfare services together, one recent development at EU level is worth highlighting. After the Council and Parliament had obtained that the general services directive, as adopted in 2006, by and large excluded the welfare services from its scope of application,<sup>71</sup> the Commission came back to the question of their legal regime in its latest Communication on services of general interest of 2007<sup>72</sup>, which is by now the third one on that subject after the Green Paper from 2003 and the White Paper from 2004<sup>73</sup>. In this latest Communication, the Commission comes to the conclusion that

*“in practice, apart from activities in relation to the exercise of public authority, to which internal market rules do not apply by virtue of Article 45 of the EC Treaty,”*<sup>74</sup> it follows that

---

<sup>69</sup> Dougan and Spaventa, 2005, at 191.

<sup>70</sup> Giubboni 2007, at 375. For a discussion of the tension between free movement of EU citizens and national solidarity in the specific case of education, see Van der Mei, 2005.

<sup>71</sup> The exact impact of the services directive on services of general economic interest is, however, not very clear due to the defective drafting of the directive: see the analysis by Neergaard, 2008.

<sup>72</sup> See FN 41.

<sup>73</sup> See FN 41.

<sup>74</sup> Art 45 TEC provides that the Treaty provisions concerning the right of establishment do not apply to

*the vast majority of services can be considered as ‘economic activities’ within the meaning of EC Treaty rules on the internal market (Articles 43 and 49).<sup>75</sup>*

It draws this radical conclusion apparently on the basis of the ECJ’s case law on health care, but that case law is itself very problematic. Indeed, in its health care cases, the Court has blurred the dividing line between services to be regarded as economic in nature (and therefore part of the internal market) and those which remain outside the internal market, by qualifying services financed by institutions which the Court itself in another case line clearly defined as fulfilling an exclusively social function (the social security bodies)<sup>76</sup> and even those directly financed by public funds<sup>77</sup> as services provided for remuneration and therefore subject to the free movement rules of Art 49 TEC.<sup>78</sup> The confusion created by the Court through its health care cases as to where the dividing line lies between economic and non-economic services has now been amplified by the Commission in its latest Communication on SGIs. The Commission remains very unclear, in this document, as to whether its approach is to qualify “‘economic activities’ within the meaning of EC Treaty rules on the internal market (Articles 43 and 49)” automatically also as economic activities under the competition rules or whether it differentiates (as the ECJ does in its case law)<sup>79</sup> between the concept of an economic activity under the free movement of services provisions and the concept of an economic activity under the competition rules. The following phrases of the Commission might suggest that it takes the former approach: “*If a service of general interest is regarded as economic, it is subject to internal market and competition rules.*” and

*“The combined effect of these changes is that an increasing number of activities performed daily by social services are now falling under the scope of EC law to the extent that they are considered as economic in nature.”<sup>80</sup>*

The Commission’s ambiguity on these crucial questions leaves much uncertainty as to the future evolution of EU law. Will the model of welfare integration by coordination under the free movement of services provisions apply to all core social welfare services (and not only to health), leading to a further cross border provision in these fields? Or will it even be absorbed into the more far-reaching model of welfare integration by liberalisation and re-regulation under the competition rules, which would lead to a crucial transformation of the MS’ organisational structures for the delivery of the core welfare services: all welfare services could gradually become economic services provided by ‘utilities’ operating in a common and competitive market.

---

activities connected with the exercise of official authority. Art 55 TEC extends the exception of Art 45 to the free movement of services.

<sup>75</sup> COM(2007) 725, FN 51, p.5. See also in the Commission’s Communication: Implementing the Community Lisbon programme: Social services of general interest in the European Union, COM (2006) 177, p.6-7.

<sup>76</sup> Joined cases C-159/91 and C-160/91, *Poucet*, ECR 1993, I-00637.

<sup>77</sup> Namely, by the general taxation system, as it is the case with the national health care services (NHS) in the UK. See Case *Watts*, FN 58.

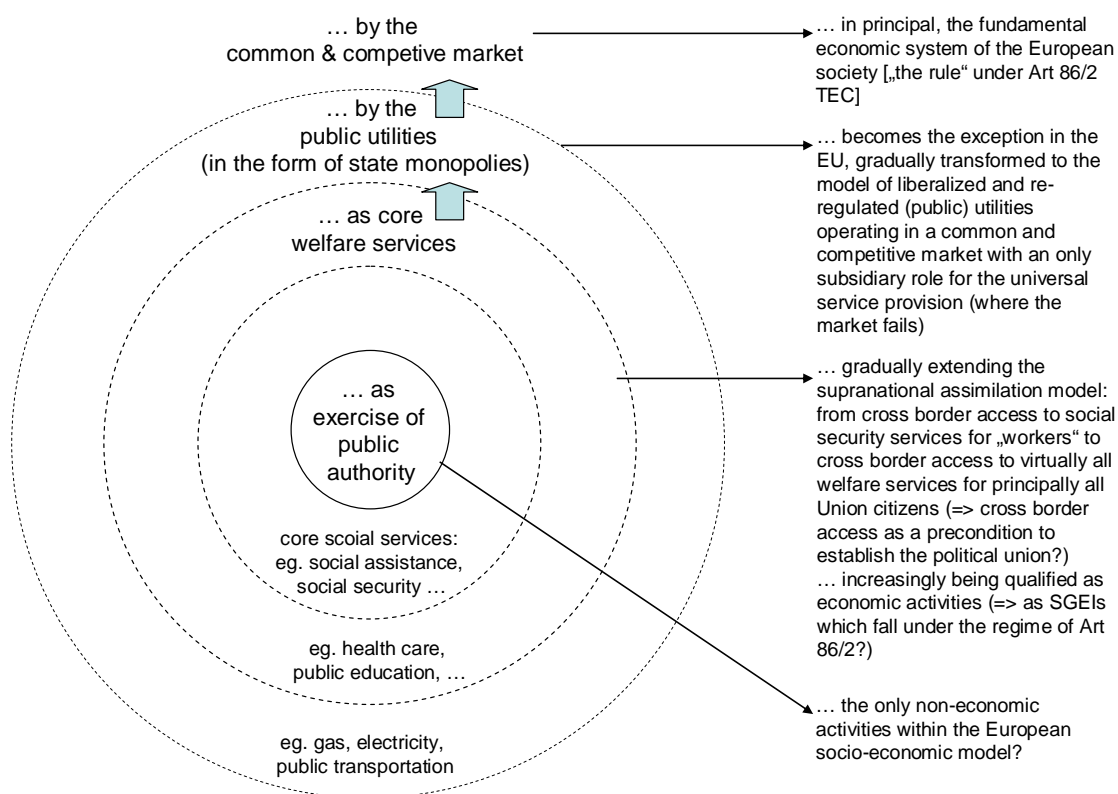
<sup>78</sup> Therewith, it makes of services that clearly form part of the MS’ core welfare systems (and are clearly situated outside the market sector) economic services covered by EU common market law.

<sup>79</sup> Cf Schweitzer, 2007, 3.

<sup>80</sup> COM(2007) 725, FN 41, p.6 (see also at p.4).

**C. Current conception of EC law on the provision of welfare services: trying to put the puzzle together**

**Provision of services ...**



*graph: current conception of EC law on the provision of welfare services: trying to put the puzzle together*

The table above can be further elucidated as follows.

The EC Treaty expressly lays down a primary responsibility for the member states as to the provision of core welfare services (social security, health care, public education), whereas the public utilities (the SGEIs) come within the shared responsibility of the EU and the Member States, according to Art 86.2 and 16 TEC. However, both the core welfare services and the public utilities are affected by the application of the common market rules (that is, by negative integration).

As regards the core welfare services, this process of negative integration started in the area of the free movement of workers. Here, welfare integration by coordination led to intra-European cross-border access to virtually all welfare benefits, but in strict connection with the exercise of an economic activity by an EU migrant. Welfare integration developed further on basis of the free movement of services provisions, whereby welfare services (in practice, mainly the health care services) were qualified as economic services. Thereby, welfare integration by coordination was decoupled from



the exercise of an economic activity, and all Union citizens were entitled to cross border access in their capacity of service recipients. Welfare integration was developed even further under the Union citizenship rules: cross border access to core welfare services is now in principle granted to all Union citizens, based on the underlying rationale of building a political union in Europe. However, this further extension is subject to limits. The European Court so far still accepts restrictions by the Member States, due to the fact that the relevant secondary legislation also allows certain welfare benefits to be denied to non-economically active foreigners when residing less than five years within the host Member State.

When we now move to consider the degree of welfare integration that results from the application of the competition rules, we find that liberalization and harmonization (re-regulation) have transformed the whole system of welfare provision through public utilities traditionally established by the MS: from provision by State monopoly undertakings to provision primarily by an open competitive market accompanied by a safety net, whose role is typically limited to guaranteeing the universal coverage of these services at a certain quality level and at affordable prices (universal service model). Core welfare functions which were also performed in these areas by the former public undertakings (e.g. provision of the public utility services also to vulnerable consumers) today play only a very subordinate role in EC legislation, and the Member States tend to cut back on them due to various factual restraints.

The ECJ so far refrained from applying the competition rules to the core welfare services, as in particular the judgements on social security schemes (“not an undertaking”) show, but then again it is qualifying (based on a thin line of argument) health services as economic services from the perspective of the freedom to provide services. There is also a tendency from the side by the Commission to include even the core welfare services within the category of SGEIs, to which in principle the regime of Art 86 TEC applies, but the Commission remains very ambiguous in this respect.

Overall, welfare integration at EC level has so far primarily taken place through negative integration, that is, as a side effect of the internal market. Even the developments in European citizenship law, which are marked by a degree of positive integration (through the adoption of regulations and directives laying down rights of EU citizens), do little more than codify the jurisprudence of the European Court of Justice. Positive integration, so far, tends to take place in the softer form of the open method of coordination (OMC) which has been used, since 2000, to foster the voluntary approximation of national policies for the delivery of social services.<sup>81</sup>

### **III. The changes under the Lisbon Treaty**

The Lisbon Treaty is a stratified document. It consists of rules that were agreed at different stages of the very long process of deliberation and negotiation that preceded the signature of the Treaty in December 2007. This phenomenon is particularly visible

---

<sup>81</sup> See generally Zeitlin and Pochet, 2005; Heidenreich and Zeitlin, 2008. On the use of the OMC in social inclusion policy, Armstrong, 2003; on the potential of OMC in health policy, Hervey and Trubek, 2007.

in the field that is of our concern in this paper. Indeed, part of the relevant content of the Lisbon Treaty was agreed already in 2000, namely the solidarity rights of the Charter of Fundamental Rights and Freedoms. As is well known, the substantive content of the Charter was not modified at any of the later stages, in contrast with the institutional provisions of the Charter and its overall legal status which were modified at various points in time after December 2000.

The main reforms agreed in the 2002-4 stage of the drafting of the Constitutional Treaty were the introduction of new ‘social language’ in the introductory articles of the Treaty and, on the other hand, a rewriting of Article 16 EC Treaty which involved the inclusion of a new legislative competence to deal with services of general economic interest.

In the final stage (for now) of the Treaty reform process, namely the drafting of the IGC mandate of June 2007 and the subsequent Lisbon Treaty, the most obvious novelty – again, for our purposes – was the enactment of a new Protocol no 9 on services of general interest. This was, in fact, one of the few substantive additions which were made to the Constitutional Treaty by the IGC of 2007 whose general aim was to reshuffle the provisions of the Constitutional Treaty so as to modify its appearance beyond recognition, rather than to add new substantive rules.

It is useful to remember this stratified nature of the innovations contained in the final text of the Lisbon Treaty, because those various Treaty amendments must be understood in the particular context of the time at which they were originally agreed. In the following pages, we will therefore adopt a chronological order in presenting those amendments and try to situate them in the political and legal context of their time, before moving, at the end of this paper, to an overall evaluation of the significance of the Lisbon Treaty for the provision of welfare services in Europe.

### ***A. The “Welfare Rights” of the Charter***

When the European Council of Cologne in June 1999 launched the process of drafting the Charter, it specified that “account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers, insofar as they do not merely establish objectives for action by the Union.” The distinction, alluded to by the European Council, between two types of social rights (those that merely contain objectives for action and those that are legally more incisive) was not closely followed by the Charter Convention that decided to include a number of ‘rights’ that were formulated as very general policy objectives. This was particularly the case in Chapter IV of the Charter entitled ‘Solidarity’ which contained the three provisions that are most directly relevant to the theme of this paper, namely Article 34 on social security and social assistance, Article 35 on health care and Article 36 on access to services of general economic interest.<sup>82</sup>

The Convention got away with this broad brush approach because it was understood that the Charter would not become legally binding, at least not immediately. The ‘justiciability issue’ came back with a vengeance during the Convention on the Future of the Union, when some delegates (particularly the UK government representative)

---

<sup>82</sup> In addition, Article 14 (curiously put in Chapter II entitled ‘Freedoms’) protects the right to education.

made it clear that their agreement to incorporate the Charter in the EU Constitution, and thus make it legally binding, would be conditional on emphasizing more clearly the distinction between ‘rights’ and ‘principles’. This eventually led to the addition of a fifth paragraph to Article II-112 of the European Constitution (corresponding to Article 52 of the Charter), which limits the justiciability of provisions containing principles: they shall be “judicially cognizable” only in the interpretation of implementing measures taken by the EU institutions or by the member states, and in rulings on their legality.

The distinction that, in the view of the Cologne European Council in 1999, should have been the basis for inclusion in the Charter or not has thus become an internal fault line within the text of the Charter as incorporated in the Constitutional Treaty and, later, the Lisbon Treaty. It is by no means clear how this fault line will operate in practice. Indeed, the Charter does not label its provisions as being either rights or principles (or rather, the use of those labels for denoting single norms in the Charter is quite inconsistent with the nature of the overall distinction made in Article 52). The rights/principles distinction is therefore bound to become a major source of confusion and controversy. This very regrettable lack of precision contrasts with some national constitutions (such as those of Ireland and Spain) that similarly exclude judicial review of some fundamental social rights provisions, but at least clearly indicate which specific provisions are excluded. The drafters’ lack of rigour is an invitation to interpretative cacophony, which was already inaugurated by the French *Conseil constitutionnel* in its decision reviewing the constitutional compatibility of the European Constitution. When referring to the distinction between rights and principles, it affirmed without any qualification and without any further argument that the right to work and the entitlement to social security benefits and social assistance are examples of principles rather than rights.<sup>83</sup>

When trying to apply the dichotomy to the fundamental social rights, it would certainly be too simple to consider that entire chapters of the Charter (say, the chapter on ‘Solidarity’, including the three ‘welfare’ provisions mentioned above) contain only marginally justiciable principles rather than fully justiciable rights. It is necessary, rather, to proceed on a case-by-case basis,<sup>84</sup> and good arguments can be made for ranging most of the Charter’s fundamental social rights in the ‘rights’ category rather than the ‘principles’ category.<sup>85</sup> Still, the fact remains that the formulation of Article 52 calls in question, in a very direct way, the promise of indivisibility held by the original text of the Charter.

The principal merit of the Charter is probably not that it imposes limits on the action of the EU institutions, so as to prevent them from encroaching on the sphere of liberty that should be left to the citizens. This ‘negative’ function of fundamental rights protection is, already now, performed by the case-law of the European Court of Justice; existing deficits of judicial protection (such as the limited access for individuals to the European

---

<sup>83</sup> *Conseil Constitutionnel*, Decision no. 2004-505 DC of 19 November 2004, *Traité établissant une Constitution pour l’Europe*, at para. 15.

<sup>84</sup> For a similar conclusion, see Hilson, at p. 215.

<sup>85</sup> One may note, in this context, that the Court of Justice has construed a directly applicable right of cross-border access to health care (corresponding to Article 35 of the Charter) on the basis of the EC Treaty provisions on freedom to provide services. See above II.B.4.

Courts and the lack of review of EU action under the second and third pillars) are not remedied by the Charter and only very partially addressed in the Treaty of Lisbon. The role of the Charter, and particularly its social rights provisions, may be more promising in two other respects: that of *limiting the liberalizing impact* of EU law on national welfare policies, and that of formulating *duties to act* for the EU institutions.

As regards the limitation of the liberalizing impact of the internal market freedoms, the recent *Viking* and *Laval* judgments of the ECJ do not augur well. Although these cases did not relate to welfare services but to employment rights and policies, the approach taken by the Court of Justice, giving relative priority to the free movement of establishment and services over the social right to take collective action, certainly does not hold the promise of an offensive judicial use of Charter rights to counterbalance the deregulatory impact of the common market freedoms.

As regards the creation of duties to act, one must take into account Article 51(2) of the Charter which provides that the Charter does not establish any new power or task for the Community or the Union. The intention of the drafters of the Charter was clearly to avoid that the mere enumeration of a fundamental right would create a competence for the European institutions to act for the protection of that right. The scope of the rights follows existing EU competences rather than the other way round. However, even though this intention is clear, the actual wording of the clause is misleading by its use of the word 'tasks'. Whereas it makes legal sense to affirm that the Charter does not extend the *powers* of the European Union, if one takes 'powers' as meaning 'legal competences', it does not make sense to state that the Charter will not extend the *tasks* of the European Union. Indeed, the very purpose of adopting a Charter of Rights was to make it a task for the European institutions to apply the Charter rights in their various activities. By adopting the Charter in their solemn proclamation made in Nice, the three institutions (Commission, Council and European Parliament) have clearly taken up the new task of respecting and promoting the rights contained in the Charter. So, whereas Article 51(2) can meaningfully be interpreted as a barrier to the extension of EU *competences* by the indirect means of promoting a Charter right, it cannot mean that the *policies* of the Community and Union remain unaffected by the Charter. That would make a charade of the Charter.

In fact, the first paragraph of the same Article 51 of the Charter imposes an obligation on the Member States and the European Union to "promote the application" of the rights contained within it. Many Charter rights (including of course the welfare rights) require positive action for "the progressive achievement of their full realization" (to use the words of the UN Social Covenant), so that the right only becomes meaningful when seen in conjunction with the measures taken for its effective enjoyment. In other words, the primary law of the Charter is intimately connected with the secondary law consisting of the measures taken for its implementation.

It would seem that, for most of the social rights included in the Charter, the European Union *does* have competence, whether broad or narrow, to take positive steps for promoting their application. The competence of the EU is sometimes quite straightforward, when the wording of the right corresponds to the definition of a sector-specific EU competence, as is the case for education, health and the various social policy competences listed in Article 137 EC Treaty (even though many of these are not law-making competences but so-called complementary competences).

In addition to these cases of clear correspondence between a Charter right and an EU competence, fundamental social rights may also play a ‘transversal’ role in other competence domains that are less directly linked to a particular social right. This can occur with the Community’s internal market competences, which are precisely not defined in sector-specific but in functional terms. The aim to facilitate the free movement of persons, services or goods justifies the adoption of EC legislation harmonising national laws and practices in a given domain. This EC legislation typically pursues a double aim: that of improving the operation of the internal market, and that of protecting at the European level a public interest which the member states (or at least some of them) were pursuing in their own divergent ways prior to harmonisation. That public interest may, occasionally, be the guarantee of a fundamental social right. On recent illustration is the Commission’s draft directive of 2 July 2008 on patients’ rights in cross-border health care. As mentioned above, this is an internal market directive; recital 3 of its preamble refers to Article 35 of the Charter dealing with the right to health.<sup>86</sup> The same connection between core economic competences of the EU and the social rights of the Charter arises with Article 36 which runs as follows:

*“The Union recognizes and respects access of services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.”*

Another, not too dissimilar, example is provided by European legislation protecting the equal exercise of welfare rights by foreign (non-EU) residents. The preamble of the Directive of 2003 on the status of third-country nationals who are long-term residents<sup>87</sup> refers to the Charter of Rights, and its Article 12 guarantees equal treatment for long-term resident foreigners in, among other things, ‘education and vocational training, including study grants’, and ‘social protection, including social security and health care’, which are social rights recognized by the Charter. In this manner, the European Union’s competence (granted by Article 63(4) EC Treaty) to define the legal status of third country nationals in their country of residence was interpreted by the EU institutions as calling for the adoption of measures to promote the exercise of Charter rights by these third country nationals.<sup>88</sup>

What happens in such cases is the legislative *mainstreaming* of social rights, in particular of their non-discrimination element. This duty of mainstreaming exists across all EU policies and applies to all fundamental rights contained in the Charter.<sup>89</sup> This

---

<sup>86</sup> However, the accompanying explanatory memorandum of the Commission does not explain in what way the draft directive would advance the Charter right to health, and one may predict a debate on this point, with some people arguing that promoting cross-border access to health care may lead to a reduction of overall health standards in Europe, or at least in some countries.

<sup>87</sup> Council Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44.

<sup>88</sup> Compare with Council Regulation 859/2003 of 14 May 2003, by which the social security exportability scheme that existed for the benefit of migrant EU nationals (the famous Regulation 1408/71) was extended to third country nationals migrating between two EU countries (OJ 2003, L 124/1). The Preamble of this Regulation refers to the right to social security and social assistance of the Charter of Fundamental Rights, but without stating in so many words that the adoption of the Regulation was mandated by the Charter text.

<sup>89</sup> See the Commission Communication COM(2005)172 of 27 April 2005, *Compliance with the Charter*

duty will become stronger if and when the Charter will acquire binding constitutional law status.

Thus, the question is not so much whether the EC and EU might gain *extra* legislative powers under the Charter for the promotion of human rights (they do not), but whether the *existing* legislative and other powers of the EU will be re-oriented and infused with a range of different values and policy considerations after the enactment of the Charter. Among the non-legislative activities that could be displayed by the EU institutions, one could mention the use of social rights as substantive indicators within the context of the open method of coordination as used in social and educational policy.<sup>90</sup> It has even been suggested recently that, beyond the incorporation of human rights concerns in existing OMC processes, one could also set up a separate open method of coordination wholly devoted to the progressive realization of the Charter rights.<sup>91</sup> Welfare rights would lend themselves particularly well to such an approach.

However, one should not nurture too much optimism. The practice of the EU institutions, so far, is rather disappointing. It is true that, as was mentioned above, the Charter has been cited in the preamble of some EC instruments since 2001. But evidence of a true change in policy formulation or implementation is rare. Take the right to *education*. The formulation of that right in Article 14 of the Charter is not particularly strong, but that does not fully explain its lack of impact on the EU's education policy since 2001. The European Union has developed an educational policy for many years now, and is currently revising the aims and instruments of that policy so as to make it an active part of the 'Lisbon process'.<sup>92</sup> However, the benchmarks and indicators that the EU institutions and member states are identifying in the course of that process do not in any way reflect the fact that education is also a fundamental right recognized in the EU Charter,<sup>93</sup> nor is the Charter mentioned in the rare binding legal acts adopted in this field.<sup>94</sup> This is, therefore, an area in which the Charter has not even started to make a rhetorical impact on EU policy, let alone shape the actual content of the policy.<sup>95</sup> Similarly, when the Commission recently presented plans for a (non-legally-binding) European Charter on the Rights of Energy Consumers,<sup>96</sup> it made no reference whatsoever to the right of access to services of general economic interest recognized by the EU Charter of Rights. So, it seems that, in the area of welfare services at least, the

---

*of Fundamental Rights in Commission legislative proposals – Methodology for systematic and rigorous monitoring.*

<sup>90</sup> See Sciarra, 2005 and Smismans, 2005.

<sup>91</sup> This idea is developed, among others, by De Schutter, 2005.

<sup>92</sup> See, generally, Lonbay, 2004.

<sup>93</sup> See, for instance, the Commission Communication COM(2003) 685 of 11 November 2003, *Education and Training 2010*.

<sup>94</sup> See, in particular, Decision 1720/2006 of 15 November 2006 establishing an action programme in the field of lifelong learning, OJ 2006, L 327/45 (the successor of the *Socrates* programme). Article 1(3) of the Decision lists 11 very broad objectives of the programme, but there is no reference there to the right to education of the Charter, nor is there a reference to the Charter in the preamble of the Decision.

<sup>95</sup> Contrast with Gori, 2001, who argues that the fundamental right to education should be a guiding principle of EU law and policy.

<sup>96</sup> Commission Communication COM(2007)386, Fn 45.

Charter of Rights remains a rhetorical flourish with little or no impact on day-to-day European policies.

Would this change once the Lisbon Treaty enters into force and the Charter of Fundamental Rights acquires full binding force? For social rights even more than for other types of rights, this change of legal status would not bring any direct consequences for the effective enjoyment of fundamental social rights. However, the entry into force of the Lisbon Treaty would still be a meaningful legal event. The Charter would act as a platform for the development of EU policies. Political and civil society actors arguing for more effective protection of particular Charter rights would be able to stand on this constitutional platform to make their voices better heard.

### ***B. The incorporation of social and welfare values in the general provisions of the Treaties***

The Constitutional Treaty first, and the Lisbon Treaty in its wake, have considerably expanded the formulation of the basic values and objectives of the European Union. The relevant Treaty articles (Articles 2 and 3 EU Treaty) include language which refers indirectly to welfare and contributes to rebalance the weight of market and non-market values in the foundational provisions of the European Union. This evolution is, thus, entirely consistent with the importance given, in the Charter, to the solidarity rights.

Solidarity is included among the values, listed in Article 2, on which the Union is based. Article 3, which lists the Union's main objectives, starts by the ringing sentence that "The Union's aim is to promote peace, its values and the well-being of its people", and then mentions, among the other main objectives, "a highly competitive social market economy" and "social progress". The Union is, furthermore, directed to "combat social exclusion" and "promote social justice and protection". In this way, the central values and principles that underlie national welfare systems are received and incorporated at the European level.

The reference to the "social market economy" has been the object of particular attention in commentaries of the Constitutional Treaty. Joerges and Rödl have noted the semantic similarity between this expression and the expression used in post-war Germany to denote a particular societal and constitutional model, and have pointed at the differences between that particular historical experience and the context of present-day Europe.<sup>97</sup> A major difference is that the commitment to establish a social market economy in Germany was accompanied by far-reaching competences of the federal government in the field of social policy, whereas they are largely lacking in the EU. In fact, there is no evidence that the drafters of the Constitutional Treaty consciously borrowed from the German constitutional tradition on this point and wanted to codify a specific social model for Europe. The expression of "social market economy" can best be seen as a generic statement of the drafters' wish to counterbalance the values of market integration with social values.<sup>98</sup>

The new language of Article 3 EU Treaty might remain a dead letter. The amendments to the Treaty may seem to be purely rhetorical because they are not fleshed out

---

<sup>97</sup> Joerges and Rödl, 2004.

<sup>98</sup> See also, in this sense, Ortega Álvarez and Arroyo Jiménez, 2007, at 351-2.

elsewhere in the Treaties by provisions that “include directly effective norms or enshrine competences and decision-making processes.”<sup>99</sup> However, as we will see *infra*, there is at least one new competence in the field of welfare services which may help to flesh out the new social rhetoric of the opening articles of the Treaty. Moreover, those provisions might also prompt the Court and Commission, in particular, to give closer consideration to welfare policy issues when interpreting and applying the market rules. The new Treaty language, by itself, does not force such a rethink by the Court or Commission, but it might provide arguments to those who complain about a market bias in the operation of those two EU institutions.

The TFEU will also contain a new mainstreaming clause stating that, in defining and implementing all its policies and activities,

*“the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.”*<sup>100</sup>

This selection of ‘mainstreamable’ welfare policy objectives overlaps in part with the fundamental social rights of the Charter and adds normative force to them.

### ***C. A new horizontal competence for welfare services (Article 14 TFEU)***

The current Article 16 EC Treaty (mentioned above) is incorporated in substantially modified form as the new Article 14 of the Treaty on the Functioning of the European Union (TFEU). The first sentence of the new article slightly rephrases Article 16 EC; the last part of the sentence now states that

*“the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions.”*

The insertion of the words “particularly economic and financial conditions” can be seen as a statement of the Member State governments directed at the Commission, cautioning it to adopt a low-key approach in its state aid policy in relation to services of general economic interest.<sup>101</sup>

The main novelty consists in the addition (compared to the current EC Treaty) of a second sentence to Article 14 TFEU which creates a new legislative competence for the European Union. It states:

*“The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of the Member States, in compliance with the Treaties, to provide, to commission and to fund such services.”*

The drafting process of this provision during the Convention on the Future of the Union was rather complicated.<sup>102</sup> The second part of the sentence (“without prejudice to the

---

<sup>99</sup> Baquero Cruz, 2007, 1119.

<sup>100</sup> Article 9 TFEU. This article is preceded by a ‘gender equality’ mainstreaming clause (Article 8) and followed by a ‘combating discrimination’ mainstreaming clause (Article 10).

<sup>101</sup> Winterstein, 2007, at 658.

<sup>102</sup> See Winterstein, 2007, at 656 ff., and Rodrigues, 2003.



competence of the MS ...”) was added later on, during the IGC that followed the Convention, and seems intended to restrict the scope of the competence given in the first part of the sentence but it is not clear to what extent it does so. It seems rather contradictory to state, on the one hand, that the European Union will have the competence to lay down the main principles and conditions, but also, on the other hand, that this leaves untouched the Member State competence to provide, organize and finance these services. Therefore, the provision seems capable of widely different interpretations.

On balance, the new provision seems to have at least the potential to create a wide-ranging legislative competence for the Union (to be exercised through the codecision procedure) to define the basic principles and conditions for the delivery of the core welfare services in Europe, and thereby to take active steps in creating a truly European social model. The creation of this basis for the development of positive welfare integration may, of course, be seen with satisfaction or regret depending on one’s preferences regarding the European economic constitution.<sup>103</sup> Much depends on the definition of the “services of general economic interest” to which this Article refers. If one adopts the very wide approach to SGEIs which the Commission put forward in its 2007 Communication (see discussion above), then the vast majority of welfare services has to be considered as economic activity – indeed anything except the ‘services’ provided in the direct exercise of public authority (police, justice and statutory social security schemes), and that would make the new competence a very broad one indeed.

This new legislative competence was added to the draft Constitutional Treaty quite late in the life of the Convention and in a kind of surprise move. Both the UK government and the European Commission have stated recently (after the confirmation of this competence by the Lisbon Treaty) that they are not keen to use it for a wholesale ‘horizontal’ regulation dealing with services of general economic interest in Europe, but only, if at all, for more specific legislation dealing with a particular service, as currently happens on the basis of other Treaty articles.<sup>104</sup> On the other hand, the socialist group in the European Parliament already elaborated a draft text of horizontal legislation on public services,<sup>105</sup> which it prepared on the basis of the current (very shaky) internal market competence given by Article 95 ECT, but which could more firmly be justified, in legal terms, once the TFEU will enter into force.

---

<sup>103</sup> For a very critical account of the new competence clause, see Schweitzer, 2004. See also Krajewski, 2008, for discussion of some of the puzzles that would be involved in the practical use of this new competence.

<sup>104</sup> For the UK government, see the Memorandum by the Department for Business, Enterprise and Regulatory Reform, in House of Lords, European Union Committee, 10<sup>th</sup> Report of Session 2007-08, *The Treaty of Lisbon: an impact assessment*, Volume II, at p. B23. As for the Commission, it implicitly rejected the call for new horizontal European legislation in its Communication of 20 November 2007, *Services of general interest, including social services of general interest: a new European commitment*, COM(2007) 725; see *Euobserver.com* of 19 November 2007, “Brussels turns down bids for EU law on public services”.

<sup>105</sup> Socialist Group in the European Parliament, *Proposal for a Framework Directive on Services of General Economic Interest*, November 2006.

#### ***D. The Lisbon Protocol on Services of General Interest***

The final layer to the Lisbon edifice was laid during the IGC which modified the Constitutional Treaty, or rather, in the secret negotiations which led to the detailed IGC mandate that was adopted by the European Council of June 2007 and then inexorably led to the Treaty of Lisbon. Indeed, the exact text of what became the Protocol nr 9 on services of general interest was already contained in a footnote of the IGC mandate.<sup>106</sup> Article 1 of the Protocol is presented as an interpretation of the new Article 14 TFEU (mentioned above); it spells out in a grammatically and stylistically clumsy way the “shared values” which are referred to in Article 14.<sup>107</sup> Article 2 is a more radical statement seeking to shield non-economic services from the impact of EU law altogether.<sup>108</sup>

It is difficult, in view of the total lack of transparency of the latest IGC, to understand why this Protocol was needed, and what its political and legal significance is. We know that the initiative for the Protocol came from the Netherlands, whose government had included it in the list of modifications to the Constitutional Treaty which it declared to be indispensable in order to ratify without recourse to a second referendum. However, this particular Dutch request, unlike the others, was not inspired by the will to dismantle the constitutional language of the Treaty. Rather, its origins are more coincidental; they seem to be linked to a controversy caused by a Commission investigation, in 2005, into the existence and legitimacy of state aid to the public housing sector in the Netherlands, a traditionally important part of the core social welfare sector in that country.<sup>109</sup>

Given the fact that Article 1 of the Protocol purports to lay down an authoritative interpretation of Article 14 TFEU, one would have expected this interpretation to be incorporated in the text of Article 14, rather than in a separate Protocol which is situated in an entirely different part of primary EU law. This lack of coherence is one of the perverse consequences of the stratified nature of the Treaty of Lisbon: rather than reopening the discussion on the formulation of Article 14, the drafters of the 2007 IGC mandate preferred to formulate an additional text in the form of a separate Protocol. It is clear, nevertheless, that Article 14 will, after the entry into force of the Lisbon Treaty, have to be interpreted in the light of the binding interpretation provided in the Protocol.

Article 2 of the Protocol is more innovative, as we see here, for the first time in primary EU law, the appearance of the notion of the “*non-economic* services of general interest” which, of course, are opposed to the services of general *economic* interest that are

---

<sup>106</sup> European Council of 21/22 June 2007, Annex 1 to the Presidency Conclusions, *Draft IGC Mandate*, at p.21, footnote 12.

<sup>107</sup> “*The shared values of the Union in respect of services of general economic interest within the meaning of Article (14) of the Treaty on the Functioning of the European Union include in particular:*  
- *the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users;*  
- *the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;*  
- *a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.*”

<sup>108</sup> “*The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organize non-economic services of general interest.*”

<sup>109</sup> See Charles Le Bihan, 2008, at 358.

covered by Article 1 of the Protocol, Article 14 TFEU and are subject – through Art 106 TFEU (today, Art 86 TEC) – to the internal market and competition rules. Two things can be noted about this new Treaty provision. First, it is difficult to take its wording at face value. If the Treaties are not to “affect in any way” the non-economic public services then, for example, the Court jurisprudence on equal access of non-national EU citizens to public employment and on the mobility rights of EU students would have been overruled by this Protocol. This can hardly have been the intention of its authors. Rather, the “non-affectation clause” must probably be read in the harmless way in which the ECJ uses similar formulas in many of its judgments, when stating that EC law does not *detract from* a particular exclusive Member State competence when it imposes certain obligations (for example, in respect of non-discrimination) on the *exercise* of that national competence.<sup>110</sup> The Court has used this formula in its health care cases,<sup>111</sup> and it will quite likely interpret the strong wording “not affect in any way” in the same belittling manner.

The second thing to note about Article 2 is that the dividing line between economic and non-economic services is not traced by the Protocol itself, nor is it within the discretion of the Member States. Rather, it will be left to the ECJ to define what are economic as opposed to non-economic services. This is an extension of its current role to define what are undertakings for the purpose of competition law, and what are services for remuneration under free movement law. So, the ECJ will continue to define which welfare services are within the shared responsibility of the Member State and the European Union (and are subject to Article 14 TFEU, Article 1 of the Protocol, and Article 106 TFEU) and which services fall within the exclusive competence of the Member States (but are nevertheless “affected”, despite the wording of Article 2, by the non-discrimination rules of EU law).

It is interesting to observe that the European Commission, in its November 2007 Communication on services of general interest, gave pride of place to the Lisbon Protocol even before it has entered into force. It used it, “somewhat cynically”,<sup>112</sup> as an argument against the enactment of European legislation on welfare services since, in the Commission’s view, the Protocol created sufficient clarity as to the EU legal framework which could, therefore, continue to be implemented through Commission action in the field of competition, and through occasional service-specific legislation. The cynical element in the Commission’s position lies in the fact that both the new competence in Article 14 TFEU and the new Lisbon Protocol were promoted by political actors who are concerned by the impact of negative integration on welfare services, but whereas Article 14 provides for a re-regulatory competence of the EU (to compensate for the effects of negative integration), the Protocol adopts a ‘hands-off’ approach, instructing the EU institutions to respect the policy autonomy of the Member States. The advocates of the existing negative integration approach, including the Commission, can therefore play out the Protocol against the second sentence of Article 14.

---

<sup>110</sup> See, for a recent example, Case C-267/06, *Tadeo Maruko v Versorgungsanstalt der deutschen Bühnen*, judgment of 1 April 2008, para 59.

<sup>111</sup> Case C-72/04, *Watts* (para 92), and Case C-444/05, *Stamatelaki* (para 23).

<sup>112</sup> Sauter 2008, at 173; see also, in the same sense, Charles Le Bihan, 2008, at 359 ff.

#### IV. General conclusion

If the Lisbon Treaty eventually enters into force, it will not radically modify the way in which EU law impacts on the provision of welfare services, but it will nevertheless introduce some interesting novelties. On the one hand, the combined wording of the introductory articles of the EU Treaty, of the Charter of Rights, and of Article 1 of the Protocol on services of general interest makes *welfare values* a much more central part of the self-understanding of the European Union. On the other hand, the Lisbon Treaty offers mixed messages when it comes to the future evolution of *welfare integration*. The member state governments, when drafting the Constitutional Treaty and the Treaty of Lisbon, made an effort to shield non-economic services from the impact of market integration, by means of the new Protocol. They also created, in the amended text of Article 14 TFEU, a new competence for the EU to promote positive integration with regard to economic services of general interest, to be exercised in the light of the new welfare values that will be entrenched in primary EU law. These two treaty amendments seem to contrast, in that the former seeks to hold back the EU and the latter encourages its action, but they are mutually consistent in policy terms, if one assumes that there is a clear demarcation line between economic and non-economic services. However, in the 'real life' of EU law, this is not really the case. We know from the Court's case law and the Commission's practice that the demarcation line between economic and non-economic services of general interest is rather blurred and constantly moving. The effect of the Lisbon Treaty will be to force the Commission and Court to adopt a more consistent line on this question of delimitation.

Whether or not the Lisbon Treaty enters into force, it is likely that in the years to come the European Union will become ever more a 'multi-level welfare system'<sup>113</sup> in which the states will continue to occupy a leading role in terms of organisation and funding of welfare services and in which the European Union will play a growing role in setting limits and providing incentives across a wide variety of welfare sectors. It is an open question in which direction this growing role of Europe will operate. Indeed, there is a discrepancy between the message conveyed by the member state governments in the Lisbon Treaty (namely, that the European Union should essentially help the member states to keep their welfare services operating in the way they wish) and the message conveyed in most of the European Commission's documents, namely that the provision of welfare services should be adapted to the requirements of market integration and cross-national competition. The future course of European integration, in this field, will depend on the internal ideological battles within each EU institution (Commission, Council and Parliament) and on the power balance between those institutions.

---

<sup>113</sup> Dougan and Spaventa, 2005, at 181.

## References

- Armstrong, Kenneth: “Tackling the Social Exclusion Through OMC: Reshaping the Boundaries of EU Governance”, in R. Cichowski and T. Börzel (eds), *The State of the European Union: Law, Politics and Society*, Volume 6 (2003).
- Baquero Cruz, Julio: “Beyond Competition: Services of General Interest and European Community Law”, in G. de Búrca (ed), *EU Law and the Welfare State – In Search of Solidarity* (2005) 169-212.
- Baquero Cruz, Julio: “The Socioeconomic Model of the European Union: Stuck with the Status Quo”, in G. Amato, H. Bribosia and B. De Witte (eds), *Genesis and Destiny of the European Constitution* (2007) 1105-1128.
- Charles Le Bihan, Danielle: “Services d’intérêt économique general et valeurs communes”, *Revue du Marché commun et de l’Union européenne* (2008) 356-360.
- Conant, Lisa: *Justice Contained. Law and Politics in the European Union* (2002).
- Craig, Paul and de Búrca, Gráinne: *EU Law*, 4<sup>th</sup> ed. (2008).
- De Schutter, Olivier: “The Implementation of Fundamental Rights through the Open Method of Coordination”, in O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (2005) 279-343.
- Dougan, Michael and Spaventa, Eleanor: “‘Wish You Weren’t Here...’ New Models of Social Solidarity in the European Union, in M. Dougan and E. Spaventa (eds), *Social Welfare and EU Law* (2005) 181-218.
- Dougan, Michael: “Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education within the EU”, *Common Market Law Review* (2005) 943-968.
- Falkner, Gerda: *EU Social Policy in the 1990s. Towards a Corporatist Policy Community* (1998).
- Finger M., Allouche J. and Luís Manso P. (eds), *Water and Liberalisation. European Water Scenarios* (2007).
- Giubboni, Stefano: “Free Movement of Persons and European Solidarity”, *European Law Journal* (2007) 360-379.
- Gori, Gisella: *Towards an EU Right to Education* (2001).
- Hatzopoulos, Vassilis: “Health Law and Policy: The Impact of the EU”, in G. de Búrca (ed), *EU Law and the Welfare State. In Search of Solidarity* (2005).
- Heidenreich, Martin and Zeitlin, Jonathan (eds): *Changing European Employment and Welfare Regimes: The Influence of the Open Method of Co-ordination on National Reforms* (forthcoming, 2008).
- Hervey, Tamara and Trubek, Louise: “Freedom to Provide Health Care Services within the EU: An Opportunity for a Transformative Directive”, *Columbia Journal of European Law* (2007) 623-647.

- Hilson, Chris: “Rights and Principles in EU Law: A Distinction without Foundation?”, *Maastricht Journal of European and Comparative Law* (2008) 193-215.
- Joerges, Christian and Rödl, Florian: “Social Market Economy as Europe’s Social Model”, *EUI Working Papers*, Law 8/2004.
- Kleinman, Mark: *A European Welfare State? European Union Social Policy in Context* (2002).
- Koutrakos, Panos: “Healthcare as an Economic Service under EC Law”, in M. Dougan and E. Spaventa (eds), *Social Welfare and EU Law* (2005) 105-129.
- Krajewski, Markus: “Providing Legal Clarity and Securing Policy Space for Public Services through a Legal Framework for Services of General Economic Interest: Squaring the Circle”, *European Public Law* (2008) 377-398.
- Larouche, Pierre: *Competition Law and Regulation in European Telecommunications* (2000).
- Leibfried, Stephan and Starke, Peter: “Transforming the ‘Cordon Sanitaire’: The Liberalization of Public Services and the Restructuring of European Welfare States”, *Socio-Economic Review* (2008) 175-198.
- Leibfried, Stephan, “Social Policy. Left to the Judges and the Markets?”, in H. Wallace, W. Wallace and M.A. Pollack (eds), *Policy Making in the European Union*, 5<sup>th</sup> ed (2005) 243-278.
- Lonbay, Julian: “Reflections on Education and Culture in EC Law”, in R. Craufurd Smith (ed), *Culture and European Union Law* (2004) 243-273.
- Maillo, Jerónimo: “Article 86. Services of General Interest and EC Competition Law”, in G. Amato and C-D. Ehlermann (eds), *EC Competition Law* (2007) 591 – 625.
- Majone, Giandomenico: *The European Community Between Social Policy and Social Regulation*, 31 *Journal of Common Market Studies* (1993) 153-170.
- Neergaard, Ulla; Nielsen, Ruth; Roseberry Lynn M. (eds) : *The Services Directive. Consequences for the Welfare State and the European Social Model* (2008).
- Neergaard, Ulla: “Services of General (Economic) Interest and the Services Directive – What is Left Out, Why and Where to Go?”, in U. Neergaard, R. Nielsen and L.M. Roseberry (eds), *The Services Directive. Consequences for the Welfare State and the European Social Model* (2008) 65-120.
- Newdick, Christopher: “Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity”, *Common Market Law Review* (2006) 1645-1668.
- Ortega Álvarez, Luis and Arroyo Jiménez, Luis: “Constitucionalismo europeo y Europa social”, *Revista Española de Derecho Europeo* (2007) 339-370.
- Pennings, Frans: “Inclusion and Exclusion of Persons and Benefits in the New Co-ordination Regulation”, in M. Dougan and E. Spaventa (eds), *Social Welfare and EU Law* (2005) 241- 260.
- Phillips, Charles F. Jr., *The Regulation of Public Utilities. Theory and Practice* (1985).
- Prosser, Tony: *The Limits of Competition Law. Markets and Public Services* (2005).

Rodrigues, Stéphane: “Vers une loi européenne des services publics”, *Revue du Marché commun et de l’Union européenne* (2003) 503-511.

Ross, Malcolm: “Promoting Solidarity: From Public Services to a European Model of Competition?” *Common Market Law Review* (2007) 1057-1080.

Samuelson, Paul A. and Nordhaus William D., *Economics*, 18<sup>th</sup> ed (2005).

Sauter, Wolf: “Services of General Economic Interest and Universal Service in EU Law”, *European Law Review* (2008) 167-193.

Scharpf, Fritz W., “The European Social Model: Coping with the Challenges of Diversity” *Journal of Common Market Studies* (2002) 645-670.

Scharpf, Fritz W., “The Joint Decision Trap: Lessons from German Federalism and European Integration”, *Public Administration* (1988) 239-278.

Schiek, Dagmar: “The European Social Model and the Services Directive”, in U. Neergaard, R. Nielsen and L.M. Roseberry (eds), *The Services Directive. Consequences for the Welfare State and the European Social Model* (2008) 25-63.

Schweitzer, Heike: “Die Daseinsvorsorge im Verfassungsentwurf des Europäischen Konvents – Ein europäischer “service public”?”, in: J. Schwarze (Hrsg.), *Der Verfassungsentwurf des Europäischen Konvents* (2004) 269-312.

Schweitzer, Heike: *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The example of Art 81*, *EUI Working Papers* (2007).

Sciarra, Silvana: “Fundamental Labour Rights after the Lisbon Agenda”, in G. de Búrca and B. de Witte (eds), *Social Rights in Europe* (2005) 199-216.

Sindbjerg Martinsen, Dorte: “Social Security Regulation in the EU: The De-Territorialization of Welfare?”, in G. de Búrca (ed), *EU Law and the Welfare State. In Search of Solidarity* (2005) 89-110.

Smismans, Stijn: “How to be Fundamental with Soft Procedures? The Open Method of Coordination and Fundamental Social Rights”, in G. de Búrca and B. de Witte (eds), *Social Rights in Europe* (2005) 217-240.

Spaventa, Eleanor: *Free Movement of Persons in the European Union. Barriers to Movement in their Constitutional Context* (2007).

Spaventa, Eleanor: “Seeing the wood despite the trees? On the scope of union citizenship and its constitutional effects”, *Common Market Law Review* (2008) 13-45.

Van der Mei, Anne Pieter: “EU Law and Education: Promotion of Student Mobility versus Protection of Education Systems”, in M. Dougan and E. Spaventa (eds), *Social Welfare and EU Law* (2005) 219-240.

Van der Mei, Anne Pieter: *Free Movement of Persons within the European Community: Cross-border Access to Public Benefits* (2003).

Winterstein, Alexander: “The Internal Market and Services of General Interest”, in G. Amato, H. Bribosia and B. De Witte (eds), *Genesis and Destiny of the European Constitution* (2007) 645-661.

Zeitlin, Jonathan and Pochet, Philippe (eds), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005).