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## *EU competition law and public services*

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### 1. Introduction

The treatment of health care by European competition law encapsulates more clearly than almost any other public service a key dilemma: to what extent are public services subject to the norms of competition law and the internal market, or are they characterized by quite different principles of solidarity and citizenship, which make the application of market and competition principles inappropriate? As we shall see, neither the European courts nor the Commission has so far provided a completely clear set of answers to these questions, although important guidance recently has been apparent in case-law and Commission policy statements. In this chapter, I shall concentrate on the applicability of competition law to public services, and the extent to which they can be made subject to partial exemption from its rules because of their distinctive role.<sup>1</sup> I shall only refer in passing to the law relating to state aids and public procurement; these are of crucial importance and are inextricably related to competition law, but are the subject of a separate chapter.

### 2. Markets and social solidarity

Of course, an important theme of European Union policy has been to create a single internal market characterized by open competition, and a major element in this has been the development of a system of

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<sup>1</sup> A more detailed account of these and related issues can be found in T. Prosser, *The limits of competition law: markets and public services* (Oxford: Oxford University Press, 2005); see also W. Sauter, 'Services of general economic interest and universal service obligations as an EU law framework for curative health care', TILEC Discussion Paper 29, Tilburg University (2007).

competition law. The most important Treaty articles for this purpose are Articles 81 and 82 (there are also complex provisions dealing with mergers, but so far these have had limited importance in the health care field and so will not be covered in this chapter). Article 81 prohibits agreements between undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the common market (although exemptions may be granted under Article 81(3)), and Article 82 prohibits abuse of a dominant position by one or more undertakings. It is not difficult to see that these provisions may have a potentially important role in the health care field; examples will be given in the discussion of the case-law below, and more details will be provided in the following chapter. Essentially, they are likely to make it difficult for a market participant to attempt to coordinate activities with other participants, or to attempt to exploit its monopoly position, for example, to exclude potential competitors or to impose unfair terms on those with whom they contract. In this area, Article 86 is also of considerable importance. The first part of the Article is addressed to Member States, stating that, in the case of public undertakings or undertakings given exclusive or special rights, Member States must not make or maintain in force measures contrary to Treaty rules, notably those mentioned above in relation to competition. A particular concern has arisen where competition has been limited by law in order to prevent new competitors 'cream skimming' – in other words, seeking only the most profitable business while leaving only an unprofitable rump to the provider of a public service required to be available to all. The second part of Article 86, by contrast, permits limited relaxation of the competition rules in relation to some public services (or 'services of general economic interest', as they are termed in the Treaty). Thus, it provides a form of 'safe haven' for services that are not wholly suited for provision under competitive conditions.<sup>2</sup>

The law on all these questions is highly complex, being developed in detail both through the case-law of the European courts and through rule-making and guidance by the Commission.<sup>3</sup> Enforcement in the past has been a matter for the Commission, subject to review by

<sup>2</sup> Sauter, 'Services of general economic interest', above n.1, p. 31.

<sup>3</sup> For an excellent account, see A. Jones and B. Sufrin, *EC competition law*, 3rd ed. (Oxford: Oxford University Press, 2007).

the Court of First Instance and, on appeal, the European Court of Justice. However, since 2004, this system has been decentralized by giving the primary enforcement role to national competition authorities in each Member State and national courts before which private actions can be brought. As we shall see in a moment, this may be significant given the fundamental divergences in attitudes to the treatment of public services between different Member States; on the one hand, decentralization could be seen as promoting greater responsiveness to national sensitivities but, on the other, it makes a consistent approach more difficult given the major differences in national approaches. However, the basic point to be made at this stage is a simple one: the underlying purpose of the competition provisions is based on that of competitive markets as the best means of achieving two objectives. The first is that of maximizing economic efficiency through ensuring that goods are allocated to those who are prepared to pay most for them and that goods are produced at the lowest possible cost. The second is that of maximizing consumer choice through encouraging the entry into the market of competing suppliers.

The other relevant principle – and one particularly characteristic of health care – is that of social solidarity.<sup>4</sup> This has been noted in a number of areas of European law, and is based on a commitment to equality, notably to equal access to services irrespective of ability to pay. In this sense, the principle is based on an ideal of citizenship: that all public services are based on our inclusion in a community, not on our financial resources.<sup>5</sup> It is not difficult to see that this principle may come into conflict with market-based principles. Thus, a government may wish to coordinate a health service in order to guarantee equal treatment for all, rather than enhancing consumer choice, which may further promote inequalities. It may

<sup>4</sup> For detailed discussion of this theme and, in particular, the relationship between national and European Union versions of solidarity, see M. Ferrera, *The boundaries of welfare: European integration and the new spatial politics of social protection* (Oxford: Oxford University Press, 2005).

<sup>5</sup> For discussions of the role of citizenship in European Union law, see T. Hervey, 'Social solidarity: a buttress against internal market law?', in J. Shaw (ed.), *Social law and policy in an evolving European Union* (Oxford: Hart, 2000), pp. 31–47; and C. Barnard, 'EU citizenship and the principle of solidarity', in E. Spavanta and M. Dougan (eds.), *Social welfare and EU law* (Oxford: Hart, 2005), pp. 157–79.

wish to ensure that services are provided free or at prices that do not reflect underlying costs; again, this will be incompatible with the free play of markets, one of the aims of which is to distribute goods and services on the basis of willingness (and ability) to pay for the costs involved. As we shall see later, there is nothing in European law that prevents national governments from organizing health care systems on a basis of solidarity. However, where governments attempt to mix markets and solidarity-based provision, this is where difficulties may arise with competition law.

The highly political nature of these different principles complicates matters further, not only in the obvious sense that they represent fundamental choices about social organization, but also because they have been associated with the approaches of different Member States of the Union. Thus (to simplify a complex picture), the markets-based approach is often characterized as 'Anglo-Saxon' and associated with the United Kingdom, which is seen as almost a Trojan horse, bringing to the Union support for the unfettered market principles of the United States. By contrast, the solidarity approach is associated in particular with France, and can be seen both as reflecting its strong republican values of equal citizenship rights and as protecting a large and influential public sector. This conflict of views was seen, for example, in the European Council meeting of June 2007 designed to rescue parts of the draft Constitutional Treaty rejected by referendums in France and the Netherlands. The French prime minister achieved what was perceived as the major coup of removing the draft Treaty's inclusion of free and undistorted competition as an objective of the Union. This reflected a concern that the French referendum result was partly the outcome of a perception that the new Treaty was too 'Anglo-Saxon' and threatened public services based on citizenship. The removal was greeted with outrage in the United Kingdom and by some competition lawyers; however, this outrage tended to ignore the fact that competition is not currently one of the objectives set out in Article 2 of the Treaty – it only appears in Article 3 as an activity for achieving those goals. The main point is that both market-based principles and those of solidarity appear in Community law and the balance between them is highly contested and potentially politically incendiary. Once this background has been understood, we can now proceed to consider what role competition law plays in determining the scope of the two types of principle.

### 3. The scope of European Union Competition Law

Before considering in any detail the substantive provisions of competition law, the essential preliminary question is to determine its scope. To what bodies, carrying out what activities, will it apply? Unfortunately, this is a question to which no precise answer can be given, though the European Court of Justice has given some indications of possible answers in recent decisions.

The basic principle is that, in order to be covered by European Union competition law, the entity in question must be an undertaking. This term is not defined in the Treaty, but it is clear from the case-law that it does not matter whether the entity is public or private, or profit-making or non-profit; what is important is whether it is engaged in an economic activity.<sup>6</sup> The focus will be on the activity in question rather than the nature of the institution itself; thus, it is perfectly possible for an entity to be covered by competition law in relation to some of its activities but not others. The concept of an economic activity will exclude a number of fields of action of importance for health care. These include:

[M]atters which are intrinsically prerogatives of the State, services such as national education and compulsory basic social security schemes, and a number of activities conducted by organizations performing largely social functions, which are not meant to engage in industrial or commercial activity.<sup>7</sup>

For example, in the case of *Humbel*, the Court held that courses provided under a national education system were not ‘services provided for remuneration’ as ‘the state is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields’.<sup>8</sup> The concept may also exclude non-economic regulatory activities – for example, the control and supervision of airspace on safety grounds in *Eurocontrol* and anti-pollution surveillance services in *Calì*.<sup>9</sup>

<sup>6</sup> See Case C-41/90, *Höfner and Elser* [1991] ECR I-1979.

<sup>7</sup> European Commission, ‘Services of general interest’, Green Paper, COM (2003) 270 final, 21 May 2003, para. 45.

<sup>8</sup> Case 263/86, *Humbel* [1988] ECR 5365.

<sup>9</sup> Case C-364/92, *Eurocontrol* [1994] ECR I-43; Case C-343/95, *Calì* [1997] EC I-1588.

The most important exclusion from the concept of economic activities in relation to health care is that of organization on the basis of social solidarity.<sup>10</sup> This has arisen in a number of cases concerned with social security schemes where membership was compulsory. Thus, in the case of *Poucet and Pistre*,<sup>11</sup> the Court considered such a scheme in France, membership of which was compulsory, which provided a basic pension regardless of the financial status and health of the contributor, and which used the contributions of active members directly to finance the pensions of retired members, thus containing a central distributive element. According to the Court, the scheme fulfilled an exclusively social function; its activity was based on the principle of national solidarity and benefits paid bore no relation to contributions. More recently, the Court decided that Germany's state-run sickness funds, in which contributions are not related to risks and payments not related to contributions, did not constitute undertakings subject to competition law. They performed an exclusively social function, founded on the principle of national solidarity, and which was entirely non-profit-making. There was also equalization of costs and risks between different funds and no competition between them in relation to their basic activity of granting obligatory state benefits (although a degree of competition had been introduced between them in relation to contributions). The emphasis in this case was thus on the underlying purpose of the activity in question.<sup>12</sup> Not all funds will fall outside competition law, however. For example, in *Albany*, a Netherlands pension fund was found to be an undertaking as membership was optional, benefits were proportional to contributions, the same principle of capitalization was applied as that in private funds and there was competition with the private sector.<sup>13</sup>

It will be most helpful to illuminate the current law by contrasting two recent cases. The first, that of *BetterCare Ltd v. Director General of Fair Trading*,<sup>14</sup> was decided not by the European courts but by

<sup>10</sup> For detailed treatment, see Ferrera, *The boundaries of welfare*, above n.4, Chapter 4, in particular.

<sup>11</sup> Joined Cases C-159/91 and 160/91, *Poucet and Pistre* [1993] ECR I-637.

<sup>12</sup> Joined Cases C-264/01, C-306/01 and C-355/01, *AOK Bundesverband* [2004] ECR I-2493.

<sup>13</sup> Case C-67/96, *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

<sup>14</sup> *BetterCare Ltd v. Director General of Fair Trading* [2002] CAT 7.

the United Kingdom Competition Appeal Tribunal. Nevertheless, it includes detailed analysis of the relevant European law and provides a vivid illustration of the issues. The Competition Act 1998 includes a similar prohibition of abuse of a dominant position to that in the European Treaty. BetterCare ran private care homes and complained to the Office of Fair Trading that the local health and social services trust in Northern Ireland, its main customer, was abusing a dominant position through offering unfairly low prices and unfair terms in its purchases from BetterCare of residential and nursing care. The trust also provided its own care directly, and so could be seen as being in competition with the private provider. The Director General rejected the complaint on the basis that the trust was not acting as an undertaking in purchasing care for the disadvantaged funded by taxation. The United Kingdom Competition Appeal Tribunal allowed BetterCare's appeal. It rejected the argument that the trust was carrying out social functions, as this was not relevant to its position as an undertaking. This was distinguished from, for example, taking a regulatory decision on whether or not to register a residential home, which would have been outside the scope of the competition rules as 'the exercise of official authority'. The tribunal also rejected the Director General's view that the functions of the trust were based on the principle of solidarity. In doing so, it concentrated on the role of the trust in contracting:

[A]lthough the *funding* which [the trust] provides has a social purpose, the way in which [the trust] carries out or *delivers* its functions is *by using business methods* ... the contracts in question take place within a business setting and are as much commercial transactions from the trust's point of view as they are from the point of view of the independent providers.<sup>15</sup>

The European cases referred to above were distinguished as referring only to 'internal' solidarity between participants in the schemes, rather than 'external' solidarity between the trust and its independent providers.

This decision thus suggested that European competition law will apply to any entity that participates in markets, even if the purpose is a social one and even if the market is highly regulated. Indeed, it

<sup>15</sup> *Ibid.*, para. 234 (emphasis in original).

is difficult to think of any public institution – apart from one limited to policy-making – at least some of whose activities would not fall within the scope of competition law. There is an interesting postscript to the case: the Office of Fair Trading, on retaking the decision, concluded that there had been no breach of competition law by the trust, as it was not responsible for setting the prices paid to BetterCare. These were set by the relevant health board and Northern Ireland Government department, which were not undertakings when doing so, as they were not offering goods or services in a market but rather allocating public funds in order to discharge social functions.

This decision is to be contrasted with that of the European Court of Justice in the more recent *FENIN* case.<sup>16</sup> The Federación Española de Empresas de Tecnología Sanitaria (FENIN) is an association of the majority of companies that market medical goods and equipment to Spanish hospitals. It complained to the Commission that the organizations managing the Spanish health service were abusing their dominant position by delaying payment of their debts. The Commission dismissed the complaint on the grounds that the health organizations were not acting as undertakings when carrying out purchasing activities. This decision was upheld by the Court of First Instance on the grounds that what was important was not the purchasing as such, but the purpose to which the goods are put; in this case, this was the provision of services free of charge on the basis of universal cover, and so fell within the principle of solidarity. In the Court of Justice, the Advocate General, who analyses the facts and case-law and provides a preliminary opinion, agreed that the relevant issue was not the purchasing but the activities for which the purchases were to be used that mattered in determining whether competition law applied; he recommended that further findings be made to determine whether the activities of the health organizations were in fact economic in nature or based on the principle of solidarity. For example, the extent to which they competed with private organizations needed to be established.

The Court of Justice delivered a brief and somewhat cryptic judgement to the effect that:

[T]here is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of

<sup>16</sup> Case C-205/03, *FENIN* [2006] ECR I-6295.



that purchasing activity, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.<sup>17</sup>

If that use consisted of offering goods and services on a market, it would constitute an economic activity; in the case in question, FENIN had not suggested until the appeal stage that provision of treatment by the health service organizations itself constituted an economic activity, and so the Court had to accept that it did not.

At first sight, this decision seems to mark a major change from the *BetterCare* decision in that it is not the activity of participation in markets through purchasing that matters, but the purpose for which the goods and services are to be used. It may be possible, however, to distinguish the two cases in a way that would result in compatible principles. It should be remembered that, in *BetterCare*, the trust that was purchasing services from the private provider itself provided care services; thus, it was in competition with the provider in the market for care services, not just for purchasing. Therefore, the trust was engaged in an economic activity – not just in purchasing, but also in the provision of services themselves. This was the understanding of the *FENIN* decision subsequently adopted by the Office of Fair Trading in the United Kingdom, which announced that it would close cases alleging infringements of competition law concerning public bodies that were only engaged in purchasing in a particular market and not engaged in the direct provisions of goods and services in that market.<sup>18</sup>

At first sight, this complex case-law may appear to have led to an appropriate conclusion. If a Member State chooses to operate a health service predominantly on the basis of social solidarity, decisions of the bodies comprising it will not be covered by competition law. If, however, a Member State decides to introduce competition into the system – for example, by contracting services out to competing suppliers of health care provision or by creating a competitive internal market – then competition law will apply, as the various bodies involved will be acting as undertakings. This effective delegation of the applicability

<sup>17</sup> *Ibid.*, para. 26.

<sup>18</sup> Office of Fair Trading, 'The Competition Act 1998 and public bodies', Policy Note 1/2004.

of competition law to national authorities is in line with both the principle of subsidiarity, according to which no Community action should be taken where objectives can better be achieved by Member States, and the vesting of the primary responsibility for the organization and delivery of health care and medical care in Member States under Article 152 of the Treaty. It is also in line with the law relating to public procurement, which is likely to apply as services are opened up to competition.<sup>19</sup> The basic principle is also sound; as stated by the Advocate General in *FENIN*, it is that:

The power of the State which is exercised in the political sphere is subject to democratic control. A different type of control is imposed on economic operators acting on a market: their conduct is governed by competition law. But there is no justification when the State is acting as an economic operator, for relieving its actions of all control.<sup>20</sup>

The choice of system is up to the national authorities, but they must accept the consequences of their decisions.

However, there are two reasons why this division of responsibilities is not as neat as it may seem at first sight. The first is that it is unclear just how much competition needs to be introduced into a national system to make activities subject to competition law. After all, there are markets and markets, some highly regulated and others operating more freely; for example, the United Kingdom health service internal market, introduced by the Conservative Government in the 1980s, looked very different from the textbook competitive market for consumer products.<sup>21</sup> As Sauter has put it, the simple distinction between solidarity- and competition-based systems ‘complicates efforts to introduce competition gradually or partially, while doing so is frequently not only a political necessity but also desirable ... (e.g. to offer an adjustment period or transition phase, or to experiment with greater and smaller degrees of market freedom)’.<sup>22</sup> The case-law offers little guidance on how much competition is necessary

<sup>19</sup> See N. Timmins, ‘European law looms over NHS contracts’, *Financial Times*, 15 January 2007; and Chapter 9 in this volume.

<sup>20</sup> AG Opinion, Case C-205/03, *FENIN*, above n.16, para. 26.

<sup>21</sup> See, for example, A. C. L. Davies, *Accountability: a public law analysis of government by contract* (Oxford: Oxford University Press, 2001).

<sup>22</sup> Sauter, ‘Services of general economic interest’, above n.2, p. 3.

to make the Treaty provisions applicable, and in this respect it is unfortunate that procedural reasons in *FENIN* prevented further analysis of the extent to which provision of services was competitive, as proposed by the Advocate General. No guidance on this matter was provided by the Court of Justice in that case, although in the earlier *AOK-Bundesverband* case, the Court stated that ‘some competition’ (presumably of a limited extent) did not in itself make competition law applicable to activities otherwise based on principles of solidarity.<sup>23</sup>

The second complication in the apparently neat division of responsibilities between Member States and the competition authorities lies in the fact that, even if activities are covered by competition law, there is provision in the Treaty for the special treatment of public services. This brings us to our next important theme: the role of Article 86(2) of the Treaty in relation to services of general economic interest.

#### 4. Article 86(2) and services of general economic interest

This article is of sufficient importance to be worth quoting at some length:

Undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar 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.

This provision is clearly of enormous potential importance in the area of health care, permitting as it does partial exemption from the competition rules for some undertakings. The first question is, of course, that of what constitutes a service of general economic interest? This is primarily a matter for Member States themselves to determine. However, they are not entirely free in doing so: the European authorities can reject a decision based on a ‘manifest error’, and the Commission has made it clear that the public service mission of the

<sup>23</sup> Joined Cases C-264/01, C-306/01 and C-355/01, *AOK Bundesverband*, above n.13, para. 56.

undertaking must be clearly defined and ‘explicitly entrusted through an act of public authority’.<sup>24</sup> The last requirement does not oblige the use of statute; a contract would be sufficient. Such a clear definition is also necessary for state aids law. A relevant example of a service of general economic interest in the health care area, which will be examined in detail later, is that of the provision of ambulance services.

In applying the test of whether the rules of competition law would obstruct the performance of the tasks assigned to the undertaking, the test is one of proportionality. Thus, the Commission and Court will ask whether an exception to the rules is necessary for the undertaking to perform its task, and this question has been the source of considerable controversy. Key questions have been whether some other means of achieving the same goals might be available that is less restrictive of competition, and what the effect of failure to apply the exception would be.<sup>25</sup>

In early cases, the Court took a highly restrictive approach to this test, holding in effect that, for an exception to the competition rules to be justified, it must otherwise be completely impossible to perform the general interest mission.<sup>26</sup> Thus, only restrictions that were *indispensable* could be allowed, and if other means of performing the general interest tasks were available, Article 86(2) could not be used. This restrictive approach was particularly associated with the task of building a single internal market, and concerned markets where competition was feasible, such as telecommunications and civil aviation. The case that represented the first important application of a more generous approach was that of *Corbeau* in 1993.<sup>27</sup> Corbeau had set up a private postal service in competition with the Belgian postal service; the latter had been given exclusive rights to provide postal services, so he was prosecuted in the Belgian courts. The exclusive rights were justified on the need to provide a basic postal service at a uniform rate throughout Belgium, a classic example of a public service requirement accompanied by restrictions on competition aimed at avoiding ‘cream skimming’. The Court of Justice asked whether the restriction

<sup>24</sup> European Commission, ‘Services of general interest in Europe’, COM (2000) 580 final, 20 September 2000.

<sup>25</sup> For a more detailed discussion of different approaches to applying the test, see Sauter, ‘Services of general economic interest’, above n.1, pp. 24–6.

<sup>26</sup> See, for example, Case C-18/88, *RTT* [1991] ECR I-5941, para. 22.

<sup>27</sup> Case C-320/91, *Paul Corbeau* [1993] ECR I-2533.

on competition was necessary to permit the holder of the exclusive right to perform its task of general interest in economically acceptable conditions. On this basis, it accepted the legitimacy of the argument that the exclusive rights were necessary to avoid 'cream skimming' so long as competition would compromise the economic equilibrium of the service of economic interest. Thus, the test was now not whether the public service task would be impossible if competition rules were fully applied, but whether doing so would undermine the economic equilibrium of the undertaking. The court did not ask whether alternative means existed that were more compatible with free competition, such as the establishment of a universal service fund available to all operators of unprofitable services.

This less restrictive approach is also apparent in a number of later cases. For example, in *Almelo*<sup>28</sup> – a case concerning exclusive purchasing and sales contracts between electricity companies required to provide a universal, uninterrupted service at uniform national rates in the Netherlands – the Court, in determining whether restrictions on competition must be allowed to permit the undertakings to perform their general interest task, took into consideration the costs the undertakings had to bear, as well as legislation, particularly that concerning the environment, to which they were subject. In cases concerning gas and electricity monopolies, it was also stated explicitly that it would not be necessary to show that the survival of the undertaking would be threatened by the application of the competition rules, nor that there was no other conceivable means of achieving the public interest goals.<sup>29</sup> This greater openness to the use of the exception from the competition rules in Article 86(2) was accompanied by a new provision in the Treaty of Amsterdam in 1997, introducing a new Article 16 to the EC Treaty. This Article, 'given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion', required the Community and Member States to take care that services of general interest 'operate on the basis of principles and conditions which enable them to fulfil their missions'. Though the meaning of this provision remains obscure, it was likely to have encouraged a greater awareness of the importance of

<sup>28</sup> Case C-393/92, *Almelo v. NV Energiebedrijf Ijsselmij* [1994] ECR I-1477.

<sup>29</sup> See, for example, Case C-157/94, *Commission v. Netherlands* [1997] ECR I-5699, paras. 43, 58.

such services in both administrative decisions by the Commission and the case-law.<sup>30</sup>

A useful illustration of this approach can be found in a case drawn from the field of health care. *Abulanz Glöckner* concerned an application by a private ambulance service for an authorization to provide non-emergency ambulance services.<sup>31</sup> It had previously held an authorization, but new legislation by the German *Länder* had provided that an authorization was to be refused if granting it would be likely to have an adverse effect on the general interest in the operation of an effective public ambulance service. This restriction had previously only applied to emergency ambulance services, but now covered non-emergency services too. Renewal of the authorization was thus refused on the grounds that the public ambulance service (run by medical aid organizations such as the Red Cross and which provided both emergency and non-emergency services) was operating below capacity because of the need to provide universal geographical coverage around the clock, including in remote areas, and rapid response times in emergencies. In effect, granting an authorization would permit a form of ‘cream skimming’, as the costs of expensive emergency coverage were in part offset by revenue from non-emergency services. The private firm argued that there was an abuse of a dominant position on the part of the public ambulance services and that the conferral on them of what was in effect an exclusive right to provide services was in breach of Article 86(1). The public authorities argued that, even if there was such a breach, Article 86(2) would apply as it was necessary to protect the public ambulance service against operators who would provide their services only at profitable peak hours in densely populated and easily accessible areas. In other words, if competition were to be introduced, ‘there is thus a serious risk that the inevitable losses of the public ambulance service are socialized, whilst its potential profits are privatized’.<sup>32</sup>

The Court of Justice held that the public ambulance services were undertakings to which competition law applied, and that they had been

<sup>30</sup> For analysis of Article 16, see M. Ross, ‘Article 16 EC and services of general interest: from derogation to obligation?’, *European Law Review* 25 (2000), 22–38.

<sup>31</sup> Case C-475/99, *Abulanz Glöckner* [2001] ECR I-8089.

<sup>32</sup> AG Opinion, *ibid.*, para. 182.

given exclusive rights to provide services that could lead to abuse of a dominant position. However, the provision of emergency ambulance services with universal round-the-clock availability was incontestably a service of general economic interest, so it was necessary to determine whether the restriction on competition was necessary for the public service to operate in conditions of economic equilibrium. The provision of emergency and of non-emergency ambulance services were so closely linked that they both fell within the concept of a service of general economic interest, and:

The extension of the medical aid organisations' exclusive rights to the non-emergency transport sector does indeed enable them to discharge their general-interest task of providing emergency transport in conditions of economic equilibrium. The possibility which would be open to private operators to concentrate, in the non-emergency sector, on more profitable journeys, could affect the degree of economic viability of the service provided by the medical aid organisations and, consequently, jeopardise the quality and reliability of that service.<sup>33</sup>

Only if it could be established that the public services could not meet demand at all times would the general interest argument for restricting the entry of competitors to the market not apply.

What is apparent in this case is thus a less restrictive approach to the need to justify the necessity of restrictions on competition for the proper performance of services of general economic interest. Although the Court used the test that the restrictions must be necessary to permit the service to operate in conditions of economic equilibrium, it emphasized in doing so that the 'quality and reliability' of the service must not be jeopardized. Thus, there does seem to be a recognition of the importance of the provision of high-quality and universal public services here. What is important, though, is that the public authorities must be prepared to justify such provision through positive arguments showing why restrictions on competition are justified. In effect, here we see a requirement of transparency rather than direct hostility to non-market forms of provision. Such a move towards requiring transparency is also apparent in recent developments in the approach by the other Community institutions in this area.

<sup>33</sup> *Ibid.*, para. 61.

## 5. The European Commission and political reform

Of course, the European courts are not the only important institutions in the European Union; the Commission also has made important statements and decisions on competition law and public services, and the Council and (to a much lesser degree) the Parliament have had major roles in reform. After the Maastricht Treaty of 1992, the political conflict between different Member States became particularly strong, especially as it had added to the EC Treaty a new Article 4 stating, *inter alia*, that the activities of the Member States and the Community shall include ‘the adoption of an economic policy which ... is conducted in accordance with the principle of an open market economy with free competition’. This was perceived by some Member States as a threat to their distinctive traditions of public service. One outcome was the publication by the Commission of a Communication on services of general interest in 1996 – note that the term ‘services of general interest’ covers both the services of general economic interest discussed above and non-market services not subject to competition law.<sup>34</sup> This summarized the existing law and covered sectoral liberalization and the development of universal service obligations. It then summarized the Commission’s future objectives, including introducing evaluation tools to assess the operation, performance and competence of services of general interest on a sector-by-sector basis and greater openness on policy in this area. However, the Commission rejected demands for amendment of what is now Article 86 to provide greater protection for services of general interest. Although there was recognition of the value of services of general interest, they were placed firmly within a single market context and their legitimate role appeared limited to cases of market failure.

As mentioned above, the Amsterdam Treaty in 1997 introduced a new Article 16 to the Treaty, which required the Community and Member States to take care that services of general economic interest ‘operate on the basis of principles and conditions which enable them to fulfil their missions’. It also included a declaration that these provisions should be implemented ‘with full respect for the jurisprudence of the Court of Justice, *inter alia* as regards the principles of equality of treatment, quality and continuity of such services’ and an important protocol on

<sup>34</sup> European Commission, ‘Communication on services of general interest in Europe’, COM (96) 443 final, 11 September 1996.



public broadcasting. Although the meaning of these provisions was unclear, it did seem to result in a more positive approach to services of general interest in later statements of policy. The Commission produced a further Communication on services of general interest in 2000, which emphasized more clearly the importance of ensuring the good functioning of such services rather than seeing them simply as unwelcome impediments to a single internal market.<sup>35</sup> A particularly important theme was that of the need for transparency. Thus:

[I]n order to fulfil their mission, it is necessary for the relevant public authorities to act in full transparency, by stipulating with some precision the needs of users for which services of general interest are being established, who is in charge of setting up and enforcing the relevant obligations and how these obligations are going to be fulfilled.<sup>36</sup>

The Commission also called for recognition of the link between ‘the special place of services of general economic interest in the shared values of the Union’ and European citizenship.<sup>37</sup> This was to some extent forthcoming in Article 36 of the Charter of Fundamental Rights adopted in 2000, entitled ‘Access to Services of General Economic Interest’:

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

The importance of this provision should not be exaggerated; legally, it is not directly enforceable, and the potential impact of a commitment to ‘recognize and respect’ is unclear. In comparison with more market-based rights and freedoms, including those of free movement, the practical effects of the provision are limited. Nevertheless, in conjunction with Article 16 it does represent a more positive recognition of the importance of social rights and social cohesion.<sup>38</sup>

<sup>35</sup> European Commission, ‘Services of general interest, above n.24.

<sup>36</sup> *Ibid.*, para. 9. <sup>37</sup> *Ibid.*, para. 64.

<sup>38</sup> See M. Ross, ‘Promoting solidarity: from public services to a European model of competition’, *Common Market Law Review* 44 (2007), 1057–80, at 1063–4, in particular.

The Communication also suggested drafting a framework directive setting out consolidated principles for the treatment of services of general economic interest. This was supported by the Parliament, and the Barcelona Summit in 2002 asked the Commission to undertake more work on this; the result was the Green Paper of 2003.<sup>39</sup> The Green Paper also took a positive approach to services of general interest, considering them to be ‘a pillar of European citizenship, forming some of the rights enjoyed by European citizens and providing an opportunity for dialogue with public authorities within the context of good governance’.<sup>40</sup> A major focus was on developing principles of good governance that could be applied to services, derived from experience in the liberalized sectors of telecommunications, energy and postal services, from Article 16 and from the Commission’s own White Paper on governance.<sup>41</sup> Examples of principles drawn from liberalized sectors were those of universal service, continuity, quality of service, affordability and user and consumer protection; these could be used to characterize a Community concept of services of general economic interest. In discussing principles of good governance, the Commission emphasized the need for the proper and transparent specification of public service requirements and the need for a transparent selection process for providers; it also built on earlier work on the means of evaluating the performance of services of general interest.

A theme was thus becoming very clear from the Commission’s work. Rather than focusing on services of general interest as obstructions to the creation of a single market, the emphasis was on the need for transparency, especially in the definition of public service requirements and the choice of the organization providing the service, and on good governance. However, the later White Paper, issued by the Commission after consultation, was much more qualified and cautious.<sup>42</sup> Although the consultation had shown a consensus on the importance of services of general interest as a pillar of the European model of society and on the importance of universal service for social and territorial cohesion, it was also necessary to respect the diversity

<sup>39</sup> European Commission, ‘Services of general interest’, above n.7.

<sup>40</sup> *Ibid.*, para. 2.

<sup>41</sup> European Commission, ‘European governance’, White Paper, COM (2001) 428 final, 25 July 2001.

<sup>42</sup> European Commission, ‘Services of general interest’, White Paper, COM (2004) 374 final, 12 May 2004.

of different types of service – for example, the difference between social and health services and network industries such as telecommunications and energy. The proposals were almost entirely for soft law rather than a binding framework directive, and the need for the latter would be reconsidered after the coming into effect of the proposed Constitutional Treaty. In terms of later developments, important documents were issued on state aids and on procurement in 2005 and 2006; these will be considered in Chapter 9. The draft Constitutional Treaty produced by the European Convention in 2003 proposed only relatively minor changes to the provisions relating to services of general interest, notably an amendment to Article 16 providing for a new framework directive to define the principles and conditions that would enable services of general economic interest to fulfil their missions.

As is well known, the Constitutional Treaty was rejected in referendums held in France and the Netherlands, in the former case apparently in part because of concerns about possible threats to Continental traditions of public service by what was perceived as an ‘Anglo-Saxon’, pro-competition approach contained in it. The Lisbon Treaty agreed in October 2007 includes two relevant amendments. It would amend Article 16 to permit the Parliament and the Council to establish (by means of regulations) principles and conditions, particularly economic and financial conditions, enabling services of general economic interest to fulfil their missions. Thus, these institutions, especially the Parliament, would potentially have a greater role in rule-making, and this could include, for example, setting out requirements for good governance.<sup>43</sup> However, the Lisbon Treaty also includes a protocol on services of general interest attempting to clarify Article 16 by stating that the shared values of the Union include, in particular:

- the essential role and wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users;

<sup>43</sup> See Sauter, ‘Services of general economic interest’, above n.1, pp. 5–6; and, for a discussion of some of the difficult issues involved, M. Krajewski, ‘Providing legal clarity and securing policy space for public services through a legal framework for services of general economic interest: squaring the circle?’, *European Public Law* 14 (2008), 377–98.

- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or culture situations; and
- a high level of quality, safety and affordability, equal treatment and the promotion of universal service and of user rights.

The protocol also states that the provisions of the Treaties ‘do not affect in any way the competence of Member States to provide, commission and organize non-economic services of general interest’. This latter provision would seriously limit any attempt to extend Community action into non-economic services of general interest, as had been suggested in the Green Paper.

What seems now to be apparent, then, is a further shift of emphasis. Rather than stressing the role of the Commission and European law in promoting public service values and good governance in services of general interest, the emphasis is now on the role of Member States and the diversity of different types of services of general interest. This is in keeping both with the concerns of Member States that a European model of public services might undermine their own distinctive traditions, and the less optimistic European vision after the setbacks to the Constitutional Treaty. Nevertheless, there will continue to be Community action in these areas; in a new Communication on services of general interest, the Commission states that it envisages such action as taking the form of providing legal guidance on cross-cutting issues such as the state aid rules, developing further the sector-specific policies in fields such as energy and transport, and monitoring and evaluating services on a sector-by-sector basis.<sup>44</sup>

## 6. Conclusions

Despite the complexity of the law described above, it is possible to reach some conclusions about the application of competition law to public services, including those in the health sector. In an earlier discussion of social solidarity in European law, Hervey concluded that this concept ‘has the potential to be an adequate means of protection

<sup>44</sup> European Commission, ‘Services of general interest, including social services of general interest: a new European commitment’, COM (2007) 725 final, 20 November 2007.

for the “European social model”; a buttress against internal market law’.<sup>45</sup> There are two reasons why this may remain true at the level of principle in the area of competition law. The first is that the basic choice for the organization of health services on the basis of social solidarity or of competition lies with the Member States; if they choose the former, competition law will not apply. The second is that the special treatment of services of general economic interest is now well recognized and does, in principle, respect the special needs of public services to provide a universal service at uniform rates, inevitably limiting opportunities for competition. Moreover, assuming that the proposed new protocol to the Treaty is adopted, this provision will probably reinforce the degree to which Member States are permitted autonomy in organizing public services and will confirm that competition law is not applicable to non-economic services of general interest. The stress in recent case-law and other legal provisions has been on the need for transparency in the organization of public services through the proper definition of the tasks of general economic interest rather than treating them as unacceptable limits to the working of the internal market.

However, when one looks at the practical implications of the current state of the law, the position is much less clear. The first problem is that, in practice, there is not likely to be a clear distinction between a service based on social solidarity and one based on markets and competition. Health provision increasingly takes the form of a mixed economy, and the Court of Justice has not made it clear just how much competition in provision is necessary to bring the system within the scope of competition law. The second problem lies not in competition law itself but in its interaction with other areas of European law. Thus, it is artificial to separate competition law from the law of state aids and public procurement, as all are closely intertwined and share the objective of a freely operating internal market.

To some extent, recent developments in these two areas do reinforce the autonomy of Member States. Thus, the 2005 Commission decision on state aids exempts public service compensation granted to hospitals carrying out services of general economic interest from the scope of those state aids that require notification; the state aid rules,

<sup>45</sup> Hervey, ‘Social solidarity’, above n.5, p. 33; and Ferrera, *The boundaries of welfare*, above n.5, pp. 252–3.

of course, do not apply to non-economic services based on solidarity for the reasons set out above.<sup>46</sup> However, important conditions of transparency are a prerequisite for the exemption, including advance specification of the public service obligations in question and the parameters for calculating compensation. These were derived from the decision by the Court of Justice in the *Altmark* case, which set out the general position on state aids and public service compensation.<sup>47</sup> One implication of the case was that, although allocation of public service tasks through competitive tendering was not necessary, adopting this procedure would simplify compliance with the conditions. Secondly, health and social services procurement contracts are exempted from the full public procurement procedures. However, more limited requirements exist for advertising and impartial procedures for contracts outside the scope of the full procurement rules. These will be discussed in more detail in Chapter 9, but, given the uncertainty about the scope of competition law, and doubts as to the precise circumstances in which state aid and procurement rules will apply, the temptation for Member States may be to adopt a full process of competitive tendering for services to avoid future challenges. This in itself has well-documented problems, including disruption to the provision of services due to periodic tendering, and a ‘race to the bottom’ in staff terms and conditions in an effort to be the successful tenderer. As a matter of principle, European competition law respects the autonomy of Member States to determine how public services should be organized, but once a Member State departs from a model predominantly based on solidarity, the uncertainty of the law may make it difficult to avoid rapid changes towards a much more consistently market-based system, despite the potential role of the exception for services of general economic interest in creating a ‘safe haven’ from the competition rules.

<sup>46</sup> Commission Decision on the application of Article 86(2) of the EC Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ 2005 No. L312/67.

<sup>47</sup> Case C-280/00, *Altmark Trans GmbH* [2003] ECR I-7747.