Groningen, Ghent, Uppsala, Turku
Annual Legal Research Network Conference 2008
30-31 October 2008, hosted by the University of Groningen

The Fine Line
Between Markets, Public Interests and Self-Regulation from an EC Law and Member State Perspective
-
EC Law as a Constitutional Disciplinary Tool Being Disciplined

Hans Vedder*

April 2008

Abstract

The EC and it's Member States find it difficult to draw the line between markets and public interests. Traditionally, these two are juxtaposed, most prominently by the continental Member States and followed by a conclusion that public interests require public governance.[1] Some of this public governance takes the form of a public law framework within which self-regulation by the members of a profession occurs. We see this on the EC level when we look at the debate surrounding the Services Directive, The Commission's Third Energy Package and the Liberalisation of the Communications Sector. On the Member State level we find similar discussions concerning the way, for example, health care is organised. In the Netherlands, for example, health care is increasingly treated as a 'normal' sector of the economy to which competition law applies.

Legislators, both at the EC and the Member State level, are moving the line between markets and public interests towards the market side. It is uniformly recognised that

[1] See T. Prosser, *Markets and Public Services*, Oxford: Oxford University Press 2005 on France and the UK.

public governance is not the blanket solution for market failures and the introduction of market mechanisms may actually increase consumer welfare. The problem, however, is that the line they draw is all but a fine one. Refining the coarse line into a finer one is a task for the courts and, notably, the European Court of Justice. This can only happen when market participants invoke (EC) law. *Engelgeer*,[2] *Van der Woude*, *Ambulanz Glöckner*, *AOK*, *BUPA,*[3] *Wouters*,[4] *Rosengren*, *Hanner*[5] and are just a few examples of such cases.

This paper does not attempt to define the status quo concerning the fine line between markets and public interests. Rather it seeks to analyse the role of EC law as a constitutional framework within which national legislators formulate a policy. Is EC law taken into account when plans for liberalisation made and – if so - to what extent? This top down influence is matched with a bottom up influence that manifests itself in the form of the amendments to the EC Treaty by the Treaty of Lisbon.[6] The hypothesis underlying this is that EC law is seen by market participants as a *de facto* federal constitutional framework that can be invoked to discipline national legislators to rethink or refine their choice concerning markets or public governance. Vice versa, the Member States seek to influence this framework, in the form of Treaty amendments or by enacting legislation.

Keywords: European Law, Competition Law, Regulation, Public Goods, Governance

*Senior Lecturer, University of Groningen, Faculty of Law, Department of European and Economic Law, h.h.b.vedder@rug.nl

2 Case 3447 before the Netherlands Competition Authority concerning no cure no pay and the legal profession.

3 Respectively cases C-222/98, C-475/99, Joined Cases C-264/01, C-306/01, C-354/01and C-355/01 and T-289/03 concerning health care and EC competition law.

4 Case C-309/99 concerning self-regulation by the legal profession.

5 Respectively cases C-170/04 and C-438/02 concerning Swedish trade monopolies.

6 See, *e.g.* the Protocol on Services of General Economic Interest and the 'French' attempt to remove the competition objective from the TFEU.