



Paper 1596: Governments in Luxembourg: How Do Governments Use EU Litigation to Protect National Policies or Influence EU Policy and Law-Making

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[Note that this paper uses the new numbering of Treaty provisions in force since 1 December 2009, except where necessary to the understanding].

Introduction

It was already more than thirty-five years ago, that Lord Denning famously declared: "the treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."¹ Over the last half-century, the European Union (EU) has gradually expanded its scope of action, to include regulatory and redistributive measures covering a wide range of policy areas. Part of this expansion was based on explicit transfers of competences to the EU in Treaty provisions. However, to a significant extent, the reach of EU activities is also the result of unintended 'creeping competences' (Pollack 2000), a phenomenon to which the European Court of Justice (ECJ) has itself contributed.

In order to protect cherished national policies against undesirable EU intervention, the Member states, as formal 'masters of the Treaties', activate a number of politico-legal mechanisms, at both national and EU level. They write into the founding documents principles such as those of conferred competences and subsidiarity (Article 5 TEU). They list EU competences in the Treaty (new Articles 2 to 6 TFEU). They maintain the unanimity requirement (i.e. veto right) for the adoption of European legislation in areas of competence which are not exclusively European. They adopt explicitly inclusive or exclusive Treaty provisions and legislation, or amended them so as to reverse or exclude particular developments. They limit the powers and jurisdiction of supranational institutions to adopt decisions interfering with specific national policies. When all this fail, they maintain or introduce national laws, regulations or practices, which limit the actual impact of EU rules on national policy domains.² Yet, a number of factors, including potentially far-reaching Treaty

¹ *HP Bulmer Ltd v Bollinger SA* [1974] Ch 401, at 418.

² i.e. non-compliance (Börzel 2001, Börzel et al. 2010, Panke 2009) or "contained compliance" (Conant 2002).

provisions (Maduro 1999), institutional and inter-institutional dynamics, and social factors undermine these safeguards, or even render them counterproductive (e.g. joint-decision trap, Scharpf 1988 and 2006). By default or defect, it thus often falls onto the ECJ to de facto fix the uncertain borders between EU and national levels of actions, in the context of specific and concrete cases.

Consequently, the ECJ has been particularly instrumental in eroding member states' autonomy, in particular - but non only-³ through extensive interpretation of internal market freedoms, making breaches into policy areas which member states' did not wish to include in, and even sometime explicitly excluded from, the field of European intervention (i.e. taxation, health, education, criminal law, etc.). Some, with good reasons, challenge the capacity of the ECJ case law to have such an autonomous impact on policies at EU and national levels (e.g. Alter and Meunier-Aitsahalia 1994, Cichowski 2004 and 2007); yet, to the extent that ECJ rulings are composed and complied with, supported by political and social mobilization (Alter and Vargas 2000, Alter 2009, Cichowski 2007, Conant 2002, Stone Sweet 2004), the ECJ is, at least potentially, a powerful policy-maker, and ... 'breaker'.

Bearing this in mind, anyone who can influence judicial decision-making by the ECJ can potentially contribute to 'safeguarding' national autonomy from EU interference. Yet, despite the Court's potential law- and policy-making powers, little is known about the way it reaches its decisions. As to the ability of member states governments to influence ECJ case law, existing research is ambivalent, to say the least.

This paper seeks to contribute to understanding ECJ decision-making, and more specifically whether and how governments can impact on legal and policy developments, through engaging into EU litigation rather than seeking to impose formal political constraints. Based on different strands of literature, it develops an explanation of ECJ case law which emphasizes litigation dynamics, and proceeds to test it on the development of European case law regarding cross-border health care (i.e. free movement of patients in Europe). Section 1 presents competing theoretical and empirical accounts regarding governments' ability to impact on European case law, as well as methodological considerations, before suggesting an alternative explanation regarding the ability of member states to influence ECJ rulings, the 'influence through litigation' hypothesis, inspired by the US socio-legal literature on litigation. Section 2 provides an assessment of member states governments' EU litigation strategies, to identify potentially influential 'Repeat-Players' amongst them. Section 3 presents the case law on the free movement of patients, in its policy and legal context. Section 4 offers a critical assessment of the ability of theories of EU judicial dynamics to explain this strand of cases. Finally, section 5 illustrates how an analysis focused on litigation strategy can throw light on some aspects of the case law on cross border health care. It concludes on integrating litigation dynamics into existing models of judicial law-making, and on the effectiveness of litigation as an alternative to formal political actions in order to affect legal developments in Europe.

1. Bringing litigation and lawyers back into studies of interactions between law and politics in the EU: conceptual and methodological considerations

Legal and political scholarship which sought to explain judicial dynamics in the EU tend to neglect litigation. Despite methodological obstacles to studying the impact of litigation on judicial decision-making in the EU caused by the peculiarities of the EU judicial system, it is submitted that there are ways by which one can assess the influence of litigation on the ECJ,

³ The ECJ doctrines of direct and indirect effect, as well as state liability, have also reduced member states' ability to escape their European commitments.

so as to provide for more comprehensive explanations of the ECJ decision-making process and law-making dynamics in the EU.

Litigation, out of the radar of European legal and political scholarship?

Legal scholarship dedicates a lot of attention to the Court, but it consists largely in dissecting, praising, criticizing or forecasting European jurisprudential developments, or in appraising their applications and impact, or lack thereof, in the member states. There are, of course, exceptions to these trends. Legal scholars have investigated at some length the contribution made by national courts which, by using, or refraining from using, the preliminary rulings mechanism (now Article 267 TFEU), and by resorting to a mix of compliance and defiance with European rulings, gave more or less implicit guidance to the European Court (e.g. Slaughter, Stone Sweet and Weiler 1998, Alter 2001). A smaller group of scholars looked at the part played by other actors in EU level litigation. Examining EU level litigation patterns, they found out that the ECJ's docket was monopolized by the Commission, governments, transnational corporate groups and a few interest groups (i.e. women rights and environmental groups) (Harding 1992, Harlow 1992, Cullen and Charlesworth 1999). The few empirical legal accounts of litigation impact converged in finding that the Court's case law, or at least its fundamental aspects, were 'driven' and 'framed' essentially by national courts (Weiler 1994), the Commission (Stein 1981), and the Court's Advocates General (Burrows and Greaves, 2007). Those authors who studied the ECJ's argumentative strategy (i.e. the fictional 'reconstruction' of its decision-making, rather than the decision-making process itself) developed explanations which highlighted judicial autonomy, because the Court was able to justify its rulings based on accepted legal argumentative styles (Bengoetxea 1997). However, some did stress that the Court was not completely 'insensitive' to its political environment, and that the Court was willing to limit the scope of application of Treaty provisions to protect measures or values which reflected a consensus amongst the member states ('majoritarian activist', Maduro 1999). Yet, in general, EU level litigation and its impact on EU law and policy developments, remains largely out of legal studies' radar (but see Rawlings 1993, Cullen and Charlesworth 1999, Granger 2004, 2006, 2009).

As for political science scholarship, it is only in the late 1980s that it (re)discovered the Court and legal integration. Many studies emphasized the role of national courts and private litigants in integration by judicial fiat in Europe (Burley and Mattli 1993, Mattli and Slaughter 1995, Stone-Sweet and Brunell 1998, Slaughter, Stone-Sweet and Weiler 1998, Alter 2001, Conant 2002, Stone Sweet 2004, Nyikos 2006, Cichowski 2004, 2007). However, a fair deal of political scientists' attention focused on the ECJ-member states relationship, as an ideal testing ground for its 'grand' theories on European integration. Some of their efforts were directed at understanding why member states' complied with European rulings which extended European institutions' power and policies beyond what they had wished (Beach 2001, Bier 2008), but studies also examined the other side of the coin, namely to what extent member states could impact on the ECJ and its case law.

Schematically, on one hand, neofunctionalists portrayed the Court as an actor driven by its own preferences (within the formal constraints of legal reasoning) fuelled by self-interested national courts and private litigants, supported by the Commission, and largely autonomous from member states' governments, since law acted as a 'mask' and 'shield' for the Court's political moves, and governments had no credible means to control it (Burley and Mattli 1993, Mattli and Slaughter 1995, Stone-Sweet and Brunell 1998). On the other hand, intergovernmentalists scholars contended that the ECJ eventually deferred to the preferences of powerful member states, because these could sanction it by cutting judicial powers and jurisdiction, reverse its case law by legislative or Treaty amendments, and limit the effects and legitimacy of rulings by not complying with them (Garrett 1995). In the last two decades, which were marked by the turn to new institutionalism, relevant works relying on rationalist

Principal-Agent approaches (or variants, e.g. ‘super-agents’ and ‘multiple principals’) identified the fundamental institutional constraints and opportunities created by the ECJ decision-making process, and sought to elucidate the conditions under which the Court would be ‘responsive’ to member states’ concerns, bearing in mind governments’ (limited) options regarding legislative or Treaty ‘overruling’ of adverse case law and non-compliance, and the constellation of member states preferences (Tallberg 2000, 2002, Pollack 1998, 2003, Tsebelis and Garrett 2001, Stone Sweet 2010). Others preferred to rely on the alternative concept of ‘trustees’ (Alter 2008). These theoretical premises were subjected to a range of empirical testing, using both case studies (Garrett, Kelemen and Schulz 1998, Alter 1998, 2001, Stone Sweet 2004, Cichowski 2004 and 2007) and quantitative analyses (Kilroy 1996, Cichowski 2007, Gabel, Carruba and Hankla 2008, Stone Sweet and Brunell 2010, Ier, Malekovic, Solano 2010), which reached conflicting results (Conant 2007), although the balance seemed to tip in favour of neofunctionalist explanations (Stone Sweet and Brunell 2010).

Most of this legal and political studies concerned with ECJ decision-making or governments-ECJ relationship left on the sideline of their investigations what could seem ‘obvious’, that is the impact of *litigation*⁴ and *lawyers* on European case law developments. This is not to say that existing analyses did not refer to litigation strategies at all. Legal works do review, in passing, or as a substantial part of their analysis, the arguments put forward by the various participants in the EU judicial process, and through examining the background or context of series of cases, identify features of civil society mobilization and strategic litigation. Moreover, (rare) existing quantitative studies of EU litigation as such (Harding 1992, Chalmers 1998), as well as case studies (e.g. Rawling 1993, Cullen and Charlesworth 2000) do throw light on forces and strategies at work, including argumentative ones. As for political sciences works, many examined European litigation strategies (e.g. Alter and Vargas 2000, Börzel 2006, Cichowski 2007, Conant 2006, Stone Sweet 2004, Alter 2009). However, their case studies tend to have a wide focus and encompass the whole spectrum of political mobilization and litigation involving EU law, leading to and following up (or “through”) ECJ cases, rather than EU level litigation as such. Besides, these studies tend to focus on non-institutional actors, meaning civil society and corporate organizations (although they do highlight the role played by supranational actors such as the Commission or EP).

Analysing EU litigation from organizational and social perspectives: the in-put of US scholarship and European political sociology

The point is that there have been, so far, few attempts to systematically analyze EU-level litigation strategies as such.⁵ Such analysis consists in assessing the organizational, human and material resources made available for EU litigation, the selection of ‘test-cases’ (for those actors which have the standing to do so at both national and EU level), the decision to submit observations or intervene in ECJ proceedings, the determination of the position to be supported in Court, the formulation of legal and policy arguments to support claims, the presentation of relevant factual evidence, and the choice and the ‘weight’ of legal representation (but see my own preliminary work on governments’ litigation, Granger 2004, 2006, 2009).⁶

Furthermore, with the exception of the Court’s members themselves (Kenney 1998, 2000, Cohen 2008), and in particular the Advocates General (Dashwood 1982, Tridimas 1997,

⁴ Litigation, for the purpose of this paper, is given a wider sense that what is normally understood, comprising not only the initiation and pursuance of lawsuits, but also the participation in judicial proceedings, through observations and interventions (similar to US *amicus curiae*’ briefs) with the view not only to ‘win’ the case, but also to impact on legal change in the longer term.

⁵ But on interest groups choice of litigation as a strategy of influence, see Bowen and McCown 2007.

⁶ For a similar observation, see Stone Sweet 2010, 30.

Mortelmans 2005, Burrows and Greaves 2007), jurists who are regularly involved in EU level litigation have not been the subject of any close inspection (but see Marchand and Vauchez 2007). This is so despite the fact that recent sociological studies suggests that, due to the paradigm of integration through law and the special reliance of the EU on legal instruments for policy implementation, ‘legal arenas stand out as the (main) forum of mediation between the dense array of sector-specific policy networks’ (Vauchez 2008, 131). In that context, lawyers, and their *savoir-faire*, significantly contribute to the shaping and legitimizing of the EU government (Vauchez 2008, Lahussen 2008).

The lack of academic attention to the role played by litigation and lawyers, in particular in the specific context of the construction of the European law and the shaping of the EU polity through case law, must be deplored, for it leaves in the shadow potentially important dynamics of integration and governance in Europe. On the other side of the Atlantic, political sciences scholars, after having dwelt at length on the respective parts played by legal factors (i.e. law, precedent, legal interpretation) and judges’ preferences (the famous attitudinal model) in the determination of judicial outcomes (e.g. Segal 1983, 1993, Segal and Spaeth 1993) are now looking for more integrated and more inclusive models of judicial decision-making. Studies look for empirical evidence of the influence of lawyers’ preferences (Rubin and Bailey 1992, 1994), their experience (MacGuire 1995) or social connections (O’Connor and Herman 1995) on judicial outcomes. Furthermore, new institutionalist studies have highlighted, amongst other factors, the potential importance of litigation, lawyers and legal *savoir-faire* for case law development (Clayton and Gillman 1999). For example, they found evidence suggesting that the submission of *amicus curiae* briefs before the US Supreme Court not only provided essential information to the judges and widened argumentative choice, but also enabled judges to make strategic decisions taking into account the preferences of stakeholders (Epstein and Knight 1999). They also showed that quality legal argumentation impacted on judicial determinations (Johnson, Walbeck and Spriggs 2006). These findings, based on the US judicial system, can nonetheless turn relevant to studies of EU legal and policy developments, since there is evidence that the EU system is developing towards US style ‘adversarial legalism’ (Kelemen 2006).⁷

Methodological challenges

The dearth of research on the definition, implementation and impact of EU litigation strategies, including argumentative strategies and lawyers’ selection, on European law may be blamed on methodological difficulties. First, the common approach, inaugurated by Stein (1981), which consists in attempting to ‘trace the influence’ of parties’ arguments in ECJ decisions, can be frustrating in the context of ECJ decision-making, which involves relatively ‘short’ single rulings, without dissenting opinion, and which traditionally make little reference to parties’ arguments.⁸ Yet, a few legal studies have succeeded in identifying the substantive impact of the Commission (Stein 1981) and Advocates General on the Court’s case law (Burrows and Greaves 2007), suggesting that, to some extent, the same should be possible for other participants in ECJ proceedings.

There is however a significant technical obstacle, which is that, unlike for the Advocate General Opinion, one does not have easy access to parties’ and participants’ written and oral observations. These are not publicly available, and one only has access to a summary of the written observations in the Report for the Hearing. This report, which used to be published as

⁷ Kelemen (2006) argues that this is due to the fragmented nature of the EU polity, the increase density, scope, and binding nature of legal rules, the breaking down of informal national regulatory mechanisms and closed policy networks, change in the European legal services industry, etc.

⁸ Although this is gradually changing, and the ECJ nowadays tend to address more systematically the observations which are presented before it.

part of the final court report, and thus translated, until 1994, is since then no longer published; it is only available upon request from the Court, and only in the language of the case.⁹ As for oral observations, besides attending the hearing in person, the only source of information is the occasional mention made to them by Advocates General or the Court.

All this contributes to making it difficult for researchers to evaluate the quality of parties' argumentative strategies and their potential impact on rulings, a task which, in any case, would inevitably entail some degree of subjective assessment. It is, indeed, impossible to establish influence, where similarities between arguments put forward in observations and ECJ rulings may be dictated by other factors, including legal logic.¹⁰

Furthermore, solely relying on arguments negates the influence that may result from other aspects of litigation strategies. Indeed, the briefs can reflect the legal knowledge, skills and experience of the lawyers presenting them, or at least the efforts that he or she put in the preparation of the case; however, they do not account for the 'authority' of these lawyers in the European politico-legal community, or the 'political' weight being them. Thus, in order to assess more comprehensively the potential influence of participants' observations in ECJ proceedings, one needs to complement the analysis of legal arguments with biographical or organizational studies. This is not an uneasy task in a multinational and multi-lingual context, where lawyers pleading before the ECJ are still very much products of national legal education and professional systems, despite certain common European cursus and careers (De Witte 2008).

Finally, in order to assess the influence of litigation strategies, one should look beyond the actors on the stage (i.e. the jurists), and their performance (i.e. the arguments), and investigate the backstage, i.e. the political-administrative mechanisms and personnel which enable participation in EU judicial arenas. Studies of the coordination of member states' European policy suggest that member states' endowed with strong coordination and clear strategies are more likely to be able to 'impose' their preferences in EU policy-making (i.e. Kassim et al. 2000). Besides, as noted above, US socio-legal scholarship dealing with the impact of litigation on legal change suggest that well-resourced and well-organized litigants, endowed with strong coordination mechanisms (in the case of institutional actor), pursuing long-term strategies, which have access to skilled, experienced and respected lawyers and which are well connected to other institutional actors, are more likely to impact durably on legal change (Galanter 1974, McGuire 1995). From this, we can hypothesize that, where participants in EU litigation fulfil these conditions, then they should be in the position to impact on legal change at EU level (including for the purpose of protecting national autonomy).

The 'influence through litigation' hypothesis

Notwithstanding the methodological limitations highlighted above, it is still worth identifying who are the 'repeat-players' of European litigation and their strategies, if one wishes to fully understand judicial dynamics in the EU. In particular, bearing in mind the aim of protecting national autonomy, one should investigate to what extent governments possess the resources, including organizational capabilities, and access to relevant legal knowledge and skills and socio-professional connections, which could give them an influential voice in ECJ proceedings, able to compete with the expertise and 'relations' of the other identified 'repeat-players', i.e. the Commission's agents and Advocates General, and the few corporate or interest groups active in EU litigation. This should be complemented by an analysis, in the context of case studies, of legal representation and argumentation, looking for 'traces' of their impact in ECJ rulings, sometimes through the 'mediation' of Advocate General Opinions,

⁹ The French version used by the Court is not made available to outsiders.

¹⁰ Regarding difficulties in neutralising legal factors for the purpose of singling out the differential impact of governments' participation, see Gabel, Carruba and Hankla 2008.

even if one will never be able to draw clear causal relations. Such analysis can still give an ‘idea’ of the potential impact of litigation strategies, which complement existing explanations of judicial developments in the EU.

Such analysis offers an alternative means to conceive of actors’ influence on EU judicial decision-making, and of governments – ECJ relations, which adds to the existing intergovernmentalist ‘control’ model, the neofunctionalist ‘autonomy’ model, and the new institutionalist ‘strategic’ model, by offering an ‘influence through litigation’ variant. It also supplements ‘existing’ legal studies account of the influence of the Commission, Advocate Generals and national courts, thus providing a fuller picture of actors’ participation in ECJ decision-making.

The rest of this paper investigates the definition, implementation and impact of governments’ European litigation strategies aimed at safeguarding national autonomy from unwanted EU interventions. In analysing member states’ governments’ litigation strategies, we leave aside the hypothesis that a motivation for governments to participate in ECJ proceedings is to signal to the ECJ threats of overruling or non-compliance (Kilroy 1996, Gabel, Carruba and Hankla 2008), since a number of recent studies have empirically discredited the effectiveness of such strategies (Cichowski 2004 and 2007, Stone Sweet and Brunell 2010), and since member states’ agents themselves insist that this is not the point of submitting observations to the ECJ (Granger 2004). Rather, we consider that the main drive for participating in proceedings before the ECJ is to ‘persuade’ the Court, essentially through legal argumentation and appropriate factual evidence, to interpret or apply EU law in a particular way, so as to secure both market integration and national autonomy.

The next section of the paper, based on my previous work on member states’ governments’ EU litigation strategies (Granger 2004, 2006 and 2009), identifies which, amongst the member states’ governments, are potentially influential ‘Repeat-Players’ (Galanter 1974), in light of the features of their litigation strategies and who their lawyers’ are, generally speaking. The following section proceeds to test the ‘influence through strategic litigation’ hypothesis in the context of the ECJ case law on cross-border health care, which challenges national autonomy regarding the organization of health care. It concludes on the effectiveness of governmental litigation in protecting national policies and on the validity of the alternative model, as compared to other models of member states-ECJ interactions.

2. Member states’ governments’ definition and implementation of an EU litigation strategy: a bunch of Repeat-Players

Previous research on governments’ participation in proceedings before the ECJ (Everling 1982; Collins 2002; Granger 2004, 2006 and 2009; Bengoetxea 2006) suggests that some member states’ governments are better ‘prepared’ than others for EU litigation, and for that reason, are more likely to be influential in the ECJ decision-making process. These conclusions are based not only on the frequency of governments’ observations or interventions in EU proceedings, including in preliminary reference cases originating from other member states which do not directly affect the rules and practices of the participating government, but also on an analysis of the definition and implementation of their EU litigation strategies. To a large extent, these findings corroborate and build on those reached by studies of the national coordination of EU policy (Kassim et al. 2000), as well as the ‘Repeat-Players’ theory (Galanter 1974, McGuire 1995 and 1998). These converge to highlight that governments which have a strong coordination structure, mobilize important resources towards EU influence (including human resources and legal expertise), which pursue long term strategies of influence, and maintain links with other institutional actors, fare better than others in law and policy-making processes. Being endowed with these

characteristics does not necessarily guarantee success, translated as the incorporation of national preferences in EU-level decisions. There exist important counter-forces, such as the strong mobilization and defence of conflicting views and interests by other institutional actors (including other member states, the Commission and the European Parliament) or corporate or interest groups, divisions before and in the Court, or path-dependencies created by ‘precedent’ which may be difficult to reverse (Pierson 1996). Yet, it provides an advantageous starting position.

The privileged position of national governments in ECJ decision-making processes

In the context of the ECJ decision-making, unlike in political institutions such as the Council of Ministers, judges, and not politicians, have the last word. However, judges do not decide in a vacuum, and their rulings are, at the very least, ‘informed’ by what they have seen or heard from the European and national legal and political communities, through more or less formal processes (Chalmers 1997, Weiler 1994, Granger 2005). This undeniably includes direct representation through briefs and pleadings submitted during EU proceedings themselves. And for that, member states’ governments, like the Commission, enjoy a ‘privileged’ position (Granger 2004, 5; Harlow 1992). First, they have an unrestricted right to challenge EU legislative and regulatory acts (Article 263 TFEU), or to bring other member states’ before the Court for failure to comply with EU law (Article 259 TFEU). Second, they also have an unlimited right to intervene in all these direct actions, as well as submitting observations in all references for a preliminary ruling (Article 267 TFEU) submitted to the Court, even by courts of other member states. Governments’ ability to submit both written and oral briefs in the preliminary references procedure is significant, as this mechanism procedure, which encourages all national tribunals, and oblige the last resort national courts, to submit to the ECJ questions relating to the interpretation of EU law or the validity of EU secondary acts, is not only an important ‘decentralised’ compliance tool, but also a formidable instrument for law- and policy-definition. All member states are, on paper, equal before the Court, which gives smaller states a special opportunity to promote their views and their interests at EU level.

Like the coordination of EU policy in political decision-making processes, the preparation for EU litigation is a demanding task. Although there are common structures for both types of influence mechanism, the rules of the games, as well as timing, are different in EU litigation from those of decision-making in the Council, and call for adjustment of strategies and coordination mechanisms.

This section highlights some of the features which affect participants ability to impact in and on the ECJ decision-making process, and identifies those governments who are the ‘Repeat-Players’ of European law. It is based on an extensive comparative empirical research which gathered information on the preparation of EU litigation by the governments of almost all the member states of the European Union,¹¹ essentially through questionnaires filled by governments’ agents, complemented by interviews and publicly available information (websites, conference papers and lectures by agents) and whose main findings have already been presented in a number of articles (Granger 2004, 2006) and book chapters (Granger 2009).

The importance of coordination

Studies of both litigation and EU policy coordination suggest that coordination contributes to institutional actors’ ability to participate effectively in decision-making processes

¹¹ Only Italy, Romania and Bulgaria are not included, for lack of access to sufficient information.

(‘projection’), although some warned that it may be ‘overrated’.¹² However, in EU litigation, the time-frame is tight, as member states’ governments have only two-months (less in emergency procedures) from the time of notification of a case by the Court to submit written observations or interventions. Within these two months, national governments must come up with a common governmental position, and draft the argumentation. The longer it takes to reach a position, the less time is available for the actual writing of the submissions, which can affect adversely the quality of the governments’ briefs. Moreover, the absence of clear and strong national position, makes the writing of legal briefs more delicate, and can undermine their legitimacy, in the eyes of national actors as well as those of the ECJ. Good coordination is thus essential.

In the context of general EU policy coordination, the timing and nature of tasks tend to favour administrators in the decision-making process, as opposed to executives. This is also true for the coordination of EU litigation, with the qualification that, in that context, the civil servants in question are jurists. Indeed, it is normally the European litigation unit which represents the government before the European Courts which also coordinates ministers’ positions.¹³ This coordination starts by an information phase, whereby the European litigation agency, which normally is the recipient of the Court’s notifications, sends information about forthcoming court cases, to the ministries responsible for the subject-matter(s) – the line-ministries-, and sometimes to all ministers (as matter of principle in some member states; only in horizontal cases, in most other states). These information notes are usually accompanied by commentaries drafted by the litigation agency, which stress the potential impact of the cases. Then, either the initiative is left largely to the competent ministries (in countries with decentralized tradition, such as Belgium), or it is shared between representatives of responsible ministries and the legal agency, within (i.e. France) or outside formal coordination structures.

In this coordination process, lawyers, be they ministerial lawyers, or legal agents working for the unit that represents the state in European litigation, or lawyers sitting in the special legal division of the interministerial coordination unit (France), have a preponderant voice. Even if they rarely have the last say formally, their opinion matters a great deal in the governmental determination of the opportunity and content of observations. In some member states (e.g. France, Netherlands, Finland), they shape governments’ litigation policy, by advising on the selection of positions and arguments which ‘stand’ a chance in Court, encouraging the government to ‘leave out’ arguments which are legally weak and which, in the long run, could undermine the legal credibility of the government. In doing so, they contribute significantly to determining the ‘official’ governmental position on the matters submitted to the Court.

Normally, the position thus reached through lawyers-dominated administrative coordination needs formal political approval by the executive. In most old member states, this is almost systematic, and consists in plain rubber-stamping by relevant interministerial committees, except for very important cases, or cases about which affected ministries could not agree; in such situation, the Cabinet, Prime Minister or President, intervenes. But in others, and in particular in new member states (e.g. Latvia until recently), this political control is more substantial, and the Government or Prime Minister has to review and approve every agreed position before the European litigation unit can start drafting observations (in practice however, the legal unit would start working on the submissions before having received the formal green light, to save time). Usually, ultimate political control takes place after the

¹² The typical example, oft cited, is that of Italy, which has weak coordination structures at national level, yet is far from always on the losers’ side.

¹³ Even in France where the coordination of the state’s position with regard to EU litigation is carried out by an interministerial organ attached to the Prime Minister, the SGCE, it is worth noting that, within that political unit, it is entrusted to the ‘Legal Section’, staffed by jurists.

drafting of written submission, when these are approved by the executive (in which ever format), and sometimes even the Parliament (e.g. Sweden).

Assessing the ‘effectiveness’ of coordination from a comparative perspective is delicate, for there is no ideal type, which would suit all administrative traditions and constitutional settings. Yet, based on agents’ assessment and studies of national coordination of EU policies, countries such as France, the United-Kingdom, the Netherlands, or Finland, appear to have coordination mechanism which are conducive to guaranteeing the political representativeness, coherence and legitimacy of the position reached as well as the overall quality of observations submitted to the Court.¹⁴

The political authority and powers of the EU litigation agency

Whilst all the member states have allocated the task of representing them before the EU courts to a specialized unit within their administration, there are significant differences amongst them concerning the ministerial hosting of this agency, as well as the scope of its functions. Whilst these differences do not, in themselves, constitute strengths or weaknesses, some features are nonetheless likely to affect the potential impact of governments’ participation in EU litigation. In particular, litigation units which are directly attached to the highest executive level, like the Chancellery (in Austria), or which belong to powerful and well resourced ministers, will not only be endowed with greater legitimacy, they will also usually be more able to mobilize sufficient resources towards EU litigation. The breadth of activities covered by the litigation agency also matters. For some of them, the preparation of EU litigation is only a small part of their activities. Most agencies combine the dual task of preparing EU litigation and advising governmental units on EU law, or EU case law. Some also supervise the implementation of EU law, and/or ECJ rulings. Although it gives the agency an encompassing view of EU and domestic law and policy, and wide expertise on the interactions of EU and national law, it may limit the agency’s ability to ‘deliver’ on EU litigation, in particular if human resources are scarce. In some member states, the litigation unit also deals with other international litigation, such as litigation before the European Court of Human Rights, the International Court of Justice, the World Trade Organization Dispute Settlement and others, which can take time and expertise away from EU matters (e.g. in Luxembourg).

Resources: staffing, training, ‘reputation’

There are great differences in the staffing of government’s agencies dealing with EU litigation. The extent and quality of human resources are difficult to assess, in particular when the task of the agencies extend beyond EU litigation, and where a large part of the preparation for litigation is undertaken by legally trained civil servants in the line-ministries, e.g. Belgium, Portugal (Granger 2004, 2006, 2009). Yet, some countries have only one person dealing with the whole of EU litigation (e.g. Luxembourg, and only in a part-time basis, since that diplomat is also in charge of other international litigation; Portugal), whilst other involve a vast number of civil servants and diplomats. However, the number of regular governments’ representatives before the Court does not necessarily imply strength. Take Greece, for example, which mobilizes on a semi-regular basis a group 20-30 civil servants, with an average of 3-4 lawyers per case. Yet, these ‘agents’ do many other things in addition to EU litigation, and do not necessarily coordinate their actions, which can lead to inconsistencies in the Greek position before the Court, as well as weaknesses in the content of observations,

¹⁴ This is to be contrasted with the situation in countries such as Italy in which, the rumour goes, the decision to participate in ECJ proceedings, as well as the arguments submitted, are left entirely to a select group of state’s attorneys (Avvocato dello Stato), and which politicians consider as none of their business (this may explain why it occurred more than once that Italy defended in the Court a position contrary to the one it had adopted on the same issue in the Council!).

where the European legal expertise of the staff is not optimal. Greece does submit a lot of observations, in particular when related to its size, but their effectiveness is contested (Granger 2004, 2009).

The ‘ideal’ situation thus seems to be that of a medium-size team, of 4 to 10 lawyers, highly trained in EU law, with a solid background in domestic law, complementary substantive law knowledge, some degree of political awareness and diplomatic skills, and who work closely together. Their activities, although they may involve legal advising to government and following up on compliance with EU caselaw, should nonetheless be focused on EU litigation. This, as a matter of fact, seems to be the ‘model’ followed by most ‘active’ countries (e.g. France, Germany, Austria, Netherlands, Finland) who have a handful of legal agents appearing before the Court on a regular basis. In some countries, like in the Netherlands, team-preparation seems to be the rule, whilst in most countries, cases are allocated to individual agents, which handle it together with, or under close supervision, of the head of the agency.¹⁵

An alternative model consists in instructing external lawyers. This is the approach adopted systematically by the United-Kingdom and Ireland. In the United-Kingdom, the agents of the Treasury Solicitor’s Office (the government’s in-house legal advice department), coordinate the national position. They then instruct external counsels to write the governments’ submissions to the Court and plead for them at the oral hearing. In that way, they secure access, where needed (i.e. in cases where important economic, political or legal interests are at stake) to the best lawyers in the country, specialized not only on EU law, but also in the substantive law or policy area at stake in the given case. The United-Kingdom hires well-known EU law specialists, often assisted by substantive law legal experts, to defend its position on a more than regular basis. The names of their regular counsels sound familiar to those who have studied EU law (Dashwood, Plender, Lasok, Anderson, Wyatt, etc.). In fact, most of these top EU lawyers, who sell their skills to anyone who will pay for them, have served at the Court at some stage of their career as *référéndaires*, and some of them may, one day, return to the Court to sit on the bench (e.g. Sharpston). Since most of them also have academic activities, they turn on the same conference circuits than many of the Court’s members (e.g. FIDE). One can thus safely assume that they enjoy a certain aura, or at least authority, in the EU legal Community, which cannot fail to impress the ECJ members. In fact, it is almost a common-place for Court’s members to comment, of-the-records, positively on the ‘quality’ of the British government’s lawyers appearing before them (e.g. Edward 2002). Whilst the Brits and the Irish are the only ones resorting systematically to external lawyers, other countries, such as Belgium, Germany or Cyprus, use them on a more exceptional basis, because of staff and expertise shortage, or for more important cases.

The notoriety of the British representatives does not mean that agents in other member states do not possess similar status and legal expertise. A quick review of the CVs of some of the heads of agency reveals that many of them are high level civil servants, often diplomats, who have made it through selective training and demanding administrative careers, who possess solid knowledge of EU law, and relevant legal and political experience (many of them have worked as *référéndaires*, or in the Commission as detached national experts). Some of the heads of unit are thus recognized members of the EU law community. However, some countries do seem to struggle with the staffing of the EU litigation unit, either by lack of interest (i.e. Luxembourg), or resources, or both. Whilst one could have expected the new member states to suffer from shortage of sufficiently knowledgeable and experienced legal

¹⁵ Many of the new member states are ‘officially’ represented by ‘their Agent’, who signs all the written observations and attend the hearing. However, this agent, the head of the EU litigation agency, is assisted in his work by a number of collaborators, usually junior lawyers, whose name is never mentioned.

personal, partially due to the Brussels brain-drain which followed accession, this is generally not the case. At least at the level of the head of agency, most of the new member states have secured the services of experienced civil servants, although some may be significantly more 'junior' than in old member states.¹⁶

At the level of supporting legal staff, one common feature is the high turn-over of agencies' staff. Whilst most national litigation agencies manage to 'snap' the best law graduates or top-ranking fresh civil service recruits, specialized in EU law, thus enlisting the services of a bright and talented new generations of Euro-lawyers, these rarely stay in the post more than a few years, moving on to more prestigious, and better paid position, in national capitals, Brussels or Luxembourg. Considering that it takes at least a year for a new agent to be fully 'operational' in EU litigation, this can be a real problem, although agencies try to retain their best legal advisors when they can. Whilst this turn-over and training demands can put strain on EU litigation agencies, they however seem to be coping by staggering arrivals and departure, and continuity is ensured by the longer 'longevity' of heads of agency.

The human 'legal' resources mobilized by government for EU litigation thus vary, with some member states being able to engage eminent and well qualified EU lawyers, assisted by promising younger lawyers (i.e. the United Kingdom, France, the Netherlands, Poland, but also, in relation to their size Finland, or Cyprus), whilst other seem to struggle to mobilize adequate human resources (e.g. Luxembourg, Portugal, Belgium until recently).

Long term, sustained influence and defence strategies

Member states' governments have different objectives in relation to EU litigation.

Having in mind the nature of political life, it does happen that, at times, governments' participation in ECJ proceedings is motivated only by the need to show domestic constituencies that they are trying to do something about it, without the government having any hope (ore even desire) of winning the case or influencing case law (populistic strategy).

The national electoral cycle could also privilege strategies aimed at defending the immediate interests threaten in a particular case (short-term defense strategy). For some government (e.g. Luxembourg), this is in fact the only purpose of their very occasional participation in ECJ decisions. However, the large majority of governments (except perhaps, until recently, Belgium and Italy) keep an eye out for the long term implications of particular rulings (long-term defence strategies). The practice of the Court, famously highlighted by British scholar T. Hartley, of introducing ground-breaking principles in factually insignificant cases, and of generally not applying these principles straight away to the case at hand, waiting for later cases to unfold the full scope of the rules (Hartley 2007), makes no mystery for the 'experienced' European jurists, whose voice is determinant in the decision to submit governments' observations and who draft them. These high ranking civil servants, whose jobs are not linked to political vagaries, will encourage and support their governments' participation in cases which could have important indirect implications for national rules, policies, or economic actors. It is thus naïve to assert that governments', because they are 'political' actors, are essentially concerned by the short-term effects of rulings, and that it is the reason why they do not fight against, or react to ECJ ground breaking rulings (Alter 2001, Obermaier 2008b).

Moreover, for a majority of governments, participating in ECJ proceedings does not only aim at protecting the short-term and long-term political, economic or legal interests of the nation, but also at contributing to the making of EU law. Allegedly, these are two sides of the same coins, for normally the desire to influence EU law is shaped by the wish to see it developing

¹⁶ But this is not peculiar to EU litigation, and is observable across the range of positions related to EU law and policy-making.

in a way which is as compatible as possible with domestic rules, policies and values, or visions of EU law. Yet, the strategy proceeds of a much broader concept of national interests, and assimilate member states' agents to advisors to the Court, rather than 'just' lawyers defending their clients. This is a vision of their role which many national agents share.

Some governments have obvious long term strategies of defence and influence (e.g. France, the United-Kingdom, the Netherlands, Finland, Austria, Poland, and more recently, even Italy). Not only they are often explicit about it, but it is also clearly revealed from their pattern of observations, as governments which pursue such strategies tend to submit an important share of their observations in preliminary references which originate in other countries (Granger 2004, 11).

Presence = influence?

Whilst the frequency of observations cannot, of itself, produce influence, regular, coherent, consistent and targeted observations, focused on the wider and long-term impact of cases, are more likely to exercise long-lasting impact on legal developments in Europe.

The participation of governments in ECJ proceedings was rather sporadic in the first few decades of European integration with essentially short-term defense strategies motivating this occasional participation (this despite Court members stressing the importance of member states participation in the making of EC law, Everling 1984). The notable exception was the United-Kingdom, which, as soon as it acceded to the EEC, mobilized strongly in order to defend British interests in Europe. Perhaps because of the common law tradition, in which the law-making power of judges is an accepted fact (contrasted with the continental myth of judges only applying the law) and in which judge-made law shapes an important part of public life, they realized earlier than other countries the need to have an active European litigation strategies, focused on the long term. However, in the early to mid-1990s, another group of states started to engage in longer term active European litigation strategies of defence and influence, sometimes following a shock caused by an unexpected damaging ECJ rulings (e.g. the Netherlands), sometimes because of the taking over of the litigation unit by a new leadership versed in European influence strategies (e.g. France, Finland), or simply because they had to 'catch up' with their courts which send many preliminary reference cases to the ECJ (e.g. Greece). From the first few sets of enlargements, only the United Kingdom, and Greece, adopted an active strategy (although Greece's participation seems to lack focus and coherence), with Denmark, Spain and Portugal not being the most present on the European judicial stage. More recently, Belgium and Italy, for long laggards, have also shifted to more pro-active and long-sighted strategies.¹⁷ The 1994 enlargement 'produced' active participants in ECJ proceedings, with Austria and Finland submitting regular and clearly targeted observations, and Sweden featuring honorably. Finally, amongst the new member states, Poland has clearly taken the lead, quickly becoming one of the most frequent participants in ECJ proceedings, whilst the Czech Republic, Hungary, and Cyprus making regular enough appearances before the Court.

Inter-state cooperation: 'L'Union fait la force'

Whilst in the past, governments' cooperation was the exception rather than the rule, it is now a common feature of the national coordination of EU litigation. Agents from the EU litigation unit swap information on cases of common interests, including exchange of observations, and at times, call for other countries to intervene in support of their positions. This coordination takes place by email or phone. In important cases (such as the Open-Sky, or Laval-Viking cases), agents of the member states even meet to better coordinate their actions. Agents also

¹⁷ Italy did submit a lot of observations, but they were focused on the numerous cases referred by Italian courts, therefore reflecting a clear short-term defence strategy.

coordinate their governments' positions ahead of the oral hearing, so as to make the most of this face-to-face, but short, opportunity to put their case directly to the ECJ judges.¹⁸ This cooperation has been reinforced since the holding of annual agents' meetings (initiated by the Dutch government in 2002) in which member states' agents take part on a yearly basis, and during which they not only discuss common problems, relevant case law developments, and future actions, but also get to know each other, which facilitates further cooperation.

Existing statistical analyses suggests that the more states submit observations in support of a particular position, e.g. supporting the validity of a particular type of national legislation or practices, the more that position is likely to succeed (e.g. in the EU context Cichowski 2007, Gabel, Carubba, and Hankla 2008, Stone Sweet and Brunell 2010; in the US context, e.g. Caldeira and Wright 1998). Putting a consensual front between member states' governments is thus important, and can more easily be achieved through close cooperation. Besides, it is likely to improve the range and quality of legal argumentation and factual evidence presented to the European judges, thus rendering it more difficult for opponents, or the Court judges themselves, to advance equally compelling argumentation to the opposite.

So, who are the Repeat-Players governments?

To conclude, many of the governments of the European Union have the means to be influential Repeat-Players in EU litigation, and thus to impact on legal change at EU level. This is partly due to the quality of their coordination mechanism, and their ability to 'engage' strong lawyers, familiar with ECJ litigation. This is particularly the case of the United-Kingdom, France, the Netherlands, Finland, and in the new Member States, Poland... If the Repeat-Players theory stands the test, then they should be able to make their views triumphs, *over the long run*, in the making of EU law. We will now proceed to test this in the context of the case law on cross border health care.

3. The ECJ case law on cross-border care

The case law on cross-border health care provides an interesting testing ground for assessing the ability of governments to safeguard their national policies from EU intervention through strategic litigation. It concerns a policy area, public health, which affects European citizens directly, and thus provides them with incentives to act or react. Besides, it lies at the heart of national social models. For that matter, it is a domain which, at least formally, still falls largely outside of the competences conferred to the EU. Finally, the provision of health care in Europe had, at least until recently, an almost exclusively social objective, and was organised around the principles of solidarity and territoriality, and therefore completely at odds with the dynamics of market integration in Europe.

The ECJ, in a series of rulings starting in the late 1990s, successfully relied on the Treaty's free movement provisions to interfere with the delivery of health care in the member states. However, in expanding the reach of internal market law, it was careful not to undermine essential features of the provision of health care by the member states (Mavridis 2008). This 'growing up and mellowing down', to borrow the phrase used by Professor Tridimas (2001) in the context of the ECJ case law on state liability, deserves explanation.

The 1998 Kohll and Decker rulings¹⁹ have often been described as break-through in terms of EU law 'intrusion' into national health care systems. However, in order to understand their full potential, it is necessary to briefly expose the policy context and 'state-of-the-law' on the

¹⁸ Parties and participating institutions and governments only have a maximum of 30 minutes to present their arguments, and often the Court will ask them to take less time.

¹⁹ C-158/96 *Kohll* [1998] ECR I-1931; C-120/95 *Decker* [1998] ECR I-1831.

eve of the rulings. Such analysis necessarily includes a review of the relevant case law preceding the rulings, to find out whether Kohll and Decker were revolutionary, or simply evolutionary. Having in mind the purpose of this paper, we find it useful to highlight governmental mobilization in the pre-Kohll and Decker case law.

Diverse national health systems, common basic principles

Although taxonomies vary, one can distinguish the health systems of the EU member states into two main types: Beveridge-type national health system (NHS) and Bismarckian type insurance-based systems (IBS) (Sauter 2008, 3). The first one consists of essentially publicly organized national health systems, usually funded through taxation or special social contributions, and whose employees often have civil servant status. These systems can be centralized (e.g. United-Kingdom or Ireland) or decentralized (e.g. Spain, Greece, Portugal, Italy, Denmark, Finland, and Sweden). The second one is based on occupational health insurances schemes, subscribed with more or less choice or freedom by workers. Within that type, one distinguishes between two sub-categories, in-kind benefits systems (e.g. Austria, Germany and the Netherlands), or reimbursement (or restitution) systems (e.g. France, Belgium, and Luxembourg).²⁰ In the in-kind system, treatment is provided for free to the patients, traditionally within a network of contracted health providers, and paid for directly by the health insurance fund to the health care provider, often in advance and based on foreseen needs of the insured population. In reimbursement systems, the patients who receive medical treatment pays for it, and are reimbursed afterwards by their insurance funds. Usually, these systems requires some degree of co-payment from the patients, in particular in the case of out-patient care, and there may be mechanisms in place to simplify the procedure and limit patients' cash advance, whereby patients are required to pay directly to the healthcare provider only their share (tiers-payant), if they can provide proof of affiliation to the health insurance fund (e.g. Carte Vitale in France), the rest being invoiced directly to the insurance fund.

Despite these differences, there are nonetheless a number of features common to European health systems, which distinguishes them from the organization of health care in other parts of the world (e.g. the US system). They provide for quasi-universal coverage, and are organized around the principle of territoriality and national solidarity (Newdick 2006). However, in most if not all member states, this solidarity is under pressure, by reason of demographic (population aging), technological (development of expensive complex equipments and treatments), and socio-psychological (higher patients' expectation) factors (Sauter 2008, 3). Most member states have thus engaged into reform processes, which are nonetheless difficult due to the sensitive nature of the subject as well as the strength of vested interests (Sauter 2008, 3). This leads to the development of alternative, or complementary, health systems, based on the 'ability to pay' (Sauter 2008, 3).

The pre-Kohll and Decker legal framework for the free movement of patients

Before the Kohll and Decker rulings, obtaining medical treatment abroad was exclusively covered by Regulation 1408/71 and its implementing regulations.²¹ This coordination (not harmonization) regulation was based what is now Article 48 TFEU (ex-Article 42 EC), which

²⁰ Information on new member states' social security system will be provided; but for the purpose of this analysis, it is not essential as the litigation was essentially in the hands of 'old' member states, until recently.

²¹ Council Regulation (EC) 1408/71 dated 14 June 1971 on the application of social security plans to workers, self-employed people and members of their families moving within the Community (OJ 1971, L 149/2), last amended Regulation (EC) No 592/2008, dated 24 July 2008, (OJ 2008 L 177) ; Council Regulation (EEC) 574/72 dated 21 March 1972 defining the procedure for the implementation of Regulation (EEC) 1408/71 (OJ 1972 L 74). Regulation 1408/71 has been largely repealed and replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 314), coming into force in 2010, once implementing legislation is adopted.

provided for the Council to adopt, at unanimity, legislation for the coordination of social security systems with the view to facilitating the movement of workers and their families in the Community.²² The application of the Regulation was eventually extended (late) to third country nationals resident in member states.²³

Article 22(1)a) of Regulation 1408/71 enabled a person temporarily staying in another member state, for either private or professional reasons, and who required urgent treatment (“immediate medical attention”) to receive medical care there at the expense of his home state. The coordination was facilitated through the issuance, prior to travelling of an E111 form (replaced since 2004 by the European Health Insurance Card).²⁴

However, Article 22(2) c) of Regulation 1408/71 also allowed workers and their families to go abroad for the purpose of receiving medical treatment (‘planned medical care’), provided that they had sought and had been granted authorization from the competent national authorities, as testified by the issuance of an E 112 form. The original version of the Regulation stated that member states were obliged to deliver the E112 authorization form for treatment abroad “when the treatment in question [could not] be given to the interested party in the territory of the member state in which he live[d]” (Article 22(2)2). Beyond this minimal condition, governments could, but were not obliged to, authorise, and reimburse, treatment abroad, and could have rules and procedures in place for such purpose.

In addition to Regulation 1408/71 and its amending and implementing acts, a few other Community legislative acts bore some direct or indirect influence on patients’ mobility, such as legislation regarding the mutual recognition of professional qualifications²⁵ and legislation regulating pharmaceuticals²⁶ and medical equipment²⁷ (Sauter 2008, 7).

The original EEC Treaty made hardly any reference to health, only providing for a public policy exception to free movement on the ground of public health (now Article 52 TFEU). However, the Treaty contained a number of provisions which could affect the delivery of health care in the member states. This was the case of the Treaty competition articles, as well as the free movement rules. More specifically, rules relating to the free movement of products could affect the trade, marketing and financing of pharmaceutical products and medical devices, whilst the rules on the free movement of services were likely, one day or the other, to require at least some adjustments of national social security schemes (Altenstetter 1992).

²² Ex-Article 42 EC: The Council shall, acting in accordance with the procedure referred to in ex-Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

The Council shall act unanimously throughout the procedure referred to in Article 251.

²³ [Council Regulation \(EC\) No 859/2003](#) (OJ 2003 L 124).

²⁴ Pensioners entitled to a pension under the legislation of one or more member states were not subject to this emergency condition to receive medical treatment outside the state of residence (Article 31). The new Regulation 631/2004 (OJ 2004 L 100) aligns the position of all insured persons and guarantee entitlements to any medically necessary treatment during a stay abroad (removing the urgency condition).

²⁵ Directive [2005/36/EC](#) of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255/22), which covers doctors, nurses, dentists and pharmacists.

²⁶ E.g., inter alia, Council Directive 89/105/EEC of 21 December 1988, relating to the transparency of measures regulating the pricing of medical products for human use and their inclusion within the scope of national health insurance systems (OJ 1989 L40/8); Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorization and supervision of medical products for human and veterinary use and establishing a European Medicine Agency, OJ 2004 L 136/1).

²⁷ E.g. inter alia, Council Directive 90/385/EEC of June 1990 on the approximation of the laws of the member states relating to active implantable medical devices (OJ 1990 L 189/17); Council Directive 93/42/EEC of 14 June 1993 concerning medical devices (OJ 1993 L169/1).

The Treaty of Maastricht, back in the early 1990s, introduced public health into the Treaty (now Article 168 TFEU); however, that provision only provided for limited supportive EU competence in relation to health matters (see current Article 6 TFEU).²⁸ In essence, the EU could only complement member states' actions related to health promotion, disease prevention and research (Article 168(1) TFEU). In any event, the Treaty was explicit that 'the Union action shall respect the responsibilities of the member states for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the member states shall include the management of health services and medical care and the allocation of resources assigned to them' (Article 169(7) TFEU).²⁹

In addition to public health provisions, the Maastricht Treaty introduced a new general subsidiarity clause (Article 5 EU), which should favour lower, i.e. national/local level of regulation of health care provision, unless action at Community level appears necessary. It is also possible that the Treaty citizenship provisions may, one day, also impact of patients' mobility.³⁰

The Treaty of Lisbon, now in force, expands the scope of EU action in the field of public health, by providing that the EU can adopt legislation setting minimum quality and safety standards to protect patients (Article 169(3) TFEU) and that the EU should encourage cooperation between member states to improve the complementarity of health care systems in borders areas (Article 169(2) TFEU). Yet, the protective 'fence' which surrounds national health systems since Maastricht remains. Finally, the formal coming into force of the EU Charter of Fundamental Rights, through reference in the EU treaty as amended by the Lisbon Treaty (Article 6 TEU), should give the right to access to preventive healthcare contained in its Article 35 a new relevance, although its impact on patients' mobility may be limited since it leaves the definition of other rights to medical treatment to the member states.

Relevant pre-Kohll and Decker case law: closing the door, but opening the gate!

Governments cut short early attempts by the ECJ to impose a liberal reading of Regulation 1408/71. However, the ECJ was slowly opening up another route to facilitate cross-borders case, not based on the secondary law facilitating the free movement of workers but on the Treaty's freedom to provide services.

Already in the late 1990s, the ECJ had endeavoured to facilitate the free movement of patients through a liberal interpretation of Article 22 of Regulation 1408/71. In *Pierik I* and *II*, the patient, a Dutch resident, went to Germany for hydrotherapy, and unsuccessfully claimed reimbursement from her health insurance.³¹ She went to court, and the national court referred questions to the ECJ, asking whether competent institutions were obliged to reimburse any adequate treatment provided abroad, even if the treatment concerned [was] not included in the national system of benefits in kind (*Pierik I*). The United-Kingdom government made a strong representation, in support of the 'defending' Dutch government, warning against the dangers of a system granting free choice to patients and based on medical opinions exogenous to the competent institutions. It claimed that the scope of the Regulation would be distorted since it would have 'the effect of creating an independent social security law of the Community

²⁸ Except regarding common safety concerns, for which member states and the EU share competences (Article 4 TFEU)

²⁹ They also listed amongst the activities of the Treaty 'a contribution to the attainment of a high level of health protection' (ex-Article 3 (1)(p) EC), and added a new objective of raising the standard of living and quality of life to ex-Article 2 EC. Ex-Article 95(3) EC (now Article 114 (3) TFEU) also provided that harmonization measures on consumer protection, environment, health, should take as a basis a high level of protection of health (mainstreaming).

³⁰ This was argued by the plaintiffs in the recent *Von Chamier-Glisczynski* case (Case C-208/07 *von Chamier-Glisczynski* [2009] ECR I-0000).

³¹ C-117/77 *Pierik I* [1978] ECR ?, and , C-182/78 *Pierik II* [1979] ECR ?

instead of merely co-ordinating the social security laws of the member states'. The Commission, for its part, set out an ambitious interpretation of Article 22 as 'creating independent rights',³² but considered it was not applicable to the case at hand, since Pierik, a pensioner, was not covered by Article 22, which concerned workers. In the follow-up Pierik II, the Commission had retreated from its earlier approach, accepting that member states could refuse authorisation for treatment abroad on medical, financial or ethical grounds. The Belgian, Dutch and British governments argued in favour of the national competence in deciding which treatments should be covered. Despite this, the Court went for bold rulings, relying on a wide notion of worker, which included all insured persons rather than just active workers, and interpreting Article 22 as granting a right to receive in another member state any medical services that provided necessary and effective treatment for the patient's illness or condition, even if that treatment was not covered by the health insurance system in the home State.

Member states strongly reacted to this unwanted extensive reading of the Regulation's provision by amending it, so as to increase their margin of discretion for the granting of the authorization for treatment abroad and limit situations in which they were forced to grant permission. The post-1981 version of Article 22 (2) (2)³³ thus provided expressly that authorization had to be granted only when the treatment required by the interested party was part of the health care package covered by the social protection system in the area of health care and this treatment could not be given to him in his State of residence within the period that was normally necessary, in view of his current state of health and the probable course of his disease.

The Regulation route having been closed, a Treaty gate started to open. In two important rulings, *Luisi and Carbone* and *SPUC v Grogan*, the ECJ provided new directions for the free movement of patients, beyond secondary legislation aimed at coordinating the free movement of workers, and based directly on the Treaty's freedoms.

In *Luisi and Carbone* (1984),³⁴ the ECJ opened a new chapter in the freedom to provide services in Europe. Two Italian citizens purchased third country currencies for use abroad for tourism, health, education and business purposes, above the limit imposed by Italian law. They were charged a fine, which they challenged as incompatible with Community law. A number of member states had submitted observations (Italy, France, Belgium, Germany and the Netherlands). France and Italy denied the relevance of the rules on the freedom to provide services, arguing that export of currencies constituted capital movement, which had not been liberalised. The parties and other participants considered that the rules on the freedom to provide services applied, although to different extents. Significantly, the Dutch government called for a wide understanding of the application of the free movement of services to include not only service providers, but also service recipients, to cover all tourists as potential service recipients, whilst the parties and the Commission admitted that tourists were not always service recipients. The Court decided that Treaty's freedom applied also to services recipients, and that currency exports should be liberalised, to allow persons to travel abroad to receive

³² The Commission argued that the Regulation 'created for the relevant persons independent rights which may exceed the benefits to which such persons [were] entitled pursuant to the provision of the legislation applied by the competent institution to which they [were] affiliated, in particular because benefits in kind to which such person [were] entitled [were] provided in accordance with the legislation administered by the institution of the place of stay or residence'

³³ As amended by Council Regulation (EEC) no. 2793/81 dated 17 September 1981, modifying Regulation 1408/71 and Regulation 574/72 setting the arrangements for implementation of Regulation no. 1408/71, O.J., L 275

³⁴ C- 286/82 and 26/83 *Luisi e Carbone* [1984] ECR 377.

services; it however admitted that member states could have mechanism in place to prevent non-liberalised movement of capital.

In *SPUC v Grogan*,³⁵ the potential scope of application of the Treaty's provision on the free movement of services to health care became clearer. Abortion was prohibited in Ireland. A student association distributed leaflets listing abortion clinics located in the United Kingdom, and the Society for the Protection of Unborn Children (SPUC) brought judicial proceedings against them. The national court asked the ECJ whether abortion was a (medical) service under the meaning of free movement of services provisions, and whether a member state could prohibit the distribution of information on abortion clinics located in another member state, when abortion was prohibited in the member state in which the information is distributed. Only the Irish government submitted observations, probably because of the controversial nature of abortion. Yet, the legal line-up for the case was impressive. SPUC hired James O'Reilly, an experienced senior counsel familiar with European litigation, the students were represented by Mary Robinson, well-known human rights lawyer, future president of Ireland and UN High Commissioner for Human Rights, assisted by John Rogers, former Ireland's Attorney General. The Irish government was assisted by prominent lawyers, Dermot Gleeson, the "youngest ever 'silk' appointed in the common law world... ", future Attorney General of Ireland,³⁶ and Aindrias O'Caoimh, a talented barrister specialized in European law, future ECJ judge, and whose father was also an ECJ judge from 1975 to 1985 (before the *SPUC v Grogan* ruling).

SPUC argued that abortion was not an economic activity and thus did not constitute a service covered by Treaty rules. The students considered that it was a service because it was normally provided against remuneration, and that prohibition to distribute information on abortion clinic situated in another member states was a restriction of women's right to *receive* a service lawfully provided in another member state (reference to *Luisi and Carbone*). They were supported by the Commission, and the Advocate General. The Irish government sustained that, since the Irish information ban law did not discriminate, and was necessary to protect the life of unborn children, it was not covered by ex-Article 59 and 60 EC; alternatively, it argued that Ireland could still rely on the public policy exemption. The Commission admitted that the Treaty did not prohibit a total ban motivated by reason of morality and which did not have protectionist effect, provided it did not entail discrimination. The Court did qualify abortion as a service, but considered that the Treaty rules on the free movement of services did not apply in that case, because the link between the students' association and the clinic was 'too tenuous' to constitute a restriction. However, it had opened the gate for the full application of the Treaty provisions on the freedom to provide services to health services, including morally controversial treatment. It is well known that the ruling triggered the adoption of a protocol attached to the Maastricht Treaty which protected the Irish ban on abortion from future claims based on the Treaty.

Yet, despite these openings, barriers remained to the full application of Treaty rules to national social security systems. First of all, national social security organs were still considered immune to Treaty rules, despite repeated attempts by some interest groups to impose EC competition rules on them. The French extreme right wing movement CDCA, led by Christian Poucet engaged in a campaign to challenge the monopoly of social security through (sometimes violent) contestation action and litigation. In the *Poucet and Pistre* (1993) case, and its follow-up *José Garcia* (1996) case,³⁷ the Court did not go as far as excluding social security matters from the scope of EC competition law, as asked by intervening

³⁵ C-159/90 *Society for the Protection of Unborn Children v Stephen Grogan and others* [1991] ECR 4685.

³⁶ See http://en.wikipedia.org/wiki/Dermot_Gleeson

³⁷ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, C-238/94 *José Garcia e.a. et Mutuelle de Prévoyance Sociale d'Aquitaine* [1996] ECR I-1673.

governments (the French and German governments in *Poucet and Pistre*, the German, French, Dutch, Spanish and Finnish governments in *José Garcia*), but was clearly sensitive to the specificities and needs of social security systems, exposed by governments, and taken on board by the Commission and Advocate General Tesauro. It concluded that sickness funds and social security organs were not affected by EC competition rules, because they pursued a purely social, and not economic, aim and thus did not qualify as undertakings for the purpose of EC competition rules (para 18-20). It can be noted that, in these cases, governments had mobilised strong legal expertise. The French government was represented by J.-P. Puyssochet, future ECJ judge, and the Dutch government by University Professor Lammers.

Besides, government had been successful in protecting national education systems from Treaty rules on free movement. In the 1988 *Humbel* case,³⁸ which concerned a request by Belgium that a French national pays the minerval, a registration fee applicable to foreign students, the Court was asked whether education should be subject to Treaty rules on the freedom to provide services. The Commission had called for a wide autonomous Community law notion of vocational training, which would include all technical and higher education, and to which the *Luisi and Carbone* case law was applicable. The United Kingdom government, although not directly concerned by the case, showed significant foresight, and made strong legal representation. It argued that general education should be distinguished from vocational training, and fell outside the scope of free movement of services rules, because it pursued an educational and social goal, was not an economic activity provided for profit and was not offered against remuneration. It highlighted the unfairness of a system which would enable foreign nationals to benefit from grants or free education in a member state to which they did not contribute. The Court did not explicitly buy into the whole argument, but followed the British Advocate General Slynn of Hadley, to conclude that, since the 'essential characteristic' of remuneration was absent in courses provided under the national education system, for the State, in establishing and maintaining such a system, [was] not seeking to engage in gainful activity but [was] fulfilling its duties towards its own population in the social, cultural and educational fields [and]... the system in question [was], as a general rule, funded from the public purse and not by pupils or their parents [para 18], rules on the freedom to provide services were not applicable.

The Kohll and Decker case law: (r)evolution?

Kohll and Decker

Kohll and Decker were two persons insured under the Luxembourg health system, an insurance based system providing for reimbursement of medical care. Kohll went abroad to receive orthodontist treatment, and Decker bought abroad a pair of glasses with a prescription provided by a Luxembourg doctor. Both sought reimbursement of the costs, although they had not received prior authorization, as required by national law. They based their claims on the Treaty's free movement of goods and services provisions (and not Article 22 of Regulation 1409/71). The ECJ considered that even though Community law did not detract from the powers of the member states to organize their social security system, in doing so they must still comply with Community law. The Court considered that by requiring prior authorization, Luxembourg law imposed a restriction on the free movement of goods and services, as it deterred insured persons from buying products or receiving medical services abroad. It admitted that such restriction could, in principle, be justified by the protection of public health, the need to ensure the financial balance of the social security system, or the need to provide a balanced medical and hospital service open to all insured persons, if such threats were substantiated. It considered that in the case at hand, the parties did not bring any evidence that the removal of the authorization would substantially affect these fundamental

³⁸ C-263/86 *Belgium v. Rene Humbel and Marie-Therese Edel* [1988] ECR 5365.

interests. The ECJ also held that the authorization mechanism of Article 22 of Regulation 1408/71 was valid, but did not provide the only means through which patients could travel abroad for treatment and received compensation. The rulings thus created a dual system, whereby patients could either rely on Article 22 of the Regulation, apply and receive authorization for treatment abroad, and receive reimbursement based on the rates of the country of treatment, or go abroad without authorization, and be reimbursed based on the rates of the country of affiliation.

Smits-Peerbooms³⁹

Mrs Geraets-Smith and Mr Peerbooms were both insured under the Dutch health insurance scheme, an insurance based system providing in-kind benefits through contracted institutions. Permission to go abroad for treatment was only granted where the requested treatment was considered 'usual in the professional circles concerned' and was necessary and not available without undue delay in the Netherlands. Mrs Geraets-Smith went for multidisciplinary treatment for Parkinson's disease in Germany, and Mr Peerbooms had been transferred by his doctor to a Austrian hospital for neuro-stimulation therapy, following a car accident after which he was in coma. Both paid for treatment and sought reimbursement from their health insurance funds, which rejected their request, since adequate treatments were available in contracted institutions in the Netherlands. The Court confirmed its Kohll and Decker ruling, and its applicability to in-kind systems, and to hospital case (para 53). It found that the requirement of prior authorization constituted a restriction to the freedom to provide services. It considered that such barrier could only be justified by 'overriding reasons relating to the public interest', such as where there was a risk of seriously undermining a social security system's financial balance, where the objective of maintaining a balanced medical and hospital services open to all was jeopardized, and where the maintenance of treatment capacity or medical competence on national territory was essential for the public health and even the survival of the population. The Court accepted that medical services provided in a hospital took place within a particular infrastructure, which required thorough planning to afford appropriate resources, guarantee wide access to quality healthcare, and limit costs and waste (para 76-79). It accepted that 'if insured person were at liberty... to use the services of hospitals with which their health insurance fund had no contractual arrangement' whether in the Netherlands or abroad, 'all the planning that goes into the contractual system in an effort to guarantee a rationalised, stable, balanced and accessible supply of hospital services would be jeopardized' (para 81). In such context, an authorization system could be justified by the objectives of planification and financial sustainability (Mavridis 2008), provided that it was necessary, proportionate, based on objective criteria, and did not discriminate. The Court left this assessment to the national court, but gave further guidance on the granting of authorization: in determining whether an equally effective treatment was available without undue delay from a contracted providers, national authorities should have regard to all the circumstances of each specific case and take due account not only of the patient's medical condition at the time the authorization was sought but also his past record (para 104).

Vanbraekel⁴⁰

Vanbraekel was insured under the Belgian health insurance system. She asked for authorization to go to France for orthopedic surgery, but her request was rejected because she had not obtained the opinion of a university medical professor. She nonetheless underwent treatment in France, and sought reimbursement. The Belgian courts considered she should

³⁹ C-157/99 *B.S.M. Geraets-Smith v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473.

⁴⁰ C-368/98 *Abdon Vanbraekel and Others v. Alliance Nationale des Mutualités Chrétiennes* [2001] ECR I-5363.

have been granted authorization, since her health required such treatment that could be better performed in France, but they did not know whether she should be reimbursed based on the French or Belgian rates, in particular since the Belgian rates were more advantageous. The Court considered that where authorization had been unlawfully refused, then Article 22 applied which provided for reimbursement based on the rates of the country of treatment. However, it considered that the Treaty provision on the free movement of services imposed, in addition, a 'top-up arrangement' (Mossialos and Palm 2003, 20) to place him or her in the same situation as if he or she had received treatment at home, otherwise that would deter the patient from seeking treatment abroad (para 45).

Müller-Fauré and Van Riet⁴¹

A Dutch insured person, Mrs Müller-Fauré, unconvinced by the quality of Dutch dentists, underwent expensive dental treatment during her holidays in Germany. Ms Van Riet, also insured under the Dutch health system, had asked for authorization to go to Belgium for an arthroscopy. Without waiting for the answer, she went and received the treatment in Belgium. Both claimed reimbursement of the costs of the treatments from their insurance funds, which rejected their claims, since Dutch law required authorization for any treatment provided in non-contracted institutions, in order to claim reimbursement. The Court recalled that restrictions to free movement, such as that created by the authorization system, could not be justified on economic grounds; however, they could be acceptable for the purpose of preventing a serious threat on the financial balance of national social security systems, or the maintenance of a medical and hospital service of quality, balanced and accessible to all. The Court then insisted again on the need to distinguish between hospital and non-hospital care. For hospital care, an authorization mechanism may be justified by the need to guarantee on the national territory sufficient and continuous access to a range of quality hospital care, to limit costs and avoid wastage of human, financial and technical resources, to the extent that they are proportionate, do not enable arbitrary decisions and provide procedural safeguards. The Court again provided guidance as to when an authorization can be refused, that is only when the treatment could have been provided without undue delay in a contracted establishment, taking into account not only the medical condition of the patient, but also the degree of pain or any disability which could prevent or make difficult the exercise of professional activities, and its past record. The Court further explained, in relation to the notion of undue delay, that the simple existence of waiting list could not justify a refusal, because it would be based only on the fear of wastage or the under-use of resources.

For non-hospital care, the ECJ considered that the removal of the authorization mechanism would not be such as to provoke an increase in cross-border care which could seriously endanger the financial balance of the social security system or to undermine the level of protection of public health. It reminded that, under Article 22 of the Regulation 1408/71, member states had to adjust their national social security system to provide for a posteriori reimbursement mechanisms. The Court also established that insured persons could claim reimbursement only up to the level of cover offered by the state of affiliation, which can fix reimbursement tariffs, provided that they are based on objective criteria, non-discriminatory, and transparent. The Court condemned authorization mechanisms for non-hospital treatment in non-contracted institutions, but accepted certain limitations, such as the requirement to consult a GP before seeing a specialist.

Inizan⁴²

⁴¹ C- 385/99 *Müller-Fauré v onderligen Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlingen Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509

⁴² C-56/01 *Patricia Inizan v Caisse Primaire d'Assurance maladie des Hauts-de-Seine* [2003] ECR I-12403

Mrs Inizan, resident in France, sought authorization to receive a multidisciplinary treatment against pain provided in a German hospital. Her demand was rejected, based on Article 22 of the regulation, on the ground that equally effective treatments were available in France. The Court repeated that Article 22 did not conflict with the Treaty provisions on free movement, but on the contrary contributed to facilitating the free movement of patients and cross-border health care, since it offered insured persons additional guarantees, such as the right to be treated during a stay abroad under the same conditions as persons affiliated with the social security institutions of the state of residence. Consequently, the Regulation could impose conditions for benefiting from these additional guarantees. The Court then confirmed that there existed two complementary procedures for the reimbursement of (hospital) care received abroad. It again repeated its guidance as to when an authorization could not be refused under Article 22, that is when an identical or equally effective treatment could not be obtained in due time in the state of residence. In deciding so, the institution of the competent state must take into account, in each concrete case, the medical condition of the patient at the moment when the authorization is requested, and where needed, the degree of pain or the nature of the disability of the patient, which could make it impossible or excessively difficult the exercise of a professional activity. The Court then considered that for cases which did not fall under Article 22, national authorities could have in place an authorization mechanism for hospital treatment abroad, if such authorization could only be refused where an identical or equally effective treatment could not be obtained in due time in the state of residence.

Leichtle⁴³

Leichtle, a German civil servant, asked his administration to cover the cost of a thermal cure which he planned to take in Italy. His request was refused because he could not prove that the envisaged cure was necessary because of the higher chance of success of the treatment, an additional condition for receiving subsidised treatment abroad. The ECJ decided that the Treaty provisions on the freedom to provide services prohibited a legislation which imposed higher requirements for seeking treatment abroad, since there was no element suggesting that it constituted a threat to the financial balance or the medical and hospital competence of German spa establishment. Where such authorization for treatment was refused in breach of Treaty free movement rules, the patient who underwent treatment before waiting for the end of the judicial procedure, and paid for it, can claim reimbursement of the costs directly from the competent institution.

Keller⁴⁴

Mrs Keller, a Spanish resident, was visiting her family in Germany, when she was diagnosed with a tumor. She was in possession of an E111 form delivered by the Spanish institutions. She was first treated in a German hospital, but was then transferred to a private clinic in Switzerland (non-EU country), as the German doctors believe that institution was the only one in Europe able to provide adequate treatment for her condition. She paid for the treatment and sought reimbursement from the Spanish institution, based on German conditions. Her request was rejected; she brought proceedings and the national court referred questions to the ECJ. The Court considered that institutions of the state of affiliation were bound by the decisions of institutions of the place of stay to send a patient to a third country for treatment, provided that under the legislation of the place of stay, patients were entitled to such benefits.

Watts⁴⁵

⁴³ C-08/02 *Ludwig Leichtle v Bundesanstalt für Arbeit* [2004] ECR I-2641.

⁴⁴ C-145/03 *Heirs of Anneette Keller v Instituto Nacional de la Seguridad Social (INSS) Instituto de la Gestion Sanitaria (INGESA)* [2005] ECR I-2529.

⁴⁵ C-372/04 *The Queen on the application of Yvonne Watts v 1) Bedford Primary care Trust 2) Secretary of state for Health* [2006] ECR I-4325.

Mrs Watts was covered by the UK national health system, which is publically funded and provide free of charge treatment. She suffered from arthritis and needed hip surgery. She was on a waiting list in the UK, and, taking account of her health situation, she was told she would receive treatment within three to four months. She asked for autorization to go to France to receive treatment more rapidly, but her request was refused because her operation was within target, and thus could be provided without undue delay. She nonetheless went to France to have the operation, and sought reimbursement of the cost of the treatment and travel and accomodation costs. The Court decided to bring together the condition for determining undue delay under both Article 22 and the Treaty provision, and set out to further clarify its meaning. Whilst it admitted that, under Article 22, member states could have a waiting list system, the competent institutions should nonetheless manage these waiting lists in a flexible and dynamic manner (para 69) and 'establish that the waiting time, arising from [planning and management objectives], [did] not exceed the period which [was] acceptable in the light of an objective medical assessment of the clinical needs of the person concerned in the light of his medical condition and the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time the authorization [was] sought' (para 68). Where the waiting time did not go beyond a 'medically acceptable waiting time', then national authorities could refuse the authorization, ... because... the resulting patients' migration would be liable to put at risk the competent member state's planning and rationalisation efforts in the vital healthcare sector so as to avoid the problems of hospital overcapacity, imbalance in the supply of hospital care and logistical and financial wastage' (para 71). It firmly established that the Treaty's freedom to provide services applied also to publically funded health systems (para 90), prohibited member states from imposing unjustified restrictions on the exercise of that freedom in the healthcare sector (para 92), and required member states to make adjustments, such as introducing mechanisms for the reimbursement of costs of hospital treatment in other member states. As to the basis of reimbursement, it considered that, under Article 22 of the Regulation, the rates of the state of treatment applied, and must be reimbursed by the home state to the institutions of the state of treatment, irrespective of whether the state of residence included tariffs or not. However, where national rates were more advantageous, under Article 22, the institutions of the state of residence must provide a top-up, and under the Treaty provision on the freedom to provide services, patients were entitled to a level of payment equivalent to that which they would have received, had they been treated in the home country. The Court however found that Article 22 did not impose nor prevent the reimbursement of travel and accommodation costs, and neither did the Treaty's freedom to provide services, except where such costs were cover for treatment received in the member state of affiliation. Finally, the ECJ considered hat its case law did not 'impos[e] on the member states an obligation to reimburse costs [of treatment abroad] without reference to any budgetary constrains, but on the contrary, [were] based on the need to balance the objective of the free movement of patients against overriding national objective relating to the management of the available hospital capacity, control of health expenditure and financial balance of social security systems' (para 145), and that the obligation to respect member states' responsibilities did not exclude the possibility that they should 'make adjustments' to their social security system, without it 'undermin[ing] their sovereignty' (para 148); therefore, it did not infringed ex-Article 169 TFEU.

Acereda Herrera⁴⁶

Mr Herrera was insured under the Spanish health system. Unhappy with Spanish health care, he asked for authorization to go for treatment in France, which he was granted, for a period of one year. These authorities covered the costs of the treatment, but rejected Mrs Herrera's request for reimbursement for his travel, accommodation and subsistence expenses and that of

⁴⁶ C-466/04 *Manuel Acereda Herrera v Servicio Cantabro de Salud* [2006] ECR I-5341.

the person who accompanied him. The Court considered that Article 22 only concerned the reimbursement of ‘medical expenses’ (para 29), and thus did not confer on someone the right to reimbursement of travel and accommodation costs. It nonetheless recalled that the Treaty’s freedom to provide services prevented national legislation excluding reimbursement of ancillary costs where these were covered for treatment provided by hospital within the national health system.

Stamatelaki⁴⁷

Greek law denied reimbursement for planned hospital treatment provided in a private establishment abroad, whilst allowing for reimbursement of hospital care provided by public hospital abroad, and by ‘contracted’ private hospitals in Greece (the relevant comparator). The Court decided it constituted a restriction to the freedom to provide services, which was not justified by overriding reasons due to their disproportionate character (existence of less restrictive alternatives).

This brief overview of the major rulings concerning cross-border health care since Kohll and Decker shows that, in deciding these cases, the ECJ sought to promote the free movement of patients, but was careful not to interfere more than needed with the way member states choose to deliver health care on their territory; indeed, the Court preserved authorization mechanisms for hospital care, contracting systems, waiting lists, referrals procedures, the exclusion of private health care providers, and only requested member states to make ‘adjustments’ to facilitate the movement of patients (e.g. modifying the conditions for the issuance of the authorization for treatment abroad, providing for reimbursement procedures and mechanisms, setting up procedural guarantees for patients seeking authorization and reimbursement, etc.) . Besides, the ECJ made a special case of hospital treatment, for which restrictive measures can be maintained, because they are justified by overriding interests.⁴⁸

Why did the ECJ ‘softened’ its take on cross-border health care? Various explanations can be put forward.

4. Explanations of the dynamics of ECJ case law on cross-border health care

The Kohll and Decker cases and their progeny can be analysed using different theoretical lenses, such as those introduced earlier, i.e. intergovernmentalist, neofunctionalist and new institutionalist, including both rational choice and historical variants. However, none of them is able to convincingly explain all aspects of the development of the cross-border health care case law. We thus suggest an additional explanation, based on the ‘influence through litigation’ argument.

Intergovernmentalist approach: at pains to explain the ‘expansionary’ aspect of the case law, more at ease with explaining the limited impact of the case law

The Kohll and Decker rulings were decided against the expressed preferences of a majority of the member states, including powerful ones. It thus seems to undermine the intergovernmentalist argument made by Garrett that ultimately the Court defers to member states’ preferences because these can sanction it (Garrett 1992), even in its toned-down version, which recognizes that the ECJ may at times divert from states’ preferences, where stakes are low and precedent strong (Garrett 1995).

⁴⁷ C-444/05 *Aikaterini Stamatelaki v NPDD organismos Asfaliseaos Eleftheron Epangelmaton* (OAE), [2007] ECR I-?

⁴⁸ A number of relevant cases are pending before the ECJ: C-211/08 *Commission v Spain*; C-512/08 *Commission v France*, and C-336/08 *Christophe Reinke v AOK Berlin*; and C-09 *Georgi Elchinov v National Health Insurance Fund*.

The stakes were potentially high, and precedent was weakly constraining.

The actual costs of patients seeking healthcare abroad and wanting reimbursement from their competent social security institutions was very low in most member states (with the notable exception of Luxembourg and Belgium), and unlikely to raise significantly in the short to medium term (due to other obstacles to cross border care, such as linguistic barriers, lack of information and trust in foreign health care system, preference for treatment near the place of residence, costs, see Palm et al. 2000, 7).⁴⁹ Therefore, the direct financial costs were likely to be minimal. Yet, the rulings were perceived by governments, and other stakeholders, as potentially highly disruptive on the national organization of the provision of health care (threats on contracting schemes, waiting list mechanisms, gate-keeping role of GPs, cost control procedures, quality control of treatments, etc.) and liable to high indirect organizational, budgetary and political costs.

Precedent led to two alternative routes. It was clearly possible for the Court, based on its prior expansionary case law, to extend the reach of free movement provisions to apply them to national health care regimes (in fact, it had been expected by commentators, Jorens 2004: 380; Altenstetter 1992). However, the Court could also have relied on other precedents (Humbel, and Poucet and Pistre/José Garcia, exposed above) to support the exclusion of social security systems from free movement rules. The Court was therefore at a cross-road, with in front of it two perfectly 'viable' paths.

If Garrett's model held true, the ECJ should have 'followed' governments, which it did not.

In latter extension of the scope of the rulings to all types of health care and any types of health systems, the structuring impact of cross-border care precedent was increasing. Besides, the application of general free movement case law precluded certain justifications for restrictive measures, based on economic reasons. In such context (strong precedent, high costs), Garrett's model offers little prediction.

The ECJ eventually did 'compromise', allowing for 'special treatment' of hospital care, accepting economic justifications (although formulated as organizational matters). The eventual fine-tuning of the case law limiting its impact on health system (Obermaier 2008b) provides some empirical support for Garrett's theories; it may be argued that the ECJ 'restrained' itself out of a concern regarding governments' non-compliance and threat of 'overruling'. Indeed, many governments started by openly disregarding the ECJ case law and discussion on the Services Directives (Hatzopoulos 2007) and Treaty revisions processes provided governments with opportunities to exclude health care provisions from the scope of the freedom to provide services

The cross-border case law: fitting neofunctionalist predictions, ...or not?

At first sight, the Kohll and Dekker judgments, and their follow-ups, which extended the scope of free movement rules to all types of medical care (ambulatory and hospital care), and all types of national health service (insurance based and publicly funded national health service) seems to fit well the neofunctionalist argument, as formulated by Mattli and

⁴⁹ At the time the Kohll and Decker cases came to the Court, the cross-border flow of patients in Europe was very marginal, amounting to around 0.3-0.5 % of public health expenditures. Most of the claims concerned urgent medical treatment incurred during tourist or business trips (E111 and E106). These imposed an administrative burden for the management of the claims but did not amount to much actual financial costs. 60% of the costs of cross border care concerned planned health care (E112), and this despite the restrictive authorization policies, whereby member states refused authorization when the treatment was available in the country of residence. France, a touristy country endowed with an attractive health care system, handled more than 40% of the claims. Other "importers" of patients were southern member states in which people retired (e.g. Spain) (Hermesse 2000, cited by Palm et al. 2000b, 6).

Slaughter (Burley and Mattli 1993, Mattli and Slaughter 1995). They foresee spill-over into new policy area, driven by self-interested supranational and subnational actors. This is, in fact, the view put forward by Greer (2006), who concluded that EU intervention in this health care was driven by the ECJ, using extensive free movement rules. Besides, Obermaier showed that national courts were supportive of the ECJ case law on cross-border health care and forced member states into compliance (Obermaier 2008a). My own analysis reveals that indeed, the national courts which referred cases to the ECJ were in the vast majority very supportive of patients' rights, and often submitted to the ECJ preemptive opinions (Nyikos 2006) which called for a liberal approach. However, not all aspects of the case law support the neofunctionalist approach. First of all, although the application of the case law was extended, its impact on national health system was gradually limited by the ECJ itself, following interactions with governments (Obermaier 2008b), so as to largely preserve the specific features of national health systems, save for a few marginal adjustments aimed at securing the right of patients to seek treatment abroad where it is necessary for their health and does not impose significant additional financial burden national health systems. Moreover, until recently, the Commission was unusually 'passive' in cross-border litigation, although it did work on a revision of the legislative framework covering the coordination of social security system to facilitate the free movement of patients. Not only did it not submit many detailed and forceful observations in preliminary reference cases submitted to the Court, it also refrained from using the infringement procedure against member states' violations of Community rules on the free movement of patients.⁵⁰ Finally, it is unclear to what extent there was real societal mobilization 'behind' this case law.

ECJ and cross-border health care: strategic player?

The cross-border health care case law also does not bid so well for most existing theoretical accounts of ECJ decision-making inspired by new institutionalist theories. A new institutionalist argument based on the existence of the ECJ's law-making power through interpretation of vague and lacunary legal framework (Stone Sweet 2004) does not add much food for thought, since it only established the existence of a space for manoeuvre, and does not expose how the Court will move within it. As for the argument based on path-dependency created by prior cases (Martinsen 2005, 1036), it is unconvincing as far as Kohll and Decker was concerned, due to the existence of viable alternative paths. In later cases, the precedential impact of Kohll and Decker strongly determined the general trend towards expansionary application as of principle. Yet, it left an important margin of manoeuvre to limit the impact of the case law, through reliance on justification for restrictive measures.

Alter's argument according to which judges could expand the reach of free movement rules to health care because member states were blinded by their short-term horizons (Alter 2001) does not hold, because member states (or at least some of them, including powerful ones) did mobilize in litigation right from the start. The United-Kingdom, in particular, made substantial observations in the early *Pierik I* and *II* cases,⁵¹ although it was not directly involved in the cases.

Institutional arguments based on Principal-Agent theory would suggest that the ECJ autonomy in expanding the scope of EU action into national health care would depend on governments' formal and informal means to control the Court, i.e. through Treaty or legislative amendments, non-compliance, or litigation (Tallberg 2000, 2002, Pollack 1998, 2003, Tsebelis and Garrett 2001)

⁵⁰ It is only recently that the Commission finally brought member states before the ECJ under the infringement procedure for breaches of EU rules of the free movement of patients. See pending cases C-512/08 *Commission v France* (2009/C44/48) and C-211/08 *Commission v Spain*

⁵¹ Case 117/77 *Pierik* [1978] *ECR* 825; Case 182/78 *Pierik* [1979] *ECR* 1977;

Governments had, in the past, already used legislative amendment to overturn an early unwanted decision which had significantly limited the national administrations' discretion in granting authorization for subsidised medical treatment abroad. Indeed, in the Pierik I and II cases, the ECJ had interpreted Article 22 of Regulation 1408/71 as allowing patients to seek treatment abroad which was not included in the benefits package granted by the national health care system, and to have it covered by the competent health insurance. The United-Kingdom government, in its observations on the case, had clearly highlighted the potential far-reaching consequences of such a solution, which would 'creat[e] an independent social security law of the Community instead of merely coordination the social security law of the member states'.⁵² Member states reacted promptly by amending Article 22 of Regulation 1408/71, so that national authorities would be obliged to grant authorization for treatment abroad only in the case of benefits covered by national healthcare systems and when it was 'medically and administratively necessary' (Martinsen 2005, 1039).⁵³ The fact that they succeeded once, suggests that they could 'do it again'. However, new developments played against the governments' ability to renew the experience. Indeed, the legal bases for the Regulation required unanimous agreement. In the context of an enlarged Union, with wider membership and an increased variety of health systems, agreement would be difficult to reach. Recently, member states did repeal most of the old Regulation 1408/71, through the adoption of a new Regulation 883/2004,⁵⁴ which amended the authorization provision, to bring it roughly in line with the ECJ case law. It now states that 'the authorization shall be accorded where the treatment in question is among the benefits provided for by the legislation in the member state where the person concerned resides and where he cannot be given such treatment *within a time-limit which is medically justifiable* [instead of within the time normally necessary for obtaining the treatment in question in the member state of residence], taking into account his current state of health and the probable course of his illness' (Article 20(2), replacing Article 22(2) of Regulation 1408/71). However, this legislative clarification, which essentially codifies current ECJ case law, does not change anything to the legal framework, only increasing its visibility and accessibility.

Besides, to some extent, the case law have shifted emphasis from the coordination necessary to secure the free movement of workers based on secondary legislation to primary (Treaty) law on the free movement of services. In consequence, if member states wish to reverse the ECJ case law concerning the application of the rules on free movement of services to cross-border care cases, outside of the scope of application of the old and new Regulation, they need to amend the Treaty in an explicit manner. Doing so requires consensus amongst all member states. Besides, in practice, reversing ECJ case law through Treaty amendments (either directly or through the form of a Protocol) would only take place within the context of on-going negotiations on Treaty reform.⁵⁵ Since the advent of the Kohll and Decker case law, there have been two successful (and one failed) reform process, which could have provided member states with opportunity for Treaty revisions, if they could agree on the necessity of such amendment, and the terms of it. But the point is that, although member states appeared to put a united front in Kohll and Decker, they are increasingly divided on the question, as testified by the wider range of governments' positions in ECJ later proceedings. When Treaty revision turns out impossible, the matter can be handled through the adoption of legislation on the freedom to provide and receive services. That option is less 'safe', for if such legislation

⁵² C- 177/77, ib.

⁵³ Regulation 2793/81 amending Regulation 1408/71

⁵⁴ **Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems**, *OJ L 166, 30.4.2004, p. 1–123*. (coming into force in May 2010, once implementing acts are adopted).

⁵⁵ E.g. the Barber protocol, which provided for an interpretation of an ECJ ruling, so as to limit its retrospective effects, and heavy financial consequences in the member states.

tries to limit, or obstruct the application of free movement provisions to cross-border care beyond what has been deemed acceptable by the Court in its case law, it would probably be challenged directly or indirectly before the ECJ and not pass the test. So far, the member states encountered some degree of 'success', in that they agreed to exclude healthcare from the scope of the recently adopted Services Directive, thereby undermining the ECJ case law which considered medical treatment as services. However, member states have difficulties agreeing on an alternative legal framework, as evidenced by the current deadlock in the process of adopting long-awaited draft Directive on the application of patients' rights in cross-border health care,⁵⁶ which the Commission proposed, as part of its new social agenda,⁵⁷ after a long-drawn process. That it encounters such difficulties may surprise, since this Directive merely codifies the ECJ case law, including the maintenance of an authorization procedure for hospital care (the original Commission proposal had done away with such authorization for both out-patient and hospital care). So, all in all, the chances of 'overruling' the ECJ case law are slim, which should grant the ECJ a large autonomy. Yet, the ECJ, once the principles set out, has been careful to protect the basic features of national healthcare system, and limited the practical impact of the rulings.

An alternative rational choice explanation of this 'self-imposed' restraint can be based on the fact that the ECJ reacted to the compliance of member states with the rulings, or lack thereof. The hypothesis would be that the more defiant the member states, the more the Court would tone down its case law (Garrett 1995, Garrett, Kelemen and Schultz 1998; see also Obermaier 2008b). However, although many member states originally stated their firm intentions not to comply with ECJ rulings, most of them (with the exception of Spain, it seems) have started to implement them into national legislation. However, this occurred once it became clear that the impact of the case law was limited, and not the other way round.⁵⁸ Besides, member states' prospects of sustained non-compliance were limited, as national courts, often sympathetic to patients' claims, acted as a 'sword' for the ECJ rulings on cross-border care by enforcing European judgments against recalcitrant national administrations (Obermaier 2008a). In that context, threat of non-compliance could not have born such a significant influence on the ECJ case law.

One can thus envisage another explanation: the ECJ adjusted its case-law as a result of member states' participation in ECJ proceedings concerning cross-border cases, because governments, through skilled and influential lawyers, put forward convincing policy reasons and strong legal arguments with the view to mitigating the potentially wide scope and adverse impact of Kohll and Decker.

5. The ECJ case law on cross-border care: how governments got the ECJ to 'soften' its case-law through litigation

The ECJ decided the seminal Kohll and Decker cases against the explicit preferences of the few attentive governments that participated in the proceedings, and most likely took the others by surprise. In follow-up cases, European governments realised the stakes and upgraded their litigation strategies.

This increasingly strong governmental litigation faced some opposition. Whilst some of the patients were only concerned with the material aspects of their reimbursement claims, and did not mobilized legal resources in ECJ cases, others seemed to have wider aspirations, secured

⁵⁶ COM (2008) 414 Final.

⁵⁷ Note the change of focus from free movement to social.

⁵⁸ Obermaier identifies a mutual process of adjustment between member-states' compliance and fine-tuning of its case law by the ECJ, but its analysis suggests that member states complied when they realized, in the wake of later cases, that the rulings were not as far reaching as they may have appeared in the first place. Also, sometimes, compliance with the rulings fitted with national strategies of healthcare reforms (Obermaier 2008b).

strong legal advice and put forward forceful argumentation. Referring national courts were also generally supportive of patients' rights. The Commission was perhaps more 'passive' than it has us accustomed to, but in most of the 'landmark' cases, it supported more liberal options. Advocates General had concerns regarding the desirability of further liberalization in the public health field, but became increasingly sympathetic to patients' claims.

The ECJ did expand the scope of application of Kohll and Decker to all health systems and types of treatment, but it did not interfere with the way member states' organised the provision of health care, beyond necessary adjustments. Also, in an unusual fashion, it integrated member states' economic concerns into the case law. A number of elements suggest that this more restrained approach resulted to a large extent from governments' participation in ECJ proceedings in cross-border healthcare cases. Significantly, this participation provided the Court with 'contextual comparative' information which enabled it to assess the potential impact of its case law on national health care systems, and adjust it accordingly. It offered the Court a wide range of legal tools to play with in order to provide for an appropriate balance between free movement objectives and the protection of national autonomy in health care matters. It granted the Court political legitimacy for adopting limitations to free movement rules. These were driven by clear litigation strategies on the part of some member states' governments, and strong mobilization of legal resources.

In this section, we highlight a few important elements of member states' litigation strategies which seem to have impacted on ECJ rulings, if not directly in the cases at hand, at least 'over the long run.' These observations are based on a systematic analysis of member states' participation in ECJ cases concerning claims for reimbursement of medical treatment received abroad, including a detailed analysis of their participation in preliminary reference cases before the ECJ, the position they took, the arguments they submitted to the Court, and the skills, experience and authority of agents and lawyers engaged in the process. The sources of information were the Court's reports, the Advocate General Opinions, the Reports for the Hearing, interviews or e-mail exchanges with governments' agents or lawyers, as well as publicly available documents produced by these agents. Relevant legal and policy literature was also used to evaluate the strength of argumentative strategies, as well as policy pressures at stake.

The free movement of patient litigation context: pre- and post-litigation pressure by national courts, 'irregular' mobilization of patients, relative passivity of the Commission, and increasing litigation pressure by governments

Obermaier (2008a) has already demonstrated that, in the context of the free movement of patients, national courts actively pressured national administrations into compliance, by enforcing the ECJ case law. However, this is not the only part which national judges have played in the development of the case law on cross-border health care. Significantly, since Kohll and Decker, they have also 'fed' the Court relevant cases, which provided the Luxembourg judges with the opportunity to develop their jurisprudence incrementally, over a short period of time, and adapt it to 'the reality on the ground.' First, the national courts, instigated by the parties, framed their questions in a way which allowed the Court to get around the fence placed on Article 22 of Regulation 1408/71 by the member states, bringing the cases concerning the movement of patients within the scope of the Treaty's free movement of services (e.g. the Luxembourg court in Kohll), or even, more recently, competition rules or citizenship rights (e.g. the Spanish court in Herrera). Sometimes, the national court even left a wide margin of discretion to the ECJ, by not specifying which Community rules may be applicable (e.g. the Greek court in Stamatelaki). Second, through their frequent requests for preliminary rulings, national courts invited the Court to further

refine its jurisprudence (Vanbraekel, Watts), and extent its scope of application (Smits-Peerbooms, Müller-Fauré, Leichtle, Watts). In Müller-Fauré, the ECJ asked the national court if it wished to withdraw its pending request for a preliminary ruling, in the light of recent judgments it had delivered. After reflection, the Dutch court maintained its request, highlighting points which required further elaboration from the Court (e.g. the application to in-kind systems and the notion of undue delay in Müller-Fauré). Third, some national judges did not hesitate to suggest, implicitly or even explicitly, to the ECJ interpretations, which favoured patients' rights (the Dutch court in Smits-Peerbooms, the German court in Leichtle). However, sometimes, the position of the national court was more ambivalent (e.g. the French court in Inizan took a provocative position challenging the validity of Regulation 1408/71, the UK Court of Appeal highlighted elements which played both in favour and against Mrs Watts).

Whilst national courts overall mobilized in support of patients, the patients themselves did not always have the capacity, or the desire, to actively promote a liberal position in Court. Most of them seemed to be chiefly concerned with obtaining reimbursement in the case at hand, and did not care about the broader implications of the case for patients' rights in Europe. Sometimes, they did not even submit observations to the Court (e.g. Van Riet, Herrera) or where they did, their briefs were minimalist (e.g. Decker, [Geraets-Smits and Peerbooms?], Müller-Fauré) or focused on factual issues. However, a number of them, i.e. Kohll, Inizan, and Watts, may have had other motivations, and financial support (?), and presented substantial arguments to the Court.

The Commission submitted observations in all cases, as usual. However, the line it proposed was not systematically 'integrationist'. It oscillated between siding with member states who adopted a moderate stance (e.g. in Vanbraekel, van der Duin, Watts) and clearly liberal positions (Kohll and Decker, Müller-Fauré, Inizan, Herrera). It seemed weary not to alienate member states, in particular in a context where it was seeking their approval for a number of legislative measures regulating cross-border care.

Governments may not have anticipated the outcome and potential impact of the Kohll and Decker rulings, since 'only' six of them submitted observations, most of them being governments of insurance-based countries (except the UK and Greece). However, once the *effet de surprise* gone, governments did not remain idle. An important group of governments actively took part in the development of the case law in the follow-up cases. Amongst them, one finds the governmental RPs identified earlier (in particular the United-Kingdom, and to a lesser extent the Netherlands, France, Germany, Sweden and Finland), as well as another group of governments, who are usually not amongst the most active in EU litigation, but took a particular interest in this line of cases (i.e. essentially Belgium, Spain, and Ireland, but also Luxembourg). The interest of Ireland, otherwise a relatively passive country in EU litigation, in this line of cases, must be related not only to the desire to protect its national health system, similar to that of the UK, but should also be linked back to the SPUC v Grogan case, and the application of free movement rules to abortion services (which its government tried to prevent through a Protocol attached to the Maastricht Treaty). The activism of Spain must be related to its characteristics as a favoured residence for Northern Europe pensioners, which can result in significant financial burden on its publically funded national health system, affording free treatment to all. Luxembourg's involvement was triggered by the fact that its population is the most likely to travel abroad for treatment. Note that, amongst the old member states, Italy, Greece, Denmark, and Portugal, remained largely absent from the judicial 'debates'. Some countries, like Austria, were involved in the early stages (Kohll and Smits-Peerbooms), but pulled out once it was clear that the case law was evolving in line with national practices. The new member states, which are likely to be particularly affected by rules on the matter, either because they can attract customers from richer Western European states to their cheaper

health care (e.g. dental care in Hungary), or because they would have to foot the bill for their nationals who prefer to get better and more expensive treatments in Western state, have not been very involved so far (except Poland, which made small contributions). Small new member states, such as Malta and Cyprus, mobilised and submitted observations in recent cases, probably because they rely on sending patients abroad for treatment, but are weary on the financial consequences of uncontrolled movement of patients.

Whilst governments mobilised in cases in which they felt they could ‘make a difference’, most of them did not think it worth wasting resources, and losing credibility, with ‘lost causes’. Thus, only Spain and the United-Kingdom, probably by principle rather than conviction, submitted observations in the *Leichtle* case, which provided for an additional condition for reimbursement of spa treatment abroad. The German government did not submit observations, leaving the defence of German rules to the Federal Labor Office. The Court took note of the lack of genuine mobilization, and openly criticised the weakness of the German administration’s and Spanish government’s observations, which did not substantiate their argument based on the preservation of the financial balance of healthcare system with ‘an analysis of the appropriateness and proportionality of the restrictive measure’ (para 45).⁵⁹

Variations in member states’ positions in Court

Reading the literature, one often gets the impression that governments act as a block against the ECJ. The reality is more nuanced, and governments defend a variety of positions in the Court, which often contradict and conflict with each other. Basically, like in the Council, governments are often divided in Court. Only the consequences are different. In the Council, division leads to compromise or non-action, whilst in the Court, it widens the judicial margin of manoeuvre.

Over the cross-border health care cases since *Kohll* and *Decker*, we observe two important patterns. First, governmental preferences (as indicated in their observations) evolved as the case law developed. Second, coalitions gradually emerged and consolidated over the cases (see Table 1 in Annex).

For example, France (*Kohll*, *Vanbraekel*) and Belgian (*Vanbraekel*) started with a rather protectionist position, eager to keep the cases within the restricted scope of Regulation 1408/71 and denying the relevance of free movement rules. However, in follow-up cases, which considered the extension of the scope of application of free movement rules to all types of treatment and health systems, they advocated an increasingly ‘liberal’ position, calling for a blanket application to all medical care, which ever way it was provided (*Smits-Peerbooms*, *Inizan*, *Watts*). France’s and Belgium’s motivation were not ‘liberal’ as such, but aimed at maintaining a level-playing field, as made explicit by Belgium in *Müller-Fauré*. Besides, these two countries, endowed with quality health care systems, in which private care providers are fully integrated, were ‘beneficiaries’ of health tourism. This was made obvious when Belgium did not hesitate, in *Müller-Fauré*, to condemn the Dutch rules as being too restrictive and unjustified (something which both the Commission and the Court refrained from asserting!). Most of the other member states which participated in the development of the case-law adopted a protectionist stance. This group, led by the United Kingdom and essentially composed of countries which have publicly funded national health care systems (Spain, Finland, Sweden, Ireland), argued at first for blanket exemptions for health care (e.g. observations in *Kohll* and *Decker*), or at least differentiated applications (see observations in *Inizan*, *Watts*), of free movement provisions, in the light of the specific features of national health care organisation. The Netherlands oscillated between more liberal positions, which it often promotes in EU policy-making (e.g. *Kohll* and *Decker*, *Keller*) and a more protectionist

⁵⁹ For a summary of governments’ mobilization and positions, see Table 1 in Annex.

stance, where its own rules were challenged (Vanbraekel, Smits-Peerboms, Müller-Fauré), although never siding with the more extreme factions (i.e. UK, Ireland and Spain).

However, beyond this diversity of interests, preferences and positions, there were points of agreement. All governments agreed on protecting hospital care from extensive liberalisation (Smits-Peerboms), on keeping the determination of covered treatments (Inizan) or costs (Leichtle, Herrera) at the national level, and on the necessity to integrate both medical and organizational considerations in the notion of ‘undue delay’ for the purpose of granting authorization for treatment abroad, or reimbursing such treatment. The Court largely deferred to these consensual positions, thereby providing evidence of its majoritarian tendencies (Maduro 1999, Stone Sweet and Brunnell 2010).

Legal representation: making a difference?

We find a great diversity in patients’ legal representation, and overall, strong legal representation on the part of the governments actively involved in the development of the case law on cross-border healthcare. This legal mobilization seems to have impact on the evolution of the Court’s jurisprudence.

As noted earlier, patients who were parties before the national court did not always present observations to the ECJ, or where they did, these were drafted by provincial lawyers, not specialised in EU law or even health law.⁶⁰ However, in the ‘landmark’ cases, where the Court extended the application of the free movement case law to healthcare, i.e. Kohll, Inizan and Watts, the patients secured strong legal representation, the effect of which was visible in their arguments, and references to them by Advocates General and the Court. Take the Kohll case for example. Kohll was represented by Jean Hoss, an experienced lawyer, and Patrick Santer, an EC lawyer and well known national politician, and ... son of Jacques Santer, the then President of the Commission...! The arguments put forward by Kohll’s lawyers displayed a real familiarity with ECJ case law and reasoning, and many of them were ‘adopted’ by Advocate General Tesauro, and eventually by the Court. But Kohll was not an exception. Mrs Inizan’s was defended by Corinne Daver and Miguel Troncoso Ferrer, both from FIDAL, the leading French business law firm. Daver was a member of FIDAL health law unit, and had a strong expertise in EU health law, whilst Troncoso Ferrer was an EU and competition lawyer. Again, this legal expertise transpires in their argumentation. Finally, and even more significantly, Watts was represented by Richard Gordon QC, one of the top British senior barristers (Times 100), specialised in EU law, and with a strong experience of pleading before the ECJ. He was assisted by Jeremy Hyam, a promising junior lawyer, specialised in health law and access to treatment. Again, a number of their arguments were ‘adopted’ by the Advocate General and the Court. Further research is clearly needed to find out whether these plaintiffs were ‘supported’, or even ‘recruited’ by cause-lawyers, or patients’ organizations, or private health providers...

The governments most involved in the development of the case law on the movement of patients also secured high level legal representation in important cases, and put together ‘specialised’ legal teams, which followed through in subsequent cases. This is particularly true of the United-Kingdom. In the Kohll case, they hired barrister Philippa Watson, former référendaire at the ECJ and Commission official in the Competition DG, who had acted as advisor in legislative and regulatory processes related to medical issues, and who had written a book on the social security law of the EC. She was assisted by heavy-weight David Pannick QC, and experienced EU lawyer, and in the oral hearing, by Richard Plender QC, another former référendaire, and expert on judicial procedures before the ECJ. However, this line-up

⁶⁰ Van Riet even seemed to be represented by a family member, since the lawyer bore the same name than her (van Riet)...

having been unsuccessful in preventing the Court from applying market rules to health care, they changed their legal team for the subsequent cases. In *Van Braekel*, *Smits-Peerbooms*, *Müller-Fauré*, *Inizan*, *Leichtle*, they secured the services of Sarah Moore, yet another former *référéndaire*, specialised on EU law and health matters. In *Watts* and *Herrera*, Sarah Lee, a promising young barrister with special expertise on free movement of services and pharmaceutical regulations took over from Moore. In the important cases of *Müller-Fauré*, *Inizan* and *Watts*, the UK government also involved high-profile British QC Derrick Wyatt, a very experienced Community lawyer, well known in the UK European law community for ‘his mind-blowing expertise in European law’, and in *Watts*, it also secured the advice of D. Lloyd-Jones QC, a senior public international lawyer. Ireland followed a similar strategy of hiring high-profile, expert and well connected lawyers. It instructed senior counsel and prominent politician Brian Lenihan in *Vanbraekel*, and promising young barristers specialised in EU law, and former *référéndaires*, Nyam Hyland, in *Vanbraekel*, and Muller-Fauré, Anthony Collins (who had already defended Ireland in the *SPUC v Grogan* case) in *Inizan*, and Noel Travers, in *Watts*. The Spanish government involved in the cases their head of EU litigation unit. In the important *Inizan* case, she was Rosario de la Puerta, who became judge at the ECJ a few months later. The French government made sure that in all important cases, it was represented by the Head of his EU litigation unit (C. de Salins, then G. Sajust de Bergues, also a former *référéndaire*). The Dutch government was led for most of the period concerned by dynamic senior lawyer Hannah Sevenster, who prior to her appointment as the Head of the Dutch litigation unit, had also defended one of the social security funds in *Smits-Peerbooms*.

One thus observes a ‘consolidation’ of the group of lawyers which took an active part in developing the law of cross-border healthcare. This is further emphasized by the fact that these cases were ‘allocated’ to the same Advocates General, Tesauro (*Kohll* and *Decker*), Ruiz Jarabo Colomer (*Smits-Peerbooms*, *Müller-Fauré*, *Inizan*, *Stamatelaki*), Geelhoed (*Watts*, *Herrera*).⁶¹

It is illusionary to believe one can ‘pin down’ causal relations between good lawyering and judicial outcomes. However, one finds ‘clues’. For example, in the *Keller* case, the Dutch government, although not directly concerned, put together a strong litigation team, involving all its regular agents. In that case, it sided with the plaintiff, and developed arguments which clearly impressed both the Advocate General and the Court, who made explicit reference to them (in particular, the division of responsibilities argument). Also, the experienced legal team put together by Ireland in *VanBraekel* seems to have impressed the Advocate General (but not so much the Court) who ‘adopted’ its analogy to the *Humbel* case law on education, and their argument calling for the exclusion of hospital care from the application of free movement provisions (*Opinion in Vanbraekel*, para 21).

One must admit that the cases in which governments mobilized strong legal representation (*Smits-Peerbooms*, *Müller-Fauré*, *Inizan*, *Watts*) coincide with cases in which the ECJ extended the scope of application of the free movement of services provisions, therefore suggesting that good lawyering was ineffective, or at least, not sufficient to counter other factors. It must be noted however that, in some of these cases, like *Watts*, governments’ lawyers pulled in opposite direction. Moreover, in most of these high-level cases, whilst the Court extended the scope of application of market rule in principle, it also accepted justification of restrictive measures based on overriding considerations, where appropriately substantiated by governments’ arguments (contrast *Smits-Peerbooms*, and *Watts*, with *Müller-Fauré*). And in *Inizan*, faced with strong legal mobilization in support of the justification of

⁶¹ Over the cases, Advocate General Ruiz Jarabo Colomer, who had started with a rather protective stance, developed an increasingly patient-friendly approach, apparently getting exasperated by obstructive practices of governments, and also, ‘constrained’ by prior precedent. As for Advocate General Geelhoed adopted right-away a liberal point of view.

the French rules, the Court limited itself to providing guidance to the national court as to how to apply such mechanism, including procedural guarantees, not making any decision itself as to the compatibility of national rules (see also Watts). Moreover, the presence of top-lawyers certainly pressured the Court to take additional care of addressing their arguments more comprehensively, and to provide more thorough reasoning in support of the ruling.

Argumentative strategies

Argumentative strategies are the most difficult to evaluate, for we do not have access to the full files of the case; besides, analysing their ‘quality’ is inherently a subjective exercise. Yet, it is significant that a number of governments, typically the UK, but also to some extent, Ireland, France, Belgium, the Netherlands, Finland, Sweden, made regular and substantial observations, which offered a range of well argued legal points and factual information addressing the various issues at stake. Others (e.g. Luxembourg, Spain, Portugal, Greece, Poland) made more ‘erratic’ contributions, the quality of which were often openly criticized by the Court. Moreover, some governments’ arguments, as well as argumentative patterns are worth examining, for they have ‘framed’ part of the ECJ case law.

First of all, it should be noted that, in Kohll and Decker, participating governments were more or less at unison, arguing for the relevance of Regulation 1408/71, the non-applicability of free movement rules, and the necessity of authorization mechanisms. In that case, the Luxembourg’s exposition of overriding interests which could justify its authorization mechanism, repeated by most other governments,⁶² framed the future evolution of the case law. Although the Court found them not substantiated in the cases at hand, the Court clearly signalled that these could provide acceptable bases for ‘saving’ national restrictive measures, if governments were to bring substantial evidence.

Once the Court established in Kohll that the Treaty provisions were applicable to patients receiving treatment abroad, alongside Regulation 1408/71, to cover unauthorised treatment, argumentative strategies diversified. Most member states, led by the UK, concentrated their effort in ‘reversing’ or minimising the scope of application of Kohll and Decker, arguing that if applicable at all, it concerned only reimbursement systems and ambulatory care. However, a few governments, those of France, Belgian, and Austria (in earlier cases), accepted Kohll and Decker and the application of free movement rules, and concentrated their argumentation on the justification of restrictive national rules and practices, based on overriding reasons.

The UK follows its usual ‘comprehensive strategy’, very much inspired by the case method taught in UK law schools. The UK would always start by arguing that all national healthcare system, or in-kind healthcare system, or publicly healthcare system, fall outside the scope of the free movement of services because they are not economic activities provided against remuneration. Where that fails, the UK tries to show that measures in place (i.e. authorization, waiting lists) do not restrict free movement. Where that fails, they argue that they are justified by overriding reasons, and are proportionate, necessary, etc. This strategy ‘forces’ the Court to ‘revisit’ its established case law, and to further justify it. It also ‘invites’ the Court to define clearly the scope of application of its case law.

What turned out to be the ‘core’ of the case law, i.e. the justification of restrictive measures based on overriding requirements, called for argumentation based on solid factual evidence. All member states ended up devoting most of their arguments to this aspect, in particular as in earlier cases, the Advocates General and the Court criticized member states for not providing any substantial evidence of the alleged significant financial impact of doing away with authorization mechanisms for out-patient treatment (e.g. Kohll, Müller-Fauré). In Smits-

⁶² Except Spain and Greece, who did not even envisage that such measures could constitute restrictions to free movement rules.

Peerbooms however, governments spared no effort in arguing that doing away with authorization mechanisms for hospital care would threaten the planning and financial balance in national healthcare systems, which convinced the Court to treat hospital care differently. In *Watts*, explanations of the British waiting list systems, seems to have incited the Court not to make any definitive statement as to their ‘compliance’ with EU law, leaving it to the national court to decide. Only a few governments did not take the measure of the importance of evidence, or did not have the legal resources to ‘work on it’. Spain, Luxembourg, regularly contented themselves with making general statements as to the possible impact of removing the authorization mechanism, without further substantiating their claims with relevant factual information.

Another important aspect of governments’ observations consisted in the ‘presentation’, usually accompanied by ‘justification’, of national rules and practices in place in states other than the one directly concerned in the case, and the potential impact of case law development on vital features of national healthcare systems. This is essential information for the Court, as it enables it to evaluate the possible consequences of its case law, and to interpret and apply EU law in a way preserve important elements of national health care organizations. It also enables it to act as a majoritarian court (Maduro 1999). To be true, governments are not the only providers of such contextual comparative information, since the Court expects the Commission, and the Advocate General, to provide such comparative contextual analysis. Yet, most governments, at some stage, carried out such presentation; the United-Kingdom was by far the most diligent (if not obsessive) in repeatedly highlighting the characteristics of its national healthcare system, and potential adverse effect of the ECJ case law on it. This even led the Advocate General Gelhoeld, in *Watts*, to comment on the fact that the Court had already, in *Müller-Fauré*, given ‘emphatic attention’ to British concerns (*Watts Opinion*, para 50).

Governments’ arguments thus provided conceptual frames for ECJ case law, as well as empirical evidence for the evaluation of national rules and practice.

Conclusions: EU litigation, first and/or last resort?

Although it is impossible to identify clear causal relationship between governments’ litigation and ECJ final rulings, a number of interesting observations can nonetheless be made, which throw a different light on the dynamics of the ECJ decision-making process.

First, where governments mobilise ‘in mass’, submit detailed and well-argued observations, which reflect a consensus amongst member states, the ECJ normally follows their lead. This is what happened in *Smits-Peerbooms*, when the Court considered as justified authorization mechanism for hospital treatment abroad, or in *Leichtle and Herrera*, where the ECJ preserved the national competence in determining the reimbursement of ancillary costs or in *Inizan*, where the Court accepted that member states were free to decide which benefits are covered under national social security schemes. Governments’ observations are thus important in highlighting convergence amongst member states’ rules. However, facing divergent governments’ positions, the Court was not willing to grant a general exemption for all in-kind treatments (despite the Advocate General’s support for this solution, and despite arguments which highlighted similar financing and planning requirements as for hospital care).

Second, the position of the majority of governments impacted on the assessment of national rules and practices. For example, in *Watts*, the ECJ was sensitive to explanations provided by the majority of governments, which represented NHS countries, and in particular the Swedish government, regarding the necessity to protect waiting list mechanisms, where these are managed with flexibility and took account of the patient’s medical condition, thereby ignoring the position of the minority governments representing insurance-based states which

considered that British rules were based on financial consideration, which could not justify exemption from Treaty-rules.

Third, governments' mobilization in litigation led to the development of legal 'balancing' tools, i.e. the range of overriding reasons, first put forward by the Luxembourg's government in the Kohll and Decker case, and developed in latter cases. It thus secured an important legal basis for protecting restrictive national measures, provided that governments could offer substantial factual evidence in support of their claims. In a number of cases, explanations regarding national rules and practices presented by governments seem to have convinced the Court that they may be compatible with EC law, although the Court left this final factual assessment to the national courts (e.g. Smits-Peerbooms; Inizan).

Fourth, the Court sometimes adopted convincing arguments proposed by particular governments. For example, the Court adopted the Dutch argument based on a division of responsibility in Keller.

Fifth, the mobilization of governments, evidenced by their participation and the lawyers they relied on, puts further pressure on the Court to better justify judicial outcomes, if it wishes to take a position at odds with that advocated by governments or a majority of them. This pressure is acknowledged by Advocates General (e.g. Tesouro in Kohll and Decker, para 14), who often found it necessary to address carefully most of the arguments submitted to them; it is also visible in the application shown by the Court in addressing a wide range of governments' arguments explicitly or implicitly.

Governments' EU litigation on cross-border healthcare does not take place in a political vacuum. Alongside litigation, governments were also involved in legislative processes, started in 2003, which could affect past or future case law. They eventually adopted New Regulation amending Regulation 1408/71, which essentially codified the ECJ case law on Article 22 of the old Regulation. However, they did not agree on the scope of application of the rules on free movement of services to health care services. They excluded medical care from the scope of the Services Directive, but could not agree on a Directive of Cross-Border Health Care. The Commission's draft, released after years of consultations and debates in the Commission, EP and Council, had, like the ECJ case law, maintained the possibility to have in place authorization procedures for hospital treatment abroad, even if it suggested that it would be, in most cases, unjustified (Sauter 2008). Besides, it had done away with the notion of 'undue delay', thereby depriving the authorization procedure from the standards set out by the ECJ (Sauter 2008, 51). Moreover, the text had been further diluted during its examination by the Council (exclusion of private health providers; possibility to refuse authorization for treatment abroad where equivalent treatment could be provided within a 'medically justified' time-limit or where the treatment posed clinical risks, etc...);⁶³ Clearly, the Draft Directive reflected the concern of some of the states that participated in the development of the case law, testifying that they were 'active' on both front. However, despite this dilution of the case law by the Directive, member states could not agree to the text, due to the opposition of poorer Central and Eastern European member states, and Spain.⁶⁴ In that context of legislative deadlock, where the politicians have 'no choice but to leave it' to the ECJ to define and protect patients' rights',⁶⁵ litigation before the ECJ is the only effective way of influencing the development of relevant law at EU level, and of preserving the essential characteristics of national health systems from unwanted EU intrusion. But it is certainly not desirable from the

⁶³ J. Rankin, 'Ministers want to limit scope of cross-border healthcare law', European Voice, 4 June 2009.

⁶⁴ Nine countries, Spain, Hungary, Ireland, Portugal, Romania, Poland, Slovakia, Slovenia, Greece, Lituania, objected to the text.

⁶⁵ J. Rankin, 'Ministers reject proposal on cross-border healthcare', European Voice, 1 December 2009.

point of view of legal certainty, for patients and governments alike. In fact, the countries who actively participated in case law development, seemed to have had their

Annex

Table 1: Participants position in ECJ cross-border health care cases

	Protectionist		→ Liberal		
Kohll & Decker (1998)	Spain, UK, Greece	France, Germany, Austria, Luxembourg	Netherlands	AG Tesouro	Kohll, Decker, Commission, ECJ
Van Braekel (2001)	Belgium, Austria, Spain, Ireland	Finland, Netherlands	France Germany Commission	AG	ECJ
Geraets-Smits & Peerbooms (2001)	UK, Germany, Ireland, Denmark, Netherlands, Sweden, Finland, Iceland AG Ruiz-Jarabo Colomer	France, Belgium, Austria		Commission ECJ	Referring Court
Müller-Fauré (2003)	Denmark, Germany, Ireland, Sweden, UK, Norway, Iceland	Spain, Italy, the Netherlands, Finland, AG Ruiz Jarabo Colomer		Belgium	Müller-Fauré, Commission ECJ
Inizan (2003)	UK, Ireland, Sweden, Spain	Luxembourg	France Council	AG Ruiz Jarabo Colomer	Inizan, Commission ECJ
Leichtle (2004)	Spain, UK			AG Ruiz Jarabo Colomer Commission Referring Court	
Keller (2005)	Belgium, Spain		Commission		The Netherlands AG Geldhoeld ECJ
Watts (2006)	UK, Ireland, Finland, Spain, Malta, Poland	Sweden		Commission	Watts, France, Belgium, AG Geelhoeld, ECJ
Herrera (2006)	Spain, UK, Ireland, Finland	Poland	AG Geelhoeld, ECJ		Commission, Belgium
Stamatelaki (2007)	Greece		AG Ruiz Jarabo Colomer, ECJ		Commission, Belgium
Commission v Spain (2010)	Spain, Belgium, Denmark, Finland, UK				Commission Advocate

	ECJ				General
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