Welfare Regulation in the European Union: Politics Still Withdrawn

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Abstract

Contemporary social Europe operates within a political deficit. The political deficit is a consequence of an increasing set of veto actors, their split preferences and inbuilt joint decision traps. At the same time, however, contemporary social Europe moves forward at considerable speed. During the last decade, the European Court of Justice has advanced welfare integration in the European Union (EU), contrary to defined political preferences. This paper examines the interplay between politics and law in the cases of EU healthcare regulation and regulation of social minimum benefits, and questions how the course of social regulation is steered and substantiated, despite a fragmented political mandate.

1. Introduction

Between the many regulatory competences of the European Union (EU), the competence to regulate welfare has not formally been granted to the supranational polity. The consequences of many veto actors, their split preferences and inbuilt joint decision traps in the EU decision-making processes at first hand suggest that a restributive polity is the 'road not taken' in the EU (Scharpf 1988, 2002, 2006). The fragmented features of the political mandate to social Europe have never managed to create a coherent supranational welfare polity, but has instead produced scattered outputs, some close to lowest common denominator. Activist social policy in the EU has had limited success (Leibfried 2005) or is based on the much vaguer mandate without posing binding obligations on the member states such as the OMC.

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Nevertheless, this paper argues that social regulation continues to move forward in the European Union in both substantive and effective manner and moreover with redistributive consequences, due to judicial activism. This paper thus argues that legal integration continues to progress social Europe much beyond apparent political stalemate. Furthermore, Court driven social regulation has by its consequences furthered beyond the classic 'regulatory function' into the 'redistribution function' as defined by Majone (Majone 1994; 1996). In part, social regulation may be reasoned in increasing the allocative efficiency of the market, but its dynamic evolution means transfer of resources from one group to another and intervenes in how public goods and benefits are to be consumed and accessed. Thus social regulation has redistributive consequences for the peoples of Europe.

More recent developments substantiate that social Europe continues to shape and take direction despite political gridlocks, but instead through remarkable judicial innovations. During winter 2007 and spring 2008, we have seen the European Parliament veto the Commission's initiative on healthcare across borders, delays in the expected proposal on anti-discrimination and furthermore the Commission abandoning to include discrimination protection for homosexuals after pressure from Germany among other member states. At the same time, the Court has already and in rather detailed manner patterned healthcare governance in the EU. In addition, the Court has recently ruled that same-sex couples are entitled to equal treatment concerning pension rights.[1] Furthermore, concerning labour market policies, the Court has received strong criticism for its interpretations in the cases of Laval[2] and Rüffert[3], argued to favour the internal market principles on the freedom to provide services and labour mobility at the expense of national and regional agreements on local pay and minimum wage. Although political responses to the Court rulings have been many and strong, among other reactions claiming change of treaty or secondary legislations, collective political actions are still awaited – and likely to remain echoes of short term outbursts, gradually silenced by the complexities of joint actions, institutional thresholds and – eventually – changed preferences.

[1] Case C-267/06, *Maruko*, 1. April 2008.
[2] Case C-341/05, *Laval*, 18. December 2007.
[3] Case C-346/06, *Rüffert*, 3. April 2008.

The objective of this paper is two-fold. First, to analyze long run but also rather recent developments of EU social regulation in order to examine the state of social Europe anno 2008. Second, against this background to discuss the institutional interplay between politics and law in giving direction and substance to social Europe. The theoretical and empirical question in focus here is whether the European Court of Justice (ECJ) steers the course of social regulation in the absence of politics – or politicians are the central decision-makers, proactively shaping and in control of the development?

This paper analyses two case studies on social regulation. The first is *healthcare regulation* in the EU in terms of *patient mobility*. The second case concerns EU regulation of social minimum benefits. Both regulation processes are shaped through subtle steps of integration, and with different encounters between law and politics. Healthcare regulation unfolds within the time span 1998-2008, whereas regulation on *social minimum benefits* extends the analytical time span over more than three decades from initial integration in the 1970s to 2007.

Below the paper is structured in three main sections; part 2) discusses theoretical viewpoints on legal autonomy in the EU integration process versus political power, part 3) analyses healthcare regulation in the EU and part 4) analyses EU regulation on social minimum benefits. Finally, some concluding remarks are provided.

2. Which institution steers the course of social regulation?

Theoretically, the functions and autonomies of the European Union's core institutions vis-à-vis one another are disputed. The manoeuvrable scope to either further or restrict European integration is often disputed through the theoretical lenses of supranationalism versus intergovernmentalism or viewed as a 'legal-politics game' (Garrett, Kelemen & Schultz 1998; Garrett and Tsebelis 2001; Moravscik 1993; Alter 1998, 2001; Burley & Mattli 1993; Stone Sweet and Sandholtz 1998). In focus of the discussion is to what extent the European Court of Justice pushes integration beyond the preferences of member state politicians or, on the other hand, the extent to which politics controls legal integration. Below some of the central disagreements between the two approaches will be outlined.

2.1 Judicial Activism Beyond Politics?

The European Court of Justice is generally regarded as having an unusually influential position, compared with other international courts. No matter whether scholars view the Court as a restrained supranational organisation with a conditioned scope of manoeuvre, or an actor in its own right and with a high degree of autonomy, it is widely agreed that the ECJ has managed to further integration (Garrett, Kelemen & Schultz 1998, p. 149; Moravscik 1993, p. 513; Alter 1998, p. 121; Burley & Mattli 1993). The former set of scholars emphasise that political power continues to set the course of integration, and that Court behaviour is conditioned by member states interests and affected by the reactions it anticipates from EU politicians (Tsebelis and Garrett 2001). The latter set of scholars argues to the contrary. Legal, neo-functional scholars, as well as scholars of comparative politics, have claimed that the European Court of Justice should be accredited its own part in European integration dynamism, and that it does act as a policy maker in its own right far from always within member state control (Weiler 1991, 1993, 1994; Shapiro 1999; Burley & Mattli 1993; Mattli & Slaughter 1995; Pierson 1996; Alter 1998, 2000, 2001; de Búrca 2005).

However, a point to which discussion continually returns is why member governments allow a supranational organisation, serving as an agent, to expand its autonomy, to define competencies and to limit the role of politics.

One explanation is that law masks politics (Burley & Mattli 1993, p. 44; Beach 2001, pp. 46-47) and that the political implications of a legal ruling are unlikely to be revealed in the first place (Alter 1998; 2001). The argument explains political non-action. It pictures law and politics as two distinct spheres, which do not follow to the same logic, and instead respond to very different ones. According to this argument, lawyers and judges evidently take a long term interest in the evolution of law, whereas politicians have short term interests, and react to judicial activism for its immediate impact and not for its potential one. To lawyers and judges, case-law is interesting for its establishment of precedent. For politicians, the rather short term impact of a case is what makes it important – or not. Politicians tend to decide on the basis of short term horizons (Pierson 1996).

However, should politicians wish to act and restrain the legal praxis of the Court, they are confronted with varying, but considerable, institutional barriers. 1) To limit the mandate of the Court of Justice would require a Treaty amendment, and thus unanimity as well as ratification by

national parliaments. 2) Should member states wish to correct one of the Court's interpretations of the Treaty, this would equally require a Treaty amendment – and unanimity. To rule in the Court through the means of a Treaty amendment is severely constrained by the fact that, besides unanimity, it would require national processes of ratification, meaning referendums for several member states, or approval by national parliaments 3) If politicians wish to overrule a legal interpretation of secondary legislation, it can be done by the Council's amendment of the legislation, which clarifies the points of dispute. Such a political correction would require unanimity or qualified majority voting, depending on the decision making procedure. These different decision-making rules thus constitute the thresholds to sanction a legal course of integration. In calling back the Court, politicians are confronted with the severity of joint decision traps (Scharpf 1988, 2006). Control has thus escaped them.

This considerable manoeuvrable scope and decision-making power of the European Court of Justice is contradicted of the political power approach.

2.2 Politics Overturning Law?

The political power approach argues the other way round. The basic argument of the political power approach is that, ultimately, member states control the Court and thus the process of legal integration. The Court does not have the autonomy to rule against the more powerful states, but must generally bend to their interests (Garrett 1992, p. 537; p. 552). Court behaviour is conditioned by member states interests and strongly affected by the reactions it anticipates from EU politicians (Tsebelis and Garrett 2001)

In a set of articles written in the 1990s, Geoffrey Garrett and co-writers pose the argument that control of the course of integration has not escaped national governments due to legal integration. On the contrary, legal integration has largely taken place when it has been politically supported. The political power approach pictures the Court of Justice as a strategic actor, sensitive to political constraints and preferences (Garrett 1992, 1995; Garrett & Weingast 1993; Garrett, Kelemen & Schultz 1998).

In contrast to neo-functionalism, the approach introduces a focus on politics in the process of legal integration - or disintegration. By bringing in political power as a (co)determinant for Court decisions, assumptions on neo-functional self-sustaining dynamics are criticised (Stone Sweet and Sandholtz 1998; Burley and Mattli 1993). Far from being self-sustained, dynamics are politically sustained, and law is not shielded from political pressures. Politics is seen as ever present and if judicial activism oversteps what member governments can accept, politicians will attempt to overturn or evade the legal decision. Politics respond actively to law.

The relationship between politics and law is illustrated in 'the legal politics game' by Garrett, Kelemen & Schultz (1998, pp. 152-154). The 'game' drawn out by Garrett, Keleman and Schultz re-focuses the role of politics and instead points out the limits of legal integration.

In part, the stage game pictures the political reaction to a Court decision which goes against defined preference(s). If the condemned member state chooses to challenge the ruling of the Court, it has three ways to react. i) It may overtly or covertly evade the decision. ii) It may work for a collective overturning of the decision, i.e. re-regulation. iii) It may propose a revision of the Treaty. Other member governments may either support the overruling of the judicial activism of the Court, through re-regulation or ultimately through a Treaty amendment. Or, they may not support the proposal to correct or constrain the Court, in which case the litigant member state will either continue its defiance alone, or finally choose to accept the decision.

According to the political power approach, this is the temporary end of the legal politics game, but the game continues with new rulings of the Court and political reaction. The infinite repetition of the game directs the evolution of legal integration. In this sense, and according to the political power approach, the process of legal integration is shaped dynamically, but not apolitically.

2.3 Deciding social regulation – politics versus law

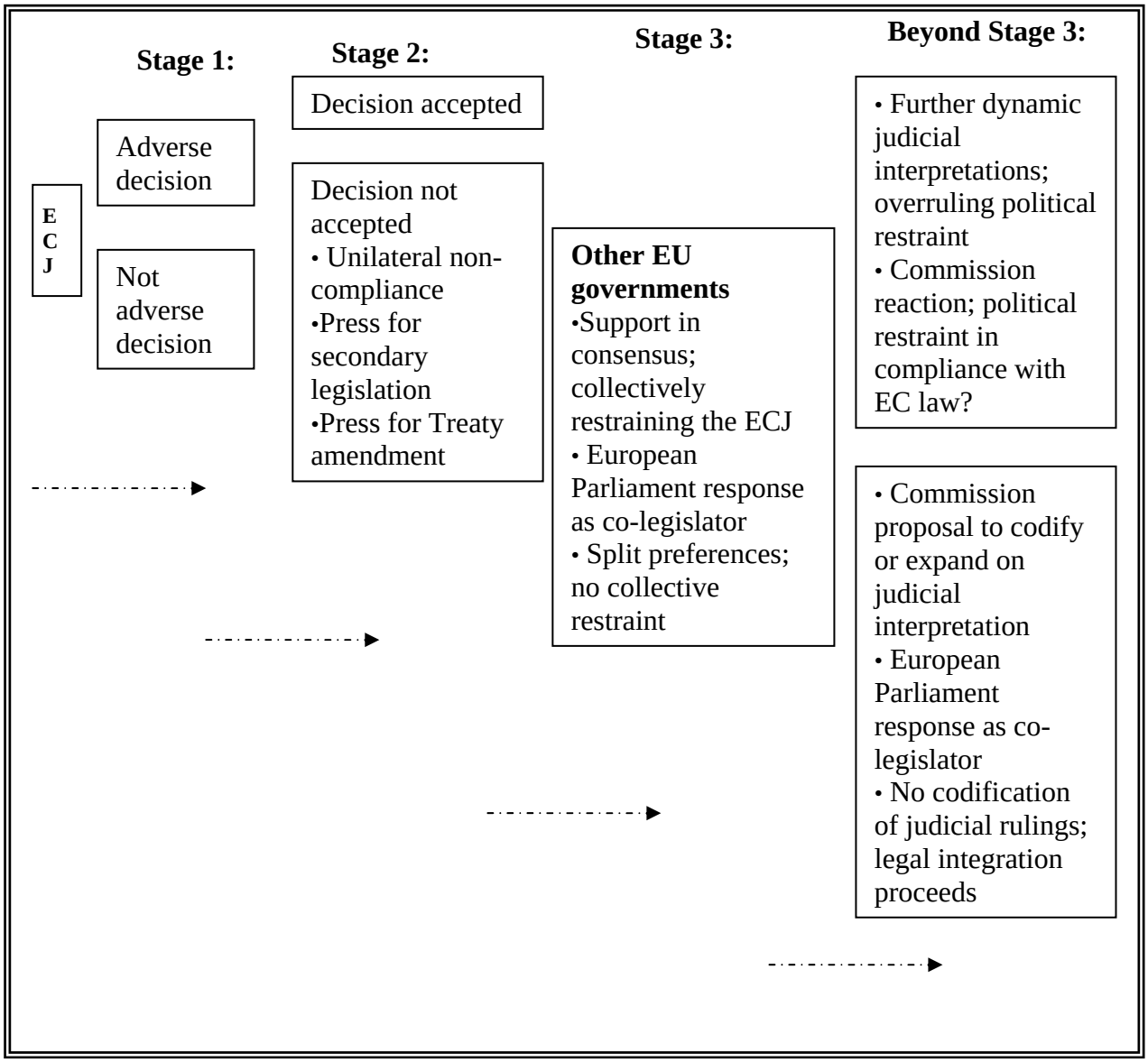
Whether the substance and direction of EU social regulation is within or beyond political control will be analysed below. The analysis has been designed through the methodological lenses of historical institutionalism (Pierson 1996; Meunier and McNamara 2007). Processes of social

regulation and re-regulation will thus be analysed as they unfold over time, and a core argument is that conclusions are likely to get the picture wrong if they are based on synchronic studies.

Social regulation is a dynamic process for which reason getting the 'the legal politics game' right must include examinations 'beyond stage 3'. Extending 'the legal politics game' as presented by Garrett, Keleman and Schultz beyond stage three means bringing in the *Commission* as the third institution in the processes of social integration. How does the European Commission respond to the legal interpretations by the Court? How does the Commission interact with the Court towards the Council? The 'stage game' shall, however, also be extended to include the *European Parliament* acting as co-decisionmaker. And the model should include the reactions of the *Court* in its own right. How does the ECJ establish precedence over time? When and on which grounds may established precedent be broken? How is the long run reaction of the Court, when being restrained by the Council? Does the Court continue to 'comply' with political overrule?

Figure 1 below presents the longitude approach to analyse the 'stage game' of EU social regulation:

Figure 1: Deciding social regulation – politics versus law
(Inspired from Garrett, Kelemen & Schultz's (1998) figure on 'The legal politics game')



The following two sections will analyse the interplay of politics and law in two fields of social regulations; health care integration and the coordination of social minimum benefits across EU borders.

3. Politicians as Vetoplayers – the Case of Health Care Integration

Until 1998, Regulation 1408/71[4] was the only regulatory source for cross-border treatment in the EU. The principles of the internal market had not been applied to the health sector and were indeed politically held to be inapplicable (Martinsen 2007). Healthcare governance in the European Union was instead based on precisely established balances between some access to the healthcare supplies of other member states through the regulatory system of 1408, but firmly controlled nationally through the governing 'principle of prior authorisation'.[5] However, ECJ judgements on the relationship between the requirement of prior authorisation and EC law were serious enough to upset the established status quo.

In a series of judgements, the ECJ questioned the justification of 'prior authorisation' and gradually established that the principles of the internal market – and especially Article 49 of the Treaty - also applied to national health policies. In the introductory judgements of Decker and Kohll, the Court first laid down that healthcare was a service within the meaning of the Treaty.[6] The requirement of prior authorisation was, in principle, found to be a barrier to free movement. The immediate impact of the 1998 judgements was, however, modest in that they considered only a limited scope of *non-hospital care* (a pair of spectacles and dental treatment), and concerned the reimbursement-based Luxembourg healthcare system.

In subsequent rulings, the ECJ extended its interpretation across the full range of EU healthcare systems. The *Geraets-Smits* and *Peerbooms* judgements of 2001[7] repeated - this time with regard to the Dutch 'benefit in kind' health insurance system - that prior authorisation constitutes a barrier to the free movement of services. Such a barrier may, however, be justified provided that 1) the

[4] Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. The regulation has recently been substantially reformed with the adoption of Regulation 883/2004. Although adopted 29th April 2004, Regulation 883/2004 has not yet entered into force as it awaits the adoption of the implementing regulation, which is currently under negotiation.

[5] 'Prior authorisation' has been institutionalised as an effective means of national control in the sense that if a patient requests to receive a publicly financed healthcare treatment in another member state, it has to be authorised beforehand by the competent healthcare institution. In this way, the national institutions can limit the use of publicly financed foreign treatment.

[6] In the cases C-120/95, *Decker*, 28 April 1998 and C-158/96, *Kohll*, 28 April 1998.

[7] Case C-157/99, *Geraets-Smits* and *Peerbooms*, 12 July 2001.

decision on whether or not to grant treatment abroad is based on "international medical science" and 2) an equivalent course of treatment can be provided in the competent member state without "undue delay" taking into consideration the medical condition of the patient, broadly defined.

The Court further restricted the discretion to grant prior authorisation by emphasising that it can only be a justified barrier to the principle of free movement if it is based on objective, non-discriminatory criteria known in advance so that national authorities cannot control the procedure arbitrarily. Requests for authorisation must furthermore be dealt with within a reasonable time, and refusals to grant authorisation must be open to appeal (para. 90, C-157/99).

The third step towards an internal healthcare market took place two years later with the case of *Müller-Fauré & Van Riet*[8]. In this case, the Court issued yet another expansive interpretation by introducing a distinction between hospital and non-hospital care. In the case of *hospital care*, the Court restated its view that the requirement for prior authorisation is justified on condition that it is exercised proportionately and that the national authority has no scope for acting in an arbitrary manner. The matter was, however, quite different for *non-hospital care*. The Court laid down that national authorisation constitutes an unjustified barrier to the free movement of services for non-hospital care.

The Court proceeded in the case of *Watts* where it ruled against the UK. The *Watts* case considered for the first time, the implications of the logic of the internal market, for member states that generally separate the provision of healthcare from market considerations, such as the UK, Ireland, the Scandinavian countries and the Southern Member States. I.e. National Health Service organised as benefits in kind. In relation to the earlier line of case law, member states with National Health Service systems had argued that such organisation in general deliberated them from internal market interferences.

However, in the *Watts* judgement, the ECJ confirmed, and indeed furthered, its previous line of health-related judgements. The conclusions remove the scope for national institutions to exercise administrative discretion and bring the rights of the European patient into sharper focus. In so

[8] Case C-385/99, 13 May 2003. *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen and Van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*. ECR 2003, p. I-04509.

doing, it intervenes in the national sphere of governance. Furthermore, the Court equips the European patient with institutional structures to claim those rights.

With *Watts* the Court entered further into the question of what constitutes undue delay. The Court sat out a (reviewable) criterion for determining whether a period of waiting is acceptable in the context of EC law. The waiting time must not:

> "exceed the period which is acceptable on the basis of an objective medical assessment of the clinical needs of the person concerned in the light of all of the factors characterising his medical condition at the time when the request for authorisation is made or renewed, as the case may be" (paragraph 79 of the judgement).

Furthermore, the decision as to whether the patient faces undue delay in accessing services must be based on:

> "an objective medical assessment of the patient's medical condition, the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time when the request for authorisation was made or renewed" (paragraph 119 of the judgement).

Thus, having enhanced the rights of the European patient by setting limits to the time period and the grounds on which the exercise of supranational rights can be put on hold, the Court went on to specify the institutional structures that member states must provide to protect those rights. The Court repeated the conclusions from *Geraets-Smits* and *Peerbooms* as well as *Müller-Fauré* and *van Riet*, and stated that the requirement for prior authorisation cannot legitimise discretionary decisions by national authorities, but must be based on objective, non-discriminatory criteria and allow for decisions on authorisation to be challenged in judicial or quasi-judicial proceedings (paragraphs. 115-116). Furthermore,

> "To that end, refusals to grant authorisation, or the advice on which such refusals may be based, must refer to the specific provisions on which they are based and be properly reasoned in accordance with them. Likewise, courts or tribunals hearing actions against such refusals must be able, if they consider it necessary for the purpose of carrying out the review which it is incumbent on them to make, to seek the advice of wholly objective and impartial independent experts" (paragraph 117 of the judgement).

The *Watts* case thus strengthened the position of the European patient. Not only has s/he been granted rights beyond national borders, but s/he has also been provided with a structure and judicial procedures through which to bypass the national system or challenge its decisions.

From *Decker/Kohll* via *Smits/Peerbooms* to *Müller-Fauré* and *Watts*, it is clear that legal judgements have been pivotal to the integration of healthcare. Within a time span of less than a decade, national health policies have been taken far further into the internal market than politicians ever intended, or could have predicted. That EC law applies regardless of the organising characteristics of national healthcare systems. That being said and repeated in the legal interpretations, many aspects, however, remain to be clarified. Such clarifications have not – yet – been provided from political side.

3.1 Political response to healthcare integration

When the European Court of Justice issued its Decker and Kohll rulings, politicians reacted forcefully. The German Government, for example, initially spoke out very strongly against the *Decker/Kohll* judgements. The former German Minister of Health, Seehofer, was quick to argue that the rulings would undermine the German health system. He further held that the Court decisions were against the preferences of the member states and that the politicians had to overturn the rulings through a Treaty amendment (Langer 1999c, p. 54; Børsen, 7. May 1998; Politiken 9 June 1998). The former Minister found the Decker/Kohll case-law revolutionary and argued that if Germany adopted its premises, it would be a long-term threat to the sustainability of the German health system (Spiegel 17/98, Fokus from 4 May 1998; Schaaf 1999, p. 274; Eichenhofer 1999a, p. 114; Eichenhofer 1999b, p. 2; Interview, Deutsche Verbindungsstelle, 18 September 2001).

This initial outburst is in sharp contrast to the subsequent political response as nothing further happened. No treaty amendment. No formal legislative reactions. Meanwhile judicial integration proceeded.

One first initiative to bring politics in was when the Commission, rather unsuccessfully, attempted to integrate the healthcare area in the proposal for a Directive on services in the internal market.[9] As a precise reproduction of the Court's decisions, Article 23 of the new directive proposed 1) an *internal market for non-hospital care*, where the patient has a right to seek treatment in another member state without prior authorisation and subsequently have the costs reimbursed by the competent national institution, 2) a right to *hospitalisation* in another member state, provided that the member state of affiliation offers the same treatment, and that *authorisation* has been granted beforehand. The health ministers, however, refused to have their policy area regulated as part of a general Directive on services, placed under the responsibility of DG Internal Market. Article 23, and thus the healthcare area, was taken out of the Directive.

Consequently it appeared clear that European healthcare could not be regulated from an overall internal market perspective, but still the judicial integration called for political codification and more transparency. In September 2006, DG Health (SANCO) communicated a consultation procedure on health services.[10] The Communication called for stakeholders' contributions to state their opinions on a set of questions related to the free movement of health services. This open hearing procedure produced no less than 280 responses from stakeholders, ranging from member states, regional governments, health care organisations, health care providers, insurers, the industry and even individual citizens. The many stakeholders' contributions expressed a high level of dispersed preferences (Martinsen 2007).

Also internally in the Commission, it was not straightforward which DG this time should be in charge of formulating the health care mobility proposal (Interview, European Commission, 2007). Having had to leave patient mobility out of the service directive, it was, however, clear that internal market considerations should not be the primary ones in the directive proposal. On the basis of previous experiences, DG SANCO had a sufficient persuasive platform to become in charge of the formulation of the proposal, which should be formulated in cooperation with DG Employment, Social Affairs and Equal Opportunities and DG Internal Market.

[9] COM (2004) 2, 5 March 2004. Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market.

[10] The Communication is SEC (2006) 1195/4, 26 September 2006.

To external observers the work seemed to progress sufficiently effective and DG SANCO announced that the proposal would be presented 19th December 2007. However, and surprisingly to many, on that same day the Commission decided to postpone (or withdraw) the proposal (EU observer 19th December 2007).

Whereas it remains unclear what exactly triggered off the withdrawal, it is clear that many different actors and organisations worked behind the scene in the run-up to the presentation of the proposal. What is also clear is that split preferences were put forward to the Commission.

First of all, the college of Commissioners appear to have disagreed strongly internally on the directive and its principles. Various cabinets intervened against the proposal just before it was presented. Some expressed concerns on the impact on national health systems (EU observer, 7th February 2008). Others were concerned on how the directive proposal would be received by the public, eventually causing protests similar to the ones on the service directive – and thus rather inconvenient during ratifications on the Lisbon Treaty.

Secondly, European social NGOs accused the proposal for not being sufficiently ambitious in the creation of a European system of healthcare governance. The proposal would not effectively promote patient mobility and would not de facto ensure equal treatment, since patients themselves would have to reimburse the cost of travel and other expenses;

> "Why does the EU directive not take account of other issues which are in the general interest of everyone living in the EU, such as equal access to affordable high quality health services for all, including particularly vulnerable groups […] That would show that the commission understands the concept of collective solidarity, not only individual consumers' right" (Fintan Farrel, president of Social Platform, quoted in EU Observer, 19th December 2007).

Thirdly, and likely to have been the key factor, members of the Party of European Socialists (PES) group in the European Parliament urged the Commission to withdraw the proposal, arguing that it would have considerable negative consequences for national healthcare systems.

Once again, the main theme was the role of 'prior authorisation' as a national means of control to foreign supplies of publicly financed treatments (Dagens Medicin, 1st February 2008). A central argument from members of the PES group was that the proposal did not simply codify the legal interpretations by the ECJ, but furthered the integration process beyond the judicial developments (Politiken, 19th January 2008);

> "The Commission moves one step further than the decisions from the European Court of Justice. It is highly problematic that prior authorisation is no longer required regarding the right to hospital treatment in another member state. That deprives the member states the instrument of economic and capacity planning and runs the risk of financially drain the national healthcare systems, because the patients in this way can take money along outside their own member state" (Christel Schaldemose, PES member of the European Parliament, quoted in Dagens Medicin, 1st February 2008. Author's translation from Danish).

PES members also strongly emphasised to the Commission that the timing was badly chosen in the run up to the ratification of the Lisbon Treaty (Politiken, 10th January 2008). The president of the Party of European Socialists and member of the European Parliament Poul Nyrup Rasmussen wrote to all socialist commissioners, expressing PES' concern, just before the Commission was to present its proposal (Politiken, 11th January 2008).

Within the line of arguments posed by PES members is a recurring one, emphasising concerns on national sovereignty. That the national autonomy of the welfare state is severely challenged runs through as an explicit and/or implicit core argument. Several times it is emphasised that whereas integration up to the point brought by the ECJ needs clarification, further steps are unacceptable. However, whether or not the proposal moves further on remains a matter of interpretation.

In this rather intense debate, it is somewhat left in the dark what was the factual contents of the withdrawn proposal, as the proposal was never made public. The proposal has, however, been read and examined as part of this analysis ('Proposal for a directive of the European Parliament and of the Council on safe, high quality and efficient cross-border healthcare' (2007)).

The withdrawn proposal was clearly drawn out on the basis of the ECJ line of case-law. The Court's interpretations run through the 60 pages long document as its binding knot, emphasising that law is already materialised, but needs to be further clarified;

> "The Court's rulings on the individual cases are clear in themselves, however, it is necessary to improve clarity to ensure a more general and effective application of freedoms to receive and provide health services" ('Proposal for a directive of the European Parliament and of the Council on safe, high quality and efficient cross-border healthcare' (2007), p. 2).

Regarding the system of 'prior authorisation', the proposal is indeed reasoned in the interpretations of the Court. In detailed manner, the individual Court cases substantiate what is already de facto regulation and what needs further clarification ('Proposal for a directive of the European Parliament and of the Council on safe, high quality and efficient cross-border healthcare' (2007), pp. 18-22).

Regarding *non-hospital care* the proposal refers to that the light of the case-law makes 'it appropriate to abolish the requirement of any prior authorisation for reimbursement by the social security system of a member state of affiliation for non-hospital care provided in another member state'. Concerning *hospital care*, on the one hand, prior authorisation should in principle be abolished as it runs counter to the free movement of services. On the other hand, as emphasised by the Court the instrument may be justified in order to uphold a balanced and accessible healthcare system. Thus it should be possible for member states to introduce prior authorisation systems in the event that the national maintenance of a balanced medical and hospital services is endangered ('Proposal for a directive of the European Parliament and of the Council on safe, high quality and efficient cross-border healthcare' (2007), pp. 19-21).

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At the time of writing, no re-proposal has been presented (May 2008). However, the now former health commissioner Markos Kyprianou continued to argue the need to re-regulate in the field of cross border healthcare, given that the ECJ had already gone forward on institutionalisation. According to Kyprianou, the Commission is obliged to re-regulate, being prompted by the ECJ rulings. Shielding behind a pro-active Court, the commissioner argued along what looks like a blame-avoidance strategy and/or argued on the grounds of necessity;

> "I don't think [we] have a choice […] It's not a initiative of the commission to create any new right, [but] offering legal certainty" (Marhus Kyprianou, Quoted in EU Observer 7th February 2008).

3.2 Politics and law in EU healthcare regulation

The different encounters between legal interpretations and political voice have so far had one result; political non-action in terms of veto positions. That veto positions are equal to non-actions are evident from the fact that they do not roll back judicial activism. Whereas politicians from the starting point of legal integration announced their opposition, they have not managed to collectively restrain the Court. During the course of Court created healthcare regulation, political statements have changed from 'this demand a treaty revision', i.e. roll-back the Court (reaction to Decker/Kohll 1998), to 'healthcare policy is not primarily a matter of the internal market' (response to service directive proposal 2004), to a veto-position from MEPs expressing that 'steps beyond legal interpretations' cannot be accepted (PES MEPs 2007).

The analysis carried out above points to political non-action as an outcome of joint decision traps, and split preferences between the different vetoplayers. But the analysis also suggests that preferences may undergo change during the 10 years of healthcare regulation. Preferences and political positions seem to have moved from outright opposition against any sort of EU interference to an acceptance of the considerable move towards EU healthcare governance that judicial interpretations have caused. The ECJ has indeed prepared the terrain for future negotiations and the Commission clearly shields behind the authoritative voice of law, as when the former health commissioner argues 'I don't think we have a choice'. The necessity to codify and clarify is likely to bring political acceptance along.

4. Coordinating Social Minimum Benefits across the European Union

The social sharing of the European Union was never meant to extend to the ultimate form of social risk; poverty. Whereas politicians agreed to coordinate social security benefits in order to facilitate the free movement of labour short after signing the Treaty of Rome, they at the same time emphasised that social assistance was exempted from the relevant regulatory scheme.[11] The

[11] The relevant regulatory scheme concerns Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. Article 4 of Reg. 1408/71 lists the included *social security benefits*, but explicitly in article 4 (4) states that *social assistance* falls outside the material scope of the Regulation. The regulation has recently been substantially reformed with the adoption of Regulation 883/2004. The new regulation will, however, not enter into force before the implementing regulation is also adopted. The implementing regulation is currently being negotiated.

political reasoning tying social minimum benefits to the nation state was, and still is, that it is different in nature from social security (van der Mei 2002).

Social assistance or social minimum benefits continue to rely on a strongly tied nation-state logic of reasoning. To socially assist those who cannot provide for themselves through benefits in cash or in kind rely on a shared understanding of solidarity within a defined community. Even in globalised or Europeanised age the substantial contents of solidarity has not proven to reach much beyond the nation-state.

Social assistance constitutes the most direct form of redistributive policy.[12] It transfers resources between members of society without making rights dependent on individual contributions. Social assistance is thus the ultimate – but also most direct - link in the social contract between the state and its citizens. As an institution it represents the unfiltered meaning of solidarity in that it assures the citizen that belonging to a society, guarded by a state structure, means that in the case of need and independent of contribution one has a right to a minimum level of subsistence.

The political preferences regarding coordination of social assistance benefits within the European Union has been both clear and relatively fixed. Politicians, both in general across member states and over time, have held that setting who has the right to access minimum benefits and where such benefits are payable belong to the repertoire of national competences, and the EU should not interfere in such form of *national* redistribution.

However, despite these clearly defined political preferences, EU coordination of social minimum benefits has taken place. Today, *accessibility* and to some extent *exportability* of social minimum benefits constitute an important part of social Europe's substantive contents. The main integrative steps in this process have been legal, but on main turning points the Commission has steered the development, actively using the European Court as authoritative voice. EU coordination of minimum benefits is an important demonstration that the interplay between the ECJ and the Commission is a strong component in the integration process, in the long run able to authoritatively overrule equally strong and historically rooted national preferences.

[12] For a definition of redistribution as the government function where resources are transferred from one social group to another, see Majone 1996, p. 54.

4.1 Setting boundaries of social sharing

The integration process, however, sets off by the Council of Ministers successfully ruling in the Court. Back in the 1970s and 1980s, the ECJ had expanded the material scope of the regulatory scheme on coordination of social security,[13] defining social schemes that the member states held to be social assistance as social security - and thus accessible and exportable across Community borders (Verschueren 2007, Christensen & Malmstedt 2000; Martinsen 2005).[14]

The member states were alarmed, arguing that the ECJ had overstepped the competences of the Community and that the relevant social assistance kind of benefits fell outside the spirit and purpose of the Treaties (ECR 1983, p. 1431). That political preferences were both intense and unified is evident from the fact that the Council of Ministers managed to overrule the Court's expansive interpretations of exportability by unanimously deciding to add a special rule to the coordination system. In 1992, the Council adopted an amending regulation[15], and thereby managed to overcome the threshold of unanimity to rein in the unintended and unwelcome case law development. The regulatory reaction constitutes a seldom seen politically imposed stop in the process of legal integration.

The special rule addressed the so-called 'special non-contributory benefits', placed in the grey area between social security and social assistance, here among social minimum benefits. In fact, the special rule inserted a different coordination system - in the coordination system. According to the special rule, 'special non-contributory benefits' were included in the material scope of Regulation 1408/71, and rights in the course of acquisition could be aggregated across member states. But the benefits remained confined to the territory of the competent state and could not be exported. For a benefit to be coordinated according to the 'special rule', it should be listed in annex IIa of the Regulation and for the benefit to be listed in the annex, it should be unanimously agreed in the Council. For all those benefits listed in annex IIa, it goes that those covered by the personal scope of the coordination regulation are equally entitled to these benefits in another member state, furthermore previous residence periods spent in other member states shall be taken into account if a

[13] I.e. Regulation 1408/71. See footnote 4 above.
[14] The more expansive interpretations include; case 1/72 Frilli; case 187/73 Callemeyn; case 63/76 Inzirillo; case 139/82 Piscitello and joined cases 379 to 381/85 & 93/86 Giletti et al.
[15] Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self- employed persons and to members of their families moving within the Community.

specific period of residence is an eligibility criteria, but the payment of benefits is restricted to the territory of the competent state. If one chooses to live in another member state, entitlements stop.

In the first place, the Court seemed to take the political correction of its previous expansionary course of integration into account. In the subsequent cases of *Snares*[16] and *Partridge*[17], the Court was requested to interpret the compatibility between the special rule and the Treaty. The *Snares* case concerned the British *disability living allowance* and the *Partridge* case the *British attendance allowance*. At that time, the Court accepted the political territorialisation of the two annex IIa benefits, among other things emphasising that UK legislation did not violate Community law, since;

> "the principle of the exportability of social security benefits applies so long as derogating provisions have not been adopted by the Community legislature" (para. 41 of the judgement in the Snares case).

With the special rule and annex IIa, the member states, the Commission and the ECJ for long seemed to have found a suitable compromise. In fact, the specific regulatory scheme soon found its own expansionary dynamics, fed by politics. When the amending regulation was adopted, the benefits inserted in the annex were still quite limited (Interview, European Commission, 2007). However, over the years the annex became a popular political solution in which more and more national benefits became listed. Over time, the annex came to count a long list of benefits – here among social minimum benefits and special benefits for disabled persons. Today about 70 benefits are governed by the special rule, quite many which have *social assistance* similar characteristics. The list is long and covers among other benefits:
The income replacement allowance from Belgium; the Spanish minimum income guarantee, cash benefits to assist the elderly; the Irish unemployment assistance; the Italian social pensions for persons without means, social allowance; the Lithuanian social assistance pension, the Hungarian non-contributory old age allowance; the Finnish special assistance for immigrants, the Swedish financial support for the elderly, the British income-based allowance for jobseekers, income support, etc.

[16] Case C-20/96, *Snares*, 4 November 1997.
[17] Case C-297/96, *Partridge*, 11 June 1998

4.2 Dismantling boundaries of social sharing

For some years, the annex seemed to give member states considerable autonomy to exempt specific benefits from exportability. The way the list of annex IIa benefits grew over the first years suggests that it was not difficult among the Council ministers to support one another that individual national benefits fell under the rule of exemption.

The Commission was, however, less satisfied with this institutional turn of the coordination system. The rather excessive use of the annex in Council negotiations meant that it became increasingly difficult for the Commission to control the development. The situation came to a head around 2001 in relation to the negotiations on the acquis with the ten candidate countries. The first delegation to negotiate was the Check republic, and one claim from the candidate country was to have a long list of benefits inserted in annex IIa (Interview, European Commission, 2007).

Just five days before the Commission negotiated with the Check republic, the situation had definitely changed with the Court's ruling in the famous *Jauch*[18] case. The *Jauch* case and the later case of *Leclere*[19] constitute turning points in the aggregated process of integration proving that the more cautious interpretations by the ECJ in the *Snares* and *Partridge* judgements were not persisting approaches. In the cases of *Jauch* and *Leclere,* the Court laid down that although listed in the annex, the Austrian long term care for the *Jauch* case and the Luxembourgian maternity allowance concerning the *Leclere* case had incorrectly been governed by the special rule and were indeed exportable according to Community law.

The rulings of the Court clearly empowered the Commission in the negotiations with the candidate countries and - perhaps more important - towards the member states. When the Check Republic came with its list of benefits to have inserted in the annex, the Commission refused the request. And when the candidate country said that these were the same benefits as Ireland had adopted in the annex, the Commission pointed out that one week ago, i.e. before the *Jauch* ruling, this would properly have been a sufficient pleading, but that with the new interpretation of the Court, the situation had changed (Interview, European Commission, 2007). Furthermore, with the *Jauch* and *Leclere* rulings the Court upright undermined the member states' established practice that placing a

[18] Case C-215/99, *Jauch*, 8 March 2001
[19] Case C-43/99, *Leclere*, 31 May 2001

benefit in the annex was enough to refuse its exportation (Verschueren 2007, p. 318). In this way, the overrule by the Court extended the manoeuvrable scope of the Commission towards the Council.

Against this background, the Commission could insist that the list needed to be amended, so that the same criteria applied for candidate countries and established member states. After very difficult negotiations, the Council and the European Parliament in co-decision adopted another amending regulation 647/2005[20]. The agreement claimed to have codified the rulings of the Court, and that it in order to take the rulings into account had introduced a new definition of special non-contributory benefits. On this behalf, the list of benefits was completely revised. Around 40 benefits were taken out of the list, which in itself was a significant progress for the Commission (interview, European Commission, 2007).

Despite claimed political codification of the Court's interpretations, the Commission was still not satisfied (Verschueren 2007). The Commission found that the Council had not taken the full consequences of the Court's ruling, but had complied too minimalist. Especially, that the *UK disability living allowance*, the *attendance allowance* and the *carer's allowance*, the *child care allowance* of *Finland* and the *Swedish disability allowance* and *care allowance for disabled children* were still placed in the annex dissatisfied the Commission.

Instead of taking each of the three member states to Court, the Commission chose a different and very remarkable strategy and brought an annulment procedure against the Council and the European Parliament in accordance with article 230 of the Treaty. That is, the Commission requested the ECJ to annul the adopted Regulation 647/2005, for having wrongly inserted the above mentioned benefits of the UK, Finland and Sweden in the annex.

This rather confrontational approach by the Commission caused significant uproar in the three affected member states. From having enjoyed considerable discretion in defining own benefits as

[20] Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71

'special' and thus regulated by the 'special rule' of non-exportability, the prospect of reduced autonomy was far from well received by the member states.

The perhaps strongest reaction came from the UK which refused to bend its positions throughout the preliminary negotiations with the Commission and in the Council (Interview, UK Department of Work and Pension, 2006). The matter was highly prioritised in the UK and became a question of national competence where the UK was by no means willing to compromise (Interview, UK Department of Work and Pension, 2006; interview European Commission, 2007). The UK maintained that their addressed benefits were special non-contributory benefits. Furthermore, the UK emphasised that the listing of the disability living allowance and the attendance allowance had already been approved by the Court in the *Snares* and *Partridge* cases (para 50 of case C-299/05).

The Court ruled on the annulment procedure October 2007.[21] The Commission high stake strategy proved successful as the Court agreed that four of the five benefits had been wrongly listed in the annex, and should be made exportable according to the rules of Regulation 1408/71. Only the mobility component of the British disability living allowance could be regarded as a special non-contrbutory benefit. The Court furthermore substantiated that the *Jauch* case had indeed been a landmark ruling, breaking with previous precedence. In the post-*Jauch* context, the earlier conclusions in the *Snares* and *Partridge* cases no longer shield the British allowances. As emphasised by the Court;

> "In addition, the fact that the Court ruled in *Snares* and *Partridge* that the DLA and AA were, in the legal context at the time, allowances coming under Article 4(2a)(b) of Regulation No 1408/71 does not affect the analysis which the Court may make of those allowances in the post-*Jauch* legal context" (para 71 of case C-299/05).

4.3 Politics and law in EU regulation on social minimum benefits

The analysis above substantiates that over time even social policy fields with very strong and relatively fixed national preferences may experience EU regulation to a considerable extent. The integrative process on social minimum benefits or 'special non-contributory benefits' is a long run

[21] Case 299/05, Judgment of the Court (Second Chamber) of 18 October 2007. Commission of the European Communities v European Parliament and Council of the European Union. Action for annulment - Social security - Regulation (EEC) No 1408/71 - Articles 4(2a) and 10a - Annex IIa - Regulation (EC) No 647/2005 - Special non-contributory benefits.

one, dating back to the 70s and is indeed one of both dis-integration and integration. The process sets off by early legal innovations, which is subsequently overruled by a unified Council. The Council introduces a rather creative political response of a coordination scheme – in the coordination scheme. The inserted 'special rule' becomes a popular political solution, which has its own expansionary dynamics. The 'special rule' clearly satisfies the preferences of the member states and provides extended discretion and thus autonomy for politicians to decide which benefits can be exported to another member state. However, later developments demonstrate how the Court and the Commission may respond in a 'beyond stage 3". Moreover, later developments point out that although politicians may manage to overcome joint decision traps and rule in the Court, such political overrule may not be permanent. In 'beyond stage 3', the Court changes precedence from restrained acceptance of political overrule to legal correction of the 'special rule' inserted. Furthermore, in this later part of the process of social regulation the interplay between the Commission and the Court proves to be a strong component, capable of authoritatively overruling equally strong and historically reasoned national preferences. Judicial activism empowers the Commission in Council negotiations and in putting pressure on individual member states. The Commission actively uses the ECJ as authoritative voice for the road of further social regulation needed to be taken. In this way, EU regulation on social minimum benefits takes direction and shape.

5. Concluding remarks

Social regulation in the European Union continues to be on the move. However, it operates within a political deficit. Politicians have due to split preferences and high thresholds to decision making not been able to give direction, substance nor coherence to social Europe. Considerable cleavages produce political non-action instead of proactively setting direction and content. Nevertheless, social regulation in the EU has taken shape in effective and substantive manner through judicial activism. Beyond the control of politicians, core dimensions of welfare are both regulated and re-regulated at the supranational level. The integrative steps of law have moved the EU's social dimension beyond a classic regulatory function and into having redistributive consequences for the peoples of Europe. Social Europe is about far more than increasing the allocative efficiency of the market, but de facto concerns transfer of resources from one group to another.

Examining social regulation ‘beyond stage 3’ substantiates the difficulties in rolling back the Court when an integrative course is embarked upon. Even concerning the core of welfare policies where national preferences are strong and relatively fixed, judicial activism is likely to ‘come back’, although ruled in by politics in the first place. In addition, the interplay between the Commission and the Court proves to be a strong component. The voice of law serves as an important and authoritative input in social policy formulation and serves as Commission back-up when arguing why the road of further social regulation needs to be taken.

References

Burley, A-M., & Mattli, W. (1993) "Europe Before the Court: A Political Theory of Legal Integration" in *International Organization*, Vol. 47, No. 1, pp. 41-76.

Christensen, A. & Malmstedt, M. (2000) “Lex Loci Laboris versus Lex Loci Domicilii – an Inquiry into the Normative Foundations of European Social Security Law” in *European Journal of Social Security* vol. 2/1, pp. 69-111.

Eichenhofer, E. (1999) “Aspekte Europäische Gesundheitspolitik – Der Zugang zu Leistungen der Kranken- und Pflegeversicherung der EU-Bürger – Situation des Koordinierungsrechts und Veränderungsbedarf” in Igl, G. (Hrsg.) *Europäische Union und gesetzliche Krankenversicehrung – Status und Entwicklungen der Gesundheitspolitik in der EU* (Wiesbaden: Verlag Chmielorz GmbH), pp. 45-60.

Eichenhofer, E. (1999b) “Das Europäische koordinierende Krankenversicherungsrecht nach den EuGH-Urteilen Kohll und Decker” in *Vierteljahresschrift für Sozialrecht* 2, pp. 101-122.

Garrett, G. (1992) “International Cooperation and Institutional Choice: The European Community’s Internal Market” in *International Organization*, Vol. 46, (2), spring, pp. 533-560.

Garrett, G., & Weingast, B. (1993) Ideas, Interests, and Institutions: Constructing the European Community's Internal Market" in Goldstein, J., & Keohane, R. O. (eds.) *Ideas and Foreign Policy* (NY: Cornell University press), pp. 173-206.

Garrett, G. (1995) "The Politics of Legal Integration in the European Union" in *International Organization*, Vol. 49, (1), winter, pp. 171-181.

Garrett, G., Kelemen, R. D. & Schultz, H. (1998) „The European Court of Justice, National Governments, and Legal Integration in the European Union", *International Organisations*, Vol. 52, No. 1, pp. 149-176.

Langer, R. (1999c) "Der Beitrag des Europäischen Gerichtshofs zu den gemeinschaftsrechtlichen Gestaltungsvorgaben für das Sozialrecht" in Ebsen, I. (Hrsg.) *Europarechtliche Gestaltungsvorgaben für das deutsche Sozialrecht – Freizügigkeit, wirtschaftliche Grundfreiheiten und europäisches Wettbewerbsrecht als Grenzen sozialstaatlicher Souveränität* (Baden-Baden: Nomos Verlagsgesellschaft), pp. 43-56.

Leibfried, S. (2005) 'Social Policy' in Wallace, H., Wallace, W., and Pollack, M. *Policy-Making in the European Union*. Oxford: Oxford University Press: 243-279.

Majone, G. (1994) 'The Rise of the Regulatory State in Europe', *West European Politics*, 17: 77-101.

Majone, G. (1996) *Regulating Europe.* Oxford: Oxford University Press

Martinsen, D. S. 2005. 'The Europeanization of Welfare – the Domestic impact of Intra-European Social Security', *Journal of Common Market Studies*, 43, 5, 1003-30.

Martinsen, D. S. (2007) *EU for the Patients. Developments, Impacts, Challenges*, SIEPS report, no. 6, http://www.sieps.se/sem/2007/sem_0615/sem_0615_en.html

Meunier, S., & McNamara, K. (2007) *Making History. European Integration at Fifty*. Oxford: Oxford University Press

Pierson, P. (1996) "The Path to European Integration - A Historical Institutionalist Analysis" in *Comparative Political Studies*, Vol. 29, No. 2, pp. 123-163.

Schaaf, M. (1999) “Die Urteile des EuGH zur Leistungsgewährung in der GKV – Gefahr für die deutsche Gesundheitspolitik ?” in *Die Sozialgerichtbarkeit,* Vol. 6/99, pp. 274-282.

Scharpf, F. W. (1988) ‘The Joint-Decision Trap: Lessons from German Federalism and European Integration’, *Public Administration*, Vol. 66, 239-78.

Scharpf, F. W. (2002) ‘The European Social Model: Coping with the Challenges of Diversity’, *Journal of Common Market Studies*, Vol. 40, 4: 645-70

Scharpf, F. W. (2006) ‘The Joint-Decision Trap Revisited’, *Journal of Common Market Studies*, Vol. 44, 4, 845-64.

Stone Sweet, A. and W. Sandholtz (1998) “Integration, Supranational Governance, and the Institutionalization of the European Polity”, in Sweet, A. and Sandholtz, W. (eds), *European Integration and Supranational Governance*, pp. 1-27. Oxford: Oxford University Press.

Tsebelis, G. and Garrett, G. (2001) ‘The Institutional Foundation of Intergovernmentalism and Supranationalism in the European Union’, *International Organization*, Vol. 55, no. 2: 357-90.

Verschueren, H. (2007) ‘European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems’, *European Journal of Migration and Law*, 9: 307-346.