

EU Competition Law and Health Care Systems

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In recent years, the European Court of Justice has in a series of decisions made clear that a general exemption from the scope of application of competition law does not apply to the field of social security. The following paper investigates the extent to which European competition law comes to bear on the activities pursued by institutions incorporated within health care systems (health care institutions). To begin with, it is queried whether, and to what extent, these institutions are undertakings within the meaning of European competition law. Subsequently, forms of prohibited conduct are dealt with. Even if a health care institution does qualify as an undertaking and does infringe European competition law, there is still the possibility that an exemption from the scope of application of competition law is acknowledged if the prerequisites set out under Art. 86 (2) of the Treaty establishing the European Community (EC) are fulfilled. Accordingly, the definitional preconditions governing this legal exception are likewise outlined and examined as to their applicability to the field of health care.

I. THE STATUS OF HEALTH CARE INSTITUTIONS AS UNDERTAKINGS

The EC Treaty itself does not define the term undertaking. It is the general practice, however, of the Community institutions¹ and the view prevailing in the literature² to base the definition of an undertaking on functional criteria. Accordingly, an undertaking within the meaning of European competition law is any entity which engages in an economic activity, regardless of its legal status and the way it is financed.³

According to the Court of Justice, a profit-making intention is not needed to qualify as an undertaking,⁴ so that also non-profit/charitable organizations, for example, may be undertakings within the meaning of competition rules.⁵ Nor do an institution's legal person or the circumstances of ownership and the legal form of an undertaking or its incorporation under public or private law play a role.⁶ Hence, the term undertaking applies also to publicly owned enterprises as well as to public corporations or associations engaged in business activities. It follows that the status of an undertaking is not restricted to benefit providers, such as physicians, (public) hospitals, pharmacists and manufacturers of medicaments/health aids; health care institutions and their umbrella organizations, too, can be undertakings in spite of their public-law structure.

¹ ECJ. (European Court of Justice), case C-41/90, *Höfner and Elser*, ECR, 1991, I-1979, para. 21; case C-159/91 and C-160/91, *Poucet and Pistre*, ECR, 1993, I-637; case C-364/92, *SAT Airlines*, ECR, 1994, I-43, para. 18; case C-244/94, *FFSA*, ECR, 1995, I-4019, para. 14; case C-55/96, *Job Centre*, ECR, 1997, I-7119; case C-67/96, *Albany*, ECR, 1999, I-5751, para. 77; case C-115/97, *Brentjens*, ECR, 1999, I-6025, para. 77; case C-219/97, *Bokken*, ECR, 1999, I-6121, para. 67; Commission, 1994-07-13, *Carton*, OJ 1994 L 243/1 (45) and 1994-07-27, *PVC*, OJ 1994 L 239/14 (28).

² Schröter, H., in H. Groeben & J. Thiesing & C.-D. Ehlermann, *Kommentar zum EU-/EG-Vertrag*⁵, Baden-Baden, Nomos, 1999, preliminary remarks on Arts. 85 to 89, margin nos. 16 ff., notably 21; Stockenhuber, P., in E. Grabitz & M. Hilf, *Das Recht der Europäischen Union, vol. I: EUV/EGV (Amsterdam version)*, München, C.H. Beck, loose-leaf edn., Art. 81 EC, margin no. 51; Grill, G., in C.O. Lenz, *EG-Vertrag*², Köln, Bundesanzeiger; Basel Genf München, Helbig & Lichtenhahn; Wien, Ueberreuter, 1999, preliminary remarks on Arts. 81-86, margin no. 33; Emmerich, V., in M.A. Dausen, *Handbuch des EU-Wirtschaftsrechts*, vol. 2, München, C.H. Beck, loose-leaf edn., H.I, margin no. 62.

² Ebsen, I., "Öffentlich-rechtliches Handeln von Krankenkassen als Gegenstand des Wettbewerbsrechts? Probleme materiellrechtlicher and kompetenzrechtlicher Koordination" in G. Igl, *Das Gesundheitswesen in der Wettbewerbsordnung*, Wiesbaden, Chmielorz, 2000, p.22 (p.33).

³ ECJ. (European Court of Justice), case C-41/90, *Höfner and Elser*, ECR, 1991, I-1979, para. 21; case C-159/91 and C-160/91, *Poucet and Pistre*, ECR, 1993, I-637; case C-244/94, *FFSA*, ECR, 1995, I-4019, para. 14; case C-55/96, *Job Centre*, ECR, 1997, I-7119; case C-67/96, *Albany*, ECR 1999, I-5751, para. 77; case C-115/97, *Brentjens*, ECR, 1999, I-6025, para. 77; case C-219/97, *Bokken*, ECR, 1999, I-6121, para. 67.

⁴ ECJ. (European Court of Justice), case C-244/94, *FFSA*, ECR, 1995, I-4019, para. 21; case C-67/96, *Albany*, ECR, 1999, I-5751, para. 85; case C-115/97, *Brentjens*, ECR, 1999, I-6025; case C-219/97, *Bokken*, ECR, 1999, I-6121.

⁵ Schröter H., quoted, preliminary remarks on Arts. 85 to 89, margin no. 22.

⁶ Schröter H., quoted, preliminary remarks on Arts. 85 to 89, margin no. 36.

A. Exemptions from health care institutions' status as undertakings

If the activity carried out by a health care institution is considered to be not economic, but social, sovereign or purely to cover need, European competition law does not become applicable.

In the author's view, the basis for an exemption from competition law is qualification as a non-economic activity, and not, say, the principle stressed by the Court of Justice in its consistent practice that the organization of social security systems comes under the jurisdiction of the Member States.⁷ This principle merely sets forth that there are no peremptory provisions at European level governing a specific form of social security organization. This area is subject to the principle of coordination; harmonization is sought only within the narrow bounds of Art. 137 (3) EC. Every Member State is free to determine the organization of its social security system. Whether and to what extent it structures its system according to the principle of solidarity, whether or not it requires compulsory membership, how benefits are provided and so forth – these decisions are left up to the Member State. This does not imply, however, that social security systems are beyond the reach of Community law. The Court of Justice clearly states in its more recent decisions that the Member States are indeed required to observe Community law in organizing their social security systems.⁸ It is therefore necessary to assume the fundamental applicability of the rules governing competition, the only exception being that a Member State structures its system in such a way as to enable the activities of insurance institutions to be classed as non-economic.

The following section deals with the question of how the activity of a health care institution must be organized in order to be regarded as not economic.

1. *The sovereign activity*

Competition law does not come to bear if, and in so far as, genuine sovereign tasks are performed.⁹

a. *Judgment in the Höfner and Elser Case*

In the Höfner and Elser Case,¹⁰ the Court of Justice regarded the employment procurement services of the German Federal Employment Office as an economic activity, although the Federal Office is a public undertaking operating on the basis of public law. The fact that such placement services are normally entrusted to public bodies did not contradict the economic nature of that activity, the Court stated. It held that employment procurement had not always been, and need not necessarily, be carried out by public entities.

The German Federal government, referring to Art. 45 EC in connection with this Case, took the view that the term 'official authority' included all activities under which an institution endowed with State authority presents itself to the citizens through some form of

⁷ Taking a different view: Benicke, Ch., "Zum Unternehmensbegriff des Europäischen Wettbewerbsrechts", EWS 1997, p.373 (p.377); Ebsen I., quoted, p.35. Regarding this principle, see ECJ. (European Court of Justice), case 238/82, *Duphar*, ECR, 1984, 523, para. 16; case C-159/91 and C-160/91, *Poucet and Pistre*, ECR, 1993, I-637, para. 6; case C-238/94, *García*, ECR, 1996, I-1673, para. 15; case C-70/95, *Sodemare*, ECR, 1997, I-3395, para. 27; case C-120/95, *Decker*, ECR, 1998, I-1831, para. 21; case C-158/96, *Kohll*, ECR, 1998, I-1931, para. 17.

⁸ ECJ. (European Court of Justice), case C-120/95, *Decker*, ECR, 1996, I-1831, para. 23; case C-158/96, *Kohll*, ECR, 1996, I-1931, para. 19; case C-18/95, *Terhoeve*, ECR, 1999, I-345, para. 34; 2000-11-23, case C-135/99 *Elser*, para. 33.

⁹ Hochbaum, I.F., in H. Groeben & I. Thiesing & C.-D. Ehlermann, *Kommentar zum EU-/EG-Vertrag*⁵, Baden-Baden, Nomos, 1999, Art. 90, margin no. 14 with further substantiation.

¹⁰ ECJ. (European Court of Justice), case C-41/90, *Höfner and Elser*, ECR, 1991, I-1979.

administrative action.¹¹ The European Commission¹² rightly pointed out that the exercise of official authority was a term under Community law, the content of which could not depend on whether the activities concerned were reserved to public offices in some of the Member States. The fact that the private recruitment of executive employees was tolerated proved that employment procurement did not involve the exercise of State sovereign power. Advocate General F.G. Jacobs argued along the same lines. He doubted that in discharging its statutory duties the Federal Employment Office exercised official authority. At any rate he was certain that private undertakings, if allowed to provide placement services, would not be exercising official authority. "Neither the plaintiffs themselves exercise official authority, nor would an undertaking established in another Member State do so if it availed itself of its vested right to provide services pursuant to Art. 59 of the EC Treaty (now Art. 49 EC). If, therefore, certain undertakings are entitled under the general provision of Art. 59 of the EC Treaty (now Art. 49 EC) to operate employment procurement services in Germany, they cannot forfeit this right through the exceptional provision of Art. 55 of the EC Treaty (now Art. 45 EC)".¹³ This view taken by both the Commission and Advocate General F.G. Jacobs with regard to the freedom to provide services is, in the author's opinion, also of significance to competition law.

Against this background, the Court's statement in *Höfner and Elser*¹⁴ that employment procurement has not always been, and is not necessarily, carried out by public entities implies that such recruitment services need not necessarily be performed by exercising official authority, but can, or could, also be provided by private undertakings as an economic activity, and thus cannot be regarded as a sovereign activity. The exercise of official authority was not imperative for the employment procurement activity of the German Federal Employment Office because the Office, in functional terms, offered the recruitment service on the employment market in the same way as a private undertaking. Competition law therefore had to become applicable.

b. Consequences for health care institutions' status as undertakings

It may be inferred from the judgment in *Höfner and Elser* that health care institutions are not automatically exempt from the scope of application of competition law just because they are holders of sovereign rights.¹⁵ In the author's view, if an activity is to qualify as being sovereign, the decisive criterion is whether said activity must necessarily be carried out through the exercise of official authority. From the point of view of competition law, the exercise of official authority is not required in cases where the holder of sovereignty supplies or demands products or services on the market alongside other undertakings. In such case, the public interest forming the basis for the exercise of official authority does not manifest itself any differently from ordinary individual interests and thus does not call for any special treatment in terms of competition law. An exemption from the application of competition rules can only be made if the public interest constitutes an interest in the performance of a particular task within the meaning of Art. 86 (2) EC (see chapter 'Exemption from competition law in respect of services of general economic interest pursuant to Art. 86 (2) EC').

The distinction between sovereign and economic activity is thus reduced to the question of whether the activity involved in the exercise of official authority can or could be carried out – at least in principle – by a private undertaking with the intention of making a profit¹⁶ – that is,

¹¹ Report for the Hearing in case *Höfner and Elser*, ECR, 1991, I-1979, no. 29.

¹² Report for the Hearing in case *Höfner and Elser*, ECR, 1991, I-1979, no. 30.

¹³ Opinion of Advocate General Jacobs, F.G., in case *Höfner and Elser* [1991] ECR I-1979, no. 23.

¹⁴ ECJ. (European Court of Justice), case C-41/90, *Höfner and Elser*, ECR, 1999, I-6025.

¹⁵ Schulz-Weidner, W. & Felix, F., "Die Konsequenzen der europäischen Wirtschaftsverfassung für die österreichische Sozialversicherung", SozSi 1997, p.1120 (p.1123).

¹⁶ Advocate General Tesouro, G., ECR, 1993, I-661, no. 8, and Advocate General Jacobs, F.G., ECR, 1999, I-5751, no. 311; see also Langer, R., "Probleme der Koordinierung beim Public/Private-Mix von

whether the holder of sovereignty, from a functional perspective, engages in business operations in the same way as a private undertaking. G. Haverkate & St. Huster¹⁷, too, take the view that European competition law is applicable here because, and in so far as, sovereign institutions operate as business enterprises (as it were, in spite of the sovereignty of their actions).

Such a competition-oriented understanding of sovereign activity makes it possible to let rest the question of whether every performance of a public service, public duty or function of public administration must already be regarded as a sovereign act. The decisive point is the effect of such an action in terms of competition – and not its legal form.¹⁸ It is thus unimportant whether or not a Member State defines a certain activity as being sovereign. What matters is whether the sovereign institution supplies or demands products or services on the market in the same way as a private undertaking does. In such case, the given activity cannot evade competition law on account of its sovereign structure or through the acting party's integration in the sovereign administration.¹⁹

In Germany, for example, the relationship between health insurance institutions and benefit providers is predominantly structured under public law. German health insurance funds have the statutory duty to provide benefits in kind, which means that health benefits are provided to the insured through external benefit providers at the cost of the funds. Benefit provision at the cost of health insurance funds can – as in Austria – be ensured on a contractual basis. The German legislator, by contrast, has opted for the granting of admissions as a matter of so-called autonomous administration on the part of health insurance funds and federal associations of panel doctors. That the selection of physicians is decided in an administrative procedure should not obscure the fact that, in functional terms, this constitutes a demand-oriented activity on the part of the funds or the panel doctors' associations. The physician is obliged by an administrative act requiring communication to provide benefits to the insured within a specific scope and at a specific price. Although the insurance funds/panel doctors' associations conduct an admission procedure under public law, they actually place a demand for medical services on the market. Thus they act as private undertakings and, consequently, should be treated as such – that is, be subject to competition law. Their acting in the legal form of public law does not alter this fact.²⁰

In cases where health care institutions act not as benefit demanders but benefit suppliers, the decisive issue is again whether or not they operate as private undertakings. Coverage against the risk of illness is also offered by private insurance companies. Health care institutions do not, however, act as such private undertakings if the activities they are engaged in are not economic, but geared to social objectives (see chapter 'Social activity')

2. Social activity

Of central importance for the assessment of health care institutions' status as undertakings is the distinction between economic and social activity.

Gesundheitsleistungen", in G. Igl, *Europäische Union und gesetzliche Krankenversicherung*, Wiesbaden, Chmielorz, 1999, p.60 (p.67).

¹⁷ *Europäisches Sozialrecht*, Baden-Baden, Nomos, 1999, margin nos. 595 ff. and 601.

¹⁸ Haverkate G. & Huster St., quoted, margin no. 600.

¹⁹ Taking a different view: Bieback, K.-J., "Die Kranken- und Pflegeversicherung im Wettbewerbsrecht der EG", EWS 1999, p.361 (p.367).

²⁰ Regarding procurement activities of German health funds in the health aid sector, see Boecken, W., "Rechtliche Schranken für die Beschaffungstätigkeit der Krankenkassen im Hilfsmittelbereich nach der Publizierung des Vertragsrechts – insbesondere zum Schutz der Leistungserbringer vor Ungleichbehandlungen", NZS 2000, p.269 (p.272).

a. Case-law

In the *Poucet and Pistre Case*²¹, the Court of Justice identified the insurance activity of compulsory insurance institutions organized according to the solidarity principle as the performance of a task with an exclusively social character. As criteria indicating the social nature of the activity, it stated: the social function, the principle of solidarity, the provision of insurance coverage irrespective of the insured persons' financial situation and their health condition at the time of admittance to the institution, State control, the statutory regulation of benefits, the fact that benefits are granted regardless of the amount of contributions paid, and the performance of tasks in conformity with the legal provisions. It follows that these institutions were thus unable to influence the level of contributions, the use of funds or the scope of benefit provision. In the Court's view, the solidarity principle is exhibited by health insurance institutions when contribution payments are geared to occupational income, whereas benefits are the same for all recipients. As a result, a distribution of income takes place between those who are well off and persons who in view of their financial circumstances and their health condition would otherwise lack the necessary social protection.

The Court refuses to acknowledge the social character in cases where social insurance institutions perform an economic activity in competition with private insurance companies. It took this view in the *Case Fédération française des sociétés d'assurance (FFSA)*²², which involved the performance of an insurance activity within a system of voluntary supplementary pension insurance. Moreover, it also deemed the insurance activity of compulsory supplementary pension insurance funds to be economic in the *Cases Albany*²³, *Brentjens*²⁴, *Bokken*²⁵ and *Pavlov*.²⁶ Here the Court above all geared its decisions to the fact that all these systems functioned according to the capitalization principle. In addition, it pointed out that qualification as an economic activity remained unaffected by the pursuit of a social objective, individual aspects of solidarity, and by restrictions or controls on investments by the social insurance establishment. In the *FFSA Case*, it saw an only very limited applicability of the solidarity principle on the ground of the voluntary nature of the insurance.

With regard to the criterion of economic efficiency, the Court of Justice also pointed out in both the judgments *Höfner and Elser*²⁷ and *Job Centre*²⁸ that the existence of a genuine or potential competitive situation was decisive. In these exceptional cases, however, the point at issue was not the insurance activity, but the performance of an employment procurement service (see chapter 'Judgment in the *Höfner and Elser Case*').

b. Consequences for health care institutions' status as undertakings

Health care institutions may infer from the case-law (see chapter 'Case law') that their status as undertakings cannot be refuted from the start. Rather their individual activities have to be assessed primarily as to whether they are social or economic. This will depend on the object of the given activity and the manner in which it is carried out.

In the opinion of the Court of Justice, a health care institution operates in an economic way if it competes with private insurance undertakings. However, it is not sufficient simply to focus on competition between social security establishments and private health insurance

²¹ ECJ. (European Court of Justice), case C-159/91 and C-160/91, *Poucet and Pistre*, ECR, 1993, I-637.

²² ECJ. (European Court of Justice), case C-244/94, *FFSA*, ECR, 1995, I-4019, para. 17.

²³ ECJ. (European Court of Justice), case C-67/96, *Albany*, ECR, 1999, I-5751, paras. 81 ff.

²⁴ ECJ. (European Court of Justice), case C-115/97, *Brentjens*, ECR, 1999, I-6025, paras. 81 ff.

²⁵ ECJ. (European Court of Justice), case C-219/97, *Bokken*, 1999, I-6121, paras. 71 ff.

²⁶ ECJ, (European Court of Justice) case C-180/98 to C-184/98, *Pavlov*, paras. 114 ff.

²⁷ ECJ. (European Court of Justice), case C-41/90, *Höfner and Elser*, ECR, 1991, I-1979, para. 22.

²⁸ ECJ. (European Court of Justice), case C-55/96, *Job Centre*, ECR, 1997, I-7119, para. 22.

companies in order to do justice to the objectives of competition law. Competition law not only safeguards competition between undertakings operating at the same economic level; an undertaking which itself does not compete can still act in a manner that is indeed relevant in terms of competition law. This becomes especially clear in the event of the prohibited abuse of a dominant position on the market. Art. 82 EC seeks especially to identify monopoly undertakings whose dominant position is expressed not by economic power and independent conduct vis-à-vis competitors, but solely by their control over other trading partners – that is, over buyers or suppliers.²⁹ Consequently, ‘to be engaged in competition’ is not an appropriate criterion for distinguishing between economic and social activity.

In the author’s view, such a distinction must be based on whether the tasks and functional modes of a given health care institution differ to such an extent from those of private undertakings that an activity carried out by private companies on that basis could not in principle be pursued for the purpose of making a profit. It is thereby irrelevant whether the social security establishment performs a concrete activity with or without a profit-making intention. The decisive point is whether such activity can or could – at least in principle – be conducted by private undertakings for the purpose of achieving a profit.³⁰ In the author’s opinion, an economic activity is defined by the fact that it can also be carried out to realize a profit, even if this does not occur in the actual case. An activity that is only possible on a non-profit-making basis will differ from an economic operation because it is not guided by economic motives. Such activities are conducted in the interest of the public and are usually performed by government agencies.

Criteria which permit the activity of a health care institution to be carried out only on a non-profit-making basis and thus divest it of its economic character are the principles of solidarity and of social protection.³¹ Social protection is above all expressed by the statutory insurance obligation and the non-observance of individual risks. These principles constitute the exceptional quality of social activity. They distinguish the activity of health care institutions from that of private health insurance undertakings: the more pronounced the principles of solidarity and social protection, the greater the manifestation of an activity’s social character. Decisive is whether the social or the economic criteria predominate.

Social elements, if strongly pronounced, lead to a product which differs from that of the private supplier – not only from the point of view of private insurance undertakings but also from that of persons demanding benefits. From the viewpoint of benefit demand, the crucial difference ensues directly from the principles of solidarity and social protection; from the perspective of private undertakings, it emerges from the resultant ‘hostility to profit-making’, which in fact excludes private companies from performing social activities.

b. The special significance of the criterion of remunerability in the case of tax-financed national health services

The aforementioned social principles are encountered not only in insurance schemes, but also in tax-financed national health services. The latter must additionally take into account that, according to the prevalent view, remunerability also forms a qualifying feature of business activity.³² In the Höfner and Elser Case³³, the Court of Justice held that an

²⁹ Schröter H., quoted, Art. 86, margin no. 101.

³⁰ Advocate General Tesouro G., *ECR*, 1993, I-661, no. 8; Advocate General Jacobs F.G., *ECR*, 1999, I-5751, no. 311.

³¹ Haverkate G. & Huster St., quoted, margin nos. 502 f.

³² Eichenhofer, E., *NJW* 1991, p.2859; Marhold, F., “Europäisches Wettbewerbsrecht für öffentliche Unternehmen”, in M. Enzinger & H.F. Hügel & W. Dillenz, *Aktuelle Probleme des Unternehmensrechts, Festschrift G. Frotz*, Wien, Manz, 1993, p.645 (p.649); Roth, W.-H., “Versicherungsmonopole und EWG-Vertrag”, in J.F. Baur & K.J. Hopt & K.P. Mailänder, *Festschrift für E. Steindorff*, Berlin New York, Walter de Gruyter, 1990, p.1313 (p.1318); Stockenhuber P., quoted, Art. 81, margin no. 57; taking a different view: Benicke Ch., *EWS* 1997, p.376.

³³ ECJ. (European Court of Justice), case C-41/90, *Höfner and Elser*, *ECR*, 1991, I-1979.

economic activity was given although the cost of employment placement was borne by the contribution payers and not the job seeker.³⁴ Consequently, it is irrelevant whether economic counter-performance for the given benefit is made by its recipient or a third party.³⁵ Decisive only is that the activity is not offered completely free of charge. Moreover, gratuitous activities do not constitute a service within the meaning of Art. 50 EC. In the Humbel and Wirth Cases, the Court took the view that public education in State schools and universities did not have a remunerative character.³⁶ It argued that by establishing and maintaining a national education system the State did not want to take up a profit-making activity, but merely fulfilled its duties towards its citizens in the social, cultural and educational sphere, and that this system was essentially financed from public funds.

In its judgement *Smits and Peerbooms*³⁷ the ECJ confirmed the remunerability of medical services provided under the benefit in kind system. This judgement is, in short, based on two facts: Firstly, that an insured patient making use of a medical treatment abroad has to pay for this service. The remunerability being expressed by this fact is obvious and can thus not be changed even if the health insurance fund - that, in principle, provides benefits in kind - reimburses the costs. Secondly, the ECJ clearly qualifies the financing of medical services on the basis of contractual agreements made in advance and (all-)inclusive directly by the health insurance fund as remuneration in the sense of Art. 50 EC.

Proceeding from this court ruling the interpretation deriving from the judgements *Humbel and Wirth*, namely that it will not be possible to regard the provision of health care benefits by tax-financed national health services as a remunerative activity, so that neither the freedom to provide services nor the rules governing competition come to bear here, can thus – at least in the author's view – not be maintained in the future anymore. If a patient being subject of a tax-financed national health service makes use of a provider of medical services established in another Member State, he/she has to pay for it. Just this fact the ECJ qualifies as remunerability.

c. *The demand for health care benefits*

The above-cited social elements, however, only form the basis for the supply of insurance benefits, but not the demand for health care benefits. Indeed, the relationship between health care institutions and benefit providers, in the very most cases, is not completely detached from the insurance/benefit relationship existing between the institution and the insured or beneficiaries, respectively. This linkage between health care institutions' various fields of activity nevertheless does not imply that just because the insurance activity is assessed as a social activity, benefit procurement operations will likewise be exempted from the scope of application of competition law.³⁸ Such a view would contradict the functional definition of an

³⁴ Eichenhofer E., NJW 1991, p.2859.

³⁵ Regarding the freedom to provide services, see ECJ. (European Court of Justice), case *Bond van Adverteerders*, ECR, 1988, 2085, paras. 14 and 16.

³⁶ ECJ. (European Court of Justice), case 263/86, *Humbel*, ECR, 1988, 5365, paras. 14-20; case C-109/92, *Wirth*, ECR, 1993, I-6447, paras. 15-19.

³⁷ ECJ. (European Court of Justice), case Rs C-157/99, *Smits and Peerbooms*, paras. 55-58.

³⁸ For a separate view on insurance activity and benefit provision, and an exemption from the scope of application of competition law limited to insurance activity, cf. Zechel, St., *Die territorial begrenzte Leistungserbringung der Krankenkassen im Lichte des EG-Vertrages*, Berlin, Erich Schmidt, 1995, p.89; Langer, R., "Konsequenzen der Privatisierung für die Koordinierung der Systeme der sozialen Sicherheit in der Verordnung (EWG) 1408/71: Probleme und Lösungen", ZIAS 1997, p.314 (p.320); Benicke, Ch., "EG-Wirtschaftsrecht und die Einrichtungen der freien Wohlfahrtspflege", ZFSH/SGB 1998, p.22 (p.30 f.); Marhold, F., "Europäischer Wettbewerb im Gesundheitswesen", in Ch. Tomuschat & H. Kötz & B. v Maydell, *Europäische Integration und nationale Rechtskulturen*, Köln Berlin Bonn München, Carl Heymanns, 1995, p.451 (p.454 ff.); Marhold, F., "Das europäische Wirtschaftsrecht und die Gesundheitsleistungen – Auswirkungen", in W. Palm, *Gesundheitsleistungen ohne Grenzen in der Europäischen Union*, Brüssel, 1999, p.48; Marhold, F., "Auswirkungen des Europäischen Wirtschaftsrechts auf die Sozialversicherung", in E. Theurl, *Der Sozialstaat an der Jahrtausendwende*, Heidelberg, Physica, 2001, p.235 (p.237 ff.). Regarding a general exemption including

undertaking which depends on whether the above-mentioned criteria have been met principally for the conduct actually at issue.³⁹ The question of whether an institution qualifies as an undertaking should relate not to the institution as a whole according to its structure or organizational form, but only to each of its individually performed activities.

If a health care institution demands benefits on the health care market, such activities will primarily follow economic and not social principles. Their underlying tasks and functional modes are geared to economic considerations; social elements merely play a subordinated role. Even if the purpose behind these activities is to safeguard socio-political tasks, this does not change anything.⁴⁰ The decisive point is only whether the health care institution engages in an economic activity in the same way as a private undertaking does. Since this is usually the case when health care institutions take part in the demand for benefits the deciding factor for these activities will be whether or not the exception pursuant to Art. 86 (2) EC can be invoked (see chapter 'Exemption from competition law in respect of services of general economic interest pursuant to Art. 86 (2) EC').

3. The mere coverage of need by the public sector

The public sector is considered to participate in the market only if it itself furnishes benefits or purchases benefits in order to distribute these to others.⁴¹ If, however, these activities are geared to the mere coverage of need, the public sector does not constitute an undertaking within the meaning of European competition law. Such cases would include activities in which the public sector does not compete as a private undertaking with other private undertakings, but only procures marketable products to maintain its own functionality.⁴² The State thus merely takes part in the workings of the economy as an ultimate consumer; its demand for products and services serves the exclusive purpose of satisfying the respective authority's own consumption requirements and does not entail any further participation in economic processes.⁴³ This exemption from competition law because of mere coverage of need is applicable to both public and private undertakings.

Hence the subsequent question is: To what extent should the demand for health care benefits be regarded as pure coverage of need on the part of health care institutions? I. Ebsen⁴⁴ affirms the consumer character in the case of tax-financed national health systems in which health care benefits are provided by State authorities as genuine benefits in kind. He compares this with the procurement of learning material by schools for the purpose of distributing these to pupils in lessons. In his view, however, such a model of State procurement does not conform with the benefit-in-kind system employed by German health insurance schemes for two reasons, which – at least when taken together – warrant this

benefit provision, cf. Knispel, U., "Krankenkassen als Adressaten des Kartellrechts", NZS 1998, p.563; Ebsen I., quoted, p.35 f.; Hailbronner, K., *Rechtsstellung und Tätigkeitsbereich der öffentlich-rechtlichen Pflicht- und Monopolversicherungsanstalten in der Europäischen Gemeinschaft*, Baden-Baden, Nomos, 1991, p.123 ff; Schulz-Weidner, W. & Felix, F., "Die Bedeutung des europäischen Wettbewerbsrechtes für die österreichische Sozialversicherung", *SozSi* 2001, p.435 (p.445 f).

³⁹ Ebsen I., quoted, p.33; see also Pieters, D., "The Consequences of European Competition Law for National Health Policies", in H. Krejci et al., *Rechtsdogmatik und Rechtspolitik im Arbeits- und Sozialrecht, Festschrift T. Tomandl*, Wien, Manz, 1998, p.603 (p.605).

⁴⁰ In case C-155/73, *Sacchi*, ECR, 1974, 409, para. 14, the European Court of Justice ruled that although a Member State may have granted, for non-economic reasons of public interest, one or several broadcasting establishments the exclusive right to broadcast television and radio programmes, these establishments are nevertheless subject to competition rules in performing their task if that task involves activities of an economic nature.

⁴¹ Bieback K.-J., EWS 1999, p.365 f. with further substantiation.

⁴² Bieback K.-J., EWS 1999, p.365.

⁴³ Müller-Graff, P.-Ch. & Zehetner, F., *Öffentliche und privilegierte Unternehmen im Recht der Europäischen Gemeinschaften*, Linz, WISO, 1991, p.39; Hochbaum I.F., quoted, Art. 90, margin nos. 13 f. with further substantiation.

⁴⁴ Quoted, p.34.

assessment. Firstly, he says, the so-called 'benefit in kind' has been 'watered down' by the insurance funds to form a legal construct which has turned the direct economic process of benefit providers supplying services and products to the insured into a triangular benefit relationship. Secondly, he asks to bear in mind that statutory health insurance schemes are organized as provident-provision systems. Owing to the insurance obligation and contribution financing, insurance funds act, in economic terms, as mediators between the actual benefit providers and the actual ultimate recipients. I. Ebsen therefore correctly takes the view that the assessment of German health insurance funds as simply being public consumers cannot be upheld.⁴⁵

In the author's view the differentiation has not to be made between National Health Services and health insurance systems but between two types of demand: It is a matter of mere coverage of need when health care institutions make purchases for their own purposes like it is the case e.g. as regards the establishment and equipment of buildings and administrative institutions. If a health care institution operates medical institutions of his own the purchase, too, of all medical instruments and material of consumption (e.g. disinfectants) is subject to the procurement law and not to the competition law⁴⁶. This will not apply if health care institutions conclude contracts with providers of medical services in favour of the patients entitled to claim in systems with benefits in kind. The *Sodemare*⁴⁷ Case dealt with a social assistance carrier's demand for health services. The ECJ did not discuss the status of the social assistance carrier as undertaking, but still applied the law on competition on the legal regulation of the demand. If the Court abides by this ruling, the demand activities of the health care institutions that are serving to provide benefits in kind have to be ruled in accordance with the competition law. This applies to both health insurance systems and National Health Services. This demand for health services is subject to procurement law as well. In the *Tögel*⁴⁸ Case the ECJ applied the procurement law on the demand of a health insurance carrier for ambulance services and rescue transportations.

II. PROHIBITED CONDUCT

European competition law contains a cartel prohibition (Art. 81 EC) as well as a prohibition of the abuse of a dominant position on the market (Art. 82 EC). Both definitional elements may become applicable alongside each other.

A. Cartel prohibition

Pursuant to Art. 81 (1) EC, an anticompetitive cartel is characterized by the following preconditions: prohibited forms of cooperation between undertakings, restraint of competition, restraint of trade between Member States and perceptibility. Prohibited cartel agreements are automatically void pursuant to Art. 81 (2) EC.

1. *Prohibited cooperation*

Art. 81 (1) EC prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which are apt to interfere with competition. Common to all three definitional elements is the conscious and deliberate cooperation between several legally independent undertakings, which in this way strive for, or bring about, a coordination of their competitive conduct.⁴⁹ The term 'agreement' also pertains to legally non-binding

⁴⁵ Taking a different view: Schulz-Weidner W. & Felix F., *SozSi* 2001, p.446.

⁴⁶ Köck, St., "Die Auswirkungen des EG-Wettbewerbsrechts auf die österreichische Sozialversicherung", in T. Tomandl, *Der Einfluß europäischen Rechts auf das Sozialrecht*, Wien, Braumüller, 2000, p.27 (p.55 ff).

⁴⁷ ECJ. (European Court of Justice), case C-70/95, *Sodemare*, ECR, 1997, I-3395, paras. 41 ff.

⁴⁸ ECJ. (European Court of Justice), case C-76/97, *Tögel*, ECR, 1998, I-5357.

⁴⁹ Schröter H., quoted, Art. 85, margin no. 40.

arrangements (so-called 'gentlemen's agreements').⁵⁰ Decisions by associations of undertakings include recommendations made by such associations to their members which bind them, in law or in fact, or which are observed by them⁵¹. Concerted practices form a collective term⁵² intended to cover agreements and decisions which are not legally and factually binding, as well as other forms of conscious and deliberate cooperation among undertakings, such as the pure form of actual cooperation.⁵³

2. Restraint of competition

The aforementioned modes of conduct must "have as their object or effect the prevention, restriction or distortion of competition within the common market". This means that competition which would exist or possibly arise without the questionable cooperation between parties to a cartel agreement must be impaired through a restriction of the economic liberty of action of one or more of these parties.⁵⁴ Art. 81 EC protects competition in all its manifestations. It seeks to prevent not only restrictions and distortions of competition between parties to such agreements, but also of competition between each of these parties and third parties. Thus the cartel prohibition applies both to 'horizontal' agreements that restrict competition between undertakings at the same stage in the economic process and to 'vertical' agreements between undertakings which operate at different stages of that process and therefore do not compete with each another.⁵⁵ It is contested whether an impairment of third parties' freedom to compete constitutes a sufficient ground.⁵⁶ The prohibition applies to distortions of both supplier and demand competition,⁵⁷ and covers product as well as service markets.⁵⁸ Agreements that restrain demand competition are examined primarily as to whether the supplier's economic scope of action is restricted.⁵⁹

A restraint of competition has to be caused, at least partly, by the questionable agreement. The fact that a further cause may be attributable to State measures does not rule out the application of Art. 81 (1) EC.⁶⁰

Art. 81 (1) EC also lists examples of prohibited modes of conduct. These include actions which "directly or indirectly fix purchase or selling prices or any other trading conditions" (Art. 81 (1) (a) EC). Prohibited price agreements include the arrangement of fixed prices or of minimum or peak prices.⁶¹ Moreover, actions which "limit or control production, markets, technical development, or investment" are expressly prohibited (Art. 81 (1) (b) EC). Common to these disparate groups of definitional elements is the restriction of undertakings' offer to perform and, hence, of competition in terms of quantity and quality.⁶² The definitional elements expressed by actions which "limit or control production" pertain above all to quota fixing⁶³.

⁵⁰ Stockenhuber P., quoted, Art. 81, margin no. 97; Schröter H., quoted, Art. 85, margin no. 42.

⁵¹ Grill G., quoted, Art. 81, margin no. 4; Stockenhuber P., quoted, Art. 81, margin no. 104; Schröter H., quoted, Art. 85, margin nos. 42 and 57.

⁵² Schröter H., quoted, Art. 85(1), margin no. 41.

⁵³ Schröter H., quoted, Art. 85, margin no. 59.

⁵⁴ Grill G., quoted, Art. 81, margin no. 10; Emmerich, V., *Kartellrecht*⁸, München, C.H. Beck, 1999, p.415 f.

⁵⁵ Schröter H., quoted, Art. 85, margin no. 83.

⁵⁶ Schröter H., quoted, Art. 85, margin no. 84, note 322.

⁵⁷ Schröter H., quoted, Art. 85 (1), margin no. 88; Stockenhuber P., Art. 81, margin no. 127.

⁵⁸ Schröter H., quoted, Art. 85 (1), margin no. 88.

⁵⁹ Schröter H., quoted, Art. 85 (1), margin no. 108.

⁶⁰ Schröter H., quoted, Art. 85, margin no. 116.

⁶¹ Emmerich V., 1999, quoted, p.423; Schröter H., quoted, Art. 85, margin nos. 131 and 139.

⁶² Schröter H., quoted, Art. 85, margin no. 146.

⁶³ Schröter H., quoted, Art. 85, margin no. 147; Stockenhuber P., quoted, Art. 81, margin no. 184.

3. Restraint of trade between Member States

Art. 81 (1) EC moreover sets out that trade between Member States is liable to be affected by the formation of cartels. This so-called intra-Community clause is broadly construed in practice and thus of only minor significance.⁶⁴ Agreements involving only undertakings of one Member State may, however, also impact cross-border trade.⁶⁵

4. Perceptibility

In its consistent practice, the Court of Justice recognizes the requirement of perceptibility – both as regards the restraint of competition and restraint of intra-Community trade – as an unwritten definitional element of Art. 81 (1) EC.⁶⁶ In this way, it seeks to exempt minor cartels from that regulation.

The European Commission has issued an – albeit non-binding – notice concerning minor cartels.⁶⁷ Accordingly, an exemption from the prohibition of cartels will, as a rule, apply if the aggregated market shares of all parties to a cartel agreement do not exceed 5% in any of the given markets (in the case of horizontal agreements) or 10% (in the case of vertical agreements). If specific restraints of competition are considered especially grave, the rule governing minor exemptions does not come to bear. For horizontal agreements, such serious restraints would be price-fixing agreements, market partitioning arrangements, and restrictions on markets or production; for vertical agreements, this would apply to agreements fixing re-selling prices and territorial protection arrangements.⁶⁸

Decisions of the Court of Justice tend to lean more heavily towards the individual aspects of a specific case and are characterized by an overall assessment of all economic and legal circumstances.⁶⁹ It attaches particular importance to the market position of the parties to an agreement.⁷⁰ One may infer from its rulings that it considers the necessary perceptibility in respect of parties' market share (achieved jointly or even individually) to be already given at about 5%.⁷¹ Nation-wide agreements at any rate corroborate the applicability of Art. 81 (1) EC, so that one can hardly speak of minor cartels here.

It should also be pointed out that the Court considers even a potentially perceptible restraint to constitute a sufficient ground.⁷²

5. Exemptions from the cartel prohibition

a. Exemption pursuant to Art. 81 (3) EC

Agreements, decisions and concerted practices coming under the prohibition set out in Art. 81 (1) EC can be exempted therefrom by virtue of Art. 81 (3) EC. Such exemption may apply to an individual case or entire groups of agreements. The prerequisite is that the agreement

⁶⁴ Stockenhuber P., quoted, Art. 81, margin nos. 206 f.; Grill G., quoted, preliminary remarks, Arts. 81-86, margin nos. 13-19.

⁶⁵ ECJ. (European Court of Justice), case 240-242/82 et al., *SSI*, ECR, 1985, 3831, para. 49; case 246/86, *Belasco*, ECR, 1989, 2117, paras. 33 ff.

⁶⁶ Emmerich V., 1999, quoted, p.417 f.; Grill G., quoted, Art. 81, margin nos. 17-19; Stockenhuber P., quoted, Art. 81, margin nos. 215 ff.; Eilmansberger, T., *Europarecht II. Das Recht des Binnenmarkts: Grundfreiheiten und Wettbewerbsrecht*, Wien, Orac, 2000, p.50 f.

⁶⁷ OJ 1997 C 372/13.

⁶⁸ Eilmansberger T., quoted, p. 50 f.

⁶⁹ ECJ. (European Court of Justice), case C-234/89, *Delimitis*, ECR, 1991, I-935, para. 14.

⁷⁰ Stockenhuber P., quoted, Art. 81, margin no. 221.

⁷¹ See judicial references by Grill G., quoted, Art. 81, margin no. 19, and Stockenhuber P., quoted, Art. 81, margin no. 221.

⁷² ECJ. (European Court of Justice), case 19/77, *Miller*, ECR, 1978, 131, paras. 14 f.

in question contributes to improving the production or distribution of products or to promoting technical or economic progress. Consumers must be allowed a fair share of the resultant benefit. Over and above this, the restriction of competition must be indispensable to the attainment of the envisaged objectives and the agreement may not afford its parties the possibility of eliminating competition for a substantial part of the products concerned.

b. Lack of an autonomous scope of action

Art. 81 EC applies only to anticompetitive conduct displayed by undertakings on their own initiative.⁷³ This presupposes the limitability of market participants' scope of action through private-autonomous measures. If sovereign measures adopted by Member States eliminate the possibility of autonomous market conduct or if competitive actions on the part of undertakings are thereby interdicted or rendered impossible, the concomitant restraint of competition cannot be attributed to the conduct of the undertakings owing to their lacking scope of action.⁷⁴ This occurs when anticompetitive conduct is dictated to undertakings through national legal provisions or if the latter form a legal framework which rules out any possibility of competitive conduct on the part of undertakings.⁷⁵

The lack of an autonomous scope of action may result not only from State measures; it is also encountered in the case of associated undertakings. In its consistent practice, the Court of Justice takes the view that market- and competition-related cooperation between members of one and the same association of undertakings or of one and the same group (of companies) does not fulfil the definitional element of the cartel prohibition. This is predominantly justified by the fact that competition between individual group members cannot be restricted owing to their lacking economic autonomy.⁷⁶ The deciding factor is thus whether the parties possess free scope for independent economic decisions and actions which could be restricted by the agreement in question.⁷⁷ If not, the anticompetitive conduct is attributed not to the individual undertakings, but to the association of undertakings or the group, with anticompetitiveness – in the absence of a prohibited cartel – seen only in the abuse of a dominant position on the market.

c. Other exemptions recognized by the courts

In a series of decisions that dealt with price fixing by statutory compulsory associations, the Court of Justice held that a cartel agreement within the meaning of Art. 81 (1) EC did not exist because the members of those associations could not be viewed as representatives called on by the undertakings or associations of undertakings to negotiate and conclude price agreements. Such a case is given if the members of an association are legally obliged when fixing prices to consider not only the interests of the undertakings/associations of undertakings belonging to the sector they represent, but also the interests of the general public and of the undertakings of other sectors or of the persons using the respective service.⁷⁸ According to the Court, further grounds that rule out classification as a prohibited cartel agreement are given if the association's members are independent of the business

⁷³ ECJ. (European Court of Justice), case C-359/95 P and C-379/95 P, *Ladbroke Racing*, ECR, 1997, I-6265, para. 33.

⁷⁴ Stockenhuber P., quoted, Art. 81, margin no. 118 with numerous judicial references.

⁷⁵ ECJ. (European Court of Justice), case C-359/95 P and C-379/95 P, *Ladbroke Racing*, ECR, 1997, I-6265, para. 33.

⁷⁶ Stockenhuber P., quoted, Art. 81, margin no. 165.

⁷⁷ Schröter H., quoted, Art. 85, margin no. 97; Stockenhuber P., quoted, Art. 81, margin no. 165.

⁷⁸ ECJ. (European Court of Justice), case C-153/93, *Delta*, ECR, 1994, I-2517, paras. 17 f.; case C-185/91, *Reiff*, ECR, 1993, I-5801, paras. 18 f.; case C-96/94, *Centro Servizi Spediporto*, ECR, 1995, I-2883, paras. 24 f.; case C-38/97, *Librandi*, ECR, 1998, I-5955, paras. 30 and 34; case C-35/96, *Commission v Italy*, ECR, 1998, I-3851, paras. 41-44.

circles posting them and if the majority of the association's members consist of representatives of public bodies.⁷⁹

In a number of cases, the Court of Justice has not subjected arrangements in restraint of competition or freedom of action to the cartel prohibition owing to their effects of fostering market penetration and integration.⁸⁰ This holds true, for example, if the restriction of parties' or third parties' economic freedom of action forms a prerequisite for the emergence of new competition.

In the Cases Albany, Brentjens and Bokken, the Court ruled that agreements concluded between the social partners in the context of collective bargaining with a view to the social policy objectives of the EC Treaty did not come under Art. 81 (1) EC by virtue of their nature and purpose.⁸¹

B. Abuse of a dominant position on the market

The definitional prerequisites set out in Art. 82 EC include the dominant position of one or more undertakings, the abuse of a dominant position on the market and the restraint of trade between Member States.

1. Dominant position of one or more undertakings

The application of Art. 82 EC requires that one or several undertakings hold a dominant position within the common market or in a substantial part of it. The Community institutions consider a dominant position to be given if an undertaking's economic position on the market enables it to prevent enduring and effective competition on the relevant market by affording it the possibility, on an appreciable scale, to act independently of its competitors, its customers and, ultimately, the consumers.⁸² In the case of legal or de facto monopolies, the Commission and the Court of Justice, as a rule, regard a dominant position as given within the meaning of Art. 82 EC.⁸³

Several undertakings together may also occupy a dominant position on the market if they are so closely affiliated they can proceed in one and the same way on that market.⁸⁴ This definitional criterion is fulfilled, for example, by several companies of one group if they are in a position to prevent effective competition in a substantial part of the market in question.⁸⁵ A jointly held dominant market position can also result from a cartel agreement between undertakings.⁸⁶

To be able to assess the market position of undertakings it is necessary to ascertain where, when and in what products they compete with one another. To this end, the relevant market

⁷⁹ ECJ. (European Court of Justice), case C-153/93, *Delta*, ECR, 1994, I-2517, paras. 16 and 18; case C-185/91, *Reiff*, ECR, 1993, I-5801, para. 17; case C-96/94, *Centro Servizi Spediporto*, ECR, 1995, I-2883, paras. 23 and 25.

⁸⁰ Stockenhuber P., quoted, Art. 81, margin no. 152.

⁸¹ ECJ. (European Court of Justice), case C-67/96, *Albany*, ECR, 1999, I-5751, para. 60; case C-115/97, *Brentjens*, ECR, 1999, I-6025, para. 60; case C-219/97, *Bokken*, ECR, 1999, I-6121, para. 50.

⁸² See numerous judicial references by Schröter H., quoted, Art. 86, margin no. 58, note 191.

⁸³ Schröter H., quoted, Art. 86, margin nos. 55 with further substantiation, 72 and 77; ECJ. (European Court of Justice), case C-41/90, *Höfner and Elser*, ECR, 1991, I-1979, para. 28; case 311/84, *CBEM*, ECR, 1985, 3261, para. 16; case C-179/90, *Merci convenzionali porto di Genova*, ECR, 1991, I-5889, para. 14; case C-18/88, *GB-Inno-BM*, ECR, 1991, I-5491, para. 17; case C-67/96, *Albany*, ECR, 1999, I-5751, para. 91; case C-115/97 to C-117/97, *Brentjens*, ECR, 1999, I-6025, para. 91; case C-219/97, *Bokken*, ECR, 1999, I-6121, para. 81.

⁸⁴ ECJ. (European Court of Justice), case C-393/92, *Almelo*, ECR, 1994, I-1477, paras. 41-43; case C-96/94, *Centro Servizi Spediporto*, ECR, 1995, I-2883, para. 33.

⁸⁵ Schröter H., quoted, Art. 86, margin no. 67.

⁸⁶ Grill G., quoted, Art. 82, margin no. 21.

is differentiated in material and territorial terms.⁸⁷ The definition of the materially relevant market is based on the exchangeability of the product or service from the perspective of the respective market counterpart.⁸⁸ The territorially relevant market is defined by the Community institutions as the region in which the particular product or service is offered and in which competitive conditions are sufficiently homogenous.⁸⁹

2. Abuse of a dominant position on the market

Art. 82 EC prohibits the abuse of a dominant position on the market by one or several market-dominating undertakings. The decisive factor is whether conduct on the part of the undertaking remains within the admissible bounds of competition in efficiency or exceeds these.⁹⁰

The examples of abusive conduct listed in Art. 82 EC are chiefly restricted to different forms of exploiting trading partners (so-called exploitative abuse).⁹¹ Thus, for instance, it is prohibited to impose, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions (Art. 82 (a) EC) or to apply dissimilar conditions to equivalent transactions with other trading parties, placing these at a competitive disadvantage (Art. 82 (c) EC).

The very broad scope of protection set out under Art. 82 EC also covers individual interests of the consumer. In its consistent practice, the Court of Justice emphasizes that the prohibition of abuse is aimed “both at practices through which consumers are prejudiced directly and at conduct which places them at an indirect disadvantage by distorting a state of effective competition within the meaning of Article 3 (g) of the Treaty”.⁹² The listed examples of abuse also take account of the individual interests of consumers. Expressly prohibited, for instance, is the limiting of production, markets or technical development to the prejudice of consumers (Art. 82 sent. 2 (b) EC). Production and sales are placed on an equal footing with the rendering of services.⁹³

Art. 82 EC, however, also prohibits the abuse of a dominant market position to obstruct competitors (so-called obstructive abuse).⁹⁴ Such abusive conduct is seen if (domestic) suppliers or their associations set quality standards or take part in setting them, thereby placing other (notably foreign) suppliers at a disadvantage without convincing reasons. Such problems can be avoided if quality standards are laid down by neutral agencies which act independently of market participants.⁹⁵

The Court of Justice moreover sees an infringement of Art. 82 EC in cases where an undertaking attempts to extend the monopoly it enjoys on a particular market to other markets without objective justification.⁹⁶

If several undertakings abuse the dominant position they have established jointly by way of a cartel agreement, both Arts. 81 and 82 EC become applicable. The same applies if the

⁸⁷ Schröter H., quoted, Art. 86, margin no. 103.

⁸⁸ Jung, in E. Grabitz & M. Hilf, *Das Recht der Europäischen Union, vol.I: EUV/EGV (Amsterdam version)*, München, C.H. Beck, loose-leaf edn., Art. 82, margin no. 30.

⁸⁹ Jung, quoted, Art. 82, margin no. 42; Grill G., quoted, Art. 82, margin no. 7.

⁹⁰ Grill G., quoted, Art. 82, margin no. 22.

⁹¹ Jung, quoted, Art. 82, margin no. 2; Emmerich V., 1999, quoted, p.456.

⁹² Schröter H., quoted, Art. 86, margin no. 138.

⁹³ Schröter H., quoted, Art. 86, margin no. 159.

⁹⁴ Emmerich V., 1999, quoted, p.456.

⁹⁵ Hänlein, A. & Kruse, J., “Einflüsse des Europäischen Wettbewerbsrechts auf die Leistungserbringung in der gesetzlichen Krankenversicherung”, NZS 2000, p.165 (p.169); ECJ. (European Court of Justice), case C-202/88, *France v Commission*, ECR, 1991, I-1223, para. 51; case C-18/88, *GB-INNO-BM*, ECR, 1991, I-5941, para. 25.

⁹⁶ ECJ. (European Court of Justice), case C-18/88, *GB-INNO-BM*, ECR, 1991, I-5941, para. 24.

abuse takes the form of competition-restricting agreements between the dominant undertaking and its suppliers, customers or competitors.⁹⁷

3. Restraint of trade between Member States

In order for the abuse of a dominant market position to be deemed as such, it must also be liable to affect trade between Member States. The intra-Community clause embodied in Art. 82 EC is analogous to the provision set out in Art. 81 EC (see chapter 'Restraint of trade between Member States').

4. Exemptions from the prohibition of abuse

a. Lack of an autonomous scope of action

Art. 82 EC, too, applies only to anticompetitive modes of conduct which undertakings display on their own initiative.⁹⁸ It follows that they must have a scope of action for determining their competitive conduct (see chapter 'Lack of an autonomous scope of action'). This precondition is considered to be lacking if anticompetitive conduct is dictated to undertakings through national legal provisions or if the latter form a legal framework which rules out any possibility of competitive conduct on the part of undertakings.⁹⁹

b. Special circumstances

Any conduct of market-dominating undertakings not stipulated in the examples set out under Art. 82 EC, but covered by the general clause (e.g. the refusal to do business) is deemed abusive only if further definitional elements come to bear. These include lack of objective grounds of justification, infringement of the principle of proportionality, employment of unfair or non-performance-related means, as well as substantial obstruction of remaining competition.¹⁰⁰ In part, the different forms of discrimination prohibited under Art. 82 (c) EC are also recognized as a possible justifications.¹⁰¹

C. The responsibility of the State

Arts. 81 and 82 EC are addressed to undertakings. However, it is the consistent practice of the Court of Justice to infer from Arts. 10 (2) and 86 (1) in connection with Art. 3 (g) and Arts. 81 and 82 EC that Member States are required not to adopt or maintain in force any measures which could destroy the practical effectiveness (effet utile) of competition rules.¹⁰²

A Member State violates this requirement particularly if it requires or favours agreements which are incompatible with Art. 81 EC or reinforces their effects.¹⁰³ It follows that the prerequisite here is an agreement that contravenes the cartel prohibition, thereby constituting an autonomous business activity (see chapter 'Lack of an autonomous scope of action'). In the case of peremptory State measures which leave undertakings no freedom of decision or action, for example the official fixing of prices, the Court therefore does not consider the

⁹⁷ Schröter H., quoted, Art. 86, margin no. 37.

⁹⁸ ECJ. (European Court of Justice), case C-359/95 P and C-379/95 P, *Ladbroke Racing*, ECR, 1997, I-6265, para. 33.

⁹⁹ ECJ. (European Court of Justice) case C-359/95 P and C-379/95 P, *Ladbroke Racing*, ECR, 1997, I-6265, para. 33.

¹⁰⁰ Schröter H., quoted, Art. 86, margin no. 142.

¹⁰¹ Jung, quoted, Art. 82, margin nos. 130 f.

¹⁰² ECJ. (European Court of Justice), case C-66/86, *Ahmed Saeed*, ECR, 1989, 804, para. 48; case C-41/90, *Höfner and Elser*, ECR, 1991, I-1979, para. 26; case C-55/96, *Job Centre*, ECR, 1997, I-7119, para. 28; case C-320/91, *Corbeau*, ECR, 1993, I-2533, para. 11.

¹⁰³ ECJ. (European Court of Justice), case C-66/86, *Ahmed Saeed*, ECR, 1989, 804, para. 48; case 229/83, *Leclerc v Au Blé Vert*, ECR, 1985, 1, para. 14; case 231/83, *Cullet v Leclerc*, ECR, 1985, 305, para. 16.

State to have infringed Arts. 10 (2) and 86 (1) in connection with Art. 3 (g) and Art. 81 EC.¹⁰⁴ In the above-cited decisions concerning price fixing by statutory compulsory associations (see chapter 'Other exemptions recognized by the courts'), the Court rejected the responsibility of the State since a prohibited cartel agreement which was required, favoured or reinforced in its effects by the State did not exist. Notwithstanding the absence of a prohibited cartel agreement, the Court, however, did in these judgments examine whether the State deprived any of its own regulations of their State character by delegating to private undertakings the responsibility for decisions affecting the economic sphere.¹⁰⁵ It did not take this view in the Reiff and Delta Cases on the grounds that the competent public authorities ensured that the fixing of tariffs was geared to the general welfare and, if necessary, decided these on their own.¹⁰⁶ In the Centro Servizi Spediporto and the Librandi Cases, it based its decisions on the fact that the competent public authorities sought the opinions of other public and private institutions prior to their approval of proposals, or even fixed the tariffs *ex officio*.¹⁰⁷

In the case of the abuse of a dominant market position by public undertakings, the Court of Justice infers from Art. 86 (1) in connection with Art. 82 EC that Member States are not only prohibited from adopting measures that lead to an infringement of competition law by market-dominating undertakings,¹⁰⁸ they are also not allowed to take any measures that would, as business measures, violate Art. 82 EC.¹⁰⁹ It is thereby irrelevant whether or not the undertaking concerned was a party to the abuse through an autonomous business act.

D. Do health care associations form cartels?

In many health care systems, the competent institutions form associations entrusted with widely differing tasks. For example, they decide on the admission of benefit providers or make the pertinent arrangements with the providers' associations. In addition, many issue recommendations in the form of standard business conditions to their institutions. Hence the question arises as to how far the cartel prohibition is applicable to these institutions.

1. Decisions and recommendations by associations

To assess the applicability of the cartel prohibition to decisions and recommendations made by the associations of health care institutions, the author considers the decisive factor to be whether or not such associations, or their affiliated institutions, dispose of a scope of action that may be limited by self-determined economic acts. The absence of such a scope of action in the field of health care systems will primarily result from statutory measures. If statutory provisions go so far as to leave no scope for autonomous business action, the cartel prohibition will not come to bear due to a lack of the associations' own relevant conduct in terms of competition law. This will be the case, for example, if a national provision sets forth that an association is required to decide by way of resolution on the admission of benefit providers, thereby stipulating the admission criteria in a binding and conclusive

¹⁰⁴ ECJ. (European Court of Justice), case C-38/97, *Librandi*, ECR, 1998, I-5955, paras. 30 and 34; case C-185/91, *Reiff*, ECR, 1993, I-5801, paras. 15-19; case C-153/93, *Delta*, ECR, 1994, I-2517, paras. 15-18; case C-96/94, *Centro Servizi Spediporto*, ECR, 1995, I-2883, paras. 22-25; Schröter H., quoted, Art. 85, margin no. 121.

¹⁰⁵ ECJ. (European Court of Justice), case C-38/97, *Librandi*, ECR, 1998, I-5955, para. 26; case 267/86, *Van Eycke*, ECR, 1988, 4769, para. 16; case C-185/91, *Reiff*, ECR, 1993, I-5801, para. 14; case C-153/93, *Delta*, ECR, 1994, I-2517, para. 14; case C-96/94, *Centro Servizi Spediporto*, ECR, 1995, I-2883, para. 21.

¹⁰⁶ ECJ. (European Court of Justice), case C-185/91, *Reiff*, ECR, 1993, I-5801, paras. 21-23; case C-153/93, *Delta*, ECR, 1994, I-2517, paras. 20-22.

¹⁰⁷ ECJ. (European Court of Justice), case C-96/94, *Centro Servizi Spediporto*, ECR, 1995, I-2883, paras. 27-30; case C-38/97, *Librandi*, ECR, 1998, I-5955, paras. 31 and 35.

¹⁰⁸ ECJ. (European Court of Justice), case C-66/86, *Ahmed Saeed*, ECR, 1989, 804, para. 48; case C-41/90, *Höfner and Elser*, ECR, 1991, I-1979, para. 26; case C-55/96, *Job Centre*, ECR, 1997, I-7119, para. 28; case C-387/93, *Banchemo*, ECR, 1995, I-4663, para. 51; Schröter H., quoted, Art. 85, margin no. 120.

¹⁰⁹ Giesen, R., *Die Vorgaben des EG-Vertrages für das Internationale Sozialrecht*, Baden-Baden, Nomos, 1999, p.117 f.

manner, so that the association merely enforces the statutory regulations without having any scope to influence the selection decision. If, conversely, anticompetitive cooperation is merely acknowledged by State authorities, or even desired by them, or if it is merely facilitated, approved or reinforced in its effects through State influence, the cartel prohibition will be applicable.¹¹⁰ It follows that an association's decision concerning the prices of medical products and services will be attributed to that association even if these prices are subsequently sanctioned by sovereign measures and declared generally binding.¹¹¹

In the author's opinion, the cartel prohibition will not apply to decisions by health care associations, even where the law allows for a certain scope of action if that scope can only be utilized by the associations but not by the institutions themselves, or where the health care system is structured in such a way that the respective association and its institutions form an economic unit which deprives the institutions of the possibility of autonomous market conduct. In such cases, the institutions involved lack the economic autonomy needed to enter into a prohibited cartel agreement. Their cooperation is not deemed a 'decision by an association of undertakings'. Although the health care association with which they are affiliated, therefore, cannot be accused of contravening the cartel prohibition, the abuse of a dominant position on the market can be alleged against it if the prerequisites set out under Art. 82 EC are fulfilled (see chapter 'Abuse of a dominant position on the market'). Institutions will lack the autonomy needed for self-determined action if, for example, the health care system is structured in such a way that these institutions operate not as several but only as one demander on the health care market. If admission requirements, scope of benefits, quality and price are determined not at the level of the individual institutions, but jointly and uniformly, then a resolution adopted by an association on the admission of benefit providers or on the price of medical products and services does not constitute a decision by an association of undertakings within the meaning of Art. 81 (1) EC.¹¹²

Conversely, if the individual institutions, and not only the association, are afforded the possibility of making autonomous decisions, this will constitute a cartel, provided the pertinent decisions or recommendations are legally or factually binding on these institutions, or observed by them.

Finally, a resolution adopted by a health care association cannot be deemed a prohibited cartel agreement if the members of the institutions affiliated with that association and called upon to pass the resolution cannot be regarded as representatives of those institutions. This will be the case if, upon adoption of the resolution, not only the interests of the institutions, but also those of the general public and benefit recipients need to be taken into account, for example the interests of the rural population in the widespread provision of (specialist) medical care.¹¹³ The same will apply if the institutions' representatives participating in the resolution are independent of these institutions or if a majority in the decision-making body consists of representatives of public authorities.¹¹⁴

Thus there is still the question of the State's responsibility. Any national regulations which require health care associations to conclude prohibited agreements, favour such agreements or reinforce their effects are not compatible with Arts. 10 (2) and 86 (1) in conjunction with Arts. 3 (g) and 81 EC. If, however, the association concerned cannot be accused of

¹¹⁰ Stockenhuber P., quoted, Art. 81, margin no. 119.

¹¹¹ Cf. ECJ. (European Court of Justice), case 123/83, *BNIC v Clair*, ECR, 1985, 391, para. 23.

¹¹² Also see Schulz-Weidner W. & Felix F., *SozSi* 2001, p.447.

¹¹³ Cf. ECJ. (European Court of Justice), case C-153/93, *Delta*, ECR, 1994, I-2517, paras. 17 f.; case C-185/91, *Reiff*, ECR, 1993, I-5801, paras. 18 f.; case C-96/94, *Centro Servizi Spediporto*, ECR, 1995, I-2883, paras. 24 f.; case C-38/97, *Librandi*, ECR, 1998, I-5955, paras. 30 and 34; case C-35/96, *Commission v Italy*, ECR, 1998, I-3851, paras. 41-44.

¹¹⁴ Cf. ECJ. (European Court of Justice), case C-153/93, *Delta*, ECR, 1994, I-2517, paras. 16 and 18; case C-185/91, *Reiff*, ECR, 1993, I-5801, para. 17; case C-96/94, *Centro Servizi Spediporto*, ECR, 1995, I-2883, paras. 23 and 25.

concluding an agreement in violation of Art. 81 EC, the State, too, only infringes its obligations if it deprives one its own regulations of its State character by transferring to the association the responsibility for intervening in economic processes. Consequently, the State is not allowed to delegate sovereign powers of economic regulation to an association.¹¹⁵

2. Agreements between health care associations and benefit providers

Frequently, agreements and decisions are met between health care associations and benefit providers. Here, too, the associations are considered not to infringe Art. 81 (1) EC if the statutory provisions are so far-reaching as to allow no scope for autonomous business conduct (see chapter 'Decisions and recommendations by associations'). As regards State responsibility, the remarks given above likewise apply in this context.

To assess the nature of agreements between associations, it is irrelevant whether the particular health care association is considered an undertaking because it comprises an 'association of undertakings' or because its affiliated institutions form an economic unit. Associations which are parties to such an agreement must, however, dispose of a scope of action that may be limited by self-determined economic acts, and the agreement must be binding on their members or observed by them. In addition, it must be possible to regard the associations' members which are parties to that agreement as representatives of the health care institutions or as representatives of the respective professional group of benefit providers. This implies that they may not be subject to any statutory obligation that makes allowances for the interests of the public and undertakings of other sectors, or benefit recipients; moreover, they may not assume the function of independent experts (see chapter 'Other exemptions recognized by the courts').

E. Restrictions on the admission of panel doctors – abuse of a dominant market position?

If health care institutions operate as demanders of health care benefits, they – as demand monopolists – as a rule meet the criteria defining a joint dominant position on the market within the meaning of Art. 82 EC. The resultant question is whether an abuse of this dominant market position is given if not all physicians are admitted as panel doctors. If restricted admission is based on the decision of an association of health care institutions or on an agreement between said association and an association of benefit providers, this may constitute an infringement of the cartel prohibition (see chapter 'Agreements between health care associations and benefit providers').

In the restricted admission of panel doctors, F. Marhold¹¹⁶ sees both a prohibited limiting of supply to the prejudice of the insured, pursuant to Art. 82 sent. 2 (b) EC, and an exclusion of non-admitted physicians from the health care market, without this being the result of economic competition aimed at surpassing other competitors in terms of the quality and good value of one's own performance and at attracting away their customers. He holds that such exclusion from the health care market is much rather the result of precluding private suppliers from a comparison of performance. This is an accurate appraisal. Physicians are largely dependent in economic terms on health care institutions due to a lack of other potential markets – and thus to a lack of effective demand competition.¹¹⁷ As demand monopolists, health care institutions are obliged to conclude contracts with physicians. A failure to meet this obligation constitutes an infringement of the prohibition of abuse pursuant to Art. 82 sent. 1 EC, unless a factual justification exists.¹¹⁸ Accordingly, a system of

¹¹⁵ Schröter H., quoted, Art. 85, margin no. 123.

¹¹⁶ 1999, quoted, p.50 f.; Marhold F., 1995, quoted, p.457 f.; fundamentally in agreement: Köck St., quoted, p.50.

¹¹⁷ Schröter H., quoted, Art. 86, margin no. 61.

¹¹⁸ See Jung, quoted, Art. 82, margin no. 156; Schröter H., quoted, Art. 86, margin nos. 204 ff.; Grill G., quoted, Art. 82, margin no. 36.

restricted admission of panel doctors will be inadmissible in cases where the procedure for the selection of physicians and the formulation of the terms of contract is arbitrary or abusive. As H.-D. Steinmeyer¹¹⁹ rightly remarks: the greater the market power, the stricter the requirements. Grounds of justification for a refusal of contract can be seen both in subjective criteria relating to the physician, such as capability or reliability, and in market circumstances.¹²⁰

The restricted admission of panel doctors also has adverse effects on patients as consumers, since it leads to a shortage of the supply of services rendered by panel doctors at the cost of health care institutions. In particular, these institutions violate Art. 82 sent. 2 (b) EC if the limited number of admitted doctors is obviously unable to satisfy the demand for medical services and if recourse to non-admitted physicians causes financial disadvantages to patients.¹²¹ Whether a refusal of business can in fact be construed as a 'limiting [of own] markets' pursuant to Art. 82 sent. 2 (b) EC or merely constitutes an infringement of the general clause stipulated in Art. 82 sent. 1 EC, is nevertheless contested in the different schools of thought.¹²²

A limiting of markets to the prejudice of consumers pursuant to Art. 82 sent. 2 (b) EC can, however, also result from the budgeting of pharmaceuticals, dressing material and medicines, for example, since the consequent pressure exerted on panel doctors' fees if they exceed their budgets is passed on by them to the patients. Budgeting, moreover, leads to rationing. If such steps are taken to the detriment of medical progress, the definitional element of limiting technical development to the prejudice of consumers (Art. 82 sent. 2 (b) EC) may likewise be fulfilled.

III. EXEMPTION FROM COMPETITION LAW IN RESPECT OF SERVICES OF GENERAL ECONOMIC INTEREST PURSUANT TO ART. 86 (2) EC

Art. 86 (2) EC provides an exemption from the scope of application of the EC Treaty for undertakings entrusted with the operation of services of general economic interest. The Treaty provisions, in particular the rules governing competition, apply to them only in so far as the application of these regulations does not obstruct the performance, in law or in fact, of the particular task assigned to them. The development of trade may not, however, be affected to such an extent as would be contrary to the interests of the Community.

A. Entrusting health care institutions with services of general economic interest

The first prerequisite for a sectoral exemption pursuant to Art. 86 (2) EC is that the undertaking in question is entrusted by the State with services of general economic interest. The criteria for determining 'general interest' are to be defined in accordance with Community law,¹²³ with protection of health and social protection considered important Community interests in this context.¹²⁴ The activities pursued by health care institutions are very closely related to the public welfare. If, in addition, these institutions also become active in economic terms, their activity can be said to consist in providing services of general 'economic' interest.

¹¹⁹ "Kassen sind kein Kartell", GuG 2000, p.44 (p.48).

¹²⁰ Schröter H., quoted, Art. 86, margin no. 209.

¹²¹ Cf. ECJ. (European Court of Justice), case C-41/90, *Höfner and Elser*, ECR, 1991, I-1979, paras. 30 f.

¹²² Schröter H., quoted, Art. 86, margin no. 168; Jung, quoted, Art. 82, margin no. 252.

¹²³ ECJ. (European Court of Justice), case 41/83, *Italy v Commission*, ECR, 1985, 873, para. 30; Schulz-Weidner W. & Felix F., SozSi 1997, p.1125 with further substantiation; Steinmeyer, H.-D., *Wettbewerbsrecht im Gesundheitswesen. Kartellrechtliche Beschränkungen in der gesetzlichen Krankenversicherung*, Berlin, Erich Schmidt, 2000, p.59.

¹²⁴ Notice from the Commission, *Services of General Interest in Europe*, (COM (96) 443, final version) OJ 1996 C-281/3, 26 Sept. 1996, paras. 69 and 73; Schulz-Weidner W. & Felix F., SozSi 1997, p.1125.

The term 'services of general economic interest' is found not only in Art. 86 (2) EC, but also in the newly established Art. 16 EC and in Art. 36 of the Fundamental Rights Charter. These provisions clearly show that services of general economic interest occupy a special position within the framework of the European Union.

B. Obstructing health care institutions from performing the particular task assigned to them

In order to meet this precondition, the application of competition rules must obstruct the performance, in law or in fact, of the particular task assigned to health care institutions.

Since Art. 86 (2) EC constitutes a regulation which limits the application of EC Treaty provisions to undertakings, this provision must be construed restrictively.¹²⁵ Accordingly, it does not suffice if, say, the task assigned to a social insurance institution is merely hampered or impeded by its observance of competition law.¹²⁶ This task must be 'obstructed', with strict demands placed on the precondition of 'obstruction'.¹²⁷ In the Cases *Sacchi*¹²⁸ as well as *Höfner and Elser*¹²⁹, the Court of Justice sets forth that the application of the provisions must be shown to be incompatible with the performance of the particular task. In the Cases *Albany*¹³⁰, *Brentjens*¹³¹ and *Bokken*¹³², the Court holds that it is not necessary, in order for the exceptional provision set out under Art. 86 (2) EC to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. Rather, it suffices that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks assigned to it or that maintenance of those rights is necessary for the performance of said tasks under economically acceptable conditions. In the author's view, the gearing of argumentation to a mere 'endangering' of task performance, as in the German translation of the *Commission v France Case*¹³³, should not be overestimated, given that the English and French judgment versions also use the terms 'not be possible' and 'faire échec à'.¹³⁴

The particular task assigned to health care institutions, as a rule, embraces the provision of widespread, high-quality and simultaneously low-cost, equal medical care to all persons eligible for benefits, with different measures of emphasis placed on the social criteria governing eligibility. An examination of whether a health care institution can only perform this particular task if it contravenes European competition rules cannot be conducted in general for all the institution's activities, but must be carried out separately for each individual activity. Such an examination must seek to take account of the specific situation of health care institutions and the special features of the health care market.

1. The specific situation of health care institutions

The specific situation of health care institutions results from their inherent social elements. If these social elements are so strongly pronounced that they divest the institutions' activities of their economic character, the status as an undertaking will already be lacking – as will a

¹²⁵ Hochbaum I.F., quoted, Art. 90, margin nos. 49 and 62 f.; Grill G., quoted, Art. 86, margin no. 27; see also Schulz-Weidner W. & Felix F., *SozSi* 1997, p.1125.

¹²⁶ Schulz-Weidner W. & Felix F., *SozSi* 1997, p.1125; Grill G., quoted, Art. 86, margin no. 27; Gassner, U.M., "Nationaler Gesundheitsmarkt und europäisches Kartellrecht", *VSSR* 2000, p.121 (p.141).

¹²⁷ Hochbaum I.F., quoted, Art. 90, margin no. 63.

¹²⁸ ECJ. (European Court of Justice), case 155/73, *Sacchi*, *ECR*, 1974, 409, para. 15.

¹²⁹ ECJ. (European Court of Justice), case C-41/90, *Höfner and Elser*, *ECR*, 1991, I-1979, para. 24.

¹³⁰ ECJ. (European Court of Justice), case C-67/96, *Albany*, *ECR*, 1999, I-5751, para. 107.

¹³¹ ECJ. (European Court of Justice), case C-115/97 to C-117/97, *Brentjens*, *ECR*, 1999, I-6025, para. 107.

¹³² ECJ. (European Court of Justice), case C-219/97, *Bokken*, *ECR*, 1999, I-6121, para. 97.

¹³³ ECJ. (European Court of Justice), case 159/94, *Commission v France*, *ECR*, 1997, I-5815, para. 59; case C-157/94, *Commission v Netherlands*, *ECR*, 1997, I-5699, para. 43.

¹³⁴ Gassner U.M., *VSSR* 2000, p.141.

precondition for the applicability of competition law (see chapter 'Social activity'). Yet also those activities not classed as 'social' are as a rule not completely free of social elements. These elements can diminish health care institutions' ability to compete with private undertakings. In its decisions concerning supplementary pension schemes (see chapter 'Case-law'), the Court of Justice recognized that such constraints could be taken to justify the exclusive right of these funds to manage the supplementary schemes.¹³⁵

Social elements have a formative influence on the activity of health care institutions as suppliers of insurance or health care benefits. As a rule, the impact of these elements on the institutions' demand conduct vis-à-vis benefit providers is not so strong as to divest benefit procurement activities of their economic character (see chapter 'The demand for health care benefits'), nor to justify an exemption pursuant to Art. 86 (2) EC. Demand conduct, however, can indeed be significantly influenced if an absolute obligation to provide benefits in kind is imposed on health care institutions. Such an obligation makes their demand conduct less competitive compared to private health insurance undertakings, since their relationship to benefit providers leaves them less scope for negotiations. In financial terms, their margin for negotiations is frequently restricted by the precept of safeguarding contribution stability.

2. The special features of the health care market

Owing to the special circumstances prevailing in the health care sector, the health care market does not fit the ideal image of pure competition. In merchandise markets which function under competitive conditions, the demander usually bears the financial consequences of his decision based on need. This differs in the case of the health care market: depending on how national health care systems are organized, the insured as demanders of health care benefits bear none, or only a certain portion, of the cost of benefits they receive. In addition: the insured patient is not a classic demander. As a rule, he/she decides only on the first step of consulting a physician and subsequently 'consumes' a benefit which is essentially prescribed by the doctor and ultimately funded by the health care institution. E. Wille¹³⁶ therefore rightly speaks of a 'splitting of functions', since – other than in the case of most products purchased on the market – not one and the same person acts as demander, spending unit and consumer.

As the cost is borne by the health care system, patients may demand numerous medical benefits, while physicians will use their information advantage to maximize profit and, through their advisory function, will seek to create additional demand, which may occasionally even be harmful to health.¹³⁷ Health care systems counter this so-called 'patient-doctor moral hazard' primarily by means of admission restrictions, fixed prices and limits on benefit provision.¹³⁸ The aim is to avoid an increase in the quantity of benefits and the concomitant rise in expenditure, both of which pose a threat to health systems' financial efficiency.

The Court of Justice repeatedly has recognized the financial balance of social security schemes as a ground for exemption from internal market regulations. Thus, for example, in the Duphar Case¹³⁹ it held that Community law did not affect the power of Member States to adopt measures to regulate drug consumption in order to maintain the financial balance of their health insurance schemes. In the Cases Kohll¹⁴⁰, Decker¹⁴¹, Smits and Peerbooms¹⁴² as

¹³⁵ ECJ. (European Court of Justice), case C-67/96, *Albany*, ECR, 1999, I-5751, paras. 109 f.; case C-115/97, *Brentjens*, ECR, 1999, I-6025, paras. 109 f.; case C-219/97, *Bokken*, ECR, 1999, I-6121, paras. 99 f.

¹³⁶ In E. Wille, *Zur Rolle des Wettbewerbs in der gesetzlichen Krankenversicherung*, Baden-Baden, Nomos, 1999, p.95 (p.106).

¹³⁷ Kletter, M., "Kostenerstattung und Sachleistungsvorsorge", *SozSi* 1994, p.27 (p.28).

¹³⁸ Kletter M., *SozSi* 1994, p.28; Kletter, M., "Das VfGH-Erkenntnis zur Kostenerstattung", *SozSi* 2000, p.704 (p.707 f.).

¹³⁹ ECJ. (European Court of Justice), case 238/82, *Duphar*, ECR, 1984, 523, para. 16.

¹⁴⁰ ECJ. (European Court of Justice), case C-158/96, *Kohll*, ECR, 1998, I-1931, para. 41.

well as Vanbraekel¹⁴³, the Court acknowledged the considerable threat to the financial balance of social security schemes as a compelling reason of general interest that could justify a restriction of the free movement of goods and services. Finally, in the Cases Albany¹⁴⁴, Brentjens¹⁴⁵ and Bokken¹⁴⁶, it considered the exceptional provision of Art. 86 (2) EC to be already fulfilled if a maintenance of the rights at issue was necessary to enable their holder to perform its tasks of general economic interest under economically acceptable conditions.

Yet the threat to the financial balance of health care schemes is not the only criterion that could obstruct the performance of the particular task; another important factor is the protection of health.

Arguments to the effect that health care institutions can only perform the particular task assigned to them if they take recourse, say, to anticompetitive price fixing and/or restrictions of admission presuppose, however, that the means employed to this end are appropriate and do justice to the principle of proportionality. Limiting the applicability of Treaty provisions may not go beyond that which is necessary for the performance of the task.¹⁴⁷ The burden of proof is imposed on Member States only in respect of the obstruction of performance of the particular task within the meaning of Art. 86 (2) EC.¹⁴⁸ Evidence of the fact that there is no other possibility to ensure task performance must not be furnished by them. In proceedings under Art. 226 EC for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled.¹⁴⁹

Consequently, as long as, and to the extent that, a performance of tasks is possible without infringing the EC Treaty, health care institutions will be bound by the Treaty. Indeed, even an amendment to the law at national level has to be considered if in this way task performance can be ensured without breach of the Treaty.¹⁵⁰ Moreover, if a health care institution is not at all able, or willing, to perform in a satisfactory manner the task assigned to it, there will be no scope for the application of Art. 86 (2) EC.¹⁵¹ It follows that a Member State will not be successful in invoking Art. 86 (2) EC to justify its system of restricted admission of panel doctors if health care institutions are obviously not in a position to meet beneficiaries' demand for medical services – be it that the medical care provided by panel doctors does not ensure blanket coverage or that quality is wanting. This simultaneously makes clear that the assessment, within the scope of Art. 86 (2) EC, of State measures taken on the health care market must consider not only cost effects, but also include qualitative aspects of health care, access to health care benefits and so forth. Of significance in this connection could be the existence of waiting lists, for example.

An exemption from the application of Art. 81 EC moreover demands that the possible exceptions set out under Art 81 (3) EC have been exhausted.¹⁵²

¹⁴¹ ECJ. (European Court of Justice), case C-120/93, *Decker*, ECR, 1998, I-1831, para. 39.

¹⁴² ECJ. (European Court of Justice), case C-157/99, *Smits and Peerbooms*, para 72.

¹⁴³ ECJ. (European Court of Justice), case C-368/98, *Vanbraekel*, para 47.

¹⁴⁴ ECJ. (European Court of Justice), case C-67/96, *Albany*, ECR, 1999, I-5751, para. 107.

¹⁴⁵ ECJ. (European Court of Justice), case C-115/97 to C-117/97, *Brentjens*, ECR, 1999, I-6025, para. 107.

¹⁴⁶ ECJ. (European Court of Justice), case C-219/97, *Bokken*, ECR, 1999, I-6121, para. 97.

¹⁴⁷ Commission Decision, *BNIA*, OJ 1976 L 231/24.

¹⁴⁸ ECJ. (European Court of Justice), case C-159/94, *Commission v France*, ECR, 1997, I-5815, para. 101.

¹⁴⁹ ECJ. (European Court of Justice), case C-159/94, *Commission v France*, ECR, 1997, I-5815, para. 102.

¹⁵⁰ Emmerich V., in M.A. Dausen, quoted, margin no. 160 with reference to ECJ. (European Court of Justice), case 155/73, *Sacchi*, ECR, 1974, 409 (431); case C-258/78, *Nungesser*, ECR, 1982, 2015 (2056 f.); case C-311/84, *Télemarketing*, ECR, 1985, 3261 (3275).

¹⁵¹ Cf. ECJ. (European Court of Justice), case C-41/90, *Höfner and Elser*, ECR, 1991, I-1979, paras. 25 ff.

¹⁵² Emmerich V., in M.A. Dausen, quoted, margin no. 161; Müller-Graff P.-Ch. & Zehetner F., quoted, p.154.

C. Taking account of the development of trade

Finally, as a last prerequisite, Art. 86 (2) EC demands that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.¹⁵³

An impairment of the development of trade is prohibited only if it reaches a scale that runs counter to the interests of the Community. This leads to a balancing of the national interests of the given Member State in performing the particular task through a service institution, on the one hand, and the interests of the European Union, on the other.¹⁵⁴ The interests of the Union are inferred from the objectives and principles of the Treaty, in particular Arts. 2, 3, 12, 14, 25, 28, 43, 49, 81 and 82 EC.¹⁵⁵

The interest in the performance of the particular task assigned to health care institutions is counterbalanced by weighty interests on the part of the Community. Thus, for example, restrictions on the admission of panel doctors are called into question not only by competition law, but also by the freedom of establishment and the freedom to provide services.¹⁵⁶ It must therefore be examined carefully whether the restricted admission of benefit providers is compatible with the fundamental freedoms. In the process, clarification is also needed as to whether the conditions for filling panel doctors' posts also allow applicants from other EU Member States to gain access to the provision of panel doctor medical care.¹⁵⁷ A conflict of interests will moreover arise, for example, if the possibility of concluding contracts with benefit providers is subject to territorial limits. This can imply both a restriction of the passive freedom to receive services on the part of the insured and a direct restriction of the active freedom to supply services on the part of benefit providers resident in another EU Member State, as well as a bar on imports of medical products.

Should a system of restricted admission of benefit providers or a price fixing scheme prove to violate one of the fundamental freedoms, a weighing up of interests will produce a result in favour of Community interests.¹⁵⁸ This would mean that, in so far, an exemption from the scope of application of competition rules does not exist.

¹⁵³ In part, the view is taken that the barrier established in Art. 86 (2) sent. 2 EC should not be observed as long as the Commission has not provided a more precise definition of this provision through secondary legislation. See Ehrlicke, U., "Zur Konzeption von Art 37 I und Art 90 II EGV", *EuZW* 1998, p.741 (p.746 f.).

¹⁵⁴ Hochbaum I.F., quoted, Art. 90, margin no. 66; Emmerich V., in M.A. Dauses, quoted, margin no. 166.

¹⁵⁵ Emmerich V., in M.A. Dauses, quoted, margin no. 166; Müller-Graff P.-Ch. & Zehetner F., quoted, p.152 f.

¹⁵⁶ Regarding the staffing and fee cartel of the Austrian panel doctor scheme, see Pitschas, R., "Heilberufe im Europäischen Gesundheitsrecht. Der Einfluß des Gemeinschaftsrechts auf die Ausübung von Heilberufen in Österreich", in T. Tomandl, *Sozialrechtliche Probleme bei der Ausübung von Heilberufen*, Wien, Braumüller, 1996, p.1 (p.25 f.); Kopetzki, Ch., "Rechtsfragen der vertragsärztlichen Stellenplanung in Österreich", in P. Jabornegg & R. Resch & O. Seewald, *Der Vertragsarzt im Spannungsfeld zwischen gesundheitspolitischer Steuerung and Freiheit der Berufsausübung*, Wien, Manz, 1999, p.31 (p.57 f.).

¹⁵⁷ Pitschas R., quoted, p.26.

¹⁵⁸ Hochbaum I.F., quoted, Art. 90, margin nos. 68 ff.; Emmerich V., in M.A. Dauses, quoted, margin no. 166.