Representation, social security and changes in EU jurisprudence - Final Draft

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Solidarity versus competition : the European Court of Justice's two-fold approach to social protection

European countries have a long tradition of social policy. Various programmes have been developed in relation with initials ideas known under the names of Bismarckian, Beveridge or Scandinavian models. They were characterized by developing different types of solidarity, respectively corporatist social insurance, universal flat rate benefits and means-tested social assistance.

With the growing primacy of European laws over member state domestic laws, particularities of national provisions seem difficult to integrate into the European Union (EU) decision making process. Political orientations adopted by the EU directly influence national design, regulation and implementation of social policy. In the process of creating a new supra-national source of law, the European Court of Justice (ECJ) exercises jurisprudence on social policy and social protection, an area where the roles of different stakeholders are changing.

"Freedom of competition" and "freedom to establish and provide services" in the Common Market are among the basic principles of European economic integration. Because of the diversity of social protection provisions, the ECJ can consider some aspects of social protection to be subject to these basic EU principles mentioned above. Therefore the ECJ has to exercise jurisprudence to guarantee equal treatment, fair competition (Article 85 of the Treaty of Rome) and the avoidance of abuse of dominant position. Any abuse by one or more companies of a dominant position, which may affect trade within the European Union should be prohibited as defined by Article 86 of this Treaty[1].

Social protection is increasingly the object of a two-fold approach at the EU level. This involves a polarization between the state, providing legally compulsory basic social

[1] Article 86, Treaty of Rome, European Community, 25 March 1957: *"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:*
a. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
b. limiting productions, markets or technical development to the prejudice of consumers;
c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

security, and competition between private companies, based on market rules providing additional layers of social protection. EU policy and jurisprudence seem to be developing along the lines of that binary split. To some extent, the subsidiarity principle applies here with, on the one hand, social policy and social security under national or sub-national legislation and, on the other hand, voluntary private programmes following market rules monitored by the European Union "competitive policy".

Basic social security programmes have so far been protected from competition by the ECJ, which has ruled that the social solidarity intrinsic to these programmes is not compatible with competition. This solidarity is expressed by pooling, that is sharing equally the uncertainty of one or several social security risks among a group of people. The realization and the cost of designated contingency risks to one person are borne by all the members of the pool and not by that person individually. As risk pooling implies financial redistribution[2] (from the rich to the poor, from the population less submitted to a risk to the population submitted more to the risk, from the productive to the unproductive stages of the life cycle, and so on), membership must be compulsory for all groups subject to any risk to guarantee the viability of such programmes[3] (see table below).

As a consequence, schemes involving voluntary membership cannot be considered as being based on social solidarity. They have to be part of a competitive market and legislation should guarantee "freedom of competition". As an example, the ECJ decided in 1995 to stop the French monopoly on tax deductibility for a voluntary additional pension scheme for farmers (see table below) called COREVA[4]. In the late 1980's in France, the Mutualité Sociale Agricole (MSA) body, providing basic social security in the agriculture sector, obtained by law a monopoly for providing an additional old age pension scheme to farmers (COREVA), based on voluntary membership. On the basis of freedom of competition, the Fédération Française des Sociétés d'assurances (FFSA), French Federation of Insurance Companies, claimed to the ECJ that there was a distortion of competition due to the monopolistic situation. European jurisprudence made the French authorities change the national law and eliminated the MSA monopoly on the voluntary additional pension scheme. With the implementation of the new national law[5], any provider of a voluntary additional pension scheme for farmers could benefit from tax deductibility and all these pension scheme providers would be competing on the basis of free market principles.

Solidarity could therefore be considered as the cornerstone determining whether or not a scheme providing social protection should compete with other schemes or maintain a monopoly as recognition of its contribution to the common good.

[2] "Risk pooling in health care", Peter C. Smith and Sophie N. Witter, Centre for Health Economics, University of York, November 2001.
[3] Poucet and Pistre decision of 17-02-1993 and Garcia decision of 26-03-1996, The Court of Justice of the European Communities.
[4] Coreva decision of 16-10-1995, The Court of Justice of the European Communities.
[5] French law of 18-11-1997, article 5.

EU jurisprudence restricting the field of social security

With this clear distinction between a public sphere - a monopoly of compulsory basic social security programmes based on solidarity - and a private sphere - competition for additional schemes that are not based on generalized solidarity, many other schemes seem hard to classify. In other words, the dichotomy lacks significant jigsaw pieces of social protection, such as private non-profit organizations providing social benefits. They offer various forms of workers' representation and can be managed either by employee-employer representatives, or like mutual societies who directly elect their administrators. These schemes can be defined as independent (private) bodies from public authority often occupational based on collective agreements and non-profit institutions; their activities are aimed at contributing to the common good. Below we refer to them as occupational non-profit schemes[6].

The table below gathers together some ECJ case laws, which distinguish between type of programmes[7] and their main consequences for these programmes.

[6] Such non-profit schemes are mostly work-related. However, some of the schemes included under this term may not be strictly occupational (e.g. regional mutual society, village tontine…) but keep a collective/group dimension.

[7] http://www.observatoire-retraites.org/observatoire/rubriques/lalettre/lettre11/LETTER11.PDF, "The European Union and retirement pensions", March 1999, Updated September 2000, La Lettre de l'Observatoire des retraites, Paris.

Type of old-age pension programmes	Case laws by the European Court of Justice	Main conclusions
- Public compulsory programmes	Pistre et Poucet, 17-02-1993 Garcia, 26-03-1996 (mentioned above concerning basic social security programmes)	Monopoly of Social security institutions due to their principles of solidarity, reflected by compulsory membership.
- Public voluntary programmes	Coreva, 16-11-1995 (mentioned above as a voluntary pension scheme for French farmers)	Schemes with voluntary membership do not imply solidarity and should be submitted to competition (art. 85 of Treaty of Rome).
- Private occupational non-profit schemes (usually compulsory by collective agreements)	Brentjens, Albany et Maatschappij, 21-09-1999 (mentioned below as the cases concerning "Dutch industry-wide pension schemes")	Monopoly given to a private enterprise "*as a measure necessary to the fulfillment of a particular social mission of general interest*" (Art. 90 of Treaty of Rome).
- Private voluntary schemes	No case law	Voluntary membership means that such schemes follow competition principles (Art. 85 of Treaty of Rome) Life insurance Directive (09-12-1992)

Why should solidarity only be in the realm of the state? What role should be attributed to civil society and other forms of representation in this regard? Among different voice representation in the social protection realm, how can the EU legislation preserve the originality of each of these collective processes? They also represent some forms of democratic process through their mode of election and their representativeness.

Beyond the EU dichotomic approach of social protection, the ECJ has already had to intervene due to the lack of proper regulation concerning these occupational non-profit-making schemes. In the late nineties, Dutch industry-wide pension schemes were brought to the fore concerning that debate.

After having been created by employee and employer representatives based on collective agreements, these representatives ask the State to make the Dutch industry-wide pension

schemes compulsory by law. These pension schemes were reinforced by a national law, which is, legally speaking, stronger than a collective agreement. That law gave a monopoly to these pension schemes and compulsory membership at the industry-wide level. But a national law could be challenged by a stronger source of law, the EU sources of law.

The decision by the European Court of Justice on 21st September 1999 seems to have clarified some cases confirming the compulsory nature of these Dutch pension schemes[8]. As membership to these industry-wide pension schemes is legally compulsory, some solidarity exists as there is no risk selection and they fulfill a common good role, in addition to the basic social security existing in the Netherlands. The monopoly of Dutch industry-wide pension schemes was not destroyed by the ECJ and that decision implicitly recognizes the role played by employer and employee representatives in social protection.

The ECJ considers that Dutch industry-wide pension schemes are in fact in the market realm, but recognizes that being compulsory is not an "abuse of dominant position" due to the fact that these schemes imply a high level of solidarity. It can be considered as an opening for other schemes with similar characteristics. Yet for now it also appears as an exception in the ruling binary approach, as no real legal European status is given for such types of occupational non-profit schemes.

Not only old-age pension programmes have been submitted to the changes of EU jurisprudence, but also more recently health care programmes had to face the development of case laws. In the Kohll and Decker cases, the principles of free movement of services and persons were in conflict with internal rules of health care programmes, in particular the prior authorization provision[9]. This prior authorization provision was implemented by health care programmes, when the affiliated members wanted to have access to health care abroad (E111 and E112 documents). Its main target was to control the financial stability of the health care programmes. For the financial stability of a scheme, it seems however harder for a national health programmes to integrate foreign health care tariffs.
If prior authorization is requested and obtained for health treatment abroad, the full reimbursement of expenses is made. However, if no prior authorization is made before the treatment, the Kohll and Decker jurisprudence set out the principle whereby the reimbursement is made according to the rates applied by the insurance. In fact, it can correspond only to a partial reimbursement, but the insurance programmes cannot use the lack of prior authorization to refuse any reimbursement.

This jurisprudence is developed for health care programmes based on the reimbursement principle. Some others are based on conventions between health care provider and the health insurance scheme. Such systems provide benefits in kind where the cost of the benefits is directly covered by the agreement and convention signed between the health

[8] http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en, "Brentjens, Albany and Maatschappij cases", C-115/97 to C-117/97, The Court of Justice of the European Communities.
[9] http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en, "Kohll and Decker cases", C-120/95 and C-158/96 The Court of Justice of the European Communities.

care provider and the health insurance scheme and no reimbursement rules apply for the patients. The financial stability of the system is fixed by the agreement or convention. How can the Kohll and Decker cases be applied to such systems, which do not have any reimbursement rule? The ECJ has not replied to that issue yet but the development of the jurisprudence seems to leave less and less room for such collective agreements. Many of them are developed by non-profit institutions, managed by employee and employer representatives with occasionally the participation of the government. Health care as well as other social security branches seem to be regularly challenged by this supranational source of law, while remaining under the responsibility of individual nation states.

What role for collective representation in social protection and solidarity ?

Some types of workers' representation in occupational non-profit-making schemes can be jeopardized as the EU approach tends to include schemes subject to market forces that are in direct competition with profit-making institutions. When occupational non-profit-making schemes aim to provide social protection provisions on the basis of a universal approach without any risk selection, profit-making institutions may set different tariffs according to the risks involved. Regulations at the EU level or at the country level should implement measures to avoid discrimination between “good” and “bad” risks. Occupational non-profit-making schemes, which provide solidarity between their members on the basis of a collective agreement, seem to avoid discrimination within their field of application.

Without any shareholders, these occupational non-profit-making schemes do not have to refer to external partners for their financial performance, but administrators can manage the schemes, so as to focus on long-term viability and the interests of their members. That does not mean that they cannot match the legal prudential rules, which are set up by financial authorities to guarantee and control the management of financial institutions. For instance, mutual societies in Europe have aligned their prudential rules with the existing third life insurance directive and such institutions can now provide the same financial guarantees as insurance companies.

For occupational non-profit-making schemes providing solidarity between their members, a court case ruling against such a scheme on the grounds that it was abusing a dominant position could be in conflict with the common good[10] and the general interest of the consumer, which is another major EU principle. Therefore, solidarity in such occupational non-profit schemes should require special rights and be exempt from market

[10] Article 90§2, Treaty of Rome, European Community, 25 March 1957 : “*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.*”

rules. Different forms of representation apply to occupational non-profit schemes, from nationwide decision-making processes to local or corporatist solutions. To that extent, social protection should be seen as a whole and the simplistic distinction split made at the EU level between nationwide basic social security programmes and additional competitive solutions does not appear satisfactory as national basic social security programmes differ in terms of benefit level. Other schemes complement them and the integration between these two layers modify the borderline of the market realm if those specificities are taken into account. Put forward by the EU itself as a solution to economic problems, how can the "subsidiarity principle" be applied to social protection integrating solidarity at different levels?

The EU has not been able to develop proper regulation in the social policy area. This lack of proper EU regulation, which requires a strong consensus between the states on social issues, leaves a large space for the ECJ and its jurisprudence. Due to the lack of regulation in that area, the decisions are taken by lawyers rather than politicians. ECJ lawyers are actually making the law rather than merely upholding it. Growing insecurity is developing for social security institutions at the same time as each case law is delivered and completes this ruling jurisprudence.

The EU has mainly developed economic integration, and as shown above by the pressure on social security programmes, social aspects are lagging. This situation jeopardizes occupational non-profit schemes, the role of their stakeholders and the diversity and the adequacy of each of this social security provision. To some extent, the agreements on trade developed by the World Trade Organisation (WTO) only focusing on economic globalisation forgets once more the social dimension of such a process. This is illustrated with the lack of consensus on an effective and comprehensive social clause in the international trade agreements. The example of difficulties faced by EU social security programmes in the framework of the European economic integration make it difficult to understand how economic globalisation promoted by the WTO will encourage Third World countries to close their coverage gaps in basic social security. Initiatives from non-profit institutions such as SEWA seem to be encouraging for the coverage of social needs in Third World countries, but represent an exception, a marginal action in a context of generalized social insecurity.