Rethinking the approach to economic justifications under the EU's free movement rules

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Abstract

The ECJ has frequently stated that it is a general rule that "economic" aims are precluded as justifications for restrictions on free movement. This on its face suggests that free movement always and automatically trumps national economic interests. However, in reality the Court's approach to balancing these different interests is much more complex: often, and increasingly, interests of an economic nature are in fact recognised in the Court's case law. This paper suggests that this rule precluding economic aims as justifications therefore requires reformulating. It is argued that this is necessary not merely to reflect the reality of the case law, but also to improve the transparency and quality of judicial decision-making.

The paper then also examines *how* the current prohibition might be reformulated in light of both the policy considerations underlying the current formulation (embodying a degree of caution in accepting economic interests) and the problems with that formulation. It is suggested that it is appropriate to maintain a kind of rule against economic objectives, but a more nuanced one concerned solely with measures that have a protectionist aim – the original target of the "general" rule prohibiting economic justifications. On the other hand, with measures that do not have protectionist aims, recognition of economic objectives should be determined on a case-by-case basis that is attuned to the wide variety of economic interests that exist.

An important group of measures within the latter category comprises those directed at protection of Member States' budgetary interests. These warrant special attention and the paper also examines how these interests can be suitably addressed within the context of the framework proposed above. According to the Court's current approach, in theory budgetary justifications are prohibited as a consequence of the rule against economic justifications in general. However, it is explained that, like certain other economic justifications, they are in reality often permitted, being allowed in certain defined and specific circumstances. Further, where they *are* permitted, the Court limits application of the proportionality test in that it does not examine whether alternative means might be used to recoup the lost revenue. In this way the Court balances national economic interests and free movement but avoids various constitutional and practical difficulties of applying a proportionality test to do so. It is proposed that the Court should continue with this approach. However, it needs to acknowledge that it does accept justifications that are budgetary in nature, and that these constitute exceptions to any general rule against budgetary justifications.

It might also be appropriate, further, to accept budgetary justifications as a general rule *in addition* to existing, specific, budgetary justifications *whenever there is a significant impact on a specific programme budget*. However, it is acknowledged that this approach is not consistent with the case law.

1. Introduction

The cornerstone of the EU's single market is the TFEU's rules on free movement of persons, goods, services and capital[1], which prohibit restrictions on free movement unless justified by Treaty derogations or overriding reasons of public interest. This paper examines one aspect of free movement, namely a rule stated by the ECJ that "economic" aims are precluded as justifications. This we will call the prohibition on economic justifications. This on its face suggests that free movement always and automatically trumps national economic interests. However, in reality the Court's approach to balancing the different interests is much more complex. As the contexts in which such a balance is needed have become ever more extensive and sensitive – raising questions, for example, of provision of state benefits to non-nationals, the scope of national powers to combat tax avoidance, and regulation of corporate governance - it has become increasingly apparent not only that the rule no longer (if it ever did) reflects reality but that it hinders decision-making. Nevertheless, the Court continues to pay lip service to it. The concern of this paper is not with how all the substantive issues should be resolved but with the Court's *approach*.

In this respect the paper argues, first, that the general prohibition on economic justifications requires reformulation. This is necessary both to reflect the reality of the case law and to enhance the transparency and quality of decision-making.

Secondly, the paper examines *how* the current prohibition might be reformulated in light of both the policy considerations underlying the current formulation (embodying a degree of caution in accepting economic interests) and the problems with that formulation. We suggest that it is appropriate to maintain a kind of rule against economic objectives, but a more nuanced one concerned solely with measures that have an overt aim of protecting industry from competition as a necessary element of their intended effect – the original target of the "general" rule on economic justifications. On the other hand, with measures that do not have protectionist aims, recognition of economic objectives should be determined on a case-by-case basis that is attuned to the wide variety of economic interests that exist.

One particularly significant aspect of the general prohibition is a rule that budgetary interests – interests in raising revenue and controlling public expenditure – cannot be invoked as justifications. This is important from the perspective of this paper for several reasons: the economic and political significance of these interests, especially in the current recessionary climate; the particular difficulty of devising suitable rules to balance such interests against free movement; the role of the case law on budgetary interests in developing the general prohibition; and the importance of this case law to the general argument in the paper. Although the starting point is that budgetary justifications are not allowed, in reality they are often permitted; further, where they *are* permitted, the Court limits application of the proportionality test in that it does not examine whether alternative means might be used to

[1] See generally C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edn, Oxford University Press 2013); P. P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press 2011) Chs 18-22; D. Chalmers, G. Davies and G. Monti, *European Union Law* (3rd edn, CUP 2014) Chs 17-20.

recoup the lost revenue (although it has not articulated this point). In this way the Court balances national economic interests and free movement but avoids various constitutional and practical difficulties of applying a proportionality test to do so. It is proposed that the Court should continue with this approach, but should acknowledge that these justifications are indeed budgetary and constitute exceptions to any general rule against budgetary justifications. It might also be appropriate, further, to accept budgetary justifications as a general rule *in addition* to existing, specific, budgetary justifications *whenever there is a significant impact on a specific programme budget*; however, it is acknowledged that this approach is not consistent with the case law.

The analysis is structured as follows. First, in section 2, the paper sets out the background to the prohibition and explains in general terms why reconsideration is needed. The remaining sections then put forward the arguments for an alternative approach. In this regard section 3 considers protectionist measures, while section 4 examines non-protectionist measures, including the treatment of budgetary interests. Section 5 concludes.

2. Background: evolution of the prohibition and the need for a new approach

The prohibition on economic justifications originated in case law on national protectionism, which made it clear that Member States could not derogate from the EEC Treaty simply to protect their industry from the very consequences of competition sought by the Treaty. Thus in the first ever case on the Treaty[2], Case 7/61 *Commission v Italy*[3] (*Italian pig-meat*), the Court concluded that Italy could not invoke what is now Art.36 TFEU to suspend imports of pig-meat leading to low prices, because the derogation "is directed to eventualities of a non-economic kind which are not liable to prejudice the principles laid down by Articles 30-34" (on free movement of goods)[4]. This issue was raised again only in 1978 in *Thompson*[5], in which Advocate General Mayras correctly regarded *Italian pig-meat* not as establishing a general prohibition on economic justifications but as ruling out *only certain kinds* of economic justifications, including those on monetary policy dealt with by specific Treaty provisions[6]. Further, the Court itself in *Thompson* accepted a ban on the export of coins that were no longer current tender to avoid their destruction (destruction being an offence within the Member State) on the basis that the public policy derogation in Art.36 protects the right to mint coinage – an economic interest – without mentioning the *Italian pig-meat* rule. A rule on economic justifications was referred to shortly afterwards in Case 95/81 *Commission v Italy*[7], rejecting a requirement for a security when paying in advance for imports which was to be forfeited if the goods were not imported within a certain time. However, the Court's statement that Art.36 "refers to matters of a non-economic nature" was a response to Italy's argument that Art.36 covered defence of the currency, including preventing currency speculation, a justification again ruled out by the Treaty's monetary policy provisions[8]. These

[2] According to Advocate General Lagrange in that case.
[3] Case 7/61 *Commission of the European Economic Community v Italian Republic* [1961] ECR 00635 (English special edition 00317) (hereafter "Italian pig-meat").
[4] Ibid, p.329.
[5] Case 7/78 *Regina v Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss* [1978] ECR 02247.
[6] Opinion of Advocate General Mayras in *Thompson*, n.5 above, p.2281.
[7] Case 95/81 *Commission of the European Communities v Italian Republic* [1982] ECR 02187, para.27.
[8] Case 95/81 *Commission v Italy*, n.7 above, p.2210 as stated by Advocate General Slynn, referring to Advocate General Mayras in *Thompson*.

early cases thus addressed merely i) measures of a protectionist nature and ii) economic aims covered by specific Treaty provisions.

However, shortly afterwards in *Duphar* the Court endorsed a much wider scope for the *Italian pig-meat* prohibition, stating that Art.36 cannot be used to justify a primarily "budgetary" objective[9], and it has subsequently allocated a very wide (although undefined) scope to the concept of an economic aim. On this basis the Court has addressed, and often rejected, not only budgetary interests but also, for example, protection of the commercial interests of undertakings, protection of the State's own commercial interests (including through resolution of legal disputes), and objectives relating to market structure, such as supporting small and medium-sized enterprises (SMEs). Moreover, the Court has applied the prohibition both to explicit derogations and overriding requirements in the public interest[10].

Many of these interests appear to be, however, legitimate national interests. As Snell has stated, "as a matter of principle, it is not immediately clear why the economic, as opposed to protectionist, nature of the aim should render it impermissible"[11]. Further, that many such interests are indeed worthy of recognition has been accepted in the case law in practice, even though not in theory. Thus, as Snell has elaborated, the Court has often either "denied or ignored" their economic nature or has accepted them on the basis of a principle that they serve a non-economic end[12]. In some areas it even considers these interests so important that it excludes measures from free movement rules altogether in recognition of the need to preserve full national autonomy over the interests in question, as in the case of many taxation measures, decisions setting the level of government benefits, and public procurement decisions regarding what to buy[13]. The fact that economic interests have in fact been recognised in these ways cases clearly raises the question as to why they should in general be treated as a separate, prohibited, category.

Answering this question is made more difficult by the fact that, subsequent to *Italian pig-meat* in which the Court referred to the protectionism rationale, an explanation for the prohibition is conspicuous by its absence; the Court's conclusions are often explained by no more than reference to *Italian pig-meat* itself[14], despite the different contexts. However, it is unlikely that the broader prohibition would have taken hold if it did not reflect genuine policy

[9] Case 238/82 *Duphar BV and others v The Netherlands State* [1984] ECR 00523, para 23 of the judgment. The Court stated in para.23 that the rule was established in "many cases" on Art.36 although there in fact appear to have been only two and the Court cited only the *Italian pig-meat* case. The plaintiffs in the main proceedings cited Joined Cases 88-90/75 *Società SADAM and others v Comitato Interministeriale dei Prezzi and others* [1976] ECR 00323 but that case (concerning a maximum price for sugar) was based on secondary legislation and did not mention any general prohibition. In *Duphar* itself the Court concluded that the budgetary measure was legitimate, based on a limited interpretation of the concept of obstacles to trade. Later cases, including Case C-120/95 *Nicolas Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-01831 and Case C-158/96 *Raymond Kohll v Union des Caisses de Maladie* [1998] ECR I-01931, arguably treat the budgetary interest in *Duphar* instead as a justification that is an exception to the prohibition stated in *Duphar* itself, but the author's view is that the case indeed did not involve any obstacle to trade, but was a purchasing decision analagous to a procurement decision that is indeed outside the free movement rules altogether: see section 4.3.2.4.

[10] E.g. Case C-398/95 *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v. Ypourgos Ergasias* ("SETTG") [1997] ECR I-03091, para.23.

[11] J. Snell, "Economic aims as justification for restrictions on free movement", in A. Schrauwen (ed), *Rule of Reason: Re-thinking Another Classic of EC Legal Doctrine* (2005; Europa Law Publishing, Groningen) 52.

[12] J. Snell, n.11 above; and see also W-H Roth, "Economic justifications and the internal market", in M. Bulterman, L. Hancher, A. McDonnell and H. Sevenster (eds), *Views of European Law from the Mountain: Liber Amoricum Piet Jan Slot* (Kluwer 2009) 73.

[13] See section 4.3.2.3.

[14] E.g. in *Duphar*, n.9 above.

concerns, and this is indeed the case, as we will see. A variety of such concerns, combined with difficulties in articulating the difference between acceptable and unacceptable economic interests, have meant that a general prohibition combined with pragmatic "exceptions" has been the Court's choice of approach.

This approach has, however, become more difficult to accommodate as the scope of free movement has expanded to affect an increasing variety of national economic interests. Examples include the extension of free movement into new areas involving publicly-funded benefits such as health[15], education[16] and student support[17]; the "unexpected"[18] ruling in *Essent*[19] that certain limits on private ownership of energy companies are restrictions on free movement of capital[20]; and the *Telaustria*[21] case law applying transparency requirements to the award of contracts and authorisations[22]. As we will see, these developments have all generated significant case law which de facto recognises economic justifications. At the same time, the Court has yet clearly to endorse the view that the rules on free movement of goods and services should apply to measures with no discriminatory aim or effect only where there is a significant impact on market access[23]. This renders imperative the recognition of more economic justifications. The present author shares the widespread view that the balance between internal market interests and national policy concerns is "improperly calibrated at present", giving undue priority to the former[24] and, more specifically, considers that in some of the areas in which economic interests are at stake narrowing the scope of free movement

[15] Decker, n.9 above, and *Kohll*, n.9 above; and in the context of benefits in kind Case C-157/*99 B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-05473.

[16] Case 293/83 *Françoise Gravier v City of Liège* [1985] ECR 00593.

[17] Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-02119, changing its previous approach adopted in Case 39/86 *Sylvie Lair v Universität Hannover* [1988] ECR 03161 and Case 197/86 *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] ECR 03205 in light, in particular, of the Treaty of Lisbon.

[18] J. Snell, "Economic Justifications and the Role of State", in P. Koutrakos, N. Nic Shuibhne and P. Syrpis (eds) *Exceptions from Free EU Movement Law: Derogation, Justification and Proportionality* (Hart; forthcoming).

[19] Joined Cases C-105/12-C-107/12 *Staat der Nederlanden v Essent NV (C-105/12), Essent Nederland BV (C-105/12), Eneco Holding NV (C-106/12) and Delta NV (C-107/12)* 22 October 2013, nyr. ECLI:EU:C:2013:677

[20] As in *Essent* itself (see further the discussion in section 4 below); and see also J. Snell, "Economic Justifications and the Role of the State", n.18 above. On the particular difficulty of defining the scope of restrictions on trade in this context in light of the state's role in setting rules on corporate governance see C. Gerner-Beurie, "Shareholders between the Market and the State: the VW law and other interventions in the Market Economy" (2012) 49 C.M.L.Rev.97.

[21] Case C–324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG* [2000] ECR I–10745.

[22] On this jurisprudence and recognition of economic justifications in these cases see section 4 below.

[23] Although some commentators have taken the view that this approach is reflected in the reasoning in Case C-110/05 *Commission of the European Communities v Italian Republic* [2009] ECR I-00519 and Case C-142/05 *Mickelsson and Roos* [2009] ECR I-04273. For a summary and overview of the debate see C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edn, Oxford University Press 2013), pp. 102-108; and see also M.S. Jansson and S. Kaliom, "De minimis meets "market access": Transformations in the substance – and the syntax – of EU free movement law" (2014) 51 CMLR 523. In public procurement cases the Court has recently adopted a very low threshold for application of free movement based simply on potential interest in even one individual contract: see S. Arrowsmith, *The Law of Public and Utilities Procurement*, Vol. I (3rd edn, Sweet & Maxwell 2014), 4.07-4.08 and 4.12-4.19 and the works cited there.

[24] N. Nic Shuibhne and M. A. Maci, "Proving Public Interest: the Growing Impact of Evidence in Free Movement Case Law" (2013) 50 C.M.L.Rev. 965, 1002, 969, noting that this is a "perception among scholars" (although it is not, of course, a universal view).

would achieve a better balance[25]. A narrow approach is in fact seen in some areas, notably in taxation where retreat from a broad refusal to recognise national budgetary interests has been implemented not only through increased recognition of justifications but also by narrowing the concept of a restriction[26]. However, this issue is not within the scope of this paper and the arguments here do not depend on the maintenance of the Court's broad approach to the scope of free movement – that approach merely makes reformulation of the economic justifications rule of even greater importance.

The issue of economic justification was examined by Snell in an important paper in 2005 but he concluded at that time, however, that the prohibition should be retained[27]. On the other hand the present author, writing on its application to public procurement, has long advocated a narrower prohibition:

"….[a general prohibition] is too unsophisticated and needs to be nuanced. ….It provides a neat way to encapsulate the principle that Treaty derogations cannot be used to justify objectives that are 'mere' protectionism or objectives that merely address the broad social or political consequences of inequality or economic decline in certain areas or activities. However, other policies that are economic in the sense of affecting industrial development – or, indeed, other financial or commercial interests of the state – should not be caught by a general principle that automatically precludes justification."[28] (footnote omitted).

Further, the increasing importance and acceptance of economic justifications has more recently led some of the Advocates General to call for overt recognition of such justifications. Thus Advocate General Jääskinen in *Essent*, considering rules on ownership and activities of energy distributors which aimed, inter alia, at promoting competition and guaranteeing investment, stated that one approach might be to "define the concept of economic objective so as to include in it an element relating to the protectionist, or even 'self-interested', aim of the measure under review"[29] or – alternatively – that the Court should at least recognise limited exceptions to a general prohibition. Similarly, in *Giersch* Advocate General Mengozzi accepted an objective of enhancing national skills for economic development which he recognised overtly as economic[30], whilst in the context of budgetary objectives both Advocate General Jacobs[31] and Advocate General Sharpston[32] have suggested that EU law does recognise justifications which are economic. These suggestions have not been taken up by the ECJ which in a decision of the Grand Chamber in *Essent* reiterated the traditional general prohibition[33]. However, these developments in the thinking of the Advocates General mean that it is particularly timely to develop the author's earlier argument on the need to re-examine the prohibition as it applies to Member States[34].

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[25] On transparency in public procurement context from this perspective, for example, see S.Arrowsmith, n.23, above, paras 4-46-4-49 and also the paras of this volume cited in n.23 above.
[26] See section 4.3.2.1.
[27] Subject to the "further interest" doctrine outlined in section 3 below: see J. Snell, n.11 above, p.54.
[28] S. Arrowsmith, "Application of the EC Treaty and Directives to Horizontal Policies: a Critical Review", Ch.4 in S. Arrowsmith and P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (CUP 2009) 156; and see also, briefly, S. Arrowsmith, n.23 above, at 4.20.
[29] *Essent*, n.19 above, para.89 of the Opinion; and see also the elaboration in para.90 of the Opinion
[30] Case C-20/12 *Elodie Giersch and Others v État du Grand-Duché de Luxembourg*, judgment of 20 June 2013 ECLI:EU:C:2013:411, para.52 of the Opinion ECLI:EU:C:2013:70; see section 4.3.2.3. below.
[31] Case C-147/03 *Commission of the European Communities v Republic of Austria* [2005] ECR I-05969, para.31 of the Opinion: see section 4.3.2.2. below.
[32] Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* [2010] ECR I-02735, para.91 of the Opinion.
[33] *Essent*, n.19, paras 51-52 of the judgment.
[34] The focus of this paper is measures by Member States; it does not consider measures of private actors or EU institutions, to which a different approach, involving wider acceptance of economic justifications – possibly

3. Measures aimed at protecting industry from competition

The first category of measures to analyse consists of measures that are protectionist in the sense of aiming overtly at protecting industry from competition as an intentional element of, or step towards, their goal. This could be protection of specific firms, of a specific sector (as in *Italian pig-meat*), of industry in a specific region[35], or of the whole national industry. The case law indicates that there is a strong presumption against measures of this kind.

First, the interests promoted by many of these measures are rejected because they aim to negate the very consequences that free movement seeks to achieve via competition. It is these measures that the ECJ envisaged in *Italian pig-meat* when stating that what is now Art.36 TFEU "is directed to eventualities of a non-economic kind *which are not liable to prejudice the principles [of free movement]*"[36] (emphasis added) and that Italy's arguments[37] would open the way to unilateral action "going directly against the aim pursued by" free movement of goods[38]. That case concerned temporary restrictions on imports of pig-meat and pig-meat products introduced by Italy in the transitional period, contrary to a general "standstill" obligation in Art.31 EEC. The measures aimed at protecting the Italian industry from competition, which Italy claimed had produced a "serious" and "urgent" situation. The Court made it clear that the explicit Treaty derogations now in Art.36 TFEU could not be used[39]. Its conclusions were supported by the fact that Art.226 EEC contained a specific safeguard clause for serious difficulties that were likely to persist in any economic sector or could seriously impair the economic situation in a region, applying only subject to Commission authorisation and during the transitional period[40]. The principle established in this case clearly precludes justification couched in terms simply of protection of an industry or avoiding negative consequences for the industry – for example, for employment, financial return of firms or survival of specific firms or the industry as a whole[41], however serious

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including even some "protectionist" interests - might be justified. See J. Snell, n.11 above and, in particular, J. Snell, n.18 above; W-H Roth, n.12 above, in particular pp.87-90.

It is also relevant to mention that the ECJ has not defined "economic" for the present purpose, and we will not do so: no definition is needed since the paper rejects the need for, and desirability of, a general prohibition or any other rules that depend on categorisation of interests as economic or non-economic.

[35] As in Case C-21/88, *Du Pont de Nemours Italiana SpA v Unità sanitaria locale Nº 2 di Carrara* [1990] ECR I-00889, discussed in section 2 below.

[36] This is a reference not merely to the measure impeding free movement but to the fact that the purported justification referred to the very sort of interest that the free movement rules are designed to remove.

[37] Specifically, in response to an Italian argument that a derogation was permitted because the restriction was temporary.

[38] N.3 above, p.328.

[39] And also rejected arguments based on "general principles of public law" allowing states to act in an emergency to remedy serious occurrences.

[40] Italy in fact applied for authorisation and was refused; however, the Commission suggested applying for authorisation for minimum price controls under Art.44 EEC and this solution was then adopted and the prohibitions on imports withdrawn.

[41] See, for example, the Opinion of Advocate General Slynn in Case 72/83 *Campus Oil Limited and others v Minister for Industry and Energy and others* [1984] ECR 02727, at p.2765; Case C-324/93 *The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd* [1995] ECR I-00563 para. 36. Case 352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 02085 and C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* [1991] ECR I-04007 (concerned to prevent competition against certain broadcasters in attracting advertising revenue) were also aimed at protecting the financial position of national firms.

and/or urgent[42]. The Court has also rejected the possibility of justifying measures because they are merely temporary[43] or a means of gradual transition towards competition[44], and justification is also unaffected by unfair or illegal practices by other Member States[45]. Interests that do not go beyond a concern with these consequences of competition may be labelled as protectionist in a narrow sense of being directly contrary to the aims of the single market.

It is also clear that avoiding other general consequences of the decline of employment and profits is not accepted as justification. These include both consequences that are economic and those that can be labelled social or political. There is no general distinction between consequences that are "purely" economic and the social and political consequences of economic decline: whilst the latter can be considered as non-economic interests that are the end objective of the economic aims they are still not recognised. These latter consequences are not inherently contrary to the operation of a competitive market in the same way as is the mere survival and development of industry that does not enjoy a comparative advantage (preventing the factors of production moving to more productive areas) but are usual and widespread (and frequently inevitable) consequences of competition which, if allowed as justification, could significantly limit the single market. They are also generally interests that, where significant, can be addressed in other ways (which are often provided for under Treaty provisions). Balancing the benefits of allowing such interests as justifications against the costs of this to the single market generally favours their rejection, and the value of a general rule leads to the conclusion that they are rejected in principle. Into this category of rejected interests fall interests in preventing reduction of tax revenue or avoiding social unrest or political difficulties, where these are consequences of the economic effect of the single market[46], as well as balance of payments difficulties[47] (which are addressed by specific EU mechanisms[48]).

Protection from competition also seems ruled out as a tool of regional policy[49]. This issue arose in *Du Pont de Nemours*[50] in which the Court concluded that preferences in public supply contracts favouring the Italian *Mezzorgiorno* violated the free movement rules. It was argued that they were justified as going beyond "protectionist aims" and seeking to eliminate regional "social and economic disequilibrium" as both a legitimate national interest and an

[42] State aid may be available in the case of serious economic disturbances: TFEU Art.107(3)(b). This possibility also reinforces the point that such aims cannot be pursued by protectionist means since this is probably not possible for objectives pursued through state aid: see further the discussion below.
[43] *Italian pig-meat*, n.3 above, p.328.
[44] Case C-353/89 *Commission of the European Communities v Kingdom of the Netherlands* [1991] ECR I-04069.
[45] C-265/95 *Commission of the European Communities v French Republic* [1997] ECR I-06959.
[46] See, for example, Case C-231/83, *Cullet/Leclerc* [1985] ECR 00305, para.33 of the judgment and, in particular, pp.312-314 of the Opinion of Advocate General Verloren Van Themaat (who did not, however, rule out a justification in exceptional cases of threats to important interests based on the "further purpose" doctrine); Case C-164/99 *Portugaia Construções Ld[a]* [2002] ECR I-00787, paras 25-26.
[47] See again the Opinion of Advocate General Slynn in *Campus Oil*, n.41 above, p.2765.
[48] As also indicated by Advocate General Slynn in *Campus Oil*, n.41 above, p.2765.
[49] It is difficult to conceive of Member States pursuing the objectives above other than to promote *national* development but were they to do so – for example, to reserve contracts for firms from poor regions in other Member States – this would be precluded as outside legitimate national concern: Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141 (rejecting protection of consumers of another Member State as a possible justification).
[50] *Du Pont de Nemours*, n.35 above.

EU objective[51]. The ECJ based its rejection of this argument on the now-debated rule that general interest requirements cannot justify distinctly applicable measures[52]. However, regional policy measures seem anyway to be precluded on the basis of the reasoning of Advocate General Lenz[53] who considered justification ruled out by the specific and adequate machinery in the Treaties[54], and also referred to the prohibition on "economic objectives"[55] and the fact that a State "may not rely on mandatory requirements to protect its domestic economy"[56]. This reasoning implies also that other policies that can be pursued through authorised state aid (for example "to promote the execution of an important project of common European interest") cannot be pursued by protectionist measures such as limiting imports. The Court also invoked the economic justifications rule to preclude use of protectionist measures to promote SMEs in Case C–360/89 *Commission v Italy*[57] which again concerned measures restricting competition in public contracts[58]. This conclusion seems correct in light of Article 173(1) TFEU which, whilst stating that the Union and Member States shall ensure conditions necessary for competitiveness of the Union's industry and for that purpose aim at, inter alia, "encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings", requires this is to be done "in accordance with a system of *open and competitive markets*" (emphasis added).

It should be noted that some measures that are protectionist in our sense do not depend on achieving a protective effect that directly or indirectly[59] favours *national* industry – for example, conferring a monopoly on a non-national to generate maximum revenue, or awarding a contract without transparency to a non-national to settle a contractual dispute. However, even when protectionist measures do not have a *national* protectionist aim they

[51] The measure being directed at a region with an abnormally low standard of living in accordance with the regional policy of the Treaty's state aid provisions within EEC Treaty 92(3)(a). See now, in particular, TFEU Art.107(3)(a) and (c).
[52] *Du Pont de Nemours*, n.35 above, para.14.
[53] It is also significant that in *Du Pont De Nemours* the Court effectively interpreted the state aid provisions as allowing authorisation only of direct and indirect financial aid, precluding authorisation of other protective measures (such as reserving public contracts): para.21 of the judgment. (The Court considered that whether or not the measures fell within the definition of state aid they could not be authorised under the state aid rules when they violated free movement, and if they did constitute state aid that alone would not exempt them from the free movement rules). This reinforces a view that the objectives potentially permitted through state aid cannot more generally be pursued through protective measures that constitute obstacles to trade under the free movement rules: if they cannot be pursued with Commission authorisation *a fortiori* they cannot be pursued unilaterally. For analysis and critique see O. Stehmann and J. Fernández Martín, "Product market integration versus regional cohesion in the Community" (1991) 16 ELRev 216.
[54] Para.45 of the Opinion.
[55] Para.42 of the Opinion.
[56] Para.45 of the Opinion.
[57] Case C-360/89 *Commission of the European Communities v Italian Republic* [1992] ECR I-03401.
[58] By way of reasoning the Court simply referred to the cases cited in argument supporting the general prohibition, namely Case C–353/89, n.44 above, and *Stichting Collectieve Antennevoorziening*, n.41above. See also Case C-400/08 *European Commission v Kingdom of Spain* [2011] ECR I-01915, paras 95-98, rejecting the possibility of measures that effectively limited the market share of retail establishments, making it impossible to open large or medium-sized retail establishments, again referring (in para.98) to the prohibition on economic considerations.
[59] Measures aiming to protect national industry will not in practice necessarily be indistinctly applicable – for example, reservation of public contracts for SMEs in general may favour national SMEs in practice. The inherently "nationalistic" aspect of such objectives, making it unlikely that they will pass a proportionality test, provides a particular reason to preclude them altogether instead of applying the usual proportionality assessment.

will be difficult to justify. In *Dickinger*[60], for example, the Court stated that the objective of maximising public revenue cannot justify a monopoly[61]. Whilst, as section 4 explains, interests in revenue generation *are* recognised, a general rule that revenue generation cannot be the object of a grant of rights is appropriate.

The ECJ has, however, accepted that it is exceptionally possible to justify protectionist measures as being not solely economic but further to an economic aim, as established in *Campus Oil*[62] - the "further purpose" doctrine. The Court indicated that the public security derogation could justify Irish legislation requiring importers of refined petroleum products to purchase certain products from a state-owned refinery to maintain the refinery's business and ultimately the supply of petroleum products in Ireland: this was to be "regarded as transcending purely economic considerations"[63] In several later cases the Court has also accepted the possibility of protecting undertakings to ensure their survival for public interest reasons (although generally indicating also that the measures would fail the proportionality test)[64].

However, the further purpose doctrine is of very limited assistance in identifying the limits on the presumption against protectionist measures. First, as we have seen, some interests clearly ruled out have, in fact, a (non-economic) further purpose, such as preventing social unrest. *Campus Oil* merely confirms that *some* purposes furthered by economic protection are admitted as justifications even though many other further objectives (both economic and non-economic) are not. Secondly, even in the context of protectionist measures, not *all* economic interests are ruled out, contrary to the suggestion in *Campus Oil*. This is shown by *Smits/Peerbooms*[65], in which the Court accepted in the context of a protectionist measure the justification[66] of "the risk of seriously undermining the financial balance of the social security system"[67] – an interest that is clearly economic (budgetary)[68]. A more recent illustration is *Spezzino*[69], in which the ECJ accepted, on the same basis, the possibility of reserving certain

[60] Case C-347/09 *Criminal proceedings against Jochen Dickinger and Franz Ömer* [2011] ECR I-08185, para.55.
[61] Para.55 of the judgment. Whilst the objective (raising revenue) is economic the Court surprisingly did not refer to any general prohibition on economic justifications. (Advocate General Bot addressed the issue solely on the basis that the measure's objective was to protect consumers and fight crime: *Dickinger*, n.60 above, para.84 of the Opinion.)
[62] *Campus Oil*, n.41 above.
[63] Para.35 of the judgment.
[64] E.g. Case C-353/89 *Commission v Netherlands*, n.44 above; Case C-118/86 *Openbaar Ministerie v Nertsvoederfabriek Nederland BV* [1987] ECR03883; *Evans Medical*, n.41, above. And see also, for example, Joined Cases C-570/07 and C-571/07 *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios (C-570/07) and Principado de Asturias (C-571/07)* [2010] ECR I-04629 (cf Joined Cases C‑72/10 and C‑77/10 *Marcello Costa (C-72/10) and Ugo Cifone (C-77/10)* 16 February 2012 ECLI:EU:C:2012:80 and Case C‑384/08 *Attanasio Group Srl v Comune di Carbognano* [2010] ECR I‑02055).
[65] N.15 above.
[66] Allowing prior authorisation of hospital treatment and conditions limiting access to such treatment in other Member States, to prevent the outflow of patients from national hospitals that could undermine planning and lead to wasted expenditure. This justification was articulated earlier in a non-protectionist context in *Decker* and *Kohll*, n.9 above, as explained in section 4.3.2.2. below. However, lost revenue from tax payments from local providers can never be taken into consideration: see above.
[67] Para.39 of the judgment.
[68] See section 4.3.3.2 below.
[69] Case C-113/13 *Azienda sanitaria locale n. 5 «Spezzino» and Others v San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus* ECJ judgment of 11 December 2014 ECLI:EU:C:2014:2440. The case to some extent followed the path set by Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-03395 but extended that decisions in some

public contracts to non-profit-making organisations and awarding them directly to national organisations[70].

It is also worth considering the case of *Belgacom* as an example of how the general prohibition can detract from a reasoned consideration of the issues[71]. Four inter-municipal associations had until 1996 provided cable services through their own cable networks. In 1996 they acquired a 1.5% share in Telenet and in exchange allowed Telenet to use their cable networks for 50 years, with exclusive use for certain services. Subsequently the associations commenced provision of digital TV services, which Telenet claimed violated the 1996 agreement. The domestic court agreed and the associations appealed. The parties then made an agreement to settle the dispute, which involved the associations giving Telenet a 38-year lease of the associations' cable networks and an exclusive right to use the networks for certain services but still enabled the associations to offer commercially-attractive services to their own subscribers. The ECJ rejected the possibility that this commercial interest of the associations could justify awarding the economic opportunity to Telenet without transparency under the free movement rules[72]. The Court also dismissed an argument based on the interests of the associations' own subscribers in having a variety of services as being merely an interest relevant to the associations' own commercial interests[73]. This ruling implies that where the governmental interests at stake in settling a legal dispute are purely economic[74] a settlement cannot ever involve an adjustment to the scope of an agreement or the award of further rights without transparency[75]. It is beyond the scope of this paper to consider the merits of the conclusion but the issues are complex and it is far from obvious that it is appropriate for all cases – for example, that where there is a genuine and reasonable dispute over the scope of services to be provided by a government contractor it should not be possible to settle the dispute by a compromise that provides for the contractor to provide some of the

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respects, not least in its apparent recognition of a purely economic objective of the kind referred to in *Decker* and *Kohll*, as discussed in section 4.3.2.2 below: see para. 57 of the judgment in *Spezzino*. For an example of a policy involving protection from competition in EU secondary legislation see e.g. Art.19 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114, allowing for Member States to reserve contracts for "sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions". This is extended in Art.20 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Text with EEA relevance) [2014] OJ L94/65 to "disadvantaged" persons in general, as well as in other ways. This measure merely, however, allows reservation of contracts for these organisations and not a direct award. Another such aim could be promoting competition where there are limited numbers of undertakings; public procurement measures that are protectionist in the sense defined in section 3 above – placing contracts with specific firms or excluding certain firms – have sometimes been used or contemplated to this end, although it is controversial whether this should be allowed.

[70] Surprisingly, the Court gave little guidance on how the proportionality test might be applied, despite a serious question mark over both the suitability and necessity of such measures, as to which see the Opinion of Advocate General Wahl and the note by D. McGowan, (2015) 24 P.P.L.R. NA61.

[71] Case C-221/12, *Belgacom NV v Interkommunale voor Teledistributie van het Gewest Antwerpen (INTEGAN) and Others* ECJ judgment of November 14 2013 ECLI:EU:C:2013:736.

[72] Para.41 of the judgment.

[73] Para.42 of the judgment.

[74] Although it does not necessarily rule out that consumer protection interests and other interests, such as health, might justify protectionist measures taken to resolve contractual disputes – for example, where a contractor refuses to provide urgent health services.

[75] And also that government commercial interests *cannot be taken into account* in assessing a settlement that also involves other interests.

disputed services[76]. Dismissal of economic interests under a general prohibition simply served in *Belgacom* to avoid analysis of the policy issues. *Belgacom* also illustrates that the further purpose doctrine is not an adequate tool to deal fully with economic justifications, and how it may obscure the reasons for decisions, in view of its great flexibility: in *Belgacom* the interest of the associations' consumers is dismissed without explanation, in contrast with the approach in *Essent* where, as we will see, consumer interests promoted by economic policies were *accepted* on the basis of the further purposes doctrine[77].

In conclusion, the above cases suggest that national measures that seek to achieve their effects by protecting industry from competition are generally ruled out, and that very often the ultimate objectives served are also rejected as grounds of justification, even when they are not per se contrary to the objectives of the Treaty and/or have a social or some other dimension. Measures of this kind that achieve their effects through favourable treatment for *national* industry – protectionist in a narrow sense - are the kind of measures at which the original prohibition on economic justifications was directed. Further, even measures that do not depend on favourable treatment for *national* industry are difficult to justify. There is a general presumption against such protectionist measures and the existing "general" prohibition on economic justifications can be reformulated as a presumption of this kind. This is only a presumption, since exceptions exist. However, the observation that permitted objectives are "further" to any protective effect is of limited value in delimiting the exceptions, since protective measures often aim at effects that are further to the immediate economic consequences of protection and most are still ruled out; indeed, the observation is unhelpful since it can obscure a reasoned consideration of why particular objectives are accepted or rejected. It is also, as we have seen, not even the case that acceptable "further" objectives are always non-economic, although acceptance of economic objectives is rare. Effectively, what is required is to analyse the objectives in question in the light of all the circumstances to determine whether the specific end goal is acceptable even though pursued through protectionist means.

4. Measures not aimed at protecting from competition

4.1. Introduction

In this section we turn to measures that do *not* seek their aims by protecting of industry from competition, and will argue that a new approach is needed that leaves no room for any prohibition of, or presumption against, economic aims. We will consider first interests of a non-budgetary nature (section 4.2), and secondly budgetary interests (section 4.3).

4.2. Economic interests other than budgetary interests

So far as concerns non-budgetary economic objectives, certainly some *are* ruled out as justifications. This is the case, in particular, for objectives addressed by specific and adequate Treaty machinery: the reasoning of Advocate General Lenz in *Du Pont de Nemours* rejecting policies that can be implemented through state aid and Advocate General Mayras in *Thompson* rejecting balance of payment and monetary policies[78] is relevant here. In practice,

[76] The possibility of settling disputes in this way is also potentially affected by explicit rules on changes to the scope of public contracts introduced by the 20l4 procurement directives, the impact of which has not been examined in this context: see, for example, Directive 2014/24/EU, n.69 above, Art.72.
[77] See section 4.2.
[78] See section 1 above.

most such measures are protectionist but that this is not necessarily so is illustrated by Case 95/81 *Commission v Italy*, discussed in section 2. Another type of justification that is rightly ruled out is seen in *SETTG*[79]. That case concerned a Greek Law classifying all tour guide/travel agent relationships as employment. The justification claimed for the measure, resolution of a long-standing dispute between guides and agencies over employment rights with the further aim of avoiding disruption to tourism and the Greek economy[80], was rejected as "economic"[81]. Here the reason for seeking to end the dispute was economic but it is far from clear that the same conclusion should not apply if maintenance of industrial peace were directed at some other interest, such as avoiding public disorder[82]. The case is arguably better regarded as based on a principle that avoiding industrial and social unrest and its "further" consequences cannot generally justify obstacles to trade not only when the measure overtly protectionist but also when it is protectionist in effect, to avoid those affected by competition influencing governments to adopt measures with a protective effect. However, whilst some types of non-budgetary economic interests (or interests that frequently have an economic aim, as in *SETTG*) cannot and should not be capable of justifying obstacles to trade, outside the context of protectionist measures these seem quite limited.

On the other hand, there are a number of non-budgetary economic interests that *have* been recognised in practice, with the ECJ generally simply ignoring their economic nature.

One example is seen in *Thompson*[83] in which, as section 2 explained, the ECJ indicated that a ban on exporting coins to prevent their destruction could be justified as protecting the right to mint coinage[84]. Although *Italian pig-meat* was cited to support rejecting this interest[85] the Court did not mention its economic nature, implying – as stated by Advocate General Mayras[86] - that it was not within the *Italian pig-meat* rule on "economic" aims.

Another recognised interest that is economic[87] is that accepted in *Alpine Investments* to justify a prohibition on cold-calling, namely maintaining "the good reputation of the national

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[79] Case C-398/95 *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v. Ypourgos Ergasias* [1997] ECR I-03091.

[80] Para.22 of the judgment.

[81] Para.23 of the judgment. Another reason was that restrictions on self-employed guides from other Member States were not necessary to achieve the aim.

[82] Cf however, Advocate General Lenz, para.62 of the Opinion, who contemplated recognition of the aim of preserving industrial peace where the end goal is non-economic. The Court, on the other hand, does not specifically endorse this view. The scope for justification based on preventing exceptional consequences of public disorder based on the further purposes doctrine is probably the same for protectionist and non-protectionist measures, and was discussed by the Advocate General in *Cullet/Leclerc*, as outlined in n.46 above. Roth, n.12 above, p.85, suggests that the case stands for the principle that "labour law legislation cannot be pursued to protect domestic employment relationships *vis-à-vis* competitive forces from other Member States by persons who perform comparable work as self-employed persons" (p.85). This may be an area where there is some difference in the rules on justifications that may be offered by Member States and regulated private parties: see W-H. Roth, n.12 above, and J. Snell, n.18 above.

On the other hand, when the Member State measure itself is not overtly protectionist but aims at some other, recognised, interest (which in practice will also frequently be an interest pursued by those involved an industrial action etc), such as worker protection in the sense of fair wages, safe working conditions etc, the measure will fall to be assessed according to its justification by reference to that other interest.

[83] *Thompson*, n.5 above.

[84] *Thompson*, n.5 above, para. 34 of the judgment.

[85] See p.2254.

[86] See section 2 above.

[87] E.g. W-H. Roth, n.12 above, pp.78-79.

financial sector" [88]. Thus, as Roth points out, measures to enhance national industry by improving quality, rather than protecting from competition, may be acceptable even when they affect trade[89]. To similar effect is *Giersch*[90] in which the Court considered that increasing the proportion of residents with a degree to promote the national economy could justify restrictions on access to student support[91]. As Advocate General Mengozzi (who also accepted the objective) recognised[92] such an objective is certainly economic.

A further type of economic justification is found in the case law on duration of authorisations. Thus in *Engelmann*[93] the ECJ treated a 15-year duration for gaming licences as a restriction on trade[94] but stated, without referring to the economic nature of the objective, that it might be justified having regard, in particular, the need for licensees' to recoup investments[95]. However, in *Commission v Italy*[96] the Court had stated that "economic" reasons such as the need to protect investments of a licence holder could not be a justification. The approach is clearly contradictory[97]. The difference in *outcome* lies in the fact that *Engelmann* concerned the duration of lawful licences (justified by the interest of controlling access to gaming) whilst *Commission v Italy* concerned renewal of existing licences which had been unlawfully awarded (as the restrictive licensing system in that case had no public interest justification). Thus only in the former case was protecting the investment a legitimate consideration.

A final example is seen in *Essent*[98] which concerned, inter alia, rules aiming to prevent distortion of competition in energy markets. Citing the general prohibition on economic justifications[99], the ECJ declined to recognise this aim per se, even though competition is an aim of the TFEU - but then concluded that protecting consumers, as a further (non-economic) aim of preventing distortion of competition, *could* provide justification[100]. Advocate General Jääskinen, however, contemplated a different approach, namely that the prohibition did not apply to objectives recognised in the TFEU itself[101]. Here the aim accepted by the Court is only a "further" aim in the same way that all economic policies (including narrowly protectionist policies) have a further aim of benefitting citizens, consumers and/or producers; in contrast with Advocate General's approach, it does not illuminate why the objective is accepted when other economic policies serving consumer interests (including SME policy and the consumer interests involved in *Belgacom*) are not.

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[88] *Alpine Investments*, n.49 above, para. 44.
[89] Ibid.
[90] *Giersch*, n.30 above.
[91] As implemented in Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2. This approach assumed that it was necessary to justify the actual purpose of the support scheme, which we suggest at 4.3.2.3 below is not correct.
[92] *Giersch*, n.30 above, para.52 of the Opinion.
[93] Case C-64/08 *Criminal proceedings against Ernst Engelmann* [2010] ECR I-08219.
[94] Separate from a limitation on numbers: *Engelmann*, above, para.46.
[95] *Engelmann*, n.93 above, para.48.
[96] Case C-260/04 *Commission of the European Communities v Italian Republic* [2007] ECR I-07083.
[97] As highlighted by G.S. Ølykke, "Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions? Recent developments in case law and their implications for one of the last sanctuaries of protectionism" (2014) 23 P.P.L.R.1, 10-11.
[98] *Essent*, n.19 above.
[99] Para.51 of the judgment, referring to two cases on budgetary justifications, Case C-109/04, *Karl Robert Kranemann v Land Nordrhein-Westfalen* [2005] ECR I-02421 and Case C-388/01 *Commission of the European Communities v Italian Republic* [2003] ECR I-00721, discussed in section 4.3.2.3 below.
[100] Para.58; as also could the objective of ensuring adequate investment in the gas and electricity industry with a view to energy security: para.59.
[101] Para.103 of the Opinion.

This case law illustrates the variety of economic justifications accepted by the Court, as well as showing how reference to the general prohibition and recourse to the further purpose doctrine can substitute for proper examination of the issues.

In light of this case law, it is submitted that the starting point with economic interests should be the same as with other kinds of interests, namely that they are considered on their specific merits. This addresses three inter-related problems with the current prohibition. Thus, first, it properly recognises the inherent legitimacy of many national economic aims. Secondly, it provides a better explanation of the case outcomes by overtly acknowledging these interests. It is also not inconsistent with most of the cases in which the Court has relied on the general prohibition to reject a measure, since generally there were specific reasons, residing either in the particular nature of the interest, or proportionality. Thirdly, it ensures transparency in the articulation of the actual reasons for decisions, which may enhance the quality of decision-making.

As we have just seen, a less radical approach was mooted by Advocate General Jääskinen in *Essent* who, as well as suggesting that the general prohibition might be confined to protectionism, contemplated also an alternative of recognising defined exceptions, in particular for interests recognised in the TFEU itself. This approach of recognising exceptions could also be applied to other economic interests: all the categories accepted by the Court could simply be acknowledged as exceptions to a general prohibition, and added to as appropriate. It is submitted, however, that a case-by-case approach is preferable. First, economic interests are not inherently less worthy of protection than many others, and it should not be necessary to overcome a presumption against them; treating them like any other interest avoids any danger that they will be unjustifiably rejected and that any presumption, no less than a (theoretical) prohibition, will militate against a careful assessment of the reasons for recognising the interest. Secondly, the economic interests actually recognised by the ECJ are *not* exceptional, but embrace many of the types of economic interest raised in the case law; it is rather those that are not recognised that are now exceptional. Further, the disparate nature of the interests treated under the umbrella of "economic" interests means that that concept is too wide to have coherence from a policy perspective.

These arguments are significantly reinforced by the extensive recognition that the Court also affords to budgetary interests, as will be discussed below. The argument for general reformulation of the approach to (non-protectionist) economic interests in the manner set out above does not, however, entail any "general" recognition of budgetary interests as justifications. These in fact require a rather nuanced approach within this more general framework and it is to this difficult area that we will now turn.

4.3. Budgetary interests: raising revenue and controlling expenditure

4.3.1. Introduction and policy considerations

Very many of the cases on economic justifications concern "budgetary" interests, in the sense of interests in securing revenue or controlling expenditure. In 1984 in *Duphar*[102] the ECJ stated that the *Italian pig-meat* prohibition precluded applying Art.36 TFEU to "budgetary"

[102] N.9 above. A reluctance to allow budgetary considerations to trump free movement was first seen in the earlier Case 104/75 *Adriaan de Peijper, Managing Director of Centrafarm BV* [1976] ECR 00613 in the context of proportionality.

considerations[103]; it was then referred to in a budgetary context in the 1990s in cases on reimbursement of healthcare costs[104] and took a firm hold in the late 1990s, in particular through cases rejecting certain discriminatory taxation measures[105]. Another key decision, cited in many subsequent cases[106], is *Kranemann*[107], concerning a German system for reimbursing travel expenses of trainees, which covered all expenses for those training in Germany but only travel expenses within Germany for those training in another Member State. Rejecting an argument that this restriction was justified by higher costs of travel outside Germany, the Court simply invoked the general prohibition on economic justifications[108] as well as indicating that such a measure failed the proportionality test since its objective could be achieved by capping payment at the cost of internal journeys[109]. However, despite constant reiteration of the prohibition there are, as is well recognised[110] and as we will elaborate below, many situations in which the Court *has* accepted budgetary justifications, either ignoring the prohibition, denying the budgetary nature of the interest and/or making spurious use of the "further purpose" doctrine. In these ways the Court has developed a body of jurisprudence that recognises budgetary interests and defines and circumscribes their use but without acknowledging what it is doing, reflecting the fact that it is willing to recognise what are inherently legitimate interests but is cautious in doing so.

Given the legitimate nature of budgetary interests the question arises as to why the Court has denied their existence in theory and shown caution in accepting them in practice. The historical development of the prohibition in the budgetary context in that, first, it derives (even in the taxation context[111]) from jurisprudence concerned with national protectionism and, secondly, was first articulated in cases in which it was not essential for the outcome (*Duphar*, and *Decker* and *Kohll*) almost gives an impression that it found its way into the jurisprudence by accident. This context has also contributed to a situation in which neither the ECJ nor Advocates General have elaborated the policy reasons behind it; in the first *non-protectionist* cases in which the prohibition was actually the reason for rejecting the measures it was simply taken as already established that budgetary interests were not recognised[112]. However, it is unlikely that the prohibition would have developed without any significant reasons behind it.

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[103] See section 1 above.
[104] See section 4.3.3.2. below.
[105] See section 4.3.2.1.
[106] Case C-384/08 *Attanasio Group Srl v Comune di Carbognano* [2010] ECR I-02055, para.55 of the judgment; *Essent*, n.19 above, para.51; Case C-322/13 *Ulrike Elfriede Grauel Rüffer v Katerina Pokorná* judgment of 27 March 2014 ECLI:EU:C:2014:189, para.25; Case C-456/10 *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administración del Estado*, judgment of 26 April 2012 ECLI:EU:C:2012:241, para.51; Joined Cases C-357/10 to C-359/10 *Duomo Gpa Srl (C-357/10), Gestione Servizi Pubblici Srl (C-358/10) and Irtel Srl (C-359/10) v Comune di Baranzate (C-357/10 and C-358/10) and Comune di Venegono Inferiore (C-359/10)*, judgment of 10 May 2012 ECLI:EU:C:2012:283; and, on benefits, Case C-220/12 *Andreas Ingemar Thiele Meneses v Region Hannover* judgment of 24 October 2013 ECLI:EU:C:2013:683, para.43 of the judgment.
[107] *Kranemann*, n.99 above.
[108] Para. 24 of the judgment.
[109] Para. 35 of the judgment.
[110] J. Snell, n.11 above; N.Nic Shuibhne and M.A.Maci, n.24 above, pp.997-1004; D. Chalmers, G. Davies and G. Monti, n.1 above, pp.896-899.
[111] Section 4.3.2.1. below.
[112] Case C-264/96 *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)* [1998] ECR I-04695 in relation to taxation (see section 4.3.2.1. below), Case C-388/01 *Commission v Italy*, n.99 above, concerning access to cultural attractions (see section 4.3.2.3 below) and *Kranemann*, n. 99 above, discussed above.

One reason could be that financial interests are simply considered relatively unimportant. However, as Davies states "There are no purely economic interests….. Money buys things, and it buys services, and governments do both, and if they have money then there are less [sic] things and less [sic] services for the people. …"[113]. A cautious approach to budgetary interests may, however, reflect a general preference for individual economic and other rights over a communitarian approach. This is most controversially seen in the case law on accessing health-care across borders[114].

The Court's approach may also be influenced, however, by the availability of means to deal with budgetary issues without restricting free movement, including by cutting back other expenditure, raising revenue by alternative means and improving efficiency. This means that there is often no *necessary* impact on any specific interests, including those near the top of the ECJ or Member State hierarchy, such as health or security, and that conflict between free movement and other interests can often be recast as a conflict between free movement and interests of low priority (it being assumed that compensating measures will be taken with these interests). Thus, it may be argued, acceptable alternative means of action are normally available. On the other hand, in a few areas the consequences of alternative means are clearly unacceptable and this might explain acceptance of budgetary justifications in these cases – for example, dealing with tax evasion by cutting expenditure or raising the revenue in a different way, rather than ensuring payment of tax due, is unfair between taxpayers. Whilst availability of alternative measures is generally addressed at the proportionality level, if they are relevant in the overwhelming majority of cases a presumption against budgetary justifications might be a suitable approach, providing legal certainty and avoiding certain other difficulties with a proportionality approach, as discussed below.

Another reason for caution could be that the size of budgetary interests is sometimes small, in absolute terms and/or in comparison with relevant obstacles to trade. This might explain cases such as *Kranemann*[115] and *Commission v Italy* (discussed below[116]). Further, in some cases a budgetary interest might be "managed" or absorbed – for example, by efficiency improvements. This might lie behind the healthcare case law or the *Bidar* line of case law on student support, discussed below, where the Court refers to the existence of a risk to the level of support available as a condition of, or reason for, justification[117]; this language might suggest that some financial consequences do not have real impact[118]. Again, if these scenarios are the norm, a general rule against budgetary interests combined with exceptions for interests of particular significance might offer a more efficient and legally certain approach than a proportionality test.

In this context, it is also relevant to recall that many national budgetary decisions do not to create obstacles to trade at all; thus a rule rejecting budgetary justifications does not bite on those budgetary decisions most deserving of protection, making such a rule more acceptable. On the other hand, the fact that some such decisions formerly outside the Treaty, such as

[113] G. Davies, "'Any Place I hang my Hat?' or: Residence is the New Nationality" (2005) 11 *European law Journal* 43, 47.
[114] See section 4.3.2.2.
[115] And also *Rüffer*, n.106 above, dismissing the possibility of justifying on cost grounds a rule denying non-nationals the same options available to nationals for use of languages in court proceedings
[116] See section 4.3.2.3.
[117] See respectively sections 4.3.2.2 and 4.3.2.3.
[118] Although it might alternatively, or additionally, reflect a desire to link budgetary impact to non-budgetary considerations even when this is tenuous.

award of student maintenance, are now considered within it, has now led to a greater need for budgetary justifications.

Relevant to several of these points are the difficulties of applying a proportionality test[119]. In theory, this might involve examining the alternatives available to address the lost revenue/additional expenditure, entailing a number of questions. What are the amounts involved? (This might be difficult and costly to determine). Would these necessarily be taken from the budget in question and, if so, what effects would that have on the contributors and/or the scope/quality of the programme? Could finance be obtained from other sources and what effect might that have on States' discretion in choosing their approach to financing (including whether activities should be self-financing) and on other interests potentially affected by the use of other revenue or additional revenue-raising activities? Must the reviewing court identify policy areas for cuts and who is to determine the priority between them? As Nic Shuibhne and Maci state, however: "Even if such a level of scrutiny was remotely feasible in practical terms, it is neither in the function nor the capacity of the courts to execute it" [120]. Such decisions are unsuited to judicial scrutiny, being highly sensitive and relating to fundamental areas of national policy-making - macro-economic policy and expenditure allocation - at the core of national sovereignty. An alternative - more consistent with the ECJ's approach of treating the level and allocation of expenditure as within Member State discretion[121] - might be a purely procedural review that ensures that States have carefully examined the alternatives[122]. However, even this creates considerable difficulties (must a Member State show that it has examined all possible areas for budget cuts?) and could create a danger of insufficient weight being given (from the perspective of the ECJ) to EU rights. In fact, as we will see, where the ECJ has recognised budgetary interests, other than sometimes requiring evidence of the costs involved to determine whether the interest is of sufficient magnitude to warrant protection at all[123], the Court has not analysed any of these issues. Thus it has not assessed whether extra expense would actually affect the programme in question – even when this is ostensibly required, it is simply assumed[124], and similarly has never examined whether expenditure might be saved by greater efficiency. Denying budgetary justifications, or limiting them to certain types of case, avoids the costs, practical difficulties and constitutionality issues of such case-by-case scrutiny; this is replaced by general rules for balancing the different interests, defined by reference to generic circumstances and based, arguably, on assumptions about the likely impact of certain types of measures.

Finally, in some recent cases the ECJ itself has finally articulated a reason for rejecting budgetary justifications: in *Commission v Netherlands* it stated, in the context of free movement of workers, that "To accept that budgetary concerns may justify a difference in

[119] The same issues arise (although not nearly as often) if budgetary justifications are subject to a condition such as that there must be an "unreasonable" burden on the budget as discussed at 4.3.2.3 below.
[120] N. Nic Shuibhne and M. A. Maci, n.24 above, p.1003.These comments were made in the context of the possible need to identify an unreasonable burden on finances with implications for the financial balance of the social security system under the *Bidar* line of case law discussed in section 4.3.2.3 below.
[121] See, for example, section 4.3.2.3 below on the level of student support and section 4.3.2.2 on the level of health benefits.
[122] See C. Newdick, "Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity" (2006) 43 CMLRev 1645.
[123] See e.g. section 4.3.2.2 below on reimbursement of health costs.
[124] Even when it has required that the financial impact be such as to seriously undermine the financial balance of the social security system (see section 4.3.2.2) the Court has not actually inquired as to what the Member State response would be to extra expenditure; nor has the Court looked at whether an unreasonable burden on the student support system would in reality actually affect the level of support made available, nor have the Advocates General contemplated that it should do so: see section 4.3.2.3 below.

treatment between migrant workers and national workers would imply that the application and the scope of a rule of EU law as fundamental as non-discrimination on grounds of nationality might vary in time and place according to the state of the public finances of Member States"[125] – a formula taken from gender equality law[126]. This argument is far from convincing, however, given the variations of rights in time and place that exist with other justifications – for example, in the level and nature of threats to public health or national security.

These, then, are some considerations that may explain the current approach and need consideration in assessing that approach[127]. Before making such an assessment, however, an account of the main situations in which budgetary justifications have been argued or are relevant is required. This is needed to illuminate the factual context; elaborate the paper's general arguments - in particular, that the ECJ does recognise economic justifications and that the fiction that such justifications are prohibited is positively unhelpful; and illustrate the possible approaches to budgetary justifications.

4.3.2. Budgetary justifications in the case law

4.3.2.1. Raising revenue by taxation

A first group of cases concerns general taxation. Whilst once reluctant to accept budgetary justifications in this area, the ECJ has been increasingly willing to do so. In contrast with some other areas, this change has not been necessitated by expansion of the scope of the free movement rules – indeed, as we will see, wider recognition of justifications has gone hand in hand with limitations on scope - but from a change of judicial attitude, perhaps influenced by the adverse reaction of Member States to some of the earlier decisions, initial rejection of the Lisbon Treaty, and the recession.

The starting point, as in other areas, has been the general prohibition on economic justifications. Interestingly, the origin of this approach in taxation cases is *Svensson*[128], which concerned a measure requiring subsidised loans to be taken out with approved domestic lenders so that part of the subsidy would be recouped through taxation. As we have seen, protection of national industry to capture tax revenues is "classic" protectionism that is clearly prohibited[129]; as Advocate General Elmer stated, to allow such a measure "would run directly counter to the objects of the Treaty"[130]. However, the Court subsequently used the prohibition to adopt a more general rule that loss of tax revenue, even in significant cases[131],

[125] Case C-542/09 *European Commission v Kingdom of the Netherlands* judgment of 14 June 2012 ECLI:EU:C:2012:346, para. 58; and see also *Giersch*, n.30 above, para.52.
[126] Case C-343/92 *M. A. De Weerd, née Roks, and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others* [1994] ECR I-00571, paragraph 36, and Case C-77/02 *Erika Steinicke v Bundesanstalt für Arbeit* [2003] ECR I-09027, paragraph 67.
[127] Section 4.4 below.
[128] Case C-484/93 *Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme e* [1995] ECR I-03955, para.15 (which refers, however, only to explicit Treaty derogations since the measure was directly discriminatory). However, the Court arguably does contemplate that the prohibition on economic justifications applies to other types of cases in treating the earlier case of *Bachmann*, n.147below, discussed below, as exceptional.
[129] See section 3.
[130] Para.31 of the Opinion.
[131] Namely when there is "an erosion of the tax base going beyond mere diminution of tax revenue": Case C-168/01 *Bosal Holding BV v. Staatssecretaris van Financiën* [2003] ECR I-09409, para.42.

cannot justify a restriction on fundamental freedoms[132] and has frequently rejected measures on this basis[133]. Thus whilst (as explained below) budgetary considerations that are significant *in the context of specific programme budgets* have sometimes been accepted as justifications[134] there is no general rule that significant loss of revenue from general taxation can justify a restriction.

However, despite this starting point, the ECJ has often recognised Member States' budgetary interests, particularly in the last few years.

The Court has done this, first, in delimiting the concept of an obstacle to trade. Thus, it has indicated recently[135] in relation to direct taxation that Member States are not constrained from choosing to tax foreign residents and income from foreign sources – assumption of tax jurisdiction over such matters is within their sovereign power of taxation – and that problems arising from the existence of parallel tax jurisdictions, such as double taxation, are not covered by free movement[136]. Further, direct taxation within the area over which jurisdiction has been assumed is covered only when measures distinguish between the domestic and comparable cross-border situation covered by the national regime, rather than merely because the measures impede trade[137]. On this basis, some measures previously considered within the free movement rules and not open to justification might be considered lawful[138]. These developments reduce the importance of justifications in this area. The apparent need for discrimination to engage the free movement rules also heads off the potential issues that arise from the fact that the mere *existence* of taxation impedes trade – without this a mere decision to raise revenue and to do so through a particular type and level of taxation, as well as the detail of taxation policy, would require justification, but as Terra and Wattel state "Obviously the Treaty drafters never intended to confer upon the Court any such absurd wide budgetary competence"[139].

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[132] Case C-35/98, *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECR I-04071, para.48; Case C-436/00 *X and Y v Riksskatteverket* [2002] ECR I-10829, para.50. This general principle was also earlier referred to in the Opinion of Advocate General Tesauro in *ICI v Colmer*, n.112 above, para.28, although only in the context of explicit derogations.

[133] *ICI v Colmer*, n.112 above, para.28; Case C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* [1999] ECR I-06161, para 50; Case C-385/00 *F.W.L. de Groot v Staatssecretaris van Financiën* [2002] ECR I-11819, para 103; Case C-319/02 *Petri Manninen* [2004] ECR I-07477, para.49; C-464/02 *Commission of the European Communities v Kingdom of Denmark* [2005] ECR I-07929 para 80.

[134] It has been argued that the Court's reasoning in the student support cases, discussed in section 4.3.2.3. below, should be applied in the context of tax deductions designed to provide support for specific policies, to allow measures to prevent an unreasonable burden on the programme, but the Court did not decide the issue: see Case C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach z* [2007] ECR I-06849; C-318/05 *Commission of the European Communities v Federal Republic of Germany* [2007] ECR I-06957.

[135] See, in particular, Case C-128/08 *Jacques Damseaux v Belgian State* [2009] ECR I-06823.

[136] Such barriers are not covered as they do not arise from the unilateral taxation acts of Member States but from a combination of circumstances resulting from the existence of parallel jurisdictions that cannot be attributed to a specific Member State. See B.J.M.Terra and P.J.Wattel, *European Tax Law* (6th edn, Kluwer Law International 2012). It has long been recognised that disparities in the law of Member States, including tax laws (for example, tax rates or allowable deductions) do not constitute obstacles to trade: see, for example, in the taxation context Case C-403/03, *Egon Schempp v Finanzamt München V* [2005] ECR I-06421.

[137] *Demseaux*, n.135 above, para.27.

[138] Including those considered in *Bosal*, n.131 above: see B.J.M. Terra and P.J. Wattel, n.136 above, pp.316-321. Further, even if not outside the free movement rules altogether arguably the measure could be justifiable on the basis of the balanced allocation of taxation powers.

[139] B.J.M. Terra and P.J. Wattel, n.136 above, p.59.

Secondly, where justifications are still needed, the Court recognises several that are primarily concerned with the amount of revenue raised, and which constitute a significant qualification to the "general" rule against budgetary justifications. Alongside the contraction in the scope of the basic free movement rules, recent years have seen an expansion in the scope of these justifications, the two combining to provide broader recognition of national budgetary interests and national discretion in protecting them.

First, the Court has long accepted the interest in effectively collecting revenue, including preventing tax evasion – "the effectiveness of fiscal supervision"[140]. Although this interest also involves non-budgetary considerations, such as ensuring fair competition, it is essentially a budgetary one concerned with securing payment of revenue due. (One reason for recognising this interest, however, as mentioned, is that the *costs* of the "alternative" solution of accepting budgetary losses from tax evasion and raising revenue by other means or reducing expenditure, are too high, being unfair between taxpayers). Secondly, while in early cases the Court rejected the idea that preventing tax *avoidance* could provide a justification[141], sometimes referring to the "economic" nature of this concern[142], it now recognises this based on general EU law doctrine concerning abuse of rights[143]. This allows States to justify measures aimed at preventing undertakings from intentionally undermining taxation powers, especially by using wholly artificial arrangements[144]. Further, for both tax evasion and tax avoidance the Court has relaxed its approach to proportionality[145], reflecting again the trend towards broader recognition of budgetary interests.

The Court also refers to other grounds of justification, the nature and relationship of which are not wholly clear[146] but which have significantly expanded in the last decade. Initially, justification was permitted based on the need for "cohesion of the tax system", as established in *Bachmann*[147]. That case concerned Belgian rules according to which certain insurance contributions could be deducted from income only if paid in Belgium. The rationale was that sums paid out under insurance schemes were taxed and contributions should not be; since sums paid outside Belgium were not taxed in Belgium, related contributions were not tax-deductible to avoid income being removed from the Belgian tax system. The Court found

[140] *Cassis de Dijon*, n.153 below, para.8 of the judgment.
[141] Case 270/83 *Commission of the European Communities v French Republic* [1986] ECR 00273, para.25 (in the context of explicit Treaty derogations). Advocate General Mancini did not mention this point but merely considered (p.280) that loss of revenue for the state had not been shown - an alternative reason for its conclusion given also by the Court.
[142] e.g. *X and Y*, n.132 above, para.50.
[143] Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] ECR I-0609; Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECR I-07995.
[144] For an overview see B.J.M.Terra and P.J.Wattel, n.136 above, section 18.
[145] Even though the Court stated that Member States enjoy "broad" powers to prevent tax fraud (Case 823/79 *Criminal proceedings against Giovanni Carciati* [1980] ECR 02773, para.9 of the judgment) the Court stated in many cases that a Member State could not impose general measures that catch certain situations that might give rise to fraud or tax avoidance, but must establish this on a case-by-case basis: Case C-478/98 *Commission of the European Communities v Kingdom of Belgium* [2000] ECR I-07587, paragraph 45; *X and Y*, n.132 above, para 62; C-464/02 *Commission of the European Communities v Kingdom of Denmark* [2005] ECR I-07929, para.81. However, recent case law accepts "reasonable presumptive criteria which contribute to reasonable application of national anti-abuse provisions, to legal certainty and to practicability for the tax authorities" (which may be part of the recently-recognised broader justification of safeguarding the "balanced exercise of taxing power", as to which see below) and do not even necessarily involve any opportunity to avoid liability by showing that there was no abuse involved: B.J.M.Terra and P.J.Wattel, n.136, section 18.1.3.
[146] For discussion of the relationship see generally see B.J.M.Terra and P.J.Wattel, n.136 above, section 18.2.
[147] Case C-204/90 *Hanns-Martin Bachmann v Belgian State* [1992] ECR I-00249.

such rules justified. However, the Court subsequently confined this justification to cases involving a direct link, in the case of the same taxpayer and same tax, between the grant of the tax advantage and the offsetting of that advantage[148], a formulation so narrow that it was not accepted again until 2008[149]. However, the ECJ has now developed broader justifications around the concept of coherence that appear to overlap with it and to side-step its limitations, referring to either "The need to protect fiscal (territorial) coherence"[150] or "the balanced allocation of taxing power"[151]. This latter[152] is now the justification most often referred to.

The Court has generally either not referred to any prohibition on economic justifications (or more specific aspect of it, such as loss of tax revenue)[153] or has referred to it but then set out justifications without reference to their economic nature[154]. As in other cases of budgetary interests, the Court has dealt with budgetary justifications by setting out precisely the situations in which they are allowed as part of the definition of the justification, rather than recognising budgetary justifications in general and then limiting their application through proportionality. (Once the interest has been recognised the Court has not considered whether the revenue lost could be recouped by other means). Thus it recognises certain significant budgetary interests whilst avoiding the constitutional and practical difficulties of using a proportionality test to balance these interests with free movement.

Whilst the scope of permitted justifications is fuzzy round the edges, in general lack of clarity cannot probably be attributed to the starting point of the prohibition on economic (and hence budgetary) justifications. However, starting from this point and then developing piecemeal rules for what are, effectively, exceptions to the general rule contributes to a fragmentation of the case law on budgetary considerations across different areas. For example, Skovgaard-Petersen[155] has argued that case law denying deduction from tax receipts of school fees paid out in another Member State, which it was contended was justified in light of the fact that

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[148] *Verkooijen*, n.132 above, para.57.

[149] In C-157/07 *Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH* [2008] ECR I-08061.

[150] Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837. See further B.J.M.Terra and P.J.Wattel, n.136 above, at 18.2.2., defining this as "the need to match, within the same taxing jurisdiction, tax base reductions and corresponding tax base increases, such as loss relief and taxation of the corresponding profits, deduction of annuity contributions and future taxation of the annuity benefits, taxation of income and the deduction of expenses incurred in earning it, accrual of unrealized capital gains and taxation of those gains upon realization, etc".

[151] Essentially concerned with ensuring generally that Member States may capture the revenue from activities in their own territory: see *Marks and Spencer*, n.150 above, para.45; *Cadbury Schweppes*, n.143 above; Case C-347/04 *Rewe Zentralfinanz eG* v *Finanzamt Köln-Mitte* [2007] ECR I-02647.

[152] This overlaps and possibly subsumes the concept of cohesion of the tax system *and* the fiscal territoriality principle: see B.J.M.Terra and P.J.Wattel, n.136 above, section 18.2.

[153] For example, in first establishing the justification of effectiveness of fiscal supervision in Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Brantwein* ("Cassis de Dijon") [1979] ECR 00649, and in *Bachmann*, n.147 above (when, in fact, a general principle that the prohibition on economic justifications precluded budgetary justifications was not established as a rule overtly in the taxation case law, although it had been stated earlier in *Duphar*, n.9 above).

[154] See, for example, *Verkooijen*, n.132 above, paras 48 and 56, referring to cohesion of the tax system; and *Cadbury Schweppes*, n.143 above, para 49, referring like many other cases, to the rule that loss of tax revenue cannot constitute a justification, but then accepting (in principle) justification couched in the language of preventing tax avoidance and the broader balanced allocation of taxing power. See also the Opinion of Advocate General Stix-Hackl in Case C-42/02 *Diana Elisabeth Lindman* [2003] ECR I-13519, where she suggests in para 88 that economic justifications are not permitted but then in para 92 that cohesion of tax system "cannot be considered to constitute an economic reason", thus *denying* the economic nature of this justification.

[155] H.Skovgaard-Petersen, "There and back again: portability of student loans, grants and fee support in a free movement perspective" [2013] E.L.Rev 783, 790-791.

deductibility was intended as a subsidy for certain schools in Germany[156], is inconsistent with the principle that Member States giving financial assistance for study need not provide for portability of funds[157]. Overt recognition of the common, budgetary, nature of the interests involved might produce more coherent outcomes[158].

4.3.2.2. Provision of healthcare - and other benefits?

A second line of economic justifications case law, which has provided an analogy for economic justifications in other areas, concerns healthcare. In general, decisions on the nature and level of benefits – such as the treatments provided and amount paid for them – are for Member States[159] and do not constitute obstacles to trade. (A low level of benefits could, for example, discourage persons from moving to take up employment.) This, it is suggested, reflects a wider principle that decisions determining the nature and scale of government programmes are not subject to review being as being unsuitable for judicial scrutiny[160]. This principle itself gives significant weight to national discretion in budgetary matters.

However, the ECJ established in *Decker*[161] and *Kohll*[162] that provision of public healthcare is not per se excluded from the free movement rules; thus restrictions on purchases from other Member States can constitute obstacles to free movement by hindering access to products or services there and/or the ability to sell across borders[163]. In these cases the issue of budgetary justifications arose because it was argued that an authorisation process and, implicitly, substantive restrictions on healthcare purchases, could be justified to control healthcare expenditure. In this respect, the Court's starting point was the general prohibition on economic - and budgetary[164] - justifications[165]. However, the Court recognised a qualification, namely that "the risk of seriously undermining the financial balance of the social security system"[166] may constitute an overriding reason in the general interest[167]. In *Smits/Peerbooms* the Court indicated, as we have seen, that this justification allowed Member States to adopt *protectionist* measures to prevent an outflow of patients from national

[156] C-56/09, *Emiliano Zanotti v Agenzia delle Entrate - Ufficio Roma 2* [2010] ECR I-04517; *Schwarz* n.134 above; C-318/05 *Commission v Germany* n.134 above.
[157] See section 4.3.2.3 below.
[158] Although it is true that in *Schwarz*, n.134 above, and C-318/05 *Commission v Germany*, n.134 above, a parallel was explicitly made in argument with other aspects of the student support case law, as to which see note 183 above.
[159] E.g. Case C-385/99 *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] I-04509, para.67; Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border health care [2011] OJ L88/45, Art.7(3) (and see also Art.7(4) on limits on reimbursement). See T.K.Hervey and J..V.McHale, *Health Law and the European Union* (CUP 2004)133-134.
[160] See section 4.3.2.1 and also section 4.3.2.4 below.
[161] *Decker*, n.9 above (concerning goods).
[162] *Kohll*, n.9 above (concerning services). One Advocate General's Opinion was delivered covering both this case and *Decker*.
[163] *Decker* and *Kohll*, n.9 above, and *Smits/Peerbooms*, n.15 above and *Müller-Faure*, n.159 above, establishing the same principle for benefits in kind.
[164] Although the Court did not refer to case law dealing with budgetary considerations: in *Kohll* the Court merely referred to *SETTG*, n.79 above, (para.41 of the judgment), examined at 4.2 above, and in *Decker* did not refer to any case law.
[165] *Decker*, n.9 above, para.39 of the judgment; *Kohll*, n.9 above, para.41 of the judgment.
[166] *Decker*, n.9 above, para.39; *Kohll*, n.9 above, para.41.
[167] In these cases there were in fact no cost implications from purchasing outside the State since reimbursement was at a set rate.

hospitals to avoid wasted expenditure[168]. However, in *Müller-Faure* a similar approach for non-hospital services was rejected regardless of an adverse effect on expenditure[169] given the absence of evidence that the financial balance of the system would be *seriously* upset[170] and indications that numbers seeking treatment elsewhere would be small[171]. The extent of impact on the budget is here taken into account in defining the justification, rather than at the level of proportionality. The position is now enshrined and elaborated in Directive 2011/24/EU[172]. This does not include an explicit requirement for the financial balance of the system to be seriously undermined but a requirement for a significant cost impact probably still applies[173].

These same principles might be thought relevant in cases that do not involve protecting the national system to avoid waste. However, in *Commission v Germany*[174] the Court appeared to accept the simple need to save costs as a justification *without* a serious impact requirement. The case concerned German legislation laying down conditions for external pharmacies supplying medicinal products to hospitals which, cumulatively, effectively required pharmacies to be located close to hospitals. The Court held the measures justified on the basis of cost-saving[175] without seeking to identify the actual costs of removing the restrictions (for example, from the fact that hospitals would need to employ their own pharmacists to provide services associated with supplying the products).

Potentially an analogous justification seems relevant also to non-healthcare benefits, as indicated in *Woningstichting Sint Servatius*[176]. That case concerned a requirement for prior authorisation for social housing bodies to invest outside the Netherlands, aimed at ensuring their expenditure was limited to their statutory purposes relating to availability of housing in the Netherlands. This restriction on free movement of capital but was held capable of justification since "requirements related to public housing policy in a Member State and to the financing of that policy" could provide grounds for justification[177] and "Moreover, …the Court has already accepted that the risk of seriously undermining the financial balance of social policies can also constitute an overriding reason in the public interest"[178]. In fact, the

[168] N.15 above. Lost revenue from tax payments from local providers cannot, however, be taken into consideration: see section 3 above.
[169] *Müller-Faure*, n.159 above, para.94 of the judgment.
[170] *Müller-Faure*, n.159 above, para.95 of the judgment. There might be an outflow of money to pay another Member State for some healthcare covered by the existing system (under which providers were paid a flat rate for each patient), but no wasted expenditure from planning difficulties. Again lost revenue from tax payments cannot be considered, as discussed in section 3.
[171] Para.96 of the judgment.
[172] Directive 2011/24/EU, n.159 above, in particular Art.7(4) stating the principle of entitlement to reimbursement at the level set by the Member State of affiliation and Art.7(9) limiting that right where there are overriding reasons in the general interest; Art.7(8) prohibiting prior authorisation and Art.8(1) making an exception for cases specified in Art.8(2) - effectively where investment in infrastructure is needed along the lines of that referred to in the case law *and* where there are planning requirements relating to control of costs and avoidance of waste (subject to the usual requirements of necessity etc).
[173] In view of the explicit reference to overriding requirements, indicating that the case law still applies, and the fact that in the specific case of hospital services etc, such an impact is anyway inherent in the fact that an authorisation must be linked to waste resulting from planning issues.
[174] Case C-141/07 *Commission of the European Communities v Federal Republic of Germany* [2008] ECR I-06935.
[175] The Court's reasoning is considered below.
[176] Case C-567/07 *Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius* [2009] ECR I-09021.
[177] Para.30 of the judgment.
[178] Para.31, citing Case C-372/04 *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-04325.

justification here merely concerned the need to limit expenditure to its designated purpose which we suggest in section 4.3.2.3 is a distinct ground of justification, but it does contemplate in principle the extension of the "financial balance" ground outside the healthcare context. We will also see in the next section that a similar approach is (possibly) adopted for student maintenance. However, we will also see there that the Court has rejected applying the same principle on a more general basis.

These cases again support reformulation of the general prohibition on economic justifications. Snell has suggested (in 2005) that this case law can be rationalised under the "further purpose" doctrine as concerned with the further objective of health, and this was the approach of Advocate General Tesauro in *Decker* and *Kohll*: he considered that the justification based on protecting the financial stability of the system was linked to ensuring quality healthcare[179] - a plausible approach *if* the source of healthcare finance is inherently limited[180]. This approach is also seen in *Commission v Germany*, as discussed below. However, with healthcare or other services financed from general taxation additional costs will not necessarily translate into a reduced service, and since *Decker* and *Kohll* the Court has in fact generally articulated the financial objective as distinct from any health-based justification[181], a position also adopted in Directive 2011/24/EU. Whilst the original reference to the financial stability of the system might have derived from a perceived need to avoid "pure" economic justification, it serves in practice mainly to indicate the need for a budgetary impact that is significant[182]. Further, whilst the Court itself still maintains that economic justifications are not allowed and denies that the justification above is economic, in subsequent case law on education services and support (examined below) Advocates General Jacobs and Sharpston have both accepted that the healthcare cases do, in fact, recognise "economic" objectives[183] - although both consider also that such objectives should be treated with "circumspection"[184].

It is also worth highlighting that the proportionality test might again imply a need to examine whether the budgetary objective can be achieved by budgetary strategies that are less restrictive of trade, but that again the Court has not undertaken any such analysis. The need for a cost impact that creates a risk for the financial stability of the system arguably indicates that this risk is alone sufficient, and specifically rules out any judicial consideration of whether the State should adjust its other budgets.

[179] See paras 53-55 of the single Opinion in *Decker*, n.9 above, and *Kohll*, n.9 above.
[180] It might also be argued that a justification based on a significant cost to the system reflects the "further" objective of preserving Member States' autonomy in their approach to financing certain activities, but the Court has not explicitly used this approach and similar arguments were effectively rejected in *Watts*, n.178 above.
[181] *Smits/Peerbooms*, n.15 above, paras 78-80; Case C-368/98 *Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes (ANMC)* [2001] ECR I-05363, paras 47-48; although cf. *Müller-Faure*, n.159, above, para.95.
[182] And also, perhaps, to indicate that the Court will not enquire as part of a proportionality test into whether national budgetary arrangements should be adapted to accommodate free movement (as discussed later below).
[183] Advocate General Jacobs has stated that the above justifications are of a "purely economic nature" and "a departure" from the orthodox position on economic aims (Case C-147/03 *Commission* v *Austria* n.31 above, para.31 of the Opinion (whilst Advocate General Sharpston in *Bressol* referred to this case law as showing that "economic or budgetary reasons may, in particular circumstances, be advanced as a justification" (*Bressol*, n.32 above, para.91 of the Opinion).
[184] Case C-147/03 *Commission v Austria*¸ n.31 above, para.31 of the Opinion; *Bressol*, n.32 above, para.92 of the Opinion.

As well as again demonstrating that pure budgetary justifications *are* recognised, this case law again also illustrates the adverse influence on judicial reasoning of the failure to recognise this.

One example concerns the right to hospital treatment outside the state of affiliation. In *Smits/Peerbooms*, where the Court accepted that prior authorisation could sometimes be justified, the Court indicated that refusal of treatment was possible on objective grounds, but could not be justified when treatment could not be obtained at home without undue delay[185]. The rationale was to allow monitoring of refusals, to ensure their legitimacy in light of the justifications invoked: thus prior authorisation must "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*" (emphasis added)[186]. Whilst if there is no domestic capacity the argument based on waste from excess capacity cannot apply there will, however, be a cost if patients are treated more quickly abroad, in that the system will pay for more treatments in the same timescale. The logic of the principle that it is for Member States to determine the nature and level of health benefits implies that there is no obstacle to trade in refusing authorisation because of this cost. Further, even if this were not the case, the fact that cost considerations may justify obstacles to free movement should have led the Court to examine whether any extra costs (like the costs that may be incurred as a result of overcapacity) could provide grounds for justification[187]. However, in *Müller-Faure* the Court effectively rejected such arguments[188], stating that refusal of prior authorisation cannot be justified based solely on the existence of national waiting lists without taking account of the patient's medical condition because this involves "considerations of a purely economic nature".[189] This approach – although maintained in Directive 2011/24 – has been criticised for giving undue weight to free movement in comparison with national sovereignty over healthcare, in particular as regards the rights-based nature of the Court's model and the inequality inherent in such an approach[190]. The reference here to the prohibition on economic justifications served to avoid any discussion of the policy issues as well as any explanation of how the decision fits with other aspects of the healthcare case law, either as regards the scope of obstacles to trade or the possibility of justification.

The prohibition also obscured the rationale for the decision in *Commission v Germany*[191]. There the Court reiterated the traditional prohibition and rationalised the justification that it accepted there by the connection to health[192] – but in fact this connection was found in nothing more than *wasted expenditure in the healthcare budget*. The Court jumped straight

[185] *Smits/Peerbooms*, n.15 above, para.103 of the judgment.
[186] *Smits/Peerbooms*, n.15 above, para.90 of the judgment.
[187] At least if they are such as to undermine the financial stability of the system
[188] Put by the UK (see paras 57-58 of the judgment) and recognised by Advocate General Ruiz-Jarabo Colomer (para.55 of the Opinion).
[189] *Müller-Faure*, n.159 above, para.92 of the judgment.
[190] See e.g. C. Newdick, "Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity" (2006) 43 CMLRev 1645; W. Palm and I. A. Glinos, "Enabling patient mobility in the EU: between free movement and coordination", Ch.12 in E. Mossialos, G. Permamand, R. Baeten and T. K. Hervey (eds), *Health Systems Governance in Europe: the Role of European Law and Policy* (CUP 2010) available at http://ebooks.cambridge.org/chapter.jsf?bid=CBO9780511750496&cid=CBO9780511750496A026), 509; A. Kaczorowska, "A Review of the Creation by the European Court of Justice of the Right to Effective and Speedy Medical Treatment and its Outcomes" (2006) 12 E.L.J. 345.
[191] Case C-141/07 *Commission v Germany*, n.174 above.
[192] See para.60 of the judgment.

from the fact that the costs will be incurred from the healthcare budget to the conclusion that there will be a health impact[193]. In contrast with the *Kohll* line of case law the Court did not even require in formal terms that the waste should prejudice healthcare (let alone call for evidence of this) nor (consequently) that it should have an impact of significance. *Commission v Germany* does not fit with the *Kohll* line of case law in either its reasoning or (in failing to require any significant budgetary impact) its substance; and the Court's explanation of the nature of the interest as non-budgetary (health) obscures the relationship between this and previous cases. Despite the absence of any real link between the budgetary objective and health, the Court cited this case in *Essent* for the proposition that economic objectives are permitted only when they serve a further, non-economic, purpose[194].

4.3.2.3. Restrictions on the beneficiaries of state benefits

A third line of case law concerns restrictions on *who* may benefit from certain services or other benefits. This issue often arises in relation to measures that discriminate against non-nationals, either under the rules on freedom to provide services[195] or, more often, those on the rights of EU citizens under Art.20 and 21 TFEU to move and reside freely in other Member States, including the right under Art.18 TFEU not to be discriminated against on grounds of nationality[196]. In this latter context the Court has addressed, inter alia, the sensitive question of the extent which EU citizenship guarantees access to social benefits on the same basis as nationals when travelling to, or residing in, another Member State[197], even when not economically active there. The issue of access to benefits has also arisen in relation to restrictions affecting a state's *own* nationals' citizenship rights – for example, residence conditions for benefits that may deter a move to other Member States – and could also again arise under free movement[198]. It seems that the rules on justification in the citizenship cases are also in principle relevant for free movement of goods and services[199]. To some extent - as with sovereignty over taxation and the level of healthcare - the Court has addressed issues of budgetary sovereignty, including the extension of financial solidarity to non-nationals, by excluding certain policy choices from the basic scope of free movement, so that no issue of

[193] See para.61 of the judgment where the Court stated that planning must be possible, first, to ensure access to a balanced range of high-quality hospital treatment and, secondly, to assist "in ensuring the desired control of costs and prevention, as far as possible, of any wastage of financial, technical and human resources" – implying that avoiding waste of resources can per se serve to provide the connection to health that it has required in para.60.

[194] Para.62 of the judgment.

[195] See Case C-388/01 *Commission v Italy*, n.99 above.

[196] And now stated as a right of equal treatment in Art.24(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (the Citizenship Directive) [2004] OJ L158/77 .

[197] See the discussion below of *Bidar*, n.17 above.

[198] For example, where measures discourage nationals from obtaining services, such as education, from other Member States. Such free movement arguments have been made in some cases but the Court has not needed to consider them.

[199] See, for example, the reasoning in *Schwarz*, n.134 above, where the Court applies the same rules in its reasoning on Art.18 TFEU in the context of citizenship rights as in the context of freedom to provide services, and makes cross reference from one to the other, assuming that the rules are the same; and see the discussion below of *Meneses*, n.106 above.

justification arises[200]. However, many national restrictions on access to benefits are treated as restrictions on EU rights that require justification.

This area again illustrates the de facto recognition of budgetary justifications for restricting EU rights. To a large extent the issue of which benefits must be provided to non-nationals is addressed in secondary legislation[201]; this includes explicit limits on financial solidarity by, in particular, providing that economically inactive persons should not impose an "unreasonable burden" on the social assistance systems of the host state[202] and precluding any obligation to provide maintenance via student grants or loans to persons other than workers or the self-employed and their families, except where there is a permanent right of residence[203]. However, in situations *not* covered explicitly by legislation at the relevant time as well as in interpreting its application, the case law, like the legislation, recognises national budgetary interests in restricting access to benefits. The leading case is *Bidar*[204], concerning a non-national living in the UK who had completed much of his secondary education there but was refused a subsidised loan from the UK for university education on the basis that he was not "settled" there[205]. In *Bidar* the Court first established the important principle that discrimination against non-nationals with regard to student maintenance is, since the Treaty of Lisbon, within Art.18 TFEU[206]. However, the potential financial consequences of this new principle were (as in *Decker* and *Kohll* in relation to healthcare) tempered by recognising a limit on financial solidarity at the justification level. In this respect the Court concluded that a Member State may ensure that a maintenance grant "does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State"[207] and can "thus" confine such assistance to students with a certain degree of integration into the society of that State[208]. The same approach was applied in in

[200] For example, with decisions that student grants should not be portable but confined to supporting study in the awarding Member State: see H. Skovgaard-Petersen, "There and back again: portability of student loans, grants and fee support in a free movement perspective" (2013) E.L.Rev.783 (who argues, however, for judicial recognition of a right of portability based on free movement, pending any legislative solution).
[201] In particular, Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1; Citizenship Directive, n.197 above, Art.24 and Regulation 883/2004, n.190 above, giving effect to this.
[202] Citizenship Directive, n.197 above, Article 7(1)(b) and (c), requiring such persons to have sufficient resources not to become a burden in order to enjoy a right of residence beyond 3 months, in a Member State that is not their own, and Art.24(2) precluding any obligation to provide social assistance during the first three months (and also beyond that period for those remaining to seek work); recital 10 referring to the need to avoid an "unreasonable burden" on social assistance systems in this context; and recital 16 precluding expulsion when such persons do not constitute an "unreasonable burden" on the systems.
[203] Citizenship Directive, n.197 above, Art.24(2).
[204] *Bidar*, n.17 above. See also, for example, Case C-75/11 *European Commission v Republic of Austria* judgment of 4 October 2012 ECLI:EU:C:2012:605, applying the principle in a recent case not covered by secondary legislation.
[205] This situation was not at that time addressed by legislation, which dealt only with persons moving to another Member State to study, in Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59, Art.3.
[206] The Court had established in Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193 that the principle of non-discrimination was applicable to students falling with the scope of the Treaty and in *Bidar* concluded that its decisions in *Lair* and *Brown* (n.17 above) ruling the principle inapplicable to student support no longer applied.
[207] Para.56 of the judgment.
[208] Para.57. Under the Citizenship Directive, n.197 above, this exists now exists whenever there is a permanent right of residence.

Morgan and Bucher[209] in assessing conditions on access to benefits of a state's own nationals which affect citizenship rights[210].

As pointed out by Advocate General Sharpston, who has called for clarification from the Court[211], the relationship between the risk of an unreasonable burden and the limitation of benefits to "integrated" persons is still not clear.

One possibility is that the unreasonable financial burden is mentioned merely because it *explains* why integration conditions are allowed[212]: often there is a risk of an unreasonable financial burden and thus such conditions are allowed in principle. If this is the case, Member States have autonomy in determining whether to allocate benefits to those outside a certain community - defined by EU law as those with a degree of integration - regardless of the impact on EU rights. This approach recognises national budgetary interests as limits on EU rights in an extensive way, and does so through a general rule that does not require any case-by-case review to determine the actual budgetary impact of an integration condition[213]. This is analagous to the approach to taxation, where budgetary interests are recognised through general rules rather than by a case-by-case analysis of actual budgetary implications, and avoids some of the practical difficulties of a case-by-case approach. Whilst, in theory, this approach might necessitate a proportionality test requiring consideration of other means to achieve savings (such as cuts elsewhere), as in the taxation and healthcare cases it seems that the ECJ will not engage in such an analysis – and in her extensive discussion of the justifications under the *Bidar* line of case law in *Prinz and Seeberger*[214] Advocate General Sharpston did not contemplate any such analysis.

Another interpretation, however, is that "integration conditions"[215] are allowed only when a risk of an unreasonable financial burden exists *in the case in question* – only then may a Member State reject full financial solidarity, or limit benefits where this impedes its own nationals' citizenship rights[216]. This is a fundamentally different conception of solidarity[217]. It

[209] Joined Cases C-11/06 and C-12/06, *Rhiannon Morgan v Bezirksregierung Köln (C-11/06) and Iris Bucher v Landrat des Kreises Düren (C-12/06)* [2007] ECR I-09161.
[210] *Morgan and Bucher*, n. 210 above, paras 43-44, read in conjunction with the specific reference in para 45 to the integration condition. In practice, given that student support of non-nationals is now addressed in the Citizenship Directive it is in this context of conditions imposed on nationals that the "unreasonable burden" test has most relevance.
[211] Joined cases C-523/11 and C-585/11 *Laurence Prinz v Region Hannover (C-523/11) and Philipp Seeberger v Studentenwerk Heidelberg (C-585/11)*, judgment of 18 July 2013 ECLI:EU:C:2013:524, para.72 of the Opinion ECLI:EU:C:2013:90. The Court did not, however, do this, in *Prinz and Seeberger* (para.36 of the judgment) essentially repeating the ambiguous formulation of the justification from *Bidar* and *Morgan and Bucher*.
[212] This is contemplated by Advocate General Sharpston in *Prinz and Seeberger*, para.71. It is notable that Advocate General Geelhoed in *Bidar* did not refer to the need for an unreasonable burden when proposing that an integration condition should be permitted, even though earlier in the Opinion (in para.31) he discussed the conditions in benefit legislation that aim at avoiding an unreasonable burden arising.
[213] Either because it is presumed and that presumption cannot be rebutted, or because it is simply irrelevant (at least in the situation of awards to non-nationals) – explanations that have different implications for conceptions of EU citizenship.
[214] N.212 above.
[215] Or other conditions as contemplated by Advocate General Sharpston in para.82 of the Opinion e.g. residence conditions that are not intended as a proxy for a degree of integration. However, this analysis is not relevant for many conditions, since it will not apply to conditions concerned with delimiting the beneficiaries in light of the basic purpose of the benefit, as discussed below.
[216] This interpretation is arguably supported by *Prinz and Seebeger*, n.212 above, para 36, indicating that the possibility of a limit depends on whether a risk to public finance "exists" (although this could be consistent with

also entails assessing the actual financial implications in each case (including the cost of extending benefits) before deciding whether integration conditions can be applied – not easy, as this involves a hypothetical scenario. (The reference to an unreasonable impact *that could affect the level of assistance* might also imply a need to demonstrate an impact on the actual benefits provided, including that funds will not be found elsewhere, but it again seems unlikely that the Court will enquire into this; as in the healthcare cases, it is probable that a requirement for a risk to the level/quality of assistance merely indicates the need for a significant cost.) In *Prinz and Seeberger* Advocate General Sharpston considered more precisely what an unreasonable burden test as such a condition of justification[218] might involve. In this respect, she considered it necessary to establish, first, the size of the budget (regarded as within the discretion of Member States[219]), and, secondly, whether removing the integration condition would create a risk of exceeding that budget:

"Suppose, for example, a Member State decides that it is prepared to devote EUR 800 million to student finance for tertiary education. It reviews the new arrangements that it proposes to put in place and realises that, unless it imposes some additional criterion, there is a risk that it will have to pay out over EUR 1 billion. It classes that risk as unacceptable. After examining the past residence history of a representative sample of existing students benefiting from funding (a sufficiently large sample to be statistically reliable), it reaches the conclusion that, were it to impose the requirement that the applicant must have resided four years within its territory, that would exclude sufficient prospective candidates to limit the risk of running seriously over budget. The single additional criterion is chosen in order to attain the economic objective. Provided that the risk-cost analysis is properly carried out, I do not find the arrangements intrinsically objectionable, even though they may well result in a restriction on free movement rights of EU citizens."

A restriction may only be regarded as proportionate when it goes no further than necessary to confine the risk of budget overrun within the bounds of reasonableness in the sense above[220]. This analysis suggests, first, that there is no unreasonable burden when the likely cost of removing the restriction in comparison with the budget[221] is sufficiently small that the cost can potentially be absorbed. Less clear is whether the Advocate General considers that a risk of running even slightly over budget is an unreasonable burden if a Member State considers that unacceptable or whether there *must* be a risk of running "seriously over budget" – and, if so, what is serious and who – the Court or Member State – decides that question.

Whether the risk of an "unreasonable burden" is an explanation of the "*Bidar"* justification or a condition to be met in each case, the justification is economic[222]. Advocate General Sharpston in *Prinz and Seeberger*, in considering its operation as a condition, refers to it expressly as an "economic objective"[223]. However, even if an integration condition is

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the second interpretation in referring to the *kind of situation* in which a risk exists); and see the remarks of Advocate General Sharpston in para.53 of the Opinion.

[217] And possibly quite a different one, so far is student support is concerned, from that provided in legislation, which refers to a permanent residence requirement.

[218] As opposed merely to an explanation for it.

[219] *Prinz and Seeberger*, n.212 above, para.59 of the Opinion.

[220] *Prinz and Seeberger*, n.212 above, para.80 of the Opinion.

[221] If the free movement issue is under consideration at the time the budget is set, rather than being applied after this time, presumably the question is how much extra must be built into the budget to avoid a restrictive effect on EU rights, in comparison with the budget that would otherwise have been devoted to the programme – a rather speculative exercise.

[222] The economic nature of this justification is highlighted by the fact that the Court has in other cases categorised such justifications as "economic" – for example, in C-388/01 *Commission v Italy*, n.99 above, on subsidised access to cultural attractions, discussed below.

[223] The situation concerned is analysed under the heading of "The economic objective" and see, in particular, para.82 of the Opinion stating that "such an analysis would be purely economic".

permitted without the need to show a specific budgetary impact (Sharpston's "integration objective") the objective is still economic: it is merely defined in a more specific way, and in fact, as we have seen, in a way that gives *greater* weight to budgetary interests than an approach that allows an integration condition only when there is an actual risk of an unreasonable burden.

The cases above concern benefits that are general in the sense of directed broadly at supporting those in the Member State "community", and determine the boundaries of that community in the light of the need to balance EU rights with national budgetary interests. Importantly, however, the ECJ has also recognised that the scope of benefits may be limited further to give effect to a more specific purpose of the benefit scheme[224], even when this has a substantial discriminatory effect. For example, in *Commission v Netherlands*[225] the Court accepted in principle as justification for restrictions on portable funding an objective of increasing student mobility and encouraging study outside the Netherlands. Similarly, in *Giersch*[226] the Court accepted the possibility of limiting support to persons likely to return to Luxembourg, in light of the scheme's purpose of increasing the proportion of Luxembourg residents with a degree to promote the national economy. In both cases, the consideration of limiting benefits to the Member State "community", as envisaged by integration conditions, was insufficient to justify limits on access for children of workers, including migrant and frontier workers, since legislation designated these persons as within the community entitled to general student benefits - but the more specific purposes of the schemes *could* justify such limits[227]. Further, the Court did not link the justifications to any risk of an unreasonable burden on finances – which is logical, since the "restrictions" here (in contrast with those in *Bidar*) implemented the very purpose of the scheme, rather than limited access to those falling within its purposes. In these cases, again, the underlying reason for the justifications is economic – here, to limit national expenditure to purposes selected by the Member State as priorities for its limited budget.

The approach to this issue is worthy of comment, however, in that the Court has sometimes required justification of the very purpose of the benefit scheme and not merely of the access conditions that give effect to that purpose. Thus in *Giersch* the Court examined[228] whether promoting education for national economic benefit can justify discrimination on grounds of nationality, whilst in *Gottwald*[229], in which the Court concluded that it did not violate Art.18 TFEU for Austria to restrict a free toll disc for disabled persons to residents and those

[224] As pointed out by Advocate General Geelhoed in *Bidar*, n.17 above, "Member States are entitled to ensure that the social benefits that they make available are granted for the purposes for which they are intended" (para.32 of the Opinion). In *Bidar* itself the Court rejected the possibility of justifying the restrictions on access to funding by reference to a purpose of ensuring a link with the national employment market "since the knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical employment market" (para.58). It seems that this purpose was rejected as not being an actual purpose of the schemes in question, which were considered as being to fund persons integrated into the community in question.

[225] Case C-542/09 *Commission v Netherlands*, n.125 above. And see also recently joined cases C-197/11 and C-203/11 *Eric Libert and Others v Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others v Vlaamse Regering (C-203/11)*, judgment of 8 May 2013 ECLI:EU:C:2013:288, accepting the possibility of limiting support for social housing to persons with a connection with the *local* area without any indication of the need for a significant impact on budgets.

[226] N.30 above, paras 53-56 of the judgment.

[227] Although as in so many cases the conditions imposed were considered too general to meet proportionality requirements.

[228] *Giersch*, n.30 above, paras 53-56.

[229] Case C-103/08 *Arthur Gottwald v Bezirkshauptmannschaft Bregenz d* [2009] ECR I-09117.

regularly travelling to Austria, under a scheme to facilitate regular journeys in Austria by those persons with a view to their integration in national society, the Court considered first whether integration of disabled persons was an objective justification[230]. This approach is questionable. For reasons outlined above concerning justiciability of expenditure decisions, neither a decision to establish a grant scheme (and hence to allocate funds for a particular purpose) nor the amount of funding[231] generally requires justification[232]. This is the case, it is submitted, with decisions on what projects to undertake – for example, decisions to allocate the budget to building roads rather than improving government IT, even though this affects providers of IT services in other Member States[233] - and also to decisions to award grants for certain purposes and not others. Thus the nature of the group chosen for a toll exemption in *Gottwald* (whether disabled persons travelling regularly or some quite different group) seems irrelevant to justification. This, in fact, was the basis of Germany's argument in *Elrick* which was concerned with measures limiting student support to certain types of courses: Germany argued that a decision on the type of course to be supported does not constitute a restriction on freedom of movement or residence[234]. The Court did not reject this argument in principle, but based its conclusion that the type of condition in that case *was* a restriction on the fact that the same limitations were not applied in funding courses inside Germany[235] - a fact that does render the condition a restriction on access, rather than a decision on the purpose for which funding should be provided in the first place.

A second problem with the approach in *Giersch* and *Gottwald* is that in any case the essential reason for allowing conditions limiting access to benefit schemes is the economic reason of avoiding spending on matters that are not of concern to, or a priority for, the Member State, to preserve those resources for other purposes – not to promote the purpose of the benefit scheme. The latter may be an additional ground for justification (in the same way that an impact on healthcare is a possible justification in the healthcare cases in addition to avoiding economic waste) - but is not the only one. Further, removing rules delimiting the purpose of the benefit - for example, opening up the free toll discs in *Gottwald* to those who are not disabled – does not *necessarily* affect the policy of the scheme: it only does so if expanding the scheme to avoid any discriminatory effect or impact on trade reduces the funds for the intended beneficiaries[236]. An *assumption* that this is the case could underlie the approach to justification that refers to the purpose of the benefit scheme – but, as in *Commission v*

[230] Para.32 of the judgment. And see also Case C-542/09 *Commission v Netherlands* n.125 above, paras. 70-72 of the judgment; and *Woningstichting Sint Servatius*, n.176 above, para.30, where the Court seems to link a justification concerned with ensuring that housing bodies' funds were spent only on authorised purposes of national housing policy to substantive justification of that policy, although the reasoning is not wholly clear (and the Court also refers to the analogy of the health cases "financial" justification, as discussed in section 4.3.2.2 above).
[231] As indicated by Advocate General Sharpston in *Prinz and Seeberger*, n.212 above, para.59 of the Opinion.
[232] Although such schemes must, of course, also comply with other specific rules of the TFEU, including on state aid.
[233] And even when the decision has a discriminatory effect e.g. because the state concerned has a strong local construction industry but would have to purchase IT services from other Member States. In the context of public procurement this can be articulated as a principle that such expenditure decisions establish the scope of the market rather than restrict access to that market: see section 4.3.2.4 below and the literature cited there.
[234] Case C-275/12 *Samantha Elrick v Bezirksregierung Köln*, ECJ judgment of 24 October 2013 ECLI:EU:C:2013:684, para.27.
[235] *Elrick*, above, para.28 of the judgment. And see also the way the argument was put in *Woningstichting Sint Servatius*, n.176 above, para.27, where again it was (correctly, it is submitted) suggested that the justification lay in the need to ensure that investment was limited to the organisation's authorised statutory purpose (alongside a separate argument that diversion of resources could have an impact on the housing programme).
[236] Such an argument was in fact made in *Giersch*, n.30 above.

Germany on healthcare, this is highly artificial. The Court's reasoning here arguably provides another example of the confusion and lack of transparency created by the perceived need to avoid casting justifications as "economic". Nuancing the general prohibition on economic justifications would facilitate a more straightforward approach, with a justification formulated as *the need to limit expenditure to the scheme's designated purposes*; the conditions would then be reviewable simply to determine whether they are suitable and necessary to designate the scope of the beneficiaries in light of that purpose. There is a parallel here with the approach suggested below to justification of conditions for access to procurement contracts[237].

So far we have examined case law that has accepted budgetary justifications. Such justifications are not, however, accepted in all cases: this depends on the context and the nature of the benefit. Thus such a justification was not accepted in the context of subsidised cultural services in *Commission v Italy*, discussed below. More recently, in *Commission v Austria* the Court rejected limiting access to higher education courses by (effectively) requiring higher admission qualifications for students from other Member States[238]. The objective was to increase the number of Austrian students to assist national economic development without the financial burden of applying the same (relatively low) admission standards for other students, who might study in Austria if they could not gain admission at home. Following Advocate General Jacobs, the Court appeared to decline by analogy what he characterised as the "economic" justification accepted in *Decker* and *Kohll*[239]. Thus the Court arguably recognised full financial solidarity in access to state-provided higher education – although, as just seen above, the Court and legislature later declined to extend this to maintenance support[240].

These cases indicate, then, first, that budgetary considerations are *sometimes* accepted as a reason not to require full solidarity in the provision of benefits and as a justification for other restrictions on EU rights. However, this depends on the context. As in the areas of general taxation and healthcare, the Court balances the interests involved and departs from its "general" prohibition in certain circumstances where national budgetary concerns are sufficiently weighty. As again in other areas, however, once this threshold is met, the Court does not assess on a case-by-case basis whether the revenue in question might be recouped through other means.

[237] See section 4.2.3.4.

[238] By requiring that students reach the standard required for admission in their home Member State, which was often higher than that set for Austria.

[239] Case C-147/03 *Commission v Austria*, n.31 above, para.61 of the judgment. The Court merely noted briefly that overall access could be restricted by higher admission standards and did not actually address the argument on facilitating access to education for Austrians for the purpose of national development (an argument that could be relevant both to indicate the limited purpose of the education system or to justify restricting access on budgetary grounds despite a broader purpose) or the basic issue of a limit of principle on financial solidarity. In theory the Court's rejection of Austria's argument was based on proportionality, specifically the possibility of adopting non-discriminatory measures to achieve the objective, but since the objective sought relating to the national community could not be achieved in this way, the judgment seems to imply rejection of the alleged ground of justification itself.

[240] As anticipated by Advocate General Jacobs in *Commission v Austria*: see para.34 of the Opinion. The issue was also raised in *Bressol*, n.32 above, but the Court did not consider the argument for restrictions based on an excessive financial burden as it found this was not the aim of the measure: para.50 of the judgment.

In addition, this case law again illustrates that continued lip-service to the general prohibition can impact adversely on decision-making. This is seen in one of the earliest benefit cases[241], *Commission v Italy*[242], which concerned preferential rates for cultural attractions operated by various Italian authorities, in some cases involving free admission for Italian nationals and in others free entry for pensioners and children resident in the authority's area. Having concluded that the measures were obstacles to free movement and discriminated on grounds of nationality[243] the Court (following Advocate General Stix-Hackl[244]) rejected the possibility of justifying preferential rates based on residence simply on the basis that the aims here were "of a purely economic nature"[245]. Neither the Court nor the Advocate General even considered Italy's arguments concerning the need for revenue to fund cultural activities, or other financial solidarity considerations of the kind examined in later cases: the Court simply did not examine whether the service fell "within the scope of acceptable and reasonable community solidarity", and whether the EU should support and recognise such solidarity at local level[246]. In light of later case law (which does not refer to this ruling) and legislation, it is possible that, whilst any similar direct discrimination on grounds of nationality remains prohibited[247], nuanced conditions confining free or subsidised access to locally-provided services to persons with local connections might be accepted, either with or without a requirement for an unreasonable burden on budgets in line with the *Bidar* approach. The significance of the case for present purposes, however, lies in the fact that the prohibition on economic justifications served again to avoid discussion or explanation of the issues[248].

It also seems plausible that the perceived need to avoid overt acceptance of budgetary considerations has influenced the Court's articulation of the rules in more recent case law. Surprisingly, the general prohibition was not explicitly mentioned in the *Bidar* case law until recently, and initially has not overtly hindered examination of the issues. In fact, as we have seen, in the citizenship cases Advocate General Sharpston has contemplated what she expressly terms an "economic objective" of avoiding an unreasonable burden on finances, without reference to any general prohibition. However, it still seems that, either directly, or indirectly through the analogy of the health cases, it is the general prohibition that underlies the Court's articulation of the need for a financial burden *that may affect the level of*

[241] The issue was also considered in a related context in Case C-186/87 *Ian William Cowan v Trésor public* [1989] ECR 00195 in which the ECJ indicated that it was contrary to the rules on free movement of services to limit claims under a compensation scheme for the victims of criminal assault to those with a residence permit or who were nationals of a state with a reciprocal agreement, thus excluding many tourists. The Court rejected an argument that the right to compensation is a "manifestation of the principle of national solidarity" and presupposes a closer connection than being a recipient of services (see para.16 of the judgment) without any substantive reasoning; the Court merely remarked that protection from harm on the same basis as nationals and persons residing there is a "corollary" of free movement (para.17).
[242] Case C-388/01 *Commission v Italy*, n.99 above.
[243] As determined previously in C-45/93 *Commission of the European Communities v Kingdom of Spain* [1994] ECR I-00911.
[244] Case C-388/01 *Commission v Italy*, n.99 above, paras 36-37 of the Opinion.
[245] Para.22 of the judgment, citing *Verkooijen*, n.131 above. The Court also rejected the possibility of justification based on *Bachmann*, n.147 above, because of the absence of a sufficient link between financing the system and benefiting from the concessions: paras 23-25 of the judgment.
[246] G. Davies, n.113 above, pp.48-49.
[247] It seems likely that Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-08507, in which direct discrimination on grounds of nationality was considered lawful is an exceptional case based on the existence of the specific legislation: D. Chalmers, G. Davies and G. Monti, n.1 above, p.491.
[248] As explained in n.242 above the Court similarly did not explain its conclusions in *Cowan*. However, this is perhaps a reflection of the more laconic style of judgment of the time; the issues were at least more fully addressed there by the Advocate General.

assistance available – a "requirement" which we have seen is assumed rather than demonstrated. The perception of a need for an impact on a non-budgetary interest may also have influenced the Court in cases such as *Gottwald* and *Giersch* erroneously to seek justification for conditions on access to benefits in the purpose of the benefit scheme in question, rather than in simply ensuring that expenditure is limited to its designated purpose.

Recently the Court has imported the general prohibition directly into the *Bidar* case law. Thus in *Commission v Netherlands*[249] it rejected the possibility of budgetary considerations constituting a justification for a requirement for migrant workers and dependents to comply with a residence requirement ('three out of six years') for funding for study outside the Netherlands. Citing gender equality cases and a formula used in those cases, the Court stated[250] that "budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, but do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers"[251]. This was repeated in *Giersch*[252].

The *Netherlands* case concerned dependents of economically active persons designated by legislation as "integrated" for benefit purposes, and the prohibition on budgetary justifications was invoked to reject an argument that Member States could impose an *additional* "integration" condition for budgetary reasons (which the Court was correct to reject). However, as we have seen, the Court did accept[253] as justification other reasons concerned with the purpose of grants – the Court's reference to the general prohibition did not preclude it from recognising this kind of economic justification. More recently in *Meneses*[254] the Court – referring to the formula in *Commission v Netherlands* and the general prohibition in the free movement cases – again rejected the possibility that "budgetary" or "purely financial" considerations could, in theory, justify restrictions on citizenship rights (of nationals)[255]. However, again the prohibition did not lead to the Court reject all economic justifications - in line with previous cases it accepted the possibility of an "integration" condition[256]. By indicating that the only permitted justification is called an integration objective *Meneses* responded *at a formal level* to Advocate General Sharpston's request for it to clarify the relationship the "economic" and "integration" objectives; however, it did not clarify the substantive issue behind that request, namely whether the "unreasonable burden" requirement is a *condition* for an integration condition, or merely an explanation. As we have seen, if the latter is the case – Advocate General Sharpston's apparent conception of the "integration" objective - then *greater* priority is being given to Member States' budgetary interests than if the former is the case, rendering even more unsatisfactory the Court's refusal to recognise overtly the objective's economic character. It is difficult to avoid concluding that the focus on the (spurious) categorisation of the interests involved as economic or non-economic is detracting from a consideration of the substantive issues; at the very least it introduces a distracting element into the Court's judgments.

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[249] Case C-542/09 *Commission v Netherlands*, n.125 above.
[250] In para.57 of the judgment. The Court refers here to Case C-187/00 *Helga Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] ECR I-02741, para. 59, and Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE* [2005] ECR I-01789, para.53.
[251] In para.58 the Court also referred to the reason for the prohibition put forward in the gender equality cases namely that EU rights should not vary in time and place, as discussed in section 4.3.1.
[252] Paras 51-52 of the judgment.
[253] In this case and in *Giersch*, n.30 above.
[254] *Meneses*, n.106 above. The Court dispensed with an Advocate General's Opinion.
[255] *Meneses*, n.106 above, paras 43-44 of the judgment.
[256] *Meneses*, n.106 above, para.46.

4.3.2.4. Ensuring performance of public contracts

Another relevant area concerns conditions for ensuring performance of public contracts - "qualification conditions"[257]. These are generally either technical – for example, requirements for a construction contractor to have sufficient experience of the work in question - or financial, ensuring that a firm has adequate financial resources to perform. In the context of free movement of services ECJ case law assumes that such conditions are obstacles to trade even without direct or indirect discrimination[258]. It then approaches justification by considering whether such conditions are justified by the specific public interest served by the contract. Thus in *Contse*[259], concerning a contract for providing assisted breathing techniques to patients at home, the Court first concluded that various conditions were obstacles to trade - for example, a condition that tenderers should have an office in the capital city of the province where the service was to be provided, and then noted that it was "common ground" that the conditions were intended to ensure protection of life and health[260] and assessed them by reference to that objective[261].

This situation raises the issue of budgetary justifications not least because such conditions aim not only at securing delivery of goods or services but at delivery without unnecessary cost. Failure to deliver may impact only slightly or not at all on the contract's objective – for example, with a contract for supplies readily available on the market. However, it may affect the government's financial interests significantly, both because of less favourable terms when purchasing replacements at short notice, in smaller quantities and without a formal competition[262], and because of the procedural costs of making alternative arrangements. Whether these are the only costs of contract failure or are additional to others[263], such as an effect on public health, clearly they need to be taken into account in the qualification process, not least because failure to do this could increase contract failures. Further, conditions may have economic objectives from the perspective of their subject matter – for example, contracts for purchasing IT systems to implement cost savings. Thus it is clearly necessary to accept budgetary justifications for qualification conditions.

However, it is not appropriate to approach justification via the specific interests at stake in each contract[264]. All contracts involve a package of interests, with a varying mix of financial and non-financial consequences of non-performance, and qualification conditions aim at protecting all those interests; it is therefore preferable to regard the relevant interest simply as the interest in ensuring contract performance. Further, this approach provides for a clearer separation between measures aiming at *delivery* of the subject matter – which constitute

[257] On permitted conditions in procurement generally see S.Arrowsmith, n.23 above, Ch.12.
[258] Case C-376/08 *Serrantoni Srl and Consorzio stabile edili Scrl v Comune di Milano* [2009] ECR I -12169.
[259] Case C–234/03 *Contse SA, Vivisol Srl and Oxigen Salud SA v Instituto Nacional de Gestión Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud)* ('Contse') [2005] ECR I–09315.
[260] Para.40 of the judgment.
[261] See, in particular, paras 52, 54 and 61 of the judgment. The Court considered that even if the above condition was a suitable method to protect patients, requiring an office at the time of tendering was disproportionate: paras 42-46 of the judgment.
[262] Generally the public procurement directives or the transparency requirements of the TFEU (see S.Arrowsmith, n.23 above, paras 4-33-4-49) will restrict purchases on failure of a contract to what is necessary pending a new award procedure under the "usual" rules.
[263] Even if other interests exist also, if the economic interests are ruled out these economic interests may not be taken into account in the overall analysis as "unrecognised" interests are not relevant even when "recognised" interests are also involved as per Advocate General Slynn in *Campus Oil*, n.41 above, pp.2764-5.
[264] The approach adopted was simply assumed by the parties as the correct one and not examined by the Court and, further, the judgment was given without any Advocate General's Opinion.

obstacles to trade - and measures that *establish* that subject matter (the decision on *what to buy*) which, as noted earlier, are unsuitable for substantive scrutiny and do not in general fall within the free movement rules[265]. Justification of measures aimed at securing performance of contracts does not entail justification of the *need* for the subject matter (for example, the need for a particular construction project) but only of the qualification condition as a means to ensure delivery[266], and formulating the interest simply as one in ensuring contract performance helps avoid confusion. There is an analogy here with conditions governing access to benefits, where the Court should likewise not be concerned with the subject matter of the benefits.

There is potential here for the Court to seek to avoid the prohibition on economic justifications in the manner of cases such as *Commission v Germany* by artificially linking the budgetary interests to the substantive programme – for example, finding that qualification conditions for contracts in the health sector are justified on health grounds even if non-performance will have no direct impact on health services, on the basis that wasted resources will affect service-levels. Apart from the artificial nature of this approach it cannot easily be used in all cases in which budgetary issues should be recognised (the extreme case being purchase of supplies for common governmental purposes[267]), and the interests of legal development are better served by overtly recognising the need simply to protect the interest in ensuring contract performance.

4.3.2.5. Saving expenditure on administrative procedure

Finally, another line of case law deals with the administrative costs of allocating economic opportunities. The need for justification based on financial interests arises here out of the fact that, in the same way that qualification conditions for procurement are considered obstacles to trade, so also are award procedures that limit access to economic opportunities[268]. This approach was established in *Belgacom*[269], in which the ECJ treated limits on the transparency obligation that arises under the free movement rules as restrictions requiring justification rather than as elements of the definition of transparency. This implies that procedures that the procurement directives call negotiated procedures without prior publication[270] (direct awards) need justification when used for contracts outside those directives[271]. It is recognised that the

[265] With the degree of stringency permitted in qualification conditions being determined in light of the relevant interests as a whole. See further S. Arrowsmith and P. Kunzlik, "EC Regulation of Public Procurement", Ch.2 in S. Arrowsmith and P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (CUP 2009), pp.59-72. See also P. Trepte, "The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate what we Buy?", Ch.3 in G. S. Ølykke, C. R. Hansen, C. D. Tvarnø (eds), *EU Public Procurement - Modernisation, Growth and Innovation: Discussions on the 2011 Proposals for Public Procurement Directives* (DJOF Publishing 2012).

[266] However, the nature of the interests threatened by non-performance is relevant to applying the proportionality test. The principle set out in *De Piejper*, as discussed at 4.3.2.5. below, will apply in determining, for example, the evidence of qualifications that can be required.

[267] And also those cases in which the end purpose of the contract is itself economic e.g. consultancy services for improving efficiency.

[268] Such economic justifications based on procedural costs are also potentially relevant for the grant of authorisations and special or exclusive rights although in practice less likely to arise in those contexts.

[269] *Belgacom*, n.71 above.

[270] E.g. Directive 2004/18/EC, n.69 above, Art.32(2).

[271] Where the transparency obligation applies i.e. where the contract is of cross-border interest.

directives' grounds for direct awards apply also under the Treaty[272] - but many of these are based on cost considerations: for example, they are allowed when there is only possible provider for technical or artistic reasons or because of exclusive rights, to avoid the costs of an unnecessary competition[273]. Other permitted restrictions on open access to procurement are also based on cost considerations – for example, limits on the number of tenderers aimed at reducing evaluation and participation costs[274]. The ECJ has accepted these justifications without referring to their "economic" nature.

Whilst it is appropriate, however, to recognise the need to limit procedural costs – a significant consideration for public procurement systems[275] - it is logical in defining the justifications to apply the principle stated in *De Peijper*[276] in the context of proportionality, that even explicit Treaty derogations "cannot be relied on to justify rules or practices which, even though they are beneficial, contain restrictions which are explained primarily by a concern to lighten the administration's burden or reduce public expenditure, unless, in the absence of the said rules or practices, this burden or expenditure clearly would exceed the limits of what can be reasonably required"[277]; there is no reason for a different approach to procedural costs at the level of defining justifications and the level of applying proportionality. Such an approach is in fact reflected in the procurement directives, which impose significant procedural costs to promote access to public procurement[278].

4.3.4. Budgetary justifications: a review and proposals

We can see, then, that with decisions affecting raising of revenue and allocation of expenditure that are within the free movement rules – and many such decisions are outside those rules – budgetary justifications are widely recognised. Whilst an impact on the budget is not automatically and per se a ground for justification, it is the sole or main basis for many more specific justifications.

In some cases budgetary interests are recognised on the basis of objective circumstances, without the need to establish a specific budgetary impact – as with justifications relating to general taxation and (it is suggested) qualification conditions and procedural rules in public procurement. Here the potential impact on the interests of revenue collection or preservation, combined (in some cases, though not all) with other interests – such as fairness between taxpayers or avoiding service disruption from contractual default – warrant a general rule

[272] Case T-258/06, *Federal Republic of Germany v European Commission* judgment of 20 May 2010 [2010] ECR II-02027 (ECLI:EU:T:2010:214) paras140-141; Advocate General Jacobs, para. 47 of the Opinion in Case C-525/03 *Commission of the European Communities v Italian Republic* [2005] ECR I-09405; Advocate General Stix-Hackl, para.93 of the Opinion in Case C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] ECR I-07287.

[273] Directive 2004/18/EC, n.69 above, Art.31(1)(b) and Directive 2014/24, n.69 above, Art.32(2)(b).

[274] And for another example of a cost-based restriction see Joined Cases C-147/06 and C-148/06, *SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v Comune di Torino* [2008] ECR I-03565, concerning the procedure for dealing with abnormally low tenders.

[275] See, for example, the UNCITRAL Model Law on Public Procurement 2011, http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf.

[276] N.102 above.

[277] Para.18 of the judgment.

[278] An example is the rule from Joined Cases C-21/03 and C-34/03 *Fabricom SA v Belgian State* [2005] ECR I-01559 requiring public purchasers to assess on a case by case basis whether tenderers should be excluded for conflicts of interest, rather than adopting general rules on the issue, now stated in Directive 2014/24/EU, n.69 above, Art.57(4)(e).

allowing such justifications. Measures taken will be subject to some scrutiny – for example, to ensure that a procurement condition is no more onerous necessary to safeguard against default – but the budgetary interest is at least sufficiently worthy to be accepted in principle. In other cases – on reimbursement for healthcare and (possibly) student maintenance - the justification is framed by reference to the existence of a degree of impact on a specific budget, which must be demonstrated. These justifications have sometimes been defined, or (with healthcare) were originally defined, by reference to the impact of a budgetary loss on the relevant service (inability to provide the same level of student support or the impact on healthcare of financial stability), but these "limits" appear fictional, possibly originating in the perceived need for impact on a non-budgetary interest. In practice, their main effect is to confine justifications to situations where the budgetary impact is significant. Whichever approach is used, however, the Court has never examined whether the funds in issue could be obtained by alternative means, this issue being unsuited to judicial scrutiny.

We argued above that the prohibition on economic justifications in general should be replaced by a case-by-case determination of whether to accept particular economic justifications. Budgetary justifications are one type of economic justification, and their de facto acceptance supports the argument for nuancing the prohibition *on economic justifications in general*. It also indicates that the Court should abandon any narrower general rule against *specifically budgetary considerations*. However, this does not dispose of the question of how to treat budgetary considerations within a case-by-case approach to economic justifications in general. An approach is needed that, first, recognises their existence; secondly, recognises their legitimacy (as reflected in the case law); and, thirdly, provides a transparent and practical tool to balance these interests with free movement.

One possibility is simply to endorse overtly the approach applied in practice by taking as a starting point that budgetary justifications are not allowed but then acknowledging exceptions, as favoured by Advocate General Sharpston. This would facilitate the clarification or removal of the fictional and/or tenuous references to "further" interests that aim to present the justification as other than a purely budgetary one, including the references to the "requirement" for an impact on the level of student support in *Bidar* and to irrelevant justifications of the purpose of benefit schemes in cases such as *Giersch*. This approach would entail a continued incremental development of budget-based justifications by reference to objective circumstances. It would involve a change in formulation of the law in line with the Court's actual decisions, but not necessarily any substantive change. However, it would certainly facilitate better recognition of budgetary interests, would enable the Court better to respond to the challenges of an expanded scope for free movement (and other) rules of EU law and current budgetary pressures, and over time could lead to greater recognition of budgetary interests.

On the other hand, it still implies a rather cautious approach: as Advocate General Jacobs pointed out in *Commission v Austria* economic justifications provide (on his analysis) "a double derogation, first from the fundamental principles of free movement and second from the accepted grounds on which those derogations can be justified" – a point that leads him to conclude that "any justification argued on their basis, especially by analogy, needs to be treated with circumspection"[279]. On this approach, budgetary justifications may remain exceptional, and discriminatory measures in the award of benefits or provision of services largely prohibited.

[279] Case C-147/03 *Commission v Austria*, n.31 above, para.31 of the Opinion.

A more radical possibility is to treat budgetary interests from a more neutral standpoint, by adopting the starting point that they can in principle provide a basis for justification. Whether this is a better approach from a normative perspective depends essentially, of course, on a value judgment over the appropriate balance between EU rights and national budgetary (and thus, to some extent, communitarian) interests. However, even if this approach is appropriate, as is the view of the present author, not every budgetary interest, however small, should be accepted, in light of the considerations discussed earlier[280]: budgetary impacts may be small; States may transfer budgetary losses to interests of low priority; and some costs can be addressed through alternative measures, such as efficiency savings, that do not impact on services[281]. Thus any presumption in favour of budgetary justifications should apply only to interests of a certain degree of significance, assessed by reference to the programme budget. In this respect, the approach suggested by Advocate General Sharpston in *Prinz and Seeberger* to determining whether there is an "unreasonable burden" on the budget for student support provides a useful starting point[282] - although any requirement for such a burden should *not* be linked to a further requirement for an impact on the level of support or service. Such a test, while not perfect, provides an appropriate way to balance the interests involved in cases such as *Commission v Austria* on access to higher education courses and *Commission v Italy* on subsidised access to museums for non-residents, where the Court is not willing to allow more stringent limits on financial solidarity. However, this would not only require a change in formulation of the law but would be inconsistent with current case law – case law which, moreover, in *Commission v Austria* (although not *Commission v Italy*) involved careful consideration of solidarity issues.

It is not suggested that this second approach should be a substitute for the more specific justifications already established in the case law[283] but merely that it should supplement them. The existing justifications (balanced allocation of taxing power etc) will remain the only justifications for general taxation measures (since the above "general" justification is not relevant), but in other areas, also, specific justifications should remain – for example, the need to ensure performance of procurement contracts or preserve funds for designated purposes. Indeed use of specific justifications is preferable to an approach that depends on showing a specific budgetary impact for reasons of cost and legal certainty, and should be used whenever possible, including in the area of student support[284].

Whatever approach is adopted, the Court should continue to refrain from assessing whether cuts in budgets, other revenue-raising measures, or efficiency savings could provide an alternative means to recoup budgetary losses: this is ruled out from a constitutional perspective, including because of the need to ensure consistency with rules limiting the scrutiny of national measures allocating national resources (such as the level and nature of benefits or content of government purchases). A balance between EU rights and national budgetary concerns is achieved through the combination of the definition of the accepted justifications and the rejection of justifications in other cases: the extent of impact on specific budgets as well as various objective circumstances (such as the fact that the chosen approach to financing might be disrupted) serve to identify when suitable alternative measures are

[280] Section 4.3.1.
[281] Ibid.
[282] See 4.2.3.3 above.
[283] Or that might be developed in future.
[284] Here it seems desirable to adopt a general rule allowing benefits based on a concept of limited solidarity - that is, accepting an integration condition as justification *without* regard to the specific budgetary impact.

unlikely to be available, as a more practical and certain substitute for aspects of the proportionality test. Even procedural review would involve excessive practical difficulties and a rule-based approach using proxy indicators is greatly preferable. However, the proportionality test will continue to play a role in other respects - for example, identifying when the same budgetary objective could be achieved by non-discriminatory means, as in *Kranemann*[285].

5. Conclusion

The prohibition on economic justifications originated as a rule that States cannot protect their industry from the very effects that free movement seeks to achieve nor from the general social, political and economic consequences of those effects, but has subsequently been extended to economic objectives more generally. While in many cases there are good reasons to reject economic objectives, often these reasons are quite different from those underlying the case law on protectionism and they also differ from case to case; and a general rule prohibiting economic justifications is not a useful tool to address them. On the other hand, in many situations it *is* appropriate to recognise economic justifications, and in reality the ECJ has done this by ignoring the prohibition, denying the economic nature of the interest, or referring (often in an artificial and/or inconsistent way) to "further" interests served by the economic aim. Such an approach is detrimental to transparency and can adversely affect the quality and consistency of decisions. Thus the "general" prohibition needs reformulating, both to reflect the reality of the case law and to promote transparency and better decision-making. As the situations in which the Court must balance free movement and national economic interests has become ever more important and diverse, so the need for reformulation has become more pressing.

We suggested above that, reflecting the origins of the rule, a "special" approach is pertinent only for measures that aim to protect industry from competition. For these measures there is a presumption that they are prohibited. However, even here there are exceptional cases in which Member States may protect a competitive position to promote a specific public policy. This is often of a non-economic nature but in some cases may be economic - for example, protecting investment by legitimate rights-holders, budgetary (as in *Smits/Peerbooms*), or, possibly, settling commercial legal disputes.

With measures that do *not* aim to protect from competition, on the other hand, economic objectives are often capable of justification and should be analysed on a case-by-case basis like other interests. There will remain situations in which it is not appropriate to recognise economic interests but these should be treated not as part of a general prohibition on economic justifications but on an individual basis. Both in reflecting the Court's actual decisions and as an appropriate policy, such a formulation is preferable both to an absolute prohibition and to an alternative approach of recognising exceptions to a general rule.

In dealing with budgetary interests within this general framework, we suggested that the Court should continue to develop specific, budget-based justifications whose scope is

[285] See section 4.3.1 above. However, the fact that cap in that case might itself discriminate indirectly by making it less likely that expenses to travel abroad would be fully covered would appear not be an obstacle to trade under the principle indicate in *Decker* and *Kohll* that the levels of benefits set are for Member States; and see also the analysis in Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-02617, where the Court assumed that a similar type of cap would be acceptable.

delimited largely by defining the general circumstances in which the justification applies, without scrutiny of whether other steps could be taken to recoup the budgetary loss – a limit on the usual proportionality test. However, the Court needs to acknowledge overtly that such budgetary justifications are accepted, and to nuance its current rules that strain to identify some of these interests as non-economic. This would not necessarily involve any substantive change in the rules but would significantly improve transparency and, arguably, the quality of decision-making. We also contemplated the possibility of a different approach that *would* involve some change of substance, to supplement (although not replace) the existing economic justifications, namely the acceptance of budgetary justifications whenever there is a significant impact on a particular programme budget. Arguably this would provide a better balance between free movement and national budgetary concerns. It would not, however, be consistent with the current case law, which has explicitly rejected such an approach - although an incremental development of further budgetary justifications might take the Court a long way in this direction without reversing current case law.

The need for a reformulation of the current general prohibition seems incontestable even if its exact form is open to debate. It is thus unfortunate that, despite several Advocates General supporting a more overt recognition of economic interests, the Court continues to repeat the traditional prohibition. It is likely, however, that the Court will have future opportunities to look at the prohibition and it is to be hoped that it will seize those opportunities to develop a more nuanced and transparent approach to this important subject.