Contours of a European Social Union in the Case-Law of the European Court of Justice

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Tensions between national welfare systems and the social rights of the citizens of the Union – Fundamental principle of free movement and the degree of financial solidarity with nationals from other member states – Introduction of internal market principles in health care – The balancing role of the Court of Justice of the European Communities.

Introduction

The endeavour to reconcile the European fundamental principle of free movement with the national interests of member states lies at the core of much of the case-law of the Court of Justice of the European Communities (hereinafter the 'Court'). In this contribution we will examine more closely how the Court weighs the interest of *awarding social rights*, as the corollary to rights of free movement, to citizens of the Union, against the interest of *safeguarding the national welfare systems*. Given the limited scope of this contribution, we do not strive for an exhaustive treatment of the subject but rather focus on two lines of recent case-law where this contentious issue has surfaced, i.e., the citizenship cases and the health care cases.

At the origin of this delicate balancing act lies the fact that the 'European Social Union', in the absence of extensive Community competences in the area of social policy, is mainly based on the national welfare systems. The case-law to be discussed thus concerns those situations where a citizen of the Union obtains *national* social rights on account of Community law, which he would not have acquired merely on the basis of national law.

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The reticence of the member states in awarding these national social rights to non-nationals flows mainly from the territorial foundation of their welfare systems. These national systems are traditionally based on the principle of territoriality whereby, on the one hand, some form of 'membership' is required before being entitled to certain social benefits, and on the other hand, only the social benefits provided and obtained on the national territory are covered.[1] The *membership requirement* is based on the idea that only those who contribute (duties) are entitled to social benefits (rights). This closed group should, logically, include those persons who work or remain in the national territory on a permanent basis. The *non-exportability of social rights* is predicated on the idea that, only within its borders, a state can maintain sufficient control over the complex 'mechanics' of its welfare system.

In spite of the constant reiteration that 'Community law does not detract from the powers of the Member States to organise their social security systems'[2] Community law does affect this national domain via the application of the fundamental principle of free movement. With the intention of realizing the internal market, Community law stimulates free movement by removing restrictive national measures even if they relate to aspects of the national welfare systems. However, these national measures can be the result of subtle socio-economic market correcting mechanisms and, therefore, potentially vital to the subsistence of those welfare systems. In other words, when recognizing mobility rights for citizens of the Union, the Court will have to take into account the potential limits of extending the circle of members (citizenship cases) or the territorial borders (health care cases) of those national welfare states.[3]

Below we will examine how the Court balances the interest of safeguarding the complex mechanisms underlying the national welfare systems against the importance of according social rights to the citizens of the Union. We will start our discussion with the citizenship cases and then move on to the health care cases.

Citizenship cases

A. *Setting*

The first line of case-law that will be evaluated from this perspective relates to citizenship of the Union, introduced into the EC Treaty (Articles 17-22) by the

[1] A.P. van der Mei, *Free Movement of Persons within the European Community* (Oxford, Hart Publishing 2003), p. 5-6; *see also* M. Coucheir, *The Characteristics of the Welfare State. The Treaty Based Method of Patient Mobility,* available at <http://www.iese.edu/en/files/6_14401.pdf>.

[2] ECJ 17 June 1997, *Sodemare/Regione Lombardia,* Case C-70/95 [1997] ECR I-3395, para. 27; ECJ 7 Feb. 1984, *Duphar*, Case 238/82 [1984] ECR 523, para. 16; ECJ 17 Feb. 1993, *Poucet and Pistre,* Joined Cases C-159/91 and C-160/91 [1993] ECR I-637, para. 6.

[3] M. Coucheir, *supra* n. 1.

Treaty of Maastricht. Every person who holds the nationality of a member state is a citizen of the Union. Although minimised at the outset as merely symbolic provisions, at the end of the 1990's, these Treaty articles revealed themselves as notorious catalysts for the provision of social rights for the citizens of the Union, in particular for the economically non-active migrants.

Given the initial focus of the European Union[4] on the *homo economicus*,[5] the economically active migrating citizens of the Union had already obtained all sorts of, traditionally national, social rights in their host member state. For it is clear that the internal market project, with its goal of efficient allocation of production factors, can only succeed if the 'human production factors' are given adequate possibilities to integrate into the socio-economic network of the host member state. Thus, via an appeal to the principle of equal treatment, the economic migrants could claim those rights that add to the 'functionality' of their right to freedom of movement and residence. Hence this group of citizens of the Union did not experience a significant expansion of social rights following the introduction of the 'fundamental status' of citizen of the Union.[6]

In contrast, for the class of economically non-active migrants, the citizenship provisions proved to be invaluable. At the beginning of the 1990's, their EU-status had been 'upgraded' for the first time when the Residence Directives accorded them the right to freedom of movement and residence.[7] But it was only after the adoption of the citizenship provisions and the ensuing case-law that they could lay claim to equal treatment and thus to certain social rights.

Even though the grant of social benefits to economically non-active citizens of the Union pursues the same goal of giving 'full effectiveness' to their fundamental right to freedom of movement and residence, it appears more controversial. Given that the awarded social benefits will come at the expense of the welfare system of the host member state, this becomes an issue of 'transnational solidarity *pur sang*'. With regard to economic migrants such solidarity was considered as less problematic since they themselves contribute to the welfare system at stake by means of their economic activity and the associated income taxes and social contributions. Conversely, in relation to economically non-active citizens of the Union, this eco-

[4] Cf. the previous *denomination* of the European Community as European *Economic* Community.

[5] Comprised of employees, self-employed persons, service providers and service recipients.

[6] It should be noted that precisely due to the initial focus on economically active migrants, the Court has interpreted this category as widely as possible, as a result of which, among others, jobseekers and tourists enjoy certain of these social rights on the basis of Art. 39 respectively Art. 50 EC.

[7] Council Directive 90/364/EEC of 28 June 1990 on the right of residence, [1990] *OJ* 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, [1990] *OJ* L 180/28; Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, [1993] *OJ* L 317/59.

nomic *quid pro quo* seems to be absent, thus evoking the spectre of social tourism. Hence the inclusion in the above-mentioned Residence Directives of strict conditions concerning the possession of sufficient resources and of comprehensive sickness insurance cover, which the economically non-active migrants have to fulfil before obtaining a right to residence. The preambles of these directives explicitly mention the intent to avoid '[unreasonably burdening] […] the social assistance system'.[8]

B. *The actual 'balancing act'*

The citizenship cases of relevance for our discussion all concern, in essence, *the situation where a national of a member state who resides legally on the territory of another member state claims certain 'national' social rights on equal terms with the nationals of the host member state.* His ability to invoke the right to equal treatment enshrined in Article 12 EC depends upon the characterisation of his situation as falling within the material scope of the Treaty. According to the Court, this will always be the case where a citizen of the Union has exercised his fundamental right to freedom of movement and residence in a member state other than his home country.[9]

1. Legal residence notwithstanding social allowance?

A citizen of the Union can only lay claim to equal treatment in another member state if his residence there is legal. As mentioned above, the applicable Community directives attach explicit conditions concerning the possession of sufficient resources and of comprehensive sickness insurance cover to the grant of a right of residence to economically non-active migrants. Hence, on the face of it, it appeared that an economically non-active citizen of the Union would be precluded from receiving social assistance from the host member state. The Court, however, was of a different opinion.

The inclusion of the citizenship provisions in the Treaty of Maastricht bestowed upon this right of residence a new 'élan', leading the Court to conclude that although Article 18(1) EC still subjects these rights to 'the limitations and condi-

[8] Council Directive 93/96/EEC of 29 Oct. 29, 1993 on the right of residence for students, [1993] *OJ* L 317/59; *see also* Council Directive 90/364/EEC of 28 June 1990 on the right of residence, [1990] *OJ* L 180/26 and 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, [1990] *OJ* L 180/28.

[9] ECJ 15 March 2005, *Bidar*, Case C-209/03, [2005] ECR I-2119, para. 42; *see also,* ECJ 24 Nov. 1998, *Bickel and Franz,* Case C-274/96 [1998] ECR I-7637, paras. 15-16; ECJ 20 Sept. 2001, *Grzelczyk,* Case C-184/99 [2001] ECR I-6193, para. 33; ECJ 2 Oct. 2003, *Garcia Avello,* Case C-148/02 [2003] ECR I-11613, para. 24.

tions laid down by the EC Treaty and by the measures adopted to give it effect',[10] 'those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality'.[11] The Court moreover deduces from the consideration in the preambles of these directives, where it is said that 'persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State', that these directives accept 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States'.[12]

Accordingly, only an *unreasonable burden* will justify the withdrawal of a right of residence; 'in no case may such [measure] become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system'.[13] In the case of a French student who applied for a minimum subsistence allowance for the period of his last year of higher education in Belgium, after he had supported himself during the three previous years by means of several small jobs, the Court found that there ought to exist 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary'.[14]

Nonetheless, the Court does recognise that this solidarity is not unlimited. Hence in *Trojani*, the Court stated that a citizen of the Union without means of subsistence cannot derive 'from Article 18 EC the right to reside in the territory of a Member State of which he is not a national, for want of sufficient resources within the meaning of Directive 90/364'.[15] In such circumstances, the withdrawal of the right of residence would not 'go beyond what is necessary to achieve the objective pursued by that directive'.[16] In this fashion, the Court makes clear that Article 18 EC cannot be a 'letter of safe-conduct' for social tourism.

[10] ECJ 17 Sept. 2002, *Baumbast and R*, Case C-413/99 [2002] ECR I-7091, para. 85.
[11] Ibid., para. 91.
[12] *Grzelczyk, supra* n. 9, para. 44.
[13] Ibid., para. 43.
[14] Ibid., para. 44. Apart from the temporary nature of the support applied for, the Court also seemed to take into account the 'involuntary' character of the situation, i.e., the fact that the student was simply unable to take on an extra job any longer due to the workload of a thesis combined with a traineeship: *see* in that sense para. 45.
[15] ECJ 7 Sept. 2004, *Trojani,* Case C-456/02 [2004] ECR I-7573, para. 36. Yet, as will be discussed below, the Court decided that, although Mr. Trojani could not draw a right of residence from *Community law*, and consequently had no right in principle to equal treatment, he was nonetheless entitled to equal treatment since Belgium had granted him a right of residence on the basis of *national law*.
[16] Ibid., para. 36.

2. Full equal treatment with regard to social rights?

The next question is whether a legally residing citizen of the Union can lay claim to all social rights that a member state grants its own nationals. Is a member state still capable of limiting the social rights it accords to those persons whom it allows to reside on its territory?

From the case-law of the Court it emerges clearly that the use of a pure nationality criterion to limit access to *the membership circle of the welfare state* conflicts with the fundamental character of the right to freedom to move and reside. Nonetheless, the Court recognises that

> although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States […], it is permissible for a Member State to ensure that the grant of assistance […] does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State'.[17]

The task of the member states is to employ the criterion that, on the one hand, sufficiently confines the circle of entitled persons such that the pie does not disappear or the support for those in need is not reduced to a few crumbs, and, on the other hand, does not disproportionally disadvantage the non-nationals.

In *Collins*,[18] the Court concluded that the United Kingdom could exclude an immigrating jobseeker[19] from a jobseeker's allowance, on the basis that he did not have his habitual residence there. Although this criterion, based on the *length* of residence, clearly favours British nationals *vis-à-vis* foreign jobseekers whose *right* of residence can moreover be limited in time by the host member state, the Court concluded that such indirect discrimination can be justified on the basis of a legitimate concern of the member state concerned 'to wish to ensure that there is a genuine link between an applicant for an allowance […] and the geographic employment market in question'.[20] Such a criterion of habitual residence can be apt to guarantee such a link, but it must also be proportional. Therefore, the required duration of residence may not be longer than 'what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State'.[21]

[17] *Bidar*, *supra* n. 9, para. 56.
[18] ECJ 23 March 2004, *Collins,* Case C-138/02 [2004] ECR I-2703.
[19] The legality of his residence was not subject to discussion since the Court had previously decided that jobseekers fall within the scope of Art. 39 EC and derive a right to residence from this article, even though this right can be limited in time.
[20] *Collins*, *supra* n. 18, para. 67.
[21] Ibid., para. 72.

Similarly, in *Bidar*, the Court confirmed that the requirement of a certain length of residence could 'correspond to the legitimate aim of ensuring that an applicant [for a subsidised study loan] has demonstrated a certain degree of integration into the society of that State'.[22] The British regulation, however, made it impossible for the student to satisfy the mandatory 'official length of residence', regardless of the real duration of his stay and the degree of his integration.[23]

An exceptional situation occurred in the above-mentioned case *Trojani* where the Court recognised that, in principle, Community law does not oblige Belgium to award a right of residence to a French national without means of subsistence. However, since Belgium had granted him a right of residence, it could not exclude Mr. Trojani from the right to a minimum subsistence allowance solely on the basis of his nationality.[24] The reasoning of the Court appears to have been that Belgium could not degrade Mr. Trojani to some sort of 'second-class citizen' who was allowed to reside legally but who could not obtain the minimal financial independence needed to participate in society.

The cases discussed above seem to indicate that a society can no longer limit its solidarity to its nationals but should include all persons who demonstrate a sufficient degree of integration in that society. Obviously, nationality can constitute *prima facie* evidence of integration, but it is not necessarily the only relevant and most proportional criterion of distinction. The Court appears to accept the requirement of a certain length of residence as an important justifiable objective criterion.[25] Still, the authorities will always have to take into account the personal circumstances of an applicant that may point to his societal integration.[26] Therefore, the situation of a young student who 'has received a substantial part of his secondary education in the host Member State, and has consequently established a genuine link with the society of the latter State'[27] differs from that of an adult student who merely seeks to obtain his MBA in another member state. Moreover, when applying these criteria, the extent of solidarity demanded should be taken into account. A request for a minimum subsistence allowance can by itself be considered as an unreasonable burden, but when, as in *Grzelczyk*,[28] a student will clearly only require this support for the duration of one year, the pressure on the system is reduced and the balancing act changes.[29]

[22] *Bidar*, *supra* n. 9, para. 61.
[23] Ibid.
[24] *Trojani*, *supra* n. 15, para. 40.
[25] *Collins, supra* n. 18, para. 72; *Bidar*, *supra* n. 9, para. 61.
[26] *See* in this sense *Bidar*, *supra* n. 9, para. 62.
[27] Ibid.
[28] *Grzelczyk, supra* n. 9.
[29] *See also* Catherine Barnard, *The Substantive Law of the EU* (Oxford, Oxford University Press 2004), p. 414-415.

Health care cases

A. *Setting*

Another line of case-law where the Court is confronted with the complex matter of according national social rights on the basis of Community law without thereby destabilizing the entire national system relates to health care costs. These cases concern the *situation where a patient goes to another member state with the explicit goal of receiving medical care*[30] *at the expense of the health care system with which he is insured.*

Initially, Community law seemed to limit the reimbursement of such 'intentional' cross-border treatment to those instances that are provided for in Article 22(1)(c) of Regulation No. 1408/71[31] (Article 20 of the new Regulation No. 883/2004[32]). On the basis of the procedure laid down in this provision, patients are entitled to travel to another member state with the intention of receiving treatment there at the expense of their 'competent Member State',[33] but only after having received authorisation to do so from that competent member state. They will be entitled to treatment in accordance with the provisions of the legislation of the host member state, as though they were insured thereunder. The regulation explicitly *obliges* the competent member state to grant its authorisation when, firstly, the treatment concerned is among the benefits provided for by that member state and, secondly, such treatment cannot be given within a time limit that is medically justifiable, taking into account the patient's current state of health and the probable course of his illness.[34]

Given the limited instances where a member state is under an obligation to grant its permission on the basis of Regulation No. 1408/71, patients attempt to drill another 'Community well' of mobility rights. Thus, they challenge the requirement of preceding authorisation employed by their national health care system, as being contrary to their fundamental right of free movement as a *service*

[30] With the exception of *Decker* (ECJ 28 April 1998, Case C-120/95 [1998] ECR I-1831) where a medical *product* (good), i.e., glasses, was purchased abroad, all these cases concern patients who received medical *services.*

[31] Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, [1971] *OJ* English Spec. Ed. (II) 416, last codified by Council Regulation (EEC) No. 118/97 of 2 Dec. 1996, [1997] *OJ* L 28/1.

[32] Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the co-ordination of social security systems, [2004] *OJ* L 166/1.

[33] The term 'competent Member State' denotes that member state where the institution with which the person concerned is insured or from which he is entitled to receive benefits is situated.

[34] Art. 20(2) of Regulation (EC) No. 883/2004, *supra* n. 32, replacing Art. 22(2) of Regulation (EEC) No. 1408/71, *supra* n. 31, which was last codified by Art. 22(2), of Council Regulation (EEC) No. 118/97, *supra* n. 31.

recipient.[35] Consequently, the Court finds itself confronted with the controversial issue of applying the free movement provisions to a sector that is traditionally characterised by a high degree of government intervention and a minimal free-market functioning.

B. *The actual 'balancing act'*

1. A few remarks with respect to the semi-public status of health care

In all EU member states, the health care sector is traditionally characterised by a *high degree of government intervention*. This can involve the government as a supplier, a financer and/or a regulator.[36] The semi-public status of medical care can be partially explained by the presence of certain market failures[37] that inhibit an efficient outcome of the free-market functioning, but rests nevertheless largely on considerations of social justice. This is because access to health care is thought to be a fundamental right[38] and thus must be based upon need instead of the individual capacity to pay.[39]

The question then is if and how the internal market principles can be introduced in this semi-public sector without jeopardizing the subsistence itself of these systems based on national solidarity. Apart from pursuing justice in each individual case, the Court must thus identify those restrictive national measures that effectively and proportionally serve the legitimate aim of maintaining the national welfare systems.

2. The case-law

If the Court had chosen the path of least resistance, it could have considered public health care cases as falling outside the scope of the free movement provisions. Previous case-law had already identified medical care as a service within the meaning of Article 50 EC,[40] but this did not necessarily 'seal' the fate of such care when provided within the specific framework of a social security system. Nonetheless, the Court decided that this type of care is equally subject to the rules on free movement[41] and constitutes an economic service.[42] Moreover, the Court

[35] ECJ 31 Jan. 1984, *Luisi and Carbone,* Joined Cases 286/82 and 26/83 [1984] ECR 377, para. 16.
[36] M. Coucheir, *supra* n. 1.
[37] Mainly asymmetrical information and external effects.
[38] Art. 35 of the Charter of Fundamental Rights of the European Union of 7 Dec. 2000, [2000], *OJ* C 364/1.
[39] M. Coucheir, *supra* n. 1.
[40] ECJ 4 Oct. 1991, *Grogan,* Case C-159/90 [1991] ECR I-04685, para. 21.
[41] ECJ 28 April 1998, *Kohll,* Case C-158/96 [1998] ECR I-1931, para. 21.
[42] ECJ 12 July 2001, *Smits and Peerbooms,* Case C -157/99 [2001] ECR I-5473, para. 58.

regards the differences between ambulant or hospital care,[43] between a reimbursement or a benefits-in-kind system[44] and between an insurance-based scheme or a national health care service[45] as irrelevant with respect to the issue of the applicability of the free movement provisions. Therefore, medical care in all its manifestations falls within the scope of the Treaty articles.

The next step for the Court was to decide whether or not a requirement of preceding authorisation constitutes a barrier to free movement. As could be expected from the previous case-law, the Court had little trouble finding that such a national measure '[deters] insured persons from approaching providers of medical services established in another Member State and [constitutes], for them and their patients, a barrier to freedom to provide services'.[46]

Although the Court therefore refuses to exclude health care, being a semi-public sector, as such from the free movement dynamics, and characterises the requirement of preceding authorisation as a barrier, it does not ignore the potential strain imposed upon the national health care systems by the creation of a 'socio-medical area without frontiers'. The complex considerations related to the semi-public nature of the health care systems are, however, only taken into account at the stage of the inquiry into potential grounds of justification of the barriers to trade.

We can distill two intrinsically related core arguments that underlie the potential grounds for justification.[47] Firstly, there exists the threat of financial imbalance when the member state loses control over the planning of its receipts and expenditure due to the breaking-up of the territorial closure of the system. For instance, cost-reducing measures on the supply-side can be put under pressure when patients are able to turn to foreign supply. Traditionally, this financial balance is thought of in terms of the balance of a social security system *sensu stricto*. But given that the health care budget in certain member states is financed only, or at least partially, by tax income, it appears useful to interpret it as the so-called 'macro-affordability', which comprises the affordability of the whole welfare system. Secondly, the member states fear that they would no longer be able to guar-

[43] *Smits and Peerbooms*, *supra* n. 42, para. 53; ECJ 12 July 2001, *Vanbraekel and others,* Case C-368/98 [2001] ECR I-5363, para. 41.

[44] *Smits and Peerbooms*, *supra* n. 42, para. 56.

[45] *See* Gareth T. Davies, 'Health and Efficiency: Community Law and National Health Systems in the Light of Müller-Fauré', *Modern Law Review* (2004), p. 94-107, at p. 101, who infers this from the manner in which the Court phrased its reasoning in *Müller-Fauré and van Riet* (ECJ 13 May 2003, Case C-385/99 [2003] ECR I-4509).

[46] *Kohll*, *supra* n. 41 para. 35; *Smits and Peerbooms*, *supra* n. 42, paras. 61-69; *Müller-Fauré and van Riet*, *supra* n. 45, para. 44.

[47] See also in that sense A.P. van der Mei, *supra* n. 1, p. 227-228. A third argument relating to the fear of the member states, that they cannot guarantee the quality of the foreign services, is not particularly relevant for our focus on the 'subsistence of the system'.

antee an 'adequate, balanced and permanent supply' of medical care on their national territory. A decreasing demand, for example, could in the long-term lead to the disappearance of certain essential medical infrastructure from the national territory to the detriment of the 'less mobile patients'. Both arguments are intrinsically related to what could be said to be the crux of public health care, i.e., the *need for planning*. Because this care is largely removed from the free-market mechanism, its optimal provision has to be carefully planned at the central level, taking into account the expected need and the budgetary limitations. The 'traversing' of this complex planning by 'mobile patients' could potentially lead to over- or undercapacity and to the unaffordibility of the existing solidarity-corrections.

In the same way as the Court does not accept the politically sensitive argument based on the substantial differences in internal organisation of the health care systems (reimbursement system versus system based on benefits-in-kind) as a reason for excluding certain systems from the scope of the free movement provisions, it does not in principle consider these differences as pertinent in the search for grounds of justification.[48] The distinction between ambulant and intramural care, however, is deemed to be extremely relevant when inquiring into the grounds of justification.

i. Ambulant care

In the pioneering cases of *Kohll* and *Decker*, the Court accepted *in principle* that a requirement of preceding authorisation can be justified, if it is meant to address 'the risk of seriously undermining the financial balance of the social security system'[49] or if it pursues the protection of public health by, on the one hand, 'maintaining a balanced medical and hospital service open to all',[50] and, on the other hand, ensuring 'the maintenance of a treatment facility or medical service on national territory'.[51] Nevertheless, these grounds of justification, although acknowledged in theory, were never found to be proven where, as in *Kohll*, *ambulant care* was concerned.

Before reaching this conclusion, the Court clarified that, unlike under the '1408/71-regime', the right to repayment based on the Treaty provisions is limited to the tariffs employed in 'the competent Member State'.[52] Moreover, it made explicit in *Smits and Peerbooms* that the member states cannot be obliged to extend the material scope of their sickness cover, and thus, only those benefits that are already

[48] *Müller-Fauré and van Riet*, *supra* n. 45, para. 108.
[49] *Kohll*, *supra* n. 41, para. 41; *Decker*, *supra* n. 30, para. 39.
[50] *Kohll*, *supra* n. 41, para. 50.
[51] Ibid., para. 51.
[52] This could already be implicitly inferred from *Kohll*, *supra* n. 41, para. 27, and was confirmed in *Müller-Fauré and van Riet*, *supra* n. 45, para. 98.

covered under the scheme of the competent member state will be reimbursed.[53]

Even though the Court recognises that the lack of an authorisation requirement 'adversely affects the ways in which health care expenditure may be controlled in the Member State of affiliation',[54] it does not expect any dramatic financial repercussions.[55] Firstly, the tariffs of reimbursement and the types of benefits covered are determined by the regulations of the competent member state, and thus, the financial burden will be equivalent to the one that would flow from a purely internal provision of care.[56] Furthermore, the Court estimates that the flow of patients to be expected will be rather limited due to the linguistic barriers, the geographic distance, the costs of staying abroad, the lack of information about the kind of care provided there, the cultural differences and the lack of a trust-based relationship between the doctor and patient that is characteristic of such care.[57]

Similarly, the related argument of the member states of not being able to guarantee an 'adequate, balanced and permanent supply' of ambulant care in the event of high patient mobility was found to be unproven in both cases.[58]

ii. Intramural care

When confronted with 'mobile *hospital* patients', the Court is more open to the wish of the member states to control the flow of patients by means of a preceding authorisation requirement. The necessity to plan intramural care with regard to 'the number of hospitals, their geographical distribution, the way in which they are organised and the facilities with which they are provided, and even the nature of the medical services which they are able to offer',[59] to guarantee 'that there is sufficient and permanent access to a balanced range of high-quality hospital treatment'[60] on the national territory, and to 'control costs and to prevent, as far as possible, any wastage of financial, technical and human resources'[61] leads the Court to conclude that 'a requirement that the assumption of costs, under a national social security system, of hospital treatment provided in another Member State must be subject to prior authorisation appears to be a measure which is both necessary and reasonable'.[62]

[53] *Smits and Peerbooms*, *supra* n. 42, paras. 86-87.
[54] *Müller-Fauré and van Riet*, *supra* n. 45, para. 94.
[55] Ibid., para. 97.
[56] *Kohll*, *supra* n. 41, *para*. 42; *Müller-Fauré and van Riet*, *supra* n. 45, para. 98.
[57] *Müller-Fauré and van Riet*, *supra* n. 45, paras. 95-97.
[58] *Kohll*, *supra* n. 41, para. 52; *Müller-Fauré and van Riet*, *supra* n. 45, paras. 71 and 97 where this consideration was thought to be so intrinsically linked with the financial stability that it was treated under that category.
[59] *Smits and Peerbooms*, *supra* n. 42, para. 76;.*Müller-Fauré and van Riet*, *supra* n. 45, para. 77.
[60] *Smits and Peerbooms*, *supra* n. 42, para. 78; *Müller-Fauré and van Riet*, *supra* n. 45, para. 79.
[61] *Smits and Peerbooms*, *supra* n. 42, para. 79; *Müller-Fauré and van Riet*, *supra* n. 45, para. 80.
[62] *Smits and Peerbooms*, *supra* n. 42, para. 80; *Müller-Fauré and van Riet*, *supra* n. 45, para. 81.

Although an authorisation regime can be justified *in se*, member states do not have 'carte blanche' when concretising it. To be precise, the conditions employed for awarding permission have to be objective, non-discriminating and proportional.[63] Moreover, certain 'administrative principles of law' have to be taken into account with regard to the authorisation procedure.[64] To date, the Court has had the opportunity to examine two examples of such conditions.

By means of a first condition relating to 'the customary character of the treatment', the Netherlands attempted to maintain control over the material scope of its health care system by determining which benefits will be susceptible to reimbursement. As mentioned above, the Court accepts in principle the prerogative of the member states to determine which benefits they will repay. Nonetheless, in doing so, the member states are obliged to employ conditions that are 'objective and [apply] without distinction to treatment provided in the Netherlands and to treatment provided abroad'.[65] Consequently, the requirement that the 'treatment must be regarded as normal in the professional circles concerned'[66] will only be justified if it is understood to mean that 'where treatment is sufficiently tried and tested by international medical science, the authorisation sought […] cannot be refused on that ground'.[67]

The second condition, i.e., the necessity of a treatment abroad,[68] will be accepted when 'authorisation can be refused on the ground of lack of medical necessity only if the same or equally effective treatment can be obtained without undue delay at an establishment having a contractual arrangement with the insured person's sickness insurance fund'.[69] This is because the Court recognises that a massive outflow of patients who can be treated equally well on the national territory would 'undermine all the planning and rationalisation carried out in this vital sector in an effort to avoid the phenomena of hospital overcapacity, imbalance in the supply of hospital medical care and logistical and financial wastage'.[70] Still, this criterion also has to be interpreted restrictively

[63] *Smits and Peerbooms*, *supra* n. 42, paras. 82, 89-90; *Müller-Fauré and van Riet*, *supra* n. 45, paras. 83-84.

[64] Thus, the discretionary freedom of the national authorities has to be restricted by employing objective, non-discriminatory criteria that are known in advance. Moreover, this scheme must be based on a procedural system that is easily accessible, and there have to be adequate possibilities of appeal. *Smits and Peerbooms*, *supra* n. 42, paras. 90-91; *Müller-Fauré and van Riet*, *supra* n. 45, paras. 84-85.

[65] *Smits and Peerbooms*, *supra* n. 42, para. 97.

[66] Ibid., para. 108.

[67] Ibid.

[68] This is also required before non-contracted institutions within the Netherlands can be consulted.

[69] *Smits and Peerbooms*, *supra* n. 42, para. 108; *Müller-Fauré and van Riet*, *supra* n. 45, para. 91.

[70] *Smits and Peerbooms*, *supra* n. 42, para. 106; *Müller-Fauré and van Riet*, *supra* n. 45, para. 91.

> [requiring] the national authorities […] to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorisation is sought and, where appropriate, of the degree of pain or the nature of the patient's disability which might, for example, make it impossible or extremely difficult for him to carry out a professional activity, but also of his medical history.[71]

Lastly, the presence of waiting lists as part of a complex planning cannot be used as an excuse to avoid an inquiry into the concrete circumstances of the case.[72]

Conclusion

From the case-law, it clearly emerges that the Court does take into account the potentially threatening consequences of its interference with the national welfare systems when obliging them to accord certain social benefits to citizens of the Union. In both lines of case-law, the Court confronts this delicate balancing act at the stage where it considers the presence of potential grounds of justification for a discriminatory measure and/or barrier.

In the citizenship cases, the Court accepts that the objective of the member states to prevent their national welfare systems from being unreasonably burdened can justify a delimitation of the circle of beneficiaries, and thus a difference in treatment. Nevertheless, the member states need to employ a relevant and proportional criterion of distinction. Thus, the Court estimates that the emphasis should be on the degree of integration in the society where the social benefit is sought. This integration can obviously be deduced from the possession of nationality, but equally so from other factors, particularly the length of stay. By all means, the chosen standard of integration has to be objective and proportional. Moreover, the criterion cannot be a monolithical one. Rather, in its application, there has to be room for considering other indications of integration, such as the individual circumstances of the applicant, and for taking into account the degree of solidarity requested. One may conclude that the Court does recognise that the membership circle of a welfare state cannot be extended *ad infinitum*, but that it requires the member states to employ relevant criteria of distinction that are proportionate to the goal pursued.

Also in the health care cases, the Court accepts that the goal of safeguarding the carefully planned national health care systems can constitute a ground of justification for hindering the free movement of services. Although the Court accepts in principle that the member states can have a legitimate interest in controlling

[71] *Müller-Fauré and van Riet*, *supra* n. 45, para. 90.
[72] Ibid., para. 92.

the 'flow of patients', the requirement of a preceding authorisation will only be justified if it is based on real considerations of effectiveness. Hence the Court recognises that guaranteeing intramural care requires such a high degree of planning from the member states that a prerequisite of authorisation to obtain such treatment abroad constitutes a justified and proportional measure. Nonetheless, the member states have to respect the principle of proportionality when deciding on and applying the specific criteria for the grant of this authorisation. In respect of ambulant care, however, the Court has to date never found an authorisation requirement to be justified in a concrete case. Given the more limited need for planning and the improbability of a massive flow of patients, the Court is of the opinion that the member states retain sufficient control since the types of benefits as well as the tariffs of reimbursement are the same as those of the purely internal provision of care.