

‘Social Solidarity’: a buttress against internal market law?

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Summary

The purpose of this paper is to analyse the emergent concept of ‘social solidarity’, in the context of the jurisprudence of the European Court of Justice and the interplay between national social policy provision and the EU’s internal market and competition law. Recently the Court has begun to deal more explicitly with the potential problems which the supremacy of internal market law, reinforced by individual litigation, may pose for national social welfare systems. The Court has done so through articulating the principle of ‘social solidarity’, according to which restrictions on internal market law may be justified. The paper will consider whether ‘social solidarity’, as conceived by the Court, is an effective means of protecting social policy entitlements within the EU’s multi-level system of governance.

1. Introduction

Social welfare policy in the European Union may be described as an area of ‘multi-level governance’.¹ Although the institutions of the European Union are responsible for some elements of social policy provision in the Member States, in general, social welfare policy remains within the competence of national governments. However, national or sub-national delivery of social welfare policy provisions in the Member States must take its place within the EU’s system of governance. Membership of the European Union requires Member States to comply with EC law (Article 10 (ex 5) EC). Such law includes the Treaty provisions on freedom of movement of goods, persons and capital, and freedom to provide and receive services. It also includes EC competition law.

The EC’s internal market and competition law may be an inhospitable environment for national social welfare entitlements, in particular because it is enforceable by individuals within the Member States. The direct effect of the relevant provisions of EC law means that those measures can be relied upon by individuals within the Member States, in order to enforce their ‘free movement rights’ or their rights to free and fair competition. Such rights have the function of ensuring that the factors of production (goods, persons, services, capital) may move freely within the EU’s territory, that anti-competitive behaviour which may affect the EU’s internal market is constrained, and that the principle of non-discrimination on grounds of nationality applies. In principle at least, ‘goods and services’ may include welfare goods and services, in particular if such goods and services are provided through market mechanisms, rather than directly by the state to welfare recipients. In the context of increasing interest

¹ Stephan Leibfried and Paul Pierson, *European Social Policy: Between Fragmentation and Integration* (Washington, Brookings, 1995); Leibfried and Pierson, ‘Social Policy’ in Helen Wallace and William Wallace, eds, *Policy-Making in the European Union* (Oxford, OUP, 1996).

in various types of market models for welfare provision among governments of all Member States,² the provisions of more aspects of national social welfare policies may potentially be subject to the application of internal market law. Individual litigation concerning the provision of national welfare entitlements may have the effect of rendering some national laws and policies inconsistent with EC law, which precludes national governments from pursuing those policies or maintaining those laws in place.³

Probably more important in practice, the dynamic of the impact and application of internal market law, through individual litigation, may render some aspects of national social welfare policies not formally unlawful, but in practice non-viable. This may arise for instance from the financial drain placed on national policies by virtue of the requirement of non-discrimination on grounds of nationality, for instance requiring non-discriminatory treatment of all migrant EU citizen workers and their families.⁴ It may also arise from the loss of control over supply implied by freedom to provide and receive welfare goods and services across frontiers. Control over supply is a classic mechanism for ensuring control over welfare costs in all Member States. Litigation processes may therefore constrain policy options for national or sub-national governments, by rendering some options politically undesirable. In other words, governments of Member States of the EU no longer maintain total control over the terms on which social welfare policy is provided within their territory.

These matters are often expressed as social or welfare dumping, or 'the race to the bottom'. They may also be articulated as a threat to the 'European social model'.⁵ There are, of course, a multiplicity of social models among the Member States of the EU.⁶ A distinctively 'European' model is discernible

² Martin Rhodes and Yves Mény, 'Europe's Social Contract Under Stress' in Rhodes and Mény eds, *The Future of European Welfare* (**, 1998); Vic George, 'Political Ideology, Globalisation and Welfare Futures in Europe' 27 *Journal of Social Policy* (1998) 17-36; George, 'The Future of the Welfare State' and Taylor-Gooby, 'The Response of Government: Fragile Convergence?' both in Vic George and Peter Taylor-Gooby, eds, *European Welfare Policy: Squaring the Welfare Circle* (London: Macmillan, 1996); Taylor-Gooby, 'Paying for Welfare: The View from Europe' (1996) 67 *PQ* 116-126; Gosta Esping-Andersen, *Welfare States in Transition: National Adaptations in Global Economies* (London: Sage, 1996).

³ See for instance recently Case C-90/97 *Swaddling* Judgment of 25 February 1999.

⁴ Or possibly all EUCs see Case C-85/96 *Martínez Sala* Judgment of 12 May 1998.

⁵ Recently defined by Commissioner Flynn in a speech for the conference *Visions for European Governance*, Harvard University, 2 March 1999, as follows. 'The European social model spans many policy areas. Education and training. Health and welfare. Social protection. Dialogue between independent trades unions and employers. Health and safety at work. The pursuit of equality. The fight against racism and discrimination. It takes many forms - welfare systems, collective arrangements, delivery mechanisms. It has been conceived, and is still applied, in many different ways. By different agents. Under different public, private and third sector arrangements in different parts of Europe. It is a system steeped in plurality and diversity - reflecting our richness of culture, tradition and political development. All the variants reflect and respect two common and balancing principles. One is competition - the driving force behind economic progress - the other is solidarity between citizens.'

⁶ See Tamara Hervey, *European Social Law and Policy* (London: Longman, 1998), p 57-61; Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: Policy, 1990); Norman Ginsburg, *Divisions of Welfare* (London: Sage, 1992); Allan Cochrane, 'Comparative Approaches to Social Policy' and 'Looking for a European Welfare State' in Allan Cochrane and John Clarke, eds, *Comparing Welfare States: Britain in International Context* (London: Open University Press, 1993); Richard Gomà, 'The social dimension of the European Union: a new type of welfare system?' 3 *JEPP*

only at a high level of abstraction. However, this does not mean that the values encapsulated in the phrase the 'European social model' are not worthy of protection. The concern is that Member States may be tempted to lower their levels of social welfare provision, or alter the principles upon which social welfare provision is based, in response (inter alia) to the competitive pressures of the internal market on such measures. Commentators do not agree over whether the phenomenon of welfare dumping really exists.⁷ However, for the purposes of this paper, this in itself is not particularly important. What matters is that policy-makers and other institutional actors behave as if it might be a reality, and thus seek to protect 'European' national welfare provision from such regulatory competition within the EU which might place the values implicit in European welfare models in jeopardy. Pressures on European social models in the context of welfare have been articulated as being of concern to political institutions at EU and national level for some time.⁸ Thus, irrespective of whether welfare dumping is happening, or whether the 'European social model' is really in jeopardy, the (perceived) problem has become one looking for a solution⁹ within policy interactions in the EU.

However, unlike the legislative institutions, until relatively recently, the European Court of Justice does not seem to have explicitly concerned itself with the internal market's potential threat to social welfare entitlements.¹⁰ In the more recent cases of Case 70/95 *Sodemare*¹¹, Case C-67/96 *Albany International et al*¹², Case C-120/95 *Decker* and Case C-158/96 *Kohl*¹³; the European Court of Justice appears to have responded more explicitly to these problems, in the contexts of provision of welfare benefits in the form of health goods and services, and retirement pensions. In order to do so, the Court has articulated the concept of 'social solidarity', in effect as a justification for measures of national social policies which may have an actual or potential effect on creating or sustaining the internal market.

'Social solidarity' is defined thus by Advocate General Fennelly in Case 70/95 *Sodemare*:¹⁴

'... the existence of systems of social provision established by Member States on the basis of the principle of solidarity does not constitute, as such, an economic activity, so that any inherent consequent restriction on the free movement of goods, services or persons does not attract the application of Treaty provisions. Social solidarity envisages the inherently uncommercial act of involuntary subsidisation of one social group by another. Rules closely

(1996) 209-230; Rhodes and Mény, supra n *; Maurizio Ferrera 'The Four 'Social Europes: Between Universalism and Selectivity' in Rhodes and Mény, supra n *.

⁷ [egs – perhaps in Catherine's paper. For an overview, see Barnard, *EC Employment Law* (Chichester: Wiley, 1996) p 81-87. See also Mosley, 'The social dimension of European integration' 129 *International Labour Review* (1990) 147-63; Kleinman and Piachaud, 'European Social Policy: Conceptions and Choices' 3 *JESP* (1993) 1-19; Deakin, 'Labour Law as Market Regulation' in Davies et al, *European Community Labour Law: Principles and Perspectives* (London: Clarendon, 1996)]

⁸ [egs]

⁹ [Armstrong, Cram]

¹⁰ See for instance the case law concerned with provision of educational entitlements, eg Case 235/87 *Matteuchi* [1988] ECR 5589; Case 152/82 *Forcheri* [1983] ECR 2323; Case 293/83 *Gravier* [1985] 593; Case C-357/89 *Raulin* [1992] ECR I-1027.

¹¹ [1997] ECR I-3395.

¹² Not yet decided; AG Opinion 28 Jan 1999.

¹³ both of 28 April 1998.

¹⁴ [1997] ECR I-3395.

connected with financing such schemes are more likely to escape the reach of the Treaty provisions on establishment and services. Thus, pursuit of social objectives on the basis of solidarity may lead Member States to withdraw all or part of the operations of social security schemes from access by private economic operators.’ (para 29)

The purpose of this paper is to analyse this emergent concept of ‘social solidarity’, in the context of the jurisprudence of the Court and the interplay between national social policy provision and the EU’s internal market and competition law. To this end, the paper first considers the rulings in some detail, setting each in the context of previously developed principles of internal market and competition law in the welfare context. The ‘welfare dumping’ or ‘race to the bottom’ problems posed or potentially posed to European national social welfare systems by each case are considered. The second section considers one possible consequence of this recent line of case law, that it will provoke a legislative response from the governments of the Member States, mediated through the institutions of the EU, in particular the Council of Ministers. In doing so, it seeks to draw comparison with an apparently similar line of case law which developed in the 1980s, in the context of educational entitlements. However, I conclude that the comparison between the legislative responses to the education cases and possible legislative responses to these ‘social solidarity’ cases is incomplete. The final section therefore considers the judicial response of the Court – that of the application of the Court’s version of the concept of ‘social solidarity’. Various potential deficiencies with that current conceptualisation are identified. The final conclusion therefore is that, if the ‘European welfare model’ is to be protected, then ‘social solidarity’ must be much more firmly articulated and embedded within the EU’s legal order.

2. The ‘social solidarity’ rulings

2.1 Case 70/95 *Sodemare*¹⁵

Case 70/95 *Sodemare* concerned the provision of social welfare services of a health care character in residential homes for the elderly in the region of Lombardy in Italy. The region of Lombardy subsidised through its social welfare and health care budgets provision of such services by licensed non-profit-making homes. As such non-profit-making homes were almost exclusively Italian, the exclusion of commercially operated homes from receipt of public funds for provision of these health care benefits was indirectly discriminatory on grounds of nationality. A Luxembourg company and its Italian subsidiaries challenged the national legislation on this basis. Questions were asked by the national court in respect of the impact of Articles 52, 58 and 59 EC on national legislation which hampers the pursuit of business activity of a company exercising its rights of freedom of establishment in EC law, by imposing on that company the condition either that it carries out its activities on a non-economic basis, or that it takes upon itself the burden of services which should be provided at the expense of the public health service.

¹⁵ [1997] ECR I-3395.

The Advocate General (Fennelly) was of the view that the Treaty rules on freedom of establishment would apply in such circumstances. He drew a distinction between this case and earlier cases such as Case 238/82 *Duphar*¹⁶ and Case C-159/91 *Poucet and Pistre*¹⁷. In *Duphar*, the Court held that a restrictive national purchasing system for pharmaceuticals, as part of the cost-containment provisions of a general national health policy, would not breach Article 30 EC on the free movement of goods, provided that national rules and practices on the purchase of medical products did not discriminate on grounds of nationality. In *Poucet and Pistre*, a challenge was made to orders served on Mr Poucet and Mr Pistre to pay social security contributions to sickness and maternity funds, in accordance with French social security law. The applicants claimed that the relevant social funds held and abused their dominant positions on the internal market, contrary to Article 86 EC, and that they should be free to approach any private insurance company established within the territory of the EU. The Court referred to the ‘principle of solidarity’ (‘the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover’ (para 10)) and ‘the fact that contributions paid by active workers serve to finance the pensions of retired workers’ (para 11) and the financial equilibrium of the French social security system (‘those [social security funds] in surplus contribute to the financing of those with structural financial difficulties’ (para 12)). The Court drew the conclusion that the activities of the schemes were not ‘economic’ and therefore the funds did not fall within the scope of Articles 85 and 86 EC, the competition rules of the internal market.

According to the Advocate General in *Sodemare*, the principle of solidarity was an ‘essential element’ in these cases (para 26). Where only very limited elements of ‘solidarity’ were present, such as in Case C-244/94 *Fédération Française des Sociétés d’Assurance (FFSA)*,¹⁸ the undertaking concerned was carrying out an economic activity, and therefore was subject to relevant provisions of internal market law. National social security systems are required to comply with EC law ‘to the extent that they affect activities of *economic* operators in ways which are not essential to the achievement of their social objectives’ (para 30). Thus if, as in *Sodemare*, Member States contract-out to, or co-opt, or subsidize economic operators, the Treaty rules apply. No social objective of the Lombardy scheme – neither its financing, nor the formal standard of provision required in the licensed homes – would be affected if Treaty rules applied.

The Court, however, did not follow its Advocate General. Rather than making a distinction between this case and the earlier cases, as the Advocate General had done, the Court simply reasserted the principle, articulated in those cases, that ‘Community law does not detract from the powers of the Member States to organise their social security systems’ (para 27). For the Court, the relevant comparison was between profit-making companies established in Italy and profit-making companies established in other Member States (para 33). Here there was no discrimination. There appears to be a contradiction in these two statements of the Court. Member States may organise their social security

¹⁶ [1984] ECR 523,

¹⁷ [1993] ECR I-637.

systems without the impact of EC law, *but only so long as they do so without the involvement of 'economic operators'*. Thus it follows that if a Member State opts to keep its system of provision sufficiently 'public' to satisfy the Court's definition of 'solidarity', then it will escape the rigours of internal market law. However, a Member State may *not* chose to 'privatise' aspects of its social welfare system without subjecting its providers to competition from other Member States. Therefore, a Member State cannot operate a 'privatised' social welfare policy without taking into account the possibility (or perhaps likelihood) of interaction with non-national providers. Thus, as much as the Court may assert that 'Community law does not detract from the powers of the Member States to organise their social security systems', Member States cannot be said to maintain complete control over such systems in the sense of maintaining all possible policy options. Membership of the EU constrains certain policy options.

2.2 Case C-67/96 *Albany International et al*¹⁹

These cases, not yet decided by the Court, concern the Dutch system of compulsory affiliation to sectoral pension funds. Albany International (and the other litigants) were ordered to pay contributions to sectoral pension funds. They refused, on the grounds *inter alia* that their own supplementary pension scheme was more generous than the sectoral scheme. Albany took the view that the national system of compulsory affiliation breached EC competition law in a number of respects. First it was argued that the collective agreements governing the sectoral pension funds constituted 'agreements between undertakings' in the sense of Article 85 (1) EC. These agreements restricted competition in that employing firms were not able to choose the most beneficial pension scheme for their employees, nor were they able to attract the best employees by offering attractive pension packages. Trade between Member States was affected as insurance companies from other Member States were prevented from providing the pensions services. Secondly, Albany claimed that the system of compulsory affiliation infringed Articles 86 and 90 (1) EC. The fact that the pension services offered by the funds do not satisfy the needs of the relevant firms constituted or was evidence of an abuse of a dominant position. The fact that it was for the funds themselves to make decisions on individual exemptions from the compulsory affiliation also constituted such an abuse.

The Advocate General (Jacobs) rejected the contention made by the Funds, the Commission, and the governments of intervening Member States (Netherlands, France and Sweden) to the effect that there is a general exception from EC competition law for the social field (para 23). Referring to previous case law,²⁰ the Advocate General pointed out that the Court has already accepted in principle that competition rules apply to the social field, in particular to employment and pensions.

¹⁸ [1995] ECR I-4013.

¹⁹ Case C-67/96 *Albany International*; Case C-115-7/97 *Brentjens*'; Case C-219/97 *Drijvende Bokken*. Not yet decided; AG Opinion 28 Jan 1999.

The Advocate General then considered whether there is a general exception for *collective agreements*, coming to the conclusion that a limited immunity from competition law for collective agreements should be applied in EC law (paras 179-194). Article 85 (1) does not apply to 'collective agreements between management and labour on core subjects such as wages and other working conditions.' However, Article 85 does apply to some aspects of collective agreements, and immunity should be limited to 'those agreements for which it is truly justified' (para 193), that is, agreements on the labour relationship between employers and employees, and not agreements which directly affect relations between employers and third parties such as clients, suppliers, competing employers or consumers. Thus it follows that collective bargaining on harmonised pension contributions, as an aspect of remuneration, does not fall within EC competition law. However, setting up a single pension scheme, administered by management and labour, under which affiliation is made compulsory according to national law for all employees in the sector, 'directly concerns the relations of employers with third parties [insurance companies; employers who wish to administer the funds themselves] and is not covered by the immunity' (para 199). The agreement to set up a single pension fund jointly managed by management and labour is similar to a cooperative joint venture (para 259). This allows the parties to achieve significant economies of scale, in a field remote from the product or services market, and is generally pro-competitive (para 265), and so not caught by Article 85 (1). The effect on private insurance companies is neutral (para 279). The restriction on Albany from making special pension arrangements arose not from the setting up of the single fund ('the agreement' in terms of Article 85), but from the action of the Netherlands government in making affiliation compulsory. Thus any anti-competitive effect should be considered under Articles 86 and 90 (1) (paras 275, 286).

The Advocate General then considered (paras 306-348) whether the relevant sectoral pension funds themselves constitute 'undertakings' within the meaning of the competition law provisions of the Treaty. He concluded that they are 'undertakings' (para 348), carrying out economic activities, irrespective of their social objectives, and the elements of sector-wide solidarity (para 307) present within them. The Advocate General distinguished *Poucet and Pistre*, in which it was held that French bodies administering a sickness and maternity insurance scheme and a pension scheme were not undertakings, and *Van Schijndel*, in which he had expressed the opinion that the Netherlands' physiotherapists' occupational pension fund was not an undertaking. However the Advocate General drew a comparison with the *FFSA* case, concerning the French supplementary retirement scheme for self-employed farmers. According to the Advocate General, 'the decisive factor is whether a certain activity is necessarily carried out by public entities or their agents' (para 330). Therefore if pension provision is made through redistribution, for instance whereby this generation's working population finances the pensions of the previous generation, this by definition is not being carried out by an 'undertaking'. The concept of generational solidarity implies state activity, not the 'economic' activity of an undertaking. In the pension funds at issue here, there were some elements of 'solidarity', but not enough to deprive the funds of their economic nature (para 343).

²⁰ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979; Case C-55/96 *Job Centre* [1997] ECR I-7119; Cases C-159 & 160/91 *Poucet and Pistre* [1993] ECR I-637; Case C-244/94 *Fédération Française des*

Finally, the Advocate General turned to the issue of whether there was a breach of Articles 90 (1) and 86 EC (paras 349-468). In view of the compulsory nature of affiliation, the pension funds held exclusive rights (in the sense of Article 90 (1)) to collect and administer the contributions. The funds held the further exclusive right to decide on applications for individual exemptions. In applying Article 90 (1), the Advocate General adopted what he termed the ‘*Corbeau*-type approach’,²¹ according to which Article 90 (1) must be read together with Article 90 (2), concerning the permissibility of conferral of exclusive rights on undertakings providing a service of general economic interest. The pension funds did provide a service of general economic interest, that of securing supplementary pension income for a large proportion of the population. In assessing whether the exclusive rights – that is, the compulsory affiliation – are necessary to achieve the objective of providing an adequate level of protection, national courts must assess in detail all relevant economic, financial and social matters. ‘Accordingly, compulsory affiliation as such infringes Articles 90 (1) and 86 only where by reason of the Netherlands’ regulatory framework the funds are manifestly not in a position to satisfy demand, and where abolishing compulsory affiliation would not obstruct the performance of the services of general interest assigned to the funds’ (para 440). The funds’ exclusive right to decide on individual exemptions,²² however, was incompatible with Articles 90 (1) and 86 EC. Of course, it remains to be seen whether the Court will follow the opinion of its Advocate General.

2.3 Case C-120/95 *Decker* and Case C-158/96 *Kohll*²³

‘Social solidarity’ arose in a slightly different context in Case C-120/95 *Decker v Caisse de Maladie des Employés Privés* and Case C-158/96 *Kohll v Union des Caisses de Maladie*. Both cases originated in Luxembourg, and both involved requests to the Luxembourg social security funds for reimbursement for medical goods or treatment. In *Decker*, the issue concerned a Luxembourg national who bought, on a prescription given by an ophthalmologist established in Luxembourg, a pair of prescription spectacles from an optician established in Belgium. According to national law, treatment abroad would only be reimbursed by the social security fund where prior authorisation had been granted. That was not the case in *Decker*’s circumstances, and so authorisation was refused. *Decker* challenged the refusal on the grounds that it breached Article 30 EC, in that it constituted a hindrance to the free movement of goods within the internal market. The national court took the view that this case fell within Regulation 1408/71/EEC, not Article 30. Article 22 of Regulation 1408/71 provides that *authorised* individuals may go to another Member State to receive medical treatment. It does not impose any duty on a Member State to grant authorisation to receive medical treatment, at the expense of the responsible

Sociétés d’Assurances [1995] ECR I-4013.

²¹ Following Case C-320/91 *Corbeau* [1993] ECR I-2533.

²² Subject only to marginal judicial review.

²³ both of 28 April 1998.

Member State's public health funds, in another Member State, except in the unusual situation in which the treatment sought is not available in the responsible Member State.²⁴

The Court repeated (para 21) its established formula that 'according to settled case law, Community law does not detract from the powers of the Member States to organise their social security systems', citing *Duphar* and *Sodemare*.²⁵ However, the Court went on to note that 'the Member States must nevertheless comply with Community law when exercising those powers' (para 23). The Court found that the fact that the national rules at issue fell within Regulation 1408/71 did not exclude the application of Article 30 (para 25). This is in stark contrast to *Sodemare* where the rules at issue were found to be outside the scope of internal market law. Therefore, applying the *Dassonville* test,²⁶ the Court had little difficulty in finding that the rules of the Luxembourg social security scheme, by requiring a prior authorisation to purchase spectacles from an optician established outside Luxembourg, but no prior authorisation to purchase spectacles from an optician established in Luxembourg, constituted a barrier to the free movement of goods as the national rules are liable to curb the import of spectacles assembled in other Member States (para 36).

Moreover, with regard to Luxembourg's submission that the national rules were justified by the need to control health expenditure – an argument based on the 'social solidarity' concept accepted in *Duphar*, *Poucet and Pistre* and *Sodemare* – the Court accepted that as spectacles were reimbursed only at a flat rate, the financial burden on the social security funds was the same as it would have been had the spectacles been bought in Luxembourg. In general, the risk of seriously undermining the financial balance of a national social security system could constitute a justification, but here that risk was not present (paras 39-40). The Court therefore found that the national rules requiring prior authorisation breached Articles 30 and 36 EC.

In *Kohll*, decided on the same day, the Court was faced with a very similar issue, only this time concerned with receipt of services. *Kohll* (a Luxembourg national) challenged the refusal of authorisation for his daughter to receive dental treatment in Trier, Germany. *Kohll*'s doctor recommended treatment by an orthodontist established there, but the social security medical supervisors refused to authorise payment for the treatment from the social security fund. Only one orthodontist established in Luxembourg would have been able to give the treatment, thus the daughter would have had to wait much longer if she were to receive treatment there, rather than in Germany.

²⁴ See Case 117/77 *Pierek No 1* [1978] ECR 825 and Case 182/78 *Pierek No 2* [1979] ECR 1977. The responsible Member State is normally the state of residence of the person in receipt of the social security benefit. See further Van der Mei, 'Cross-border access to Medical Care within the EU' 5 MJ (1998) 277-297; Hervey, 'Buy Baby: The European Union and the Regulation of Human Reproduction' 18 OJLS (1998) 207-233, at 215-6.

²⁵ [Note, not the more subtle (and more accurate) formulation provided by the Advocate General in *Sodemare*.]

²⁶ Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

The text of the judgment in *Kohll* is very similar to that in *Decker*. The Court held that the 'special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement' (para 20). Treatment was to be provided for remuneration by an orthodontist, established in another Member State 'outside any hospital [ie public] infrastructure' (para 29). Thus the application of Articles 59 and 60 EC on provision of services was not excluded in this case. Luxembourg again raised as justification the need to control health expenditure. The Court accepted the argument of Mr Kohll, that he was asking for reimbursement only at the Luxembourg rate, and so application of the free movement rules presented no threat to the financial stability of the social security scheme (para 37). Justification was not established.

The *Decker* and *Kohll* cases establish that, provided that no direct threat is posed to the financial stability of the social security funds, individuals may receive health or welfare benefits from providers in another Member State, and require that their national social security funds meet the cost, at least at the rate at which they would be reimbursed if the benefit were received in the home Member State. Of course, this principle applies only in the case of benefits or social services provided through the mechanism of cash benefits to be spent in the market of social service providers. The principle would not apply where a Member State makes provision through publicly funded services, and health or welfare benefits are free at the point of receipt.

2.4 The 'social solidarity' cases as a threat to European social models

Each of these three sets of cases illustrate different aspects of the (at least perceived) threat to European models of national social welfare provision within the context of the EC's internal market and competition law.

The facts of the *Sodemare* case were such that the Court took a generous approach to the need to protect national welfare systems, and the application of internal market law was minimal. In effect the Court held that care homes operated on a not-for-profit basis could not be compared to commercially operated homes. Thus the indirect discrimination which arose because non-Italian providers were all commercially operated care homes, and the not-for-profit homes were all Italian, did not breach Article 52 EC. The problem raised by *Sodemare* is that only such 'non-commercial' provision of welfare benefits falls outside the scope of internal market law. However, this in itself may impose pressures on national social welfare systems, as illustrated by *Albany International*.

If the Court follows its Advocate General in *Albany*, then this will confirm that, in principle, social insurance schemes may be subject to EC competition law. The application of Article 85 EC appears unlikely to be significant, as agreements for instance between employers made as part of a social insurance system are likely to be considered to be cooperative joint ventures, which do not restrict competition as they only concern concerted action in a field removed from the main markets in which the employers operate. What appears to be more likely is that the undertakings administering the social

insurance scheme abuse their dominant position in contravention of Article 86 EC. Such undertakings would almost certainly be granted ‘special or exclusive rights’, as otherwise they would not be able to provide the service of universal social insurance, and thus are likely to occupy a dominant position. This is all the more likely if the relevant market is restricted to provision of social insurance of a particular type (for instance, as in *Albany*, retirement pensions) to those working in a particular Member State, or a particular economic sector within a Member State.

Article 90 (2) grants an exemption from Article 86 to state monopolies providing a ‘service of general economic interest’, which would include a state-wide or sector-wide social insurance scheme. However, the exemption applies only where the application of EC competition rules would ‘obstruct the performance, in law or in fact, of the particular tasks assigned’ to the undertaking. According to the Advocate General, in the context of the Netherlands schemes at issue in *Albany*, abuse contrary to Article 86 would arise only if the funds were not able to satisfy demand²⁷ and where the service of a general interest could still be provided if compulsory affiliation were removed. This approach was taken from the *Corbeau* case, which concerned the Belgian state postal service. Corbeau provided a private, rapid delivery service for letters within the city of Liège. He was prosecuted under Belgian law, which granted exclusive rights to collect, transport and deliver post to the Belgian national post office. The Court held that a *general and universal* postal service was a service of ‘general economic interest’ in the sense of Article 90 (2). However, Belgian law prohibiting competitors such as Corbeau from providing *special* postal services was contrary to EC competition law. Such a prohibition would be compatible with EC law only if it could be shown that the existence of special service providers would compromise the economic basis and equilibrium of the general service.

Thus provision of special social benefits or services (which do not jeopardise the provision of a service of general economic interest) is subject to EC competition law. Member States must permit such services to be provided within their territory, and may not restrict access of consumers to such services. The risk here is one of ‘cream-skimming’. Private providers of social benefits or services will not do so unless they can make a profit. *Albany* sought to opt out of the compulsory sector-wide retirement pension scheme, in order to make better provision for its employees. Retirement pension providers spread the risk across the group of those affiliated to the pension scheme. It may be that a provider of such a special extra service – here insurance cover for retirement pensions which was better either in the sense of requiring lower premiums or in the sense of higher returns – is able to provide an improved service through greater administrative efficiency, lower overheads or lower pay for its employees than the ‘state’ or compulsory affiliation scheme. However, there must be at least a possibility that such an improved level of service can be provided only if the group insured is a lower risk group than the general population, or the sector covered under the general ‘public’ scheme provided by the state monopoly. This might be the case for instance if an employer has a workforce of a lower age group, who tend to move on to other employment before they retire, or the workforce is one in which men are over-represented (as men live less long, and therefore draw pensions for less long, than women). The

²⁷ [is this the abuse of ‘limiting production to the prejudice of consumers’ in A 86]?

public scheme will thus lose the revenue of the contributions paid in respect of those who have opted out, the lower risk employees. The public scheme will thus be required to cover the group of higher risk employees without the benefit of income generated by membership of the lower risk employees of the scheme. Therefore, public general schemes might be jeopardised by the impact of EC competition rules. If a Member State chooses to reorganise the provision of national social security, for instance of old age pensions, to move to a system of insurance rather than generational redistribution, it may not do so and avoid the application of EC competition law.

Decker and *Kohll* raise rather different issues from *Sodemare* and *Albany International*. Two distinct pressures on national health systems may arise from the rulings. From the point of view of Member States to which patients go to receive medical goods or services, such states may experience an unpredictable influx of patients. This may have an impact on national health care provision for nationals, for instance longer waiting lists. Nothing in the *Decker* or *Kohll* judgments appears to provide a mechanism by which such host states may protect the stability of their health service systems, as they may not lawfully refuse treatment to non-nationals as to do so would be discriminatory, contrary to Articles 59 and 6 EC. Moreover, a Member State that provides a higher standard of service, better value for money, or a greater choice for medical 'consumers' is likely to attract more free movers to receive these services. Perhaps, for instance, *Decker* wanted to go to Belgium to purchase spectacles because the choice of frames and lenses was greater there. Or perhaps the amount of reimbursement would purchase a higher quality of spectacles on the Belgian market than in Luxembourg. Member States may then be tempted to reduce the quality of service provided, in order to discourage such medical tourism – the classic 'race to the bottom'.

Dekker and *Kohll* may also raise difficulties from the point of view of those Member States whose nationals go elsewhere to receive medical treatment or purchase medical goods. Such Member States must reimburse this treatment as if it had been purchased in the home Member State. The problem is not that the home Member State is obliged to pay higher rates for the medical goods or treatment than those payable if the good or service were purchased at home. *Decker* and *Kohll* make it clear that the obligation is limited to payment at the rate of reimbursement of the home state, not the state in which the goods or services are purchased. However, the ability to purchase medical goods or services elsewhere in the EU may mean that it is easier for patients to find the treatment they are seeking. It may be that the patients in *Decker* and *Kohll* chose to go to Belgium and Germany for treatment because that was more convenient, for instance, because they lived close to the border and the optician or the orthodontist in the host Member State was nearer their place of residence than one in their own Member State. However, it is not inconceivable that the fact that only one orthodontist with this particular specialism was established in Luxembourg is a function of some cost-containment measures in Luxembourg law or policy, for instance restrictive licensing requirements, or very onerous overheads in terms of taxation, or insurance. Member States do adopt various such controls on supply of medical goods and services, in order to constrain the financial burdens on their national health insurance funds. After *Decker* and *Kohll*, it will be more difficult for Member States to maintain in

place effective cost containment controls, as a Member State cannot control supply from other Member States.

Thus, an examination of the potential effects of the principles established in these ‘social solidarity’ cases illustrates that the application of EC internal market and competition law, through individual litigation, may have not insignificant effects on the organisation, financing and delivery of social welfare in the Member States of the EU. The Court’s mantra to the effect that ‘according to settled case law, Community law does not detract from the powers of the Member States to organise their social security systems’ does not hold true.

3. A legislative response?

It is noteworthy that a number of Member States (Luxembourg, Belgium, France, Germany, the Netherlands, Spain, and the UK) intervened in the *Decker* and *Kohll* cases. Italy and the Netherlands intervened in *Sodemare*; and the Netherlands, France and Sweden intervened in *Albany International*. These interventions may illustrate the importance of the issues raised to national governments and their concern about these types of challenges to national social security, health and welfare policies. In cases of cross-border provision of welfare services, concerns are raised not only by the ‘home’ Member State which pays, but also by actual or potential ‘host’ Member States. Where litigation imposes a potential threat to national policy provision, one possible policy response is legislative. The governments of the Member States may seek to act through the Council of Ministers in order to enact legislation responding to the perceived threats imposed by the Court’s jurisprudence in the social solidarity cases.

Such a dynamic may be seen in other areas of EC law, for instance in the sphere of EU level intervention in the provision of education.²⁸ Education and training are traditionally viewed as part of national social policies because they are linked, via employment, to the role of the state in providing social protection for those who are unable to provide for their own needs. Members of a well-educated population will be better enabled to provide for themselves through employment, thus reducing the drain on public social policy funds. Thus education services represent a form of collective ‘investment’ in the future economic success of a state and in the future welfare of the individual recipients of those educational services, indeed an expression of ‘solidarity’ across the generations. National governments therefore legitimately wish to control conditions of access to educational services, in order to ensure that those who benefit are those who ‘belong’ to the state, and who are likely to ‘repay the investment’ by their participation in the economic life of the state, including contribution to public funds, in the future.

²⁸ See in general Jo Shaw, ‘***’ in Paul Craig and Grainne de Búrca, eds, *Evolutionary Perspectives* (Oxford: OUP, 1999)

EC law concerning migrant workers and their families operates as a constraint on this desire to restrict provision of educational services free at the point of receipt to nationals only. Children of migrant workers resident in the host Member State are entitled to access to the general educational and vocational training courses of that host state under the same conditions as children of nationals of that state.²⁹ However, in terms of access to primary and secondary education, the provision in Regulation 1612/68, Article 12 (1) has been largely non-contentious, perhaps because the migrant worker parent is by definition already participating in the economic life of the host state. The scope of Regulation 1612/68 as a source of rights to higher (post-compulsory) education has in contrast been much more contentious.

In addition to the vocational training provision in Article 7 (3) of Regulation 1612/68, the entitlement of migrant workers themselves to education benefits has been developed through litigation before the European Court of Justice on the basis of Article 7 (2) of Regulation 1612/68. Article 7 (2) provides that European Union citizen (EUC) migrant workers are to receive 'social advantages' on an equal basis with nationals. The European Court of Justice has construed the term 'social advantages' to include educational entitlements such as the right of access to educational establishments, fees, maintenance grants and scholarships.³⁰ This is potentially a very generous entitlement, constituting a burden on the public finances of the host state in respect of a migrant EUC worker who is by definition while undertaking his or her studies neither economically active nor contributing to the public finances of the host state. Member States (particularly those with generous provision of public finance for education) feared that Article 7 (2), as an aspect of the EC's internal market law concerned with free movement for workers, could be relied upon by individuals after a relatively short period of employment in the host state (for instance a summer job) to gain educational benefits.³¹ As is well known, this possibility was opened up by the Court's generous construction of the term 'worker' for the purposes of those free movement rules.³² This generosity in construction of the basic internal market rules is characteristic of the Court's jurisprudence in freedom of movement of workers, goods, services and the provisions on freedom of establishment, all of which may affect provision of welfare entitlements within Member States.

In response to this jurisprudence, the governments of some Member States were concerned that their generous educational entitlements, threatened with large influxes of 'worker-students', would have to be lowered in order to protect the financial viability of a system based on social solidarity between the generations, that is, the assumption that beneficiaries of educational services in one generation would finance provision in the future. However, various limitations were imposed by the EU institutions on

²⁹ Regulation 1612/68/EEC OJ Sp Ed 1968 p 475, Article 12 (1).

³⁰ Case 235/87 *Matteuci* [1988] ECR 5589; Jo Shaw, 'Education and the Law in the European Community' 21 *Journal of Law and Education* (1992) 415-422, at 424.

³¹ Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials* (Oxford: OUP, 1995), p 714-718; Flynn, 'Vocational Training in Community Law and Practice' 8 *YEL* (1988) 59-85, at 73.

³² Case 53/81 *Levin* [1982] 1035; Case 66/85 *Lawrie-Blum* [1986] ECR 2121; Case 139/85 *Kempf* [1986] ECR 1035; Case 196/87 *Steymann* [1988] ECR 6159; Case C-357/89 *Raulin* [1992] ECR I-1027.

the march of internal market law in this field. The scope for Article 7 (2) of Regulation 1612/68 to jeopardise educational provision in the Member States (even those with the most generous entitlements for their nationals) is limited. The Court itself acted to constrain its jurisprudence on this matter,³³ especially in Case 197/86 *Brown*,³⁴ in which the Court held that an individual who carries out work in a host Member State prior to a period of study purely in order to prepare for that course of study may not rely on Article 7 (2) to receive maintenance grants. In the *Brown* case the Court may be seen as responding to the UK's concerns that its system of funding university students (at that time through relatively generous maintenance grants funded from public finances) would have been under threat from an influx of EUCs from other Member States, benefitting from the generous provision, and then returning to their home Member States on graduation to work and to pay taxes. The Court may also be seen as supporting the legislative provisions agreed by Council and Commission concerning the ERASMUS system of mobility for migrant students.³⁵

The entitlements of migrant students³⁶ are also the product of the Court's jurisprudence.³⁷ However, the development of the law concerning entitlements of migrant students by the Court and crucially also the EU legislature³⁸ has been on the basis that migrant students are entitled to *access* to educational courses and residence in the host state, but not to financial support from that state (see in particular Case 39/86 *Lair*). Indeed Directive 93/96 provides that residence rights are to be granted to financially independent students only. Thus again, although internal market law, and the movement of individuals, at times enforced through litigation, has had the potential to affect national educational policy, in practice the EU institutions, in particular those with legislative power, have responded to ensure that national entitlements are protected.

Therefore we can see that, although membership of the EU may restrict some options for national provision of educational entitlements available to states, these restrictions are in limited areas, such as the provision of education for children of migrant workers. Moreover, the EU legislature and the European Court of Justice itself have acted to restrain the potentially unfettered development of internal market law, as interpreted by the Court, in ways which might threaten this national provision.

If the jurisprudence of the Court in the 'social solidarity' cases discussed above develops along the same sort of lines as the jurisprudence on educational rights, then we might predict an eventual response from the EU legislature to coordinate (along the lines of the ERASMUS scheme) or constrain this free movement. We might also predict a gradual narrowing of the Court's jurisprudence, to ensure

³³ See for instance Case 39/86 *Lair* [1988] ECR 3161 and Case C-3/90 *Bernini* [1992] ECR I-1071 in which it was established that there must be a link between previous employment and the course of education, unless the worker is made unemployed on an involuntary basis.

³⁴ [1988] ECR 3205.

³⁵ Shaw [1992], supra n *, 429.

³⁶ An independent category of migrant in EC law, see Shaw, [1992], supra n *, 427.

³⁷ Case 152/82 *Forcheri* [1983] ECR 2323; Case 293/83 *Gravier* [1985] ECR 593, Case 39/86 *Lair*; Case C-357/89 *Raulin*.

³⁸ Directive 93/96/EEC OJ 1993 L 317/59.

that national systems are protected. The development of the Court's jurisprudence is considered below. Here we are concerned with possible legislative responses.

Although there are similarities between the education case law and the emergent case law on social security, health and welfare, there are also a number of differences which might suggest that the pattern of development of educational rights in EC law, and its effect on national educational provision, will not be transferred to the areas of social security, health and welfare. In the education field, there were two main legislative responses: the ERASMUS programme and Directive 93/96/EC.

The ERASMUS (now Socrates) scheme aimed to control movement of EUC students within the EU through the setting up of voluntary networks of educational establishments, governed by bilateral or multilateral agreements. Movement of students is to take place within these administrative arrangements. In order to entice students (and educational establishments) to use the scheme, financial support was given, via the Commission, to those participating. The underlying principle, however, from the point of view of educational providers, is one of equivalent burdens. For every ERASMUS 'incoming student' there should be an ERASMUS 'outgoing student', and so the burden on each educational establishment should be no more and no less than it would have been had no free movement taken place. Moreover, fees are paid in respect of the migrant student (either by the student, or by the national social security system for educational entitlements) at the rate of the *home* educational system. Thus the host educational system could not gain more income at the expense of the home system, even if its fees for its home students were set at a higher rate, and thus the burden on the home educational system remains the same. The financial equilibrium of the home and host educational systems would thus be unaffected by the free movement of EUC students.

The ERASMUS-type system would not, however, be transferable as a solution to the *Decker/Kohll* situation, in which individuals go to another Member State to receive health care goods (spectacles) or services (orthodontic treatment). It would be virtually impossible to put in place a principle of equivalent burdens, whereby for each Luxemburger receiving medical goods in Belgium, a Belgian receives medical goods of equivalent value in Luxembourg. Moreover, the incentives on educational establishments to cooperate under ERASMUS (such as Commission funding, collaboration between academics, added pedagogical benefits in having a student body composed of students from different Member States) are not present with respect to health care providers.

Of course, Regulation 1408/71 already provides a mechanism for coordination of national social security systems. The Regulation 1408 scheme implies that the impact of free movement of EUC workers, self-employed persons, and their families, on national social security systems is to be managed by a complex system of aggregation and apportionment of benefits, and exportability of benefits from Member State to Member State. According to Regulation 1408 (generally speaking) benefits accrue under the social security system in which work is undertaken, and, although benefits are paid by one Member State (the 'competent state'), that Member State recoups the relevant proportions

of benefits paid from the social security systems of other Member States in which the recipient has been insured.

However, as *Decker* and *Kohll* illustrate, the Regulation 1408 system is not totally immune from the general provisions of internal market law. Article 22 (1) of Regulation 1408 appears to provide the EUCs may go to another Member State for the purpose of receiving medical treatment to be financed by their home national health system only where ‘authorisation’ is given. According to Article 22 (2), authorisation is mandatory only in the circumstance where ‘the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resides’ and ‘where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence’. This appears to leave mandatory authorisation in only the most exceptional circumstances, for instance a situation of emergency where the authorising state’s national health provision with respect to the particular medical treatment sought is already gravely over-stretched. Indeed Article 22 (2) is an example of a legislative amendment in response to litigation before the European Court of Justice. In Case 117/77 *Pierek No 1*³⁹ and Case 182/78 *Pierek No 2*⁴⁰ the Court held that authorisation under Article 22 (1) (c) was mandatory in circumstances where the treatment sought is not available in the home state, even, by implication, where the home state has chosen not to provide that particular health treatment or benefit, for non-medical reasons, such as the need to reduce the financial burden on the national health system, or for ethical grounds. The governments of the Member States responded to this potential threat to the financial stability of their health care systems by enacting an amendment to Article 22 (2)⁴¹ to the effect that patients do not have the right to claim financial support from their home Member State for treatments received in another Member State which are not available, or not publicly funded, in the home Member State. The aim was also to prevent patients from circumventing waiting lists in the home Member State by claiming a ‘right to be treated’ in another Member State.⁴² The intention of the legislature, it seems, was to reassert that control over the authorisation procedure remains firmly at the discretion of the Member States, and is not the subject of individually enforceable rights in EC law.

But *Decker* and *Kohll* undermine this intention by bringing into play the ‘fundamental’ Treaty provisions of Articles 30 and 59 EC. A Member State may not refuse authorisation if receipt of medical goods or services is reimbursed by national social security funds, the goods or service would be available in the home Member State, and the patient wishes to purchase them in another Member State. The only justification would be if the financial equilibrium of the national social security scheme for health would be seriously undermined where authorisation was mandated. This would not be the case where the medical goods or services were reimbursed at a flat rate.

³⁹ [1978] ECR 825.

⁴⁰ [1979] ECR 1977.

⁴¹ OJ 1981 L 275.

⁴² Van der Mei, ‘Cross-border access to Medical Care within the EU – Some reflections on the judgments in *Dekker* and *Kohll*’ 5 MJ (1998) 277-297, at 286.

Thus, legislation based on the Regulation 1408 approach could have some limited effect on some aspects of the ‘race to the bottom’ problem, in particular those raised by the *Decker/Kohll* situation of free movement of welfare service recipients. However, as we have seen, it may not be feasible to insulate the coordination system totally from directly effective provisions of internal market law. Moreover, at least at present, Regulation 1408 only covers ‘social security’ benefits⁴³ paid to those affiliated to or insured under a national social security scheme.⁴⁴ It does not cover either ‘social and medical assistance’⁴⁵ or occupational social security schemes. Finally, Regulation 1408 would not be helpful in alleviating the problems raised by *Sodemare* and *Albany International*-type situations, where the jeopardy to national welfare systems is in respect of the opening up of competition from non-national providers of welfare services or goods.

The second legislative response to the education jurisprudence was the ‘completion’ of the measures on free movement by the enactment of the residence directives, in particular Directive 93/96 concerning rights of residence of migrant EUC students. Directive 93/96 makes it clear that such migrant students have the right to reside in the host Member State only where the student ‘assures the relevant national authority ... that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State’ and ‘is covered by sickness insurance in respect of all risks in the host Member State’.⁴⁶ The Directive specifically states that it ‘shall not establish any entitlement to the payment of maintenance grants by the host Member State to the migrant student’.⁴⁷ Such an approach as a response to the ‘social solidarity’ case law suffers from the same limitations outlined above. Presumably, it would be possible for Member States to enact a Directive concerning freedom to receive welfare goods or services in another Member State, and provide that such goods or services should be purely privately remunerated, and not remunerated through any ‘state sponsored’ social security scheme, irrespective of how far removed the state’s involvement in the scheme. However, such a Directive would be exposed to the application of the primary (and directly effective) Treaty provisions on free movement of goods and freedom to provide and receive services. The Court might even be persuaded that Council lacked competence to enact a Directive restricting receipt of goods and services to purely privately remunerated goods, on the grounds that it breached such fundamental principles of EC law. Where social welfare benefits are provided through market mechanisms such as provision of flat rate financial benefits administered through social insurance schemes, these cannot be insulated from the application of EC internal market or competition law.

4. ‘Social solidarity’: a buttress against internal market law?

⁴³ Those protecting against the risks of sickness, maternity, invalidity, old age, accidents at work and industrial diseases, and unemployment (Regulation 1408/71, Article 4).

⁴⁴ Regulation 1408/71, Article 2 (1).

⁴⁵ That is, welfare benefits granted by discretion, or means-testing, rather than as of right, after a period of affiliation to a scheme. Regulation 1408/71, Article 4 (1); Case 139/82 *Piscitello v INPS* [1983] ECR 1427.

⁴⁶ Directive 93/96/EC, Article 1.

⁴⁷ Directive 93/96/EC, Article 3.

Given that legislative responses are likely to be problematic – either incomplete, or inappropriate for the particular problem in hand – the other possibility is that the jurisprudence of the European Court of Justice will develop to deal with the problems raised by the ‘social solidarity’ cases, as it did in the education context with rulings such as that in the *Brown* case. At least at first sight, it would seem that the Court is indeed responding to the problems raised by *Sodemare*, *Albany International*, and *Decker and Kohll*. In these ‘social solidarity’ cases, the Court is explicit about the financial pressures potentially placed on national systems by the unfettered application of internal market rules. This is in contrast to the education jurisprudence, where the ‘social solidarity’, financial and ‘race to the bottom’ considerations were not made explicit. The Court is using the notion of ‘social solidarity’ within which to articulate these arguments. However a number of problems remain with the Court’s notion of ‘social solidarity’, at least as currently conceptualised.

There appear to be a number of inter-related core elements present in the concept of ‘social solidarity’. Activities or systems promoting social solidarity do not constitute ‘economic’ activity. Social solidarity systems are based on social aims, not on the ‘economic’ goal of profit-making. Thus state or public involvement in provision of benefits by means of social solidarity systems is necessary. The welfare benefits provided by such systems cannot be effectively provided through private market actors. The mechanism for social solidarity is that of subsidisation, either across the generations, or within one generation, for instance, across social classes, or across those who are wealthy and those who are not able to meet their basic needs, or across those who are healthy and those who are not. Subsidisation can be effected through public taxation systems, though it need not be so. Such cross-subsidisation, administered through schemes promoting social solidarity is seen as essentially an ‘involuntary’ act on the part of those involved, either as contributors or as recipients.

This definition of social solidarity contains a curious elision of ‘economic’ and ‘commercial’ activity. Subsidisation of one social group by another may not be a commercial activity, if no profits accrue to the provider. However, it may be carried out for sound economic reasons, for instance to ensure a healthy workforce. There appears to be a confusion of private activity, which is commercial and for-profit, with ‘economic’ activity. The assumption appears to be that public authorities of states would never have social policies with ‘economic’ ends. However, it is not possible to separate ‘economic’ and ‘social’ goals in the way implied. In practice, the ‘social’ policies of states pursue a number of different goals, both ‘social’ and ‘economic’ in nature.⁴⁸

Moreover, this stark division between ‘commercial’ or ‘for-profit’ and ‘non-commercial’ providers of social services is already difficult to maintain, and is likely to become more so, as social welfare systems adjust to the current circumstances in which the market has established itself as an integral provider of social welfare services.⁴⁹ The assumptions (in particular concerning patterns of

⁴⁸ Paul Spicker, *Social Policy: Themes and Approaches* (Prentice Hall/Harvester Wheatsheaf, 1995); Cahill, *supra* n *; Wise and Gibb, *Single Market to Social Europe* (London: Longman, 1990).

⁴⁹ Cahill, *The New Social Policy* (London: Blackwell, 1994); Spicker, *Social Policy: Themes and Approaches* (Prentice Hall/Harvester Wheatsheaf, 1995).

employment) on which the state-funded provision of the 1950s and 1960s settlement of welfare capitalism have been significantly eroded since the 1980s. These trends have led to increased interest among all western democracies, including the Member States of the EU, in 'privatisation' of welfare provision, for instance by granting direct cash benefits to be spent in the market of social service providers or the contracting-out of service provision to private enterprises in competition for government social services contracts. In some Member States, 'third sector' voluntary or charitable organisations are traditionally key providers of social welfare benefits and services; indeed it was such providers that were at issue in *Sodemare*. These providers are neither 'public' (part of the institutions of the state) nor 'private' in the sense of commercial, 'for-profit' operators. 'Social solidarity' as currently conceived does not take sufficient account of such different mechanisms for provision of social welfare benefits, or the reorganisation of European social welfare systems to include such 'private' or 'third sector' actors.

It may also be objected that many private social security or insurance schemes, operated for profit, work on precisely the basis of subsidisation by one group of another. This is particularly the case for private retirement pension schemes and private health care schemes. Cross-subsidisation and profit are not necessarily mutually exclusive: 'social solidarity' as currently conceived implies that they are.

The 'necessity' of state action is also a problematic part of the Court's current definition of 'social solidarity'. In one sense, no state 'needs' to provide any social security or social welfare measures. But all Member States of the EU do so, because that is the political choice made by their citizens. The debate is not over whether some sort of welfare provision needs to be made, but on how it should be effectively provided. Governments of Member States might argue that they 'need' to provide social welfare benefits through private for-profit organs, rather than state or charitable institutions, for instance in order to achieve 'value for money' or to ensure that provision is financed in a situation of an ageing population. Yet it is precisely such profit-making organs that the Court seeks to expose to the provisions of EC internal market and competition law. If this leads simply to more efficient provision of social welfare, then it cannot be objectionable. But it may be that opening up cross-border competition in social welfare provision exposes 'unprofitable' elements of such provision to 'cream-skimming' by private providers. Such exposure may lead to 'race to the bottom' or levelling down pressures on European social models, if Member States seek to reduce the provision of social welfare benefits so that their national providers can compete with those from other Member States. If this were to happen, the level of social welfare provision might be reduced across the EU as a whole, or the principles upon which social welfare is provided might be altered, thus jeopardising welfare components of the European social model. The principle of 'social solidarity' is supposed to guard against this.

Finally, it may also be problematic to assume that provision of social welfare benefits through mechanisms of cross-subsidisation, such as public taxation or mandatory social insurance, is 'involuntary'. It might be objected that the participation of citizens in this kind of social citizenship

collective provision of welfare is implicitly *voluntary*, in their belonging to the state, and participating in its political process through which the policies underpinning such public provision are developed. The idea of the 'social contract', implicit in the 'European social model', although under threat in the 1990s, still underpins social welfare provision in the Member States of the EU.

All these objections suggest that the current concept of 'social solidarity' may not be sufficiently rigorous to protect national social welfare provision from internal market law. The Court therefore will need to develop the concept in future jurisprudence, in order to take account the changing face of social welfare provision in the EU, and to adequately protect the 'European social model'.

5. Conclusions

The matters raised by the 'social solidarity' cases are of course one example of the more fundamental question: what kind of system of governance is to be created in the European Union?⁵⁰ Is it to be a system in which integration through the internal market and free competition is paramount? Or is it to be one in which 'European' social values are respected and protected, even in cases in which they conflict with such 'market' aims? If the system is to tend towards the former model, then individual rights to freedom of movement, and cross-border provision of goods and services, and to prevent anti-competitive behaviour of market actors, should be readily enforceable. Exceptions to such individual rights should be very narrowly defined. If, however, the system aims to move towards the latter model, then exercise of such individual rights must be mediated through application of collective values, *inter alia* of social welfare. 'Social solidarity', as a buttress against internal market law, has the potential to become one way of expressing those values. To achieve this aim, 'social solidarity' needs to be more firmly 'embedded in the *acquis communautaire*',⁵¹ and more firmly articulated by the European Court of Justice in its application of EC internal market and competition law.

⁵⁰ A selection from the massive literature pertinent to this issue includes Stephen Weatherill, *Law and Integration in the European Union* (Oxford: Clarendon, 1995); Miguel Poires Maduro, *We, the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998); Maduro, 'Reforming the Market or the State?' (1997) 3 ELJ 55-82; Christian Joerges, 'European Economic Law, the Nation State and the Maastricht Treaty' in Dehousse, ed, *Europe After Maastricht: An Ever Closer Union?* (Munich: Beck, 1994), Bercusson et al, 'A Manifesto for Social Europe' (1997) 3 ELJ 189-205.

⁵¹ Antje Wiener, 'The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance' (1998) 4 ELJ 294-315.