Chapter 2
"Economic Activity": Criteria and Relevance in the Fields of EU Internal Market Law, Competition Law and Procurement Law

Abstract This chapter analyses the legal meaning of the notion of "economic activity" and the relevance of this notion for the applicability of EU free movement, competition and procurement rules. It shows that the CJEU makes a distinction between an activity which at an EU level *can be* economic, and therefore constitutes services, goods or capital in the meaning of the Treaties, and an activity which in a specific case (under a national regulation or in a specific transaction) *is* economic. It finds that a *legal and unitary* interpretation of the notion of "economic activity" for the purpose of EU rules on competition, free movement, and procurement emerges from the Court's case law. It also finds that in a case by case approach, the Court determines that an activity *is* economic on the basis of two criteria of agreement and remuneration, both easily fulfilled. The Court's approach implies that an activity does not have to be economic in a Member State for this Member State's regulation of this activity to be subject to EU market rules. Once the CJEU has established that public services, including social services, *can be* economic at a Union level, the Court finds that the Member States' regulatory and administrative measures affecting these services are covered by EU market rules. The chapter concludes that the Court's approach explains the development of its case law on public services, with a relatively lenient approach in the application of EU market rules. It also concludes that these judicial developments made it legally and politically necessary to transform the Treaties, and constitute a major cause of the emergence of SGEI as a constitutional public service concept in the post-Lisbon Treaties.

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Contents

This chapter is devoted to examining the first sub-question of the book, which should be recalled here:

> *Can the CJEU's case law on the definition and the relevance of the notion of "economic activity" explain the necessity of a constitutional public service concept in the post-Lisbon Treaties?*

To make sense of the complex case law on the criteria of applicability of EU market rules to public services, in particular social services, it seems helpful to follow Hatzopoulos advice, and to distinguish the concept of economic activity from the scope of application of the Treaty and secondary law market rules.[1] Based on an in-depth study of the case law of the CJEU conducted elsewhere,[2] this chapter has therefore its focus on identifying the legal meaning of the notion of economic activity for the purpose of the Treaty rules on free movement, competition and public procurement and on the relationship between this notion and the concepts of entry to these rules.

The first section briefly recalls important elements in the CJEU's approach to determine the applicability of the Treaty market rules, and addresses critically the

[1]Hatzopoulos holds the view that the concept is unitary and has the same content under both internal market and competition law. See Hatzopoulos 2011, p. 4–6.

[2]See Wehlander 2015, pp. 37–187.

thesis that there may be a dual meaning of the notion of economic activity. The relevance of the notion of "economic activity" for the applicability of the Treaty market rules and the criteria determining that an activity is economic are then examined for the purpose of the Treaty rules on free movement in Sect. 2.1, on competition rules in Sect. 2.3, and on procurement in Sect. 2.4. The last section concludes on the question addressed by part I.

2.1 "Economic Activity": "One Test" Determining the Applicability of the Treaty Market Rules to Activities in the Public Sector?

Let us begin here by recalling that the notion of "economic activity" was present in old Articles 2 EEC and 2 EC, suggesting that the economic character of an activity constituted a legal limit to the applicability of EU law. The notion has disappeared in Article 3 TEU, not only because Treaty modifications have led EU law to cover certain activities regardless of their economic character, but also because the CJEU's basic test to determine whether a Member State's legislative or administrative measure is covered by EU market rules is not possible to contain in a horizontal legal criterion of "economic activity".

Taking the Union's mission to establish an internal market very seriously, the CJEU has namely delineated the scope of the Treaty market rules in what is often called a functional manner. The Court has in particular established that certain inherent or regulatory elements of activities in the Member States' public sector may be able to mitigate the application of EU market rules, but do not in themselves limit their scope. Thus, the fact that the activity lies within the policy powers of the Member States, in accordance with the principle of conferral, can never be invoked to exclude the applicability of the Treaty market rules to public services. As the Treaties in no way prejudice the rules governing the system of property ownership in the Member States—a principle laid down in Article 345 TFEU—the existence of markets in the public sector is initially a question for each Member State. However, one Member State cannot prevent another Member State from liberalizing activities in the public sector, and therefore cannot deny the existence in that Member State of commercial interests which may be protected by EU law.

Also, the CJEU has found that the special nature of certain services is not enough to exclude the applicability of the fundamental freedom of movement and the application of Articles 56 and 57 TFEU,[3] even if it is settled case law that "Community law does not detract from the powers of the Member States to organize their social security systems".[4] Regarding the Treaty rules on competition in a

[3]Case C-157/99, *Smits and. Peerbooms* [2001] ECR I-05473, paras 44–45.

[4]This was first laid down in *Duphar*, see Case C-238/82 *Duphar* [1984] ECR I-00523, para 16.

broad meaning (i.e. including state aid rules), the Court has not been as explicit, but by establishing in *Höfner* that "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed", it opened for a very broad application of these rules, including to public bodies destined to fulfil social and environmental policy.[5] As a result, the fact that a service is related to social or environment objectives cannot *per se* suffice to claim the inapplicability of the Treaty competition rules to this service, and in *AG2R*, the Court of Justice could reiterate its earlier made statement that "the social aim of an insurance scheme is not in itself sufficient to preclude the activity in question from being classified as an economic activity (for the purpose of Article 102 TFEU, precision added)".[6]

Some authors argue that the notion of "economic activity", defined for the purpose of EU competition rules as "any activity consisting in offering goods and services on a given market"[7] has different meanings for the purpose of the free movement rules respectively the competition rules, which would explain their different scopes.[8] They usually invoke the Court of Justice's approach in *Meca-Medina,*[9] but it is argued here that this ruling does not support their thesis. Indeed, having found that the rules of the International Olympic Committee (IOC) rules were subject to competition rules, the Court never said that the reason why the IOC rules fell outside the free movement rules was that the athletes at issue did not conduct an economic activity for the purpose of the free movement rules. Thus the Court did establish that the economic relevance of one and the same regulatory measure may vary in the two fields of law, but not the criteria determining the economic character of the activity affected.

AG Poiares Maduro's Opinion in *FENIN* has also been invoked to argue that the notion of "economic activity" would have a dual meaning in EU law, but does not either make a good case for this thesis.[10] The AG's statement that "there is no doubt that the provision of health care free of charge is an economic activity for the purpose of Article 49 EC" can be seen as his own practical manner to express

[5]Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, para 21. The challenging element in the ruling in *Höfner* was arguably the irrelevance of the form of the activity's financing, as the Court, in *Commission* v *Italy*, had established not only the irrelevance of the legal form for determining the existence of a public undertaking, but also, long before the ruling in Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, that the State may act either by exercising public powers or *by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market* (see Case C-118/85, *Commission* v *Italy* [1987] ECR 2599, paras 10 and 7).

[6]Case C-437/09 *AG2R* [2011] ECR I-973, para 45, where the Court refers to the same statement in several earlier cases.

[7]See Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, para 75.

[8]See in particular Odudu 2009, p. 226.

[9]Case C-519/04 P *Meca-Medina* [2006] ECR I-6991.

[10]Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN v. Commission* ECR [2006] I-6295, para 51.

that any national rule related to healthcare services is regarded by the CJEU as covered by Article 56 TFEU, rather than a view that the activity *is* economic in the Member State upholding such a rule.

2.2 "Economic Activity" in the Field of Internal Market Law: Relevance and Criteria

This section analyses first how the CJEU's understanding of the concepts of "goods", "services", "establishment", and "capital"[11] that determine the applicability of the Treaty provisions on free movement relates to the notion of economic activity, and second the substantial criteria determining case by case that an activity *is* economic in the meaning of EU free movement law.

2.2.1 The Relationship Between the Notion of "Economic Activity" and the Concepts of Entry of the Treaty Rules on Free Movement

It is important to observe that the CJEU actually avoids the terminology of "economic activity" when reasoning on the applicability of the fundamental freedoms to Member States' measures related to public services, and in particular social services regarding for which this question is particularly sensitive.[12] In order to determine that Articles 30, 56 or 63 TFEU apply to the measure at issue, the Court normally questions instead whether it affects goods, services, or capital in the meaning of these rules, which it finds to be the case if "they may be subject to economic transactions". This interpretation of the concepts of entry to the free movement rules allows the Court to maximize their capacity to liberalise activities in the public sector, without having to state that the activity *is* economic in every Member State, which in the present state of EU law on social services is not possible. The Court has also maximized the effet utile of the free movement principles by reading in Article 56 TFEU both an active right for persons established in a Member State to offer services in another Member State, and a passive right for persons established in a Member State to go to another Member State and receive a service there.

However, the Court does make a distinction between on the one side finding that an activity *is* economic in the meaning of the free movement principes (and

[11]For the sake of simplicity, the free movement of workers and of EU-citizens has been left outside the scope of the study conducted in this chapter.

[12]Although to a lesser extent, this is true even in cases relating to the freedom of establishment.

therefore allows its provider or recipient to benefit from their fundamental freedoms), and on the other side an activity that in general *can be* economic (regardless of the regulatory context of a particular Member State) and therefore relates to goods, services, or capital.[13] This distinction appears to underpin all freedoms, but is clearest in the field of services, where the Court makes the following distinction:

(a) A service activity *is* economic if it is *actually* provided for remuneration in the frame of a specific transaction or in the frame of a specific regulation. This test, determining whether a fundamental freedom may be claimed in relation to a given provider, and based on the direct effect of the Treaty provisions ensuring its respect, was explicitly applied in *Freskot*.[14] In the Greek compulsory insurance scheme at issue, the Court found clear that the insurance against natural risks provided by the public body to Greek farmers could *in that specific case* not be regarded as services within the meaning of Articles 56 and 57 TFEU, because the contribution by the Greek farmers did not constitute *economic* consideration for the benefits provided by the public body managing the compulsory insurance scheme.

(b) A service activity *can be* economic if it is *normally* provided for remuneration. It is namely submitted that the CJEU interprets the word "normally" in the definition of services in Article 57 TFEU, as meaning that the service *can be* provided for remuneration. This "basic test" determines that a national rule which can affect the supply of such a service is an "economic rule" covered by the Treaty rules on free movement, even if the service is *actually* pursued as an economic activity only in other Member States and not in the Member State of the rule at issue.

While test (a) has to be made case by case, test (b) is made once and for all. Once it is established that a service is "normally" provided for remuneration, any national rule related to this service is a priori an "economic rule", which implies that it must by principle and *ex-ante* be adapted to the fundamental freedoms, *both the freedom to provide services and the freedom of establishment*. This does not mean that national rules related to that service would not be compatible with EU law, but involves that they must be justified by the Member State as necessary in

[13]See in-depth study in Wehlander 2015, pp. 57–105.

[14]Case C-355/00 *Freskot* [2003] ECR I-05263, paras 52–59. As to the freedom of establishment, it is explicitly characterized by the Court as a right to pursue an "economic activity", see for instance Case C-221/89 *Factortame II* [1991] ECR I-3905, para 20, and regarding service activities, the Court defines an economic activity for the purpose of the freedom of establishment as services "provided for remuneration", see Case C-268/99 *Jany* [2001] ECR I-8615, para 48. However, by contrast with by AG Bot, the Court is obviously careful to justify the applicability of the Treaty provision to national rules restricting social services, by invoking their character of "service in the meaning of the Treaties" and not by characterizing them as an "economic activity". Examples of this approach can be found in Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes* [2009] ECR I-4171, para 18. In this paragraph, the Court refers to Case C-372/04 *Watts* [2006] ECR I-4325, paras 92 and 146 and to Case C-169/07 *Hartlauer* [2009] ECR I-1721, para 29, see Wehlander 2015, pp. 71–78.

order to attain legitimate objectives. The CJEU has found that hospital, medical and paramedical services, elderly care, manpower, university courses, and education in schools essentially financed by private funds fulfilled *in casu* the (a) test. This implies that the (b) test is from then on automatically fulfilled, and also that the free movement of services and the freedom of establishment have a normative effect on national legislative and administrative measures related to these social services.

The term "normally" in Article 57 TFEU seems to be understood by the CJEU as a broad notion, which is quite in line with the CJEU's very restrictive interpretation of the notion of "activities connected, even occasionally, with the exercise of official authority" in Article 52 TFEU, requiring that such activities are conducted by entities with a high degree of decisional autonomy in exercising official authority. Although even such services could be argued to be at least *in theory* possible to provide for remuneration, it is submitted that the strong derogation allows a legally strong presumption that they are not. This is why, regarding public services (or in EU words, services of general interest), "activities connected, even occasionally, with the exercise of official authority" constitute arguably the "surest" form of non-economic services of general interest.

The distinction between tests (a) and (b) above has several implications.

First it explains how relying on the ambiguity of the word "normally" in Article 57 TFEU allows the CJEU avoiding the notion "economic activity" in the field of service activities, thereby sparing many feelings. The Court does not have to state explicitly that whereas Member State A may organise a service through rules that imply that the activity *is* non-economic in its territory, fundamental freedoms may anyway challenge these rules as soon as the same activity *is* economic in some other Member State, and possibly impose reforms which implacably lead the activity to become economic in Member State A. It does not either have to state, in relevant cases, that an activity constitutes a service in the meaning of the Treaty rules on free movement, but as pursued under the rules of a specific Member State, *is not* economic for the purpose of free movement law", which would entertain the perception that there can be some possibility for Member States to withdraw a service from both EU competition rules *and* EU free movement rules. However, by its ambiguous use of the term "service in the meaning of Article 57 TFEU" and its reluctance to clarify that the notion term "economic activity" in the field of free movement law can only refer to a specific activity in a specific regulatory frame, the Court maintains confusion.

Second, it explains the different scopes of EU free movement rules and EU competition rules. While a Member State's rules rendering non-economic the activity of the provider in that Member State cannot be challenged by economic rights based on EU competition law, they can be challenged on the basis of the fundamental freedoms if the activity (for instance a social service) is economic in at least one other Member State, which implies that, *in an EU market perspective*—the activity *can be* economic.

Third, although it does not demonstrate that the criteria determining that a specific activity (as pursued in a given regulatory context) *is* economic are the same

in the fields of competition and free movement, it supports the thesis that these criteria can be identical.

And fourth, it sheds new light on the word "economic" in the concept of service of general economic interest and on the CJEU's approach of this notion and of its relevance for the application of free movement law to welfare services, in particular social services. This issue is developed in Chap. 5.

2.2.2 *The Meaning of the Notion of "Economic Activity" for the Purposes of the Treaty Rules on Free Movement*

Let us now look closer at the criteria used by the CJEU to determine that an activity *is* economic in the frame of a specific type of transaction or of a regulatory scheme, in other words that the service *is* provided for remuneration, test (a) above.

In *Humbel*, the Court has defined the notion of remuneration by stating that its essential characteristic lies in the fact that it constitutes "consideration for the service in question, and is normally agreed between the provider and the recipient of the service in question".[15] In that ruling, the Court considered that teaching or enrolment fees which pupils or their parents must sometimes pay in order to make a certain contribution to the operating expenses of courses provided under the national education system could not be seen as remuneration as

- The State, in establishing and maintaining the system, is not seeking to engage in gainful activity but fulfils social, cultural, educational duties towards its population and
- The system is as a general rule funded by public purse and not by parents/pupils.[16]

As a result of this approach, the Court concluded that courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services for the purpose of Article 59 EEC (now Article 56 TFEU).[17] The *Humbel* ruling has led some Member States to hope that services provided in the frame of publicly funded welfare systems *never* would be regarded as services in the meaning of the Treaties. However, in the field of public services, the CJEU normally discards the "system approach" of *Humbel*, and uses instead a case by case "economic provider's approach". In that approach, remuneration can exist even when the service is not paid for by those for whom it is performed, as what is relevant is *whether payments received by the specific*

[15]Case C-263/86 *Humbel* [1988] ECR 5365, para 17.

[16]Case C-263/86 *Humbel*, para 18.

[17]Case C-263/86 *Humbel*, para 20.

service operator may be regarded as economic compensation in this provider's perspective, which supposes that two basic conditions are fulfilled:

1. The provider receives a compensation amount but the provision does not have to be for-profit (the "compensation criterion").
2. The economic compensation received can be seen as a market price for the service, as it is comparable to remuneration normally *agreed* between the provider and the recipient of the service (the "agreement criterion").

Indeed, in *Freskot*, the activity of the body providing the insurance service was non-economic in the meaning of free movement (and of competition law), because Greek farmers' financial contribution could not be seen as an *economic* compensation for the service in question. The benefit provided was not a service for the purpose of Article 56 FEUF and the public body providing this benefit was not an undertaking for the same reason: there was some compensation from farmers but it was not *agreed* by the public body, which had no control over the nature and level of the benefits, and could not either decide the characteristics and rate of the contribution, as all these elements were set by law.[18]

Regarding the compensation criterion, the Court has taken the view in *Jundt* that remuneration may exist as soon as the service is "not for nothing", which suggests that the compensation does not even have to cover all costs incurred to provide the service.[19] As to the agreement criterion, it is arguably regarded as fulfilled by the CJEU as soon as the operator can be regarded as having *in some way* agreed *ex-ante* to provide the service in question for a certain compensation amount, as a sign that the provider controls its financial risk for providing the service. This view emerges discreetly from judgments as *Smits and Peerbooms* and *Watts*, where the Court carried weight on the fact that treatment received from an operator in a Member State by patients from another Member State, had been paid directly by the patients.[20] It also emerges from an *obiter dictum* in *Smits and Peerbooms*, where the Court took the view that public hospitals which provided free of charge health care and received flat-rates payments from Dutch sickness insurance funds under *contractual arrangements*, unquestionably received remuneration (compensation for the service in question, i.e. the first part of the *Humbel* definition of remuneration) and were therefore, in the conduct of their intrastate transactions, engaged in an "activity of an economic character".[21] As this view

[18]Case C-355/00 *Freskot* [2003] ECR I-05263, paras 56–59 and 78–79. The contribution was essentially a charge imposed by law equally to all operators and levied by the tax authority.

[19]Case C-281/06 *Jundt* [2007] ECR I-12231, para 33.

[20]Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, para 55.

[21]Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, para 58. The Court's statement signals also that "consideration for the service in question" may cover the total volume of service provided under a period rather than per service unit, and can be agreed upon between the provider and the financer of the service, rather than "as normally on a market" between the provider and the recipient.

was specified to be "in the present cases" and "under the contractual arrangements" provided for by Dutch law in force at the time of the judgment, the Court did obviously not mean that providing health care free of charge is *under any circumstances* an economic activity in the meaning of free movement.

As clear from the above, the Court gives a wide interpretation of both the "compensation criterion" and the "agreement criterion", which involves that remuneration is easily found and that test (a) above, determining whether an activity *is* economic in a specific transaction or scheme—a service actually provided for remuneration—is very easily fulfilled. However, to understand the extent of the liberalization of welfare services, in particular social services, which the Court's case law can lead to, it is essential to be aware of the relation between tests (a) and (b). As soon as the Court finds in the frame of a dispute brought to its jurisdiction that a cross-border transaction on social services fulfils test (a), the Court does not merely establish that this specific type of transaction may not be restricted by national rules without being justified under the principle of proportionality. It also demonstrates that the service fulfils test (b) and *can be* provided for remuneration, that it is "a service *normally* provided for remuneration".

Apart from the notion of "activities connected with the exercise of official authority", there is no constitutional limit to which services may be deemed to be "normally" provided for remuneration. In fact, it is seriously doubted here that courses in national systems of education may be seen as non-economic services of general interest in the sense that they *cannot* be subject to economic transactions. The "economic provider's approach" has not only excluded the *Humbel* formula in the sector of healthcare, but also considerably weakened the *Humbel* formula in the field of education. Indeed, the *Schwarz* and *Jundt* cases show that national rules governing the national education system may be seen as "economic rules" and be challenged on the basis of both the passive and the active freedoms to provide services. Besides, if publicly-funded but for-profit school services develop in the Member States, relying on *Humbel* to exclude the applicability of EU free movement rules to education provided in the frame of systems established, maintained and essentially funded by the State, looks increasingly as a weak legal shield.

The above does not only confirm that there is "no nucleus of sovereignty that the Member States can invoke, as such, against the Community",[22] but also shows that there is *almost* no nucleus of sovereignty that the Member States can invoke to claim that their national rules organising welfare services escape EU market law. Some may argue that the CJEU's case law simply expresses what the Treaties have always meant, but things are not that simple. AG Stix-Hackl's questioning of the consequences of the Court's choice allowing "a way out of closed systems of national solidarity" suggests that there has been a debate within the Court on the

[22]This radical statement was made 25 years ago by Judge Koen Lenaerts, see Lenaerts 1990, *Constitutionalism and the many faces of federalism*, 38 American Journal of Comparative Law 205 (1990) at 220.

meaning of the principle of solidarity in national welfare systems and on whether other EU foundational principles do not exclude a judicially driven liberalization of social services.[23] At any rate, the Court has discreetly but resolutely established a mechanism of tests with minimal criteria and broad effects, which closes the possibility for national rules to "exit" from EU free movement law.

This considerable expansion of the scope of the fundamental freedoms may easily lead to far-reaching liberalisation requirements on social services, not only on the demand side, but also on the supply side of social services. In particular, given the limited "bite" of the EU state action doctrine, it may be tempting for economic operators to rely on the freedom of establishment, which requires no effect on trade to apply, in order to challenge national rules affecting their opportunities of business in the field of social services. When such disputes are brought under its jurisdiction, Judge Lenaerts has explained that the Court takes a nuanced approach aimed at "striking a fair balance between the general interest pursued by such services and the effectiveness of the relevant Treaty provisions governing the internal market".[24] Indeed, in the absence of EU legislation in the sector of social welfare, the CJEU faces not only a risk of rejection from the Member States (a political issue), but also a competence problem (a constitutional issue), and its "nuanced" approach includes the following key elements.

First, it must be underlined that the Court considers certain rules to be non-economic in nature, and for that reason not covered by the economic rights to free movement. As in *Keck,*[25] the CJEU's doctrine in *Meca-Medina*[26] implies that rules governing strictly non-economic aspects of an otherwise commercial activity may escape from the scope of the fundamental freedoms, even where the activity *can be* economic.

Second, the Court's *Humbel* doctrine may be understood so that a *theoretical* possibility for a service to be provided for remuneration does not suffice for a service to be seen as "normally" provided for remuneration in the meaning of Article 57 TFEU. In other words, "normally" requires that the service is actually provided for remuneration *in at least one* Member State. If this interpretation is correct, the Court requires economic rights to free movement to *actually* exist somewhere in the EU, which is excluded as long as no Member State allows that providers in a welfare system objectively have another aim than the State—an economic purpose—in providing the service.[27] Accordingly, although the thesis that "state edu-

[23]Opinion of AG Stix-Hackl in C-76/05 *Schwarz* [2007] ECR I-6849, paras 39–40: the creation of a way out' of closed systems of national solidarity, accompanying the possibility of exercising the fundamental freedoms laid down in the EC Treaty/…/ is in itself detrimental at least to the idea of national solidarity, because the spreading of risk is restricted".

[24]Lenaerts 2012, p. 1249.

[25]Joined Cases C-267 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

[26]Case C-519/04 P *Meca-Medina* [2006] ECR I-6991.

[27]Another thing is of course that non-economic EU rights, such as the right to move and reside freely within the EU in accordance with Article 20(2) TFEU, may not unjustified be restricted by the national legislators.

cation is special" still finds support,[28] it seems reasonable to expect that the CJEU will regard courses in national education systems as services *normally* provided for remuneration when confronted with the fact that a Member State allows private providers in the national system to have an aim of profit instead of the State's aim to serve its population, as is now the case in Sweden. How long the *Humbel* doctrine can stand the test of reality and of legal coherence remains thus to be seen, in particular as there is pressure for "modernizing school" in several Member States.

Third, the Court's approach in *Sodemare* is submitted to mean that even when the provision of a service is externalized to private entities, a Member State withholds the power to deny solidarity funding of for-profit activity without infringing the freedom of establishment.[29] The *Sodemare* ruling may be interpreted as acknowledging the Member States' retained powers not only as regulators but also as financers of social services. Where neither the societal objectives nor the modes of supply are harmonized, the legislator of a Member State may—on the basis of a democratic mandate—define precisely the service it finds important to finance on the basis of solidarity and decide that solidarity funding does not remunerate capital.

This understanding gets support from the recent ruling in *San Lorenzo*. In this ruling, the Court found first that national legislation imposing on local authorities to entrust the provision of ambulance services to non-profit associations with priority and by direct award (financing the costs incurred for providing the service and certain fixed costs necessary to fulfil the task) was covered by Articles 49 and 56 TFEU, provided that the national court could establish the existence of a certain cross-border interest.[30] However, the Court confirmed its stance in *Sodemare* that these provisions (1) do not preclude that a Member State, in the exercise of its retained powers to organize social security systems, decides the social aims of welfare services and (2) considers that recourse to non-profit associations is consistent with these aims and may help to control costs relating to those services, provided that this preferential regime actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which the system is based.[31]

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[28]See Lenaerts 2012, p. 1251.

[29]Case C-70/95 *Sodemare* [1997] ECR I-3495, where the Court found that the Italian regulation imposing a not-for-profit condition to admit operators in the public-funded welfare system for old peoples' homes in Italy was compatible with the right of establishment of a profit-making company established in Luxemburg which had set up for-profit old peoples' homes in Italy.

[30]Case C-113/13 *San Lorenzo* [decided on 11 December 2014, nyr], para 50.

[31]Ibid, paras 59–60. The Court emphasized that this freedom is subject to several conditions, in particular that the associations do not pursue objectives other than the good of the community and budgetary efficiency, do not make any profit as a result of their services, apart from the reimbursement of the variable, fixed and on-going expenditure necessary to provide them, and do not procure any profit for their members, see paras 61–63.

It will be seen in Chap. 9 that as a result of the Swedish policy on public education, the *Sodemare* approach may constitute the only manner for other Member States to claim their powers to impose a not-for-profit condition for subsidizing courses provided by private entities, which allows guessing that this approach is difficult to overrule, and important to confirm.

2.3 "Economic Activity" in the Field of Competition: Relevance and Criteria

In order to determine the applicability of the Treaty rules on competition, the CJEU has elaborated an intricate body of definitions and tests, and thereby forced the principle of competition into the core of national welfare services.[32] This section sheds first light on the difference between tests determining whether an activity which *can be* economic (the so called "comparative test" in *Höfner* and the doctrine on activities related to the exercise of public authority in the *Eurocontrol* line of case law) and others determining whether an activity *is* economic in the specific case (the market participation test in *Pavlov* and the doctrine on activities fulfilling an exclusively social function in the *Poucet and Pistre* line of case law). The second part of the section examines the criteria determining that an activity *is* economic for the purpose of EU competition law, and compares them with the corresponding criteria in EU free movement law. This should allow answering the questions whether the notion of "service" has the same meaning for the purpose of EU competition rules and EU free movement rules, and what the CJEU means with the notion "on a market".

2.3.1 Relevance of the Fact that an Activity Can Be *Economic for the Applicability of the Treaty Competition Rules*

The CJEU established in *Commission v Italy* that the State may act either by *exercising public powers* or by carrying on economic activities of an industrial or commercial nature by *offering goods and services on the market*.[33] One must therefore consider *case by case* the activities exercised by the State and determine the category to which those activities belong.[34] In line with this basic axiom, the Court later defined in *Höfner*—now settled law—the notion of

[32]According to Semmelmann, the CJEU's interpretation of the Treaty competition rules pursues the same overarching goal as its interpretation of EU free movement rules, "namely to abolish obstacles to cross-border trade". See Semmelmann 2010, p. 521.

[33]Case C-118/85 *Commission v Italy* [1987] ECR 2599, para 7.

[34]Ibid.

"undertaking"—constituting the concept of entry to the Treaty competition rules—as "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed". The "undertaking" character of an entity is thus determined solely by the economic character of its activity *under the rules it is subject to*, and consequently competition rules can apply even to (1) entities conducting activities directly or indirectly funded by the State or with State resources and (2) public entities that are not organized as private law entities.

The *Höfner* definition of an undertaking is generally qualified as functional but leaves unsaid what an economic activity is. In *Höfner* the CJEU found relevant for the applicability of the Treaty competition rules that "the activity is not necessarily, and has not always been, conducted by public entities".[35] It is obviously incorrect to understand this comparative formula as a definition of an "economic activity" for the purpose of the Treaty competition rules. The Court produced namely in *Pavlov* the pivotal definition of an "economic activity" for the purpose of EU competition rules as "any activity consisting in offering goods and services on a given market".[36]

The meaning of the comparative formula launched in *Höfner* and later also used in *Glöckner*, is not explicit in the Court's case law, but in these two cases, where it was difficult to show that the activity pursued by a specific entity *was* economic, this "comparative test" was clearly used by the Court to establish that it *could be* economic, in other words that there is some market for the activities in question. It is therefore submitted that the comparative test is an inherent part of the definition of an undertaking formulated in *Höfner* and of the definition of an economic activity in *Pavlov*, and has the following meaning:

- It allows determining whether the activity *can be* economic. Thus, a service activity which fulfils the comparative test has "a potential market" in a Member State, as it could (in theory) be conducted by private entities for-profit. This capacity of a given service to be subject to commercial transactions is precisely what is meant by "service *normally* provided for remuneration" in Article 57 TFEU. Hence, the comparative test in the field of competition law seems to correspond in substance to the notion of "service" in Article 57 TFEU and "goods" for the purpose of the Treaties.
- Where it is found that the activity *can be* economic, it may be presumed that the absence of effective competition for the activity in a specific case is due to the Member State's own regulatory or administrative measures. That the activity *can be* economic does not mean that the activity as conducted under the scheme of a Member State *is* economic, but that EU competition law "may have a role to play".

In this understanding, the comparative test, construed as a basic test, is made once and for all in the Union for a given activity, and is therefore not explicitly formulated each time the CJEU refers to *Höfner*.

As this test can be fulfilled by virtually any activity, the Court has been forced to give substance to its own axiom that the State may in certain cases be seen as

[35]Case C-41/90 *Höfner* [1991] ECR I-1979.

[36]See Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, para 75.

not offering goods or services on a market, and to formulate criteria determining that the State acts instead by "exercising public powers". The Court has done so in a line of case law including the *Eurocontrol* ruling on navigation control activities conducted by an organization which also established and collected route charges from airlines, and the *Cali* ruling on charges levied by a company entrusted with anti-pollution surveillance in the port of Genoa.[37] In this doctrine, the Court has established that an activity which by its nature, its aim and the rules it is subject to, involves powers which are typical of a public authority, consists in the exercise of public powers. For the purpose of determining whether an activity amounts to the exercise of public powers, the comparative test is totally irrelevant, because the Court defers instead to the *Member State's own assessment* that the activity *cannot* be economic due to its aim and nature, and necessitates instead that the entity entrusted with its conduct relies on powers derogating from ordinary law and typical of the prerogatives of the State.

If an activity constitutes the exercise of public powers, the Member State may be accountable at national and/or international level for fulfilling the general interest missions pursued by the activity, but the activity is not affected by EU competition law and most probably not either by EU free movement law. The correspondence between the doctrine on the exercise of public powers and the free movement derogation in Article 52 TFEU is rather obvious, as they both address the "exercise of public powers", are both very potent, and are both interpreted by the Court very restrictively. Thus, by developing this doctrine, the CJEU has undeniably increased, in the field of services, the symmetry between the criteria of applicability of the Treaty rules on free movement rules and on competition.[38]

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[37]In Case C-364/92 *Eurocontrol* [1994] ECR I-43 and Case C-343/95 *Diego Cali* [1997] ECR I-1547, the Court concluded that the activities at issue constituted the exercise of public powers, and came to the opposite conclusion regarding the provision of airline facilities against fees freely set by the airport management company in Case C-82/01 P *Aéroports de Paris* [2002] ECR I-09297. For a more in-depth analysis, see Wehlander 2015, pp. 121–128.

[38]In this respect, it is interesting to note the Commission Decision finding that the electronic procurement platform (TenderNed) supplied in-house by the Dutch Ministry of Economic Affairs, Agriculture and Innovation must be een as the exercise of public powers. Therefore, and Although a market exists in the Netherlands for the supply of electronic procurement platforms, the Commission concluded that the supply of this platform is a non-economic activity. The Commission reasoning is challenging, as it argues in particular that supplying such a platform is not an "inherent economic activity, but rather a service of general interest, which can be commercially exploited only so long as the State fails to offer the service itself" and thus can be an economic activity as conducted by private operators, see Commission's Decision of 18 December 2014 on The Netherlands E-procurement platform TenderNed SA.34646 (2014/NN) (ex 2012/CP), point 68. Unsurprisingly, this Decision has been contested and brought to the General Court, see Case T-138/15 *Aanbestedingskalender a.o. v Commission*. The Commission's approach regarding TenderNed does not seem to fit well with its own reasoning in its Decision 2012/485/EU of 25 April 2012 on the aid to the Zweckverband Tierkorperbeseitigung in Rheinland-Pfalz, im Saarland, im Rheingau-Taunus-Kreis und im Landkreis Limburg-Weilburg (ZT) SA.25051 (C 19/10), supported by the General Court, see Case T-309/12 *ZT* EU:T:2014:676. On these decisions, see Szyszczak 2015, p. 684.

As to the relationship between the comparative test and the *Pavlov* definition of an economic activity ("an offer of *services* or *goods* on the market"), it is submitted that the comparative criterion allows establishing that the activity examined is related to "goods or services" in the meaning of the *Pavlov* definition. Thus, in the presence of a service activity, the comparative test allows determining that it is a "service *normally* provided for remuneration". When this is established, it remains to examine whether the activity at issue consists in offering these goods or services on a market, which the comparative test cannot tell. Thus, in spite of the confusing terminology used by some Advocates General,[39] it seems clear that the comparative test alone is not meant to determine whether a specific activity in the specific case *is* economic under national rules, as the Court does not consider that an activity fulfilling the comparative criterion *is* economic unless it also fulfils the condition "offered on the market" laid down in the *Pavlov* definition.

Finding that a non-harmonised social service fulfils the comparative test and thus constitutes a "service" in the meaning of the Treaties, legitimates that EU competition law has the upper hand and that the policy powers of the Member States are constrained by the objectives of the Treaties, with the following legal effects:

– As the activity involves the provision of "services" or "goods" in the meaning of the Treaties, the interpretation of the notion of "offer on the market" in the *Pavlov* definition is made under EU law and not under national law.
– National rules restricting or eliminating competition are put "under EU competition law control". The CJEU applies a "principle of competition" from which it derives a "duty of consistency" on the Member States' regulation and organisation of the activity on their territory. This was the case in *Ambulance Glöckner*, where awarding to non-profit organisations exclusive rights to conduct emergency and ambulance transport was acceptable only if the operators were not manifestly unable to satisfy demand.[40]

2.3.2 *Criteria Determining that an Activity* Is *Economic for the Purpose of the Treaty Competition Rules*

The CJEU considers obviously that most activities, unless they are characterized by the exercise of public powers, *can be* economic, either by reference to situations in the past, or to their organisation in some Member States. This implies,

[39] In particular AG Jacobs characterized an activity that could at least in principle be carried on by a private undertaking in order to make profits as "economic in character", which is a somewhat confusing term for an activity only fulfilling the "comparative test", see Opinion of AG Jacobs in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK* [2004] ECR I-2493, para 28.

[40] As seen above, such a "duty of consistency" has also emerged in *San Lorenzo* regarding not-for-profit conditions in public service systems restricting the freedom of establishment, see Case C-113/13 *San Lorenzo* [decided on 11 December 2014, nyr].

if the interpretation of the term "normally" in Article 57 TFEU proposed above is correct, that the Court regards most public services, including social services, as "services" both in the meaning of Article 57 TFEU and for the purpose of its *Pavlov* definition of an economic activity ("services" offered on a market). Under such circumstances, the CJEU's criteria determining whether the services or goods are "offered on a market" are entirely decisive to determine whether the specific entity's activity *is* economic and whether its operator *is* an undertaking. Concerning these criteria, the following elements emerge from the CJEU's case law.

First, while repeating that certain characteristics are *not* in themselves decisive to exclude that services or goods are "offered on a market" (see above Sect. 2.1), the Court has clarified that it takes an "offer" to make an "economic activity" for the purpose of EU competition rules. The *FENIN* ruling established namely that unless contracting authorities' purchasing activity is directly related to *their* offer of goods or services on a market, this purchasing activity is not an economic activity.[41]

Second, the CJEU's case law suggests that the Court considers remuneration, *in some sense*, as relevant in determining whether an activity is economic for the purpose of the Treaty rules on competition. Thus, the criterion of remuneration, related to a risk for the service provider, must be fulfilled for self-employed persons to constitute undertakings.[42] Also, in *Aéroports de Paris*, the airport management company was regarded as conducting an economic activity, because it provided airport facilities to airlines and other service providers *for a fee at a rate which the company fixed freely*.[43] Even in *Höfner* and in *Glöckner*, where the CJEU has launched the comparative criterion and thereby gone furthest in widening the applicability of the Treaty rules on competition, it has not discarded the requirement that the entity examined must actually provide goods or services for remuneration. Thus, the element of compensation for the service offered appears relevant to find that it is offered on a market, as is the case to find that an activity *is* economic in the meaning of free movement law.

Third, starting with *Poucet and Pistre*, the Court has elaborated a doctrine so far only applied in the field of social security, involving that the social security activity considered in a specific case may constitute services or goods in the meaning of the Treaties, but *is* not economic for the purpose of EU competition rules if it is regulated so that it fulfils an exclusively social function. This approach seems binary: goods or services are either "offered on the market" or provided to fulfil

[41]Case C-205/03 P *FENIN* [2006] ECR I-6295, para 26, confirmed in Case C-113/07 P *SELEX* [2009] ECR I-2207, paras 102 and 114.

[42]See Case C-35/96 *Commission* v *Italy* [1998] ECR 1-3851, para 37; Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-5481, para 76; Case C-309/99 *Wouters* [2002] ECR I-1577, para 48.

[43]Case C-82/01 P *Aéroports de Paris* [2002] ECR I-9297, para 78. In that case the issue was rather that a distinction had to be made between the non-economic and economic activities conducted by the airport management company.

an exclusively social function. If this understanding is correct, the factor implying that the activity does not exclusively fulfil a social function should be relevant to determine that it consists in offering goods or services "on the market". In the field of social security, the Court has found an activity is non-economic if it pursues social objectives, is organised predominantly under the principle of solidarity, and is conducted under state control. The Court has thus signalled that its social objectives and its solidarity elements are important but not *per se* decisive, as what also counts is that providers enjoy a degree of autonomy allowing them to influence the economic conditions for providing the service. This element of "autonomous agreement" to provide fits well with the Court's approach of an economic activity for the purpose of the Treaty free movement rules examined above.

Competition rulings on social services are scarce and the CJEU has never clarified what in substance distinguishes the *Pavlov* definition from the comparative test, in other words it has not spelled out which criteria determine that an activity in a specific situation is "offered on the market", and thus *is* (as opposed to *can be*) economic for the purpose of EU competition rules.[44] In that situation of uncertainty, AG Poiares Maduro argued in *FENIN* that to determine the applicability of EU competition rules, healthcare provision must be assessed separately from the social security elements of a national healthcare system. Referring to the *obiter dictum* in *Smits and Peerbooms* the Advocate General proposed that the provision of healthcare under a scheme characterized by a high degree of solidarity *is* economic if the State has not reserved the activity exclusively to State bodies guided solely by considerations of solidarity.[45] His approach is discussed below but supports the view submitted in Sect. 2.3 that by entities *actually* providing *for remuneration*, the CJEU spelled the *legal* definition of an economic activity "in free movement law terms". And indeed, the Commission and the High Surveillance Authority have also used the *obiter dictum* in *Smits and Peerbooms* in state aid decisions in the fields of hospital services, tertiary education, school education and primary healthcare, an approach which was validated by the GC in *CBI*.[46]

AG Poiares Maduro's statement may be understood as meaning that public bodies offer services on a market as soon as the State allows, be it only in fact, that some entities provide a *similar* service for remuneration, *regardless of whether these public bodies enjoy a minimum degree of autonomy allowing them to influence the economic conditions of their own service provision*. As "similarity" may be quite far from identity, this understanding would imply that public funding of

[44]By "positive criterion" is meant here a criterion which specifically can be found in an economic activity, by contrast with an approach finding that an economic activity can be found even in the absence of certain criteria.

[45]Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, paras 47 and 52.

[46]Case T-137/10 *CBI*, Judgement of 7 November 2012, para 91, refereing to Commission decision of 28 October 2009 Financement des hôpitaux publics du réseau IRIS de la Région Bruxelles-Capitale (Belgique), NN 54/2009—C (2009) 8120 final.

public bodies is considered as remuneration, even if this funding does not cover the costs of providing the service under the conditions imposed on them by the State. Would such an interpretation be compatible with the principle that Member States may decide the level of social protection in their welfare services, and would it fit with the Court's finding in *Freskot* that the public provider is not an undertaking if it lacks control over the characteristics of the service and the compensation received?

In fact, in *Smits and Peerbooms* and in *CBI*, both private and public entities were allowed to provide similar hospital services, but both did so in the frame of *contractual arrangements* implying that both received payments from public authorities giving them powers to influence the financial conditions of service provision. In the Dutch system and in the Belgian schemes at issue in those cases, the public hospitals seemed to enjoy an economic autonomy allowing them to influence the risk of providing hospital services, and could be argued to provide hospital services for remuneration. And in *Glöckner*, the not-for-profit organisations providing ambulance services enjoyed some economic autonomy allowing them to cover their costs. *Höfner* emerges as the only case where the activity of a publicly funded not-for-profit public body was found economic in the meaning of EU competition rules without this body's economic autonomy or lack of economic autonomy being at least evoked as a fact in the case. Thus, at this stage in the development of the CJEU's case law, it seems possible to argue that the requirement that services or goods are "offered on a market" by an entity implies that the two following criteria are fulfilled:

1. The entity does not provide goods/services for free (compensation criterion).
2. The entity can influence the economic conditions of its own service provision (agreement criterion).

2.4 EU Procurement Law: The Concepts of "Service" and "Undertaking" Meet in the Notion of "Economic Transaction"

Hatzopoulos holds as "indisputable" that at as soon as activities, even what he calls "genuinely non-economic activities", are to be awarded to some non-state actor, EU rules and principles on public procurement become applicable.[47] In that case, should we expect that even school education services are subject to EU

[47]Hatzopoulos 2011, p. 2: "some authors strive to demonstrate that certain Treaty rules also apply in the absence of an economic activity". In a similarly pragmatic manner, van de Gronden states that "[i]f a public authority externalises the provision of SSGI, the Directive for the award of public works contracts, public supply contracts and public service contracts comes into play, see van de Gronden 2013b, p. 150–151.

procurement law when their provision is entrusted against remuneration to non-state actors? To elude this troublesome question, some may put their thrust in *Humbel*, where the CJEU found that the provision of courses in national education systems is not a service in the meaning of the Treaties decision, or in the fact that school education services are not "prioritized" in EU procurement legislation. However, it is nowadays well-known that the CJEU's appreciation of whether an activity constitutes a service in the meaning of the Treaties may evolve, subject to policy and economic facts in the Member States, and that the Treaty principles imply procurement rules of primary law that the EU legislator must respect when adopting secondary law on procurement.

Against this background, this section examines the criteria determining that a transaction falls within the scope of EU procurement law. Hatzopoulos' assertion is taken as a premise, and it is therefore assumed that *something* must happen *in the process of planning the award of a non-economic activity to a non-state actor*, which transforms the activity into an activity that at least *can be* economic, as otherwise Article 2 in the SGI Protocol, providing that the provisions of the Treaties *do not affect in any way the competence of the Member States to commission and organise non-economic services of general interest,* does not make any sense. This section draws upon (1) the constitutionalisation of EU procurement law resulting from the CJEU's case law, (2) the Court's broad interpretation of the notion of "public contract" triggering the applicability of the procurement directives, which allows identifying the essential elements of procurement as an "economic transaction", and (3) the "certain cross-border interest", "in-house" and "public-public cooperation" doctrines, introduced by a CJEU aware that its interpretation of EU procurement rules may build "a bridge too far" and calls for limitations.[48]

The CJEU has established that, when organising the provision of public services, Member States must not only respect EU procurement directives, but also procurement rules based directly on the EU Treaties. By finding in particular that an obligation of prior publication for the award of certain contracts follows directly from a duty of transparency concomitant to a duty of equal treatment, the Court has elevated the dignity of "equal treatment" from an *objective* of EU procurement legislation to a *principle* directly deriving from the fundamental freedoms in Articles 49 and 56 TFEU.[49] The Court has justified its approach by a will to open up public contracts to the widest possible *undistorted* competition. Some authors claim that the Court's approach is justified by a principle of free competition that would *always* have formed a basic part of EU procurement rules.[50]

However, by grafting the principle of undistorted competition—a competition law principle—onto EU free movement principles, the Court has arguably

[48]These are the terms used by Hordjik and Meulenbelt to criticise the CJEU's approach, see Hordijk and Meulenbelt 2005, p. 126.

[49]See for instance Case C-324/98 *Telaustria AG* [2000] ECR I-10793, paras 60–62; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, para 50 and Case C-410/04 *ANAV* [2006] ECR I-3303, para 22.

[50]For instance, Sánchez Graells 2011, p. 195.

established the principle of competition as one of the fundamental principles of Community law on the award of public contracts.[51] As this approach has shaped a quasi-constitutional right to *equal* access to "public procurement", the delineation of this notion is decisive for the scope of EU procurement law, and for the Member States' freedom to organise public services, in particular social services. As "procurement" is not defined in the Treaties, and as EU primary law on procurement can evidently not apply unless certain *legal* criteria are fulfilled, an attempt to identify what essential elements a planned transaction must include to be covered by any EU procurement law, be it primary and secondary law, may be made by inferring these elements from the CJEU's case law

1. Interpreting the notion of "public contract" that triggers the applicability of the procurement directives and is defined therein
2. Exempting from EU procurement law transactions regarded as "in-house", lacking a certain cross-border interest, or public-public cooperation to achieve public service tasks.

Let us focus for the sake of simplicity on the definition of "public contract" in the Public Sector Directive as (1) a contract, (2) for pecuniary interest, (3) in writing, (4) between contracting authorities and economic operators, and (5) having as its object services, goods or works.[52] These basic criteria delineate procurement as an *economic transaction* between public authorities (or bodies governed by public law) and *economic* operators. It should be underlined here that the requirement that contracting authorities must have a "pecuniary interest" in this economic transaction does not per se entail that they conduct an economic activity, as follows from *FENIN*. Also, the requirement that the contract is "in writing" appears as a formal one, and may be construed by the Court as proving rather than constituting the existence of a contractual situation. From a detailed analysis of the CJEU's case law,[53] the following two elements emerge as essential for a planned transaction to be caught by EU procurement law:

(a) An *agreement between two autonomous wills*, finding a specific expression in the Directive's requirement of a contract (an agreement criterion). The CJEU appears to interpret this criterion functionally rather than formally, for instance when the authority's autonomy does not include the choice of the provider, or when the provider's autonomy is limited by the fact that the agreement is governed by public law and is concluded with authorities in their exercise of public power.[54]

[51]This argument was made by AG Stix-Hackl in her Opinion to Case C-247/02 *Sintesi* [2004] ECR I-9215, para 33.

[52]See Article 1(2) (a) Directive 2004/18/EC.

[53]See for instance Wehlander 2015, p. 167–178.

[54]Case C-399/98, *La Scala* [2001] ECR I-5409, para 73.

(b) An *offer of remuneration in exchange for services/goods/works*, finding a specific expression in the Directive's requirement of a pecuniary interest (a compensation criterion). This criterion supposes providers' economic interest but also contracting authorities' of gaining access, for themselves or third persons, to services, goods or works having economic value. In the Court's view, the fact that remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service does not exclude a contract's pecuniary interest, and does not exclude that it may constitute a public contract.[55] Also, the requirement that the object of the transaction must be "services" or "goods" is fulfilled as soon as the authority plans to offer remuneration for the services/goods in question, because this very planning shows that the services/goods at issue can be subject to an economic transaction.

In light of these criteria, determining the existence of "public contract" and by inference, of "public procurement", it is submitted that EU procurement rules (secondary or primary law rules) apply only inasmuch as, in the frame and under the conditions of the contract *planned*, the transaction is economic both in the meaning of free movement law and in the meaning of competition law. In the frame of an economic transaction covered by EU procurement law, operators must provide de facto for remuneration, and thus be "*economic* operators". In *CoNISMa* the CJEU has defined the notion of "economic operator" in a manner that is strikingly similar to the definition of the notion of "undertaking" in the field of EU competition law.[56] It emerges namely that "economic operator" in the meaning of the procurement directives is "any natural or legal person or public entity or group of such persons and/or bodies, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis and whether or not it is subsidised by public funds, which offers on the market, respectively, the execution of works and/or a work, products or services".[57]

As a result of this definition of "economic operator", it is submitted that in *CoNISMa* the CJEU has enlarged eligibility to take part to tendering procedures to the point where *in fact* it recognizes a freedom for any *potential* undertaking to compete for contracts covered or partly covered by the directives, which triggers a duty of transparency enabling to ensure equal access to the award procedure. This approach was confirmed in *Lecce* (Grand Chamber), where the Court also reaffirmed that Member States may regulate non-profit public entities "and inter alia authorise or not authorise them to operate on the market, taking into account their objectives as an institution", but that "if and to the extent that [non-profit] entities

[55]Case C-159/11 *Lecce*, [decided by the Grand Chamber on 19 December 2012, nyr], para 29. This approach is quite in line with the Court's interpretation of the notion of "remuneration" for the purpose of the fundamental freedoms.

[56]Case C-305/08 *CoNISMa* [2009] ECR I-12129.

[57]Ibid., see paras 28 to 30 read in combination.

are entitled to offer certain services on the market, they may not be prevented from participating in a tendering procedure for the services concerned".[58] Thus, in public procurement transactions, the economic character of the activity can be equivalently characterized in free movement terms "provided (actually) for remuneration" or in competition law terms "offered on a market".

The CJEU has certainly been aware that it challenged the acceptance of the masters of the Treaty by its "purposive approach",[59] where the basic criteria of applicability of EU procurement rules, identified above, entail that a wide range of transactions are covered by EU primary law on procurement and that a wide range of operators must be given access to such transactions. This explains doubtlessly the derogations it has opened for in its case law, as these derogations seem to fit well with the understanding proposed above of what triggers the applicability of any rule of EU procurement law. However, these derogations have been formulated in terms which are so nuanced that they create new uncertainties.

In *Teckal*, the CJEU established that a contract between a public authority and a person legally distinct from that authority falls outside EU procurement directives if it is "in-house", which is the case if the two following criteria are fulfilled:

(a) The authority exercises over the person at issue a control similar to the control it exercises over its own departments (the "control criterion")
(b) This entity carries out the essential part of its activities with the authority or authorities that control it (the "activity criterion").[60]

In *Parking Brixen* the Court found that these considerations could be transposed to service concessions only covered by primary EU procurement law as

> the principle of equal treatment and the specific expressions of that principle, namely the prohibition on discrimination on grounds of nationality and Articles 43 EC and 49 EC, are to be applied in cases where a public authority *entrusts the supply of economic activities to a third party*. By contrast, it is *not appropriate* to apply the Community rules on public procurement or public service concessions *in cases where a public authority performs tasks in the public interest* for which it is responsible by its own administrative, technical and other means, without calling upon external entities.[61]

Through this "nuanced" reasoning, the Court tells us arguably that in-house transactions may derogate from EU procurement principles,

– Not because the operator's activity is not economic (it may offer some of its services/goods on a market), but
– Because public authorities' prerogatives are essentially founded on their mandate to act in the public interest, and hence forbidding that they perform their

[58]Case C-159/11 *Lecce*, [decided by the Grand Chamber on 19 December 2012, nyr], para 27. This implies perhaps that the benefit of an advertising obligation is not only for operators whose activity was economic before they tendered.

[59]See Arrowsmith et al. 2011, p. 37.

[60]Case C-107/98 *Teckal* [1999] ECR I-8121, para 50.

[61]Case C-458/03 *Parking Brixen* [2005] ECR I-8585, para 61, emphasis added.

public interest tasks by using entities which *to a sufficient degree* must share their motivation to act in the public interest (and not to offer services/goods on a market) would be *inappropriate*.

The in-house doctrine reflects the Court's insight that, as long as "procurement" is not a well-defined constitutional concept of EU law, it is constitutionally "inappropriate" to extend the impact of pro-competitive EU procurement law on Member States' *administration* of services for which they have retained competence.

The CJEU's will to limit the impact of its approach—placing free competition at the heart of EU primary law on procurement—is also clear from *An Post* where it established that publication obligations following directly from the principle of equal treatment and the concomitant duty of transparency apply only to contracts having "a *certain* cross-border interest", in other words the transaction is economic but has not enough impact on EU's economic activities.[62] The Court regards objective criteria such as the contract's value and the place where it is carried out as relevant to assess this interest. In the Court's view, indications on such criteria may be laid down in national or regional regulation, but contracting authorities/entities must examine case by case whether a cross-border interest exists or not, and their appreciation is judicially reviewable, which supposes that the fundamental freedoms are normative whatever the case. Thus, the criterion "no certain cross-border interest" is not a truly "safe" exemption rule, even if the 2014 procurement directives try to take the lead by establishing an assumption that social services under a certain threshold are not of cross-border interest and need not be published *ex ante*.

In *Commission v Germany* there was no "in-house situation" and the cross-border interest was clear, the contract at issue concerning the continuous delivery of household waste by some municipalities to the municipality of Hamburg.[63] The Court could not justify a derogation by the transaction's lack of economic impact, and had to point explicitly at another decisive criterion, which the Court in that ruling chose to name "public service tasks" rather than "services of general interest". The relevance of the concept of SGEI for this derogation is studied in detail in Chap. 4.

It should finally be stressed that the concrete impact of the fundamental freedoms on the Member States welfare systems has grown not only as a consequence of the CJEU's interpretation of EU procurement law, but also because the Court tends to submit any public measures generating business opportunities on their territories—such as schemes combining authorizations and public funding—to principles of EU administrative law which coincide with "general principles of EU procurement law". A case in point is *Hartlauer*, where the Court found that Austrian rules which did not submit *all* private entities providing dental care to a requirement of authorization, did not pursue its social objectives consistently and systematically. It also found that the authorization system was not based on objective, non-discriminatory criteria known in advance, and adequately circumscribing the exercise by the national authorities of their discretion. By combining the

[62]Case C-507/03 *Commission v Ireland ("An Post")* [2007] ECR I-9777, para 29.

[63]Case C-480/06 *Commission* v *Germany* [2009] ECR I-04747.

Court's arguments, it appears that the authorization system was incompatible with the freedom of establishment, because it did not respect the principles of non-discrimination, equal treatment and transparency, which is exactly the same combination of principles as those governing procurement.[64] However, by contrast with procurement measures, systems of public funding through authorizations such as in *Hartlauer* are not submitted to any obligation of prior *publication*, which explains that the EU legislator introduced definitions of "procurement" and "concession" in the 2014 procurement directives, as seen in more detail in Chap. 7.

2.5 Conclusions: Closure of "Exit" from EU Law for Public Services Enhances the Need of Member States' "Voice"

2.5.1 Legal Meaning of "Economic Activity" as a Unitary Notion of EU Market Law

The analysis above allows submitting the following conclusions.

Firstly, the CJEU appears to make, in the three fields of Treaty market rules—free movement, competition, and procurement, a distinction between an "economic activity"/"economic transaction" and an activity/transaction that *can be* economic exists in the three fields or EU market law.

(a) An activity can be economic in the meaning of EU free movement rules if it consists in the provision of goods or services that *normally* (in the EU generally but not necessarily in the case considered) are provided for remuneration. An activity can be economic in the meaning of EU competition rules if it consists in providing services or goods that *can be* offered on the market (it fulfils the comparative test in *Höfner*).

(b) An activity *is* economic in the meaning of free movement law and as such entitled to free movement rights if it *actually* (in the specific case considered) consists in providing goods or services for remuneration. An activity *is* economic in the meaning of EU competition rules if it *actually* (in the specific case considered) consists in offering goods or services on the market (it fulfils the definition in *Pavlov*).

(a) and (b) interact through a "domino effect", as

– The fact that an activity *is* economic in one Member State or in cross-border transactions, shows that the activity *can be* economic at EU level in general, and
– The fact that the activity *can be* economic (is about services or goods which can be subject to economic transactions) shows that there is market potential, allowing to examine whether national rules constitute the cause of an absence of competition.

[64]Case C-169/07 *Hartlauer* [2009] ECR I-1721.

Second, regarding case (b) above, two criteria emerge as essential to determine that an activity *is* economic for the purpose of EU free movement law, competition law and procurement law:

1. A remuneration criterion: the entity at issue receives remuneration for providing the services/goods. Remuneration exists as soon as provision is not for free, and provision does not have to be for-profit. This criterion finds a specific expression in the procurement directives' requirement that the planned transaction has a pecuniary interest.
2. An agreement criterion: the remuneration can be seen as a market price for the provision, in the sense that the operator can agree *ex-ante* to provide the services/goods in question for this amount. This criterion finds a specific expression in the procurement directives' requirement of a contract.

In all fields of EU market law, the CJEU has widened the scope of what is an "economic activity"/"economic transaction" by a functional approach of the two criteria. It is therefore submitted that, at this stage in the development of the CJEU's case law, the notion of economic activity/transaction has a unitary meaning in EU market law, and that its definition in the field of free movement—provision of services/goods for remuneration—is equivalent to its definition in the field of competition—offer of services/goods on the market. Thus, the fact that an activity in a specific transaction/regulation is regarded as an economic activity for the purpose of EU free movement means that it is in that specific case also an economic activity for the purpose of EU competition rules, and vice versa. As will be seen in more detail in Chap. 7, this seems to be the Commission's point of departure in its state aid decision-practice.

Third, it emerges that the CJEU considers as "procurement" the planning of an *economic transaction* between contracting authorities and economic operators. The very *planning* of such an economic transaction shows that the activity *can be* economic, which involves per se that its object constitutes services or goods in the meaning of the Treaties. This explains Hatzopoulos' view, evoked above, that even "genuinely non-economic activities" covered by EU rules and principles on public procurement become applicable, as soon as they are to be awarded to some non-state actor.

2.5.2 Relevance of the Economic Character of an Activity/ Transaction for the Applicability of EU Rules on Free Movement and Competition

The CJEU's tests and doctrines analysed in Sects. 2.2 and 2.3 entail that EU market law affects national rules related to public services depending on three basic alternatives:

– If the activity of public service *cannot be economic*, neither the free movement nor the competition rules can apply. Therefore national rules governing the

public service are not "economic rules" and not constrained by the EU rules. This is the case of activities related to the exercise of public authority, which the Court seems to understand as an activity that *cannot be a service* (Articles 51 and 62 TFEU), and *cannot be offered on a/the market* (*Eurocontrol*, *Diego Cali*). However, EU procurement rules may apply to such activities, as soon as public authorities plan to award them to non-state actors against *remuneration*.

– If the activity of public service *can be economic but is not economic* in the specific case, EU competition rules are normally not applicable, but EU free movement rules are applicable to national rules related to the public service. This is the situation in *Freskot* where the public service was regarded as neither provided for remuneration nor offered on the national market due to the fact that it was regulated by national rules based on the principle of solidarity, but where it overlapped at least to a certain extent with services *normally* provided for remuneration. In this alternative, the national rules related to the public service are "economic rules" and must *accommodate* the fundamental freedoms related to services/goods which they affect. This "accommodation" may be regarded as setting lighter pressure on national rules than a strict duty of "compliance", but they can force a Member State to open a public service for competition.
– If the activity of public service in general *can be economic and is economic* in the specific case, the national rules affecting this activity must *comply with* both EU free movement rules and competition.

It is easy to see that the Court has developed a sophisticated tool box to integrate and facilitate the opening of national markets in the field of public services, in particular social services. Indeed, while the test that an activity is economic has to be made case by case, the test of whether it can be economic is made once and for all. Once it is established that a service is "normally" provided for remuneration (for instance because it is so in one Member State), national rules related to this service are a priori "economic rules" and must "make some place" for the fundamental freedoms which they affect. This does not mean that national rules related to that service would not be compatible with EU, but that they must be justified by the Member State as necessary to achieve missions or objectives of general interest. Also, in order to adapt to free movement imperatives, the national rules must normally be reformed, with the probable effect that the activity will become economic in that Member State too, as the criteria of market autonomy and remuneration are fulfilled on very tenuous grounds, according to the CJEU's case law.

2.5.3 Exit from EU Law Closed for Public Services Within Member States: An EU Constitutional Issue of Competence

These propositions may not seem so surprising. According to Azoulai, the fact that "EU law, in some of its provisions, has a practically unlimited field of application"

is "nothing that the generalists of EU law do not already know".[65] However, the analysis conducted in this chapter shows that the CJEU's implacable determination not to let the argument of solidarity stand in the way of EU integration through market law, leads to a situation where neither the solidarity doctrine in the field of competition law nor the *Humbel* doctrine in the field of free movement law can effectively shield national rules governing social services from being challenged under EU law.

In a legal perspective, this situation implies that there is simply no way for Member States to keep their welfare legislation and administration totally "outside" from EU market law, be it on policy grounds. If Hirschman's theory on "voice" and "exit" is applied to the Member States' political situation, it is easy to see that, as members of the Union, they cannot choose "exit" to lead their welfare systems to a desirable result for their community, and it should surprise no one that they have felt a pressing need to have their "voice" heard in EU law, in particular in the field of social services where they have repeatedly emphasized their wish to retain policy powers.

It may be argued that the CJEU has understood the legitimacy of this "voice" before other EU institutions, and that this understanding explains that the Court activated the Member States' possibility to invoke the SGEI rule in Article 106(2) TFEU. Azoulai submits that the Court has recognized the Member States' legitimate claim to retain their powers, in particular in the field of social services, through the "formula of retained powers" formulated first in *Duphar* and developed in *Schumacker* as follows:

> Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law.[66]

Azoulai argues that the formula's recurrence in the CJEU's case law amounts to the emergence of a new "total law doctrine", based on (1) the recognition of the Member States' essential own capacities within the EU and (2) the requirement to include certain under-protected interests and situations in the manner national authorities usually use to think and to act.[67] In his view, the formula of retained powers is related to Weiler's theory on "absorption"—illustrated by the *Casagrande* ruling—as one of four categories of mutation operated by the CJEU in the division of competences between the Community and the Member States, as both build on a distinction between the *existence* of Member States' competence

[65] Azoulai 2011, p. 192–219.

[66] Case C-279/93, *Schumacker* [1995] ECR I-225, para 21.

[67] Azoulai 2011, p. 211.

and their *exercise* of this competence.[68] However, Azoulai believes that the formula on retained powers goes further than absorption, and signals a new phase in the transformation of Europe, where the CJEU acknowledges the "raison d' être" of the Member States' retained powers in the European construction, which supposes that these powers can be exercised.

One may wonder what happened between Weiler's "absorption" and Azoulai's "totalization", and the explanation is arguably to be found in the Commission's White Paper of 1985, the Single European Act (SEA) and the Treaty of Maastricht, which all opened for market integration and not for social regulation. The Commission's dramatic shift of emphasis in competition law toward the problem of government interference with the competitive process was based on the view that "Community-wide liberalization of public procurement in the field of public services [was] vital for the future of the Community economy".[69] As noted by Gerber, this "public turn" had procurement law as the main "motor" and aimed at integrating the market in public sector activities, with a focus on state aid as a competition concern.[70]

In the pre-Lisbon Treaty absence of enumerated powers and in the name of market integration, the CJEU has effectively supported the Commission's public turn. However, the Court has also signalled that its determination to pursue market integration and apply the principle of EU law's supremacy did not mean that in "areas of reserved competence", the market objectives of EU law had a higher dignity than their own societal objectives. In other words, the CJEU, knowing that its

[68]In his classic essay on the transformation of the European Community between 1957 and 1991, Weiler argued that under a period of political stagnation, from 1973 to the mid-1980s, when the Treaty itself did not precisely define the material limits of Community jurisdiction, the Court's case law constituted evidence of a substantial change in the distribution of competences without resort to Treaty amendments. In his view, this had taken place through jurisdictional mutations in the concept of enumeration, which Weiler divided in four categories of mutation in the Court's case law, which he called extension, absorption, incorporation and expansion. He illustrated "absorption" by the *Casagrande* ruling. In that case, and on the basis of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2, Casagrande had requested annulment of a German law entitling children satisfying a means test to a monthly educational grant, but which excluded from entitlement non-Germans except stateless people and residents under a right of asylum. In a two-phase reasoning the Court stated that: "*Although educational and training policy is not as such included in the spheres which the treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training; Chapters 1 and 2 of Title III of Part Two of the Treaty in particular contain several provisions the application of which could affect this policy.*" Weiler held that in this reasoning, it was not the Community policy that encroached on national education policy, but instead the national educational policy that was impinging on Community free-movement policy and thus had to give way. See Weiler 1991, p. 2440, with reference to Case 9/74 *Casagrande* [1974] 773.

[69]Commission, "Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28–29 June 1985)" COM (85) 310, point 87.

[70]Gerber 1994, p. 137.

case law had closed "exit" from EU law for very sensitive areas of Member States' competence, was aware that it had to enhance Member States' capacity to have their "voice" heard if they were expected to remain loyal to the project of EU integration.[71] It is submitted that this is an essential explanation of the remarkable development of the Court's pre-Lisbon case law on based on Article 106(2) TFEU, as SGEIs have a good potential to clarify what a State wants to achieve through regulation, in particular through public funding of social services.

There is no doubt that some Member States have demanded a constitutionalisation of this case law in exchange for their adherence to the Lisbon Treaty, and thus, it may be concluded that indeed, the CJEU's case law on the definition and the relevance of the notion of "economic activity" can explain the necessity of a constitutional public service concept in the post-Lisbon Treaties.

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[71] In Azoulai's words, the question arises "how to safeguard the "essential functions" of Member States without undermining the "core" of EU integration? This indefinite oscillatory motion will repeat in the case law." Azoulai relates this "oscillatory motion" to the political and social context of distrust towards further integration and federalization of Europe, See Azoulai 2011, p. 206, footnotes omitted.

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