The Power of Free Movement: Implications of CJEU Case Law for the Vertical Division of Competences in the EU

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ABSTRACT

The paper considers how the CJEU's interpretation of the free movement rules has shaped the constitutional division of competences between the EU and the Member States. It argues that the Court's reasoning in judgments concerning constitutionally and politically sensitive areas of national policy is incoherent in light of the principles that govern the vertical division of competences in the EU – conferral and subsidiarity. In particular, because of the Court's expansive interpretation of the scope of the free movement rules, the case law on healthcare, education and collective labour law sits in tension with the principle of conferral. The latter case law, in contrast to the Court's case law on gambling, is also incompatible with the principle of subsidiarity because it deprives Member States of any meaningful degree of regulatory discretion.

INTRODUCTION

In a time when the authority of EU law is being increasingly questioned, it is ever more essential that the limits of EU competences are duly observed by its institutions, most notably the Court of Justice of the European Union (the CJEU or the Court), which has a broad jurisdiction to 'ensure that in the interpretation and application of the Treaties the law is observed'.[1] The paper considers how the CJEU's interpretation of EU free movement rules, in particular articles on EU citizenship (Art. 21 TFEU) and the freedoms of establishment (Art. 49 TFEU) and of provision of services (Art. 56 TFEU), has shaped the constitutional division of competences between the EU and the Member States. It argues that the Court's reasoning in judgments concerning constitutionally and politically sensitive areas of national policy is incoherent in light of the principles that govern the vertical division of competences in the EU – conferral and subsidiarity. In particular, the Court's case law involving the areas of healthcare, education and collective labour law, in contrast to the case law on gambling, sits in tension with the principle of conferral and is incompatible with the principle of subsidiarity.

The argument draws on the comparative analysis of the Court's reasoning in cases involving conflicts between, on the one hand, the free movement rules and, on the other hand, domestic regulatory measures enacted in execution of national social policy. The domestic policy areas that form the subject of the inquiry are healthcare, education, collective labour law[2] and gambling.[3] All of them are highly regulated at the national level in order to either ensure universal access to public services or protect vulnerable societal groups, consumers and employees. The four policy areas have another common feature

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1 Art. 19(1) Consolidated Version of the Treaty on European Union [2010] OJ C83/01 (TEU).

2 The term 'collective labour law' refers to collective aspects of labour law, as opposed to the individual ones, also known as employment law.

3 The term 'gambling' includes gaming and betting activities.

– none of them has been harmonised at EU level (save for the legislation essentially codifying CJEU case law),[4] due to the lack of competence on behalf of the EU and/or political blockages to its exercise.[5] Therefore, they only come within the purview of EU law through the case law of the CJEU.

Despite the explicit exclusion of harmonisation under the sectoral legal bases,[6] healthcare, education and collective labour law have been substantially influenced by EU law through the judgments of the CJEU. The Court's elaborate definition of the 'medical necessity' test employed in cases concerning the reimbursement of costs of medical treatment obtained abroad has been criticised for depriving Member States of their right to manage national healthcare budgets independently. Similarly, the Court's interpretation of the relationship between collective labour rights and EU economic freedoms has been claimed to constrain the operational autonomy of trade unions, thus challenging the viability of domestic industrial relations systems. Finally, the high standard of proof required in education cases for justifying quotas on admissions of foreign students have made it extremely difficult for governments to maintain open access, free education policies. By contrast, the effects of the case law on the gambling sector have been relatively insignificant, owing to the broad discretion granted to the Member States to regulate their gambling markets.

The aim of this paper is to assess the implications of this case law from the perspective of EU constitutional law, namely, how the judicial developments have affected the constitutional division of competences between the EU and the Member States. I begin by discussing the main developments in CJEU free movement case law in the areas of healthcare, education, collective labour law, and gambling, focussing on the implications of the case law for the scope of Member States' regulatory autonomy. Then, I go on to demonstrate through the comparative analysis that the Court's interpretation of the free movement rules displays varying degrees of respect for the principles of conferral and subsidiarity. Because of the Court's expansive interpretation of the scope of the free movement rules, the case law on healthcare, education and collective labour law sits in tension with the principle of conferral. Moreover, the latter case law, unlike the case law on gambling, is incompatible with the principle of subsidiarity because it deprives Member States of any meaningful degree of regulatory discretion.

CJEU CASE LAW AND ITS IMPLICATIONS FOR THE SCOPE OF NATIONAL REGULATORY AUTONOMY

Patient mobility: less room for regulatory autonomy – better healthcare for EU citizens?

According to the case law of the CJEU on cross-border access to healthcare, any outpatient care to which a patient is entitled under the social security scheme in their home Member State may also be obtained in any other Member State and be reimbursed

4 See Council Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/45, discussed in V. Velyvyte, 'The Power to Shape the Internal Market: Implications of CJEU Case Law for the EU's Institutional Balance', 12 *CYELP* (2016) p. 25.

5 European Commission, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (Monti II) COM (2012) 130 final; P. Runner, 'EU Parliament Opposes Creation of Online Gambling Market', *EUobserver*, 10 March 2009, www.euobserver.com/?aid=27752, visited 18 November 2016.

6 Arts. 153, 165, 168 Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/49 (TFEU).

up to the level of reimbursement provided by the patient's home State.[7] Inpatient, or hospital, care may also be obtained elsewhere in the EU, provided that the patient has been granted prior authorisation by the authorities in the home Member State. This authorisation must be given if the healthcare system to which the patient is affiliated cannot provide equally effective treatment within a medically acceptable time limit. In determining whether the relevant treatment can be obtained within an acceptable time, national authorities must take into account the circumstances pertaining to the medical situation and the clinical needs of the person concerned, such as the history and probable course of illness, the degree of pain the patient is in and/or the nature of their disability at the time when the request for authorisation was made or renewed.[8] If authorisation is granted or has been unlawfully refused, the patient is entitled to full reimbursement of the costs of treatment received abroad, determined in accordance with the tariff set by the host State.[9]

Essentially every judgment of the CJEU involving cross-border healthcare starts with the recognition, in accordance with Article 168(7) TFEU, that the EU's action in the field of public health has to respect fully the responsibilities of the Member States for the organisation and delivery of health services and medical care. In the absence of EU-level harmonisation in the field, it is for the legislation of each Member State to determine 'the personal scope, conditions of entitlement and range of benefits'.[10] At the same time, Article 168(7) does not exclude the possibility that Member States may be required under other Treaty provisions, such as the free movement rules, or measures adopted on the basis of these provisions, such as Article 22 of Regulation 883/2004 on the coordination of national social security systems,[11] to make adjustments to national social security systems. These necessary adjustments do not, however, undermine Member States' sovereign powers in the field.[12]

In line with this logic, the Court emphasises that its interpretation of conditions for obtaining treatment abroad in light of EU free movement rules aims to balance EU citizens' right to cross-border healthcare with national concerns relating to the sustainability and financial stability of their social security systems.[13] This balance is to be achieved by drawing a distinction between, on the one hand, reasonable waiting time for receiving medical treatment in the home State and, on the other hand, undue delay or medically unjustifiable waiting time. If the waiting time is reasonable, the fact that equally effective treatment is available more quickly in another Member State does not suffice to challenge a decision to refuse authorisation (and consequently claim reimbursement of the costs of treatment received abroad). Otherwise, patient migration would be liable to

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7 ECJ 28 April 1998, Case C-120/95 *Nicolas Decker* v *Caisse de maladie des employés privés*; ECJ 28 April 1998, Case C-158/96 *Raymond Kohll* v *Union des caisses de maladie* (*Kohll*); ECJ 13 May 2003, Case C-385/99 *V.G. Müller-Fauré* v *Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet* v *Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* (*Müller-Fauré*).

8 ECJ 12 July 2001, Case C-157/99 *B.S.M. Geraets-Smits* v *Stichting Ziekenfonds VGZ and H.T.M. Peerbooms* v *Stichting CZ Groep Zorgverzekeringen* (*Smits*), paras. 53 – 55; *Müller-Fauré*, *supra* n. 7, paras. 89 – 90; ECJ 16 May 2006, Case C-372/04 *The Queen, on the application of Yvonne Watts* v *Bedford Primary Care Trust and Secretary of State for Health* (*Watts*), paras. 59 – 61.

9 Note that reimbursement will be calculated in accordance with the tariff of the home Member State when the claim is not based on Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.

10 See eg *Smits*, *supra* n. 8, para. 45.

11 Regulation 883/2004, *supra* n. 9.

12 *Watts*, *supra* n. 8, para. 121.

13 *Watts*, *supra* n. 8, para. 145; *Smits*, *supra* n. 8, paras. 76, 78 – 79.

put at risk governments' planning and rationalisation efforts in the healthcare sector, which could create problems of hospital overcapacity, imbalance in the supply of hospital medical care, and logistical and financial wastage.[14] However, where the waiting time for adequate treatment in the home State exceeds medically justifiable time, according to the interpretation of this concept provided by the Court, the granting of authorisation and subsequent reimbursement of costs are not considered to be liable to jeopardise the sustainability of hospital care.[15]

The position adopted by the Court does not seem to reflect the realities of the operation of the healthcare sector and in fact threatens to jeopardise the financial sustainability of national healthcare systems, thus affecting the accessibility and quality of healthcare. The Court's focus on the individual case of the patient when determining the necessity of treatment interferes with the prerogative of national governments to plan and prioritise healthcare expenditure. Since the budget allocated by governments to social healthcare is usually not sufficient to allow for the swift provision of treatment to *all* patients, competent authorities make use of the available resources by planning and setting priorities.[16] Waiting lists, for instance in the British NHS, reflect those priorities and are intended to maintain fairness and equality between patients who require hospital treatment.[17] While benefiting the vocal minority of patients, the test of medical necessity diverts resources from 'poorly represented, less visible, less articulate groups, typically composed of disabled, mentally ill and elderly patients'.[18] As a consequence, the waiting time for those groups of patients with equally, if not more, urgent needs, but incapable of travelling abroad, becomes longer. To avoid this situation and maintain equal access to hospital care, governments would need either to provide additional funding for the healthcare budget, or to restrict the range of treatments available.[19]

Moreover, the additional financial pressure might especially hurt the less economically developed Member States, since patients from these countries will be the most likely candidates to use the benefits of cross-border healthcare.[20] A situation where the poorer Member States have to fund expensive treatment received in the richer ones may exacerbate the already existing inequities among the national healthcare systems, threatening the sustainability of the social security budgets of the less developed Member States and thus contributing to further decline in the quality of healthcare in their territories.[21] Without an EU-level fund for balancing these extreme inequalities, patient mobility in the EU may sooner or later prove unsustainable.[22]

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14 *Smits*, *supra* n. 8, para. 106; *Müller-Fauré*, *supra* n. 7, para. 91; *Watts*, *supra* n. 8, para. 71.

15 *Smits*, *supra* n. 8, para. 105; *Watts*, *supra* n. 8, para. 75.

16 *Watts*, *supra* n. 8, para. 13.

17 Ibid, para. 14.

18 C. Newdick, 'Citizenship, Free Movement, and Healthcare: Cementing Individual Rights by Corroding Social Solidarity', 43 *CML Rev* (2006) p. 1645 at p. 1646; See also D. Schiek, 'The EU Constitution of Social Governance in an Economic Crisis in Defence of a Transnational Dimension to Social Europe', 20 *MJ* (2013) p. 195.

19 *Watts*, *supra* n. 8, para. 42.

20 See eg ECJ 9 October 2014, Case C-268/13 *Elena Petru v Casa Judeţeană de Asigurări de Sănătate Sibiu and Casa Naţională de Asigurări de Sănătate*, where the CJEU suggests that Romanian authorities should pay for Ms. Petru's heart surgery performed in Germany.

21 A. Kaczorowska, 'A Review of the Creation by the European Court of Justice of the Right to Effective and Speedy Medical Treatment and its Outcomes', 12 *ELJ* (2006) p. 345 at p. 366 – 367.

22 Ibid; G. Davies, 'The Process and Side-Effects of Harmonisation of European Welfare States' *NYU Jean*

The costs of student mobility

Similarly to its stance in the patient mobility case law, the CJEU has firmly established that while Member States retain the power to organise their education systems, in accordance with Art. 165(1) TFEU, when exercising that power, they must comply with the provisions regarding EU citizens' freedom to move and reside within the territory of the EU.[23] This obligation means that tuition fees and other conditions of access to university should be at the same level for all EU students, as should tuition fee loans, where they exist. The CJEU accepts that differences in treatment between local and incoming students can be justified by considerations relating to the preservation of the homogeneity, or quality, of the higher education system and the protection of public health. The objective of the protection of public health comprises the homogeneity argument when the influx of students concerns medical and paramedical courses (as it did in the majority of the cases that came before the CJEU). To justify limitations on foreign students' access to medical programmes, governments need to provide a thorough analysis backed by figures and data, capable of demonstrating that the absence of discriminatory measures will result in the shortage of healthcare professionals in the territory, which will pose a genuine risk to the protection of public health.[24]

By focusing narrowly on the quality of medical education and the resulting risks to public health, the Court seems to neglect the broader financial and structural implications of student mobility, arising from the fact that countries with open access, low-threshold education policies provide free education for students who do not contribute to its financing, either through paying taxes or establishing themselves in the territory after graduation. These problems are experienced by all countries which 'import' foreign students.[25] Even where incoming students have to pay tuition fees, these fees typically cover only a fraction of the total cost of education, which is heavily subsidised by governments.[26] Moreover, financial pressures become even more significant when equal treatment for migrant students is extended into the area of tuition grants and maintenance assistance.[27]

Admittedly, students who after their studies enter the employment market of the host Member State, do provide a 'return on investment' for the latter, but that does not happen often. For instance, in the *Bressol* case, concerning the higher education system of the French Community of Belgium, the government provided data showing that during the period between 2003 and 2006, nearly one third of the veterinarians establishing

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Monnet Working Papers (2006) p. 125, www.jeanmonnetprogram.org/papers/06/060201, visited 7 June 2016.

23 ECJ 13 April 2010, Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others* v *Gouvernement de la Communauté française*, paras. 29, 38 (*Bressol*). See also ECJ 11 September 2007, Case C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz* v *Finanzamt Bergisch Gladbach*, para. 70; ECJ 23 October 2007, Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan* v *Bezirksregierung Köln and Iris Bucher* v *Landrat des Kreises Düren*, para. 24 (*Morgan and Bucher*).

24 *Bressol*, *supra* n. 23, para. 71.

25 Ibid, para. 50.

26 Data cited in A. Hoogenboom, 'Mobility of Students and the Financial Sustainability of Higher Education Systems in the EU: a Union of Harmony or Irreconcilable Differences?', 9 *Croatian YB EL & Pol'y* (2013) p. 15 at p. 24, 43.

27 ECJ 15 March 2010, Case C-209/03 *Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* (*Bidar*); M. Dougan, 'Fees, Grants, Loans And Dole Cheques: Who Covers The Costs Of Migrant Education Within The EU?', 1 *J Contemporary Eur Research* (2007) p. 4 at p. 7 – 9.

themselves in France had obtained their diploma in Belgium. Students who immediately after their studies return to their Member State of origin are simply 'free riders' from the point of view of the host State.[28] And although the CJEU might be justified in requiring a certain degree of financial solidarity among the Member States,[29] this requirement seems to be quite unfair in situations where foreign students make up more than 80 percent of the class, which is the case for certain medical courses offered by Belgian and Austrian universities.[30] In the absence of an EU budget for education, this raises serious issues of equity between the Member States in sharing the financial burdens of cross-border education.[31] By neglecting these considerations, the Court seems also to neglect the fundamental stipulation enshrined in Art. 165(1) TFEU that EU action fostering the mobility of students must fully respect the responsibility of the Member States for the organization of their education systems, which undoubtedly includes aspects of financing.

Collectively-set labour standards as an obstacle to economic freedoms

In its case law on collective labour rights,[32] the CJEU asserts that, in principle, EU law does not preclude the territorial application of national legislation or collective agreements. Member States are also free to define conditions of the exercise of collective bargaining and collective action. However, in exercising these competences, Member States have to comply with EU free movement rules.[33] In the Court's interpretation, this means that national labour laws and EU free movement rules are in a hierarchical relationship, whereby the terms and conditions of employment capable of dissuading foreign undertakings from exercising their freedom of establishment or freedom to provide services must be justified as appropriate and necessary in light of the objective of the protection of workers.[34] Such interpretation significantly narrows down the scope of application of national labour standards to posted workers and threatens to undermine national systems of industrial relations.

The proportionality review of strike action, laid down in the seminal *Viking* and *Laval* judgments, weakens the position of trade unions vis-à-vis foreign employers. On the one hand, the CJEU acknowledges that the organisation of collective action by trade unions must be regarded as covered by their legal autonomy.[35] And yet it seems

28 ECJ 7 July 2005, Case C-147/03 *Commission* v *Austria*, Opinion of AG Jacobs, para. 36; A.P. Van der Mei, 'Free Movement of Students and the Protection of National Educational Interests: Reflections on *Bressol and Chaverot*', 13 *Eur J Migration and L* (2011) p. 123.

29 ECJ 20 September 2001, Case C-184/99 *Rudy Grzelczyk* v *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, para. 44 (*Grzelczyk*); *Bidar*, *supra* n. 27, para. 56.

30 *Bressol*, *supra* n. 23, Opinion of AG Sharpston, para. 20.

31 Dougan, *supra* n. 27 p. 9.

32 See eg ECJ 11 December 2007, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line* (*Viking*); ECJ 18 December 2007, Case C-341/05 *Laval* v *Svenska Byggnadsarbetareförbundet* (*Laval*); ECJ 3 April 2008, Case C-346/06 *Dirk Rüffert* v *Land Niedersachsen*; ECJ 19 June 2008, Case C-319/06 *Commission of the European Communities* v *Grand Duchy of Luxembourg*; ECJ 15 July 2010, Case C-271/08 *Commission* v *Germany*; ECJ 8 July 2013, Case C-426/11 *Mark Alemo-Herron and Others* v *Parkwood Leisure Ltd.*

33 *Viking*, *supra* n. 32, para. 40, with further references to *Decker*, *supra* n. 7, paras. 22 – 23, and *Kohll*, *supra* n. 7, paras. 18 – 19.

34 *Viking*, *supra* n. 32, paras. 72, 73, 75; *Laval*, *supra* n. 32, para. 57.

35 *Viking*, *supra* n. 32, para. 35.

significantly to restrict that autonomy by narrowing down the permissible objectives of strike action to one – securing employment conditions that are under serious jeopardy.[36] Moreover, the requirement that strike action constitutes the least restrictive means in a given situation[37] seems to go against the nature of the right to strike and risks compromising the effectiveness of collective bargaining and trade union activity more generally.[38]

Also, this test creates a climate of legal uncertainty. Trade unions can no longer rely on national law to secure the legality of collective action, while EU law makes it conditional on a case-by-case assessment of necessity in relation to EU business freedoms, something that is extremely difficult to predict.[39] At the same time, due to the horizontal direct effect of Articles 49 and 56 TFEU,[40] employers are handed a strong incentive to sue trade unions in courts with a promise of pecuniary compensation. As a result, trade unions are dissuaded from taking collective action, in the first place, given the risks involved,[41] which significantly weakens their bargaining power and inhibits their ability to protect workers' interests.

Furthermore, the Court seems to be reluctant to accept collective bargaining as a means of laying down the terms and conditions of employment. Collective agreements – with the exception of those that are universally or generally applicable and lay down the 'nucleus' of employment conditions listed in Article 3(1) of the Posted Workers Directive (PWD)[42] – are considered to create too much uncertainty in the legal framework of the transnational provision of services and, hence, make it 'excessively difficult' for employers to determine the obligations with which they need to comply.[43] These agreements cannot therefore be justified as lawful either under the PWD or Article 56 TFEU. The Court's position seems to go against the objectives of the Treaty, which since Maastricht have affirmed the EU's commitment to promoting social dialogue, emphasising respect for the autonomy of social partners and for the diversity of national systems.[44]

By constraining the operational autonomy of trade unions and limiting the scope of collective bargaining, the Court challenges the viability of European systems of industrial relations, particularly in those Member States that rely on autonomous collective bargaining in the implementation of national social policy, such as the

36 Ibid, paras. 77, 81.

37 Ibid, paras. 87 – 89.

38 T. Novitz, P. Germanotta, 'Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action', 18(1) *IJCLLIR* (2002) p. 67 at p. 68 – 69; A.C.L. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', 37 *ILJ* (2008) p. 126 at p. 143; K.D. Ewing and J. Hendy QC, 'The Dramatic Implications of *Demir and Baykara*', 39 *ILJ* (2010) p. 2 at p. 13.

39 C. Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action', 37 *EL Rev* (2012) p. 117 at p. 120 – 121; P. Syrpis and T. Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation', 33 *EL Rev* (2008) p. 411 at p. 418 – 419.

40 *Viking*, *supra* n. 32, paras. 57 – 61.

41 Syrpis and Novitz, *supra* n. 39 p. 418 – 419; Barnard, *supra* n. 39 p. 120 – 121.

42 Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.

43 *Laval*, *supra* n. 32, paras. 107, 110. See also *Rüffert*, *supra* n. 32, paras. 26 – 29, 39 – 40.

44 Arts. 151, 152 TFEU; Arts. 136, 138 TEC. Also contrast the *Viking* and *Laval* judgments with ECJ 21 September 1999, Case C-67/96 *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie*, paras. 59 – 60.

Scandinavian countries.[45] In the Scandinavian model, trade unions in principle have the exclusive responsibility to safeguard rather high-average, flexible levels of wages and employment conditions for all different categories of employees.[46] In the face of the Court's case law, governments must either modify their traditional methods of social regulation or accept the fact that labour standards set by trade unions will most likely be rejected by the CJEU. A number of countries have already followed the first route, which is problematic in light of the lack of EU competence to regulate collective labour law.[47]

Gambling: national regulatory autonomy is not at stake

In contrast to the approach regarding regulatory measures adopted in the areas of healthcare, education and labour law, the CJEU holds that, in the absence of EU-wide harmonisation of the gaming and betting sector, it is in the discretion of each Member State to determine, in accordance with its own scale of values, as well as social and cultural features, what is required to protect the players and maintain order in society.[48] The basis for this discretion seems to be the religious and cultural aspects linked to gambling, as well as its morally and financially harmful consequences for the individual and society. The Court explains that an unregulated gambling market would lead the operators to compete with each other in making their offers more attractive than their competitors and, in that way, would increase consumers' expenditure on gaming and their risk of addiction.[49] Moreover, such market would be incapable of preventing fraud, money laundering and other criminal practices conducted against consumers by the operators.[50]

The discretion accorded to national authorities manifests in various ways, but, first and foremost, in choosing the specific regulatory model, from a complete prohibition of gambling activities to a non-exclusive licencing system, or a combination of the various models. In line with the rest of the CJEU's case law on free movement, the regulatory regimes must not, however, unduly restrict the freedom to provide cross-border services. Restrictions on Article 56 TFEU can be justified in light of numerous public interest objectives relating to consumer protection and crime prevention – the

45 C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', 15 *ELJ* (2009) p. 1.

46 J. Malmberg and T. Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice', 45 *CML Rev* (2008) p. 1115; J. Malmberg, 'The Impact of the ECJ Judgments in *Viking*, *Laval*, *Ruffert* and *Luxembourg* on the Practice of Collective Bargaining and the Effectiveness of Social Action', *European Parliament Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy*, 11 May 2010, p. 7 www.europarl.europa.eu/activities/committees/studies.do?language=EN, visited 17 February 2017.

47 A. Bücker and W. Warneck (eds.), '*Viking – Laval – Rüffert*: Consequences and Policy Perspectives', *ETUI Report* (2010) p. 111; M. Blauberger, 'With *Luxembourg* in Mind … The Remaking of National Policies in the Face of ECJ Jurisprudence', 19 *Journal of Eur Public Policy* (2012) p. 109 at p. 114 – 124; M. Rönnmar, 'Sweden', in M. Freedland, J. Prassl (eds), *EU Law in the Member States: Viking, Laval and Beyond* (Hart Publishing 2014).

48 ECJ 24 March 1994, Case C-275/92 *Her Majesty's Customs and Excise* v *Gerhart Schindler and Jörg Schindler*, para. 61 (*Schindler*).

49 ECJ 24 January 2013, Joined Cases C-186/11 and C-209/11 *Stanleybet International Ltd and Others and Sportingbet plc* v *Ypourgos Oikonomias kai Oikonomikon and Ypourgos Politismou*, para. 45 (*Stanleybet*); ECJ 3 June 2010, Case C-203/08 *Sporting Exchange Ltd* v *Minister van Justitie,* Opinion of AG Bot, paras. 59 – 62.

50 ECJ 3 June 2010, Case C-258/08 *Betting & Gaming Ltd, Ladbrokes International Ltd* v *Stichting de Nationale Sporttotalisator*, paras. 29 – 30.

Court has so far accepted virtually every objective submitted before it, save for those of a purely financial nature.[51] To pass the test of proportionality, governments only have to demonstrate that their policies reflect a 'genuine' concern to attain public interest objectives in a 'consistent and systematic manner'.[52]

For instance, public authorities cannot rely on the need to protect players from gambling addiction and spending, if they pursue a policy of expansion in the betting and gaming sector or conduct or tolerate campaigns that encourage consumers to gamble, with the aim of increasing tax revenue.[53] However, when, in addition to consumer protection, they also aim to reduce the scale of unauthorised gambling, in order to prevent fraud and crime, the same policy of expansion will be tolerated despite its apparent conflict with the objective of protecting players from spending and gambling addiction. In this respect, public authorities will have to show that unlawful activity in their gambling market is significant, and the measures adopted are aimed at channelling consumers' propensity to gamble into activities that are lawful.[54] Alternatively, the authorities may choose to refer in their national laws solely to the objective of combating crime, thus avoiding the limitations that consumer protection requirements impose on such marketing campaigns.[55] In that case, Member States will be required to show merely that the problem of clandestine gambling is real and serious enough to necessitate a more substantial expansion of the regulated gambling market.[56]

The effects of the gambling case law on the scope of national regulatory autonomy are therefore relatively insignificant. Since national authorities are entitled to broad discretion, as long as the regulatory system works somewhat coherently within its own frame of reference, almost any restrictive measure will be considered as a lawful exception to fundamental freedoms.

IMPLICATIONS FOR THE CONSTITUTIONAL DIVISION OF COMPETENCES IN THE EU

The following discussion focuses on a comparative analysis of the Court's reasoning in cases discussed earlier in light of the constitutional principles governing the existence and exercise of EU competences – conferral and subsidiarity, respectively. The analysis goes to show that, firstly, the Court's interpretation of the scope of application of the free movement rules to the areas of healthcare, education and labour law sits in tension with the principle of conferral because it is unjustifiably expansive in light of the text and objectives of the Treaty. Secondly, the Court does not seem to have a coherent standard

51 S. Planzer, *Empirical Views on European Gambling Law and Addiction* (Springer Publishing International 2014) p. 63 – 66.

52 ECJ 21 October 1999, C-67/98 *Questore di Verona* v *Diego Zenatti*, para. 35 (*Zenatti*); ECJ 6 November 2003 Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others*, paras. 69, 72 (*Gambelli*); ECJ 8 September 2009, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd* v *Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, para. 59 – 61 (*Liga Portuguesa*).

53 *Gambelli*, *supra* n. 52, paras. 69, 72.

54 Ibid, paras. 7 – 8, 69; ECJ 8 September 2010, Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Markus Stoß, Avalon Service-Online-Dienste GmbH and Olaf Amadeus Wilhelm Happel* v *Wetteraukreis and Kulpa Automatenservice Asperg GmbH, SOBO Sport & Entertainment GmbH and Andreas Kunert* v *Land Baden-Württemberg*, para. 99 (*Stoss*).

55 Compare the findings in ECJ, 6 March 2007 Joined Cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio*, para. 16 and *Stoss*, *supra* n. 54.

56 *Ladbrokes*, *supra* n. 50, paras. 29 – 30.

of review of national social policy measures. It employs a strict-scrutiny approach in the areas of healthcare, education and labour law, in particular, and, in contrast to the gambling case law, reduces the scope of national regulatory autonomy in these areas to an extent that is incompatible with the principle of subsidiarity.

The existence of competence to interfere: implications for the principle of conferral

The principle of conferral in theory

While having been in operation since the origins of the European Community (now the EU), the principle of conferral has been expressly enshrined in EU primary law since the entry into force of the Maastricht Treaty and was later reinforced by the Lisbon reforms.[57] It is spelled out in Article 5(2) TEU and requires that the Union must act only within the limits of the competences conferred upon it by the Member States, and 'competences not conferred upon the Union in the Treaties remain with the Member States'. The principle of conferral therefore governs the existence of Union competences, which are further classified under Articles 2–6 TFEU into exclusive, shared, and supplementary.

Pursuant to Articles 2(5) and 6 TFEU, the prohibition for the EU to interfere within the competences reserved for the Member States extends to areas falling within the category of the EU's supplementary, or complementary, competences. These are the areas where the Union has only been granted competence 'to carry out actions to support, coordinate or supplement' Member States' actions, excluding the possibility of adopting binding EU legislation. The list includes the protection and improvement of human health, education and vocational training, as well as social policy, except for the aspects of social policy belonging to competences that are *shared* with the Member States.[58] As an internal market service, gambling falls within the category of shared competences under Article 4 TFEU, giving the EU an unrestricted mandate to supersede Member State action in this area. The Treaties contain no other provision that would limit the EU's competence to regulate gambling services.

The sector-specific legal bases on healthcare, education and labour law, on the other hand, reiterate and make more concrete the limitations expressed in the principle of conferral. Article 168 TFEU provides the EU with complementary competences in the area of public health, excluding the option of harmonisation, and obliges the EU to 'respect the responsibilities of the [Member States] for the definition of their health policy and the organisation and delivery of health services and medical care'. Article 165(1) TFEU charges the EU with a duty to 'contribute to the development of quality education by encouraging cooperation between [Member States] and, if necessary, by supporting and supplementing their action'. However, any EU action in the field must be taken while fully respecting the responsibilities of the Member States and therefore excludes any harmonisation of national laws or regulations.[59] Similarly, Article 153(1) TFEU stipulates that the EU shall support and complement the activities of the MS in *inter alia* the representation and collective defence of the interests of workers and employers. This provision is subject to paragraph (5) of the same article, which expressly excludes the right to strike and the right of association from EU-level harmonisation.

57 See Art. 4(2) TEU; Arts. 2 – 6 TFEU.

58 Art. 4(b) TFEU.

59 See also Art. 6 TEU; Art. 165(4) TFEU.

The right to collective bargaining is not explicitly listed among the exclusions, but the Treaty provides no clear legislative basis for it,[60] and Article 156 suggests that collective bargaining is not subject to binding legislation by stating that the Commission shall encourage cooperation between Member States and facilitate the coordination of their action in matters relating to collective bargaining.

The general and sector-specific definitions of the principle of conferral seem to preclude a sort of interference by the EU into the areas of healthcare, education and collective labour law that would go beyond actions of non-binding, recommendatory nature.

The principle of conferral in practice

The way the principle of conferral operates in practice, rather than in theory, is less clear-cut because, owing to the asymmetry in the relationship between negative and positive integration,[61] Member States must comply with the free movement rules even in the areas that in principle fall outside the EU's legislative competence. Accordingly, the Court recognises that, in the absence of EU-level harmonisation, Member States retain the competence to regulate healthcare, education, labour law, and gambling matters in question. However, when exercising that competence, they nevertheless need to comply with the free movement rules. From the EU's perspective, this means that EU law can legitimately encroach into the areas falling outside its scope of competence to the extent that such interference stems from the exercise of the competences that the EU does possess, such as the internal market competences.[62]

Whilst apt to create some tensions of constitutional nature, the Court's broad reading of the internal market rules in principle seems to be justified. The *effet utile* of EU law as well as its integration process might be hindered if the whole range of areas, such as healthcare, education and collective labour law, were *a priori* excluded from the reach of the free movement and competition law. However, the problem with the principle of conferral seems to be neither the flexibility inherent in its application, nor the existence of overlap between the EU's conferred and supplementary competences, most notably, the free movement rules, on the one hand, and Articles 153, 165, and 168, on the other. It is rather the *degree* of overlap between the two determined by the Court. I argue that the Court overstretches the principle of conferral by adopting an interpretation of the scope of application of the free movement rules that is often incoherent and goes beyond both the textual and the teleological reading of the Treaty.

Healthcare

The CJEU seems to adopt an extremely broad interpretation of the Treaty provisions

60 B. Ryan, 'The Charter and Collective Labour Law', in T.K. Hervey, J. Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights – a Legal Perspective* (Hart Publishing 2003) p. 67, at p. 67 – 68, 84 – 85; A.C.L. Davies, 'Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States?', in P. Alston (ed), *Labour Rights as Human Rights* (OUP 2005) p. 177 at p. 206–207.

61 J.H.H. Weiler, 'The Dual Character of Supranationalism', 1 *YEL* (1981) 267; F. Scharpf, 'The Asymmetry of European Integration or Why the EU Cannot Be a "Social Market Economy"', *KFG Working Paper Series* (2009), www.polsoz.fu-berlin.de/en/v/transformeurope/publications/working_paper/WP_06_September_Scharpf1.pdf, visited 14 June 2016.

62 See S. Weatherill, 'The limits of legislative harmonisation ten years after *Tobacco Advertising*: how the Court's case law has become a "drafting guide"', 12 *German Law Journal* (2011) p. 827.

when faced with the question whether a national measure or practice falls within the scope of the Treaty. In the context of patient mobility, the Court extends the application of Article 56 TFEU on the freedom to provide services to healthcare provided under national social security schemes, viewing it as an activity of an economic character within the meaning of Art 57 TFEU. In doing so, the Court focuses on the pecuniary nature of the transaction between the patient and the foreign healthcare provider, while completely disregarding the social policy relationship between citizen and the national welfare system within the home State itself.[63] The latter relationship is the necessary precondition for receiving any type of medical service abroad, and yet it has been consistently disregarded in the Court's assessment whether the situation falls under Article 56 TFEU.[64]

Interestingly, the Court does not consider public education to be a service within the meaning of Article 57 TFEU. It holds that when managing its education system the state is fulfilling the duties towards its own population, rather than engaging in an economic activity. This function is reflected in the fact that education is predominantly financed from the public purse.[65] The Court's reasons for excluding education from the scope of Article 56 by and large apply to the healthcare sector. Moreover, the Court adopts a different stand in competition law cases concerning healthcare, where elements of solidarity in the provision of healthcare determine whether the provider in question is engaged in an economic activity for the purposes of constituting an 'undertaking'.[66] In light of the apparent inconsistencies in the Court's reasoning, the finding that public healthcare is a service lacks plausibility.

Education

The Court's interpretation of the scope of the Treaty in education cases is equally expansive, if in a different way. The Court has used two Treaty provisions to derive individual rights for mobile students – the prohibition of discrimination on the basis of nationality, and, after the entry into force of the Maastricht Treaty, EU citizenship. In order for the principle of non-discrimination to apply, the Court relied on Article 128 EEC (vocational training) to bring university education within the scope of EU law.[67] Article 128 EEC did not foresee a role for the Community in regulating higher education policies.[68] However, the Court considered that access to cross-border education fell within the scope of vocational training and, hence, Community law by virtue of having an indirect link to the labour market.[69]

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63 Dougan, *supra* n. 27, p. 20.

64 *Kohll*, *supra* n. 7, para. 21; *Smits*, *supra* n. 8, paras. 53 – 58; *Watts*, *supra* n. 8, para. 90.

65 ECJ 7 December 1993, Case C-109/92 *Stephan Max Wirth* v *Landeshauptstadt Hannover*; ECJ 27 December 1988, Case C-263/86 *Belgian State* v *René Humbel and Marie-Thérèse Edel*; W. Gekiere, R. Baeten and W. Palm, 'Free movement of services in the EU and health care', in E. Mossialos et al. (eds.), *Health Systems Governance in Europe: The Role of European Union Law and Policy* (Cambridge University Press 2010) p. 461 at p. 461 – 475.

66 See ECJ 11 July 2006, Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria* v *Commission* (*FENIN*), paras. 8, 26.

67 See ECJ 13 February 1985, Case C-293/83 *Françoise Gravier* v *City of Liège* (*Gravier*).

68 See also Arts. 2 and 3 EEC Treaty (1957).

69 *Gravier*, *supra* n. 67, paras. 30 – 31. See also ECJ 2 February 1988, Case C-24/86 *Vincent Blaizot* v *University of Liège and other*; F.G. Jacobs, 'Citizenship of the European Union – A Legal Analysis', 13 *ELJ* (2007) p. 591 at p. 602.

After the entry into force of the Maastricht Treaty, the Court used the concept of EU citizenship further to expand the EU's interference into the area of education. It took the view that Union citizenship constituted a 'fundamental status of EU citizens', which, interpreted along with the principle of non-discrimination, guaranteed nationals of EU Member States equal treatment irrespective of their nationality when they found themselves in the same circumstances with the nationals of the host State. Such equal treatment extended to situations where students were applying for financial assistance in the host Member State.[70] Not only did this finding bring the question of cross-border access of economically inactive persons to social security schemes within the scope of the Treaty,[71] but it also went against an explicit EU legislative consensus on the matter.[72]

As regards the post-Maastricht student mobility case law, the introduction of EU citizenship was not the only amendment made in 1992. The new legal basis for education, Article 126 EC, stressed that Community's role in education was complementary in nature and limited to encouraging cooperation between Member States. An almost identical stipulation was added to Article 127 EC regarding vocational training. Moreover, the Treaty made explicit the principles of conferral and subsidiarity, which were supposed to clarify the division of competences between the EC and the Member States.[73] The Maastricht reforms signified an attempt by the Member States to curtail Community's ambitions in the area of education, as well as in other politically sensitive policy areas.[74] However, the CEJU seems to have focussed exclusively on those Treaty amendments which justified broadening the scope of the freedom of movement.

Collective labour rights

The case law concerning collective labour rights is problematic for the finding that activities of trade unions fall within the scope of Articles 49 and 56 TFEU as potential restrictions on the freedoms of establishment and of provision of services.[75] This finding elucidates the problem with the Court's definition of a 'restriction', which encompasses any measure or practice liable to make the free movement 'less attractive'.[76] Notably, this definition departs from the Court's approach in the free movement of goods case law, where non-discriminatory, market-correcting measures that restrict businesses' commercial freedom are not considered as obstacles to the free movement.[77] The

70 *Grzelczyk*, *supra* n. 29.

71 See ECJ 11 November 2014, Case C-333/13 *Elisabeta Dano and Florin Dano* v *Jobcenter Leipzig*, suggesting that, at least on the issue of cross-border access to social security, the CJEU has become more cautious and attentive to the political mood.

72 Preamble, Recital 4, Art. 3 Council Directive (EEC) 90/364 on the right of residence [1990] OJ L180/26; Preamble, Recital 4, Art. 3 Council Directive (EEC) 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28; Preamble, Recitals 10 and 11, Art. 4 Council Directive (EEC) 93/96 on the right of residence for students [1993] OJ L317/59.

73 Art. 3(b) TEC.

74 Dougan, *supra* n. 27, p. 6.

75 *Viking*, *supra* n. 32, paras. 57 – 61.

76 ECJ 30 November 1995, Case C-55/94 *Reinhard Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, para. 37; *Laval*, *supra* n. 32, para. 99.

77 ECJ 24 November 1993, Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard*. See L. Daniele, 'Non-discriminatory restrictions to the free movement of persons', 22 *EL Rev* (1997) p. 191.

definition adopted by the Court in the services and establishment case law seems to be ill suited to apply to collective labour rights. Their exercise by nature is aimed exactly at restricting the commercial freedom of the employer in order to protect the employees, who are the weaker party in the employment relationship. As a result, as long as an undertaking wishes to provide services in a Member State that offers a higher level of worker protection than the undertaking's home Member State, the legal environment of the host State will always be 'less attractive', as it takes away the undertaking's competitive advantage of using cheap(er) labour.

The comparative analysis demonstrates that the Court's broad reading of the scope of the free movement rules is often incoherent and does not find sufficient support in the Treaty. Yet it generates constitutionally significant consequences. By broadly defining the scope of the free movement rules and expanding the categories of restrictions on the fundamental freedoms, the Court diminishes the practical significance of the principle of conferral and places Member States in the position where their regulatory policies can be judicially challenged and will need to be justified as appropriate and necessary in light of the regulatory objectives they pursue.

The exercise of conferred competences: implications for subsidiarity

Irrespective of the question of compliance with the principle of conferral, the EU is obliged to *exercise* the competences conferred upon it consistently with the principle of subsidiarity.[78] This concern becomes particularly important when the judicial exercise of internal market competences involves constitutionally and politically sensitive policy areas, such as the ones forming the subject of this paper, not least because the principle of conferral does not seem to serve as an effective safeguard against the EU's interference. I argue that the Court's interpretation of the free movement rules in the healthcare, education and labour law cases, unlike in the gambling cases, reduces the scope of national regulatory autonomy to an extent incompatible with the principle of subsidiarity.

What does subsidiarity require?

Pursuant to Article 5 (3) TEU, subsidiarity must be observed when the Union exercises its non-exclusive competences, the free movement law being among them.[79] As a principle addressed to EU institutions, including the CJEU, subsidiarity also guides the interpretation and application of EU law.[80] It authorises intervention by the Union 'only if and in so far as' the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, 'by reason of the scale and effects of the proposed action'.[81]

A rationale behind the principle of subsidiarity is the desire to preserve distinctive national political, social or cultural identities of the Member States, in so far as this is

78 Arts. 5(3), 5(4) TEU.

79 Arts. 4 and 6 TFEU.

80 T. Schilling, 'Subsidiarity as a Rule and a Principle', *14 Yearbook of Eur Law* (1994) p. 203; G.A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', 94 *Columbia Law Review* (1994) p. 331 at p. 337, 400 – 402; G. de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', 36 *Journal of Common Market Studies* (1998) p. 217.

81 Art. 5(3) TEU.

compatible with effective problem solving.[82] To that end, subsidiarity governs the conditions to be fulfilled for the EU to act ('only if') as well as the extent of that action ('in so far'). It imposes a two-fold test to justify action on EU level. One, MS alone must be unable to achieve the objectives of the action in question. Two, if Member States are capable of acting alone, action by the EU will be justified only if the objectives of the proposed action can be better achieved at Union level 'by reason of [its] scale and effects'. Essentially, to pass the test of subsidiarity, EU-level intervention must carry with it an added value.

According to the meaning of subsidiarity derived to by the CJEU, subsidiarity is nothing more than a competence review. In the Court's interpretation of Article 114 TFEU, as long as harmonisation of any sector is justified by reference to the objectives of the internal market, subsidiarity is complied with.[83] This test is circular and is virtually impossible to breach once the competence is shown to exist because the objectives and the scale of an EU action will always be intrinsically pan-European and so will be their effects.[84] According to this version of subsidiarity, the case law analysed in this paper is likely to comply with the test because it fulfils the required pan-European objective by facilitating the free movement in the EU. Patients who are in need of medical treatment may obtain it abroad without undue delays, students are granted access to foreign universities on equal conditions with nationals, and workers get employment opportunities across Europe.

However, the test of subsidiarity applied this narrowly departs from the express wording of Art. 5 (3) TEU and fails to achieve its main objective, that is to determine whether action on EU level is more advantageous than no action at all or action by individual Member States. This failure results from the fact that the Court's test does not assess the necessity of the particular exercise of the EU internal market competences in light of the potential impact of such exercise on national regulatory autonomy.[85] And yet the assessment of the 'scale and effects' of EU action seems to be an indispensable element of the principle of subsidiarity.[86] As Weatherill convincingly argues, subsidiarity at its core requires an inquiry into 'whether even if the EU's objectives are advanced by and best achieved by the proposed measure, it is nevertheless important enough to override objections rooted in the worth of national diversity and autonomy'.[87]

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82 E.T. Swaine, 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice', 41 *Harvard International Law Journal* (2000) p. 58 at p. 54 – 55, referring to European Council in Edinburgh, 'Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union', *Conclusions of the Presidency, Press Release, Commission of the European Communities* (1992), Annex to part A Conclusions.

83 ECJ 10 December 2002, Case C-491/01 *R* v *Secretary of State ex parte BAT and Imperial Tobacco* (Tobacco Advertising); Weatherill, *supra* n. 62 p. 19; D. Wyatt, 'Subsidiarity: is it too vague to be effective as a legal principle?', in K. Nicolaidis, S. Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union* (European Studies at Oxford 2003) p. 92, www3.law.ox.ac.uk/themes/iecl/pdfs/whoseeurope.pdf, visited 5 July 2016.

84 Wyatt, *supra* n. 83, p. 88.

85 For an argument that subsidiarity requires to limit the reach of internal market rules to what is strictly necessary, see Schilling, *supra* n. 80, p. 247 – 255; M. Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union', 12 *ELJ* (2006) p. 503 at p. 523. See also ECJ 15 December 2005, Case C-415/93 *Union royale belge des sociétés de football association ASBL* v *Jean-Marc Bosman, Royal club liégeois SA* v *Jean-Marc Bosman and others and Union des associations européennes de football (UEFA)* v *Jean-Marc Bosman*, para. 72. On conceptualising subsidiarity as competence-proportionality, see G. Davies, 'Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time', 43 *CML Rev* (2006) p. 6.

86 Bermann, *supra* n. 80, p. 400 – 403.

87 Weatherill, *supra* n. 62. See also Bermann, *supra* n. 86, p. 337, 390 – 403; Kumm, *supra* n. 85.

Varying degrees of proportionality review

I argue that the Court's case law involving healthcare, education and collective labour law is inconsistent with the principle of subsidiarity because it shows failure on behalf of the Court to consider the necessity of its particular interpretation of the free movement rules in light of its scale and effects on the scope of national regulatory autonomy. This pattern becomes evident when comparing the standards of the proportionality review employed by the Court to assess the legality of national measures in the areas of healthcare, education and labour law, on the one hand, and gambling, on the other. Whilst the judgments concerning the former three areas display a close-scrutiny approach, the case law on gambling exemplifies a mild review, grounded in respect for the regulatory discretion of national authorities.

Healthcare

The Court accepts that due to the special characteristics of the hospital sector, namely the need for planning and control of costs, prior authorisation schemes for reimbursement of the costs of treatment provided abroad are considered to be a reasonable and necessary measure. However, the specific conditions attached to the grant of authorisation are checked for proportionality, which means that authorisation cannot be refused if equally effective treatment in the patient's home country is not available within a medically justifiable time.[88]

When assessing whether the treatment available abroad is sufficiently effective, the Court consistently dismisses governments' concerns about the quality of foreign healthcare provision, referring generally to the EU principle of mutual recognition of professional qualifications.[89] In establishing whether the waiting time is medically justifiable, the Court requires that national authorities take into account all the circumstances that help to determine the seriousness of the medical condition of the patient in question.[90] Therefore, where the delay arising from the waiting lists appears to be excessive in light of 'an objective medical assessment of all the circumstances of the situation and the clinical needs of the person concerned', virtually no consideration is capable of justifying the refusal to grant prior authorisation in such a case.

The inquiry focused on the individual circumstances is fairly common in the adjudication of individual rights, however, it does not seem suitable for dealing with complex socioeconomic issues, such as the distribution of funds allocated for public healthcare. Where the inquiry focuses on the individual's circumstances, especially when these circumstances relate to serious health issues, 'every human inclination' will be to rescue the patient by providing treatment even if the likelihood of success is uncertain.[91] However, such inquiry leaves aside those whose treatment may be affected as a result and allows patients with less urgent medical needs to gain priority over patients with more urgent medical needs, thus questioning a system's fairness and commitment to

88 *Watts*, *supra* n. 8, para. 68.

89 *Decker*, *supra* n. 7, para. 43; *Kohll*, *supra* n. 7, para. 48. See also Council Directive 2013/55/EU of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System [2013] OJ L354.

90 *Smits*, *supra* n. 8, para. 53; *Müller-Fauré*, *supra* n. 7, para. 89 – 90; *Watts*, *supra* n. 8, paras. 59 – 61.

91 Newdick, *supra* n. 18, p. 1650.

equality.[92]

Education

The Court's application of the proportionality test in education cases seems to be heavily focused on the standard of proof. A strict review is presupposed by the Court's starting position that EU students' right to access higher education in other Member States constitutes the very essence of the free movement of students in the EU and that limitations thereto can only be accepted exceptionally.[93] Accordingly, in order to justify restrictions on access to medical education, national authorities are required to submit a thorough analysis backed by hard evidence, showing that the risks to public health are real and that the measures employed to counter those risks are appropriate and necessary.[94] In the language of the Court in *Bressol*,

> [t]he reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments. […] Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to public health.[95]

Furthermore, the Court tends to emphasise the existence of non-discriminatory alternatives that can help counteract the potential problems caused by high numbers of foreign students, such as entry exams and minimum grade requirements.[96] Accordingly, governments have to demonstrate that discriminatory measures are the least restrictive option capable of guaranteeing proper medical education and adequate provision of public healthcare.

Finally, the analysis presented by the authorities needs to account for the fact that after graduation some foreign students may be willing to establish themselves in the State where they pursue university education.[97] Member States must therefore provide various data and assessments showing that a limitation of the number of non-resident students can really bring about an increase in the number of graduates ready to ensure the future availability of public health services within the territory. In the *Bressol* case, for instance, Belgium provided figures showing that when the French Community organised an entrance exam for a number of medical courses three years in a row, only a small percentage of locals passed it. The Court dismissed these figures as being unrepresentative of the problems in the whole field of medicine.

Collective labour rights

The proportionality review in labour law cases is grounded in a view that, in the process of achieving social policy objectives, in particular the objective of worker protection, governments (and other actors) should choose the means that are least restrictive of the economic freedoms. Strike action must be invoked with the objective of securing employment conditions that are under serious jeopardy, and those conditions must be

92 Ibid, p. 1650, 1662; *Watts*, *supra* n. 8, para. 42.

93 *Bressol*, *supra* n. 23, para. 79.

94 Ibid, para. 71.

95 Ibid.

96 Ibid, paras. 77 – 78.

97 Ibid, para. 72.

laid down in accordance with EU secondary legislation, where applicable.[98] In addition, strike action must be taken as a last resort after other, possibly less restrictive means have been exhausted.[99] The Court also makes clear that, save for the universally or generally applicable collective agreements,[100] the system allowing sectoral collective bargaining is 'insufficiently precise and accessible' to be considered as necessary and appropriate.[101]

As a result of the high-threshold necessity review, the working conditions of migrant workers are likely to be governed by labour standards of the least regulated Member State relevant to the situation in question, save for the nucleus of rules for minimum levels of protection enshrined in the PWD.[102] This position encourages regulatory competition between governments, as well as wage competition among businesses and workers.[103] While encouraging wage competition may be a valid economic policy decision, the Court's asymmetrical approach to the relationship between economic freedoms and labour rights threatens to override the also legitimate aim of Member States wishing to maintain their chosen level of worker protection. It also challenges the capacity of new Member States to build their own social models and risks creating a race to the bottom in European labour standards. Moreover, the legitimacy of judicial decision-making is strained when such extremely political choices are embedded within adjudication.

Gambling

In sharp contrast to the case law involving healthcare, education and collective labour law, virtually every judgment of the CJEU concerning gambling is premised on the recognition of the subsidiary nature of EU law and the subsidiary role of the Court itself in supervising the regulatory choices of national authorities. Accordingly, each Member State is entitled to a margin of discretion to determine, in accordance with its own scale of values as well as social and cultural features, what is required to protect consumers and maintain order in society:[104]

> [D]etermination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation which the Court [has] recognised as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.[105]

As a result of the margin of appreciation enjoyed by the national authorities, the

98 *Viking*, *supra* n. 32; *Laval*, *supra* n. 32.

99 *Viking*, *supra* n. 32, paras. 87 – 89.

100 *Laval*, *supra* n. 32; *Rüffert*, *supra* n. 32.

101 *Laval*, *supra* n. 32.

102 S. Deakin, 'Regulatory Competition in Europe after Laval', *University of Cambridge CBR Working Papers* (2008) p. 18, www.cbr.cam.ac.uk/pdf/WP364.pdf, visited 21 November 2016; N. Hös, 'The Principle of Proportionality in the Viking and Laval Cases: An Appropriate Standard of Judicial Review?', *EUI Department of Law Working Papers* (2009) p. 16, at p. 19 – 20, www.cadmus.eui.eu/bitstream/handle/1814/11259/LAW_2009_06.pdf, visited 27 July 2016.

103 Deakin, *supra* n. 102, p. 14 – 15, 20 – 21; Malmberg and Sigeman, *supra* n. 47, p. 1116.

104 *Schindler*, *supra* n. 48, paras. 59 – 61.

105 *Schindler*, *supra* n. 48, para. 61; ECJ 21 Sepember 1999, C-124/97 *Markku Juhani Läärä & Others* v *Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)*, para. 35 (*Läärä*); *Zenatti, supra* n. 52, para. 33.

proportionality review focuses on checking national rules for consistency rather than necessity.[106] The fact that a chosen system of protection may not be 'the least restrictive one' has no bearing on the assessment of proportionality:

> [t]he mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure.[107]

Moreover, the standard of proof required in the gambling cases is extremely low. The Court often endorses abstract, unsubstantiated arguments advanced by governments, such as that: the online gambling market presents unique and greater dangers compared to other forms of gambling and other markets; foreign gambling operators cannot effectively be supervised and controlled by their States of establishment; and even that national measures will in fact achieve the aims they pursue.[108] The Court's ready acceptance of these claims is surprising, considering that it will not hesitate to dismiss the same type of claims as unsubstantiated in the cases of patient and student mobility, where, as regards the former, governments' distrust in the quality controls of foreign healthcare providers is simply deemed unfounded, and in the case of the latter, the burden of proof required seems to be virtually insurmountable.[109]

The comparative analysis reveals that the Court applies proportionality review with varying intensity. The review is especially intense when it comes to national healthcare, education and collective labour law systems. The inquiry focuses on establishing the necessity of the regulatory measure in question, and, to that end, the Court provides detailed guidelines to national courts: from suggesting that there may be (hypothetical) less restrictive alternatives available in a given situation, to providing EU law definitions of certain key concepts (medical necessity), to instructing the courts on the standard of proof and the type of evidence that is admissible. The guidelines provided by the Court often clearly lead to a conclusion that the national measures in question cannot be justified. As a consequence, the Court's judgments produce rules that modify the core of national social polices and show little consideration to concerns of social solidarity expressed by national governments. Moreover, the effects of the Court's case law cannot be remedied by legislative solutions either at the national or EU level because the Court's judgments constitute an interpretation of EU primary law, with which secondary legislation has to comply.

By contrast, when faced with national gambling rules, the Court exercises deference towards national regulatory choices and accepts them in-so-far as they reflect a genuine concern on behalf of the authorities to protect consumers from gambling addiction and fraud, even where that genuine concern is not backed by any evidence. The application of the necessity test is minimal. As a result of a mild review, not only

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106 *Liga Portuguesa*, *supra* n. 52, paras. 59 – 61; *Stanleybet*, *supra* n. 49, para. 27.

107 *Läärä*, *supra* n. 105, paras. 36, 58; *Zenatti*, *supra* n. 48, paras. 34.

108 *Liga Portuguesa*, *supra* n. 52, paras. 70 – 72; *Stoss*, *supra* n. 54, paras. 71 – 72; S. Planzer, '*Liga Portuguesa* – the ECJ and its Mysterious Ways of Reasoning', 11 *European Law Reporter* (2009) p. 372; S. van den Bogaert, A. Cuyvers, '"Money for nothing": The case law of the EU Court of Justice on the regulation of gambling', 48 *CML Rev* (2011) p. 1175 at p. 1191, 1204 – 1206.

109 See *Commission v Austria*, *supra* n. 28; *Decker*, *supra* n. 7, para. 43; *Kohll*, *supra* n. 7, para. 48. See also Council Directive 2013/55/EU of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System [2013] OJ L354.

public authorities, but also national courts are granted a lot of leeway when applying the Court's interpretations to the facts of the case.

IN LIEU OF A CONCLUSION: A CALL FOR CONSISTENCY

This paper sought to determine the implications of CJEU free movement case law for the constitutional division of competences between the EU and the Member States. It did so by conducting a comparative analysis of the Court's interpretation of the free movement rules involving the areas of domestic policy that are not harmonised at EU level and highly regulated at the national level.

The comparative analysis revealed that the case law concerning healthcare, education and collective labour law sits in tension with the principle of conferral because the Court's interpretation of the scope of the free movement rules is internally inconsistent and often goes beyond both the text and objectives of the Treaty. Moreover, the proportionality review applied in this line of case law reduces the scope of national regulatory autonomy to an extent that is incompatible with the principle of subsidiarity. At the same time, the standard of proportionality review applied in the gambling cases seems to suggest that the Court takes into account the scale and effects of its judgments on the scope of national regulatory autonomy, thus showing due regard to the requirements of subsidiarity.

Is there a compelling reason to distinguish gambling as a unique policy area, requiring a more deferential approach on behalf of the CJEU? The standard of review applicable in the gambling cases is premised on the recognition that the gaming and betting market is too politically and socially sensitive to be subjected to the full force of the free movement rules. Therefore, proportionality review is aimed at counteracting overt protectionism rather than controlling the degree by which national rules restrict the free movement of companies operating in the EU's gambling market. In this respect, the reasons advanced by governments to justify regulatory measures in the gambling sector are remarkably similar to those advanced in cases concerning healthcare, education and collective labour law. They all stem from considerations of social solidarity and emphasise the peculiarity of the sector and the need to protect vulnerable groups. Moreover, as discussed in this paper and has been recognised by the Court, areas of healthcare, education and collective labour law seem to require additional sensitivity for constitutional reasons: unlike gambling, the three areas fall outside the EU's legislative competence.

Admittedly, one could envisage the facts justifying a measure of differentiation in the proportionality review on a case-by-case basis. However, considering the relevant similarities across the four policy areas, there appears to be no valid *general* reason why the Court would differentiate between them by employing the standards of review that are on the opposite ends of the spectrum of intensity. Moreover, it would appear that the rationale for the grant of discretion with respect to the areas of healthcare, education and collective labour law may be stronger than in the case of gambling. I therefore conclude that judicial compliance with the principle of subsidiarity would require a more relaxed judicial review of national measures pertaining to the latter policy areas. In particular, the Court would be expected to show deference to the national authorities, both administrative and judicial, by according them a margin of appreciation in their actions.