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Structural Guarantees for  
the State Aid Field  
—  
The Community's Last Best  
Hope against National  
Arbitrariness

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# Contents

<b>SUMMARY</b>	<b>1</b>
<b>SAMMANFATTNING</b>	<b>2</b>
<b>ABBREVIATIONS</b>	<b>3</b>
<b>1 INTRODUCTION</b>	<b>4</b>
1.1 Subject and Purpose	5
1.2 Method and Materials	6
1.3 Outline	6
1.4 Delimitations	7
<b>2 THE FOUNDATION OF STRUCTURAL GUARANTEES</b>	<b>8</b>
2.1 A Community Built on the Rule of Law	8
2.1.1 <i>Equality</i>	9
2.1.2 <i>Effectiveness</i>	12
2.1.3 <i>General Principles of Community Law (GPCL)</i>	14
2.1.3.1 Effective Judicial Protection	15
2.1.3.2 Good Administration	16
2.1.3.3 Transparency	18
<b>3 THE FUNCTION OF STRUCTURAL GUARANTEES</b>	<b>20</b>
3.1 How GPCL Generally Function	20
3.1.1 <i>Scope of Review</i>	20
3.1.2 <i>Collateral nature of the review</i>	21
3.1.3 <i>Intensity of Review</i>	22
3.2 The Use of Structural Guarantees by the ECJ	24
3.2.1 <i>Organisation of Monopolies</i>	24
3.2.1.1 <i>Franzén</i>	25
3.2.1.2 <i>Hanner</i>	26
3.2.2 <i>Regulation of the Labour Market</i>	27
3.2.2.1 <i>Laval</i>	27
3.2.3 <i>Positive Action regarding Gender Discrimination</i>	28
3.2.3.1 <i>Kalanke</i>	28
3.2.3.2 <i>Marschall</i>	29
3.2.4 <i>Public Distortion of Competition</i>	29
3.2.4.1 <i>ERT</i>	30

3.2.4.2	<i>MOTOE</i>	30
3.3	<b>Structural Guarantees Stepping Up where Proportionality Falls Short</b>	<b>31</b>
3.3.1	<i>The Problem of National Discretion</i>	31
3.3.2	<i>Deference to National Discretion</i>	32
3.3.3	<i>Avoiding Unrestrained Deference</i>	34
<b>4</b>	<b>ALTMARK INTRODUCING STRUCTURAL GUARANTEES TO THE STATE AID FIELD</b>	<b>36</b>
4.1	<b>Pre-Altmark Confusion Concerning Compensation for SGEIs</b>	<b>37</b>
4.1.1	<i>Complicating Particularities of SGEIs</i>	37
4.1.2	<i>State Aid Approach</i>	38
4.1.3	<i>Compensation approach</i>	39
4.2	<b>The Holding of Altmark</b>	<b>39</b>
4.2.1	<i>Facts of the Case</i>	40
4.2.2	<i>Opinions of Advocate General Léger</i>	40
4.2.3	<i>Judgement of the Court</i>	41
4.2.4	<i>New Structural Guarantees</i>	42
4.3	<b>Post-Altmark Application</b>	<b>44</b>
4.3.1	<i>The Monti-package</i>	44
4.3.1.1	Amendment to the Transparency Directive	44
4.3.1.2	Decision on the Application of Article 86(2)	45
4.3.1.3	Framework Decision	45
4.3.2	<i>Further Application by the Commission</i>	46
4.3.3	<i>Further Application by the Courts</i>	47
4.3.3.1	<i>Enirisorse</i>	47
4.3.3.2	<i>Servizi Ausiliari Dottori Commercialisti</i>	48
4.3.3.3	<i>BUPA</i>	49
<b>5</b>	<b>ANALYSIS AND CONCLUDING REMARKS</b>	<b>51</b>
	<b>BIBLIOGRAPHY</b>	<b>54</b>
	<b>TABLE OF CASES</b>	<b>59</b>

# Summary

In line with current tendencies of ‘new modes of governance’, this essay introduces judicial tools which strike a balance between the respect for national autonomy in individual assessments and the effective implementation of Community law. The balance is struck through the demands of structural guarantees; administrative safeguards, which weeds out arbitrary national decision-making. These administrative safeguards are, particularly needed in areas where the Member States of the EU have been granted a wide margin of discretion.

Examples of demands for structural guarantees are the provision of transparent and accessible legislation and administrative procedures based on objective criteria, as well as the access to effective judicial review; together creating a system of checks to prevent the discretion from turning into arbitrariness. All of these demands are ultimately emanating from principle of rule of law, on which the European Community is said to be founded.

The existence of the demands for structural guarantees, being somewhat of an elusive ‘non-concept’ in legal doctrine, is firmly established in this essay, through a study of their nature, as well as functioning. The use of structural guarantees, as a tool of judicial review, is legitimised through their umbilical cord to the rule of law. Different emanations of the rule of law; the principle of equality, effectiveness, alongside other general principles of Community law (GPCL), are presented to give a comprehensive overview of the substantive content of the structural guarantees. As the function of the demands for structural guarantees in a judicial review is, inevitably, linked to that of GPCL in general, the latter is used as a starting-point for the examination of the function of structural guarantees. The case law of the ECJ has been researched to provide a cross-section of relevant examples of how the structural guarantees work as a judicial tool, in practice. To conclude the probe into the specific function of structural guarantees, the particular importance of this judicial tool, in cases of high Member State discretion, is accentuated.

To further exemplify the introduction of structural guarantees, by the ECJ, the developments concerning compensation of services of general economic interest (SGEIs) are presented. The focal point being the structural demands of the *Altmark* case, which are, subsequently, examined and analysed against the intended function of structural guarantees.

# Sammanfattning

I linje med de rådande trenderna som förespråkar nya former av styrmedel; *new modes of governance*, inom EU, ämnar denna uppsats att introducera juridiska verktyg som balanserar respekten för den nationella autonomi i enskilda övervägningar med den effektiva implementeringen av EG-rätten. Denna balansgång möjliggörs genom krav på strukturella garantier; eller administrativa säkerhetsmekanismer, som ämnar gallra bort godtyckliga nationella beslut. Dessa administrativa säkerhetsmekanismer är framförallt påkallade i de fall då EU:s medlemsstater har tilldelats ett stort beslutsfattande handlingsutrymme.

Exempel på dylika krav, gällande strukturella garantier, är krav på tydliga och lättillgängliga lagar samt administrativa processer som baseras på objektiva kriterier, så väl som tillgången till effektiv judiciell prövning. Tillsammans utgör kraven ett kontrollsystem som förebygger att ett skönsmässigt utrymme utnyttjas till godtycklig beslutsfattning. Alla dessa krav mynnar ursprungligen från den rättsstatsprincip som den Europeiska Gemenskapen sägs vara byggd på.

Förekomsten av dessa krav på strukturella garantier, som i stort behandlats som obskyra 'icke-koncept' i den juridiska doktrinen, etableras i denna uppsats, genom en studie av deras härkomst och funktion. Användningen av strukturella garantier som ett redskap i en judiciell prövning, legitimeras av deras starka släktskap till rättsstatsprincipen. Olika uttryck av denna rättsstatsprincip; likabehandlingsprincipen, principen om effektivt genomslag av EG-rätten, tillsammans med andra allmänna rättsprinciper, presenteras för att ge en greppbar översikt av de strukturella garantiernas substantiella innehåll. Då de strukturella garantiernas funktion, som hjälpmedel i judiciella prövningar, ofrånkomligen är knuten till de allmänna rättsprincipernas dylika funktion, används den senare som utgångspunkt för den mer specifika utredningen om de strukturella garantiernas funktion. EG-domstolens praxis har undersökts för att erbjuda ett tvärsnitt av relevanta exempel på hur strukturella garantier agerar hjälpmedel i praktiska judiciella prövningar. För att avsluta undersökningen av de strukturella garantiernas specifika funktion, betonas dess synnerligen viktiga roll i fall då medlemsstaten har tilldelats en stor skönsmässig beslutsman.

För att vidare ge exempel på EG-domstolens införande av strukturella garantier, presenteras utvecklingen kring statlig kompensation för utförande av allmännyttiga tjänster. Fokus dras till de krav på strukturella garantier som uppställdes i *Altmark*-fallet, och dessa analyseras sedan närmare mot bakgrund av de strukturella garantiernas tilltänkta funktion.

# Abbreviations

AG	Advocate General
CFI	Court of First Instance
CFR	Charter of Fundamental Rights of the European Union
EC	European Community
EU	European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
GPCL	General Principles of Community Law
PSO	Public Service Obligation
SGEI	Service of General Economic Interest
TEC	Treaty of the European Community
TEU	Treaty on the European Union
ToA	Treaty of Amsterdam
ToL	Treaty of Lisbon

# 1 Introduction

In line with current tendencies of ‘new governance’, this essay will introduce a novel judicial tool which strike a balance between the respect for national autonomy in individual assessments and the effective implementation of Community law. The balance is struck through the demands of structural guarantees; administrative safeguards, which weeds out arbitrary national decision-making. These administrative safeguards are, as will be illustrated through the course of this thesis, particularly needed in areas where the Member States of the EU have been granted a wide margin of discretion. Examples of demands for structural guarantees are the provision of transparent and accessible legislation and administrative procedures based on objective criteria, as well as the access to effective judicial review; together creating a system of checks to prevent the discretion from turning into arbitrariness. These demands have nothing to do with assessments of individual cases, but rather ensure the soundness of the legal system’s inbuilt administrative structures. They have proved to be a much needed complement to already existing legal tools of judicial review.

The demands for structural guarantees are tangible and specific expressions of general principles of Community law (GPCL). The GPCL have become a force to be reckoned with and they are said to form an integral part of the ECJ’s methodology, as well as expressing important constitutional values.<sup>1</sup> Their enforceability, however, have at times been hampered by a lack of pre-specified exact content. One needs to isolate sufficiently precise demands, flowing from the GPCL, for them to be effectively justiciable at the national level.<sup>2</sup> The Charter of Fundamental Rights (CFR), although not yet legally binding, has certainly been of great importance in the development towards more precise and enforceable GPCL. The Community courts have indeed in recent years started to cautiously refer to this political document. However, these Courts have long since been committed to the ambitious project of crystallising the common body of GPCL. This practice should not to be disregarded as an exercise of a mere guessing game, since the Courts conduct qualified comparative legal studies with a clear Community purpose. The demands for structural guarantees only represent one specific branch on the ever-growing trunk of the GPCL.

The demands for structural guarantees obviously serve the aim of an effective implementation of Community law. However, even if these demands are to be used strictly in a judicial review, they represent the very lowest requirements of integration. Community law imposes both positive

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<sup>1</sup> Tridimas, T., *The General Principles of EC Law*, second edition, Oxford University Press, 2006, p. 548.

<sup>2</sup> See references to French case law, where the lack of precision impeded the use of GPCL as basis for judicial review, in Groussot, X., *General Principles of Community Law*, Europa Law Publishing, 2006, p.364.

and negative obligations on the Member States.<sup>3</sup> The demands for structural guarantees act as minimum positive obligations, which work in a subsidiary fashion; only stepping up in areas virtually untouched by Community harmonisation. For obvious reasons, these demands do not impose as intrusive positive obligations as those which could have been forced through legal harmonisation.

The EU does in fact not have the specific competence to regulate the public service or the administrative and organisational structures of the Member States. But as national administrative law is being increasingly affected by parameters set out by the ECJ, national public services are being dragged into the European integration process ‘through the backdoor’, case by case.<sup>4</sup> Structural guarantees can at times be demanded through Community legislative acts,<sup>5</sup> but the development is primarily propelled by case law, and this essay will consequently focus on the minimum standards provided by the Community courts.

## 1.1 Subject and Purpose

The essay aims to introduce the concept of structural guarantees as a legitimate and useful tool to be employed in a national judicial review based on Community law. As it is a novel labelling of existing legal currents, an initial objective of this essay is to provide the reader with an understanding of both the nature and function of these structural guarantees. To successfully justify the use of these demands, the structural guarantees must not only be illuminated through their appearance in the case law of the Community courts, but must furthermore be bestowed with a firm legal basis. The specific function of these demands, as a counterweight to national discretion, will be explained and emphasised.

Moreover, the thesis aims to highlight the emergence of structural guarantees in the specific field of state aid. In particular, focus will be drawn to the legal developments concerning the compensation of services of general economic interest (SGEIs). While acting as an illuminating example of how the Community’s judiciary can develop demands for structural guarantees to offset a granting of national discretion, this specific development will, in itself, be subject to scrutiny. The final aspiration of the essay will be to critically evaluate the development of the structural guarantees in the specific area of state aid and compensation of SGEIs.

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<sup>3</sup> See the distinction made in Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*. Europa Law Publishing, 2007, p. 52.

<sup>4</sup> Demmke, C., “Undefined Boundaries and Grey Areas: The Evolving Interaction Between the EU and National public Services” 2 (2002) *Eipascope*, p. 11.

<sup>5</sup> As shall be shown in the Commissions response to the Altmark-case, see section 4.3.1.



## 1.2 Method and Materials

A traditional dogmatic method will be used throughout the thesis; establishing and exemplifying the demands for structural guarantees through the use of pertinent legal sources. The thesis, although partly drawing from Swedish doctrinal sources, will not have a particularly Swedish focus, nor will it be built on traditional Swedish legal method. The method to be used will instead be greatly coloured by a Community law-approach, affecting both the choice of resources and their relative authority.

Great weight will be put on legal principles, how they have been deduced, used and developed through the case law of the European courts. The jurisprudence of the Courts will therefore take a highly prominent role as a legal source. Nevertheless, primary and secondary Community legislation will obviously serve as legal groundwork for the analysis. Dwelling in the area of legal principles, international conventions such as the ECHR and the CFR will be used as supportive sources to the explanatory section regarding the foundation of the structural guarantees. Moreover, since the focus of the essay penetrates a particularly dynamic area of law, comments in Opinions of Advocate Generals and other doctrine on Community law will serve as supportive legal sources throughout the thesis. The doctrine will be consulted to give a nuanced and more comprehensive picture of the current state of matters, but will not be treated as authoritative in and of itself. As far as possible, internationally reviewable sources will be used. But as a fair amount of the illuminating cases, as well as doctrine on structural guarantees, are Swedish, a substantial amount of Swedish resources will also be consulted.

## 1.3 Outline

Chapter 2, together with chapter 3, aim to establish the nature and function of the structural guarantees. The former presents the different principles of law, which provide the foundation for the demands of such guarantees, while the latter presents the function of the above-mentioned principles in general, as well as that of the structural guarantees in particular. Following a line of case-studies where structural guarantees have been used in judicial review, the last section of chapter 3 underlines the particular importance of structural guarantees in areas of high national discretion. The assertions made concerning the relationship between structural guarantees and discretion will create a point of reference for the subsequent critical analysis of the development of structural guarantees in the state aid field.

Chapter 4 constitutes a more narrowed down application of the legal theories, which have been elaborated in the earlier chapters. The *Altmark* case<sup>6</sup>, and surrounding legal developments, are dissected to identify the

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<sup>6</sup> Case C-280/00 *Altmark* [2003] ECR I-7747.

precipitation of structural guarantees; specific demands put on national administrations when granting compensation for SGEIs. This chapter will be wrapped up with a thorough examination of the application of these guarantees in subsequent case law.

The final chapter aims to critically evaluate the development of structural guarantees within the state aid area, as it has been presented. These concluding remarks will sum up the specific function of the demands for structural guarantees and evaluate how well this function has been introduced in regards to the compensation of SGEIs.

## 1.4 Delimitations

The essay only deals with a limited part of a vast topic, one which is, furthermore, constantly evolving. The underlying ambition has been to give an introduction to the functioning of structural guarantees, rather than to provide a conclusive catalogue of various specific demands. A number of examples of demands for structural guarantees will certainly be given throughout the essay, to be able to establish the concept, but the list is not to be regarded as exhaustive.

The issues of state liability and sanctions, although interesting, have been disregarded, in order not to overstep the limits of this particular examination. Focus has been put on the benchmarks used in a legality review, and not on potential effects of such a review.

The concept of structural guarantees is in no way unrelated to that of proportionality; in fact, these guarantees are often used as the basis for a disqualification of a national measure in the name of proportionality. But not to confuse the reader, the essay will as far as possible stay clear of in-depth discussions of proportionality; only referring to it in its specific relation to the structural guarantees. Generally speaking, for a national measure to be compatible with Community law, it has to pass both the hurdles of structural guarantees as well as that of proportionality.<sup>7</sup>

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<sup>7</sup> Hettne, J., *Rättsprinciper som styrmedel*, Norstedts Juridik, 2008, p. 133.

# 2 The Foundation of Structural Guarantees

## 2.1 A Community Built on the Rule of Law

To justify the use of structural guarantees in judicial reviews, one would be advised to start at one of the founding pillars of the Community legal order; the principle of the rule of law. The structural guarantees can be seen as concrete demands ultimately emanating from this fundamental, but in itself non-operational, principle.

The rule of law, being far from non-controversial principle, is one which primarily has emerged to prevent arbitrariness, discrimination and denial of justice. The rule of law has been described as an ‘essentially contested concept’ as it has never obtained a universally acceptable definition.<sup>8</sup> The academics nevertheless seem to reach common ground on the premise that this principle expresses an aspiration to control public power, and thereby to prevent abuse of such power.<sup>9</sup> The rule of law voices a concern induced by the development of the welfare state.<sup>10</sup> The importance of formalistic procedural guarantees, flowing from this principle, therefore seems to grow in tandem with the growth of the welfare state, and with the increased discretion given to public powers.

Arbitrariness is the abuse of discretionary decision-making power, and should not be confused with the mere ‘use’ of discretion or legal prerogatives.<sup>11</sup> The principle aim of the rule of law is not to eliminate wide discretionary powers, but rather to control the exercise of such powers through law.<sup>12</sup> In relation to the discretion given through Community directives, the ECJ stated its *VNO*-judgment<sup>13</sup> that a national court should ensure that the national authority has not stepped out of bounds of its margin of discretion, without thereby evaluating the discretionary choices as such.<sup>14</sup>

Besides being the institution which have spear-headed the development of the application of the rule of law, the ECJ was the very first to proclaim the European Community to be a Community which is based on the rule of law.<sup>15</sup> The omnipotence of this principle was recently confirmed in the

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<sup>8</sup> Wennerström, E., *The Rule of Law and the European Union*, Iustus Förlag, 2007, p. 45.

<sup>9</sup> *Ibid.* p. 54.

<sup>10</sup> *Ibid.* pp. 89f.

<sup>11</sup> Ibañes, A., *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits*, Hart Publishing, 1999, p.240.

<sup>12</sup> Wade, H.W.R., and Forsyth, C. F., *Administrative Law*, seventh edition, Clarendon Press, 1994, p. 379.

<sup>13</sup> Case 51/76 *VNO* [1977] ECR 113.

<sup>14</sup> *Ibid.* para. 29.

<sup>15</sup> Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para. 23 and Opinion 1/91 *EEA* [1991] ECR 6097.

*Kadi*<sup>16</sup> judgment, where the ECJ repeatedly affirmed the rule of law within the Community legal order, in quite an exceptional manner.<sup>17</sup> Furthermore, Wennerström reached the conclusion that the EC conception of the rule of law has developed into a strong and fairly well defined one, within its limited scope.<sup>18</sup> Over the years, the ECJ has proven to endorse a substantive, rather than formal version of the rule of law. By recognizing the GPCL as expressing fundamental values shared throughout the Community, the rule of law has indeed come to reach far beyond mere formal requirements.<sup>19</sup>

Substantive conception as it might have become, the rule of law should continue to be viewed as an enabler of rights and not a creator of such. The principle in itself does not confer any human rights on individuals. The rule of law instead provides a more generic protection for the individual, by ensuring that the legal system as a whole has the capacity and inclination to deliver on such individual rights.<sup>20</sup> Because, as Leanerts and Corthaut put it:

*A legal order stuffed with legal norms which promise a reality the citizen cannot enjoy in practice, eventually loses all credibility.*<sup>21</sup>

The principles of equality and effectiveness, along with other general principles of Community law, all constitute particular expressions of the all-important rule of law. As such, they readily promote the development of structural guarantees against arbitrariness, and will therefore be presented in more detail below.

## 2.1.1 Equality

The principle of equality and non-discrimination is of particular importance since it has served as the moral fibre for the creation of many structural guarantees. This principle has been widely applied by the ECJ and it has been described as one of the most influential principles in restricting the Member States' freedom to organize their national legal orders.<sup>22</sup>

The principle of equality in Community law has been aptly described as one constant principle which has multiple appearances.<sup>23</sup> The Lisbon Treaty proclaims the principle of equality to be one of the principles on which the

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<sup>16</sup> Cases C-402 and 415/05 P *Kadi* and *Al Barakaat v Commission* [2008] ECR I-6351.

<sup>17</sup> *Ibid.* paras. 81, 285, 288 and 316.

<sup>18</sup> Wennerström, E., *The Rule of Law and the European Union*, p. 134.

<sup>19</sup> Tridimas, T., *The General Principles of EC Law*, pp. 548f.

<sup>20</sup> Wennerström, E., *The Rule of Law and the European Union*, p. 40.

<sup>21</sup> Leanerts, K. and Corthaut, T., "Of birds and hedges: the role of primacy in invoking norms of EU law" 31 (2006) E.L. Rev., pp. 288f.

<sup>22</sup> Reichel, J., *God Förvaltning i EU och Sverige*, Jure Förlag, 2006, pp. 180 and 250.

<sup>23</sup> Leanerts, K., "L'Egalité de Traitement en Droit Communautaire – Un Principe aux apparances multiples" 27 (1991) CDE, p. 3.

European Union is founded,<sup>24</sup> and the principle has been given a whole chapter in the CFR.<sup>25</sup> The TEC however, is not as explicit on this point. Instead, an explicit reference has been substituted by various expressions of the principle; among which Articles 12, 141, 34(2), 81 and 82 are just a few examples. Notwithstanding this scattered picture, the ECJ has with abundance shown its acceptance of the principle as a fundamental one, which reaches beyond any specific enunciation in the TEC.<sup>26</sup> For obvious reasons, the ECJ has, when possible, applied the express provisions of the Treaty and secondary legislation. This practice has in turn led to the impression that, while the principle of equality is further and further fleshed out in Community law statutes, the principle itself has been disappearing into the background.<sup>27</sup>

The essence of the principle of equality boils down to that ‘like cases should be treated equal and unlike cases should be treated differently, unless objectively justified’. When a distinction is made without an objectively established justification, it has long since been deemed to be “arbitrary, discriminatory and illegal”.<sup>28</sup> The equality test can be viewed as a two-part test; first, an objective comparison has to be carried out between the entities who will be affected by the contested measure, and second (if a *prima facie* discrimination has occurred), the justification put forward by the responsible authority has to be based on objective grounds.<sup>29</sup> For a measure to be viewed as arbitrary, it has to fail both of these objectivity tests.<sup>30</sup> The demand for structural guarantees promotes equality as they aim to reveal the lack of objectivity in both parts of this test.

The main doctrinal dispute over the characterisation of the principle of equality has recently been between the formal and the substantial conceptions of equality.<sup>31</sup> The formal conception has been the one hitherto backed by the ECJ, having been effectively used to combat formal discriminatory rules, but not demanding any positive reordering of society beyond that point.<sup>32</sup> The widespread adoption of indirect discrimination seems to have pointed in the direction of a more substantive approach

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<sup>24</sup> Article 2 of The Treaty on The European Union.

<sup>25</sup> Chapter III CFR.

<sup>26</sup> Various examples of this would be in Case 1/72 *Frilli v Belgium* [1972] ECR 457, para. 19, Case 152/73 *Sotgiu* [1974] ECR 153, para. 4, Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, para. 7, Cases 124/76 and 20/77 *Moulins & Huileries* [1977] ECR 1795, para. 16, subsequently confirmed in Case 245/81 *Edeka v Germany* [1982] ECR 2745, para. 11, and yet again established in Case 168/82 *ECSC v Ferriere Sant’Anna* [1983] ECR 1681, para.16.

<sup>27</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 125.

<sup>28</sup> Case 8/57 *Hauts Fourneaux et Aciéries Belges v High Authority* [1958] ECR 245.

<sup>29</sup> See discussions in Craig, Paul, *EU Administrative Law*, Oxford University Press, 2006, pp. 580ff.

<sup>30</sup> See e.g. Case 106/81 *Julius Kind* [1982] ECR 2885, para. 22.

<sup>31</sup> Groussot, X., *General Principles of Community Law*, pp.160f.

<sup>32</sup> Barret, G., “Re-examining the Concept and Principle of Equality in the EC Law”, 22 (2003) YEL 117, pp. 122-123.

towards equality.<sup>33</sup> Nevertheless, the substantive conception of equality, also labelled equality of result, continue to be a quite controversial stance as phenomenon such as positive discrimination (see further in section 3.2.3) continues to be viewed as ‘discrimination’ in the eyes of the ECJ, being inherently incompatible with the very principle of equality itself.<sup>34</sup> As a legal concept, equality has historically been used to attain ever shifting goals, and has been given so many meanings that leading scholars have started to question if the principle has turned devoid of any real substantive content.<sup>35</sup> The ECJ’s use of the principle can, however, not be said to support any one particular substantive theory of equality. The principle has rather been used to develop a structural safety net; generously allowing for several different policy decision, merely weeding out arbitrary ones.<sup>36</sup>

The principle of non-discrimination has been endowed by the ECJ with a highly regulatory role in areas where unchecked market forces would not be desirable.<sup>37</sup> Through the shackles of objectivity, this principle effectively restrains the possible policy choices open to any given administration. The principle has consistently been used to regulate Community policy choices, but eventually the ECJ came to also review national measures against the fundamental principle of equal treatment.<sup>38</sup> It should be noted that the ECJ shows greater deference to Member State discretion in certain areas, such as taxation and social security, where the judicial review of equality draws near to a bare test of arbitrariness.<sup>39</sup> The principle of equality has, however, retained more regulatory power when faced with wide discretion held by national administrative authorities, than that of the Community institutions.<sup>40</sup> One explanation for this difference in the intensity of legal review might be that the principle of equality is, in the former case, used as an instrument of integration. As such, it allows the Community court to question the justifications presented by the national authority on the basis of effects being contrary to market integration.<sup>41</sup>

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<sup>33</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 141. See also Prechal, S., “Equality of Treatment, Non-discrimination and social policy: Achievements in Three Themes”, 41 (2004) CMLRev., p.537.

<sup>34</sup> Barret, G., “Re-examining the Concept and Principle of Equality in the EC Law”, 22 (2003) YEL, pp. 126, and Opinion of AG Tesaro in Case C-450/93 *Kalanke* [1995] ECR I-3051, para 28.

<sup>35</sup> As observed in Tridimas, T., *The General Principles of EC Law*, 2006, p. 60.

<sup>36</sup> *Ibid.* p. 62. and Jans, J., de Lange, R., Prechal, S., Widdershoven, Rob, *Europeanisation of Public Law*, p. 127.

<sup>37</sup> See discussions in Craig, P, *EU Administrative Law*, p. 579.

<sup>38</sup> The first time this happened was in Case 201 and 202/85 *Klensch* [1986] ECR 3477, paras. 9-10, which was later confirmed in Case 313/99 *Gerard Mulligan* [2002] ECR I-5719, paras. 35-36.

<sup>39</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, pp. 138f, see further in section 3.3.2 of this essay.

<sup>40</sup> Case C-167/97 *Seymore-Smith* [1999] ECR I-623, para. 75, see also the comparative conclusion about the review of Community policy decisions reached in Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 139.

<sup>41</sup> Tridimas, T., *The General Principles of EC Law*, pp. 60 and 76.

The principle of equality works in tandem with the prominent principle of proportionality, in judicial reviews of national measures. They have been used as the main tools to distinguish unlawful impediments to free movement, from the lawful ones.<sup>42</sup> Together, the two principles contribute to a fair application of law; and thereby advance the rule of law.<sup>43</sup> Even though the content of the value of equality has been debated (see discussion above), equality and the prohibition of arbitrariness do have independent values. Proportionality on the other hand does not possess such a value, but is merely a balancing of values.<sup>44</sup> Tridimas further differentiated these co-working principles by considering equality to be one of participation, and proportionality to be one of merits.<sup>45</sup> He also characterized their relationship as an inverted one, declaring that the less the ECJ relies on equality, the more it will rely on proportionality.<sup>46</sup> In this thesis, it will be argued that when the scales instead shift to the effect that the proportionality review is restricted, the use of structural guarantees are required to secure equality and the rule of law (see further in section 3.3).

## 2.1.2 Effectiveness

To ensure that the rule of law will prevail throughout the European Union, it is imperative that claims based on Community law are being effectively addressed by national courts and administrative bodies. As Community law is evolving, and the amount of claims based on it steadily increases, the conception of effectiveness is likewise evolving. With an ever more detailed substantive harmonisation of the internal market, more attention need be turned towards procedural structures and practices at national levels.<sup>47</sup> The time seems ripe for the increased reliance on structural guarantees as an important benchmark in judicial reviews.

The principle of effectiveness relies on central Community law principles such as direct effect and supremacy. Since the ECJ has neither the capacity nor the competence to take on the mantle of an effective centralized system of judicial enforcement, the Court has developed these ingenious judicial tools to ensure compliance from the Community's decentralized system of enforcement.<sup>48</sup> Effectiveness has not, as of yet, been approved by the Member States through a Treaty blessing.<sup>49</sup> Instead, Article 10 TEC, being the only provision in the Treaty which deals generally with Community and

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<sup>42</sup> Tridimas, T., *The General Principles of EC Law*, p. 196.

<sup>43</sup> Wennerström, E., *The Rule of Law and the European Union*, p. 127.

<sup>44</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, Rob, *Europeanisation of Public Law*, p. 143.

<sup>45</sup> Tridimas, T., *The General Principles of EC Law*, second edition, p.551.

<sup>46</sup> *Ibid.* p. 196.

<sup>47</sup> Accetto, M. and Zleptnig, S., "The Principle of Effectiveness: Rethinking Its Role in Community Law", 11 (2005) EPL, p. 380.

<sup>48</sup> Eliantonio, M., *Europeanisation of Administrative Justice?* Europa Law Publishing, 2009, pp. 6 and 8.

<sup>49</sup> Ross, M., "Effectiveness in the European Legal Order(s): beyond Supremacy to Constitutional Proportionality?", 31 (2006) E.L. Rev. p. 480.

national powers, has been the stepping stone for the development of the principle of effectiveness.<sup>50</sup> This Treaty provision does not in itself have direct effect or create any new duties. But it has been used to give extensive effect to other Community law duties, as well as creating unforeseen consequences of such duties.<sup>51</sup> In view of the ECJ's creative approach, Ross nominated effectiveness as the current driver of constitutional evolution.<sup>52</sup>

The principle of effectiveness has been the main instrument for the achievement of systematic coherence. It dictates both the point at which Community law should trump national law and also to which extent the latter should have to adjust to the former.<sup>53</sup> Effectiveness is usually described as 'securing the uniform application of Community law across the Member States', and this is principally done by forcing through a replication of the European style of reasoning at different national levels.<sup>54</sup> Important to note is that the concept of effectiveness is not only triggered in the protection of a Community right conferred on individuals. Effectiveness comes into play whenever there appears to be a lack of consistency between Community and national law.<sup>55</sup>

Traditionally, the ECJ has shown a certain amount of deference towards national procedural autonomy, but the Court's approach toward national procedural law has turned increasingly invasive over the years.<sup>56</sup> Substantial national differences, in the protection awarded to litigants wishing to enforce Community rights, are highly undesirable when venturing to create an integrated legal order.<sup>57</sup> The existence of a Community competence to regulate national procedural law has been debated, but the more convincing view seems to be that of the former ECJ judge Kakouris. He has insisted that the principle of national procedural autonomy has been a temporary solution in the advent of Community regulation, one which was never intended to create an area of national sovereignty.<sup>58</sup> In the 1990's, the ECJ offered a handful of seminal judgments where the principle of effective

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<sup>50</sup> Lang, J.T., "The Duties of Cooperation of National Authorities and Courts under Article 10 E.C.: Two more reflections.", 26 (2001) E.L. Rev., pp. 86 and 88. See also Van Gerven, W. in the Report of the XIX F.I.D.E. Congress, Helsinki 1-3 June 2000, pp. 9ff.

<sup>51</sup> Lang, J. T., "The Duties of Cooperation of National Authorities and Courts under Article 10 E.C.:Two more reflections", p. 91, see also Ross, Malcolm, "Effectiveness in the European Legal Order(s): beyond Supremacy to Constitutional Proportionality?"p. 481; where he concludes that in Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, the "demands of effectiveness transmuted an absent requirement into an inherent one".

<sup>52</sup> Ross, M., "Effectiveness in the European Legal Order(s): beyond Supremacy to Constitutional Proportionality?". p. 477.

<sup>53</sup> *Ibid.* p. 495.

<sup>54</sup> *Ibid.* p. 480.

<sup>55</sup> Leanerts, K. and C., Tim, "Of birds and hedges: the role of primacy in invoking norms of EU law" 31 (2006) E.L. Rev., p. 290; where he states that "to the extent that a national measure is inconsistent with EC law, it cannot be allowed to apply over EC law".

<sup>56</sup> Eliantonio, M., *Europeanisation of Administrative Justice?*, p.9.

<sup>57</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p.58.

<sup>58</sup> Reichel, J, *God Förvaltning i EU och Sverige*, pp. 122-123.



judicial protection,<sup>59</sup> combined with Article 10 TEC and the concept of *effet utile*, were used to significantly chip away at the national procedural autonomy. In these cases, an extension of the principle of effectiveness created positive obligations for the national courts, obligations which were tied to strict Community law conditions.<sup>60</sup> Even though an extensive harmonization of national procedural rules seems improbable in the near future, the creation of common European standards for judicial protection is a process which is not likely to shy away from restructuring any stage of the judicial process.<sup>61</sup>

The ECJ has in various ways, with the help of the principle of effectiveness, sought to remedy the Community's inherent enforcement deficit. The enforcement of Community law is largely dependent on the compliance by national courts; they are the only institutions who have the competence to effectively review national law for compatibility with community law standards, and have thereby been assigned the role of 'Community constitutional courts'.<sup>62</sup> One road taken by the ECJ to sidestep the reliance on the national courts has been to promote private enforcement of Community rights.<sup>63</sup> This has been done in competition law cases<sup>64</sup> and it would probably be an even more pertinent position in the state aid field, given the role of the State in such proceedings. Private enforcement though, tends to depend on the direct effectiveness of the Community provision relied upon by the private enforcer. Another, more general route, taken by the ECJ to ensure wide cohesion, is to introduce both an instrumental and a protective function of enforcement. The instrumental function demands that national enforcement of Community law must fulfil requirements of equivalence, effectiveness, dissuasiveness and proportionality. The protective one, on the other hand, demands that Member States comply with fundamental rights, Treaty freedoms and the general principles of Community law in their enforcement.<sup>65</sup>

### 2.1.3 General Principles of Community Law (GPCL)

When the ECJ proclaimed that the Community is based on the rule of law, it did not refer exclusively to law laid down in Treaty provisions and secondary legislation. Just as Dicey once deemed the British constitution to

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<sup>59</sup> See further in section 2.1.3.1.

<sup>60</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p.51f; referring primarily to Case C-213/89 *Factortame* [1990] ECR I-2433, Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Soest* [1991] ECR I-415 and Case C-465/93 *Atlanta* [1995] ECR I-3761.

<sup>61</sup> Eliantonio, M., *Europeanisation of Administrative Justice?*. p. 10f.

<sup>62</sup> *Ibid.*. p.8.

<sup>63</sup> Reichel, J., *God Förvaltning i EU och Sverige*, pp. 138 and 162.

<sup>64</sup> Case C-253/00 *Muños* [2002] ECR I-7289, paras.30-31 and Case C-379/04 *Dahms* [2005] ECR I-8723, para. 20.

<sup>65</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, pp. 201 and 206ff.

be “a product of historical development rather than deliberate design”<sup>66</sup>, many of the constitutional principles of the EU draws on a development based on a common history. The ECJ has, over the years, led a remarkable crusade in the name of the rule of law, where it has deemed certain principles of law to be sufficiently important and adequately recognised throughout the Community, that they have been dubbed GPCL.<sup>67</sup> Several of the structural guarantees are concrete demands; constituting tangible expressions of specific GPCL, the most pertinent ones being presented below.

### 2.1.3.1 Effective Judicial Protection

The principle of effective judicial protection can be seen as a specific limb of the main body of effectiveness. A limb which has, in its own right, developed into one of the most influential GPCL today. This principle has proved to be a potent complement to the well-established tools of ‘equivalence and effectiveness’ when reviewing national standards of judicial protection, and has strongly contributed to a common European standard in this field.<sup>68</sup>

An effective judicial protection demands that an individual is to be given the opportunity to enforce, before a court of law, all the rights conferred on her by Community law. In Community law, this principle was first expressed and recognised as a GPCL in *Johnston*.<sup>69</sup> For a national procedural structure to truly conform with this principle, it has to offer the individual, wishing to enforce her rights, both access to a court and effective remedies.<sup>70</sup> The right of access to a court, and that of an effective remedy, have been incorporated in Article 47 CFR. This Charter provision is based on Article 13 ECHR, but further expounds this right by demanding access to a ‘court of law’, and not merely to an authority.<sup>71</sup> Concerning this time-honoured right, the ECtHR has clarified that even administrative decisions based in a wide margin of appreciation should be reviewable before a court,<sup>72</sup> and that a State is not entitled to withdraw certain specific areas from judicial review.<sup>73</sup>

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<sup>66</sup> As cited by Bogdanor in Markesinis, B., *The British Contribution to the Europe of the Twentyfirst Century*, Hart Publishing, 2004. p.202.

<sup>67</sup> For further enlightenment on how these various GPCL are ‘distilled’ from common national legal traditions see Tridimas, T., *The General Principles of EC Law*, pp. 17-29, Groussot, X., *General Principles of Community Law*, p.43-58, and Opinion of AG Léger in Case C-87/01 P *Commission v. CEMR* [2003] ECR I-7617, paras.41-43.

<sup>68</sup> Eliantonio, M., *Europeanisation of Administrative Justice?*, pp. 10ff.

<sup>69</sup> Case 222/84 *Johnston* [1986] ECR 1651, paras. 18-19.

<sup>70</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 241.

<sup>71</sup> Tridimas, T., *The General Principles of EC Law*, p.455. See e.g. Case C-424/99 *Commission v Austria* [2001] ECR I-9285, para. 43.

<sup>72</sup> *Hasan & Chaush v Bulgaria* (309854/96) ECHR (26 October 2000) paras. 100-104, see also *Skärby v Sweden* (12258/86) ECHR (12 April 1990) para. 28.

<sup>73</sup> *Golder v United Kingdom* (4451/70) ECHR (21 February 1975), para. 35.

Finally, it can not be stressed enough that, for the principle of effective judicial protection to be given real impact in the shared and integrated European legal order, the national courts have to take their role as *juge du droit commun* seriously. Even more so since the Community courts apparently feel forced to restrict *locus standi* due to lack of capacity and competence.<sup>74</sup> Indeed, even if the standards of legality are based on Community law, the reliance on national courts is a *sine qua non* condition for the enforcement of EC law.<sup>75</sup> In *Verholen*<sup>76</sup>, the ECJ therefore enunciated the demand that national law must refrain from undermining the right to effective judicial protection by limiting *locus standi*. Moreover, in the state aid field, the ECJ has implicitly required a guaranteed *locus standi* for competitors.<sup>77</sup>

### 2.1.3.2 Good Administration

Good administration, as a principle, has been lurking in the shadows, growing in importance along with the expansion of national administrations, and only very hesitantly been given operative legal effect. Ten years ago, Nehl concluded that, although a decent ideal, the material aspects of this principle were too vague for it to be recognised as an operative principle of law; capable of setting procedural standards with an explicit content and meaning.<sup>78</sup> The principle of good administration can indeed be viewed through different glasses. It can be seen as both a material concept, encompassing questions of fairness, equal treatment and proportionality, but it can also be seen as a more concrete procedural tool, aiming to regulate the decision making procedure.<sup>79</sup> The latter view is certainly the most relevant one in an examination of the development of structural guarantees, in particular since it has proved far more successful to raise procedural flaws before a Community court, than material ones.<sup>80</sup>

The absolute content of the principle of good administration is thus, far from uncontroversial. Most of the attempts at defining it points towards an umbrella-conceptualisation encompassing many independently significant principles; such as lawfulness, equality, proportionality, effective judicial protection and transparency (all of which have been given their own treatment in this essay). The valour of the principle of good administration might lie in the use of these principles toward a unified purpose. A good

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<sup>74</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 259.

<sup>75</sup> Tridimas, T., *The General Principles of EC Law*, p. 452.

<sup>76</sup> Cases C-87 to 89/90 *Verholen* [1991] ECR I-3757, para. 24.

<sup>77</sup> Tridimas, T., *The General Principles of EC Law*, second edition, p. 455, using Case C-254/90 *Fédération Nationale Extérieur v France* [1991] ECR I-5505 as an example. For further support, see Craig, P. and De Búrca, G., *EU Law, Text, Cases and Materials*, Fourth edition, Oxford University Press, 2008, pp. 518f.

<sup>78</sup> Nehl, H.P. *Principles of Administrative procedure in EC Law*, Hart Publishing, 1999, pp. 20 and 37.

<sup>79</sup> Reichel, J., *God Förvaltning i EU och Sverige*, pp. 257f.

<sup>80</sup> Hettne, J., "Gemenskapsdomstolarnas rättskontroll och allmänna förvaltningsrättsliga principer", 2 (2002) ERT, p. 239.

administrative procedure secures the protection of the individual from an adversely effecting decision, formed in violation of constitutional rights. Furthermore, the principle ensures that objectively well-founded decisions are adopted, which will gain greater public respect; an element which will hopefully lead to fewer challenges and hence promote legal certainty.<sup>81</sup> Both the Commission and the European Ombudsman have made attempts to flesh out this principle in Codes of conduct.<sup>82</sup> Although certainly being capable of acting as interpretative authority by various levels of administrations, these Codes and have to date had negligible judicial effect, due to their restricted scopes of application.<sup>83</sup>

Regardless of disputes over exact content, the right to good administration has been enshrined in the CFR, as well as having been recognised in the case law of the ECJ. Article 41 CFR, much like Article 6 ECHR on the right to a fair trial, presents a non-exclusive list of procedural guarantees that should be granted to individuals.<sup>84</sup> Unfortunately, this expression of the right is qualified to only extend the right towards Community institutions. The CFI has indeed used the principle of sound administration to enforce demands of diligent and impartial treatment against the administrative authorities of the Community.<sup>85</sup> The principle as such has subsequently also received recognition by the ECJ.<sup>86</sup>

As a specific expression of the principle of good administration, the duty of care can be of particular interest. This duty was, early on, imposed on the Community institutions by the ECJ.<sup>87</sup> The duty was most strongly emphasised when discretionary determinations were made in individual cases, for example concerning state aid.<sup>88</sup> The principle of care has since developed and widened its application in cases such as *Nölle*<sup>89</sup> and

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<sup>81</sup> Hettne, J., "Gemenskapsdomstolarnas rättskontroll och allmänna förvaltningsrättsliga principer", p. 239f.

<sup>82</sup> "The European Code of Good Administrative Behaviour", adopted by the European Parliament Resolution on the European Ombudsman's Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (c5-0438/2000-2000/2212 (COS)) and "Code of good administrative behaviour for staff of the European Commission in their relations with the public", being attached to the Commission's Rules of Procedure [C(2000) 3614] respectively.

<sup>83</sup> Fortsakis, T., "Principles Governing Good Administration" 11 (2005) EPL, p. 212, and Reichel, J., *God Förvaltning i EU och Sverige*, p. 294.

<sup>84</sup> Reichel, J., *God Förvaltning i EU och Sverige*, p. 291.

<sup>85</sup> Case T-54/99 *max.mobil v Commission* [2002] ECR II-313, para. 48, and Case T-211/02 *Tideland Signal v Commission* [2002] ECR II-3781, para. 37.

<sup>86</sup> Case C-170/02 P *Schlüsselverlag v Commission* [2003] ECR I- 9889, para. 29.

<sup>87</sup> Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken v High Authority* [1962] ECR 253.

<sup>88</sup> Craig, P., *EU Administrative Law*, p. 373, referring to Case 120/73 *Gebrüder Lorenz v Germany* [1973] ECR 1471. For further discussion on the need for the duty of care in cases of high discretion, see Opinion of AG Gervens in Case C-16/90 *Nölle* [1991] ECR I-5163, para. 28.

<sup>89</sup> Case C-16/90 *Nölle* [1991] ECR I-5163.

*Technische Universität München*<sup>90</sup>. A few years later, the CFI gave its judgment in *Sytraval*<sup>91</sup>, which has come to be represent the high-point of the principle of care to this date. This judgement was subsequently quashed by the ECJ,<sup>92</sup> who in turn did not wish to extend this duty to create a right for a competitor to an adversarial debate with the Commission. The ECJ contained the Commissions obligation to the conduction of a diligent and impartial examination of complaints, although reaching further than merely the matters expressly raised by the complaining competitor.<sup>93</sup> The duty of care has been considered to be apt for a review of substantive legality, unlike connected principles such as the right to be heard and the duty to give reasons (see below in section 2.1.3.3), which have rather been used in the review of procedural legality.<sup>94</sup>

### 2.1.3.3 Transparency

This newcomer among general principles is one with an important potential for the erection of structural guarantees as judicial benchmarks. Although transparency has not yet been officially recognised by the ECJ to be one of the GPCL, it seems only to be a matter of time before this occurs. Already a decade ago, transparency was described as a budding principle of Community law, the components of which had reached different stages of maturity, but together represented an important judicial tool, far from being just a ‘fashionable word’.<sup>95</sup> The principle of transparency has been reinforced by the Community through Treaty amendment and enacted secondary legislation, as well as through the inclusion in the CFR.<sup>96</sup>

The duty to give reasons is a rather well-established component of transparency. Inadequate reasoning would fundamentally counter the principle of transparency. Such deficient reasoning would prevent both the individual concerned, the reviewing court, and the public at large, from examining whether an administrative decision has a sound legal basis and if particular arguments are well-founded.<sup>97</sup> In the view of this statement, one can conclude that the duty to give reasons has a universal nature, as it is not qualified by any specific content or addressee.<sup>98</sup> The duty is included among the expressions of good administration in Article 41 CFR, but the Community institutions have long since been effectively bound by it

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<sup>90</sup> Case C-269/90 *Technische Universität München* [1991] ECR I-5469.

<sup>91</sup> Case T-95/94 *Sytraval v Commission* [1995] ECR II-2651.

<sup>92</sup> Case C-267/95 P *Commission v Sytraval* [1998] ECR I-1719.

<sup>93</sup> *Ibid.* and the discussion in Craig, Paul, *EU Administrative Law*, p. 378.

<sup>94</sup> Groussot, X., *General Principles of Community Law*, p. 253.

<sup>95</sup> Vesterdorf, B., ”Transparency – Not Just a Vogue Word”, *FILJ* (1999) pp. 902 and 925.

<sup>96</sup> Article 255 TEC was introduced through the ToA, and provides a strong legal basis for transparency, Regulation 1049/2001 and the Directive 2000/52/EC both demand increased transparency, and the principle is given solid recognition in both Article 41 and 42 of the CFR.

<sup>97</sup> Cases T-371 and 394/94 *British Airways et al. v Commission* [1998] ECR II-2405, para. 280.

<sup>98</sup> Vesterdorf, B., ”Transparency – Not Just a Vogue Word”, pp. 903f.

through Article 253 TEC<sup>99</sup>. The ECJ has also developed a consistent case law enforcing this duty.<sup>100</sup>

Access to documents can be seen as the quintessential aspect of transparency, although not standing alone among new goals set out by the Community in its strife for increased openness and accessibility.<sup>101</sup> Lenaerts has made a convincing argument that the status of transparency as a GPCL can no longer be denied.<sup>102</sup> Even though the justiciability of most of the manifestations of this emerging principle seems to be restricted to actions against Community institutions, the principle often works in tandem with other GPCL and, in so doing, tends to reach beyond such confinements. An illustrative example would be when in *Coname*<sup>103</sup> the ECJ viewed the non-compliance with transparency-demands to constitute a violation on the principle of equal treatment.<sup>104</sup>

The principle of transparency is of particular importance as a component of the structural guarantees. Not only has it, much like the structural guarantees themselves, a decidedly procedural focal point. What is more, the principle has been seen as a helpful means to ensure that the Member States respect their Community law obligations.<sup>105</sup> This double purpose of ensuring procedural rights of individuals, while at the same time securing Member State compliance, rings equally true for the demand of structural guarantees.

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<sup>99</sup> Formerly Article 190 EC.

<sup>100</sup> Case C-350/88 *Biscuits Delacre v Commission* [1990] ECR I-395, para. 15 and case law cited therein, and also Case C-127/00 *Hässle* [2003] ECR I-14781, para. 43.

<sup>101</sup> Additional aspects of transparency are e.g. clarity of procedures, clear drafting and publication/notification of legislation and decisions. See further Prechal, S., and de Leeuw, M., “Dimensions of Transparency: The Building Blocks for a New Legal Principle?”, 1 (2007) *RevEAL*, p. 51.

<sup>102</sup> Lenaerts, K., “In the Union we Trust: Trust-enhancing principles of Community Law”, 41 (2004) *CMLRev.*, p. 321f.

<sup>103</sup> Case C-231/03 *Coname* [2005] ECR I-7287, paras. 17-18.

<sup>104</sup> See Prechal, S., and de Leeuw, M., “Dimensions of Transparency: The Building Blocks for a New Legal Principle?”, pp. 57ff. for further discussion on the corollary between equality and transparency.

<sup>105</sup> Craig, P., *EU Administrative Law*, p. 350.

# 3 The Function of Structural Guarantees

## 3.1 How GPCL Generally Function

As the practical demands for structural guarantees generally stem from the legal requirements posed by GPCL, the function of the former is entirely dependent on that of the latter. Since the structural guarantees are judicial tools tailored for the review of national measures though, the function of the GPCL will be presented exclusively in its relation to national measures.<sup>106</sup> Three different dimensions of this function will be explored in turn; the range of national measures which can come under review (3.1.1), the invocability of the GPCL before a national court (3.1.2) and the intensity of review required by Community law (3.1.3).

### 3.1.1 Scope of Review

The majority of the GPCL discussed in this essay has been codified in the CFR, which in turn seemingly has specified the justiciable reach of these principles. Article 51(1) CFR explicitly states that the provisions of the Charter are enforceable against a Member State only when it implements Union law. One would be advised not to read a restriction of ECJ jurisprudence into this Charter provision. On the contrary; two subsequent explanatory memoranda have referred to the Court's case law when interpreting the scope of the Charter *vis-à-vis* Member States to signify situations when the State acts in the "context of Community law"<sup>107</sup>, alternatively acts in the "scope of Union law"<sup>108</sup>. The case law traditionally determining this scope has been championed by *Cinéthèque*<sup>109</sup>, *Demirel*<sup>110</sup> and *Caballero*<sup>111</sup>.

The scope of review based on Community law seems to have expanded even further through *Karner*<sup>112</sup>; with its vagueness practically giving the

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<sup>106</sup> Even if the judicial reviews, of both Community and national measures, are based in the same GPCL, the demands for structural guarantees only appears in relation to national measures. Framed, as they are, by administrative structures which the Community have very limited legislative power to alter, unlike the Community administrative structures themselves.

<sup>107</sup> Charte 4473/00, Convent 49, Explanations Relating to the Charter of Fundamental Rights, 11 October 2000, para. 46.

<sup>108</sup> CONV 828/03, Updated Explanations Relating to the text of the Charter of Fundamental Rights, 9 July 2003, paras. 46-47.

<sup>109</sup> Cases 60 and 61/84 *Cinéthèque* [1985] ECR 2618.

<sup>110</sup> Case 12/86 *Demirel* [1987] ECR 3719.

<sup>111</sup> Case C-442/00 *Caballero* [2002] ECR I-11915.

<sup>112</sup> Case C-71/02 *Karner* [2004] ECR I-3025, para. 49.

ECJ universal jurisdiction on fundamental rights.<sup>113</sup> Already through earlier cases such as *ERT*<sup>114</sup> and *Familiapress*<sup>115</sup>, the possible scope of review was significantly widened in the interest of bringing fundamental rights into the frame of reference.<sup>116</sup> Regardless of whether a national measure is taken in the process of implementing Community law or not, the moment it impinges on the effectiveness of Community law it will fall within the Community legal context.<sup>117</sup> The national measure would likewise be drawn in to the context of Community law if it fails to respect the common standard of protection for fundamental rights.<sup>118</sup>

### 3.1.2 Collateral nature of the review

Even if many expressions of GPCL lack direct invocability before a national court, the ECJ has over the recent years increasingly been using them as judicial standards in collateral reviews; albeit in the guise of proportionality reviews. In such cases, a Treaty provision with direct effect (such as a fundamental freedom) is used as the primary head of review, but the reviewed national measure is then benchmarked against incidental standards such as the GPCL. Tridimas called this tendency a prevalence of ‘the public law element of proportionality’.<sup>119</sup> The resulting form of review can most certainly be traced back to the principles of rule of law and effectiveness, as means to control national public power. Furthermore, this multi-faceted review accurately depicts the highly developed interdependence between procedural and substantive law, in the area of administrative decision-making process.<sup>120</sup>

The GPCL is to be invoked against a national measure through ‘legality review’, which has in doctrine been referred to as a particular type of direct effect.<sup>121</sup> The generality and open-endedness of many GPCL make them, only with great difficulty, apt to be granted direct effect in the traditional sense. The original trademark mantras of direct effect; the demands that a Community provision must be ‘unconditional and sufficiently precise’, seem to have turned obsolete. The ECJ has in both *Kraaijeveld*<sup>122</sup> and *Mangold*<sup>123</sup> implicitly endorsed the earlier mentioned judgment in *VNO*<sup>124</sup>, and moved the focus of a review of national measures towards ‘legality’; i.e.

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<sup>113</sup> Tridimas, T., *The General Principles of EC Law*, p. 336.

<sup>114</sup> Case C-260/89 *ERT* [1991] ECR I-2925.

<sup>115</sup> Case C-368/95 *Familiapress* [1997] ECR I-3689.

<sup>116</sup> Groussot, X., *General Principles of Community Law*, p. 280.

<sup>117</sup> Reichel, J., *God Förvaltning i EU och Sverige*, pp.208f.

<sup>118</sup> *Ibid.* p. 224.

<sup>119</sup> Tridimas, T., *The General Principles of EC Law*, p.194.

<sup>120</sup> Schwarze, J., *European Administrative Law*, Sweet & Maxwell, 2006, pp. 1173f.

<sup>121</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*. p. 69.

<sup>122</sup> Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.

<sup>123</sup> Case C-114/04 *Mangold* [2005] ECR I-9981.

<sup>124</sup> Case 51/76 *VNO* [1977] ECR 113.



compliance with Community law requirements as a package deal.<sup>125</sup> As AG Mischo once noted, a Community provision does indeed not stand alone, but is inseparable from norms, which it must itself comply with, including the GPCL.<sup>126</sup> Even if a certain provision of Community law gives the national authority a ‘genuine discretion’ in complying with its obligations under European law, and this provision thereby impossibly can be ascribed with direct effect, the use of such discretion by the national authority may still not violate fundamental rights and other GPCL.<sup>127</sup>

### 3.1.3 Intensity of Review

All the while creating European judicial standards through the GPCL, the degree of intensity with which these standards should be applied still suffers from some uncertainty. The European courts are seen to be the sole arbiters of the legal meaning expressed in the Treaties. As such, they generally indulge in the substitution of judgements on questions of law; something which is termed a ‘comprehensive review’. However, there is also a broad recognition that in particularly technical or economically complex areas, the intensity of review by a generalist court ought not to be as intrusive.<sup>128</sup> Where the ECJ has recognised the existence of a ‘jurisdictional discretion’ to establish the fulfilment of certain conditions; which need be based on complex economic or social assessments, this have forcibly had a relaxing effect on the standard of review of such administrative assessments.<sup>129</sup> In such cases, the ECJ has tended to favour a marginal review; restricting the judicial review to the control of manifest errors, misuse of power and other clear transgressions of the given discretion.<sup>130</sup>

As a rule, however, the reduced intensity of the substantial review is generally compensated by a firm control of procedural rights and administrative soundness.<sup>131</sup> This general rule can be exemplified through a brief look at the Community courts’ developing control of the Commission’s administrative decision-making. Even if the tripartite maxim of the discretion-induced marginal review was affirmed in *Pfizer*<sup>132</sup>, the CFI nevertheless proved to be far more exigent in its execution of this marginal review than the ECJ had been in previous cases.<sup>133</sup> The CFI continued to

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<sup>125</sup> Jans, J., de Lange, R., Prechal, S, Widdershoven, R., *Europeanisation of Public Law*, p. 71.

<sup>126</sup> AG Mischo’s Opinion in Cases C-20 and 64/00 *Booker Aquaculture* [2003] ECR I-7411, para. 58.

<sup>127</sup> Jans, J., de Lange, R., Prechal, S, Widdershoven, R., *Europeanisation of Public Law*, pp. 66ff.

<sup>128</sup> Craig, P., *EU Administrative Law*, p. 437.

<sup>129</sup> *Ibid.* pp. 433f and 440ff.

<sup>130</sup> *Ibid.* p. 441; using Case 98/78 *Racke* [1979] ECR 69 as an illustrating example.

<sup>131</sup> Hettne, J., *Rättsprinciper som styrmedel*, p. 117.

<sup>132</sup> Case T-13/99 *Pfizer* [2002] ECR II-3303, para. 169.

<sup>133</sup> Craig, P., *EU Administrative Law*, pp. 447ff.

apply a rather intensive marginal review in *Tetra Laval*<sup>134</sup>, requiring the Commission in this case to fulfil certain ‘requisite legal standards’, the failure to do so brought the Court to proclaim the existence of a manifest error on the part of the Commission. The ECJ supported the conclusion of the CFI and affirmed that even if an administrative authority such as the Commission might have a wide margin of discretion with regard to economic matters, this did not deprive the reviewing court from examining the authority’s inferences from information of an economic nature.<sup>135</sup>

Moreover, the degree of intensity of review required of national courts by Community law also depend on the subject matter at hand, and, in particular, on the directive or regulation governing that particular area.<sup>136</sup> Where no specific rules are expressed for the area in question, only a legality review seems to be required of the national courts. The national courts are thereby not forced, nor advised for that matter, to substitute their own judgment on merit for that of the national authority under review.<sup>137</sup> It should additionally be noted that when some discretion has been awarded the Member States in the application and implementation of Community law, other judicial standards than the Community one might legitimately apply, as long as the use of this other standard does not impede the general conformity with Community law.<sup>138</sup> The national judiciary is merely obliged to use the Community standard in a subsidiary and corrective manner; as a minimum judicial standard.<sup>139</sup>

The standard of review used for national measures has long been stricter than that of Community measures. Since the judiciary, in addition to protecting the rights of private parties, has to consider the over-arching objective of market integration when reviewing national measures against GPCL.<sup>140</sup> The ECJ’s judgment in *Upjohn*<sup>141</sup> seems to mark a turning-point in the jurisprudence though; seemingly levelling out the intensity of these two forms of judicial review. This tendency leaves the national court free to indulge in a mere marginal review of national measures, when they have been based on complex assessment and the exercise of broad discretion.<sup>142</sup> As developed above however, the current notion of a marginal review, infused with GPCL, might very well be more intensive than the initial conception.<sup>143</sup>

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<sup>134</sup> Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381, see also the earlier Case T-342/99 *Airtours* [2002] ECR II-2585.

<sup>135</sup> Case C-12/03 P *Commission v. Tetra Laval* [2005] ECR I- 987, para. 39.

<sup>136</sup> Jans, J., de Lange, R., Prechal, S, Widdershoven, R., *Europeanisation of Public Law*, pp. 90ff.

<sup>137</sup> Jans, J., de Lange, R., Prechal, S, Widdershoven, R., *Europeanisation of Public Law*, pp. 93f.

<sup>138</sup> Besselink, L., “Entrapped by the Maximun Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union” 35 (1998) CMLRev., p. 631.

<sup>139</sup> Reichel, J., *God Förvaltning i EU och Sverige*, pp. 543f.

<sup>140</sup> Tridimas, T., *The General Principles of EC Law*, second edition, p.548.

<sup>141</sup> Case C-120/97 *Upjohn* [1999] ECR I-223.

<sup>142</sup> *Ibid.* paras. 34-37.

<sup>143</sup> *Ibid.* See in particular para. 36.

As a concluding remark, one might recall that development of Community law traditionally moves forward in alternating bursts and backlashes, and the demands for intensity of judicial review is no exception. The Community principle of equality in particular, has tended to put relatively higher demands on the intensity of review conducted by national courts.<sup>144</sup> In addition, the lack of respect for various GPCL and structural guarantees can result in a stricter guidance of the national judicial review from the ECJ. The judgement in *Garage Molenheide*<sup>145</sup> is just one example of when the national court, which normally is left free to apply the proportionality test of national measures itself, was given detailed guidance. The failure to provide for access to judicial review was to be condemned, and the national court was obliged to deem the national measure under review as being disproportionate. This trend of guided intensified review will be given ample illustration in the subsequent sections of this essay, which will provide a summary account of a few key cases where the judicial review has hinged on the existence of structural guarantees.

## 3.2 The Use of Structural Guarantees by the ECJ

The ECJ has called for the use of structural guarantees as minimum standards in the review of complex national regulations and administrative systems in various fields. A number of prominent cases where this trend has been evident, grouped together according to their respective regulatory areas, will be presented below and the emerging function of the demand of structural guarantees will be accentuated. The regulatory areas; being national monopolies, the internal labour market, national rules on positive action and the public distortion of competition, have been chosen due to the pertinence of the ECJs jurisprudence in these fields. Far from holding exclusivity as fertile soil for the use of structural guarantees, these regulatory fields merely show the diversity of these up and coming judicial standards.

### 3.2.1 Organisation of Monopolies

The organisations of two major Swedish monopolies have been reviewed in the light of structural guarantees; ‘Systembolaget’ in *Franzén*<sup>146</sup> and ‘Apoteket’ in *Hanner*<sup>147</sup>. The ECJ did in both of these highly enlightening cases elevate the existence of structural guarantees as being the critical element for the monopoly’s compatibility with the common market. As has been touched upon in section 2.1.1, and will be further developed in section

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<sup>144</sup> Jans, J., de Lange, R., Prechal, S, Widdershoven, R., *Europeanisation of Public Law*. pp. 141f.

<sup>145</sup> Cases C-286/94, 340 and 401/95, and 47/96 *Garage Molenheide* [1997] ECR I-3123, para 64.

<sup>146</sup> Case C-189/95 *Franzén* [1997] ECR I-5909.

<sup>147</sup> Case C-438/02 *Hanner* [2005] ECR I-4551.

3.3, the lack of a proper proportionality assessment might very well explain this reliance on structural guarantees, to ensure non-discrimination by warding of potential arbitrariness.

### 3.2.1.1 *Franzén*

The ECJ's conclusions in the *Franzén*-judgment came to set the stage for the use of structural guarantees when dealing with the organisation of monopolies. The Swedish statutory retail monopoly of alcoholic beverages; 'Systembolaget', virtually being an establishment of national cultural dignity, was challenged before the national court through the course of criminal proceedings against Mr Franzén shortly after Sweden's accession to the EU in 1994. Mr Franzén had intentionally breached the existing law on alcohol<sup>148</sup> by offering wine for sale without a being holder of a licence to do so.<sup>149</sup> The national court asked the ECJ for a preliminary ruling on whether a statutory monopoly such as Systembolaget was compatible with Community law, in particular Articles 28 and 31 TEC<sup>150</sup>. The ECJ did not see fit to examine whether Systembolaget in actual terms was indulging in discriminatory practices counter to Community law, but rather looked at the inherent structural compatibility of the regulatory framework surrounding the monopoly.<sup>151</sup> AG Helmer was very critical in his delivered opinion, and suggested that the cumulative effect of the regulation surrounding Systembolaget posed disproportionate restrictions to trade between Member States.<sup>152</sup> The conclusions of the ECJ departed significantly from those of the Advocate General. The Court shirked his harsh conclusion by dividing the examination in two distinct parts. The rules governing the existence and operation of the retail monopoly were examined against Article 31 TEC, and the effect on intra-Community trade by auxiliary national provisions were separately subjected to the condemnation of the Court under Article 28 TEC.<sup>153</sup>

The introduction of specific structural guarantees in relation to the functioning of Systembolaget seems to have saved this statutory monopoly from being condemned by the ECJ. By referring to *Manghera*<sup>154</sup> the ECJ confirmed that the monopoly merely had to be adjusted, in order to comply with Community law, not abolished.<sup>155</sup> The adjustments required by Article 31 TEC seems to equal the adoption of certain imperative structural guarantees. The trade with alcoholic beverages in Sweden had, prior to the accession to the EU, been severely constrained in the name of public health. But through negotiations with the European Commission in connection with the accession, Sweden managed to make the retail monopoly acceptable to

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<sup>148</sup> Alkohollagen (1994:1738)

<sup>149</sup> Case C-189/95 *Franzén* [1997] ECR I-5909, para. 27.

<sup>150</sup> Formerly Articles 30 and 37 TEC.

<sup>151</sup> Case C-189/95 *Franzén* [1997] ECR I-5909, para. 31.

<sup>152</sup> Opinion of AG Helmer in Case C-189/95 *Franzén* [1997] ECR I-5909, paras. 93 and 103.

<sup>153</sup> Case C-189/95 *Franzén* [1997] ECR I-5909, paras. 35-36.

<sup>154</sup> Case 59/75 *Manghera* [1976] ECR 9.

<sup>155</sup> Case C-189/95 *Franzén* [1997] ECR I-5909, paras. 38-40.

the Commission by infusing its operation with structural guarantees.<sup>156</sup> In the *Franzén*-judgment, the ECJ put decisive weight on these guarantees; in length developing on the objective criteria set out in advance in the purchase plan of Systembolaget, the non-discriminatory nature of the selection process of products to be sold, the obligation for a negative decision to be accompanied with explicit reasons as well as being challengeable before an independent body of appeal.<sup>157</sup>

### 3.2.1.2 *Hanner*

The challenges of Swedish retail monopolies continued as the ECJ a few years later was faced with the *Hanner* case, and yet again chose to put decisive weight on the existence of structural guarantees. The organisation of ‘Apoteket’; a state controlled retail monopoly on pharmaceutical products, was challenged through the criminal proceedings against Mr Hanner. His company had sold non-prescription medicinal preparations in breach of Apoteket’s statutory monopoly on sales of medical preparations.<sup>158</sup> The existence of Apoteket has, just as that of Systembolaget, been justified by reasons of public health. Even though the purpose of Apoteket has been to secure a reliable nationwide supply of medicines, as opposed to the primary aim of Systembolaget, which was rather to restrain the sales of alcoholic beverages. Another most crucial difference between the functioning of these two monopolies was that Apoteket had not, as had been the case with Systembolaget, been invested with structural guarantees to exclude discriminatory effects on Community trade.

Although the judgment in *Franzén* had been subjected to a lot of criticism,<sup>159</sup> not the least by AG Legér in his Opinion to the *Hanner* case,<sup>160</sup> the ECJ nevertheless chose to loyally stand by its earlier reasoning when opportunity presented itself. The Advocate General had proposed a more in-depth assessment of the effect of the monopoly on Community trade; a shift of review which would represent an outright overruling of the *Franzén*-judgment.<sup>161</sup> The Grand Chamber of the ECJ ended up finding the organisation of Apoteket to be incompatible with Community law, just as its Advocate General had. But unlike AG Legér, the Court reached this conclusion on grounds of lacking structural guarantees rather than by a proportionality assessment accounting for actual effects on trade. Tenaciously referring to *Franzén*, the ECJ examined if the organisation of Apoteket excluded possible discrimination through e.g. a transparent selection system based on objective criteria, subject to independent review.<sup>162</sup> Finding that such “structural safeguards” against discrimination

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<sup>156</sup> Hettne, J., *Rättsprinciper som styrmedel*, pp. 148f.

<sup>157</sup> Case C-189/95 *Franzén* [1997] ECR I-5909, paras. 44-52.

<sup>158</sup> Case C-438/02 *Hanner* [2005] ECR I-4551, para. 16.

<sup>159</sup> Meyrowitsch, A., Allroth, E., and Hettne, J., *EU och Svenska Monopol – teori, verklighet och framtid*, Sieps 2005:6, pp. 26ff.

<sup>160</sup> *Ibid.* pp. 35f.

<sup>161</sup> Hettne, J., *Rättsprinciper som styrmedel*, pp. 154ff.

<sup>162</sup> Case C-438/02 *Hanner* [2005] ECR I-4551, para. 39.

was lacking, the current organisation of Apoteket was thence proclaimed incompatible with Community law.<sup>163</sup>

### 3.2.2 Regulation of the Labour Market

In the above-elucidated cases, involving the free movement of goods in relation to national retail monopolies, the ECJ displayed a quite extraordinary straightforwardness in its preference for the use of structural guarantees. However, the Court has in recent years shown that, when needed, structural guarantees can be successfully employed in the defence of other fundamental freedoms as well. The prime example of this selective use of structural guarantees as a judicial standard is the *Laval* case<sup>164</sup>, and especially so when viewed in contrast with its ‘twin’ case; *Viking Line*<sup>165</sup>. Both cases supposedly invoked a balancing between the right to take collective action and a Community freedom. But the existence, or rather non-existence, of structural guarantees only became an issue in *Laval*; something which seems to have affected the required intensity of review.

#### 3.2.2.1 *Laval*

Once again, the compatibility of Swedish administrative structures with Community law was questioned, this time within the framework of the national organisation of the labour market. *Laval*; a Latvian construction company which posted workers in Sweden, complained before the Swedish labour court against a collective action instigated by the Swedish Building Worker’s Union. The conflict called for a judicial review of the Swedish regulation of the labour market and a preliminary question of compatibility with Community law reached the Grand Chamber of the ECJ. The Swedish labour market has largely been regulated through collective agreements, negotiated by the social partners. Trade unions have held a strong position and have had the possibility, as was indeed exercised against *Laval*, of using collective action to force a foreign company posting workers in Sweden to sign a Swedish collective agreement. Even if the Directive 96/71 on Posted Workers, being invoked in this case, entitles a Member State to extend certain national regulations to foreign service providers, the collective agreement in question went above and beyond the requirements listed in this directive. The collective actions taken by Swedish trade unions to force through such a collective agreement was therefore regarded by the ECJ to be a restriction of the fundamental freedom to provide services, as enunciated in Article 49 TEC.<sup>166</sup>

Just as in the by then freshly released judgment in *Viking Line*, the restriction of the fundamental freedom was set to be balanced against the

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<sup>163</sup> *Ibid.* paras. 43-44.

<sup>164</sup> Case C-341/05 *Laval* [2007] ECR I-11767.

<sup>165</sup> Case C-438/05 *Viking Line* [2007] ECR I-10779.

<sup>166</sup> Case C-341/05 *Laval* [2007] ECR I-11767, para. 99.

fundamental right to take collective action.<sup>167</sup> However, a closer look at the *Laval* judgment shows significant considerations being made regarding the lack of structural guarantees in the Swedish system.<sup>168</sup> This inherent lack of transparency and foreseeability in the Swedish system seems to have been the determining factor which compelled the ECJ to take matters into their own hands. Instead of leaving the traditional balancing act of a proportionality judgment in the hands of the national court, as was done in the otherwise very similar *Viking Line* case, the Court in *Laval* clearly declared the Swedish system to be incompatible with Community law.<sup>169</sup>

### 3.2.3 Positive Action regarding Gender Discrimination

Article 141(4) TEC opens a window for national discretion regarding positive action in order to combat gender discrimination inbedded in the social fabric of a society. But even though the Treaty specifically allows for such positive action, positive discrimination has certainly not received any blessing from the ECJ (as was mentioned in section 2.2.1). Two key cases on the subject of positive action, and the closely related concept of positive discrimination, will be briefly outlined below. The combined impression of these cases represents yet another confirmation of the role which structural guarantees can play in such politically, as well as judicially, sensitive distinctions.

#### 3.2.3.1 *Kalanke*

The ECJ's judgment in *Kalanke*<sup>170</sup> firmly laid down the premise that positive action of an automatic character may not be permissible under Community law.<sup>171</sup> The Bremen law on civil servants provided that women with equal qualification as men should be given priority in sectors where women were under-represented.<sup>172</sup> The window for allowing positive actions has been clarified through Article 2(4) of the Equal Treatment Directive<sup>173</sup>, but this discretionary window was restrictively interpreted in *Kalanke*. The ECJ firmly established that “[n]ational rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the

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<sup>167</sup> *Ibid.* para. 105 and Case C-438/05 *Viking Line* [2007] ECR I-10779, para. 79.

<sup>168</sup> Case C-341/05 *Laval* [2007] ECR I-11767, para. 110; where the ECJ found the “national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for [a foreign service provider] to determine the obligations with which it is required to comply as regards minimum pay” to be unjustifiable under Community law.

<sup>169</sup> *Ibid.* para. 121.

<sup>170</sup> Case C-450/93 *Kalanke* [1995] ECR I-3051.

<sup>171</sup> Groussot, X., *General Principles of Community Law*, p. 177.

<sup>172</sup> Case C-450/93 *Kalanke* [1995] ECR I-3051, para. 3.

<sup>173</sup> Directive 76/207

exception in Article 2(4) of the Directive”.<sup>174</sup> In terms of structural guarantees, the automatic nature of this specific German legal provision prevented any objective equality assessment, and hence any guarantees of equal treatment and good administration.

### 3.2.3.2 *Marschall*

In *Marschall*<sup>175</sup>, yet another German legal provision for positive action was challenged against the principle of equality. But through the investment in structural guarantees, this provision managed to receive the blessing of the ECJ. The provision under review functioned in all relevant parts like the one at hand in *Kalanke*, with the exception for what the Court termed the ‘saving clause’.<sup>176</sup> This clause was deemed to provide a sufficient guarantee that candidatures would be the subject to an objective assessment, which would negate the automatic nature of the positive action.<sup>177</sup> Far from entering into the merits of the case at hand, the ECJ contented itself with ensuring that the system as a whole was built on structures promoting careful administrative assessments based on objective criteria; ensuring the existence of structural guarantees against arbitrariness.

## 3.2.4 Public Distortion of Competition

Member States stand under the general obligation not to adopt or maintain in force measures, which would disturb the free competition on the internal market. Article 10 TEC combined with Article 3(g) TEC has been used by the ECJ to delegitimize and avoid such government intervention.<sup>178</sup> Article 87(1) TEC is of course a more specific enunciation of this general prohibition, and it will be thoroughly dealt with in Chapter 4, where the compensation of SGEIs, boarding on illegal state aid, will be the topic in focus. However, Article 86(1) TEC too explicitly demands that the Member States refrain from any anti-competitive interventions.<sup>179</sup> Slot has sketched out four categories of such prohibited public distortion of competition; (1) when a statutory monopoly suffers from a manifest inability to meet demand, (2) when an undertaking is given a ‘regulatory’ function which creates a conflict of interest, (3) when a monopoly is extended to neighbouring markets and (4) cases of price abuses.<sup>180</sup> Since all these cases deal with the exertion of national public power; demands for good administration and the rule of law are obviously needed. To avoid arbitrariness in the national administration, the legal order has to be invested with certain structural guarantees to comply with Community law. The

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<sup>174</sup> Case C-450/93 *Kalanke* [1995] ECR I-3051, para. 22.

<sup>175</sup> Case C-409/95 *Marschall* [1997] ECR I-6363.

<sup>176</sup> *Ibid.* para.24.

<sup>177</sup> *Ibid.* para.33.

<sup>178</sup> Slot, P., “Rättsutlåtande om betydelsen av EG:statsstödsregler och konkurrensrätt för svensk bostadsmarknad och hyreslagstiftning”, *EU, allmännyttan och hyrorna, Bilagor*, SOU 2008:38, p. 56f.

<sup>179</sup> *Ibid.* p. 72.

<sup>180</sup> *Ibid.* p. 74f.



second of the abovementioned categories; the cases when a conflict of interest is induced by a delegation of public power, constitute a particularly relevant example of when structural guarantees may prove useful as a judicial tool. Two cases will be presented below to develop this assertion.

### 3.2.4.1 *ERT*

The importance of the *ERT* case<sup>181</sup> has already been accentuated in regards to the scope of review based on GPCL,<sup>182</sup> but this seminal judgement also illustrates the obligation of the Member States to keep national measures free from structural seeds of arbitrariness. *ERT*; the Greek radio and television monopoly, had been given exclusive rights to conduct its activities, and was challenged before a domestic court during the course of summary proceedings against an independent Greek broadcaster. As one point of uncertainty, the Greek court demanded clarification on the compatibility with competition law of the all-encompassing nature of the exclusive rights granted to *ERT*.<sup>183</sup> In essence, the ECJ concluded that the coupling the exclusive rights both of transmitting and retransmitting television broadcastings was incompatible with Community law, when liable to create an abusive behaviour by the monopoly holder.<sup>184</sup> In other words; a mere probability of induced abuse was enough for the granting of exclusive rights to be condemnable in the light of Community law.<sup>185</sup> In line with the function of structural guarantees, this part of the *ERT* judgment examines the structural propensity for arbitrariness. For a Member State to escape condemnation, when a conflict of interest has been created by the public authority, arbitrariness must accordingly be prevented through the implementation of structural guarantees.

### 3.2.4.2 *MOTOE*

In a recent judgment from the ECJ; *MOTOE*<sup>186</sup>, a Member State had delegated a particular administrative power without providing adequate structural guarantees, and thereby became subject to the condemnation of the Court. In this Greek case, an organisation called ELPA was both authoriser of all motorcycling competitions and in the meantime also organiser of such events. This organisation had thereby been given the administrative power to limit access to a market in which ELPA itself operated on.<sup>187</sup> What ultimately seems to have tipped the judicial scales to the detriment of this administrative delegation was the systematic lack of safeguards against arbitrariness. The Grand Chamber of the ECJ put particular focus on the fact that the administrative power had been

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<sup>181</sup> Case C-260/89 *ERT* [1991] ECR I-2925.

<sup>182</sup> See section 3.1.1.

<sup>183</sup> Case C-260/89 *ERT* [1991] ECR I-2925, para. 8.

<sup>184</sup> *Ibid.* para. 37.

<sup>185</sup> Slot, P., "Rättsutlåtande om betydelsen av EG:statsstödsregler och konkurrensrätt för svensk bostadsmarknad och hyreslagstiftning", *EU, allmännyttan och hyrorna, Bilagor*, SOU 2008:38, p. 74.

<sup>186</sup> Case C-49/07 *MOTOE* [2008] ECR I-4863.

<sup>187</sup> *Ibid.* para. 51.

transferred without being subject to “restrictions, obligations and review”<sup>188</sup>; once again took the opportunity to advance structural guarantees as a prominent tool of judicial review.

### 3.3 Structural Guarantees Stepping Up where Proportionality Falls Short

The function of, and in particular the relationships between, the various Community tools of review and integration, go to the core of this essay. The inverse relationship between proportionality and equality has already been discussed above.<sup>189</sup> This section will aim to establish that the structural guarantees are of a crucial instrumental importance, especially in those cases where a proportionality review has been emasculated. The problem of appropriate Community demands in judicial reviews especially arises in cases where the Member States are allowed a larger amount of discretion. In such cases, the delicate balance between equality and proportionality needs the support of a wider safety net, based on the rule of law.

The rule of law and the freedom of trade have, long since, been considered as closely intertwined aspects of the same constitutional order.<sup>190</sup> Already in cases such as *Kraus*<sup>191</sup> and *Beer*<sup>192</sup>, the ECJ made the clearance of national measures, which restricts fundamental freedoms, dependent on the compliance with essential procedural guarantees. To complement a proportionality assessment, the trend seems to signal a move away from a traditional equality standard and towards the use of structural guarantees capable of securing equality. These structural minimum requirements provide a more adaptable judicial tool than non-discrimination itself. Furthermore, the demands for structural guarantees are less invasive than the proportionality standard, and hence potentially more tolerable by the Member States.

#### 3.3.1 The Problem of National Discretion

A certain level of national discretion is unavoidable in a decentralised system, as that of the European Community, and such discretion has indeed at times been shown considerable deference. Nevertheless, the Community’s concern with unchecked national discretion has a long history. The ECJ has, early on, stated that a national criterion, which leaves the domestic authorities an excessive discretionary power, would not conform with the system of guarantees introduced by Community rules. The excessive

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<sup>188</sup> *Ibid.* paras. 52-53.

<sup>189</sup> See section 2.1.1.

<sup>190</sup> Tridimas, T., *The General Principles of EC Law*, p. 194.

<sup>191</sup> Case C-19/92 *Kraus* [1993] ECR I-1663.

<sup>192</sup> Case 178/84 *Commission v Germany* [1987] ECR 1227.

discretion would create an ever-present risk of differences in treatment.<sup>193</sup> The Community has vested national courts with the responsibility to ensure that the national legislature, as well as administrative authorities, comply with their Community law obligations and stay within the bounds of any discretion they may have been granted.<sup>194</sup>

Furthermore, it was made abundantly clear in the *Sotgiu* case<sup>195</sup> that the national courts must abstain from using national labels and categorisations in their assessments, since such legal designation are left to the unencumbered discretion of the national legislator.<sup>196</sup> The national court must, throughout the course of its control, pay heed to the interpretative monopoly of the ECJ.<sup>197</sup> The ECJ must in turn give appropriate guidance to the national courts.<sup>198</sup> It all boils down to the rule of law, and in this case; Community law. If national discretion is left unfettered, and not honed down by the rule of law, it is bound to warp into arbitrariness.

### 3.3.2 Deference to National Discretion

A proportionality review, in general being one of the most useful tools of integration available to a *juge du droit commun*, becomes non-functional in areas of legitimate Member State discretion. Judicial review based on proportionality is usually a strict one, but the jurisprudence showcases a considerable amount of deference to the plethora of national values within the Union.<sup>199</sup> Generally speaking, the intensity of the proportionality review is lower in instances when Member States have been allowed greater discretion. It has been stated that the proportionality principle hinges on the question of who is to decide the level of protection presumably hindering the free movements within the internal market.<sup>200</sup> In the limited cases where the Community recognises that the level of protection should be left to Member State discretion, the Community practically renounces the right to review the proportionality *stricto sensu* of the chosen level of protection.<sup>201</sup> In for example *Läärä*<sup>202</sup>, the ECJ found that there were ‘overriding reasons of public interest’ present concerning the negative effects of gambling and

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<sup>193</sup> Ibáñez, A., *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits*, pp. 219f; referring to Case 39/70 *Fleischkontor* [1971] ECR 49, paras. 4-5, and Cases 205-215/82 *Deutsche Milchkontor* [1983] ECR 2633, para 22.

<sup>194</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 67.

<sup>195</sup> Case 152/73 *Sotgiu* [1974] ECR 153.

<sup>196</sup> *Ibid.* para 5.

<sup>197</sup> Craig, P., *EU Administrative Law*, p. 555.

<sup>198</sup> Reichel, J., *God Förvaltning i EU och Sverige*, p. 251.

<sup>199</sup> Craig, P., *EU Administrative Law*, p. 715.

<sup>200</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 158.

<sup>201</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, pp. 158f.

<sup>202</sup> Case C-124/97 *Läärä* [1999] ECR I-6067.

refrained from any proportionality review in the narrow sense, showing significant deference to the “national authorities’ power of assessment”.<sup>203</sup>

A particularly pertinent area of sanctioned Member State discretion, for the purpose of this essay, is obviously that of national provision of public services. This wide discretion on the part of the Member States has even been endorsed by, and clearly spelled out in, the Protocol on services of general interest, which is to be annexed to the ToL.<sup>204</sup> Very rarely have the Community institutions restricted the Member States’ discretion to provide public services, and a wide range of activities have been accepted as SGEIs. Among the accepted services, one finds the operation of a river port,<sup>205</sup> public telecommunication network,<sup>206</sup> operation of television services,<sup>207</sup> employment procurement,<sup>208</sup> postal services,<sup>209</sup> distribution of utilities.<sup>210</sup> Much like the approach to the previously discussed national monopolies, a soft application of the principle of proportionality is exercised when reviewing the national organisation of public services. As a rule, the ECJ does not question the need to create exclusive rights, nor does the Court demand that other less intrusive forms of operation should have been exhausted.<sup>211</sup> Soriano argues that the proportionality principle, not only is applied softly in cases involving anti-competitive State measures, but actually leads to the recognition of Member States’ discretionary powers in the provision of SGEIs.<sup>212</sup>

Policy areas involving great administrative complexity, serve as yet more examples of where considerable deference has been given to national discretion. A clear example of this is given through the ECJ’s judgment in *Albany*<sup>213</sup>, a case about pension rights. The facts of the case exemplifies a situation of conferred public power which could have risked being condemned under Article 86(1) for creating a conflict of interest (as developed in section 3.2.4).<sup>214</sup> However, in view of the high level of complexity involved in the delegated administrative task, the ECJ recognised that it might not be desirable, or even feasible, for the Member

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<sup>203</sup> *Ibid.* para. 35.

<sup>204</sup> See the Presidency Conclusions of the Brussels European Council 21/22 June 2007, 11177/1/07 REV 1, Concl 2.

<sup>205</sup> Case 10/71 *Port of Pertet* [1971] ECR 730.

<sup>206</sup> Case C-18/88 *RTT* [1991] ECR I-5979.

<sup>207</sup> Case 115/73 *Sacchi* [1974] ECR 409.

<sup>208</sup> Case C-41/91 *Höfner* [1991] ECR I-2017.

<sup>209</sup> E.g. Case C-320/91 *Corbeau* [1993] ECR I-2568 and Cases C-147 and 148/97 *Deutsche Post* [2000] ECR I-825.

<sup>210</sup> Case C-393/92 *Almelo* [1994] ECR I-1477.

<sup>211</sup> Szyszczak, E., “Public Service Provision in Competitive Markets”, 21 (2001) Y.E.L., p. 49.

<sup>212</sup> Soriano, L. M., “How proportionate should anti-competitive State intervention be?”, 28 (2003) E.L.Rev., p. 112.

<sup>213</sup> Case C-67/96 *Albany* [1999] ECR I-5751.

<sup>214</sup> Indeed, AG Jacobs found that the arrangements allowed the private entity (the pension fund bestowed with the administrative function) to “itself [determine] the scope of its statutory monopoly”, filling the part of both “judge and party”, something which he deemed caused “an obvious conflict of interest”. See Opinion of AG Jacobs in Case C-67/96 *Albany* [1999] ECR I-5751, paras. 448, 450 and 453.

State to delegate this particular public power to an entity completely detached from the specific market at hand.<sup>215</sup> Instead of striking down on this arrangement on grounds of proportionality, the ECJ instead chose to merely assure itself of the existence of structural guarantees such as an effective judicial review.<sup>216</sup> In his annotation of the case, Gyselen declared that the ECJ took a rather deferential attitude on both issues of proportionality, and burden of proof.<sup>217</sup> Indeed, the Court used the very lowest threshold of structural guarantees; barely ensuring the possibility of a low intensity judicial review which would verify that the administrative powers had not been used in an arbitrary manner.

### 3.3.3 Avoiding Unrestrained Deference

Some of the judgments leaving the ECJ have indeed shown a tendency towards larger deference to national discretion. For this development to avoid being distorted into a deference towards national arbitrariness, one might argue that it needs to be accompanied by a greater exigency for the provision of structural guarantees.

Regardless of the tendencies of deference to national discretion though, it would be a fallacy to claim that the Community allows for peninsulas of completely untouchable national sovereignty. For instance, the somewhat extraordinary circumstances of *Schmidberger*<sup>218</sup> seem to have compelled the ECJ to resort to a complete balancing of interests based on proportionality. The same form of balancing of interests appear to have been invoked in the controversial *Laval* case<sup>219</sup>, even if the right to take collective action, according to Article 137(5) TEC, is supposed to be an area of regulation reserved for the national legislator. However, as has been developed above, a closer look at the *Laval* judgment shows signs of considerations going beyond a traditional proportionality review, instead relying on the absence of structural guarantees.

Concerning the high discretion granted to national authorities in shaping public services, Szyszczak has concluded that much of this discretionary freedom is illusory. Although a Member State's definition of a PSO can technically only be subject to marginal review of 'manifest error', she points to the plethora of other obligations created through Community law, such as that of transparency in the entrustment of the public service mission.<sup>220</sup> This

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<sup>215</sup> Case C-67/96 *Albany* [1999] ECR I-5751, paras. 119-120.

<sup>216</sup> *Ibid.* para. 121.

<sup>217</sup> Gyselen, L., "Case C-67/96, *Albany v. Stichting Bedrijfspensioenfonds Textielindustrie*; Joined Cases C115-117/97, *Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenfonds voor de handel in bouwmaterialen*; and Case C-219/97, *Drijvende Bokken v. Stichting Bedrijfspensioenfonds voor de vervoer- en havenbedrijven*. Judgments of the Full Court of 21 September 1999, not yet reported." 37 (2000) CMLRev., p. 447.

<sup>218</sup> Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 81.

<sup>219</sup> Case C-341/05 *Laval* [2007] ECR I-11767, see section 2.2.3.1.

<sup>220</sup> Szyszczak, E., "Public Service Provision in Competitive Markets", p. 77.

assertion being made prior to the ECJ's ruling in *Altmark*,<sup>221</sup> one can only note, at this point, that the discretionary freedom has been even further restricted since Szyszczak's evaluation of current state of affairs.

Demands for various structural guarantees have proven to be useful when high discretion is allowed. In section 3.2, numerous cases of thwarted proportionality reviews were presented. A judicial solution to maintain the rule of Community law was to examine the national structures and uphold minimum demands of transparency, good administration and effective judicial protection. For example in the area of protection of human health, traditionally being tainted with high deference to Member State discretion, demands of structural guarantees have been used to offset the low burden of proof, imposed on the national authority in order to fulfil the proportionality requirements.<sup>222</sup> Alongside the more general demands for transparent and accessible legislation, access to judicial review and reasonable administrative procedures, the obligation to state reasons has been considered to be especially important where the decision-making authority has a large discretionary power. This is so since the statement of reasons in such cases is the prime source for the review of the authorities' use of discretion; the only way to detect and prevent arbitrariness.<sup>223</sup>

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<sup>221</sup> A ruling, the implications of which, will be thoroughly discussed below.

<sup>222</sup> Jarvis, M., "Cases C-24/00 Commission v. France, C-95/01 Greenhamn and Abel and C-270/02 Commission v. Italy, judgments of the Court of justice of 5 February 2004. Sixth and Third Chambers.", 41 (2004) CMLRev., pp.1398f and 1406.

<sup>223</sup> Hettne, J., "Gemenskapsdomstolarnas rättskontroll och allmänna förvaltningsrättsliga principer", pp. 250f.

## 4 *Altmark* Introducing Structural Guarantees to the State Aid Field

The judicial review of administrative measures in the state aid field has many layers of particularity. The ECJ has backed off in its intensity of review of the Commission, in this area. The Court's deferential stance is said to be required by the complex economic nature of decisions made in this field, as well as by the difficulty to separate facts from discretionary policy choices.<sup>224</sup> These complexities would reasonably make themselves equally felt in relation to judicial review of national decisions in the state aid field. Nevertheless, there are other features of the control of national measures in this field which might demand a stricter judicial review. It should be recalled that when the ECJ controls the Commission in the competition field, albeit staying within the prescribed marginal review-formula, a stricter review has been called for due to the Commissions peculiar role as "prosecutor, judge and jury"<sup>225</sup> in such cases. Likewise, an intensified marginal review might very well be called for when reviewing Member States who devise compensation schemes. In those cases, the Member State in a way is discretionary withdrawing certain flows of state funding from the established mechanism of Community control.

The set-up of the respective roles of the Member State and the Community in handling the provision of SGEIs, has been a delicate political issue, but one of utmost interest to the subsequent sections of this essay. The political tensions surrounding this issue was made abundantly evident through the drafting of Article 16 TEC, which was added through the ToA. This provision, being the only one besides Article 86(2) TEC mentioning SGEIs, has been said to, simultaneously, feed multiple interpretations, stretching from one end of the political spectrum to the other.<sup>226</sup> SGEIs are any economic activities which are entrusted with special public interest obligations, such as universal services.<sup>227</sup> It is clear that these services have a historical and cultural importance to Europe, and are endorsed as such. But as, in the name of being 'united in diversity',<sup>228</sup> the Member States have been given a wide discretion in defining and organising these services<sup>229</sup>, the Community has been left wanting in means of control and cohesion. The European approach thence seemed to be the ambition to create a new institutional design, which would re-model the established relationship

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<sup>224</sup> Craig, P., *EU Administrative Law*, Oxford University Press, 2006, p. 472.

<sup>225</sup> *Ibid.* p. 473.

<sup>226</sup> Ross, M., "Article 16 E.C. and services of general interest: from derogation to obligation?", 25 (2000) E. L. Rev., p. 22.

<sup>227</sup> Krajewski, M., "Background paper on a legal framework for services of general (economic) interest", (2006), <http://www.epsu.org/a/3016>, 2009-08-24, p. 22.

<sup>228</sup> Official motto of the EU.

<sup>229</sup> See above in section 3.3.

between the State and the provisions of public services. In so doing, the Community aims to promote structures which enable the provision of public services through competitive markets.<sup>230</sup> In the particular area of SGEIs, the controversy has been between the Member States' competence to finance and organize their social protection on the one hand and the imperatives of Community free market and competition law on the other. To resolve the conflict, the Community seems to have turned to the rather more open method of co-ordination of Member States' policies called 'new governance'; securing the Community interests through conditioning the national competence, rather than trying to take on the competence itself.<sup>231</sup> One means of conditioning the national competences, is by requiring certain structural guarantees, to contain the wide policy discretion. In the particular field of the provision of SGEIs, these requirements were laid down in the landmark judgment of the *Altmark* case<sup>232</sup>.

## 4.1 Pre-*Altmark* Confusion Concerning Compensation for SGEIs

The question of whether the state financing of a SGEI should be regarded as state aid, and hence fall within the control mechanism set up by the Community, was during many years answered in two distinctly different manners. The CFI, following the so called 'state aid approach' would answer yes. Whereas the ECJ would tend to answer in the negative, fuelling claims of prominence of the so called 'compensation approach'. These approaches will be briefly presented below, following the initial elaboration on the particular nature of the SGEIs, and the problems involved in their financing.

### 4.1.1 Complicating Particularities of SGEIs

The core of the dispute between these two camps has lied in the definition of an advantage. When determining the existence of an advantage, for the purpose of a state aid classification in accordance with Article 87(1) TEC, one might need to contemplate whether the transferred financial advantage is negated through a consideration, which lacks a market value. The question boils down to whether an advantage really is an advantage, in the proper sense of the word, if the value of the advantage is reduced or completely negated due to the cost incurred in complying with the eligibility conditions attached to the transfer of resources.<sup>233</sup> This type of 'valueless' consideration, given as the counter-part for state-transferred benefits, can be of varying nature, and the cost for providing this consideration can indeed

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<sup>230</sup> Szyszczak, E., "Public Service Provision in Competitive Markets", p. 35.

<sup>231</sup> *Ibid.*, p. 67.

<sup>232</sup> Case C-280/00 *Altmark* [2003] ECR I-7747.

<sup>233</sup> Winter, J., "Re(de)fining the Notion of State Aid in Article 87(1) of the EC Treaty", 41 (2004) CMLRev., p. 488.



be substantial. These seemingly worthless considerations may constitute, for example, good environmental practices in certain sensitive sectors, a guaranteed provision of goods or services to a secluded geographical area, a guaranteed provision of goods generating positive externalities.<sup>234</sup> The common denominator for all these considerations is that they provide a real, but non-calculable, benefit to the State and society as a whole. However, most of these considerations impose costs on the provider which are just as real, and in most cases, just as calculable.

The question remains whether any of these costs are capable of cancelling out the mentioned gratuitous nature of the advantage given to an undertaking providing a SGEI. One can argue that all state measures, regardless of their form, is intended to induce a certain behaviour and that the State can not be held accountable for compensating all costs for such alterations in behaviour. These various kinds of intangible benefits to society, which economist label ‘positive externalities’, are the actual rationale of subsidies and other forms of state aid.<sup>235</sup> An aid measure consequently does not generally lose its character as gratuitous advantage, solely, because the beneficiary of the aid has costs to bear.

#### 4.1.2 State Aid Approach

The ‘state aid approach’ is merely a formal interpretation of the advantage criterion of Article 87(1) TEC, primarily developed in doctrine and by Advocate Generals and heavily endorsed in the case law of the CFI. The position that the SGEIs, a certain restricted category of considerations which lack market value, could negate the advantage transferred by the State in the context of the Community state aid regime, has been heavily resisted. It has been argued that a financial benefit, in cases where the recipient supplies goods or offers services which would normally not exist (or have a value) on the private market, should be regarded as a pure compensation for costs incurred.<sup>236</sup> But the CFI has traditionally taken the view that a benefit granted by the State does not lose its character as an advantage, or its classification as an aid, just because it is intended to offset any additional costs assumed by the recipient when executing public service tasks.<sup>237</sup> The CFI considered that even if this compensatory nature of the granted benefit could justify the state aid, something that would be relevant when examining compatibility within the scope of Article 86(2) TEC, it would in no way affect the classification under Article 87(1) EC.<sup>238</sup> The CFI relied on the traditional notions that the definition of state aid in the Community regime, set out by the Treaty, is based on effect, and not on aims or causes.

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<sup>234</sup> For further examples, see Winter, J., “Re(de)fining the Notion of State Aid in Article 87(1) of the EC Treaty”, p. 491.

<sup>235</sup> *Ibid.* p. 494.

<sup>236</sup> *Ibid.* p. 488 and 493.

<sup>237</sup> Case T-106/95 *FFSA et al. v Commission* [1997] ECR II-229, para. 82.

<sup>238</sup> Case T-46/97 *SIC v Commission* [2000] ECR II-212, paras. 78-84.

### 4.1.3 Compensation approach

On a few junctures, even the ECJ seemed to have tacitly endorsed the ‘state aid approach’.<sup>239</sup> However, the ECJ has, on most occasions, paid heed to the slightly more pragmatic ‘compensation approach’. This being the doctrinal term commonly used for the reasoning which generally exclude the compensation for SGEIs from constituting an advantage in the meaning of Article 87(1) TEC. This less strict tack was conveyed already in the *ADBHU* case<sup>240</sup>, and later on endorsed in *Ferring*<sup>241</sup>. Unfortunately, in *Ferring*, the ECJ out-lined rather vague standards for this possible exclusion of certain types of compensation from the scope of Community state aid control. The only threshold the compensation would have to surpass, to be excluded from Community control, seemed to be the existence of a “necessary equivalence between the [benefit] and the additional costs incurred”<sup>242</sup>. As long as the compensation did not cross over to ‘overcompensation’, the transfer of resources would fall completely out-side the Community state aid regime. Although, evidently, an important case in the firm recognition of the ‘compensation approach’, the judgment in *Ferring* left a trail of uncertainties. For one, the judgment did not specify when compensation would be regarded as over-compensation, and whether the excluded compensation could include a reasonable profit, or only costs actually incurred.<sup>243</sup> Furthermore, the judgment failed to truly take into consideration the effect of the exclusion it so firmly manifested, and thereby failed to erect demands for sufficient structural guarantees against arbitrariness on a national level.

## 4.2 The Holding of *Altmark*

Fortunately for the consistency of competition law in general, and the effective control of state aids in particular, the ECJ got the opportunity to clarify the situation and infuse the state aid field with some minimum demands for structural guarantees. Compared to its above-mentioned judgment in *Ferring*, the Court expressed itself with greater clarity, and in a much more restrictive fashion, in its subsequent *Altmark* judgment.

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<sup>239</sup> Case C-387/92 *Banco Exterior de España* [1994] ECR I-877. See also Lynskey, O., “The Application of Article 68(2) EC to Measures Which do Not Fulfil the Altmark Criteria; Institutionalising Incoherence in the Legal Framework Governing State compensation of Public Service Obligations”, 30 (2007) WC, p. 156, referring to Case C-332/98 *CELF* [2000] ECR I-4833.

<sup>240</sup> Case 240/83 *ADBHU* [1985] ECR 530. para. 18.

<sup>241</sup> Case C-53/00 *Ferring* [2001] ECR I-9067.

<sup>242</sup> *Ibid.* para. 27.

<sup>243</sup> Lynskey, O., “The Application of Article 68(2) EC to Measures Which do Not Fulfil the Altmark Criteria; Institutionalising Incoherence in the Legal Framework Governing State compensation of Public Service Obligations”, p. 158.

## 4.2.1 Facts of the Case

The case concerned the grant of licences for scheduled bus transport services in a specific German region, to the bus company Altmark Trans GmbH, and the provision of public compensation for those services. The licence granted exclusive rights to Altmark, who in return had to comply with certain obligations of a public service character.<sup>244</sup> In proceedings initiated by its competitor, Altmark Trans was accused of not being an economically viable undertaking, able to survive without the public subsidies, and that the licences this company had been granted therefore were unlawful.<sup>245</sup> After a request for a preliminary ruling had been lodged by the German national court, the ECJ had to give guidance on whether the compensation received by Altmark Trans, for providing the transport services, contained illegal state aid. The focal point of the case, of course, being whether the compensation for the SGEI<sup>246</sup> in question would qualify as an advantage in accordance with Article 87(1) TEC, or not.

## 4.2.2 Opinions of Advocate General Léger

The seminal character of the *Altmark* case is only accentuated by the fact that two subsequent Opinions of the Advocate General were submitted to aid the Court in its groundbreaking task. The explanation for this extraordinary protocol was the release of AG Jacobs highly relevant Opinion in the *GEMO* case<sup>247</sup>, hardly more than a month after AG Légers first Opinion in *Altmark*<sup>248</sup>. However, even after considering the different possibilities laid down by AG Jacobs, AG Léger held true to his conclusions in his first Opinion. He strongly opposed the ‘compensation approach’ and claimed that, if further endorsed, it would “undermine the structure and logic of the Treaty provisions in respect of [s]tate aid”<sup>249</sup>. He pointed out that the reasoning endorsed in *Ferring* would deprive Article 86(2) TEC of its role in the compatibility-assessment of state funding of SGEIs, as well as confusing the distinction between the classification and the justification of state aid.<sup>250</sup> Accordingly, AG Léger insisted that the Court should rule that financial advantages granted to providers of public service obligations (PSOs), to compensate for costs incurred, should be regarded as state aid and that national authorities must abstain from an assessment under Article 86(2) TEC, due to the provision’s lack of direct effect in the state aid

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<sup>244</sup> Case C-280/00 *Altmark* [2003] ECR I-7747, para. 12.

<sup>245</sup> German law demands that a holder of a license must be a financially sound company, see Case C-280/00 *Altmark* [2003] ECR I-7747, para. 13.

<sup>246</sup> The SGEI is consistently referred to as the provision of PSOs throughout the case. However, these two labels are to be considered as perfectly interchangeable.

<sup>247</sup> Opinion of AG Jacobs in Case C-126/01 *GEMO* [2003] ECR I-13769.

<sup>248</sup> Opinion of AG Léger on 19 March 2002 in Case C-280/00 *Altmark* [2003] ECR I-7747.

<sup>249</sup> *Ibid.* para. 61.

<sup>250</sup> *Ibid.* paras. 76 and 82.

field.<sup>251</sup> Indeed, AG Léger seemed eager to avoid the shift of vast discretionary powers into the hands of the Member States, which would have been the unequivocal effect of further endorsement of the ‘compensation approach’. It should be noted that, if the ECJ had chosen to follow the Opinion of its Advocate General, there would have been no need to set up demands for structural guarantees, since such are only called for to compensate for a creation of national discretionary powers.

### 4.2.3 Judgement of the Court

At the end of the day, the ECJ chose not to follow the Opinion of AG Léger, but all the while formally endorsing the *Ferring* judgment, the Court severely narrowed the scope application of the ‘compensation approach’. The shift of the discretion, which would be handed over to the national authorities, was substantially diminished, by making the possible exclusion of the financing of SGEIs dependent on a specific set of restrictive criteria.

The ECJ ruled that public financial support, merely representing compensation for PSOs, can not be characterised as state aid, and fall under the Community control regime. The ECJ regurgitated that, for a measure to classify as state aid within the meaning of the Treaty, it must constitute a gratuitous advantage.<sup>252</sup> However, the Court chose to sanction the interpretation that the, seemingly, gratuitous advantage, transferred by the State, may in effect be negated due to costs incurred through the performance of PSOs. The Court justified the exclusion of the compensation of SGEIs from the identification as a “real financial advantage” by holding that “the measure does not have the effect of putting [the undertaking] in a more favourable competitive position”<sup>253</sup>.

The Court then proceeded to an examination of whether the financing of the SGEI really transferred such an advantage on Altmark Trans, or if this was to be regarded as a mere compensation for the discharge of the PSOs. In so doing, the Court used a methodology reminiscent of that used in the assessments of compatibility under Article 86(2) TEC, but instead of dwelling on proportionality, the Court made use of more formal criteria.

The four cumulative requirements put on the compensation of SGEIs, for it to escape the classification as state aid, have quite simply come to be known as the ‘*Altmark* criteria’:

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<sup>251</sup> Rizza, C., “The Financial Assistance Granted by Member States to Undertakings Entrusted with the Operation of a Service of General Economic Interest” pp. 67-84; in: Biondi, A., Eeckhout, P., Flynn, J. (eds.), *The Law of State Aid in the European Union*, Oxford University Press, 2003, p. 79.

<sup>252</sup> Case C-280/00 *Altmark* [2003] ECR I-7747, paras. 83-84.

<sup>253</sup> *Ibid.* para. 87.

- **First**, the recipient undertaking must have been entrusted with the performance of actual PSOs, which should have been clearly defined in advance.
- **Second**, the parameters, on the basis of which the compensation is to be calculated, must be predetermined in an objective and transparent manner.
- **Third**, the compensation granted may not exceed what is necessary to cover all or parts of the costs incurred in the discharge of the PSOs, when appropriate account has been taken to relevant receipts and as well as reasonable profit.
- **Fourth**, if the undertaking has not been chosen through a public procurement procedure, the level of the compensation must be determined on the basis of an analysis of costs which a typical efficient undertaking would have incurred in discharging the PSOs at hand.<sup>254</sup>

The ECJ abstained from passing judgment on the fulfilment of these criteria in the specific case at hand, merely laying down the judicial tools to be used by the national court.<sup>255</sup> Should the compensation scheme fulfil each and every one of these criteria, the transfer of state resources is not to be regarded as conferring an advantage on the recipient. The scheme would thereby escape any further scrutiny under the state aid rules, as well as the obligation to notify the measure to the Commission.

#### 4.2.4 New Structural Guarantees

In its final judgment, the ECJ failed to endorse, either the state aid approach or the compensation approach, hole-heartedly.<sup>256</sup> Instead, it proposed a new model; which has been referred to as a ‘conditional compensation approach’.<sup>257</sup> Renzulli has concluded that the introduction of the four above-mentioned criteria, imposes both tighter and more transparent procedures for the allocation of resources.<sup>258</sup> Indeed, doubts have been raised in the doctrine about whether the factual situation in *Ferring* would itself have passed the procedural requirements of this subsequently established test.<sup>259</sup>

The criteria introduced by the *Altmark* judgment, collectively create a set of benchmark standards to be nationally enforced in the common interest of avoiding potential overcompensation. As concluded in section 4.1.1, the

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<sup>254</sup> Case C-280/00 *Altmark* [2003] ECR I-7747, paras. 89-93.

<sup>255</sup> *Ibid.* para. 95.

<sup>256</sup> Neither did it choose to support the ‘quid pro quo’-model advocated by AG Jacobs in his Opinion in Case C-126/01 *GEMO* [2003] ECR I-13769, paras. 118-124.

<sup>257</sup> Lynskey, O., “The Application of Article 68(2) EC to Measures Which do Not Fulfil the *Altmark* Criteria; Institutionalising Incoherence in the Legal Framework Governing State compensation of Public Service Obligations”, p. 158.

<sup>258</sup> Renzulli, A., “Services of General Economic Interest: The Post-*Altmark* Scenario”, 14 (2008) EPL, p. 399.

<sup>259</sup> Biondi, A., Eeckhout, P., Flynn, J. (eds.), *The Law of State Aid in the European Union*, Oxford University Press, 2003, p. xvi.

advantage gained by the State, in consideration for its financing of SGEI, might not have a quantifiable value on the market. However, the *Altmark* test, specifically tailored for the compensation for the PSOs involved in the provision of SGEIs, aims to create structural guarantees to avoid overcompensation in this area. By providing an objective test, referring to average costs of undertakings in a competitive market, the requirements in *Altmark* holds true to the logic of the ‘market economy investor test’ in as much as it only refers to efficient undertakings.<sup>260</sup> Ultimately, these judicial standards are intended to safeguard against national arbitrary financing in an area which, through the *Ferring* and *Altmark* judgments, now incontestably has been withdrawn from Community control in the favour of national self-determination.

Examining the *Altmark* criteria closer, one might conclude that a familiar reasoning from the judicial practices developed in regards to Article 86(2) TEC<sup>261</sup> has been recycled and infused with novel efficiency criteria.<sup>262</sup> The first criterion; determining what is actually to be considered as PSOs, has traditionally, due to a lack of a Community definition, been left up to the Member State’s own discretion. The remaining three criteria handle the question of overcompensation. The second and the fourth criteria demand *ex ante* examinations, which should guarantee transparency and efficiency. This prior accounting exercise differs from the requirements posed by Article 86(2) TEC, and marks the increased need of such structural guarantees, when the control shifts to national authorities. The third criterion requires a continuous *ex post* examination of the alignment of the compensation, and the actual costs incurred by the recipient undertaking.

Although established assessments under Article 86(2) TEC seem to have acted as a guiding blue-print for parts of this new test, these judicial tools are nonetheless unfamiliar to the national judge. As this Article has never been awarded direct effect in the state aid field, the national courts have, prior to the *Altmark* ruling, never stood under the Community duty to examine the existence of either of these conditions. The obligation to notify state aid, as expressed in Article 88(3) TEC, has however direct effect. National courts have due to this provision repeatedly been called upon to

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<sup>260</sup> J.-D. Braun, J. Kuhling “Article 87 EC and the Community courts: from evolution to revolution”, 45 (2008) CMLRev., p. 476.

<sup>261</sup> Five conditions must be fulfilled under Article 86(2) TEC: the undertaking must be (a) entrusted with (b) the task of providing a SGEI (c) which cannot be performed by measures less restrictive of competition. Furthermore, (d) the application of the Treaty rules must threaten to frustrate the discharging of the particular PSO and (e) the measure under review must not substantially affect intra-community trade. See Lynskey, O., “The Application of Article 68(2) EC to Measures Which do Not Fulfil the Altmark Criteria; Institutionalising Incoherence in the Legal Framework Governing State compensation of Public Service Obligations”, p. 160.

<sup>262</sup> The *Altmark* test has been described as being “derived from the existing jurisprudence on Art. 86(2)” in Hancher, L., Ottevanger, T., Slot, P. J., *EC State Aids*, third edition, Sweet & Maxwell, 2006, p. 210.

determine whether a national measure should be notified due to its fulfilment of the conditions of Article 87(1) TEC.<sup>263</sup>

## 4.3 Post-*Altmark* Application

Having established that certain demands for structural guarantees have been introduced regarding the compensation for SGEIs, the following sections will aim to present a comprehensive overview of the subsequent appliance of these demands. The Commission responded to the *Altmark* judgment through an adapted approach in specific decisions, but also through the adoption of more general legislative measures. These responses will be briefly outlined to provide a legal context, and to illustrate the state of developments following this important case. However, since the focus of this essay has been structural guarantees as a judicial tool, the weight of this impact assessment will be on the development in case law of the Community courts.

### 4.3.1 The Monti-package

In 2005, the Commission published three measures; known as the *Altmark*-package or more commonly as the Monti-package, after the then retiring Commissioner for Competition, Mario Monti. The measures, which will be presented in turn below, aimed to clarify the *Altmark* judgement and to provide guidelines for national public authorities on how to apply the newly established *Altmark* criteria.<sup>264</sup>

#### 4.3.1.1 Amendment to the Transparency Directive

The original Transparency Directive from 1980 has continuously been amended to ensure the effective surveillance of national public transfers, and thereby the effective application of the Community state aid regime.<sup>265</sup> Due to the withdrawal of the compensation of SGEIs, from the notification obligation, and hence the formal Community control mechanisms, it was necessary to amend the Transparency Directive once again as a response to the *Altmark* ruling. This amendment<sup>266</sup> made sure that providers of SGEIs would not escape the obligation to keep separate accounts, even if the received public financing was not to be considered as state aid. This amendment was a crucial step to enable the control, both by the

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<sup>263</sup> Case 120/73 *Lorenz* [1973] ECR 1471, para. 8, Case C-354/90 *Fédération Nationale* [1991] ECR I-5505, para. 11, and Case C-174/02 *SWNB* [2005] ECR I-85, para. 15.

<sup>264</sup> Krajewski, M., "Background paper on a legal framework for services of general (economic) interest", p. 20.

<sup>265</sup> Hancher, L., Ottevanger, T., Slot, P. J., *EC State Aids*, pp. 200f.

<sup>266</sup> Commission Directive 2005/81/EC, Amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ 2005 L 312, pp.47-48.

Commission and by reviewing national authorities, of the correlation between compensation given, and costs actually incurred.<sup>267</sup>

#### **4.3.1.2 Decision on the Application of Article 86(2)**

The Commission Decision on the application of Article 86(2) TEC to state aid in the form of public service compensation<sup>268</sup> is a block exemption with the effect of, in a sense, extending the *Altmark*-type exemptions. By virtue of this decision, public service compensation which fails to satisfy the *Altmark* criteria, but satisfy the substantively similar criteria of Article 86(2) can be relieved of the notification obligation in much the same way as those measures actually satisfying the *Altmark* criteria. This possibility, however, is only open to the compensation for the operation of hospitals, social housing, and in cases of other SGEIs, only when such compensation falls below certain specified thresholds. As a counterweight to the created expansion of the scope of measures which falls outside the obligation to notify the Commission, the decision expresses a number of administrative demands to ensure the existence of structural guarantees.<sup>269</sup>

#### **4.3.1.3 Framework Decision**

The Community Framework Decision on the subject of state aid in the form of public service compensation<sup>270</sup> in turn lays down a Commission procedure for individual exemptions. This decision addresses funding for public services failing to fulfil both the *Altmark* criteria and the criteria outlined in the Decision addressed in section 4.3.1.2. Such funding is thus inevitably regarded as state aid, which it to be notified to the Commission. The framework decision simply lays down conditions under which the Commission will find this specific type of state aid compatible with the common market. It should be noted that the conditions of this individual exemption procedure are broadly similar to the ones enumerated in the formerly discussed block exception.<sup>271</sup> Hancher concluded that the framework decision merely underlines the general impression of an increasingly strict approach taken by the Commission toward national public service compensation.<sup>272</sup> However, even if it reaffirms the newfound reliance on structural guarantees, the ones enunciated in the framework decision will exclusively be demands posed by the Commission on national

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<sup>267</sup> Renzulli, A., “Services of General Economic Interest: The Post-Altmark Scenario”, p. 419.

<sup>268</sup> Commission Decision of 13 July 2005 on the application of Article 86(2) of the Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ 2005 L 312, pp. 67-73.

<sup>269</sup> Article 4-6 of the Decision, where e.g. the obligation to lay down, in advance, specific parameters for calculating, controlling, and reviewing the compensation, as well as the arrangements for avoiding and repaying any overcompensation.

<sup>270</sup> Community Framework for State Aid in the form of public service compensation, OJ 2005 C 297, pp. 4-7.

<sup>271</sup> Hancher, L., Ottevanger, T., Slot, P. J., *EC State Aids*, p.214.

<sup>272</sup> *Ibid.* p. 217.



administration, and never become *per se* relevant as decisive yardsticks before a national court.

### 4.3.2 Further Application by the Commission

Without necessarily going in to the details of the specific decisions concerning compensation of SGEIs after *Altmark*, it shall be noted that the Commission, generally, have applied the demands for structural guarantees in a strict fashion. This brief conclusion is supported both by the scarce number of compensation-schemes, having been deemed by the Commission to entirely fulfil the *Altmark* test, and by the focus of the assessment in those rare cases where the test was deemed to have been fulfilled.

As there are relatively few examples of decisions in which the *Altmark* criteria have been considered to be fulfilled, the Commission rather seems to have tended towards routinely qualifying national measures as state aid. When this qualification is done, the Commission is able to move ahead and make a comparatively less restricted assessment under Article 87(3) or 86(2) TEC.<sup>273</sup> This tendency does not, however, mean that the Commission has failed to enforce the demands for structural guarantees of the *Altmark* test, but rather that the Commission has implemented the test very strictly.

The Commission's practice can be seen to have clarified certain criteria of the *Altmark* test, which have been left undeveloped by the Community courts.<sup>274</sup> But for the purpose of this essay, the important point of observation rather lies in the Commission's strict adherence to the demands of structural guarantees introduced by the Court, than in the process of refinement on a decision-by-decision basis. In the rare cases when the Commission has found the entirety of the *Altmark* criteria to be fulfilled, considerable weight has been put on the formal requirements of a public procurement procedure; which presumably ensures both transparency and equality of opportunity.<sup>275</sup> The *CADA*-decision<sup>276</sup>, being the first where the *Altmark* test was deemed satisfied, further accentuates the way in which a strict application of the demands for structural guarantees can be used even within the restricted remit of a manifest error-review. Renzulli concluded that the Commission's practice concerning the first *Altmark* criterion has proven the role of this transparency criterion to be a "counterweight to the large autonomy of the Member States in defining their services of public interest"<sup>277</sup>.

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<sup>273</sup> Hancher, L., Ottevanger, T., Slot, P. J., *EC State Aids*, pp. 210f.

<sup>274</sup> Renzulli, A., "Services of General Economic Interest: The Post-Altmark Scenario", p. 404.

<sup>275</sup> See State Aid N-381/2004, *Pyrénées-Atlantiques*, C(2004) 4343 fin and State Aid N-382/2004, *DORSAL*, C(2005) 1170 fin.

<sup>276</sup> State Aid N-475/2003, *CADA*, C(2003) 4488 fin.

<sup>277</sup> Renzulli, A., "Services of General Economic Interest: The Post-Altmark Scenario", p. 406.

### 4.3.3 Further Application by the Courts

To secure the implementation of structural guarantees as safeguards against national arbitrariness in the state aid field, it is imperative that the national courts are required to strictly uphold the criteria of *Altmark*-test. Although this test, as a judicial tool seems comprehensive and relatively precise for its purposes, its generality opens up for the possibility of including more state measures in its application than the test might actually be fit to govern. The ECJ have had a number of opportunities to express further guidance on the application of this new tool. In the following sections, a sample of these cases will be presented, and particular attention will be given to how the ‘Altmarkian’ demands for structural guarantees have been upheld.

#### 4.3.3.1 *Enirisorse*

Shortly after giving its seminal judgment in *Altmark*, the ECJ passed judgment in the *Enirisorse* case<sup>278</sup>; one of many conflicts concerning the operation of Italian ports that have managed to reach the highest instance of the Community’s judiciary. *Enirisorse*, being an Italian shipping company, which used its own personnel and equipment, while loading and unloading good in the Italian port of Cagliari, had refused to pay the customary port charge. *Enirisorse* had thereby not made use of the services provided by the Azienda, a state-supervised entity responsible for the management of mechanical loading and unloading equipment in that port. Regardless, *Enirisorse* was, just like everyone who used the port, obliged by domestic law to pay a charge. Two thirds of this charge were directed to the financing of the port; equipment, employees and such. The Italian court initiated a preliminary ruling procedure to ascertain, among other things, if this transfer of parts of the statutory charge is to be considered as state aid.<sup>279</sup>

Referring heavily to the *Altmark* judgment as authoritative precedence, the ECJ set out to verify whether the transfer of the charges could be regarded as such a compensation of a SGEI which did not produce a competitive advantage. Examining the *Altmark* criteria one by one, it was initially noted that the operation of a port is not automatically regarded as a PSO, and the Court found it to be unclear if the Azienda was actually discharging clearly defined public service duties. There seemed not to exist any act of entrustment where such duties had been clearly defined.<sup>280</sup> The ECJ then struck down on the measure not fulfilling the second criteria, as the parameters on the basis of which the compensation was calculated were not established in advance and in an objective and transparent manner. As it was, the amount of port charges paid to the Azienda was a factor of the activity in the port, not of the costs involved in the operating of the port.

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<sup>278</sup> Cases C- 34/01 to 38/01 *Enirisorse* [2003] ECR I-14243.

<sup>279</sup> Question 3 by the Corte Suprema di Cassazione, recited in Cases C- 34/01 to 38/01 *Enirisorse* [2003] ECR I-14243, para. 18.

<sup>280</sup> Cases C- 34/01 to 38/01 *Enirisorse* [2003] ECR I-14243, para. 34.

Accordingly, the Court ruled that such a system failed to satisfy the requirements of the *Altmark*-test.<sup>281</sup>

This judgment is a quite solid endorsement of the demands of structural guarantees introduced in *Altmark*. Renzulli saw it as an affirmation that the *Altmark* test indeed now represents the new standard of assessment in the field of SGEIs.<sup>282</sup> Since the Italian system of allocated port charges did not provide any guarantees against overcompensation of the Azienda, the ECJ firmly adjudicated the issue of fulfilment (or non-fulfilment in this case) of the demand of transparently established parameters. The judgment does not give any guidance on the third and fourth *Altmark* criteria. Further assessments within the *Altmark*-test would however have been futile, since the criteria are cumulative, and the failure to fulfil a mere one of them excludes the application of the exemption as a whole.

#### **4.3.3.2 Servizi Ausiliari Dottori Commercialisti**

A few years later, in the *Servizi Ausiliari Dottori Commercialisti* case,<sup>283</sup> the ECJ seemed to have somewhat relaxed their application of the structural demands imposed by the *Altmark* test. The case reached the ECJ through a request for a preliminary ruling concerning, *inter alia*, whether public funding of tax advice centres should be considered as state aid. The tax advice centres; ‘CAF’, provided advice and assistance in tax matters to the general public and they received a payment from state funds for each declaration completed and filed with the tax authorities.

In its cautious assessment of the payment made to the CAF, the ECJ barely did more than regurgitate the rationale of the *Altmark* judgment and spell out the different elements of the test established in that judgment. The Court refrained from any detailed verification based on the facts of the case, merely stating that the first two conditions could very well be fulfilled by the funding measure at hand, and left any conclusive assessment to the national court. Regarding the third and fourth *Altmark* criteria, the ECJ expressly shunned any effort of assessment by referring to the national court’s exclusive competence to assess factual circumstances in the main proceeding.<sup>284</sup>

Although the *Altmark* test is yet again confirmed as the authoritative benchmark concerning the dividing line between state aid and mere compensation of SGEIs, the *Servizi Ausiliari Dottori Commercialisti* judgment reveals the reluctance of the ECJ to further clarify the conditions of this test.<sup>285</sup> With regard to the conclusions made about the functioning of

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<sup>281</sup> Cases C- 34/01 to 38/01 *Enirisorse* [2003] ECR I-14243, para. 39.

<sup>282</sup> Renzulli, A., “Services of General Economic Interest: The Post-Altmark Scenario”, p. 402.

<sup>283</sup> Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941.

<sup>284</sup> *Ibid*, paras. 68-69.

<sup>285</sup> Renzulli, A., “Services of General Economic Interest: The Post-Altmark Scenario”, p. 403.

the demand for structural guarantees as a judicial tool,<sup>286</sup> it might seem alarming that these minimum criteria are not applied strictly. However, the *Altmark* test itself was in no way weakened through this later judgment, and the Italian court remains under the obligation to strictly impose the demands for structural guarantees when exercising its full assessment using the *Altmark* test.

#### 4.3.3.3 **BUPA**

Last year, the CFI released its judgment in *BUPA*<sup>287</sup>; a long and extremely technical case which threatened to stretch the boundaries of the *Altmark* test. The case concerned the quite recently liberalized market for private health insurance in Ireland. To ensure that the former monopoly holder; ‘VHI’, would not be subjected to excessively predatory competition from newcomers on the market, which were not bound by the same PSOs, a risk equalization scheme; the ‘RES’, was put into place. The workings of the RES are quite complex, and a sizable amount of the CFI’s judgment is indeed dedicated to explain this scheme. In essence, the RES is a mechanism, providing, first, for payment of a levy by insurers with a risk profile below the average market risk profile and, second, for a corresponding payment to insurers with a risk profile higher than the average. In this way, the risk was supposed to be reallocated, and born equally between the insurers. BUPA was the VHI’s main competitor on the Irish market. As BUPA had evidently entered the market by giving preferential deals to low risk insurance takers, the RES did in effect conduct a flow of money from BUPA to its main competitor VHI. When the RES was notified to the Commission, the latter deemed the scheme to be compatible with Community law due to its character as a SGEI, basing its decision on Article 86(2) TEC. BUPA then brought an action for annulment of that decision before the CFI.

The CFI confirmed the Commission’s decision and dismissed the action. The Court did so by using the Commission’s arguments for a compatibility assessment under Article 86(2) TEC in the context of an *Altmark* test; ultimately concluding that the relevant considerations made by the Commission would fulfil the *Altmark* criteria as well, and that the RES thus would not even be regarded as state aid. The CFI consistently showed great deference to the Member State’s discretion throughout its judgment. As a point of departure, the Court declared that the Member States has a wide discretion as to define national SGEIs, and even more so in the field of health; where the Member State holds an almost exclusive competence.<sup>288</sup> The Court then proceeded to examine the Commission’s control of the established SGEI, stating that the Commission may only verify the absence of manifest errors of assessment and that certain minimum criteria are satisfied, in particular, the presence of an act of a public entrustment.<sup>289</sup>

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<sup>286</sup> See Chapter 3.

<sup>287</sup> Case T-289/03 *BUPA* [2008] ECR II-81.

<sup>288</sup> *Ibid.* paras. 166-167.

<sup>289</sup> *Ibid.* para. 172.

While subsequently, on the surface, considering the fulfilment of each of the *Altmark* criteria, the CFI seemed ultimately content with establishing that the Irish legislation defined the PSOs in detail, in an act of a public authority, and that the SGEI was of a seemingly universal and compulsory nature. The CFI finally concluded that the mechanism provided by RES was a necessary and proportionate means of compensating the insurers required to cover, at the same price, all persons person living in Ireland, independently of their state of health, age or sex.

Before discussing how the demands for structural guarantees, as expressed in *Altmark*, have been upheld in the *BUPA* judgment, a few clarifications must be made. This judgment was given through an action for annulment, and is therefore not *per se* dealing with the demands national courts should pose on national administrative structures. Furthermore, the assessment in an action for annulment of a Commissions decision is inevitably tainted by the relation between the Community executive and judiciary branch, based on the separation of powers. The CFI was bound to execute a marginal judicial review of an administrative review, which was itself very limited. However, the judgment evidently can give some guidance on the development of the *Altmark* test as such and the application of its conditions. Unfortunately, the ECJ will never pronounce on the issues of *BUPA*, as no appeal was filed.

The *BUPA* ruling have highlighted that a strictly applied *Altmark* test might not fit every type of compensation of SGEIs. But instead of considering the misfits to be state aid in accordance with strict demands for structural guarantees, leaving them to be assessed by the Commission after notification, the CFI chose to adapt and severely extend the scope of the *Altmark* test. Indeed, the formula used in *BUPA* has been referred in doctrine as a fundamentally different alternative, rather than a pure application of the *Altmark* conditions.<sup>290</sup> Without any convincing assessments or requirements of structural guarantees, the CFI concluded that the RES was necessary and proportionate by reference to the costs incurred in discharging the PSOs in question. In fact, the fulfilment of the third *Altmark* criterion seems to have been assumed after the fulfilment of the first criterion, while the CFI disregarded the previously required link between efficiently incurred costs and the compensation conferred.<sup>291</sup>

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<sup>290</sup> Sauter, W., ” Case T-289/03 British United Provident Association Ltd (BUPA), BUPA Insurance Ltd, BUPA Ireland Ltd v. Commission of the European Communities, Judgment of the Court of First Instance of 12 February 2008, nyr” 46 (2009) CMLRev., p. 285.

<sup>291</sup> Biondi, A., “BUPA v Commission: Annotation” 2 (2008) EStAL, p.405.

## 5 Analysis and Concluding Remarks

After having developed, at length, on the foundation and function of structural guarantees, it must be recalled that, hitherto, they have represented a practically invisible ‘non-concept’ in legal theory. Demands for structural guarantees can, certainly, not be found in the Treaty founding the European Community, nor are they explicitly mentioned in any secondary legislation produced by the Community. Moreover, they are very sparsely mentioned in doctrine on Community law. If at all mentioned, the demands for such administrative guarantees, are brushed over under labels such as “the proceduralization of proportionality”<sup>292</sup>, or “the public law element of proportionality”<sup>293</sup>. Such labels can be rather misleading, bearing in mind that, the demands for structural guarantees work as a legal ,safety-net, for cases where a proportionality review has, itself, been crippled. Most likely, this lack of a conceptual consensus is the result of the ECJ’s own unwillingness to put a label on this development. A development of the use of structural guarantees, which the Court is, itself, spearheading. In fact, the actual phrase ‘structural guarantee’, has never appeared in a single judgement from the ECJ.

Elusive, as the concept of structural guarantees may be, it, nevertheless, manages to capture important current legal trends; providing a judicial middle-ground between national autonomy and effective enforcement of Community law. In recent years, the workings of European integration have changed towards, what has commonly been called, ‘new modes of governance’. Bernard summarised ‘new governance’ as entailing “power-sharing, diversity and decentralisation, flexible instruments and a re-assertion of the primacy of political processes over legal ones”<sup>294</sup>. He continued to make the contention that these ‘new modes of governance’, substituting strict top-down harmonisation, are generally provoked as a response to two main issues. These issues; being complexity and lack of legitimacy, are increasingly felt concerns throughout the Community administration.<sup>295</sup> Both of these issues have been discussed, through the course of this essay, as factors, which have, indeed, induced a greater deference to national discretion in certain policy areas.

‘New modes of governance’ do not, however, imply a void of governance. It is important to ensure an effective implementation of Community law, even in policy areas, which, due to either complexity or lack of legitimacy,

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<sup>292</sup> Barnard, C., *The Substantive Law of the EU, The Four Freedoms*, second edition, Oxford University Press, 2007, pp. 85ff.

<sup>293</sup> Tridimas, T., *The General Principles of EC Law*, p.194.

<sup>294</sup> Bernard, N., ” ‘New Governance’ Approach to Economics, Social and Cultural Rights”, pp. 247-267; in: Hervey, T., and Kenner, J., (Eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights-A Legal Perspective*, Hart Publishing, 2003, p.248.

<sup>295</sup> *Ibid.* pp. 254f.

have been withdrawn from the Community hegemony. The rule of law can be used by Community, as well as national, courts, to prevent the increased margin of national discretion from turning into undesirable arbitrariness. By channelling different GPCL, tangible administrative demands can be crystallised, and used as minimum standards in judicial reviews of national measures. These standards must be applied in a strict fashion, since they serve as, nothing less than, the last out-post of the rule of law throughout the Community.

The demands for structural guarantees should, probably, not be viewed as a new progressive form of integration, since they merely act as judicial safeguards against an arbitrary application of Community law. These strictly applied minimum criteria, should only be seen as a supplement to other, more demanding, judicial tools of review. In other words; the demands for structural guarantees, are only needed when a higher Community standard, based on proportionality and equality, can not be used to review the national measure at stake.

Over the years, the dispute over how much discretion the national authorities should have to organise and finance SGEIs, without the interference of Community state aid control, has been fought in the Community courts. The scales have ultimately tipped in favour of granting a substantial amount of discretion to the national authorities. To off-set this withdrawal from Community direct control, a set of demands for structural guarantees were duly presented by the ECJ in its *Altmark* judgment.

Hereafter, national courts are obliged to examine all national compensation of SGEIs against the *Altmark* criteria, to verify that the compensation is not liable to be regarded as state aid. These examinations would involve assessments on the sufficient level of transparency of the national legislation, or administrative decision, which dictates the terms of the SGEI, and the terms of its financing. The reviewing court would also have to verify that certain procedures, ensuring transparency and non-discrimination, have been adhered to by the national administration. Furthermore, the judicial review would have to confirm that certain controls, to prevent over-compensation, have been put into place. The Community has unquestionably surrendered a wide margin of discretion to the Member States in the field of SGEIs, but, the rule of law can, nonetheless, demand certain structural guarantees, which will qualify the conformity with EC law, of the use of said national discretion.

The importance of effectively justiciable standards, for the functioning of a decentralised system of enforcement, has already been stressed, during the course of this thesis. The question remains whether the structural guarantees, introduced to the state aid field, through *Altmark*, are adequate to prevent arbitrariness. Can these standards be effectively utilised by national courts, to ensure that the discretion to fund SGEIs is not abused? The ECJ should certainly be commended for its straight-forward set of criteria, which facilitates a strict implementation by a national court.

Furthermore, the reasoning of the four-part *Altmark* test, seems to have been consistently endorsed, ever since its introduction. This clarity, combined with consistent application, should encourage the national courts to assess the domestic structures against the benchmark criteria set out.

The *Altmark* test is, however, haunted by a certain number of shortcomings, in regards to a proficient application to combat national arbitrariness. Although the implications of the CFI's judgment *BUPA*, should not be overstated, this reinterpretation, and relaxation, of the *Altmark* conditions, in the face of a complex factual situation, does raise questions about the serviceability of the *Altmark* test. If the test can be watered down to be able to encompass a wider variety of state measures, than it is actually designed for, a door of Member State discretion, into an area of state aid beyond Community control, might be opened. This would defeat the purpose of the structural guarantees and entail a clear risk of arbitrary state behaviour. Moreover, the ECJ's persistence reluctance, to further clarify the content of the various *Altmark* conditions, certainly contribute to the threat of such weakened structural guarantees. Last, there could be a danger in the apparent conclusiveness of the *Altmark* test, if national courts ignore to uphold demands for other structural guarantees than those explicitly enunciated in *Altmark*. For example, the *Altmark* test mentions nothing of the enabling of private enforcement. When a Member State, practically, is given the possibility to, itself, determine which state funding to withdraw from Community control, the proper functioning of private enforcement is of crucial importance to uphold the rule of law.

To conclude this exposé on structural guarantees, and their function as a judicial tool, all that remains to be said is that, although, probably being the Community's last best hope against arbitrariness, these standards still suffer from the lack of clarity which they were created to combat. For the national courts to be able to efficiently make use of the concept of structural guarantees in judicial reviews, the demands have to be further clarified by the ECJ. And, as has been exemplified in the state aid field, even when the ECJ takes on the task of listing demands for structural guarantees, these demands might, in the end, prove to be less than ideal for an effective implementation by national courts.



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