



**THE EUROPEAN COURT OF JUSTICE
RECOGNITION OF CROSS-BORDER WELFARE
RIGHTS THROUGH THE RESHAPING OF MEMBER
STATES' WELFARE POLICIES**

**O RECONHECIMENTO DE DIREITOS SOCIAIS
TRANSNACIONAIS PELO TRIBUNAL DE JUSTIÇA
ATRAVÉS DA REFORMULAÇÃO DAS POLÍTICAS DE
BEM-ESTAR DOS ESTADOS-MEMBROS**

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THE EUROPEAN COURT OF JUSTICE RECOGNITION OF CROSS-BORDER WELFARE RIGHTS THROUGH THE RESHAPING OF MEMBER STATES' WELFARE POLICIES

O RECONHECIMENTO DE DIREITOS SOCIAIS TRANSNACIONAIS PELO TRIBUNAL DE JUSTIÇA ATRAVÉS DA REFORMULAÇÃO DAS POLÍTICAS DE BEM-ESTAR DOS ESTADOS-MEMBROS

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Abstract: This article intends to shed light on the nature of the cross-border welfare rights that are recognized by the European Court of Justice in its free movement cases. To this end, it first sets forth the specific context characterizing the European Union. It then assesses to what extent the Court's case law has the effect of reshaping Member States' welfare policies. It finally identifies the key-features of European Union cross-border rights. It claims, as a result, that such rights (i) have a far-reaching scope, since they cover matters over which the European Union (henceforth EU) has no, or very limited, jurisdiction; (ii) have a limited substance, since, despite their cross-border dimension, they remain first and foremost national.

Resumo: Este artigo pretende esclarecer a natureza dos direitos sociais transnacionais que são reconhecidos pelo Tribunal de Justiça Europeu, em casos sobre livre circulação. Para este efeito, em primeiro lugar, é estabelecido o contexto específico que caracteriza a União Europeia. Em seguida, avalia-se até que ponto a jurisprudência do Tribunal leva à reformulação das políticas de bem-estar dos Estados-Membros. Finalmente, identificam-se as características-chave dos direitos transnacionais da União Europeia. Em consequência, no presente artigo alega-se que tais direitos (i) têm um âmbito alargado, uma vez que cobrem assuntos sobre os quais a União Europeia (doravante, UE) não tem (ou tem, mas de forma muito limitada) jurisdição; (ii) têm um conteúdo limitado, uma vez que, apesar da sua dimensão transfronteiriça, eles continuam a ser, antes de mais, direitos de cariz nacional.

Keywords: EU free movement law – European Court of Justice – Jurisdiction – National welfare policies – Welfare rights

Palavras-chave: Liberdade de circulação na UE - Tribunal de Justiça - Competência - Políticas nacionais de bem-estar - Direitos sociais

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1. Introduction

The European Union quickly extended beyond the strict economic sphere it was originally confined to. The expansion has taken place along two main lines, described, in European Union law jargon, as negative integration – through the enforcement of the free movement principle (comprising the free movement of goods, persons, capital, and the freedom to provide services) by the European Court of Justice – and positive integration – through the adoption of acts of secondary legislation and the gradual building of a European Union social policy. This paper focuses on the first trend, and, more specifically, on cross-border welfare rights recently recognized by the European Court of Justice in the fields of education and social security through the interpretation of the four economic freedoms as well as European Union citizenship provisions. Initially reserved to economically active people, such as European Union workers and their families, cross-border education- and social security-related rights now even concern European Union citizens who are not necessarily economically active, such as patients,² civil war victims,³ and students⁴ who move across the borders of the European Union.⁵ The purpose of this paper is to identify the peculiar nature of these newly recognized rights.

This paper is divided into three main points. To begin with, it draws a brief picture of the specific context characterizing the European Union, in order to identify the issues raised by the recognition of cross-border welfare rights. It then focuses on the approach developed by the European Court of Justice when recognizing welfare rights, and shows that it amounts to reshaping Member States' welfare policies through a mutual adjustment resolution. It finally culminates with an assessment of the peculiar nature of European Union welfare rights.

2. The Specific Context Characterizing The European Union

Regardless of what type of welfare model a State has opted for,⁶ welfare rights share common specific features that distinguish them from other social rights. As M. DOUGAN accurately points out:

“[T]hey are fundamentally about the redistribution of income between social groups, and imply a claim on resources and legitimization of the redistributive

2. E.g. Decision of the Court of Justice of the European Union, 16.05.2006, *ECR* I-4325, Case C-372/04, *Watts*,

3. E.g. Decision of the Court of Justice of the European Union, 22.05.2008, *ECR* I-3993, Case C-499/06, *Nerkowska*.

4. E.g. Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*.

5. ALINA TRYFONIDOU, Further steps on the road to convergence among the market freedoms, *European Law Review*, 35, 2010, p. 40.

6. FRANÇOIS XAVIER MERRIEN, *L'État providence*, 1st ed., Paris, PUF, 1997, p. 7; GØSTA ESPING-ANDERSEN, *The Three Worlds of Welfare Capitalism*, Cambridge, UK: Polity Press, 1990, pp. 26-28.

role of the state. Questions about entitlement to welfare engage not only the individual's personal expectation of social support, but also the relevant society's choices about the allocation of its available resources, which in turn reflect collective moral judgments concerning the nature of its social solidarity: what risks to protect against, what levels of support to offer, and which individuals fall within the catchment area of collective responsibility.⁷

Thus, the existence and the exercise of welfare rights depend upon tremendous financial investments from the state providing them.⁸ For instance, education represents no less than 5% of EU Member States' GDP.⁹ Furthermore, not only do welfare rights consist in granting benefits to individuals, but they also reflect the peculiar relationship that binds a state and a community of individuals together. That being said, the context of the European Union is characterized by the quasi-inexistence of European Union jurisdiction over welfare. Member States in principle retain jurisdiction over this matter.

a. Non-existent or limited character of EU jurisdiction over welfare

The European Union is fundamentally dependent on Member States to develop and implement welfare policies. In this respect, F. DE WITTE rightly notes that "the Union currently lacks the public sphere and a system of representative democracy strong enough to support a contractarian model of justice."¹⁰ The European Union moreover lacks the necessary budget to pursue redistributive policies. Therefore, the European Union own social purposes may only be carried out through its Member States.¹¹

EU action is not completely excluded in the fields relating to higher education and health care, but it is merely complementary in nature.¹² The Treaty on the Functioning of the European Union (hereafter "TFEU") expressly excludes

7. MICHAEL DOUGAN, Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship, in *The European Court of Justice and the Autonomy of the Member States*, HANS MICKLITZ & BRUNO DE WITTE (Eds.), Cambridge, Intersentia, 2012, pp. 128-129.

8. See, generally, STEPHEN HOLMES & CASS R. SUSTEIN, *The cost of rights. Why liberty depends on taxes*, New York, London, W. W. Norton & Company, 2000.

9. EURYDICE, EUROSTAT, *Key Data on Education in Europe 2012*, available from http://eacea.ec.europa.eu/education/eurydice/documents/key_data_series/134EN.pdf, 87.

10. FLORIAN DE WITTE, The role of transnational solidarity in mediating conflicts of justice in Europe *European Law Journal*, 18, 2012, p. 697. See also MICHAEL DOUGAN, The Spatial Restructuring of National Welfare States within the European Union: The Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon, in *Integrating Welfare Functions into EU Law. From Rome to Lisbon*, ULLA NEERGAARD *et al.* (Eds.), DJØF Publishing, 2009, pp. 152-153, who refers to a "constitutional asymmetry."

11. LOIC AZOULAI, The European Court of Justice and the duty to respect sensitive national interests, in *Judicial activism at the European Court of Justice: causes, responses and solutions*, MARK DAWSON, BRUNO DE WITTE & ELISE MUIR (Eds.), Cheltenham : Edward Elgar, 2013, p. 184.

12. On the notion of complementary powers, see, generally, ROBERT SCHÜTZE, Cooperative federalism constitutionalized: the emergence of complementary competences in the EC legal order, *European Law Review* 31(2), 2006, pp. 167-184.

harmonization,¹³ and it moreover contains provisions precluding the Union from taking actions that could affect the core of national educational and health care policies. In addition, it stresses that the responsibility to pursue education and health policies remains within the hands of Member States.¹⁴ However, the relevant provisions have not totally precluded the European legislator from adopting certain acts of secondary legislation, which incidentally pertain to these areas. Thus, Articles 7(3) and 12 of Regulation 1612/68 on freedom of movement for workers within the Community respectively concern the right of Community workers to have access to vocational training and the right of Community's workers' children "to be admitted to [the State of residence] general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State." Numerous directives for the mutual recognition of diplomas were moreover adopted on the basis on what is now Article 54 TFEU. In the field of health care, Regulations 883/2004 and 987/2009, which replaced Regulations 1408/71 and 574/72, pertain to the coordination – but not the harmonization¹⁵ – of social security systems.

The Treaty does not provide express exclusions of European Union action with respect to the compensation of civil war victims. It is simply silent on this issue, which means, in accordance with the conferral principle, that the European Union does not hold jurisdiction over this field. Regulation 883/2004 on the coordination of social security systems moreover expressly excludes matters relating to the compensation of war victims from its material scope of application.¹⁶

b. Member States general jurisdiction over welfare

Member States' welfare powers encompass national policies built upon the same basic principle: the principle of closure. From a legal perspective, this means that the territorial and personal scopes of these policies are strictly circumscribed. The preservation of their internal coherence, and, therefore of their existence, is consubstantial with Member States' capacity to impose inclusion and exclusion rules or, to put it differently, to erect territorial and membership *boundaries*.

Inclusion and exclusion rules are crucial for the preservation of the internal coherence of welfare policies, and hence for the existence of welfare rights. Two main reasons may be put forward. First, the existence of boundaries is essential for the financial sustainability of these policies. Their functioning moreover requires capacity planning. Consequently, it is practically impossible to offer wider access to national welfare policies without imposing extra-financial burdens on the Member States and ultimately on the members of their respective

13. See Articles 165§4 (general education), 166§4 (vocational training), and 168§5 (public health).

14. See Articles 165§1 (general education), 166§1 (vocational training), and 168§7 (public health).

15. ROB CORNELISSEN, The principle of territoriality and the Community Regulations on social security (Regulations 1408/71 and 574/72), *Common Market Law Rev.* 33, 1996, pp. 443-444.

16. Article 3§5 of Regulation 883/2004: "This Regulation shall not apply to social and medical assistance or to benefit schemes for victims of war or its consequences."

communities. Second, welfare policies are institutionalized forms of solidarity, “serving both efficiency and social justice objectives.”¹⁷ They are indeed primarily based on redistribution mechanisms and provide welfare recipients with services well below their actual costs. In Europe, solidarity operates within closed communities and, as M. FERRERA points out, “[t]he establishment of redistributive arrangements played a crucial role in stabilizing the new form of political organization (the nation state) that gradually emerged in modern Europe.”¹⁸ Consequently, the redrawing of welfare boundaries may have the effect of altering the bonds that exist between a state and its community. It may also allow the entry into redistributive schemes of free riders who are not linked in any way with the state providing welfare benefits, and on top of that, who do not financially contribute to these schemes. Therefore, inclusion and exclusion rules are legal expressions of the principle of solidarity that bonds a state to its population.

c. Issues raised by the constraints put by EU law on national welfare powers

Accordingly, the recognition of welfare rights in the context of the European Union raises three significant issues. First of all, the main tension facing the European Court of Justice in cases recognizing welfare rights pertains to the requirements of the European Union free movement principle: removing boundaries by giving access of public benefits to nonresidents, and those of welfare policies: for such policies to be sustainable, there must necessarily exist boundaries, which may take the form of residence or nationality requirements. Second of all, notwithstanding the active part played by the European Court of Justice in the recognition of cross-border welfare rights, or even the implementation of a European Union social policy, the role of Member States remains essential in the provision of welfare. Since the European Union is deprived of any substantial budget, it cannot supplement Member States in the provision of welfare, and is therefore inherently dependent upon their capacity to pursue redistributive policies. Last but not least, opening national welfare policies to nonresidents implies granting rights to people who neither participate in the national democratic process nor contribute through taxes.

3. A Mutual Adjustment Resolution

In what follows, I focus on the issue as to how, in practice, the European Court of Justice settles jurisdictional disputes involving national welfare policies and the European Union free movement principle. My main point is that this settlement can be best described as a ‘mutual adjustment resolution.’ This concept aims to reflect the two fundamental components of the Court of Justice approach.

17. MAURIZIO FERRERA, *The boundaries of welfare: European integration and the new spatial politics of social protection*, Oxford: Oxford University Press, 2005, p. 45.

18. Ibid. See also JOST HALFMANN, *Welfare State and Territory*, in *Immigration and Welfare: Challenging the Borders of the Welfare State*, MICHAEL BOMMES & ANDREW GEDDES (Eds.), London: Routledge, 2000.

On the one hand, the Court softens its traditional approach in several respects. But, on the other hand, it compels Member States to comply with European Union law by imposing constraining and peculiar obligations, that I designate as ‘adjustment requirements.’

Cases involving welfare issues, just like any other free movement ruling, are divided into three main steps: applicability, restriction and justification. First, the Court of Justice decides on the applicability of European Union law by verifying whether the dispute falls within the scope of one of the freedoms. Second, it appraises the possible restrictive character of the national measure and, in case a restriction is established, it thirdly assesses whether the grounds of justifications put forward by the Member States are legitimate. If so, the Court concludes its reasoning by the assessment of proportionality. Cases involving welfare issues revolve, to a substantial extent, around the recognition of individual rights. The Court has gradually granted students and social security recipients specific rights pertaining respectively to higher education, cross-border health care, and the compensation of civil war victims. A close reading of these rulings also reveals that the notion of power plays a crucial role in the Court’s reasoning, especially at the applicability and the justification stages. The Court of Justice almost systematically uses formulae at the applicability stage, according to which even if the field at issue remains within Member States’ jurisdiction, they must nonetheless exercise it in compliance with European Union law.¹⁹ As for the assessment of proportionality, it is centered on the idea of *adjustment*, as expressly stated, for instance, in the field of social security:

“[T]he achievement of the fundamental freedoms guaranteed by the EC Treaty inevitably requires Member States to make some *adjustments* to their systems of social security.”²⁰

19. The Court indeed states, in the field of education: “Whilst Community law does not detract from the power of the Member States as regards, first, the content of education and the organization of education systems and their cultural and linguistic diversity (Article 149(1) EC) and, secondly, the content and organization of vocational training (Article 150(1) EC), the fact remains that, when exercising that power, Member States must comply with Community law, in particular the provisions on the freedom to provide services.” (Decision of the Court of Justice of the European Union, 11.09.2007, *ECR* I-6849, Case C-76/05, *Schwarz*, 70); social security: “Community law does not detract from the power of the Member States to organize their social security systems. In the absence of harmonization at Community level, it is therefore for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits. Nevertheless, the Member States must comply with Community law when exercising that power.” (Decision of the Court of Justice of the European Union, 12.07.2001, *ECR* I-5473, Case C-157/99, *Geraets-Smits & Peerbooms*, 44-46); and with respect to the compensation of civil war victims: “In that regard, it is important to bear in mind that, as Community law now stands, a benefit such as that in issue in the main proceedings, which is intended to compensate civilian war victims for physical or mental damage which they have suffered, falls within the competence of the Member States. However, Member States must exercise that competence in accordance with Community law, in particular with the Treaty provisions giving every citizen of the Union the right to move and reside freely within the territory of the Member States.” (Decision of the Court of Justice of the European Union, 26.10.2006, *ECR* I-10451, Case C-192/05, *Tas-Hagen*, 21-22).

20. Decision of the Court of Justice of the European Union, 27.01.2011, *ECR* I-247, Case C-490/09, *Commission v. Luxembourg*, 45 (Emphasis added). See also Decision of the Court of

Therefore, the Court adopts a structural- and constitutional-oriented approach when cases involve welfare issues. It is specifically concerned with the relationship between national and European spheres of powers, and with the implications of the recognition of cross-border welfare rights for national welfare policies.

a. The ECJ self-imposed adjustments

In cases involving the aforementioned national welfare policies, the European Court of Justice has accepted the following grounds of justification:

Table 1. Acceptable grounds of justification.

Field	Acceptable grounds of justification
Education	Ensuring that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State; ²¹ Safeguarding the homogeneity of the higher university education system, ²² which must be examined in the light of the public health argument; ²³ Objective of ensuring that students complete their courses in a short period of time, thus contributing to the financial equilibrium of the education system of the MS concerned. ²⁴
Cross-border health care	Control of health expenditure, balancing the budget of the social security system / possible risk of undermining a social security system's financial balance; ²⁵ Guarantee of the quality of medical services, balanced medical and hospital service open to all insured people; ²⁶ Maintenance of treatment capacity or medical competence on national territory is essential for the public health, and even the survival of, the population. ²⁷

Justice of the European Union, 13.05.2003, *ECR* I-4509, Case C-385/99, *Müller-Fauré & Van Riet*, 102 and Decision of the Court of Justice of the European Union, 16.05.2006, *ECR* I-4325, Case C-372/04, *Watts*, 121.

21. Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*, 56.

22. Decision of the Court of Justice of the European Union, 07.07.2005; Case C-147/03, *ECR* I-5969, *Commission v. Austria*, 50.

23. Decision of the Court of Justice of the European Union, 13.04.2010, *ECR* I-2735, Case C-73/08, *Bressol*, 54.

24. Decision of the Court of Justice of the European Union, 23.10.2007, *ECR* I-9161, Cases C-11/06 & 12/06, *Morgan & Bucher*, 36.

25. Decision of the Court of Justice of the European Union, 28.04.1998, *ECR* I-1931, Case C-158/96, *Kohll*.

26. *Ibid.* 52.

27. Decision of the Court of Justice of the European Union, 12.07.2001, *ECR* I-5473, Case C-157/99, *Geraets-Smits & Peerbooms*, 70.

Cross-border health care	<p>Control of health expenditure, balancing the budget of the social security system / possible risk of undermining a social security system's financial balance;²⁵</p> <p>Guarantee of the quality of medical services, balanced medical and hospital service open to all insured people;²⁶</p> <p>Maintenance of treatment capacity or medical competence on national territory is essential for the public health, and even the survival of, the population.²⁷</p>
Compensation of war victims	<p>Aim of solidarity;²⁸</p> <p>Ensuring that there is a connection between the society of the Member State concerned and the recipient of a benefit;²⁹</p> <p>Necessity to verify that the recipient continues to satisfy the conditions for the grant of that benefit;³⁰</p> <p>Desire to provide a benefit that takes into account differences between Member States such as differences in the cost of living;³¹</p> <p>Need to ensure effective monitoring of the employment and social situation of beneficiaries.³²</p>

As reflected in this table, the accepted grounds of justification embody Member States' concern to protect their welfare powers and their financial interests from the supposed destructuring effect of the recognition of cross-border welfare rights.

The Court has accepted the 'necessity to demonstrate a certain degree of integration into the society of the host state' in the field of education, the 'maintenance of treatment capacity or medical competence on national territory is essential for the public health, and even the survival of, the population' in the field of cross-border health care, and the 'aim of solidarity' in the field of compensation of civil war victims. This set of justifications allows Member States to remain responsible for defining the conditions of membership of their welfare schemes. In the field of cross-border health care, the Court of Justice has repeatedly held that:

“[I]t is [...] for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme [...] and, second, the conditions for entitlement to benefits [...]”.³³

This idea is even more reflected in cases relating to students' financial support.

28. Decision of the Court of Justice of the European Union, 26.10.2006, ECR I-10451, Case C-192/05, *Tas-Hagen*, 35.

29. Decision of the Court of Justice of the European Union, 22.05.2008, ECR I-3993, Case C-499/06, *Nerkowska*. 37.

30. *Ibid.*, 37.

31. Decision of the Court of Justice of the European Union, 04.12.2008, ECR I-9029, Case C-221/07, *Zablocka*, 39..

32. *Ibid.*

33. See, for instance, Decision of the Court of Justice of the European Union, 12.07.2001, ECR I-5473, Case C-157/99, *Geraets-Smits & Peerbooms*, 45.

In *Bidar*, the Court held for instance that it is:

“[L]egitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State.”³⁴

Therefore, European Union law does not require Member States to break the links that bond them, as welfare states, to welfare recipients. To put it differently, the Court of Justice does not call into question the fact that Member States set out award conditions that reflect the relationship existing between themselves and individuals who receive social benefits. The same holds true with respect to the relationship between Member States and civil war victims. In *Nerkowska*, for instance, the Court held that:

“It is thus lawful for a Member State to restrict, by means of conditions related to the nationality or to the place of residence of the person concerned, the compensation granted to civilian victims of war or repression to persons who are regarded as showing a certain degree of connection to the society of that Member State.”³⁵

Here again, the Court acknowledges that Member States may restrict the benefit of an allowance to individuals sharing specific bonds with their societies. In other words, when welfare powers are involved, the Court of Justice concedes that solidarity is first and foremost national.

Member States have been allowed to rely on economic interests in all the fields analyzed herein. Looking specifically at cross-border health care, the Court has recognized, since *Kohll*, that the ‘risk of undermining the financial balance of a social security system’ constitutes an overriding reason in the general interest.³⁶ It has even acknowledged that it amounted to protecting economic interests:

“It must be recalled that aims of a purely economic nature cannot justify a barrier to the fundamental principle of freedom to provide services [...]. However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind.”³⁷

34. Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*, 57.

35. Decision of the Court of Justice of the European Union, 22.05.2008, *ECR* I-3993, Case C-499/06, *Nerkowska*, 39. See also Opinion in Decision of the Court of Justice of the European Union, 22.05.2008, *ECR* I-3993, Case C-499/06, *Nerkowska*, 22, Opinion in Decision of the Court of Justice of the European Union, 26.10.2006, *ECR* I-10451, Case C-192/05, *Tas-Hagen*, 58, and the Court in the same ruling, 34-35.

36. Decision of the Court of Justice of the European Union, 28.04.1998, *ECR* I-1931, Case C-158/96, *Kohll*, 41.

37. Decision of the Court of Justice of the European Union, 28.04.1998, *ECR* I-1931,

The Court has also been inclined to protect Member States' financial interests in the field of education, but to various extents. It was relatively explicit as regards students' financial support in *Bidar*:

“[A]lthough the Member States must, in the organization and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State.”³⁸

Member States' financial solidarity is conditional upon the degree of integration of students from other Member States into their society. Therefore, the Court did not place the Member States under an absolute obligation to grant assistance to non-nationals/non-residents. It gave them some leeway to refuse to grant assistance. Likewise, it accepted in *Morgan & Bucher*, a case concerning the exportation of financial support in the form of grant to study abroad, the justification based on the “unreasonable burden which could lead to a general reduction in study allowances granted in the Member State of origin.”³⁹ It moreover limited the scope of the exportation of financial support in the form of tax relief.⁴⁰

The above shows that the Court breaks with its traditional approach when welfare is involved, and accepts to assess the proportionality of national measure in light of economic grounds. As J. SNELL pointed out:

“[I]n certain circumstances, the constitutional structure of the Union as a divided power system may mandate a more permissive approach towards economic aims. Member States remain solely or primarily responsible for many important policy areas. Sometimes the only reasonable practical way of discharging these responsibilities involves the adoption of measures the immediate aim of which is economic but that ultimately serve as a means for pursuing a legitimate public interest aim.”⁴¹

Case C-158/96, *Kohll*, 41. See also Decision of the Court of Justice of the European Union, 13.12.2005, *ECR* I-10837, Case C-446/03, *Marks & Spencer*, 32; Decision of the Court of Justice of the European Union, 15.05.2008, *ECR* I-3601, Case C-414/06, *Lidl Belgium*, 46; and Decision of the Court of Justice of the European Union, 18.07.2007, *ECR* I-6373, Case C-231/05, *Oy AA*, 56.

38. Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*, 56.

39. Decision of the Court of Justice of the European Union, 23.10.2007, *ECR* I-9161, Cases C-11/06 & 12/06, *Morgan & Bucher*, 42.

40. Decision of the Court of Justice of the European Union, 20.05.2010, *ECR* I-4517, Case C-56/09, *Zanotti*, 54.

41. JUKKA SNELL, “Economic aims as justification of restrictions on free movement,” in *The rule of reason: rethinking another classic of European legal doctrine*, A. A. M. SCHRAUWEN (Ed.), Groningen: Europa Law Pub., 2005, p. 49.

Therefore, the flexible character of the Court's approach with respect to the acceptable grounds of justification and their assessment may be explained by two main factors. First, the constitutional division of powers in the European Union is such that it is necessary to recognize a wider margin of appreciation for the Member States. Second, and maybe even more importantly, the admission of economic grounds reflects the necessity to preserve Member States' autonomy. Both sets of justifications indeed have the effect of giving more leeway to Member States, by allowing them to rely on a wider range of interests than in traditional free movement cases.

b. Obligations imposed upon Member States

The second dimension of what I have called the 'mutual adjustment resolution' relates to the obligations placed upon Member States to recognize and enforce cross-border welfare rights. The European Court of Justice's case law however reveals that the obligations are but seldom unconditional. Most of the time, they allow Member States' political, social, and economic interests to prevail over cross-border welfare rights. Four sets of obligations may be identified: obligations to open subject to the preservation of the sustainability of welfare systems, obligations to open subject to the degree of integration into society, obligations to take into account personal circumstances, and procedural requirements.

Obligations to open subject to the preservation of the sustainability of welfare systems

Two contemporary cases have specified the extent to which Member States must give access of their higher education system to nonresidents.⁴² They concern Austria and Belgium, which have opted for the principle of unrestricted access, but which used to impose additional conditions on non-resident students. The Court ruled in both *Commission v. Austria* and *Bressol* that the national measures restricted the free movement principle. Austria relied on several grounds of justification, relating to the need to safeguard the homogeneity of the Austrian higher or university education system and the need to prevent abuse of Community law. The Court ruled that:

“[I]t need merely be observed that the possibility for a student from the European Union, who has obtained his secondary education diploma in a Member State other than Austria, to gain access to Austrian higher or university education under the same conditions as holders of diplomas awarded in Austria constitutes the very essence of the principle of

42. See also the following early cases: Decision of the Court of Justice of the European Union, 15.03.1984, *ECR* 1425, Case 28/83, *Forcheri*; Decision of the Court of Justice of the European Union, 13.02.1985, *ECR* 593, Case 293/83, *Gravier*; Decision of the Court of Justice of the European Union, 02.02.1988, *ECR* 379, Case 24/86, *Blaizot*; Decision of the Court of Justice of the European Union, 27.10.1988, *ECR* 5445, Case 42/87, *Commission v. Belgium*; Decision of the Court of Justice of the European Union, 03.05.1994, *ECR* I-1593, Case C-47/93, *Commission v. Belgium*.

freedom of movement for students guaranteed by the Treaty.”⁴³

This statement tends to confirm the idea that restrictions on access, which have a very detrimental effect on cross-border rights, are subject to a strict proportionality test. But if the Court rejected the Austrian line of arguments, it is primarily because Austria did not provide empirical evidence that the homogeneity of the Austrian education system would be jeopardized if access were to be equally granted to residents and nonresidents. It turns out that it is only if the creation of restrictions on access is ‘essentially preventive in nature’ that Member States must adjust the conditions of access to their open education systems in such a way as to grant any European Union student holding a secondary-school diploma a right of access. The Court of Justice followed an approach that seems, to say the least, equivocal in *Bressol*.⁴⁴ On the one hand, it acknowledged that the quotas set up by Belgium could be justified in light of the protection of public health. It moreover did not really assess proportionality, and left it almost entirely to the national court: “it is for the referring court to establish that there are genuine risks to the protection of public health.”⁴⁵ On the other hand, the Court of Justice specified how the national court must carry out the proportionality test. It reaffirmed that such risks must be actual, supported by detailed statistical data,⁴⁶ and that Member States bear the burden of proof.⁴⁷ The assessment of proportionality also requires national courts to check the suitability of the national measures.⁴⁸ The Court finally invited the national courts to engage into a ‘no less restrictive means’ test.⁴⁹ In particular, if it stems from statistical evidence that the restriction on access of nonresident students is necessary, Member States may nevertheless not arbitrarily select these students. In this respect, the Court pointed out that “nonresident students who are selected [...] by drawing lots which, as such, does not take into account their knowledge or experience,”⁵⁰ and it required the national court to assess whether the non-taking into account of students’ personal skills was necessary. In any case, it held that:

“Admittedly, it cannot be excluded from the outset that the prevention of a risk to the existence of a national education system and to its homogeneity may justify a difference in treatment between some students.”⁵¹

43. Decision of the Court of Justice of the European Union, 07.07.2005; Case C-147/03, *ECR I-5969, Commission v. Austria*, 70. (Emphasis added)

44. For different points of view, see, for instance, SACHA GARBEN, Case C-73/08, *Bressol, Chaverot and Others v. Gouvernement de la Communauté française*, *Common Market Law Review* 47, 2010, 1508; SOPHIE GROSBON, *Libre circulation et systèmes de sélection universitaire: une équation complexe*, *Revue des Affaires Européennes-Law and European Affairs* 2009-2010/3, pp. 640 ff.

45. Decision of the Court of Justice of the European Union, 13.04.2010, *ECR I-2735, Case C-73/08, Bressol*, 66.

46. *Ibid.*, 71-73.

47. *Ibid.*, 74.

48. *Ibid.*, 75-76.

49. *Ibid.*, 79.

50. *Ibid.*, 80.

51. *Ibid.*, 53.

Both *Commission v. Austria* and *Bressol* are characterized by the fact that the Court put great emphasis on the need to preserve and safeguard the sustainability of educational systems. As a result, Member States are required to enforce cross-border access rights so long as this does not alter the organization of their education systems.

National social security schemes are based on the principle of territoriality. Patients may only receive treatment on the territory of their Member State of affiliation. This principle is however not intangible. Even before the Court of Justice initiated its case law relating to cross-border health care, most of Member States' legal systems provided for mechanisms whereby, in case of scheduled treatments, and under strict conditions, patients could receive treatments abroad. These conditions notably included the obligation to be granted an authorization before receiving cross-border treatments. In this regard, national authorities used to grant these authorizations to patients in a discretionary manner. This is precisely on this point that national laws and practices have been challenged before the Court of Justice. To this end, patients have relied on the freedom to provide services in a vast majority of cases. *Decker* and *Kohll*⁵² were the first rulings where the Court was called upon to rule on the compatibility of measures relating to cross-border health care with the free movement principle. *Decker* concerned a Luxembourg national who purchased a pair of spectacles with corrective lenses from an optician established in Belgium.⁵³ Luxembourg authorities refused to reimburse him on the grounds that he had not obtained a prior authorization. The Court ruled that this amounted to an unjustified restriction. The facts in *Kohll* were slightly different from those in *Decker*. This time, Luxembourg authorities refused to authorize the appellant's daughter to receive dental treatment in Germany. The appellant thus directly challenged their refusal, which the Court once again found to be contrary to European Union law. Following these two initial decisions, the Court of Justice clarified the reach, as well as the meaning, of the newly recognized rights. In *Geraets-Smits & Peerbooms*,⁵⁴ which involved a compulsory sickness insurance scheme, *Müller-Fauré & Van Riet*,⁵⁵ which pertained to a compulsory insurance scheme providing only benefits-in-kind, and *Watts*,⁵⁶ where the British National Health Service was at

52. Decision of the Court of Justice of the European Union, 28.04.1998, ECR I-1831, Case C-120/95, *Decker*; Decision of the Court of Justice of the European Union, 28.04.1998, ECR I-1931, Case C-158/96, *Kohll*. See ANNE PIETER VAN DER MEI, Cross-border access to medical care within the European Union – Some reflections on the judgments in *Decker* and *Kohll*, *Maastricht Journal of European & Comparative Law*, 5, 1998, pp. 277-297.

53. It is to be noted that Decision of the Court of Justice of the European Union, 28.04.1998, ECR I-1831, Case C-120/95, *Decker* is based on the free movement of goods.

54. Decision of the Court of Justice of the European Union, 12.07.2001, ECR I-5473, Case C-157/99, *Geraets-Smits & Peerbooms*. See, e.g., ELIES STEYGER, "National health care systems under fire (but not too heavily)," *Legal Issues of Economic Integration* (2002) 29(1): 97-107.

55. Decision of the Court of Justice of the European Union, 13.05.2003, ECR I-4509, Case C-385/99, *Müller-Fauré & Van Riet*. See, e.g., ANNE PIETER VAN DER MEI, Cross-border access to medical care: Non-hospital care and waiting lists, *Legal Issues of Economic Integration* 31(1), 2004, pp. 57-67; MARK FLEAR, *Common Market Law Review* 41, 2004, pp. 209-233.

56. Decision of the Court of Justice of the European Union, 16.05.2006, ECR I-4325, Case C-372/04, *Watts*. See, e.g., SEAN VAN RAEPENBUSCH, L'état de la jurisprudence de la CJCE relative au libre accès aux soins de santé à l'intérieur de l'Union européenne après l'arrêt du 16

stake, the Court held that any social security scheme must comply with European Union law requirements. In addition, the Court made it clear in *Geraets-Smits & Peerbooms* that treatments provided both outside hospital environment and in hospital environment fall within the scope of European Union law. The effects of *Decker* and *Kohll* are far-reaching. They indeed preclude Member States of their powers to impose obligations relating to the prior obtaining of authorizations. However, this extensive requirement to open national social security schemes is limited in scope. It only concerns the purchase of medical goods and treatments received abroad in non-hospital environment. The Court did not go that far in cases involving hospital environment⁵⁷ as well as treatments received in non-hospital environment involving the use of major medical equipment.⁵⁸ In these instances, Member States may still subject the exercise of cross-border health care rights to prior authorizations. In *Geraets-Smits & Peerbooms*, the Court held for instance that:

“[A] requirement that the assumption of costs, under a national social security system, of hospital treatment provided in another Member State must be subject to prior authorization appears to be a measure which is both necessary and reasonable.”⁵⁹

However, the Court has carried out strict proportionality tests with respect to the conditions under which Member States may limit the grant of prior authorizations:

“[I]n order for a prior administrative authorization scheme to be justified [...] it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities’ discretion, so that it is not used arbitrarily.”⁶⁰

Member States are thus compelled to comply with the principles of objectivity

mai 2006, *Watts*, C-372/04, *Gazette du Palais*, vendredi 8, samedi 9 décembre 2006, pp. 8-14; LOIC AZOULAI, En attendant la justice sociale, vive la justice procédurale! À propos de la libre circulation des patients dans l’Union (CJCE 16 mai 2006, *Watts*, Aff. C-372/04), *Revue de droit sanitaire et social*, 5, 2006, pp. 843-851; MEL COUSINS, Patient mobility and national health systems, *Legal Issues of Economic Integration*, 34(2), 2007, pp. 183-193.

57. E.g. Decision of the Court of Justice of the European Union, 12.07.2001, *ECR I-5473*, Case C-157/99, *Geraets-Smits & Peerbooms*.

58. Decision of the Court of Justice of the European Union, 05.10.2010, *ECR I-8833*, Case C-512/08, *Commission v. France*; Decision of the Court of Justice of the European Union, 27.10.2011, *ECR I-547*, Case C-255/09, *Commission v. Portugal*.

59. Decision of the Court of Justice of the European Union, 12.07.2001, *ECR I-5473*, Case C-157/99, *Geraets-Smits & Peerbooms*, 80. See also Decision of the Court of Justice of the European Union, 13.05.2003, *ECR I-4509*, Case C-385/99, *Müller-Fauré & Van Riet*; and Decision of the Court of Justice of the European Union, 16.05.2006, *ECR I-4325*, Case C-372/04, *Watts*.

60. Decision of the Court of Justice of the European Union, 12.07.2001, *ECR I-5473*, Case C-157/99, *Geraets-Smits & Peerbooms*, 90.

and non-discrimination. The Court controlled the proportionality of several substantive conditions laid down by Member States in light of these principles. For instance, the Netherlands set out a rule whereby prior authorizations could only be granted in relation to treatments considered as 'normal' in the professional circles concerned.⁶¹ The Court regarded this requirement as being too general, and as being, accordingly, open to several interpretations, thereby creating uncertainty.⁶² It compelled Dutch authorities to interpret this condition "on the basis of what is sufficiently tried and tested by international medical science," and to apply the criteria objectively and regardless of the place of establishment of the treatment providers.⁶³ In *Müller-Fauré & Van Riet*, it acknowledged that national authorities could subject an authorization to a condition relating to the necessity of cross-border treatments, as long as treatments were not provided by the state of affiliation with undue delay.⁶⁴ Cases involving cross-border health care therefore impose substantial requirements upon Member States. The Court seems to start from a premise similar to that of cases on higher education. It does not preclude Member States from their powers if the exercise of cross-border health care rights jeopardizes the organization, functioning and/or financing of national social security systems. However, it strictly supervises the conditions under which Member States may maintain mechanisms restricting these rights by subjecting them to the aforementioned adjustment requirements, and by controlling whether individual conditions comply, in practice, with European Union law.

Obligations to open subject to the degree of integration into society

As far as nonresident students' financial assistance is concerned,⁶⁵ the Court initially decided that students' financial assistance did not fall within the scope of European Union law.⁶⁶ The Court of Justice clearly departed from this initial stand in *Bidar* and *Förster*.⁶⁷ This change followed two important decisions, which involved the conditions of award of social benefits. *Grzelczyk*⁶⁸ concerned

61. Ibid..

62. Ibid., 91-92.

63. Ibid., 94-97.

64. Decision of the Court of Justice of the European Union, 13.05.2003, ECR I-4509, Case C-385/99, *Müller-Fauré & Van Riet*, 89.

65. The issue has also been raised with respect to the financial assistance of students studying abroad. See Decision of the Court of Justice of the European Union, 23.10.2007, ECR I-9161, Cases C-11/06 & 12/06, *Morgan & Bucher*. See, e.g., MICHAEL DOUGAN, Cross-border educational mobility and the exportation of student financial assistance, *European Law Review* 33(5), 2008, pp. 723-738.

66. Decision of the Court of Justice of the European Union, 21.06.1988, ECR 3161, Case 39/86, *Lair*, 15; Decision of the Court of Justice of the European Union, 21.06.1988, ECR 3205, Case 197/86, *Brown*, 18.

67. Decision of the Court of Justice of the European Union, 15.03.2005, ECR I-2119, Case C-209/03, *Bidar*; Decision of the Court of Justice of the European Union, 18.11.2008, ECR I-8507, Case C-158/07, *Förster*.

68. Decision of the Court of Justice of the European Union, 20.11.2001, ECR I-6193, Case C-184/99, *Grzelczyk*. See, e.g. D. MARTIN, A big step forward for Union Citizens, but a step backwards for legal coherence, *European Journal of Migration and Law*, 4, 2002, pp. 136-144; ALINA ILIOPOULOU & HELEN TORNER, *Common Market Law Review*, 39, 2002, pp. 609-620.

a non-Belgian EU national who studied in Belgium and who challenged the Belgian authorities' refusal to grant him a social benefit in the form of minimum subsistence allowance – the 'minimex' – yet guaranteed by Belgian law to Belgian nationals. The Court compelled Belgium to grant him the minimex, and thus to broaden the scope *materiae personae* of the award conditions. It proceeded similarly in *D'Hoop*.⁶⁹ This time, Belgium refused to grant a 'tideover allowance' intended for young unemployed people seeking their first job on the ground that the applicant – a Belgian national – had not attended secondary school in Belgium. The Court considered that this amounted to a breach of European Union citizenship provisions. *Grzelczyk* and *D'Hoop* paved the way for the defining move that occurred in *Bidar*.⁷⁰ This case concerned a French national who attended high school as well as university in the United Kingdom. While this Member State granted him assistance in relation to his tuition fees, it refused him a loan for maintenance costs on the grounds that he was not 'settled' in the United Kingdom.⁷¹ The Court, following its Advocate General, reversed its previous case law and found that students' financial assistance fell within the scope of the Treaty.⁷² It also considered that the settled-status requirement breached European Union citizenship provisions.⁷³ Therefore, for the first time, a Member State was compelled to extend the benefit of student financial support in order to comply with European Union law. The Court subjected Member States' powers relating to the award of students' financial assistance to both negative and positive obligations. Member States may not "require the students concerned to establish a link with [their] employment market."⁷⁴ More importantly, neither may they "preclude any possibility of a national of another Member State" from obtaining a status that would allow them to benefit from financial assistance.⁷⁵ Positive obligations consist in compelling Member States to grant assistance – provided it does not become an unreasonable financial

69. Decision of the Court of Justice of the European Union, 11.07.2002, *ECR* I-6191, Case C-224/98, *D'Hoop*.

70. Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*. See, e.g., OXANA GOLYNKER, Student loans: the European concept of social justice according to *Bidar*, *European Law Review* 31(3), 2006, pp. 390-401; CATHERINE BARNARD, *Common Market Law Review*, 42, 2005, 1465-1489; DIONYSIOS V. TSIROS, Maintenance assistance for migrant students: European Union citizenship, equal treatment and the attribution of social rights under the *Bidar* judgment and beyond, *Revue Hellénique de Droit International*, 63, 2010, p. 948.

71. See Opinion in Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*, 55: "In order to be eligible for maintenance assistance economically inactive EU citizens are required to be 'settled' in the United Kingdom within the meaning of national immigration law. Periods spent receiving full-time education are not taken into consideration for calculating the period of being settled. Settled status must also be demonstrated by the possession of a residence permit. This same condition of 'being settled' does not apply to British nationals. They only need to have been ordinarily resident within the United Kingdom for the three years prior to commencing their studies."

72. See Opinion in Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*, 35-50; Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*, 38-43.

73. Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*, 53.

74. *Ibid.*, 58.

75. *Ibid.*, 60.

burden – if the students concerned are able to demonstrate a certain degree of integration into their society. In this regard, the Court specified that this could be “regarded as established by a finding that the student has resided in the host Member State for a certain length of time.”⁷⁶ *Förster*⁷⁷ concerned a German national studying in the Netherlands. She performed paid work in this country, and subsequently became economically inactive. She applied for financial assistance, but the Dutch authorities rejected her application on the ground that neither did she retain the status of a Community worker, nor did she fulfill the requirement of lawful residence in the Netherlands for a continuous period of at least five years. It is to be noted that Mrs. Förster moved to the Netherlands for the sole purpose of pursuing higher education. The Court held that the principles stemming from *Bidar* were applicable.⁷⁸ It rejected Member States’ argument whereby a distinction shall be drawn between individuals who move to another Member State with the primary objective of pursuing studies there – and who should be subject to Directive 93/96 – and individuals who settle in another Member State for other reasons, and subsequently decide to take up studies – and who may rely on European Union citizenship provisions.⁷⁹ The Court moreover confirmed that Member States might not place non-nationals in a situation where they are wholly precluded from enjoying the right to assistance to cover their maintenance costs. They must take into account the students’ actual degree of integration.⁸⁰ However, the Court did not follow its Advocate General with respect to the conditions of assessment of the degree of integration. Advocate General MAZÁK seemed to have endorsed Mrs. Förster’s claim that:

“Member States should assess in each individual case whether the person concerned demonstrates a sufficient degree of integration into society of the host Member State, account being taken of personal factors.”⁸¹

It indeed concluded that the five-year residence requirement imposed by Dutch authorities was proportionate.⁸² There is thus a discrepancy between *Bidar* and *Förster*. The former indeed seemed to strictly restrict Member States’ assessment

76. *Ibid.*, 59.

77. Decision of the Court of Justice of the European Union, 18.11.2008, *ECR* I-8507, Case C-158/07, *Förster*. See MALCOLM ROSS, The struggle for EU citizenship: Why solidarity matters, in *The European Court of Justice and the Autonomy of the Member States*, HANS MICKLITZ & BRUNO DE WITTE (Eds.), Cambridge; Antwerp: Intersentia; Oxford, 2011, p. 291; STÉPHANE DE LA ROSA, La citoyenneté européenne à la mesure des intérêts nationaux. À propos de l’arrêt *Förster*, *Cahiers de Droit Européen*, 45, 3-4, 2009, pp. 549-567.

78. Decision of the Court of Justice of the European Union, 18.11.2008, *ECR* I-8507, Case C-158/07, *Förster*, 44.

79. See Opinion in Decision of the Court of Justice of the European Union, 18.11.2008, *ECR* I-8507, Case C-158/07, *Förster*, 99.

80. Decision of the Court of Justice of the European Union, 18.11.2008, *ECR* I-8507, Case C-158/07, *Förster*, 47.

81. Opinion in Decision of the Court of Justice of the European Union, 18.11.2008, *ECR* I-8507, Case C-158/07, *Förster*, 93.

82. Decision of the Court of Justice of the European Union, 18.11.2008, *ECR* I-8507, Case C-158/07, *Förster*, 54: “A condition of five years’ continuous residence cannot be held to be excessive having regard [...] to the requirements put forward with respect to the degree of integration of non-nationals in the host Member State.”

of the ‘degree of integration’ by imposing on them the obligation to grant financial assistance on a case-by-case basis. But the latter gives more leeway to national authorities, which are allowed to set out general criteria, such as a five-year residence requirement. These criteria, by definition, do not systematically enable students to demonstrate that they are actually integrated into their host society.

Turning now to the compensation of war victims, three cases deserve attention. They all involved national regulations subjecting the welfare recipients to a residence requirement. *Tas-Hagen*,⁸³ pertained to a rule enacted by the Netherlands requiring the beneficiaries to reside in this Member State at the time where they submitted their application. In *Nerkowska*,⁸⁴ the Polish legislation required beneficiaries to reside on the national territory throughout the period of payment of the benefit. As for *Zablocka*,⁸⁵ it concerned a German law that excluded from its scope the payment of certain benefits to surviving spouses of war victims because the latter were domiciled in the territory of certain specific Member States. The Court of Justice regarded each of these measures as being contrary to European Union citizenship provisions. It nonetheless accepted the idea that Member States may limit the grant of these social benefits on the basis of the solidarity principle. This results in the obligation put on individuals to demonstrate a certain degree of integration into society.⁸⁶ But discretion does not mean arbitrariness and the Court limited, once again, the freedom enjoyed by Member States. As Advocate General SHARPSTON pointed out in *Tas-Hagen*, “the residence requirement may not be ‘too general and exclusive’.”⁸⁷ In this context, the Court put emphasis on the fact that:

“[A] criterion requiring residence cannot be considered a satisfactory indicator of the degree of connection of applicants to the Member State granting the benefit when it is liable [...] to lead to different results for persons resident abroad whose degree of integration into the society of the Member State granting the benefit is in all respects comparable.”⁸⁸

83. Decision of the Court of Justice of the European Union, 26.10.2006, *ECR* I-10451, Case C-192/05, *Tas-Hagen*.

84. Decision of the Court of Justice of the European Union, 22.05.2008, *ECR* I-3993, Case C-499/06, *Nerkowska*.

85. Decision of the Court of Justice of the European Union, 04.12.2008, *ECR* I-9029, Case C-221/07, *Zablocka*.

86. Opinion in Decision of the Court of Justice of the European Union, 26.10.2006, *ECR* I-10451, Case C-192/05, *Tas-Hagen*, 57; Decision of the Court of Justice of the European Union, 26.10.2006, *ECR* I-10451, Case C-192/05, *Tas-Hagen*, 34; Opinion in Decision of the Court of Justice of the European Union, 22.05.2008, *ECR* I-3993, Case C-499/06, *Nerkowska*, 21; Decision of the Court of Justice of the European Union, 22.05.2008, *ECR* I-3993, Case C-499/06, *Nerkowska*, 35.

87. Opinion in Decision of the Court of Justice of the European Union, 26.10.2006, *ECR* I-10451, Case C-192/05, *Tas-Hagen*, 64.

88. Decision of the Court of Justice of the European Union, 26.10.2006, *ECR* I-10451, Case C-192/05, *Tas-Hagen*.

Applying this principle to the facts of *Tas-Hagen*, the Court found that the Dutch criterion was not “a satisfactory indicator of the degree of attachment of the applicant to the society.”⁸⁹ The condition imposed by this Member State notably excluded all the people who had lived and worked there for a long period of time but who subsequently decided to spend their retirement abroad.⁹⁰ It reached the same conclusion in *Nerkowska*.⁹¹ Another ground of justification relating to the need to ensure effective monitoring was also accepted. However, the Court developed a ‘no less restrictive means’ approach and underlined, for instance, in *Nerkowska*, that nothing precludes Member States from requesting their nationals to undergo a check on a regular basis.⁹² In addition, it ruled that such an objective could not justify that residence in certain Member States only excluded the recipients from the benefits offered by Germany.⁹³ Therefore, in cases relating to the compensation of war victims, the counter-limit pertaining to the degree of integration of individuals into society is strictly assessed.

Obligations to take into account personal circumstances

In the field of cross-border health care, the Court has put emphasis, on several occasions, on the obligation to take into account the personal circumstances of patients. Thus, in *Watts* it held that:

“[A] refusal to grant prior authorization cannot be based merely on the existence of waiting lists enabling the supply of hospital care to be planned and managed on the basis of predetermined general clinical priorities, without carrying out in the individual case in question an objective medical assessment of the patient’s medical condition, the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time when the request for authorization was made or renewed.”⁹⁴

It results from this statement that Member States are free to define predetermined general clinical priorities. But they must adjust these priorities according to a set of factors pertaining to patients’ personal conditions. In any case, they are required to justify their decisions on the basis of detailed arguments relating to patients’ personal circumstances.

89. *Ibid.*, 39.

90. Opinion in Decision of the Court of Justice of the European Union, 26.10.2006, *ECR* I-10451, Case C-192/05, *Tas-Hagen*, 67.

91. Decision of the Court of Justice of the European Union, 22.05.2008, *ECR* I-3993, Case C-499/06, *Nerkowska*, 43.

92. *Ibid.*, 45.

93. Decision of the Court of Justice of the European Union, 04.12.2008, *ECR* I-9029, Case C-221/07, *Zablocka*, 42s.

94. Decision of the Court of Justice of the European Union, 16.05.2006, *ECR* I-4325, Case C-372/04, *Watts*, 119. See also Decision of the Court of Justice of the European Union, 13.05.2003, *ECR* I-4509, Case C-385/99, *Müller-Fauré & Van Riet*, 90.

Procedural requirements

Aside from the aforementioned substantive requirements, the Court of Justice has also subjected Member States to procedural obligations.⁹⁵ A prior authorization scheme will be deemed proportionate if it is:

“[B]ased on a procedural system which is easily accessible and capable of ensuring that a request for authorization will be dealt with objectively and impartially within a reasonable time and refusals to grant authorization must also be capable of being challenged in judicial or quasi-judicial proceedings.”⁹⁶

This statement shows that Member States must comply with four main procedural principles: objectivity, transparency, reasonable time principle, and the right to appeal. In *Watts*, for instance, the Court unequivocally condemned the British National Health Service because it did not set out “the criteria for the grant or refusal of the prior authorization.”⁹⁷

Similarly, in the field of higher education, the Court of Justice subjected Member States to the obligation of adopting criteria that are clear and known in advance,⁹⁸

“[S]uch as to guarantee a significant level of legal certainty and transparency in the context of the award of maintenance grants to students.”⁹⁹

This last statement is reminiscent of Advocate General GEELHOED’s opinion in *Bidar*:

95. See, in this respect, PANOS KOUTRAKOS, *Health care as an economic service under EC law*, in *Social welfare and EU law*, MICHAEL DOUGAN & ELEONORA SPAVENTA (Eds.), Oxford and Portland, Oregon, Hart publishing, 2005, pp. 117 ff.; LOIC AZOULAI, *En attendant la justice sociale, vive la justice procédurale! À propos de la libre circulation des patients dans l’ Union* (CJCE 16 mai 2006, *Watts*, Aff. C-372/04), *Revue de droit sanitaire et social*, 5, 2006, pp. 843-851.

96. Decision of the Court of Justice of the European Union, 12.07.2001, *ECR* I-5473, Case C-157/99, *Geraets-Smits & Peerbooms*, 90; Decision of the Court of Justice of the European Union, 13.05.2003, *ECR* I-4509, Case C-385/99, *Müller-Fauré & Van Riet*, 83; Decision of the Court of Justice of the European Union, 16.05.2006, *ECR* I-4325, Case C-372/04, *Watts* 116. The Court added in Decision of the Court of Justice of the European Union, 16.05.2006, *ECR* I-4325, Case C-372/04, *Watts*, 117: “refusals to grant authorization, or the advice on which such refusals may be based, must refer to the specific provisions on which they are based and be properly reasoned in accordance with them. Likewise, courts or tribunals hearing actions against such refusals must be able, if they consider it necessary for the purpose of carrying out the review which it is incumbent on them to make, to seek the advice of wholly objective and impartial independent experts.”

97. Decision of the Court of Justice of the European Union, 16.05.2006, *ECR* I-4325, Case C-372/04, *Watts*, 118.

98. *Ibid.*, 56.

99. *Ibid.*, 57.

“Member States [...] must ensure that the criteria and conditions for granting such assistance do not discriminate directly or indirectly between their own nationals and other EU citizens, that they are clear, suited to attaining the purpose of the assistance, are made known in advance and that the application is subject to judicial review.”¹⁰⁰

4. The Nature Of Cross-Border Welfare Rights

Given the above, it is now possible to identify the nature of the cross-border welfare rights recognized by the European Court of Justice through the interpretation of the economic freedoms and EU citizenship in the fields of education and social security. To this end, I put emphasis, in turn, on their scope and their substance.

a. Scope

As seen earlier, the European Union holds no, or very limited jurisdiction in the field of welfare. However, the Court of Justice approach makes it clear that the scope of the cross-border rights recognized at EU level is broader than the scope of jurisdiction of the European Union. In *Tas Hagen*,¹⁰¹ Advocate General KOKOTT dedicated a substantial part of her demonstration to the analysis of the meaning and reach of the Court’s applicability-stage reasoning. She noted, in particular, the following:

“Union citizens can assert their right to free movement even if the matter concerned or the benefit claimed is not governed by Community law.”¹⁰²

“[T]he classic fundamental freedoms apply also to matters in respect of which the Treaty grants the Community no powers or otherwise contains rules.”¹⁰³

She subsequently added that:

“[I]t would be equally inconsistent with the notion of Union citizenship as the fundamental status of all Union citizens, which they enjoy irrespective of any economic activity, if the Member States did not have to observe Union citizens’ right to free movement in all areas but merely in individual matters in respect of which the Treaty grants the Community

100. Opinion in Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidart*, 32. (Emphases added)

101. Opinion in Decision of the Court of Justice of the European Union, 26.10.2006, *ECR* I-10451, Case C-192/05, *Tas-Hagen*.

102. *Ibid.*, 33.

103. *Ibid.*, 35.

specific powers or other rules of Community law exist.”¹⁰⁴

In light of these rather straightforward statements, it is possible to make several observations. First, they show that, in the Advocate General’s eyes, no distinction needs to be drawn between rulings involving the economic freedoms and those involving European Union citizenship. The same paradigm should apply in both cases. Second, she openly acknowledges that scope of application of European Union law and scope of European Union powers ought to be distinguished.¹⁰⁵ Therefore, the scope of cross-border welfare rights is broader than the latter. Furthermore, there is no need to identify a corresponding power to recognize the existence of cross-border welfare rights. As a result, the reach of cross-border welfare rights is far reaching. As soon as national regulations impinge on the free movement principle, the European Court of Justice subjects them to its scrutiny.

b. Substance

In many of the cases involving welfare, Member States have tried to justify their restrictive measures by relying on the national solidarity principle.¹⁰⁶ In their view, to benefit from *national* redistributive policies, it is necessary to contribute financially through taxation,¹⁰⁷ or to be tied to the political community through nationality or residence. The Court has never denied the crucial role played by solidarity with respect to Member States’ welfare arrangements. However, it has also required Member States to extend the benefit of their solidarity mechanisms to a certain extent. In the field of education, it held, for instance, that:

“Member States must, in the organization and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States.”¹⁰⁸

In this regard, Advocate General POIARES MADURO well summarized the rationale behind the Court of Justice approach:

104. *Ibid.*, 38.

105. ALAN DASHWOOD, The limits of European Community powers, *European Law Review*, 23, 1996, p. 114.

106. Decision of the Court of Justice of the European Union, 13.02.1985, *ECR* 593, Case 293/83, *Gravier*; Opinion in Decision of the Court of Justice of the European Union, 07.07.2005; Case C-147/03, *ECR* I-5969, *Commission v. Austria*, 27; Opinion in Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*, 65; Opinion in Decision of the Court of Justice of the European Union, 26.10.2006, *ECR* I-10451, Case C-192/05, *Tas-Hagen*, 8; Decision of the Court of Justice of the European Union, 22.05.2008, *ECR* I-3993, Case C-499/06, *Nerkowska*, 21.

107. See MICHAEL DOUGAN, The Spatial Restructuring of National Welfare States within the European Union: The Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon, in *Integrating Welfare Functions into EU Law. From Rome to Lisbon*, ULLA NEERGAARD *et al.* (Eds.), DJØF Publishing, 2009, p. 168.

108. Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*, 56. See also the Opinion in Decision of the Court of Justice of the European Union, 18.11.2008, *ECR* I-8507, Case C-158/07, *Förster*, 55.

“Citizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bounds of the national community, but also within the wider context of the society of peoples of the Union.”¹⁰⁹

The foregoing raises the question as to whether such an approach affects Member States’ models of solidarity. The starting point of the inquiry necessarily requires pointing out that the Court’s reasoning relies on *national solidarity mechanisms*. Some authors talk about a ‘constitutional asymmetry’ to describe the discrepancy between what is provided by the Member States and what can be provided by the European Union:

“[T]he pressures on national social choices exerted by the European economic integration are not matched by the availability at Union level of countervailing resources for the purposes of protecting and promoting social rights in general, or welfare provision in particular.”¹¹⁰

Therefore, the basic component of the Court’s model of solidarity lies in the fact that, whatever form it may take, it is presently inexorably mediated by the Member States’ solidarity mechanisms. Hence the endless difficulty faced by the Court: furthering European integration through the recognition of welfare rights while safeguarding the ability of Member States to pursue welfare policies. In this respect, several authors, alongside some Member States, fear that European Union law might challenge the sustainability of national welfare policies, and even give rise to a ‘race to the bottom.’ Among them, G. DAVIES has probably developed the sharpest criticism:

“The logic of the state is that citizens, or residents, contribute via taxation and receive via services of various kinds. To insist that all services must be provided without reference to borders is to render the state incoherent. It breaks the link between obligation and benefit, and makes national

109. Opinion in Decision of the Court of Justice of the European Union, 22.05.2008, *ECR* I-3993, Case C-499/06, *Nerkowska*, 23. (Emphasis added) See also the Opinion in Decision of the Court of Justice of the European Union, 07.07.2005; Case C-147/03, *ECR* I-5969, *Commission v. Austria*, 39. CLEMENS RIEDER, *Common Market Law Review*, 43, 2006, pp. 1711-1726 has noted in this regard that “it is necessary for Member States to become aware of the fact that in a common market, where people move around, it will always be the case that a Member State pays for a person’s education without necessarily harvesting the fruit i.e. in the form of taxes.”

110. MICHAEL DOUGAN, *The Spatial Restructuring of National Welfare States within the European Union: The Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon*, in *Integrating Welfare Functions into EU Law. From Rome to Lisbon*, ULLA NEERGAARD *et al.* (Eds.), DJØF Publishing, 2009, p. 152. See also MICHAEL DOUGAN & ELEONORA SPAVENTA, ‘Wish you weren’t here...’ New models of social solidarity in the European Union, in *Social welfare and EU law*, MICHAEL DOUGAN & ELEONORA SPAVENTA (Eds), Oxford and Portland, Oregon, Hart publishing, 2005, p. 189: “the lack of extensive harmonizing competences makes it difficult to identify a truly effective vehicle by which the Community might articulate any genuinely supranational framework of social solidarity.”

budget control impossible.”¹¹¹

Two main ranges of concerns have been raised.¹¹² First of all, this would go against principles of social justice. It is contended that the Court of Justice case law favor primarily financially privileged EU citizens, i.e. those who can afford moving to other Member States. In the case of cross-border health care, only the wealthiest could exercise the rights recognized by the Court’s decisions,¹¹³ while in the case of education, poor taxpayers would end up paying for wealthy incomers – whether access or financial support is concerned.¹¹⁴ It is also contended that the Court’s approach creates inequalities among Member States. Some of them are indeed more likely than others to attract cross-border patients, thereby creating a phenomenon of overcapacity while leading to undercapacity in States sending patients.¹¹⁵ Likewise, Member States, such as the U.K., Ireland or Belgium, are net receivers in terms of flows of students, and face, therefore, more practical and financial burdens than Member States sending students out.¹¹⁶ Second of all, this would bring about significant financial burdens on Member States. It would indeed impair their planning capacities with respect to cross-border health care,¹¹⁷ which are vital¹¹⁸ for the preservation of health care policies. The same goes with respect to education: the Court’s case law would give rise to uncontrolled flows of students.¹¹⁹

Powerful arguments show that the impact of the Court of Justice approach is not as deep as it may seem at first glance. To begin with, this is evidenced by empirical data. In reality, very few patients go abroad to receive cross-border

111. GARETH DAVIES, The humiliation of the state as a constitutional tactic, in *The constitutional integrity of the European Union*, FABIAN AMTENBRINK & PETER A.J. VAN DEN BERG (Eds.), The Hague, Asser Press, 2010, pp. 147-174.

112. It is to be noted that such arguments primarily concern the fields of health care and education, to the exclusion of the compensation of war victims, probably because the latter is not one of the core welfare policies implemented by Member States.

113. ANNE PIETER VAN DER MEI, Cross-border access to medical care within the European Union – Some reflections on the judgments in *Decker* and *Kohll*, *Maastricht Journal of European & Comparative Law* 5, 1998, p. 297; JEAN V. McHALE, Framing a right to Treatment in English Law: Watts in Retrospective, *Maastricht Journal of European and Comparative Law*, 14(3), 2007, p. 279.

114. CATHERINE BARNARD, *Common Market Law Review*, 42, 2005, pp. 1485-1486.

115. TAMARA HERVEY, Social solidarity: a buttress against internal market law?, in *Social law and policy in an evolving European Union*, JO SHAW (Ed.), Oxford: Hart, 2000, p. 42.

116. SACHA GARBEN, Case C-73/08, Bressol, Chaverot and Others v. Gouvernement de la Communauté française, *Common Market Law Review* 47, 2010, p. 1495; MICHAEL DOUGAN, Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?, *Common Market Law Review*, 42, 2005, pp. 1483-1484.

117. ANNE PIETER VAN DER MEI, “Cross-border access to medical care within the European Union – Some reflections on the judgments in *Decker* and *Kohll*,” *Maastricht Journal of European & Comparative Law*, 5, 1998, p. 296.

118. RITA BAETEN & WILLY PALM, The compatibility of health care capacity planning policies with EU internal market rules, in *Health Care and EU law*, JOHAN VAN DE GRONDEN, et al. (Eds.), Asser Press, 2011, pp. 391-392.

119. ANNE PIETER VAN DER MEI, EU law and education: Promotion of students versus protection of education systems, in *Social welfare and EU law*, MICHAEL DOUGAN & ELEONORA SPAVENTA (Eds.), Oxford and Portland, Oregon, Hart publishing, 2005, 219.

treatments.¹²⁰ Thus, the Court of Justice case law has not, so far, created substantial financial burdens on Member States' social security budgets. Neither has it jeopardized their planning capacities. Two other arguments, of a legal nature this time, demonstrate that the Court of Justice case law does not amount to jeopardizing national health care policies. First of all, as seen earlier, concerns relating to the necessity to safeguard the sustainability of national health care systems are reflected in the justifications accepted by the Court. Second of all, if Member States must admittedly adjust their health care systems so as to comply with European Union law, they always have the "final say."¹²¹ They are indeed responsible for deciding, at each stage of the procedure, whether a patient may be allowed to seek cross-border health care: they rule on which treatments may be sought, on the personal circumstances of patients, and they grant prior authorizations. The recent cases decided by the Court furthermore tend to show that Member States are allowed to maintain prior authorization requirements as soon as they can demonstrate that the treatments at stake involve significant costs.

As seen earlier, access to higher education is based, in Belgium and Austria, on the principle of open, or unrestricted, access. It could seem, at the outset, that the interpretation of the European Union non-discrimination principle by the Court of Justice is such as to bring about fundamental changes.¹²² In *Commission v. Austria*¹²³ and *Bressol*,¹²⁴ Advocates General JACOBS and SHARPSTON both took the stance that European Union law could compel Member States to alter the basic principle underlying the conditions of access to their higher educational systems. E. SHARPSTON went as far as to suggest, for instance, that:

"It seems to me very possible that implementing less discriminatory measures may mean abandoning the current system of unrestricted public access to higher education for all Belgians. I can well see that that will be thought undesirable and that it might well be better if [...] the flow of students across borders were regulated at Community level. In the absence of such a system, however, the fact that such changes may be necessary reflects the need to comply with the obligations arising from

120. YVES JORENS, The right to health care across borders, in *The impact of EU law on health care systems*, MARTIN MCKEE *et al.* (Eds.), Brussels, P.I.E.-Peter Lang, 2002, p. 100; DORTE SINDBJERG MARTINSEN, Towards an internal health market with the European Court, *West European Politics*, 28: 5, 2005, p. 1047.

121. This is pointed out with respect to other contexts by CHLOE O'BRIEN, Real links, abstract rights and false alarms: The relationship between the ECJ's 'real link' case law and national solidarity, *European law review*, 33: 5, 2008, 643-665, but it also holds true as far as health care is concerned.

122. KOEN LENAERTS, Federalism and the rule of law: Perspectives from the European Court of Justice, *Fordham International Law Journal*, 33: 5, 2011, p. 1348.

123. Decision of the Court of Justice of the European Union, 07.07.2005; Case C-147/03, *ECR I-5969, Commission v. Austria*.

124. Decision of the Court of Justice of the European Union, 13.04.2010, *ECR I-2735, Case C-73/08, Bressol*.

the principle of equal treatment under the Treaty.”¹²⁵

However, as shown earlier, in both *Commission v. Austria* and *Bressol*, the Court of Justice endorsed a more flexible approach than it is used to when faced with access restrictions:

“Admittedly, it cannot be excluded from the outset that the prevention of a risk to the existence of a national education system and to its homogeneity may justify a difference in treatment between some students.”¹²⁶

Accordingly, this validates, once again, the assumption whereby Member States are required enforce free movement rights only to the extent that this does not undermine the material scope of these powers.

It seems here again unlikely that the obligations put on Member States are such as to impose upon them significant burdens. For to benefit from financial assistance, nonresident students must indeed demonstrate that they share sufficient links with their host/home state. With respect to incoming students, the Court accepted in *Förster*,¹²⁷ for instance, that a five-year residence requirement was proportionate. Yet it is doubtful that migrant students may be led to study more than five years in another Member State – it takes, for instance, no more than five years to obtain a Master’s degree in most European Union Member States. It is more probable that only those students who arrived prior to taking up university studies – like Mr. *Bidar*¹²⁸ – will be able to benefit from their host States’ financial support. This shows that Member States “have considerable discretion in setting residence/social integration requirements for benefit eligibility.”¹²⁹

The Court of Justice has recognized that Member States enjoy a wide margin of appreciation to assess the “degree of connection to society.”¹³⁰ It went on by acknowledging that criteria such as nationality and residence were legitimate, to the extent that they did not go beyond what was necessary.¹³¹ Therefore, Member States are still at liberty to set out inclusion and exclusion rules. Furthermore, the existence of preexisting links between the national community and the welfare

125. Opinion in Decision of the Court of Justice of the European Union, 13.04.2010, *ECR* I-2735, Case C-73/08, *Bressol*, 108. (Emphasis added) See also Advocate General JACOBS’ similar line of reasoning in his Opinion in Decision of the Court of Justice of the European Union, 07.07.2005; Case C-147/03, *ECR* I-5969, *Commission v. Austria*, 51-53.

126. Decision of the Court of Justice of the European Union, 07.07.2005; Case C-147/03, *ECR* I-5969, *Commission v. Austria*, 53.

127. Decision of the Court of Justice of the European Union, 18.11.2008, *ECR* I-8507, Case C-158/07, *Förster*.

128. Decision of the Court of Justice of the European Union, 15.03.2005, *ECR* I-2119, Case C-209/03, *Bidar*.

129. CHLOE O’BRIEN, Real links, abstract rights and false alarms: The relationship between the ECJ’s ‘real link’ case law and national solidarity, *European law review*, 33: 5, 2008, p. 653.

130. See, e.g., Decision of the Court of Justice of the European Union, 22.05.2008, *ECR* I-3993, Case C-499/06, *Nerkowska*, 38.

131. *Ibid.*, 39.

recipient, as well as the necessity to submit supporting evidence, are absolute prerequisites to benefit from the state allowance.

5. Conclusion

Three defining features characterize the substance of cross-border welfare rights. First, the Court consistently takes into account the potentially adverse implications of its case law for national welfare systems.¹³² Both the acceptance of justifications reflecting national (financial) interests and the assessment of proportionality are used by the Court to protect the sustainability of national welfare systems. Second, it is noteworthy that, to the exclusion of cases relating to access to higher education, the various rulings rely on Member States to assess whether an individual's circumstances justify that they benefit from welfare benefits. This, in turn, permits, as C. O'BRIEN accurately points out, "each Member State to be the final arbiter over where the line of exclusion lies."¹³³ Last but not least, the Court of Justice approach in fields relating to welfare may be described as containing "a tacit recognition that welfare state is – and will remain – a largely domestic matter."¹³⁴ This means that the rights recognized by the Court of Justice, if they have a cross-border dimension, remains first and foremost national in nature. As a result, it is suggested that there is a discrepancy between their far-reaching scope and their actual substance.

132. KOEN LENAERTS & TINNE HEREMANS, Contours of a European social union in the case law of the European Court of Justice, *European Constitutional Law Review*, 2: 1, 2006, p. 114.

133. CHLOE O'BRIEN, Real links, abstract rights and false alarms: The relationship between the ECJ's 'real link' case law and national solidarity, *European law review*, 33: 5, 2008, p. 664.

134. CATHERINE BARNARD, EU Citizenship and the Principle of Solidarity, in *Social Welfare and EU Law*, MICHAEL DOUGAN & ELEONORA SPAVENTA (Eds.), Hart Publishing, 2005, p. 180.