Do EU Rules on Public Procurement Apply to Tax-funded Welfare Services?

Mathias Sylvan

EU law; Public procurement; Social welfare; Sweden

Introduction

The demarcation between "economic" and "non-economic" services is of importance for the application of EU law. Under the new (2014) directives on public procurement it is clear that this demarcation is relevant also to the applicability of the EU rules on public procurement. Recital 6 of EU Directive 2014/24 concludes with the clarification that "non-economic services of general interest" ("NESGI") should not fall within the scope of the directive.

The conclusions in this article, and a report the author has written on behalf of the City of Malmö, are that essentially tax-funded welfare services belong to this category NESGI and that the procurement of these services consequently falls outside the EU rules on public procurement.

The conclusions are controversial. The article challenges the widespread opinion that all services which can be provided under conditions of competition fall under EU rules on freedom of movement and competition. The practical importance might not be so dramatic though, since the Member States are largely free to choose their own rules for the procurement of welfare services regardless of whether these services are NESGI or "services of general economic interest" ("SGEI").

Background

On 6 October 2014, the Swedish Government signed an agreement with the Left Party on new terms for private for profit actors to provide tax-funded welfare services, "Our joint view of profit in the welfare sector".[1] In Sweden, there are currently no obstacles to for-profit companies providing publicly financed healthcare, social care and education. According to the agreement between the Government and the Left Party, this situation will be reviewed, whereupon "the hunt for profit [author's translation]"[2] will be eliminated as an incentive in the welfare sector.

The background to the agreement is growing criticism of the fact that Swedish welfare provision is increasingly being entrusted to private for-profit companies. In Sweden, education (including university education), healthcare and social care are primarily financed through taxes. According to the Swedish Education Act, compulsory school and upper-secondary school must be free of charge.[3] Childcare is also heavily subsidised. Charges made up only 7 per cent of the cost in 2014.[4]

At the same time, the performance of welfare services has become increasingly privatised, even though the majority are still provided by the public sector, principally municipalities and county councils. Out of the municipalities' and county councils' total costs for welfare services in 2013, approximately 15 per

[1] *http://www.vansterpartiet.se/assets/var-gemensamma-syn-pa-vinst-i-valfarden.pdf* [Accessed 5 September 2016].
[2] *http://www.vansterpartiet.se/assets/var-gemensamma-syn-pa-vinst-i-valfarden.pdf*, "vinstjakten" [Accessed 5 September 2016].
[3] See Ch.10 p.10 and Ch.15 p.17 of the Education Act (Sw: skollagen).
[4] Ulrika Lorentzi and Olof Widmark, "Skilda världar En jämförelse mellan kommunalt driven, ideellt driven och bolagsdriven barnomsorg" ("Different worlds A comparison of municipal driven, volunteer driven and corporate driven childcare") (Kommunal, 2014), p.7.

cent went to private suppliers.[5] These public contracts are awarded, either through public procurement according to the Public Procurement Act (lagen (2007:1091) om offentlig upphandling, LOU) or through the Act on Systems of Choice in the Public Sector (lagen (2008:962) om valfrihetssystem, LOV). LOV means that users are entitled to select from a list normally comprising one municipal provider and several private providers. Such free choice systems are common in Sweden in respect of assistance for the elderly with cleaning, washing, purchasing, personal hygiene, etc. LOV also applies within primary care.[6] According to the Swedish legislature, the allocation of contracts in accordance with LOV must also comply with the fundamental principles of EU law. The content of LOV is therefore very reminiscent of the general Swedish law on public procurement, LOU.

In the field of education, however, Sweden has formulated a free choice system that does not claim to be an implementation of EU law. According to this system, private actors that have been approved by the Swedish Schools Inspectorate may run compulsory schools or and/upper-secondary schools in competition with municipal schools. When it comes to preschools or after-school activities that are not co-ordinated at a school, it is the municipality that grants approval.[7] The Swedish free school system consequently means that private free schools compete with the municipal schools for the pupils and the public financing that comprises a fixed amount of compensation per child/pupil. This is a system of free choice for the pupil, not for the school. Both municipal and private schools must as a rule be open to all pupils entitled to education[8].

The absence of profit restrictions for private companies operating within publicly financed welfare is frequently discussed. In an article in the newspaper *Dagens Nyheter* on 5 March 2015, the Minister for Public Administration, Ardalan Shekarabi, who is also responsible for the legislation on public procurement, stated that Sweden distinguishes itself from many other European countries by the large proportion of welfare that is provided by commercial actors.

Many of the largest actors, such as Attendo (care), Academedia (education) and Aleris (healthcare and social care), are owned by private equity companies that have their registered offices outside Sweden. In the debate, they are criticised for avoiding corporation tax through advanced tax planning.[9] One particular case that attracted a considerable amount of attention is the private equity-owned free school group JB Education, which went bankrupt in June 2013. At the time, the company was running 35 schools right across Sweden with 11,000 pupils. The liquidator's administrative report stated that the Group's former owners had taken 500 million Swedish crowns out of the company before selling it on to another private equity company.[10]

The increasing proportion of provision by private companies in the Swedish welfare sector was one of the central issues in the general election in 2014. In order to obtain the support of the Left Party in Parliament, the new Government, comprising the Social Democratic Party and the Green Party, reached the above agreement in October 2014 regarding restricting profit withdrawals within the welfare sector. From a legal procurement perspective, the following declaration of intent in the agreement is of particular interest:

[5] Henrik Jordahl (ed.), Välfärdstjänster i privat regi: Framväxt och drivkrafter (*Private Management of Welfare Services: Emergence and Incentives*) (SNS-förlag, 2013), p.12.

[6] "Primary care" is defined in s.5 of the Health Care Act (1982: 763) as part of outpatient care without demarcation of the disease, age or patient groups will respond to the population's needs for such basic medical treatment, care, prevention and rehabilitation which are not requires hospitals' medical and technical resources, or other special skills.

[7] See Ch.2, p.7 of the Education Act (Sw: skollagen).

[8] A private school can only refuse if the child has special educational needs that would cause serious economic or organisational difficulties to the school.

[9] *http://www.affarsvarlden.se/hem/nyheter/article3831373.ece* [Accessed 5 September 2016].

[10] *http://www.di.se/artiklar/2014/5/7/ex-agare-lansade-skolbolag/* [Accessed 5 September 2016].

> "Municipalities and county councils must be able to determine whether procurements and the free choice system should be targeted solely at non-commercial actors [author's translation]."[11]

One question therefore is what scope Sweden has, as a Member State of the EU, to achieve this aim, i.e. to limit awards—whether under traditional procurements or under free choice systems for healthcare, social care and education—solely to non-profit suppliers. Article 77 in EU Directive 2014/24[12] admittedly allows the procurement of social services and other particular services to be reserved for non-profit organisations. At the same time, however, art.77 contains restrictions that make the provision unsuitable for municipalities and county councils that seek long-term, contractual relations with non-profit organisations.[13]

The agreement between the government and the Left party relates to the borders between Member State independence and EU superiority, a topic that is also central in a report written by the current author at the request of the City of Malmö during his time as a senior legal adviser at the Swedish Association of Local Authorities and Regions ("SALAR"), "Procurement of tax-finance welfare services — an investigation for the City of Malmö" ("the Malmö Report"). The report looks at the demarcation between SGEI and NESGI in relation to a specific legal area, public procurement. However, the significance of the demarcation between "economic" and "non-economic" services is greater than this. It ultimately relates to the limits of EU dominance over the Member States.

The Malmö Report

The *Malmö Report* was pending for a long time, before SALAR decided to publish it in October 2014. The publication was preceded by a thorough review. In the foreword, the head of the legal department at SALAR writes that the issues the report highlights should be investigated further by the Government.

The conclusions that the report reaches are the reason for the drawn-out decision-making process. According to the *Malmö Report*, the procurement of tax-financed welfare services falls outside of EU law—not only outside of the new directives on public procurement, but also outside the TFEU.[14] Sweden, which has a large proportion of tax-financed welfare, could consequently adopt its own rules for the procurement of tax-financed healthcare, social care and education. For many Swedish lawyers these conclusions are hard to digest. After all, they have learnt that these services are subject to the EU's fundamental principles of open and non-discriminatory exposure to competition of public contracts, and that they must be procured according to the rules in a separate chapter in the Swedish Public Procurement Act, LOU.[15] This chapter, which covers procurements under the thresholds and procurement for Part B-services[16] irrespective of value, contains rules that are meant to be more flexible, but that in reality are almost as strict as the other provisions in LOU.

Starting Points for the Malmö Report

The *Malmö Report* is based on two of the EU's legal acts. The first is the EU Directive 2014/24. Recital 6 begins by pointing out that the Directive "should not affect the social security legislation of the Member States". The second paragraph states that "Member States are free to organise the provision of compulsory

[11] "Kommuner och landsting ska kunna avgöra om upphandlingar och valfrihetssystem ska riktas till enbart icke-kommersiella aktörer" ("Local governments should be able to determine whether the procurement and systems of choice must be directed exclusively to non- commercial operators"), *http://www.vansterpartiet.se/assets/var-gemensamma-syn-pa-vinst-i-valfarden.pdf* [Accessed 5 September 2016].

[12] EU Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

[13] The maximum duration of the contract shall not be longer than three years and the organisation shall not have been awarded a contract for the services concerned by the contracting authority concerned pursuant to art.77 within the last three years.

[14] Treaty on the Functioning of the European Union.

[15] Chapter 15 of the Swedish Public Procurement Act.

[16] See below for an explanation of the concept of "Part B services".

social services and other services" as either "services of general economic interest" or as "non-economic services of general interest or as a mixture thereof". Recital 6 concludes with the following clarification:

> "It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive."

Inhouse provision is exempted from the rules on public procurement, including the quasi inhouse procurement developed in the *Teckal* jurisprudence of the ECJ.[17] It is accepted that a contracting authority retains the prerogative to decide whether it will perform a service itself or if it wishes to externalise the provision of the service. On the other hand, if it chooses the second alternative, it is also an accepted opinion that the contracting authority is bound by the obligation according to EU law to do this through an open and non-discriminating procurement procedure.[18]Recital 6, however, indicates that this is not the case if the service is a NESGI.

Bearing in mind the frustration that many feel regarding the bureaucratic process to which the rules on public procurement give rise, such a clarification ought to awaken curiosity and the significance of the provisions ought to be investigated further, especially since it has been the widespread opinion among academics that NESGI, although not covered by EU rules on competition, are still covered by the EU rules on public procurement.[19] One explanation for why such an investigation is superfluous might be that NESGI are covered anyway by the general principles of free movement in the Treaty, which is why Sweden, just like other Member States, is bound to have rules for the procurement of these services as well.

This explanation may apply to Part B services, which were included as a category in EU Directive 2004/18/EC. Part B services differed from Part A services as they were only covered by arts 23 and 35.4 in EU Directive 2004/18/EC (obligations on technical specifications and award notices), and by the general principles pursuant to TFEU, arts 49 and 56 where the procurement had a definite cross-border interest.[20] However, the division between SGEI and NESGI is of a more fundamental nature. Part B services, for example, hotels and restaurants, laundries, security and legal services, are considered to be less suited to cross-border trade than Part A services, which is why the procurement of Part B services was not as strictly regulated.[21] However, Part B services were nevertheless "services" within the meaning of TFEU.

NESGI, on the other hand, with a few exceptions, falls outside of EU law.[22] From the case law of the European Court of Justice ("ECJ") it can be seen that the EU's rules regarding free movement, competition or state aid are generally not applicable to NESGI. A reasonable interpretation of the second legal act that is the starting point of the *Malmö Report*, art.2 in the EU's Protocol on services of general interest ("the Protocol"), is that this also applies to the obligation to conduct an open and non-discriminatory award procedure according to TFEU, arts 49 and 56. Article 2 of the Protocol states the following:

> "The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest."

[17] *Teckal* (C-107/98) [1999] E.C.R. I-8121, EU Directive 2014/24, art.12. For a detailed exposition of the *Teckal* jurisprudence of the ECJ, see "Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')", SEC(2011) 1169 final.

[18] See, for example, Elisabetta Manunza and Wouter Jan Berends, Social Services of General Interest and the EU Public Procurement Rules, in Ulla Neergaard et al (eds), *Social Services of General Interest in the EU* (The Hague: TMC Asser Press, 2013), pp.347–384.

[19] See, for example, Vassilis Hatzopoulos, "The concept of 'economic activity' in the EU Treaty: from ideological dead-ends to workable judicial concepts", Research Paper in Law, 06/2011 College of Europe, p.20 and Wolf Sauter, "Services of general economic interest and universal service in EU law" (2008) 33 *European Law Review* 183 (April.

[20] *Azienda sanitaria locale n. 5 «Spezzino» v San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus* (C-113/13) ECLI:EU:C:2014:2440, at [45] and [46].

[21] *Contse Sa, Vivisorl Srl, & Oxigen Salud Sa v Instituto Nacional de Gestión Sanitaria (Ingesa)* (C-234/03) [2005] E.C.R. I-9315, at [68].

[22] One exemption is vocational training, see *Gravier v City of Liege* (293/83) [1985] E.C.R. 593; [1985] 3 C.L.M.R. 1.

Article 2 of the Protocol is clearly and unambiguously formulated. The provisions in the Treaty do not "affect in any way" the Member States' freedom to "provide, commission and organise non-economic services of general interest". According to Damjanovic and De Witte, this is "a more radical statement seeking to shield non-economic services from the impact of EU law altogether".[23] Even though Damjanovic and De Witte are unsure as to the extent of the interpretations that can be made of art.2 of the Protocol,[24] it is hardly a far-fetched conclusion that the procurement of NESGI not only falls outside EU Directive 2014/24 but also outside the TFEU.

There may now be grounds to investigate in greater detail what the concept of NESGI covers. It might be argued that this enquiry is not worthwhile as it is only in very rare cases that something that is an NESGI is put out for procurement. [25]However, it is submitted that NESGI is neither particularly rare nor something that in Sweden, in any case, is reserved for public sector actors.

The demarcation between SGEI and NESGI has been dealt with sparingly in the legal literature. In the standard work *Exclusive Rights and State Monopolies under EC Law* ("Exclusive Rights"), Buendia Sierra notes the lack of interest among academics in the definition of "economic activity" and that this lack of interest is largely dependent on the concept's elusiveness.[26] This appears still to be the case, even though the lack of certainty regarding the meaning of "economic activity" and the demarcation between NESGI and SGEI has created some headaches for academics dealing with the wider subject of "public services" and the status of these services within EU law.[27] However, a detailed examination has been attempted of the concept of NESGI in a 2015 dissertation by Wehlander.[28]

In the case law of the ECJ, however, since Buenida Sierra published *Exclusive Rights*, there have been several judgments that are of relevance for the understanding of the EU concept "economic activity" as well as the demarcation between NESGI and SGEI. The ruling of the EFTA Court in *Private Barnehager* can also be mentioned in this context.[29]

Services Normally Provided for Remuneration

In order to answer the question of what makes a service "non-economic", it is appropriate to start at the other end, i.e. to answer what it is that makes a service or an activity[30] "economic" within the meaning of TFEU. Anyone who tackles this task should bear in mind that EU law concepts such as "service" and "economic activity" have a meaning that is not always identical to the meaning that the same concepts have in Member States' legal systems,[31] or for that matter in everyday language.

The definition of "service" within the meaning of TFEU, can be found in TFEU, art.57. The first paragraph of art.57 has the following wording:

> "Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons."

[23] Dragana Damjanovic and Bruno De Witte, *Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty*, EUI Working Papers LAW 2008/34, p. 28.

[24] Damjanovic and De Witte, *Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty*, p.29.

[25] See Ulla Neergaard, The Concept of SSGI and the Asymmetries between Free Movement and Competition Law, in Neergaard et al, *Social Services of General Interest in the EU* (2013), pp.209–212.

[26] José Luis Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law* (Oxford: Oxford University Press, 1999, reprinted 2004), at [1.152].

[27] Wolf Sauter, *Public Services in EU Law* (Cambridge: Cambridge University Press, 2015), p.160.

[28] Caroline Wehlander, *Who is Afraid of SGEI?* (Umeå: Umeå universitet, 2015).

[29] *Private Barnehagers Landsforbund v EFTA Surveillance authority* (E-5/07), 21 February 2008.

[30] The ECJ uses both the term "service" and the term "economic activity" in judgments that deal with the rules of the Treaty on freedom of movement, see, for example, *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* (C-157/99) [2001] E.C.R. I-5473, at [58].

[31] *CILFIT v Ministry of Health* (283/81) [1982] E.C.R. 3415; [1983] 1 C.M.L.R. 472, at [19].

A precondition for something being a "service" in this sense is consequently that it "*is* normally provided for remuneration". The concept of "remuneration" is not defined in the Treaty, but in the case law of the ECJ. In *Humbel* the ECJ states that:

> "[t]he essential characteristic of remuneration ... lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service."[32]

The Advocate General in *Humbel* defines "remuneration" as follows:

> "'Remuneration' within Article 60 [TFEU, art.57] will almost invariably be a payment made by or on behalf of the recipient which is related to the economic cost of providing the services or is other-wise fixed by commercial criteria (as where a service is provided free or cheaply in hopes of attracting more work or in response to competitive pressures)."[33]

The concept of "remuneration" consequently refers to a payment that, as a starting point, is made by the recipient and the size of which is determined by market terms.[34] However, the modern market economy is multi-faceted. There are complex services that can be the subject of cross-border trade that are not paid for directly by the recipient. In a case relating to cross-border cable transmissions of commercial television, *Bond van Adverteeders*,[35] the ECJ therefore extended the meaning of "normally provided for remuneration" to also cover "remuneration" that is paid by another person than the one for whom the service is performed. Four parties were involved in *Bond van Adverteeders*: cable network operators, broadcasters, network subscribers and advertisers. The fact that the cable network operators were paid by the subscribers for the service they provided the broadcasters for relaying their programmes did not change the fact that this service was provided for "remuneration". In *Skandia*, the insurance policy holder's employer paid in the premiums for an occupational pension insurance, money that in reality was withheld salary.[36] According to the ECJ, the premiums were also "remuneration" within the meaning of TFEU, art.57. With reference to Bond van Adverteerders the ECJ justified this by stating that EC, art.50 (TFEU, art.57) "does not require that the service be paid for those for whom it is performed".[37] In *Smits and Peerbooms* the ECJ reasoned in a similar manner regarding a compulsory sickness insurance scheme financed partly by contributions paid by insured persons, partly by contributions paid by the employers and partly by an annual payment made by the State.[38] In the related joined cases *Deiliège*, the Advocate General observed that the ECJ sometimes shows "a degree of flexibility" regarding "the link that must exist between the provider of the service and the recipient".[39]

Humbel

How far does this abovementioned degree of flexibility go? Is tax funding also to be viewed as "remuneration" within the meaning of the Treaty in the same way as in *Bond van Adverteeders*? It could be asserted that the recipients of welfare services are indirectly paying for these services in their capacity as taxpayers. However, one reason why this argument falls down is that tax-financed general welfare is

[32] *Belgian State v René Humbel and Marie-Thérèse Edel* (263/86) [1988] E.C.R. 0-5365; [1989] 1 C.M.L.R. 393, at [17].

[33] *Belgian State v René Humbel and Marie-Thérèse Edel* (263/86) ECLI:EU:C:1988:151, Opinion.

[34] In *Freskot and Elliniko Dimosio* (C-355/00)[2003] E.C.R. I-5263; [2003] 2 C.M.L.R. 30, the contributions by Greek farmers to an agricultural insurance was not "remuneration" since it was "essentially in the nature of a charge imposed by the legislature and is levied by the tax authority", at [57].

[35] *Bond van Adverteeders versus Netherlands* (352/85) [1988] E.C.R. 2085; [1989] 3 C.L.M.R. 113.

[36] *Skandia and Ramstedt* (C-422/01) [2003] E.C.R. I-6817; [2004] 1 C.L.M.R. 4, at [31].

[37] *Skandia and Ramstedt* (C-422/01) [2003] E.C.R. I-6817; [2004] 1 C.L.M.R. 4, at [24].

[38] *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* (C-157/99) [2001] E.C.R. I-5473, at [56]–[57]; Opinion at [40] and *Skandia and Ramstedt*, (C-422/01) [2003] E.C.R. I-6817; [2004] 1 C.L.M.R. 4, at [24].

[39] *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée* (C-51/96 and C-191/97) [2000] E.C.R. I-02549; [2002] 2 C.L.M.R. 65, Opinion, at [31].

based on the solidarity financing principle that everyone is entitled to welfare, regardless of whether they pay tax or not. Children, the elderly, the unemployed and the ill are also entitled to tax-funded general welfare. The needs are decisive, not the ability to pay.

The central ruling here is the abovementioned case of *Humbel* where the ECJ answers the question whether publicly financed general secondary education is a "service". The ECJ's answer is clear. Publicly financed education is not a "service" and consequently not covered by the rules of the Treaty on freedom of movement (parenthetically it can be stated that TFEU, art.18 does not apply here since it applies independently only to situations in regard to which the Treaty lays down no specific rules prohibiting discrimination[40]). According to the ECJ, in *Humbel* " ... *only* services 'normally provided for remuneration' are to be considered to be 'services, within the meaning of the Treaty"[41] (emphasis added). The ECJ states that there is admittedly no definition of "remuneration" in the Treaty, but concludes that "it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service".[42]

For publicly financed education, however, there is no such "essential characteristic of remuneration".[43] There are two reasons for this:

> "First of all the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule funded from the public purse and not by pupils or their parents".[44]

Publicly financed education is consequently not carried out against "remuneration", partly due to its social, cultural and educational objectives, and partly due to its public financing. This is not affected by the fact that pupils or their parents sometimes have to contribute with teaching or enrolment fees.[45]

Watts

What is the extent of the conclusions that can be drawn from *Humbel*? Are the reasons in *Humbel* for why publicly financed education is not a "service" also valid for other publicly financed welfare services?

The ECJ has examined several cases relating to cross-border healthcare where the question has arisen of whether the healthcare in the patient's home country is an "economic activity".[46] The way in which healthcare is organised and financed in the patient's home country was irrelevant, however, as the patient had received the treatment in another Member State and had been forced to pay for it there. The healthcare that had been received in the other Member State was therefore a service provided for "remuneration".[47] The fact that the patients, on their return, applied for compensation for the costs they had incurred in the other Member State did not change this.[48]

Of these cases *Watts*[49] is of particular interest. In *Watts* the national court considered that it was of relevance for the assessment of Yvonne Watts' claim for compensation for the costs she had incurred for an operation in France whether the healthcare in her state of residence, the UK, was a "service" within the meaning of the Treaty.[50] The reason why the national court raised this question was the fact that the

[40] *Skandia and Ramstedt* [2003] E.C.R. I-6817; [2004] 1 C.L.M.R. 4, at [61].
[41] *Humbel* 1988] E.C.R. 0-5365; [1989] 1 C.M.L.R. 393, at [15].
[42] *Humbel* 1988] E.C.R. 0-5365; [1989] 1 C.M.L.R. 393, at [17]
[43] *Humbel* 1988] E.C.R. 0-5365; [1989] 1 C.M.L.R. 393.
[44] *Humbel* 1988] E.C.R. 0-5365; [1989] 1 C.M.L.R. 393, at [18].
[45] *Humbel* 1988] E.C.R. 0-5365; [1989] 1 C.M.L.R. 393, at [19].
[46] For example, *Smits and Peerbooms* [2001] E.C.R. I-5473, at [48].
[47] *Raymond Kohll v Union des caisses de maladie* (C-158/96) [1998] E.C.R. I-1931, at [29]; *Watts* (C-372/04) [2006] E.C.R. I-4325, at [88].
[48] *Smits and Peerbooms* [2001] E.C.R. I-5473, at [55].
[49] *Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* (C-372/04) [2006] E.C.R. I-4325.
[50] *Watts* (C-372/04) [2006] E.C.R. I-4325, at [42].

National Health Service ("NHS") in the UK was financed directly by the State, essentially from general taxation, with the consequence that hospital care was provided "free of charge" to all persons ordinarily resident in the UK without any demand for co-payments from the patient.[51]

However, the ECJ observed that Yvonne Watts received her treatment in France, where she had to pay an amount of £3,900[52] out of her own pocket (the amoun "was paid by her directly").[53] The treatment that Yvonne Watts received in France was thereby a "service provided for remuneration" and consequently came under the rules of the Treaty on freedom of movement. There was therefore no reason for the ECJ to examine "whether the provision of the hospital treatment in the context of national health service such as the NHS is in itself a service within the meaning of those provisions [EC, art.49 (TFEU, art.56)]".[54] Unlike in *Smits and Peerbooms*[55] which concerned a compulsory insurance system for persons with low income and persons in receipt of social benefits managed by sickness funds with a separate legal personality and financed partly by contributions paid by insured persons and employers and partly by the State,[56] and where the ECJ concluded that the system in the Netherlands implied that the hospitals were "engaged in an activity of economic character"[57] (although this remark was equally unnecessary for the assessment of the case since the treatment was not provided in the Netherlands but in Germany and Austria for remuneration), the ECJ in *Watts* refrained from giving a view on whether health service in the UK was a "service" within the meaning of TFEU.

Services provided free of charge

Even though, in *Watts*, the ECJ refrained from answering the question whether tax-financed healthcare in the UK was a "service" within the meaning of the Treaty, it can still be seen from *Watts* what is the opposite of "services normally provided for remuneration". At several points in *Watts*, the ECJ describes the tax-financed healthcare supplied by the NHS as healthcare that is provided "free of charge".[58]

FENIN

In *Watts* the fact that the healthcare in the UK was provided "free of charge" was not important for the assessment of the case. In *FENIN*,[59] however, the way in which the healthcare services were financed was decisive for the outcome. *FENIN* related to the matter of whether Spanish hospitals' late payments to suppliers for medical goods and equipment was an abuse of a dominant position within the meaning of EC, art.82 (TFEU, art.102). Federacíon Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental ("FENIN"), which is an amalgamation of companies that sell healthcare products to the Spanish national health and sickness care bodies ("SNS bodies"), asserted that these bodies' late payments were an abuse of a dominant position within the meaning of EC, art.82 (TFEU, art.102). However, the General Court stated that the SNS bodies were not conducting an "economic activity" as their activity:

> "operates according to the principle of solidarity in that is funded from social security contributions and other State funding and provides services *free of charge* [emphasis added] to its members on the basis of universal cover".[60]

[51] *Watts* (C-372/04) [2006] E.C.R. I-4325, at [7]–[10].
[52] *Watts* (C-372/04) [2006] E.C.R. I-4325, at [31].
[53] *Watts* (C-372/04) [2006] E.C.R. I-4325, at [88].
[54] *Watts* (C-372/04) [2006] E.C.R. I-4325, at [91]. See also Tamara K. Hervey, "If only it were so simple: Public health services and EU law", in M. Cremona (ed.), *Market Integration and Public Services in the European Union* (Oxford: OUP, 2011), p.223.
[55] *Smits and Peerbooms* [2001] E.C.R. I-5473, at [57], [58].
[56] *Smits and Peerbooms* [2001] E.C.R. I-5473, at [56], [57].
[57] *Smits and Peerbooms* [2001] E.C.R. I-5473, at [58].
[58] *Watts* (C-372/04) [2006] E.C.R. I-4325, at [52], at [96], at [123] etc.
[59] *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* (C-205/03 P) [2006] E.C.R. I-6295; [2006] 5 C.M.L.R. 559.
[60] *FENIN* (C-205/03 P) [2006] E.C.R. I-6295; [2006] 5 C.M.L.R. 559, at [39].

The solidarity financing of healthcare in Spain was consequently decisive for the conclusion that the healthcare provided by the SNS bodies was not covered by the rules of the Treaty on competition.

FENIN argued that the hospitals' purchase of healthcare products under all circumstances must be viewed as an "economic activity". Even though the healthcare that the SNS bodies provided to the patients was characterised by a principle of solidarity, this could not affect the hospital's relations with their suppliers, according to *FENIN*.[61] According to the General Court, however, it would be "incorrect ... to dissociate the activity of purchasing goods from the subsequent use to which they are put".[62] As the primary activity was not "economic", nor were the purchases an "economic activity".

The ECJ confirmed the assessment of the General Court. In its judgment, the ECJ repeats the observation that the SNS bodies were not conducting an "economic activity" as:

> "... the SNS operates according to the principle of solidarity in that it is funded from social security contributions and other State funding and provides services free of charge to its members on the basis of universal cover..."[63]

The Spanish SNS bodies were not carrying out an "economic activity" since they provided health services "free of charge". If the activity of the SNS bodies was not "economic" neither was their purchasing of healthcare products an "economic activity". The ECJ consequently agreed with the General Court

> "that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity."[64]

The conclusions of this article may be hard to digest for many academics. However, the same goes for the outcome in *FENIN*.[65] The gist of *FENIN* is that neither the publicly financed healthcare nor the hospitals' purchasing of healthcare products was an "economic activity". This was hardly an obvious conclusion for FENIN's members.

The documentation does not suggest anything other than that the suppliers of the healthcare products were commercial companies that had entered into customary commercial contracts with the SNS bodies. For them, the notion that their relationship with the Spanish hospitals would not be an "economic" relation was naturally a strange thought. However, the outcome in *FENIN* is a consequence of the meaning given to concepts such as "service" and "economic activity" in EU law.

In *Humbel*, the ECJ defines "remuneration" as something which is "consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service".[66] It can be seen from *Watts* and *FENIN* that when this "essential characteristic" is absent due to the fact that the welfare service is financed through taxes or other public funds, then the service is "free of charge" within the meaning of TFEU, and consequently the activity that comprised the provision of health services "free of charge" is not an "economic activity". The service is certainly not "free of charge" in the sense that it does not consume resources. Neither is it free of charge for the State to hire private actors to perform tax-funded welfare services as in the Swedish free school system. However, the starting point in TFEU, art.57 is "remuneration" paid by the recipient. Welfare services such as healthcare and education are "free of charge" for the recipient if the recipient does not have to pay for the service other than possibly a limited charge. From the recipient's perspective, it is of no further significance whether the tax-financed welfare

[61] *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* (T-319/99) [2003] E.C.R. II-357; [2003] 5 C.M.L.R. 34, at [29].

[62] *FENIN* (T-319/99) [2003] E.C.R. II-357; [2003] 5 C.M.L.R. 34, at [36].

[63] *FENIN* (C-205/03 P) [2006] E.C.R. I-6295; [2006] 5 C.M.L.R. 559, at [8].

[64] *FENIN* (C-205/03 P) [2006] E.C.R. I-6295; [2006] 5 C.M.L.R. 559, at [26].

[65] See, for example: Heike Schweitzer, "Services of general economic interest: European law's impact on the role of markets and of Members States", in Cremona, *Market Integration and Public Services in the European Union* (2011), p.24; Albert Sánchez Graells, *Distortions of Competition by the Public (Power) Buyer: A Perceived Gap in EC Competition Law and Proposals to Bridge it*, Working Paper CCLP (L) 23, The University of Oxford Centre for Competition Law and Policy.

[66] *Humbel* [1988] E.C.R. 0-5365; [1989] 1 C.M.L.R. 393, at [16] and [17].

service is performed by a public actor or by a private actor that is carrying out the service on the behalf of the State, as long as this does not affect the cost for the recipient.

The Financing Doctrine Versus the Market Doctrine

The conclusion drawn in this article and in the *Malmö Report* is that the way in which welfare services are financed is decisive for whether they are SGEI or NESGI. According to TFEU, art.57, a service, in order to be covered by the Treaty, must be a service that "is normally provided for remuneration". A publicly financed welfare service is not provided for remuneration, but is provided "free of charge". We can refer to this interpretation as the *financing doctrine*.

However, there is a competing more widespread doctrine according to which a welfare service is a "service" within the meaning of TFEU if it is carried out or potentially can be carried out by private, for-profit companies. We can refer to this competing doctrine as the *market doctrine*. This interpretation of EU law that a "service" is any service that is actually or potentially provided in competition is hard to derive from the definition of "service" in the TFEU. The main support for the market doctrine is rather a ruling of the ECJ in the case *Höfner*.[67]

Höfner

Höfner related to the issue of whether the recruitment of managers to private companies was an "economic activity". According to the ECJ this was the case. The fact that "employment procurement activities are normally entrusted to public agencies" was unimportant in this respect. The decisive factor was that the activities could also be carried out by private actors. The ECJ concluded that an employment service "has not always been, and is not necessarily, carried out by public entities" a finding that "applies in particular to executive recruitment".[68]

The definition of "economic activity" in *Höfner* differs fundamentally from the definition of "service" in *Humbel*. The consequence for the applicability of EU law is also significantly more far-reaching. In principle, all public activities can be carried out by private companies, as long as there is a solid buyer who is willing to pay. With this definition, it is difficult to imagine many areas where the Member States retain their independence from the EU.

The objection can be made that *Höfner* is of no relevance to the field of public procurement, as *Höfner* relates to EU rules on competition, while public procurement is part of the rules freedom of movement.[69] However, the case law of the ECJ does not support the existence of two fundamentally different definitions of what are "services" or "economic activities" depending on whether the rules in the Treaty on freedom of movement or competition are being discussed. Rulings like *Freskot*, *Kattner Stahlbau*, *Private Barnehager* and *Commission v Finland* (below) all indicate that the existence of "remuneration" within the meaning this concept is given in EU law is essential for the applicability of EU market rules in general.

Even if the EU directives on public procurement are primarily a part of the freedom of movement, the rules of the Treaty on competition can also be of relevance. This was the case for example in *Sodemare*[70] and *Spezzino*.[71]

[67] *Klaus Höfner and Fritz Elser v Macrotron GmbH* (C-41/90) [1991] E.C.R. I-1979; [1993] 4 C.M.L.R. 306.
[68] *Höfner* (C-41/90) [1991] E.C.R. I-1979; [1993] 4 C.M.L.R. 306, at [22].
[69] EU Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65, recital 1.
[70] *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* (C-70/95) [1997] E.C.R. I-3395; [1997] 3 C.M.L.R. 591.
[71] *Spezzino* (C-113/13) ECLI:EU:C:2014:2440.

The objection can also be made that *Höfner* did not relate to a welfare service. One reason for the outcome of *Höfner* could very well be the lack of a social objective, something which was apparently significant in the judgment.[72] Executive recruitment hardly has a social purpose.

Anyway, in its subsequent case law the ECJ has chosen not to apply the definition of "economic activity" in *Höfner* although it would have been most relevant.

Poucet and Pistre

Only about a year after *Höfner*, the ECJ issued a ruling in the joined cases *Poucet and Pistre*. Christian Poucet and Daniel Pistre refused to affiliate to a compulsory health and pension insurance scheme, as they preferred to "be free to approach any private insurance company".[73] In other words, in *Poucet and Pistre*, just like in *Höfner*, the activity was "not necessarily, carried out by public entities".[74] Nevertheless, that did not make the activity of the body managing the scheme an "economic activity". The ECJ justified this conclusion with the same distribution policy argument that underpins the tax-financed general welfare. The reason for the compulsory health and pension insurance scheme not being an "economic activity" was that the activities pursue "a social objective and embody the principle of solidarity",[75] a principle that "entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover".[76] As Buenida Sierra notes, *Poucet and Pistre* are hard to combine with *Höfner*.[77] The same goes for a number of subsequent judgments.

Cisal

In *Cisal*[78] an Italian company did not want to pay charges for a compulsory insurance for workers against accidents at work and occupational diseases, as the company already had an equivalent policy with a private insurance company.[79] In other words, the activity could be carried out by private actors. According to the ECJ, however, the compulsory insurance was not an "economic service for the purposes of competition law".[80] The ECJ concluded that social aim of the scheme was not enough to preclude the activity from being classified as an economic activity. In this case, however, the scheme also met the other criteria of a non-economic activity, i.e. the scheme had to apply the principle of solidarity and be subject to the supervision of the State.[81] The ECJ based this conclusion on several circumstances, such as the absence of a link between the contributions and the risk insured and the absence of a link between the benefits and the insured person's earnings, something that according to the ECJ entails a "solidarity between better paid workers and those who, given their low earnings, would be deprived of social cover if such a link existed".[82] Like in *Poucet and Pistre*, the ECJ reached this conclusion after a thorough review of the activity performed by the public-service providing body, INAIL. In other cases, however, such as

[72] *Höfner* (C-41/90) [1991] E.C.R. I-1979; [1993] 4 C.M.L.R. 306, at [22]: "The fact that employment procurement activities are normally entrusted to public agencies cannot effect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding in particular to executive recruitment [emphasis added]."

[73] *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* (C-159/91) and *Daniel Pistre v Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse des Artisans (Cancava)* (C-160/91) [1993] E.C.R. I-637, at [3].

[74] *Höfner* (C-41/90) [1991] E.C.R. I-1979; [1993] 4 C.M.L.R. 306.

[75] *Poucet* [1993] E.C.R. I-637, at [8].

[76] *Poucet* [1993] E.C.R. I-637, at [10].

[77] Sierra, *Exclusive Rights and State Monopolies under EC Law* (1999), pp.1.161–1.165.

[78] *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* (C-218/00) [2002] E.C.R. I-691; [2002] 4 C.M.L.R 24.

[79] *Cisal* (C-218/00) [2002] E.C.R. I-691; [2002] 4 C.M.L.R 24, at [25]. According to the ECJ the insurance services provided by the public service providing body INAIL were "fully comparable to those provided by private insurance companies".

[80] *Cisal* (C-218/00) [2002] E.C.R. I-691; [2002] 4 C.M.L.R 24, at [45].

[81] *Cisal* (C-218/00) [2002] E.C.R. I-691; [2002] 4 C.M.L.R 24, at [38]–[43]

[82] *Cisal* (C-218/00) [2002] E.C.R. I-691; [2002] 4 C.M.L.R 24, at [38]–[42].

Albany[83] and *Pavlov*,[84] the ECJ did not consider the element of solidarity-based financing to be strong enough for the activity to be classified as "non-economic".

Ambulanz Glöckner

The ECJ has referred to *Höfner* several times in later case law. However, the ECJ has only repeated the "the comparative criterion",[85] i.e. the definition of "economic activity" in *Höfner* in one subsequent ruling, *Ambulanz Glöckner*.[86] Yet, in *Ambulanz Glöckner*[87] the ECJ does not adopt a stance on the choice between *Humbel* and *Höfner*. According to the ECJ in *Ambulanz Glöckner*, the emergency transport services and the patient transport services in issue were conducted in part "for remuneration from users" (*Humbel*), and they had "not always been, and are not necessarily, carried on by such organizations [medical aid organisations] or by public authorities" (*Höfner*).[88]

AOK Bundesverband

In *Exclusive Rights*, Buenida Sierra believes the definition of "economic activity" in *Poucet and Pistre* to be unacceptable to the idea of a common market since "solidarity financing" entails that an activity is assessed differently depending on how the Member State has decided to finance it (discussed further below).[89] Contrary to Buenida Sierra's predictions, however, it is this definition that has prevailed in the subsequent case law of the ECJ. *FENIN*, *Cisal* and *Kattner Stahlbau*[90] are examples of this. Another example is seen in the joined cases *AOK Bundesverband*. In *AOK Bundesverband*, the Advocate General adopted the definition in *Höfner*. According to the Advocate General, "the basic test appears ... to be whether [an activity] could, at least in principle, be carried on by a private undertaking in order to make profits".[91] However, the ECJ implicitly dismissed the assessment of the Advocate General. Rather than referring to *Höfner*, the ECJ concluded with reference to *Poucet* and *Cisal* that the German health insurance offices did not conduct any economic activity as "they fulfil an exclusively social function, which is founded on the principle of national solidarity and is entirely non-profit-making".[92] The fact that the sickness funds engaged in some competition with one another in order to attract members did "not call this analysis into question".[93]

AG2R

In *AG2R*[94] one of the questions to be answered by ECJ was whether the management of a compulsory scheme for supplementary reimbursement of healthcare costs provided for in a collective agreement was considered to be an "economic activity" and consequently AG2R, a provident non-profit society governed by the French law to manage this scheme, an undertaking. Beaudout Père et Fils SARL ("Beaudout"), which refused to join the scheme since Beaudout was already affiliated to an insurance company other than AG2R, challenged the compliance of the French regulation with TFEU, arts 101 and 102. According to Beaudout there were other provident societies and insurance companies which offered services that

[83] *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96) [1999] E.C.R. I-5751; [2001] 4 C.M.L.R. 446.
[84] *Pavlov* (C-180/98 to C-184/98) [2000] E.C.R. I-6451; [2001] 4 C.M.L.R. 30.
[85] *AOK Bundesverband* (C-264/01, C-306/01, C-354/01 and C-355/01) [2004] E.C.R. I-2493; [2006] 4 C.M.L.R. 22, Opinion, at [11].
[86] Wehlander, *Who is afraid of SGEI?* (2015), p. 118.
[87] *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* (C-475/99) [2001] E.C.R. I-8089; [2002] 4 C.M.L.R 21.
[88] *Firma Ambulanz Glöckner* (C-475/99) [2001] E.C.R. I-8089; [2002] 4 C.M.L.R 21, at [20].
[89] Sierra, *Exclusive Rights and State Monopolies under EC Law* (1999), para.1.196: "Contrary to what is stated in judgement in *Poucet*, 'solidarity' in the means of financing has absolutely nothing to do with whether the activity is economic or not."
[90] *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft* (C-350/07) [2009] E.C.R. I-1513.
[91] *AOK Bundesverband* [2004] E.C.R. I-2493; [2006] 4 C.M.L.R. 22, Opinion, at [27].
[92] *AOK Bundesverband* [2004] E.C.R. I-2493; [2006] 4 C.M.L.R. 22, at [51].
[93] *AOK Bundesverband* [2004] E.C.R. I-2493; [2006] 4 C.M.L.R. 22, at [56].
[94] *AG2R Prévoyance* (C-437/09) [2011] E.C.R. 1-973; [2011] 4 C.M.L.R. 19.

were substantially identical to those provided by AG2R.[95] The ECJ did not question this. The ECJ did not, however, apply the comparative criterion of *Höfner*. Instead the ECJ examined the activity of AG2R according to the criteria of solidarity financing, developed in *Cisal* among other judgments, i.e. considered whether the scheme pursued a social objective,[96] whether it applied the principle of solidarity[97] and whether the scheme was subject to the supervision of the State.[98] According to the ECJ the two first criteria were satified. There was, however, some uncertainty concerning the third criterion. Since there was no obligation on the social partners to appoint AG2R to manage the scheme or on AG2R to assume the management, it was unclear whether the scheme was subject to supervision of the State.[99] The ECJ observed that there were other provident societies and insurance companies for the social partners of the collective agreement to choose between and that the AG2R enjoyed a margin of negotiation. The ECJ, however, left it for the national court to examine whether the requirement of State control was fulfilled.[100]

Femarbel and the Services Directive

The purpose of the Services Directive[101] is to facilitate the freedom of movement of service providers and the free movement of services mainly through simplification of formalities and administrative procedures. The Directive is probably the most controversial legal act enacted by the EU.[102] The fear of rampant free market capitalism and social dumping that would come in its wake has given cause to a number of extensive exemptions. Thus several categories of services are excluded from the scope of the Directive such as financial services, transportation, gambling services, electronic services and networks.

The exemptions in the social field are probably the most far-reaching. Recital 17 includes the remark that "[s]ervices of general interest are not covered by the definition in Article 50 of the Treaty [TFEU, art.57] and therefore do not fall within the scope of this Directive". This somewhat striking statement is immediately modified by the clarification that "[s]ervices of general economic interest ... do fall within the scope of this Directive". On the other hand, the Services Directive is clear that NESGI are not covered. According to art.2(2)(a) of the Directive, it "shall not apply to ... non-economic services of general interest".

If NESGI were only services which could not, not even in theory, be provided in competition, the clarification in art.2(2)(a) could be perceived as insignificant. Yet, the Services Directive, in defining the concept "service" does not adhere to the comparative criterion of *Höfner*. The definition given in recital 34, is in fact a very reminiscent of the definition in *Humbel*. Thus the essential characteristic of a "service" is that it is provided for "remuneration", a characteristic that is absent in publicly funded activities that have a social, cultural and educational objective. Furthermore, this is not altered by the fact that the recipient pays a fee "in order to make a certain contribution to the operating expenses of a system", for example, a tuition fee or enrolment fee since "the service is still essentially financed by public funds".

Although SGEI are covered there are important exemptions. Article 2.2(f) stipulates that health services "regardless of the ways in which they are organised and financed at national level or whether they are public or private" fall outside the concept. According to art.2.2(j) the same goes for several social services "which are provided by the State, by providers mandated by the State or by charities recognised as such by the State".

[95] *AG2R* (C-437/09) [2011] E.C.R. 1-973; [2011] 4 C.M.L.R. 19, at [63].
[96] *AG2R* (C-437/09) [2011] E.C.R. 1-973; [2011] 4 C.M.L.R. 19, [at] 44.
[97] *AG2R* (C-437/09) [2011] E.C.R. 1-973; [2011] 4 C.M.L.R. 19, [at] 46.
[98] *AG2R* (C-437/09) [2011] E.C.R. 1-973; [2011] 4 C.M.L.R. 19.
[99] *AG2R* (C-437/09) [2011] E.C.R. 1-973; [2011] 4 C.M.L.R. 19, at [62].
[100] *AG2R* (C-437/09) [2011] E.C.R. 1-973; [2011] 4 C.M.L.R. 19, at [65].
[101] EU Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.
[102] Sauter, *Public Services in EU Law* (2015), p.158.

In *Femarbel*[103] the question put to the ECJ was whether the services performed in Belgian day-care centres and night-care centres for elderly persons were excluded from the scope of the Directive under either of these two exemptions.

The Advocate General did not, however, restrict himself to art.2.2(f) and art.2.2(j), but also raised the issue whether the activities in question could be covered by art.2(2)(a), i.e. the article which excludes NESGI from the ambit of the Services Directive.[104] This was a relevant issue since the exemption in art.2(2)(j) only "concerns social services of an economic nature".[105] The Advocate General concluded, however, that there could "be no doubt" that these activities were economic activities "in that their function is to offer services in a market governed by the principle of free competition".[106] Since there is no support, at least no explicit support, in the Directive for this conclusion the Advocate General had to refer to case law, notably *Höfner*.[107]

Femarbel could have been the perfect moment for the ECJ to elaborate on the meaning of EU law concepts such "service", "economic activity" and "non-economic services of general interest". The ECJ, however, as it did in *Watts*, refrained from dwelling upon anything not immediately relevant to the question asked by the national court. Instead of discussing the definition of "service" or the scope of art.2(2)(a) it merely concluded that the Directive applied to "any self-employed economic activity, normally provided for remuneration",[108] and narrowed its answer to the two exemptions raised by the national court.

A Scheme Controlled by the State or Managed by the State

Cases like *AG2R*, *Poucet* and *Cisal* are examples of the social insurance "Bismarckian" model,[109] whereby welfare services are paid for by a compulsory insurance managed by a body that, although being subject to State control, is a legal person governed by private law and thus separate from the State. A scheme based on this model can still be precluded from being classified as an "economic activity" but only after a thorough examination against criteria such as the application of the principle of solidarity and State control. In contrast, with the other "Beveridgean" model of welfare system, which is based on tax funding and where the scheme is normally managed by the State, the fulfilment of these criteria is more or less taken for granted. In *Private Barnehager* (below) the EFTA Court concluded without further examination that "the municipalities have a statutory duty to ensure that sufficient places for children below compulsory school age exist".[110]

Is *Humbel* Outdated?

One variant of the market doctrine is that a welfare service can become a "service" within the meaning of the TFEU if it is carried out by a sufficient number of private companies. In Sweden, the proportion of private providers of healthcare, social care and education stands at approximately 15 per cent.[111] According to Wehlander, the Swedish free school system, whereby private schools for profit may conduct tax-financed school education, implies that *Humbel* is outdated.[112] However, this is an assumption that is not confirmed by the ECJ's case law. On the contrary, in its more recent case law, the ECJ refers on

[103] *Femarbel v Commission communautaire commune de Bruxelles-Capitale* (C-57/12) [2013] E.C.R. 00000.
[104] *Femarbel* (C-57/12) [2013] E.C.R. 00000, Opinion, at [38].
[105] *Femarbel* (C-57/12) [2013] E.C.R. 00000.
[106] *Femarbel* (C-57/12) [2013] E.C.R. 00000, at [39].
[107] *Femarbel* (C-57/12) [2013] E.C.R. 00000, fn.7.
[108] *Femarbel* (C-57/12) [2013] E.C.R. 00000, at [32].
[109] Hervey, "If only it were so simple: Public health services and EU law" (2011), p.183.
[110] *Private Barnehagers* (E-5/07), 21 February 2008, at [82].
[111] Jordahl, *Välfärdstjänster i privat regi: Framväxt och drivkrafter* (2013).
[112] Wehlander, *Who is Afraid of SGEI?* (2015), p.70: "However, education is now also subject to liberal trends, as clear in Sweden where for private entities may to provide primary and secondary education in the tax-funded national system. Under such circumstances, the Humbel doctrine may be very difficult to uphold."

numerous occasions to both the definition of "remuneration" in *Humbel*,[113] and to the principle of "solidarity financing" in *Poucet and Pistre*.[114] The assertion that the existence of private actors, actual or potential, should affect the "non-economic" character of a tax-funded welfare service is contradicted by ECJ case law like *Cisal*, *AOK Bundesverband*, *AG2R* and *Commission v Finland* (below). It is also contradicted by the EFTA Court's ruling in *Private Barnehager*.

Private Barnehager

The conflict between *Humbel* and *Höfner* was brought to a head in the EFTA Court's ruling in *Private Barnehager*.[115] This case related to the matter of whether State subsidies for municipal preschools constituted unlawful State aid. A pre-condition was that the municipal pre-schools were conducting an "economic activity". In Norway, approximately 46 per cent of all pre-schools are run by private actors. Both private and municipal preschools receive 80 per cent of their funding through grants from the Norwegian State, with the remaining 20 per cent made up of parental contributions. The applicant, Private Barnehagers Landsforbund ("PBL"), cited *Höfner* in support of the assertion that childcare in Norway was an "economic activity" and the municipal pre-schools were consequently "undertakings" as the childcare was largely carried out by private for-profit companies. However, the EFTA Court dismissed this argument since this would make all public activities "economic" within the exemption of the exercise of public authority.[116]

Contrary to PBL, the EFTA Court embraced the definition in *Humbel*.[117] The EFTA Court noted that childcare in Norway received 80 per cent of its funding

> "by the public purse ... that there is no connection between the actual costs of the service provided and the fee paid by the parents whose child is attending the kindergarten ..." [and] " ... that kindergartens in Norway have important social, cultural, educational and pedagogical purposes."[118]

On this basis, the municipal kindergartens were not "undertakings" according to the EFTA Court. Although the municipal kindergartens offered their services to children and parents in Norway, their activity did not classify as "economic", in the sense that the municipal kindergartens offered goods or services on the market.[119] The reason for this was the lack of the essential characteristic "remuneration" within the meaning this concept is given in EU law. In *Private Barnehager*, the EFTA Court opted for *Humbel* rather than *Höfner*. The ruling is one more example that a service or an activity must include this characteristic in order to be subject to EU market rules, in this case the EU rules on State aid.

The Freedom of Member States to Organise the Provision of Social Services

It is fair to say that Buenida Sierra's criticism of "solidarity financing" is an expression of an exaggerated perception of the EU's power over the Member States. According to Buenida Sierra, "solidarity financing" is incompatible with the principles of a common market, as "solidarity financing" entails that "the same activity may be subject to Community law in some countries but not in others, depending on the way it

[113] For example *Smits and Peerbooms* (C-157/99) [2001] E.C.R. I-5473, at [58], *Freskot* (C-355/00) [2003] E.C.R. I-5263; [2003] 2 C.M.L.R. 30, at [55], *Skandia and Ramstedt* (C-422/01) [2003] E.C.R. I-6817; [2004] 1 C.L.M.R. 4, at [23], *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* (C-76/05) [2007] E.C.R. I-6849; [2007] 3 C.M.L.R 47, at [28] and [29] and *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg* (C-281/06) [2007] E.C.R. I-12231, at [29], [30].

[114] For example *C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) [2002] E.C.R. I-1577; [2002] 4 C.M.L.R 27, at [57], [58], *Cisal* (C-218/00) [2002] E.C.R. I-691; [2002] 4 C.M.L.R 24, at [26], *AOK Bundesverband* (C-264/01, C-306/01, C-354/01 and C-355/01) [2004] E.C.R. I-2493; [2006] 4 C.M.L.R. 22, at [47], at [51] and [55] and *Kattner Stahlbau* (C-350/07) [2009] E.C.R. I-1513, at [48].

[115] *Private Barnehagers* (E-5/07), 21 February 2008.

[116] *Private Barnehagers* (E-5/07), at [80].

[117] *Private Barnehagers* (E-5/07), 21 February 2008: "In this respect, the reasoning of the ECJ in *Humbel*, which concerned the notion of 'service' within the meaning of the fundamental freedoms, can be transposed to a State aid case such as the one at hand."

[118] *Private Barnehagers* (E-5/07), 21 February 2008, at [82].

[119] *Commission v Italy* (118/85) [1987] E.C.R. 2599; [1988] 3 C.M.L.R 255, at [7].

is organized ... [something that] is clearly incompatible with a legal system which aims to govern competition in a common market".[120]

However, legal developments have shown that the EU gives the Member States more independence than Sierra assumes in *Exclusive Rights*. Contrary to Sierra's assumption, the EU gives the Member States the freedom to determine for themselves how they want to organise the provision of welfare services, even if this results in the same service becoming SGEI in one Member State but NESGI in another. This is indicated in recital 6 of EU Directive 2014/24:

> "It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof."

In Annex XIV to EU Directive 2014/24, the EU specifies which services belong to the category "social services and other special services" with an associated CPV code.[121] The list comprises an extensive register of various welfare services, including services such as 85100000-0 Health services, 85111000-0 Hospital services, 85312100-0 Daycare services, 85311100-3 Welfare services for the elderly, 85310000-5 Social services, 8531200-4 Rehabilitation services, 85312310-5 Counselling services, 80000000-4 Education and training services, 80300000-7 Higher education services and 80430000-7 Adult education services at university level, to name just a few examples. All of these services consequently belong to the category of "social and other special services", where the Member States "are free to organise the provision ... either as services of general economic interest or as non-economic services of general interest or as a mixture thereof".

NESGI or SGEI?

The conclusion of the *Malmö Report* is that the procurement of tax-funded welfare services falls outside EU rules on public procurement since tax-funded welfare services are NESGI. On the other hand, SGEI are covered.

Unlike NESGI, SGEI are provided for "remuneration". An important factor that makes this difference between essentially *tax-funded* NESGI, and *tax-subsidised* SGEI is the degree of tax funding. Another is the circumstances according to which the size of the payment of the recipient is determined. In *Humbel* the fact that the pupils or their parents had to make a certain contribution did not affect the nature of the educational services. In *Private Barnehager* 80 percent public financing was enough to make childcare a NESGI since there was "no connection between the actual costs of the service provided and the fee paid by the parents".[122]. In *Freskot* the ECJ considered the payment of contribution by the Greek farmers not to constitute consideration for the benefits provided by an agricultural insurance scheme since the charge was "determined by the legislature"[123] and "in such a way as to apply equally to all operators".[124] In other words, there was no direct link between the payment and the value of the service. When there is no such link the payment is rather a fee than a consideration for the service concerned.

Commission v Finland

The requirement for the need of a link between the value of the service and the remuneration paid by the recipient has been further delevloped by the ECJ in *Commission v Finland*.[125]

[120] Sierra, *Exclusive Rights and State Monopolies under EC Law* (1999), para 1.195.
[121] Common Procurement Vocabulary.
[122] *Private Barnehagers* (E-5/07), 21 February 2008.
[123] *Freskot* [2003] E.C.R. I-5263; [2003] 2 C.M.L.R. 30, at [57].
[124] *Freskot* [2003] E.C.R. I-5263; [2003] 2 C.M.L.R. 30, at [58].
[125] *Commission v Finland* (C-246/08) [2009] E.C.R. 1-10605.

In Finland, legal assistance, financed out of public funds, was granted to people with a low income. The aid was provided free of charge to those with a monthly disposable income under a certain level. A person whose income was above that threshold had to pay a contribution that increased with the income until a level where no legal aid was granted. The legal assistance was provided by legal advisers employed by public legal aid offices, but also by private advisors, an advocate or another private lawyer. According to Finnish law there was no VAT on the legal services provided by the public offices while the services provided by a private advisor were subject to VAT. The Commission did not challenge the fact that VAT was not levied on the services provided by the public offices, which were free of charge. However, the fact that VAT was not levied on those services provided by public offices for which the recipient had to pay a contribution entailed, according to the Commission, a distortion of competition, since VAT was levied on the legal services provided by private advisors.

The Sixth Council Directive 77/388/EEC on VAT,[126] defined the services subject to VAT in a way very similar to the approach to services in TFEU, art.57. According to art.2.1 "services effected for consideration" were subject to VAT. The concept "economic activity" was also included in the Sixth Directive. Article 4.1 defined "taxable person" as "any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or result of that activity". According to art.4.5, States, regional and local authorities and other bodies goverened by public law were considered "non-taxable persons" provided they did not engage in activities "where treatment as non-taxable persons would lead to significant distortions of competition".

Although the term "economic activity" featured in the Sixth Directive neither the ECJ nor the Advocate General in *Commission v Finland* applied the comparative crtiterion in *Höfner*.[127] The relevant question was not whether legal aid could be carried out by private actors, which was clearly the case, but whether the services were "effected for consideration". According to the ECJ the Sixth Directive could only apply if there was "a direct link between the services provided and the consideration received".[128]

The ECJ did not define exactly when this link arose. It concluded, however, that the link did not exist here since the payment of the recipient was partly calculated on the basis of "the recipient's income and assets" rather than "the number of hours worked by the public offices or the complexity of the case concerned".[129] Moreover, the payments of the recipients in 2007 amounted to only €1.9 million, whist the operating costs of the public offices were €24.5 million. The payment of the recipient was consequently to be regarded "as a fee" rather than "a consideration in the strict sense".[130] Thus the public offices did "not engage in an economic activity" and consequently there was no need for the ECJ to examine whether the Finnish system implied a distortion of competition.

It follows from *Commission v Finland* that only payment from the recipient is "consideration" within the meaning of the Sixth Directive. The public funding is not. Moreover, the payment must reflect the value of the service provided. Finally, like in *FENIN* the ECJ establishes the link between "services" and "economic activity" so that at body that is not providing services for remuneration is not engaged in an "economic activity".[131]

[126] The Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment [1977] OJ L/145.

[127] See *AOK Bundesverband* (C-264/01, C-306/01, C-354/01 and C-355/01) [2004] E.C.R. I-2493; [2006] 4 C.M.L.R. 22.

[128] *Commission v Finland* [2009] E.C.R. 1-10605, at [45].

[129] *Commission v Finland* [2009] E.C.R. 1-10605, at [48].

[130] *Commission v Finland* [2009] E.C.R. 1-10605, at [50].

[131] *Commission v Finland* [2009] E.C.R. 1-10605: " ... the part payments made in 2007 by recipients of legal aid services provided by the public offices (which relate to only one third of all the services provided by public offices) amounted to EUR 1.9 million, whilst the gross operating costs of those offices were EUR 24.5 million. Even if those data also include legal aid services provided other than in court proceedings, such a difference suggests that the part payment borne by recipients must be regarded more as a fee, receipt of which does not, per se, mean that a given activity is economic in nature, than as consideration in the strict sense."

Should *Commission v Finland* be dismissed since the case was about VAT and not about public procurement or freedom of movement? Not if we accept the notion that the definition of concepts like "service" and "economic activity" are basically the same in EU law[132].

In *Commission v Finland*, like *Poucet and Pistre* , *FENIN*, *Private Barnehager* and other cases discussed above, the public actor did not engage in an "economic activity" and consequently there was no reason to examine whether there was a distortion of competition. On the other hand, in cases like *Altmark*,[133] where there was an element of public subsidy but apparently not substantial enough to make the activity "non-economic", the ECJ had to examine the case further.

The Light Regime

In many Member States welfare services are financed and organised in such a way that they are considered to be "services" within the meaning of TFEU.[134] These welfare services are covered by a few provisions in a certain chapter in EU Directive 2014/24/EU, "Social and other specific services", if the value of the contract is €750,000 or more. EU Directive 2014/24 describes these rules as "the light regime".[135] The specific significance of "the light regime" can be seen from arts 74–77 of EU Directive 2014/24. Member States are obliged to have rules for the publication of procurements and of the results of the procurement procedure by means of a contract award notice. Other than this, EU Directive 2014/24 contains no specific procedural rules for the procurement of "social and other specific services".[136]

"The light regime" is a consequence of the particular position that the EU assigns to SGEI. In art.1 of the Protocol, the EU confirms "the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest". In several rulings, the ECJ has maintained that EU law "does not detract from the power of the Member States to organise their public health and social security systems".[137] Thus it follows already from case law that the Member States enjoy a greater freedom also to decide the rules according to which social services and health services should be procured regardless of how these services are financed (although "the light regime" in EU Directive 2014/24 includes also other SGEI such as educational services).[138] This is the case, for example, in *Sodemare* and *Spezzino* where the ECJ concluded that the power of the Member States to organise their public health and social security systems included the right to limit the admission of private operators to the system to those that are non-profit-making.[139]

The differences between what will apply to the procurement of SGEI and NESGI are consequently not so dramatic. In one respect at least, however, "the light regime" is not sufficient to facilitate the goals in the agreement between the Swedish Government and the Left Party. For the same reason, the demarcation between SGEI and NESGI is not only of academic interest. A central element in this agreement is that contracting authorities must be able reserve the contracts for organisations that reinvest profits in the operation. This is admittedly permitted according to art.77 of EU Directive 2014/24. At the same time, however, art.77 contains restrictions that make this provision impracticable for municipalities that seek

[132] See, for example, Julio Baquero Cruz, The Case Law of the European Court of Justice on the Mobility of Parients: An Assessment, in van de Gronden et al (eds), *Health Care and EU Law* (The Hague: TMC Asser Press, 2011), p.94.

[133] *Altmark* (280/00) E.C.R. I-7747 [2003] 3 C.M.L.R. 12.

[134] For example, the emergency transport services and the patient transport services in *Ambulanz Glöckner* [2001] E.C.R. I-8089; [2002] 4 C.M.L.R 21.

[135] EU Directive 2014/24, recital 28.

[136] For "the light regime", see S. Smith, "Articles 74 to 77 of the 2014 Public Procurement Directive: The new "light regime" for social, health and other services and a new category of reserved contracts for certain social, health and cultural services contracts" [2014] 4 P.P.L.R.

[137] *Spezzino* (C-113/13) ECLI:EU:C:2014:2440, at [55] and *Sodemare* [1997] E.C.R. I-3395; [1997] 3 C.M.L.R. 591, at [27].

[138] The scope of "the light regime" follows from Annex XIV. Also hotel and restaurant services and legal services are covered by "the light regime". The scope of the provision "Reserved contracts for certain services" follows from art.77(1).

[139] *Spezzino* (C-113/13) ECLI:EU:C:2014:2440, at [58] and *Sodemare* [1997] E.C.R. I-3395; [1997] 3 C.M.L.R. 591, at [32], see also *Consorzio Artigiano Servizio Taxi e Autonoleggio (CASTA) v Azienda Sanitaria Locale di Ciriè Chivasso e Ivrea (ASL TO4)* , Regione Piemonte (Case C-50/114) ECLI:EU:C:2016:56.

long-term relationships with local non-profit organisations, such as co-operatives and non-profit women's refuges. According to art.77, the agreements may not be longer than three years, and a non-profit organisation that has entered into such an agreement may not participate the next time the municipality conducts a procurement process according to this provision for a period of three years from the termination of the agreement. This follows from the fourth cumulative condition according to which an organisation may not have "been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years".[140] This condition does not, of course, prevent an organisation which has been awarded a contract in a reserved contract process from taking part in a unreserved competition at the expiry of the first contract. This is, however, not an option for local authorities in Sweden which on political grounds do not wish to accept for-profit providers in the welfare sector.

However, if tax-financed welfare services fall outside EU Directive 2014/24, these restrictions do not apply. For the procurement of tax-financed welfare services, the Member State could consequently adopt their rules that permit contracts to be reserved for non-profit organisations, with no particular time limits.

The conclusions of the *Malmö Report* have been perceived as far-reaching or even dangerous. Lawyers see a risk of circumvention—an apprehension that is also clear in Buenida Sierra's *Exclusive Rights*.[141] This is an important reason why the *Malmö Report* has been met with suspicion.

However, the way the Member States organise the provision of welfare services is often based on substantive considerations rather than a desire to circumvent EU law. In recital 114 of EU Directive 2014/24, the EU states that the way of supplying these services "varies widely amongst Member States, due to different cultural traditions". The Member States' independence to determine their own social security systems, including how social services are to be procured, is also extensive, regardless of whether the services are SGEI or NESGI, as can be seen in particular from art.1 of the Protocol, "the light regime" and case law such as *Sodemare* and *Spezzino*. Finally, artificial arrangements are not accepted that are intended to "to circumvent the rules of public procurement".[142]

Conclusion

There is a major issue over the extent to which NESGI on the whole are affected by the rules of the Treaty. Not least the provisions in the Services Directive discussed above suggest that the demarcation between SGEI and NESGI is relevant to EU law in general. On the other hand, the ECJ's judgement in *Gravier*, which related to publicly financed vocational training, shows that even services that are "free of charge" are covered by some provisions of the TFEU.[143]

This article, however, deals with a more limited question, more specifically to what extent tax-funded welfare services are affected by the EU rules on public procurement. A central conclusion of this article is that tax-funded welfare services are not "services" within the meaning of TFEU since tax-funded welfare services are not provided for remuneration. The article consequently challenges the opinion that the existence of competition, actual or potential, is essential for the definition of a "service".[144]

Rulings like Private Barnhager and *Commission v Finland* confirm that a service provided by a public actor can be a NESGI although there are competing private providers. Now when the new public procurement directives clarify that NESGI do not fall within the Directive, the logical question must be whether a service provided by a private party can also be a NESGI, especially when the provision occurs

[140] EU Directive 2014/24, art.77(2)(d).

[141] Sierra, *Exclusive Rights and State Monopolies under EC Law*, para.1.194: "If this mere fact [solidarity financing] were sufficient to exclude [activities] from the scope of competition rules the whole system would be distorted. In fact, it would encourage the adoption of 'solidarity financing' in other sectors for purely protectionist ends, which would have enormous risks of distortion from the point of view of economic efficiency."

[142] *Commission of the European Communities v Federal Republic of Germany* (Case C-480/06) [2009] E.C.R. I-4747; [2010] 1 C.M.L.R 32, at [48].

[143] In *Gravier* [1985] E.C.R. 593; [1985] 3 C.L.M.R. 1. Unlike *Humbel* (263/86) [1988] E.C.R. 0-5365; [1989] 1 C.M.L.R. 393, *Gravier* concerned vocational training which is not covered by TFEU, arts 56 and 57 but covered by TFEU, art.18, see also Suater, *Public Services in EU Law* (2015), pp.94, 95.

[144] Sauter, *Public Services in EU Law* (2015), p.18.

within a tax-funded scheme managed by the State. In Sweden the State manages such a system in the field of education. In this system private schools compete with public schools for pupils and the public funding that follows each pupil. There are private for-profit providers in the system but the Swedish State does not engage in gainful activity in establishing and maintaining the system.

Does the Swedish model of choice in the field of tax-funded education, or for that matter in the field of tax-funded social care and healthcare, make the services provided within these systems "services" within the meaning of TFEU, art.57? According to many academics the answer should be affirmative.[145] The logical consequence of such an answer is that the competence of Member States to provide, commission and organise NESGI *in some ways* is affected by the provisions of the Treaties. Yet, art.2 of the Protocol is clear that the opposite shall apply, the provisions of the Treaties shall not in " in any way" affect this authority of the Member States.

The ECJ often remarks that, although "Community law does not detract from the power of the Member States to organise their social security systems", the Member States must nevertheless, in exercising that power "comply with Community law, in particular the provisions of the Treaty on the freedoms of movement, including freedom of establishment".[146] In *Kattner Stahlbau*, for instance, the ECJ clarifies that the freedom of the Member State to determine "the requirement to be insured with a social security scheme and, consequently, the method of financing that scheme" does not imply the freedom not to comply with EU law "when exercising those powers".[147]

It is therefore worth emphasising that art.2 of the Protocol *is* EU law. It might be within the competence of the EU to change this state of affairs in the future, although current political developments make this highly unlikely, at least in the near future. However, as it stands today the EU has itself by this statement set a clear limit to its power over the Member States.

Thus, the notion that NESGI are not at all affected by EU rules on public procurement is not implausible bearing in mind the clear information that is provided in the two legal acts that are the starting points of the *Malmö Report*.

It is a greater challenge to determine what is included within the EU law concept of NESGI. In this respect, additional clarifying case law is naturally welcome. During the years that have elapsed since Buenida Sierra published *Exclusive Rights*, however, case law has arisen that has brought further clarity to the concepts of "service" and "economic activity". The sprawling nature that characterises the case law of the ECJ during the 1980s and 1990s (*Humbel*, *Höfner*, *Poucet*, *Eurocontrol*[148] and *Cali*[149]), has been replaced during the 2000s by a more consistent approach, whereby the financing of welfare services has acquired decisive importance for this demarcation.

[145] For example, Caroline Wehlander and Tom Madell, "SSGIs in Sweden: with a special emphasis on education", in Neergaard et al, *Social Services of General Interest in the EU* (2013), pp.461–496, but also Hervey, "If only it were so simple: Public health services and EU law" (2011), p.194; Sauter, *Public Services in EU Law* (2015), p.121.

[146] See, for example *Hartlauer* (C-169/07) [2009] E.C.R. I-1721, [at] 29.

[147] *Kattner Stahlbau* (C-350/07) [2009] E.C.R. I-1513, at [74].

[148] *SAT Fluggesellschaft mbH v Eurocontrol* (C-364/92) [1994] E.C.R. I-43; [1994] 5 C.M.L.R. 28.

[149] *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* (Case C-343/95) [1997] E.C.R. I-1547; 5 C.M.L.R. 484.