Public Service as Social Solidarity

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Public Service as Social Solidarity

The notion of public service cannot any more be defined with reference to activities provided only or predominantly by public authorities. After three (or thereabouts) decades of liberalisation, privatisation, and the introduction of market mechanisms into the welfare states of Europe, the public service sector is dominated by public an private activity, even if the level of marketisation varies from sector to sector. What does clearly mark the public service sector still, is the principle of social solidarity which in turn is generally formulated as a requirement that these services be universally accessible and distributed on an equalitarian basis. The supervision of those principles has remained a responsibility of the State. But whilst the solidarity principle continues to dominate the public service sector in the sense that equal access continues to be a public concern, other facets of the principle have gradually been marginalised in the public debate about the limits of the market in public services. The argument that markets are limited so that a social good be distributed in a way that the market could not achieve without regulatory interference, in order to secure equal access, is well rehearsed. The argument that States may also choose to limit market activity on the basis that communal provision which enshrines a public ethos or public spiritedness protects deeper forms of communal solidarity than are expressed in the universal access requirement, is heard considerably less.

EC Competition Law and Social Solidarity

A sensitivity for these arguments however exists within the European Court of Justice (the Court). The Court has gradually carved out an area of autonomy for institutions involved in the provision of public health and care services in the Member States, shielding them from the Community's competition rules. Where it did not exclude those institutions from the definition of "undertaking" on the basis of their social functions, it interpreted the derogation from EC competition law for services of general economic interest in Art. 86(2) EC widely in their favour. Whilst it is plausible to declare these cases to be judicial politics or pragmatics, they can be explained in a more principled way by reference to the principle of social solidarity which forms the basis of the Court's reasoning. In this way, the Court has found a way of upholding the Member States' political autonomy to decide, for themselves, how to give effect to their citizens wish to extend mutual obligations towards each other. Operating as a political trump or shield against EC competition law, the principle of social solidarity gives effect to the original compact between the Member States and the Community, whereby the Community upholds the Internal Market and the Member States retain competence to organise their welfare states. It provides the Court with a means of distinguishing occasions on which it is appropriate to protect from EC competition law Member States' attempts to limit or prevent market competition in order to achieve what they consider to be the appropriate degree of solidarity between their citizens, from those on which it is right to expose their attempts to do so to the rigours of the Community's competition rules. [1]

Even though it does not go as far as saying so expressly, the Court recognises that the solidarity citizens may wish to extend towards each other may, in reality, take two forms. First, a Member State may decide that the degree of solidarity its citizens expect from one another requires it to realise a different distribution of a particular good than may be attained on the free market; for example, it may decide to provide a particular good to all citizens on a universal basis.[2] Secondly, and going beyond, the Member State may find legitimate reasons to exclude certain activities from market competition, or limit market competition, so as to protect their distinct, public ethos. It may tightly control the

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[1] N. Boeger, "Solidarity and EC Competition Law", (2007) 32 E.L.Rev. 319
[2] *Ibid.*

provision of certain services quite deliberately, not only because the market would be unable to achieve a certain distribution, but also because it considers that by leaving their provision to the State or the Third Sector, thereby shielding them, largely, from the for-profit incentives of the market, it preserves the civic values they have come to enshrine.

Solidarity as Public Ethos: the Case Law

This second sense of the solidarity principle - the protection of a public service ethos – dominates the Court's decisions on public health and care services and is the reason for its restraint in applying the Community's competition rules in this sector.

In *Sodemare*,[3] the Court was prepared to exclude from the scope of the Community's economic rules an Italian law requiring private care institutions to be non-profit making in order to receive public health funding. It accepted that "the non-profit condition has been found to represent the most logical approach, having regard to the exclusively social aims of the system", even if the condition in question, that providers be not-for profit institutions, was not imperative for the economic viability of the system, but rather to sustain the system's social objectives (to assist people in need of care and shelter).[4] Similarly, in *Ambulanz Glöckner*,[5] an arrangement whereby a German regional law authorised the contracting out of public ambulance services "to recognised medical aid organizations … which are non-profit-making",[6] creating a *de facto* monopoly for existing NGO licence-holders,[7] was found to be a service of general economic interest pursuant to Art. 86(2) EC.[8] It reflected the spirit of the German rule when the Court applied the justification in Art. 86(2) EC generously, concluding that "[t]he possibility of private operators to concentrate, in the non-emergency sector, on more profitable journeys could affect the degree of economic viability of the service provided by the medical aid organizations and, consequently, jeopardize the quality and reliability of that

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[3] Case C-70/95, *Sodemare v Regione Lombardia* [1997] E.C.R. I-3395.
[4] *Ibid*., paragraph 31
[5] Case C-475/99 *Ambulanz Glöckner v. Landkreis Südwestpfalz* [2001] E.C.R. I-8089
[6] *Ibid.*, paragraph 4
[7] *Ibid*., paragraphs 7-8
[8] *Ibid.*, paragraph 55

service."[9] What the Court did not do was to ask whether a less stringent rule could have attained the same service quality, for example by permitting the licensing of for-profit entities, subject to quality control.

In both *Sodemare* and in *Glockner*, the authorities had regulated the public market deliberately tightly. Their preferential treatment of not-for-profit organisations expresses a certain preference for how they wished to set up the relationship between the individual and the State, and between individuals; whether they were happy for these public services to be provided by private actors motivated by private market incentives, with the public becoming "consumers" of those services, or whether it saw the public sector and not-for-profit organisations as an essential part of what holds society together, such that retaining the provision of these public services within their auspices was a good in itself.

Two further recent cases can be explained in a similar way. In *AOK Bundesverband*,[10] the Court refused to hold Germany's public sickness funds to account under the competition rules, on the basis that the competition between them did not constitute a market,[11] and the funds exercised regulatory powers under ministerial control.[12] Their overall role was "to ensure continuance of the operation of the German social security system".[13] Similarly, in *FENIN*,[14] the Court found that the management bodies of Spanish public hospitals could not be held responsible under EC competition law as their activities were exclusively social. Their global function to run the public health system determined the nature of any activity these institutions undertook in connection with that function unless it could be clearly dissociated from it. At one level, the purpose of the activities in *AOK* and in *FENIN* was distributive, to provide public health free at the point of delivery. But this alone would not explain why the activities of the German sickness funds and the

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[9] *Ibid.* paragraph 61
[10] Joined Cases C-264/01, C306/01, C-354/01 and C-355/01 *AOK Bundesverband v. Ichthyol-Gesellschaft Cordes, Hermani & Co.* [2004] E.C.R. I-2493
[11] *Ibid.*, paragraphs 47 – 55 and paragraph 63
[12] *Ibid.*, paragraph 61: "if the fund associations do not succeed in determining fixed maximum amounts, the competent minister must then decide".
[13] *Ibid.,* paragraph 61
[14] Case C-205/03 P *Federacion Nacional de Empresas de Instrumentacion Cientifica, Medica, Tecnica y Dental (FENIN) v Commission*

Spanish health agencies remained so tightly controlled by the State. In reality, these institutions fulfil a social purpose not only by distributing public health as a social good, but also by ensuring the distribution takes place under the auspices of the state (or, where appropriate, the Third Sector), so as not to let control slip away from the citizens (or the institutions representing their interests) and towards the commercial sector where decisions will be determined by profit; because it is for citizens themselves, through their political participation, to determine whether they consider themselves mere "consumers" of public health services, or whether these services embody a deeper meaning for them as an expression of the solidarity obligations they owe to one another and whose provision by the state or the Third Sector (as opposed to the market) says something about the society in which they wish to live. The Court therefore had an independent reason not to take the inquiry under EC competition law further than it did. Had it done so, it would have run the danger of undermining the public ethos of the public health system which both Member States wished to protect alongside their distributive programmes.

Conclusion

The solidarity principle, which continues to mark the public service sector as distinct and justifies restrictions to be placed on the operation of the market in this sector, has to be understood in its fully developed sense. In this respect, the Court's endeavours to define the limits of EC competition law when it is applied to the Member States' public health systems have led it to identify that the solidarity principle can be understood not only as a distributive principle (ensuring equal access to a social good which the market alone could not attain), but also as the expression of a public ethos or public spiritedness which the political community considers important. Both expressions of solidarity should be understood separately, and both can provide States with separate justifications for restricting or excluding the market from providing those public services to which they apply.