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The Transformation of EU Competition and Internal Market Law by the Stability and Growth Pact: competence creeps into the national welfare states

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THE TRANSFORMATION OF EU COMPETITION AND INTERNAL MARKET LAW BY THE STABILITY AND GROWTH PACT: COMPETENCE CREEPS INTO THE NATIONAL WELFARE STATES?

Johan van de Gronden

1. INTRODUCTION

In the wake of the financial and economic crisis the EU has taken measures to improve the economic governance of the Union as a whole and, more in particular, of the euro zone. The Stability and Growth Pact (SGP) has been heavily amended. Recently, the council clinched a deal on a bank union.[1] A case in point is the adoption of the so-called six-pack[2] and the conclusion of the Treaty on Stability Coordination and Governance (TSCG).[3] The rules adopted address excessive budget deficits and macroeconomic imbalances of the EU Member States. The Commission and Council examine national budget plans (stability programmes of the euro countries and convergence programmes of the non-euro countries) and, on the basis of their findings, direct guidelines and recommendations at the Member States for the improvement of their financial and economic situations. Apart from requiring austerity measures, the guidelines and recommendations issued by the Commission and the Council raise issues such as the competitiveness of a particular Member State, the need to reform the social welfare states (e.g. labour and pension markets and social security) and the wish to prioritise growth-friendly expenditure (on, for example, education, research, innovation and energy).

The question arises how the new SGP rules relate to the 'classic economic Treaty provisions', i.e. EU competition and internal market law.[4] The TFEU is based on the presumption that the Treaty provisions on competition and the internal market are concerned with the competition process in the EU, whereas the competences to organise the welfare state rest with the Member States. It is

1 Brussels, 13 December 2012, 17739/12, PRESSE 528, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/134265.pdf.

2 The six-pack compromises of five Regulations and one Directive, which are published in issue L306 of OJ 2011.

3 This Treaty is available at http://www.consilium.europa.eu/media/1478399/07_-_tscg.en12.pdf. It should be noted that important Member States, such as the UK, are not party to this treaty.

4 The Commission has issued proposals on the so-called 'two-pack'. This concerns two draft regulations for monitoring Member States with excessive deficits or serious financial difficulties. These regulations are available at http://ec.europa.eu/economy_finance/economic_governance/index_en.htm. As these regulations are not adopted yet, they will not be discussed in this paper.

clear from the outset that the SGP rules are relevant for both the national economy and the organisation of the social welfare states. The aim of the paper is to examine whether the SGP will transform EU competition and the internal market law, in so far as the social welfare competences of the Member States are concerned. Is the SGP capable of changing the impact of these provisions of the TFEU on the social welfare state? In this regard, it should be noted that this paper does not discuss the stability mechanisms introduced to remedy high deficits of particular Member States, as these mechanisms are not directly related to issues which are also at play in EU competition and Internal market law.[5]

The paper will start with discussing the SGP rules. Attention will be paid to the changes brought upon by the Treaty of Lisbon with regard to the SGP, to the six-pack and to the TSCG. This analysis will, however, mainly focus on the concrete recommendations directed at the Member States on the basis of the SGP rules. Subsequently, the interplay between the SGP rules and EU internal market law will be explored. To what extent are the free movement rules applicable to the social welfare states? What are the limits of the EU in adopting harmonization measures that aim at resolving problems resulting from social welfare state policies? Then, the interplay between the SGP and EU competition law will be discussed. Important issues, such as the application of the competition rules to social security systems, will be raised. In this regard, it should be noted that the role that the EU state aid rules played, and still play, in the current crisis will not be analysed. For a great extent, these rules are applied to bailouts of banks and, as a result, in these cases no issues directly connected with the social welfare state are at play. This paper will end by drawing some conclusions.

2. THE SGP: ECONOMIC GOVERNANCE IN THE EU

The Treaty of Lisbon has added new provisions on the economic and monetary policy to the TFEU. Some of them deal with the SGP. The principles laid down in these provisions are worked out in five regulations and one directive, which address the issues of excessive budget deficits and macroeconomic imbalances.[6] These measures are referred to as the six-pack. On top of that, the ma-

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5 On the legal issues related to these stability mechanisms, see e.g. P. Athanassiou, Of Past Measures and Future Plans for Europe's exit from the sovereign debt crisis: what us legally possible (and what is not)?, *European law Review* 2011, p. 558 et seq.

6 See Regulation 1175/2011 of the European Parliament and the Council amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 2011 L306/12; Regulation 1174/2011 of the European Parliament and of the Council on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ 2011 L306/8; Regulation 1175/2011 of the European Parliament and of the Council amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary →

jority of the Member States have concluded the TSCG. In this section, the general framework of the SGP and its application in 2012, the first year that the new SGP rules were operative, will be discussed.

2.1 The General framework of the SGP

Article 126 (1) TFEU provides that Member States must avoid excessive government deficits. According to the famous Maastricht criteria the budget deficit must be below 3% of the Gross Domestic Product (GDP) and the debt of a Member State should not exceed 60% of its GDP.[7] Pursuant to Article 126 (5) TFEU the Commission will take action if an excessive deficit occurs in a Member State and inform the Council. According to sections 6 and 7 the Council will address recommendations at the Member State having an excessive deficit. If the Member State persists in failing to meet the Maastricht criteria, the Council may give notice to that Member State to remedy the problems as soon as possible. What is more important, is that on the basis of Article 126 (11) TFEU the Council has the authority to require the Member State concerned to make a non-interest-bearing deposit or to impose on this Member State a fine. Section 13 of this provision sets out that such a decision will be taken by a qualified majority and the Member State having the excessive deficit does not have the right to vote.

Article 126 TFEU is worked out in the six-pack. Regulation 1466/97, as amended by Regulation 1175/2011, introduces the so-called European Semester, which applies for both euro and non-euro Member States. This is the preventive part of the SGP. In the European semester general guidelines for the economic state of affairs in the EU are drafted. On their turn the Member States should draw-up budget plans for the purposes of their own economic governance policies. These budget plans are referred to as Stability programmes for the euro-countries and as convergence programmes for the non-euro countries. The programmes must meet the criteria of the SGP, i.e., the Maastricht criteria. As already was stated, according to these criteria the government deficit should not exceed 3%. However, the six-pack has added a balanced budget-rule as a medium-term budgetary objective to the SGP. This

positions and the surveillance and coordination of economic policies, OJ 2011 L306/12; Regulation 1176/2011 of the European Parliament and of the Council on the prevention and correction of macroeconomic imbalances, OJ 2011 L306/25; Regulation 1177/2011 of the Council amending Regulation on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 2011 L306/33 and Directive 2011/85 of the Council on requirements for budgetary frameworks of the Member States, OJ 2011 L306/41.

7 See Article 1 of the Protocol on the excessive deficit procedure, OJ 2010 C83/279. This protocol is annexed to the Treaty of Lisbon. See also Article 1 of the Protocol on the excessive deficit procedure, OJ 1992 C224/120, which was annexed to the Treaty of Maastricht.

rule is defined as -1% of the GDP. So, the new SGP has made the deficit criterion stricter by requiring a balanced budget in the medium-term run. Furthermore, according to the six-pack measures the public debt is not allowed to exceed 60% of the GDP. In exceptional circumstances Member States may derogate from the six-pack requirements. As such an exceptional circumstance is defined 1) an unusual event outside the control of the Member State and with a major impact on its public finances or 2) a severe economic downturn is.[8]

As currently virtually no Member State meets all Maastricht criteria, every national plan should set out how the ambitious goals of the SGP will be achieved in the near future. The national plans will be assessed at EU level. At first the Commission sends a draft recommendation to the Council. On the basis of this draft the Council will adopt its recommendation directed at a particular Member State.

Regulation 1467/97, as amended by Regulation 1177/2011, comes into play when a Member State runs an excessive deficit. It would be beyond the scope of this paper to discuss all steps that must be taken for imposing a sanction upon a Member States in violation of the SGP rules. It is however clear from the outset that infringing the recommendations of the Council could have serious effects. The various regulations introduced by the six-pack measures in the aftermath of the current sovereign debt crisis list various penalties. For the euro-countries a special procedure is introduced, which can lead to 'semi-automatic sanctions': if the Commission proposes a sanction and a qualified majority is not opposed to this proposal (reverse voting procedure) it is assumed that the Council has decided to impose a penalty upon the Member State in violation.[9] In general, it could be argued that the enforcement of the SGP rules is improved. Nonetheless, the plan to impose a penalty upon a Member States with excessive deficits will still meet with strong resistance, given the political sensitiveness surrounding such deficits and the possibility to invoke the exception of the unusual event or the economic downturn.[10]

Another important set of rules introduced by the six-pack concerns the macro-economic imbalances. Regulation 1176/2011 gives the Commission and the Council the authority to take action, if a particular Member States is experiencing such an imbalance. The Council could adopt a recommendation forcing a Member State to address the economic problems identified in this recommendation. If a Member State fails to comply with the instructions it risks the imposition of a penalty. Also for macro-economic imbalances the penalty is semi-automatic: the proposal of the Commission is followed, unless a qualified majority of the Member States votes against it.

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8 See e.g. Article 2 (1) of Regulation 1467/97.

9 See Article 6 of Regulation 1173/2011.

10 See D. Adamski, National Power Games and Structural Failures in the European Macroeconomic Governance, *Common Market Law Review* 2012, p. 1345-1348.

It is striking that the role of the European Parliament is very limited in the procedure leading to the adoption of recommendations and the imposition of penalties.[11] The six-pack measures only provide for an economic dialogue between the European Parliament, the Council and the Commission.[12] In this dialogue important documents, such as the recommendations directed at Member States, could be discussed. However, this dialogue does not give the European Parliament a real opportunity to give feed back into the process and, therefore, it is a weak accountability.[13]

The economic governance introduced by the six-pack measures is reinforced by the TSCG. It should be noted that two Member States, the UK and the Czech Republic, have decided not to sign this Treaty. Some of the conditions laid down in this Treaty repeat what is already stipulated in the six-pack. For example, according to Article 4 of the TSCG the public debt of a Member States should not exceed 60% of GDP. The balanced-budget rule is, however, made stricter than in the six-pack: (in principle) the medium-term objective of a Member State should be below -0.5% of GDP pursuant Article 3 (1 under b) TSCG. Nevertheless, a deficit of 1% of GDP could be permitted, provided that public debt is below 60% of GDP and the '…risks in terms of long-term sustainability are low…'.[14] Article 3 (2) TSCG requires that the balanced budget rule will be transposed into national provisions of binding force and permanent character, preferably in the constitution of the Member State concerned. As the drafting of this provision allows for derogation from the obligation of implementation in the national constitution, it is doubtful to what extent Member States will adopt national measures of overriding binding force.[15] Furthermore, Article 3 (1 under e) TSCG imposes on the Member States the obligation to introduce an 'automatic correction mechanism', which will be triggered in the event of an excessive deficit. Also the TSCG confers powers upon the Commission to monitor compliance with the provisions of this treaty. The CJEU has even the authority to impose a financial sanction according to Article 8 TSCG. This authority is an important novelty with regard to the economic governance of the SGP, as in the past the competences of the CJEU were limited in EMU matters.[16] As the TSCG is a Treaty concluded outside the framework of the TEU

11 See M. Ruffert, The European Debt Crisis and European Union Law, *Common Market Law Review* 2011, p. 1801.
12 See e.g. Article 2-ab of Regulation 1466/97, article 2a of Regulation 1467/97 and Article 14 of Regulation 1176/2011.
13 See D. Chalmers, The European Redistributive State and a European Law of Struggle, *European Law Journal* 2012, p. 692.
14 See Article 3 (1 under d) TSCG.
15 See P. Graig, The Stability and Governance Treaty: principle, politics and pragmatism, *European Law Review* 2012, p. 236 and 237.
16 See F. Amtenbrink, Legal Developments, *Journal of Common Market Studies* 2012, p. 144.

and TFEU, a lot of significant issues of institutional nature can be raised. However, it would beyond the scope of this paper to address them.[17]

From the analysis carried out above, it is apparent that the recommendations directed at the Member States concern serious matters. Therefore, it is important to examine which policy areas are covered in these guidelines.

2.2 The Country-specific Recommendations issued in 2012

The country specific guidelines are based on the Annual Growth Survey, which outlines the general state of economic affairs in the EU. The 2011 Survey inter alia stressed the need to reform the labour markets.[18] In this regard it should be noted that according to the Euro Plus Pact the unit labour costs in relation to productivity will be monitored.[19] Furthermore, it was argued that pension schemes should be reformed in order to make them more sustainable.[20] The 2012 Survey pointed to the need to take austerity measures in order to ensure the sustainability of the public budgets over time.[21] Furthermore, it argued that growth-friendly expenditure on, for example, education, research & innovation and energy should be prioritised.[22] Also the reform of the pension systems should be high on the agenda.[23] Furthermore, the administrative systems of the EU and its Member States are discussed.[24]

These Annual Growth Surveys have resulted in country-specific recommendations. First, the country-specific recommendations issued on the basis of the stability programmes submitted by the euro Member States, will be discussed. Subsequently, attention will be paid to the recommendations issued in relation to the convergence programmes, which are submitted by the non-euro Member States. I confine myself to the recommendations of 2012, as these recommendations are the most recent ones.

2.2.1 The recommendations directed at the euro Member States

The recommendations directed at all euro-countries will be discussed below. The recommendations are based on the plans submitted by the countries themselves to the Council.

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17 On these issues, see, for example, P. Graig, op.cit., p. 238 et seq.

18 See Annual Growth Survey: advancing the EU's comprehensive response to the crisis, COM(2011) 11 final, p. 5 et seq.

19 See the Conclusions of the Heads of State or Government of the Euro Area of 11 March 2011, p. 7, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119809.pdf.

20 See Annual Growth Survey: advancing the EU's comprehensive response to the crisis, COM(2011) 11 final, p. 6.

21 See Annual Growth Survey 2012, COM(2011) 815 final, p. 4-6.

22 See See Annual Growth Survey 2012, COM(2011) 815 final, p. 4.

23 See previous note.

24 See Annual Growth Survey 2012, COM(2011) 815 final, p. 12-14.

Austria

In its recommendation of 10 July 2012[25] the Council argues that Austria is on the path to more sustainable public finances, but criticises this country for not having made effective agreements with regional and local authorities on their fiscal relations.[26] In its recommendation the Council does not only discuss the level of public spending, but it also raises issues related to the national welfare state. Austria is criticised for not having raised the effective retirement age substantially.[27] Furthermore, the Council is concerned about the competiveness of the services sector in Austria.[28] One of the problems is the distortive behaviour of incumbent firms and the lack of progress made in opening-up liberal professions. It is even argued that the number of regulated professions is too high and that unjustified restrictions persist. Another problem is that no tangible progress is made on strengthening the position of the federal competition authority. Furthermore Austria is requested to restructure its financial sector, as its banks are exposed to huge risks.[29] One of the recommendations directed at Austria is to improve the organisation, financing and efficiency of health care and education.[30] Also of interest is the recommendation to stimulate further competition in the services sector.[31]

Belgium

The recommendation of the Council directed at Belgium starts with stressing the importance of the public debt level of this Member State (which is around 98% of its GDP).[32] Apart from this financial problem, the weak competition system of many industries, most notably the retail sector and the network sector, is criticised.[33] One of the problems of the network sectors is the strong position of the incumbents, while it remains unclear whether the Belgian competition authority will be sufficiently independent and have adequate sources despite the recent reform this authority has undergone. On top of that Belgium is recommended to reduce its expenditure on statutory pensions and health care schemes by, inter alia, rising the age of retirement.[34]

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25 Council Recommendation of 10 July 201 on the National Reform Programme 2012 of Austria and delivering a Council opinion on the Stability Programme of Austria, 2011-2016, OJ 2012 C219/1.

26 See para. 11 of the 2012 Recommendation issued at Austria.

27 See para. 12 of the 2012 Recommendation directed at Austria.

28 See para. 14 of the 2012 Recommendation directed at Austria.

29 See para. 15 of the 2012 Recommendation directed at Austria.

30 See recommendation 2 of the 2012 Recommendation directed at Austria.

31 See recommendation 6 of the 2012 Recommendation directed at Austria.

32 See para. 10 of the Council Recommendation of 10 July 201 on the National Reform Programme 2012 of Belgium delivering a Council opinion on the Stability Programme of Belgium, 2012-15, OJ 2012 C219/5.

33 See para. 15 of the 2012 Recommendation directed at Belgium.

34 See recommendation 2 of the 2012 Recommendation directed at Belgium.

Cyprus

The Council is of the opinion that Cyprus is on the right track in reducing its public debt, but given the wide exposure of its banking institutions to the Greek sovereign debt crisis, this country is facing considerable risks.[35] The Council expresses its regret that Cyprus has not addressed the inequality and inefficiencies in the health care sector.[36] Furthermore, Cyprus is encouraged to change is wage system[37] and to remove obstacles to free trade in various services sectors[38] in order to boost its competiveness. Another important issue is rising the age of retirement.[39]

Estonia

Estonia has a sizeable budget surplus in 2011 and considers plans in order to control the efficiency of public spending (by means of the introduction of a structural budget rule).[40] The Council recommends Estonia to reform the labour market by introducing incentives for low- and high-income earners receiving unemployment and parental benefits to take-up work again.[41] Strikingly, the Council urges Estonia to ensure the financial stability of the local authorities in order improve the provision of public services.[42] The Council expresses its concern about the difficulties these authorities encounter in universally delivering the necessary social, health, labour market, transport and educational services.[43]

Finland

The situation of public finances is in line with the GDP standards in Finland, but in the long run the sustainability of the these finances can be put under pressure due to the rapidly ageing of the population.[44] The Council contends that the productivity of public services has been in decline over the past decade in Finland and, therefore, it encourages this Member State to introduce more

35 See paras. 10 and 12 of the Council Recommendation of 10 July 201 on the National Reform Programme 2012 of Cyprus and delivering a Council opinion on the Stability Programme of Cyprus 2012-2014, OJ 2012 C219/13.
36 See para. 14 of the 2012 Recommendation directed at Cyprus.
37 See para. 15 of the 2012 Recommendation directed at Cyprus.
38 See para. 16 of the 2012 Recommendation directed at Cyprus.
39 See recommendation 3 of the 2012 Recommendation directed at Cyprus.
40 See para. 11 of the Recommendation of 10 July 201 on the National Reform Programme 2012 of Estonia and delivering a Council Opinion on the Stability Programme of Estonia, 2012-15, OJ 2012 C219/25.
41 See para. 12 of the 2012 Recommendation directed at Estonia.
42 See para. 15 of the 2012 Recommendation directed at Estonia.
43 See previous note.
44 See para. 10 of the Recommendation of 10 July 201 on the National Reform Programme 2012 of Finland and delivering a Council opinion on the Stability Programme of Finland, 2012-2015, OJ 2012 C219/28.

competition in shielded private and public service sectors.[45] Furthermore, the Council points to restrictive regulatory barriers in the services sector, the high market concentration in many sectors and the low level of the competition law fines.[46]

France

The Council argues that France should specify the measures to be taken in order to reduce its excessive deficit.[47] The Council argues that as regards the increase of the age of retirement France has failed to take sufficient measures.[48] Also, the Council opines that the measures taken by France in order to simply business environment has fallen short and more barriers to entry with regard to, for example, regulated professions have to be removed.[49] On top of that, the intensity of competition in the network sectors should be reinforced.[50] France is also advised to introduce a more simple and balanced taxation system, which shifts the tax burden from labour to other forms of taxation that weigh less on growth and competiveness.[51]

Germany

Germany's deficit was 1 % in 2013 and close to 0,5 % in the years to come, while its debt will be on a downwards path as from 2013.[52] Despite this excellent track record, the Council expresses its concern about the future costs increases in health care.[53] Therefore, Germany is advised to improve the efficiency of its health care sector, which is necessary in order to contain expected further expenditure increases.[54] On top of that the Council tells Germany to ensure effective spending by regional authorities in the areas of education and research.[55] Also Germany is advised to remove fiscal disincentives for low-income earners and second earners in order to stimulate them to return to the labour market.[56]

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45 See para. 11 of the 2012 Recommendation directed at Finland.
46 See para. 13 of the 2012 Recommendation directed at Finland.
47 See para. 10 of the Recommendation of 10 July 201 on the National Reform Programme 2012 of France and delivering a Council opinion on the Stability Programme of France, 2012-2016, OJ 2012 OJ219/31.
48 See para. 13 of the 2012 Recommendation directed at France.
49 See para. 17 of the 2012 Recommendation directed at France.
50 See para. 18 of the 2012 Recommendation directed at France.
51 See recommendation 3 of the 2012 Recommendation directed at France.
52 See para. 11 of the Recommendation of 10 July 201 on the National Reform Programme 2012 of Germany and delivering a Council opinion on the Stability Programme of Germany, 2012-2016, OJ 2012 C219/35.
53 See para. 12 of the 2012 Recommendation directed at Germany.
54 See previous note.
55 See previous note.
56 See recommendation 4 of the 2012 Recommendation directed at Germany.

Greece, Ireland and Portugal

It is clear that Greece, Ireland and Portugal are in deep financial problems. Money was lent to these countries through various mechanisms, such as the European Financial Stability Facility and the IMF, on the condition that ambitious, structural, financial and economic reforms were carried out. It is not a surprise that in its 2012 Recommendations the Council mainly confines itself to referring to the measures already adopted and to recommending implementing all these measures.[57]

Italy

Although the debt of Italy is very high, this Member State expects to have reduced the general government deficit below 3% by 2012.[58] Nevertheless, a lot of work must still be done. Tax compliance and governance must be improved.[59] As for the labour market, the wage-bargaining system must be improved as to allow for more flexible arrangements.[60] On top of that, the high youth unemployment should be addressed.[61] Italy is praised for the progress it has made in liberalising various services markets (such as the sector of professional services) but it is stressed that bottlenecks, especially in the energy and transport sectors, must be solved.[62] Moreover, administrative simplification and the improvement of the judicial system are needed, since the business environment is complex in Italy.[63]

Luxembourg

The government deficit and the public debt of Luxembourg are at a very low level. Nevertheless, the Council advises this Member State to implement rigorously its own budgetary strategy, as due to the ageing of the population public

57 See the Council Recommendation of 10 July 2012 on the National Reform Programme 2012 Greece, OJ 219/38; the Council Recommendation of 10 July 2012 on t he National Reform Programme 2012 of Ireland and delivering a Council opinion on the Stability Programme of Ireland, 2012-2015, OJ 2012 C219/44 and the Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Portugal and delivering a Council opinion on the Stability Programme of Portugal, 2012-16, OJ 2012 C-219/69.

58 See para. 10 of the Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Italy and delivering a Council opinion on the Stability Programme of Italy, 2012-2015, OJ 2012 C219/46.

59 See para. 12 of the 2012 Recommendation directed at Italy.

60 See para. 13 of the 2012 Recommendation directed at Italy.

61 See para. 15 of the 2012 Recommendation directed at Italy.

62 See para. 17 of the 2012 Recommendation directed at Italy.

63 See para. 18 of the 2012 Recommendation directed at Italy.

spending on pensions will raise.[64] The Council criticises the pension reforms adopted by the government of Luxembourg,[65] as these reforms have only had limited effect on the effective age of retirement. Furthermore, the Council argues that Luxembourg should take action in order to solve the problem of high youth unemployment.[66]

Malta

Although the deficit of Malta is not high, the Council advises Malta to take appropriate measures, as government expenditure could rise due to some economic problems.[67] In the view of the Council it is important that Malta develops a comprehensive active-ageing strategy.[68] Furthermore, given the mismatch between demand and supply of skills on the market the Council recommends Malta to improve its education system and labour market.[69]

The Netherlands

The Council states that the measures taken by The Netherlands will bring down the government deficit to below 3%.[70] However, the Council also notes that no measures for reducing the public debt are specified.[71] The plans of the Dutch government to rise the statutory age of retirement to 67 (in 2024) is welcomed by the Council. Furthermore, in order to improve the functioning of the labour market The Netherlands should reduce the fiscal disincentives for second-income earners.[72] Furthermore, the Council recommends the Dutch government to address the distortions on the housing markets by modifying the favourable tax treatment of home ownership, by introducing a more market-oriented pricing system for the rental market and, for social housing, by aligning rents with household income.[73]

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64 See para. 10 of the Recommendation of 10 July 201 on the National Reform Programme 2012 of Luxembourg and delivering a Council opinion on the Stability Programme of Luxembourg, 2012-2015, OJ 2012 C219/58.
65 See para. 11 of the 2012 Recommendation directed at Luxembourg.
66 See para. 13 of the 2012 Recommendation directed at Luxembourg.
67 See para. 10 of the Recommendation of 10 July 201 on the National Reform Programme 2012 of Malta and delivering a Council opinion on the Stability Programme of Malta, 2012-2015, OJ 2012 C219/61.
68 See para. 11 of the 2012 Recommendation directed at Malta.
69 See para. 12 of the 2012 Recommendation directed at Malta.
70 See para. 10 the Recommendation of 10 July 201 on the National Reform Programme 2012 of The Netherlands and delivering a Council opinion on the Stability Programme of The Netherlands, 2012-2015, OJ 2012 C219/88.
71 See previous note.
72 See para. 12 of the 2012 Recommendation directed at The Netherlands.
73 See recommendation 5 of the 2012 Recommendation directed at The Netherlands.

Slovakia

The Council asks Slovakia to take additional measures in order to correct the excessive deficit.[74] In the view of the Council Slovakia has not undertaken sufficient action to make its public finances sustainable. It is of great importance to reform the pension system.[75] Slovakia is criticised for its lack of action regarding the limited participation of older workers and women in the labour market.[76] Furthermore, it is argued that the overall quality and capacity of the public institutions remain weak.[77] Therefore, the quality of the public service should be strengthened.[78]

Slovenia

The Council notes that Slovenia has committed itself to bring the government deficit below 3%, which is in line with the rules of the SGP; however, it expresses also its concern that the targets set could not be achieved due to the lack of specification of the measures to be taken and the economic problems, such as the possible additional capital support operations that some Slovenian banks may need.[79] It is also argued that Slovenia should rise the effective age of retirement and to increase the employment rate of older workers.[80] Given the weak position of Slovenian banks the government is urged to take the required steps in order to ensure that sufficient capital buffers are built.[81] Furthermore, it is necessary to adjust employment protection legislation with regard to permanent contracts in order to reduce labour market segmentation.[82] Moreover, Slovenia should ensure, by co-operating with the social partners, that wage growth supports competiveness.[83] It may be assumed that this means that the government should prevent wage from rising (too much). On top of that the Council recommends Slovenia to open-up markets, especially those of professional services, and to improve the business environment by, inter alia, reforming its national competition authority.[84]

74 See recommendation 1 of the Recommendation of 10 July 201 on the National Reform Programme 2012 of Slovakia and delivering a Council opinion on the Stability Programme of Slovakia, 2012-2015, OJ 2012 C219/74.
75 See para. 12 of the 2012 Recommendation directed at Slovakia.
76 See para. 13 of the 2012 Recommendation directed at Slovakia.
77 See para. 16 of the 2012 Recommendation directed at Slovakia.
78 See recommendation 7 of the 2012 Recommendation directed at Slovakia.
79 See para. 10 of the Recommendation of 10 July 201 on the National Reform Programme 2012 of Slovenia and delivering a Council opinion on the Stability Programme of Slovenia, 2012-2015, OJ 2012 C219/747.
80 See para. 11 of the 2012 Recommendation directed at Slovenia.
81 See recommendation 3 of the 2012 Recommendation directed at Slovenia.
82 See recommendation 4 of the 2012 Recommendation directed at Slovenia.
83 See recommendation 7 of the 2012 Recommendation directed at Slovenia.
84 See recommendation 6 of the 2012 Recommendation directed at Slovenia.

Spain

The last years Spain was confronted with deep financial problems. It is therefore not a surprise that the Council is of the opinion that Spain should reduce its government deficit (below 3%) and its public debt (below 60% of its GDP).[85] Spain should adopt and implement the multi-annual budget plan for 2013-2014 and ensure that obligations imposed by this plan are also observed by its regional authorities.[86] Furthermore, Spain should implement its pension reform plans and ensure that the retirement age is rising in line with life expectancy.[87] Given the economic problems Spain is encouraged to ensure the sustainability of its banks and other financial institutions despite the fact that it has already made much progress in this regard.[88] Spain is urged to implement measures to tackle its high youth unemployment without delay.[89] A concern expressed by the Council is that professional services remain protected from competition in Spain and, therefore, the provision of these services should be reformed, which could increase the potential GDP.[90]

2.2.2 The Recommendations directed at non-euro Member States

Below a few recommendations directed at non-euro Member States will be discussed. Due to space restraints, only three non-euro countries will be included in the analysis. The countries selected are Hungary, Sweden and the UK. This selection will lead to a representative assessment given the different features of the countries concerned: Hungary is confronted with serious financial problems, the performance of Sweden is on a considerable high level despite the current economic downturn and the UK is one of the largest economies in the EU. The recommendations discussed below are based on the convergence programmes submitted by the Member States concerned.

Hungary

The Council is concerned that the plans proposed by the Hungarian government are not specific enough to reduce the government deficit and, therefore, it advises to specify the structural measures and not to rely too heavily on one-off measures.[91] Furthermore, the macroeconomic imbalances should be mitigated

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85 See para. 10 of the Recommendation of 10 July 201 on the National Reform Programme 2012 of Spain and delivering a Council opinion on the Stability Programme of Spain, 2012-2015, OJ 2012 C219/81.

86 See recommendation 1 of the 2012 Recommendation directed at Spain.

87 See recommendation 2 of the 2012 Recommendation directed at Spain.

88 See para. 13 of the 2012 Recommendation directed at Spain.

89 See para. 15 of the 2012 Recommendation directed at Spain.

90 See para. 17 of the 2012 Recommendation directed at Spain.

91 See recommendation 1 of the Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Hungary and delivering a Council opinion on the Convergence Programme of Hungary, 2012-2015, OJ2012 C219/40.

and the pubic debt ratio should be brought on a firm downward path.[92] Furthermore, Hungary is criticized for not having adopted effective measures for encouraging low wage earners and women to participate in the labour market.[93] Despite the progress made, Hungary is urged to improve its business environment and to take action with regard to its public administration, which ranks very low on many indicators of transparency and quality.[94] It should implement measures to reduce the administrative burden and it has to ensure that public procurement and the legislative process support market competition and a business-friendly environment for enterprises.[95] On top of that, it is contended that Hungary should make its public transport system more efficient and it has to increase the cross-border capacity of its electricity network.

Sweden

The deficit of Sweden is below 3 % and its debt ratio is not in excess of 60% of the GDP, and, therefore, Sweden is encouraged to preserve its sound fiscal policies.[96] Nevertheless, some potential problems are identified: Sweden is warned for the volatility of its housing market due to generous tax facility for ownership, whereas also a stringent rent regulation is in place.[97] The rather high level of household debt, resulting from this situation, needs attention. Another problem that Sweden should address is the low level of labour market participation of young workers and vulnerable groups.[98]

United Kingdom

As the government deficit of the UK is estimated at 4,4% in 2014-15 and its public debt will be at 94,7% of GDP around that time, this country is urged to take action in order to make public finance more sustainable.[99] Furthermore, the UK should address the high and volatile house prices and the high household debt by, inter alia, increasing house supply.[100] The Council expresses its concerns about the high rate of unemployment, especially with regard to young

92 See previous note.
93 See para. 13 of the 2012 Recommendation directed at Hungary.
94 See para. 15 of the 2012 Recommendation directed at Hungary.
95 See recommendation 5 of the 2012 Recommendation directed at Hungary.
96 See para. 9 and recommendation 1 of the Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Sweden and delivering a Council opinion on the Convergence Programme of Sweden, 2012-2015, OJ2012 C219/85.
97 See para. 10 of the 2012 Recommendation directed at Sweden.
98 See para. 11 of the 2012 Recommendation directed at Sweden.
99 See para. 10 and recommendation 1 of the Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of United Kingdom and delivering a Council opinion on the Convergence Programme of United Kingdom, 2012-2017, OJ2012 C219/91.
100 See recommendation 2 of the 2012 Recommendation directed at the UK.

workers.[101] Therefore, the employability of most notably young people has to be increased.[102] Another serious concern is related to child poverty: as the number of pour children rise, the UK should implement measures that facilitate access to childcare services.[103] On top of that, the UK should improve its energy and transport infrastructure in order to give a boost to the competiveness of its economy.[104]

2.2.3 Evaluation

It is clear from the analysis of the Council's recommendations that not only issues of sound public finance policy are addressed, but also other subjects. Many of the issues covered by the guidelines concern matters of the social welfare state. Statutory pension schemes are often included in the recommendations and, mostly, it is argued that the effective age of retirement should be raised. Furthermore, housing, educational matters and social services, such as childcare, play a role in the Council's analysis as well.

Two things catch the eye more in particular. In the first place, Member States are stimulated to introduce competition in schemes of the social welfare state in order to enhance the efficiency of the provision of the services concerned. So, competition is a key value that Member States should respect, also in matters concerning the social welfare state. In the second place, from time to time the Council criticises the level of the provision of particular welfare services. In other words, the Council applies a particular benchmark for the minimum level of quality and cover with regard to these services. What this level exactly entails, is not specified by the Council, but by criticising some Member States for not solving a particular social problem, it, at least, suggests that a EU approach to such a minimum level is being developed.

Apart from the social welfare state, it is clear that the Council also assigns great value to the public institutions of the Member States. The success of the economy and, therefore, the effectiveness of the measures for reducing the government deficit and the public debt are depending on the functioning of important public institutions such as the judiciary and authorities responsible for the (smooth) issuing of authorisations. The analysis of the recommendation shows that the Council relates the functioning of these institutions to the economic and financial performance of a particular Member State. The Council does also not shy away from giving instructions on how a Member State should organise its public institutions.

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101 See para. 12 of the 2012 Recommendation directed at the UK.
102 See recommendation 3 of the 2012 Recommendation directed at the UK.
103 See recommendation 4 of the 2012 Recommendation directed at the UK.
104 See para. 15 of the 2012 Recommendation directed at the UK.

In other words, important non-economic values are analysed and assessed in the light of economic assessments. The reason for intervening in these matters lies in ensuring the sustainability of the public finances of the Member States. In other words, the SGP has added an economic dimension to many policy areas, which are used to be governed by non-economic principles.

These findings should not come as a surprise. The SGP rules are reinforced and competiveness is one of the values that are at the heart of the six-pack measures. The drafting of these rules authorises the Council to develop an integrated and comprehensive approach to economic and non-economic matters, which are binding upon the Member States.

Below, it will be examined to what extent the classical areas of European economic law, i.e. free movement and competition law, allow for integrating economic areas with social welfare state matters.

3. EU INTERNAL MARKET LAW AND ECONOMIC GOVERNANCE

Establishing an EU internal market is one of the major objectives of the EU.[105] When it comes to economic governance in the EU, the role of the EU Internal Market is of great importance. The EU rules on the internal market should be divided into two categories: The Treaty provisions on free movement and the harmonisation measures adopted by the European legislature. Therefore, both these areas of EU law will be discussed below.

3.1 The evolving rules for free movement in the EU

The Treaty provisions on free movement are interpreted in an expansive way by the CJEU. Every restriction that could render market access more difficult is prohibited.[106] In the past, the case law on e.g. the free movement of services started with forbidding discriminatory measures,[107] but later the CJEU has extended its interpretation of the free movements prohibitions to every national measure restricting market access[108] and has also brought sensitive national

105 See Art. 3 (3) TEU and Art. 26 TFEU.

106 See, e.g., C. Barnard, *The Substantive Law of the EU*, Oxford: Oxford University Press 2010, p. 116, 354, 355, 416 and 600. Important landmark cases are Case 120/78, *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649; C-76/90, *Manfred Säger v. Dennemeyer & Co. Ltd* [1991] ECR I-4221; Case C-384/93, *Alpine Investments BV* v *Ministerie van Financiën* [1995] I-1141 and Case C-55/94, *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] I-4165 and case C-302/97, *Klaus Konle vs Republic Austria* [1999] I-3099.

107 See e.g, Case 2/74, *Jean Reyners v. Belgium* [1974] ECR 631.

108 See, for example, Case C-76/90, *Manfred Säger v. Dennemeyer & Co. Ltd* [1991] ECR I-4221; case C-384/93, *Alpine Investments BV* v. *Ministerie van Financiën* [1995] ECR I-1141 and case C-55/94, *Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

policy areas, such as health care,[109] within the ambit of the Treaty provisions on free movement.[110] Accordingly, many restrictions to services markets should be removed. As was apparent from the analysis of the six-pack rules, the social welfare states are also subject to scrutiny in the SGP. It is remarkable that national social security systems are not immune from the free movement rules as well. In cases such as *Freskot*[111] and *Kattner Stahlbau*,[112] the CJEU held that if a social security scheme concerns insurable risks, it should be assessed whether the national rules for these systems restrict free movement. In this regard, it should be noted that as a rule national social security systems are based on compulsory affiliation, and therefore, they have restrictive effects on the tree trade in, for example, services. It should be noted that if an insurance scheme does not concern insurable risks, EU free movement law does not apply and that, as a result, compulsory affiliation to these kinds of schemes do not lead to free movement issues. In general, it may be assumed that many statutory schemes escape from the free movement rules, as such schemes do not normally amount to interesting business cases for commercial operators, whereas supplementary schemes are likely to be subject to these rules, since a commercial enterprise may be interested in providing the cover of the risks concerned.

However, exceptions can be invoked in order to justify particular restrictions. These exceptions come down to the protection of policies of general interest, as acknowledged in the Treaty[113] or developed in the case law (overriding requirements of general interest).[114] In cases concerning social security schemes, the CJEU has acknowledged that objectives closely related to the social welfare state, such as social policy[115] and the financial equilibrium of social security schemes,[116] are interests accommodated in these exceptions. Nevertheless, only national measures that are proportionate are justifiable. As a result, the CJEU examined in some cases whether compulsory affiliation only con-

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109 See e.g. Case C-158/96, *Kohll* [1998] ECR I-1931; Case C-120/95, Decker [1998] ECR I-1831; Case C-157/99, *Smits en Peerbooms* ECR [2001] I-5473; Case C-385/99, *Müller-Fauré* ECR, [2003] I-4509 and Case C-372/04, *Watts* ECR [2006] I-4325.

110 On this development, see J.W. van de Gronden, The freedom to provide services, in: S.E. Gaines, B. Egelund Olsen & K. Engsig Sørensen, *Liberalising Trade in the EU and the WTO*, Cambridge: Cambridge University Press 2012, p.235-240.

111 Case C-355/00, *Freskot AE v. Elliniko Dimosio* [2003] ECR I-5263.

112 Case C-350/07, *Kattner Stahlbau v Maschinenbau- und Metall- Berufsgenossenschaft* [2009] ECR I-1513.

113 See, e.g., Article 36 TFEU and Article 52 TFEU.

114 In *Cassis de Dijon* (already mentioned) the CJEU accepted for the first time that these requirements (which were then referred to as 'mandatory requirements') were capable of justifying restrictions of free movement. In legal doctrine this exception is known as the Rule of Reason.

115 See, for example, *Freskot*.

116 See, e.g., Case C-158/96, *Kohll* [1998] ECR I-1931; Case C-120/95, *Decker* [1998] ECR I-1831; Case C-157/99, *Smits en Peerbooms*, ECR [2001] I-5473; Case C-385/99, *Müller-Fauré* [2003] ECR I-4509 and Case C-372/04, *Watts*, ECR [2006] I-4325.

cerned essential services, or whether compulsory affiliation also encompassed additional services, which could be disconnected from the essential social welfare services at issue.[117] If the latter was the case, the principle of proportionality was not met and, as a result, EU free movement law was infringed. So, if a scheme provides for the cover of risks that are not necessary for the performance of the social task assigned to a body managing the scheme concerned, the Treaty provisions on free movement are violated. In other words, market considerations play an important role in this assessment. If possible, the provision of a social service should be left to market forces.

Then again, it is clear from the outset that such a test is hard to apply. As a result, the CJEU is inclined to allow the Member States a wide margin of appreciation in sensitive areas such as the social welfare states.[118] Increasingly, in these areas the CJEU examines whether the national measures are drafted in a systematic and consistent way.[119] If this is the case, the CJEU is likely to decide that the proportionality principle is observed. Consequently, the design of national measure is of great importance. If these measures respect good governance-type principles, they are more likely to pass the proportionality test than if they do not do so. The principles of transparency[120] and fundamental rights[121] are applied in such cases by the CJEU.

This analysis shows that the free movement rules that aim at removing obstacles to free trade have also an impact on the social welfare state, as social security systems could fall within the scope of these rules. This finding is in line with the analysis of the SGP. However, EU free movement law is not allowed to cross the line of non-insurable activities. Risks that cannot be insured fall outside the scope of the Treaty provisions on free movement. In other words, only in so far as social security schemes have an economic dimension, they are subject to free movement scrutiny. This is a great difference with the SGP rules, as the

117 See para. 89 of Kattner Stahlbau.

118 See, e.g., Joined Cases C-570/07 and C-571/07, *José Manuel Blanco Pérez a.o. v. Consejerá de Salud y Servicios Sanitarios and Principado de Asturias*, 1 June 2010, n.y.r.; Case C-512/08, *Commission v. French Republic*, 5 October 2010, n.y.r.; Case C-46/08, *Carmen Media Group Ltd v. Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein*, 8 September 2010, n.y.r. and Case C-89/09, *Commission v. French Republic*, 16 December 2010, n.y.r.

119 See, for example, Case C-169/07, *Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung and Oberösterreichische Landesregierung* [2009] ECR I-1721.

120 See, for example, Case C-231/03, *Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti* [2005] ECR I-7287 and Case C-324/98, *Telaustria Verlags GmbH, Telefonadress GmbH v. Telekom Austria AG* [2000] ECR I-10745. On this case law see, e.g., B.J. Drijber & H. Stergiou, Public Procurement law and Internal Market law, *Common Market Law Review* 46 (2009), pp. 815-821.

121 See, e.g., Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609 and Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003] ECR I-5659.

application of these rules does not depend on the character of the national scheme concerned.

Then again, some interesting similarities between the SGP rules and free movement law should be pointed out. As was outlined above, EU free movement law forces Member State to make a distinction between social welfare services that can be left to the market and those that should be made subject to State control. Also, the SGP rules are interpreted as to encompass a duty for Member States to introduce competition in social welfare schemes, if possible.

Another interesting similarity is that the application of EU free movement law has given rise to the development of non-economic values, such as the principles of good governance. This finding matches with the conclusion that under the SGP rules attention is paid to the quality of public institutions. In consequence, the application and interpretation of market-oriented rules inspire the EU institutions to develop non-economic values. In addition, the case law of the CJEU on free movement law contains a huge body of precedencies, which enables the EU and its Member States to review national market interventions. Consequently, this case law could provide the Commission and the Council with guidance on how to carry out their tasks under the six-pack. More in particular, the experience gained in EU free movement law shows how trade-offs between market and non market values could be made. In which circumstances should priority be given to opening up a market and when should public interests prevail?

To conclude, the development of these two areas of law (the SGP and EU free movement law) also reveals a significant difference with regard to the institutional framework. EU free movement law has a longstanding tradition and its development is predominantly in the hands of the CJEU. The SGP rules are only very recently adopted and should still prove itself. In contrast, the Council and the Commission play a key role in the application and enforcement of the SGP roles, and to date the CJEU's role remains rather unclear.

3.2 Harmonisation and the social welfare state

It is a well-known fact that the EU has adopted many harmonisation measures in order to level out the disparities resulting from the different national legal systems. An important aim of these EU measures is to harmonise the competition conditions.[122] A very important example in this respect is the Services Directive.[123] It is striking that in EU documents published in relation to the euro crisis

122 P. Graig & G. de Burca, *EU Law. Text, Cases and Materials*, Oxford: Oxford University Press 2011, p. 582.

123 *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*, OJ [2006] L 376/36.

the importance of the good implementation of this directive is stressed.[124] It is clear that the full enforcement of the Services Directive will contribute considerably to the competiveness of a particular country. In this regard, it is striking that the Euro Plus Pact states that sheltered sectors should be opened-up and unjustified restrictions should be removed.[125] It goes without saying that enforcement not only means the transposition of the Services Directive in national acts but also applying it in practice. So, addressing the competiveness of a particular Member States under the six-pack rules leads to monitoring to what extent significant EU harmonisation measures, such as the Services Directive, are effectuated in the Member State concerned. In other words, if under the SGP rules the Council criticises national measures for restricting the provision of particular services, this is an indication that possibly a EU harmonisation measure, such as the Services Directive, is not complied with. As a result the Commission could start an investigation and consider starting an Article 258 TFEU procedure. Consequently, the SGP could give a considerable boost to the enforcement of EU free movement law.

However, a very important observation must be made in this respect. It is apparent from the TFEU that the EU has only limited competences in harmonising the competiveness of its Member States. Article 114 TFEU vests the EU with powers to adopt binding legislation for the internal market, but other provisions of the Treaty are crystal clear about its competences in social welfare matters. These competences are highly limited. It is up to the Member States to develop policies for high employment rates (Art 145-149), to adopt binding measures for social policy (Articles 151-161 TFEU), to organise education (Art 165-166) and to organise and deliver health care (Art 168 TFEU). In cases, such as *Tobacco Advertisement*,[126] the CJEU has held that it is only permitted for the EU to take action on the basis of Article 114 TFEU, in order to remove obstacles to free movement or to solve appreciable distortions of competition.[127] On the other hand, the *Tobacco Advertisement* case is also an extension of the Article 114 TFEU powers of the EU, as measures that predominately pursue objectives, such as the protection of public health, could be based on this Treaty provision, as long as they address appreciable effects on the fundamental freedoms or

124 See para. 7 of the Conclusions of the European Council of 24 and 25 March 2011, EUCO 10/1/11. In these conclusions the Member States are called upon to fully implement the Services Directives.

125 See the Conclusions of the Heads of State or Government of the Euro Area of 11 March 2011, p. 8.

126 Case C-376/98, *Germany v. European Parliament (Tobacco Advertisement)* [2000] ECR I-8419.

127 See para. 84 and 106 of *Germany vs European Parliament (Tobacco Advertisement)*. See also S.A. de Vries, *Tensions within the Internal Market. The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies*, Groningen: Europa Law Publishing 2006, p. 268.

competition.[128] Accordingly, the CJEU has extended the authority of the EU to take action in internal market matters. Nevertheless, it goes without saying that the EU is not allowed to cross the red line drawn by the Treaty. Some Treaty provisions clearly prohibit the EU to harmonise particular matters. For example, Article 168 (7) TFEU provides that the EU must respect the Member States' competences to organise and deliver health care. As the design of health care schemes is at the heart of organisation and delivery of care, it is not permitted for the EU to harmonise the national laws governing these schemes.

In sum, apart from a few exceptions the role of the EU is limited in social welfare matters. Consequently, approximation of the national systems of the welfare states cannot be realised under the TFEU, as it stands now. It is clear that one of the core issues of such systems is constituted by the benefits, which the citizens of a Member State are entitled to. Strikingly, under the surveillance mechanism introduced by the six-pack rules the Commission and the Council express their views as on how Member States should reform their social welfare states. The economic rationale for this is clear, as the level of benefits has a huge impact on government deficits and public debt. In term of division of powers, however, the measures taken under the SGP do nit sit well with the division of the competences between the EU's and Member States as envisaged by the TFEU. The EU cannot adopt a law obliging a Member State to change the key features of a particular social security system. But if a Member State fails to reform these features and, as a result, exceeds the maximum level of the government deficit set by the SGP rules or worsens macroeconomic imbalances, it risks being fined by the EU. The recommendations adopted under the SGP are not permissive, despite their misleading name. In sum, the classical division of powers as laid down in the TFEU is put under pressure by the economic governance rules of the six-pack.

4. EU COMPETITION LAW AND ECONOMIC GOVERNANCE

It goes without saying that the Treaty provisions on competition are capable of improving the competiveness of the EU Member States. Compliance with these provisions will help Member States to make their markets and economies more efficient. The competition rules laid down in the Treaty prohibit undertakings from engaging in anti-competitive practices. It goes without saying that good track records in enforcing these rules considerably contribute to the competiveness of the EU and its Member States. The Commission plays a key role in enforcing the European competition rules. Furthermore, in 2004 the enforcement of the competition rules was decentralised. Regulation 2003/1[129] obliges the

128 See S.A. de Vries, *op.cit.*, p. 268 and 269.

129 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.

national competition authorities to apply the European competition rules to business practises influencing the trade between the Member States. Consequently, in the EU there is a multi-layered network composed of the Commission and the national competition authorities, which are responsible for the enforcement of the competition rules.

Both the Commission and the national competition authorities publish annual reports on the state of competition and the compliance with the competition rules. These reports give very valuable information on the competiveness of the European markets and therefore, they could be used in the supervision of the public budgets and the macroeconomic developments introduced by the Six-pack.

The point is, however, that SGP recommendations address both the functioning of national markets and national welfare states. National security systems play a key role in national welfare state policies. Accordingly, it should be examined to what extent the competition rules apply to the social security systems. Therefore, below the concept of undertaking will be explored and then it will be discussed how the competition rules are applied to social security systems.

4.1 The concept of undertaking and social security systems

The competition rules apply in so far as the entities concerned are undertakings for the purposes of European competition law. It is settled case law that every entity engaged in an economic activity is an undertaking[130] and that the offering of goods or services on the market amounts to such an economic activity.[131]
Do the competition rules apply to the institutions that play a key role in social welfare states, i.e., the bodies managing social security schemes? It is apparent from cases, such as *AOK*[132] and *AG2R*,[133] that, as long as the principle of solidarity is predominant and the managing bodies of the scheme under review are subject to substantial State control, competition law does not apply. It may be assumed that solidarity is predominant when the level of benefits is fixed in national legislation.[134] As a result, if no substantial competition elements are

130 See for example case C-41/90, *Höfner* [1991] ECR I-1979.

131 See e.g. case 118/85, *Commission v. Italy* [1987] ECR 2599.

132 See Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband et al. v. Ichthyol-Gesellschaft Cordes, Hermani & Co. et al.* [2004] ECR I-2493. See also, for example, joined cases C-159/91 and C-160/91, *Christian Poucet v. Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* [1993] ECR I-637 and C-355/01, *AOK Bundesverband et al. v. Ichthyol-Gesellschaft Cordes, Hermani & Co. et al.* [2004] ECR I-2493 and Case C-205/03P, *FENIN v. Commission* [2006] ECR I-6295.

133 See Case C-437/09, *AG2R Prévoyance v. Beaudout Père et Fils SARL*, 3 March 2011, n.y.r. See also Case C-350/07, Kattner *Stahlbau GmbH v. Maschinen- und Metall-Berufsgenossenschaft* [2009] ECR I-1513.

134 See para. 52 of *AOK*.

introduced in a social security scheme, the bodies managing these schemes are not undertakings within the meaning of EU competition law. Accordingly, competition law cannot be used in order to force Member States to make their social security schemes more competitive. It is up to the national legislature to decide on the role competition plays in such schemes. As soon as the national legislature decides to introduce competition with regard to the benefits, which its citizens are entitled to, the competition rules kick in and the effective operation of the scheme concerned can be assessed in the light of these rules.

In this respect, it should be noted that recently the CJEU has slightly changed its approach to the concept of undertaking. In *AG2R*, it has clearly set out what this new approach entails. Apart from solidarity, the management of the social security scheme concerned should also be subject to substantial State control. If not, the managing bodies will not escape from EU competition law. Accordingly, as soon as a scheme is out of control of the State, the competition rules come into play. The CJEU has stretched-up the applicability of the Treaty provisions on competition. In *AG2R*, the CJEU contended in clear wording that the two requirements of solidarity and substantial State control are cumulative: if a scheme fails to meet one of them, the managing body is an undertaking. Consequently, as soon as a national legislature decides to place the management of a social security scheme at arm's length of the State or to allow for competition, the bodies managing these schemes are subjected to competition law.

4.2 The competition rules and social security systems

The applicability of EU competition law implies that bodies managing the social security schemes concerned should observe Articles 101 and 102 TFEU and the EU merger control rules. It would be beyond the scope of this paper to fully discuss these rules. However, in comparison with the EU free movement rules the Treaty provisions on competition has undergone a different development. The last 15 years the need of an economic approach to EU competition law is frequently advocated and pushed. Especially, the Commission has aligned its policy with the modern thinking on efficiency and consumer welfare.[135] It is undeniable that a formalistic interpretation of the competition rules would lead to inefficient results in many cases. Nevertheless, it should be noted that now agreements that used to be regarded as restrictive are permitted, if they do not cause substantial harm to competition. This stands in contrast with the free movement rules, which are increasingly interpreted in an expansive way, as was outlined in section 3. Whereas the room for manoeuvre for the Member States have been narrowed down, firms now have more leeway for their com-

135 See A. Jones & B. Sufrin, *EU Competition law. Text Cases and Materials*, Oxford: Oxford University Press 2011, p. 45.

mercial policies. In relation to the SGP rules this is an interesting development. The free movement rules call into question national legislative acts that restrict market access and have adverse effects on efficiency. In general, the competition rules do not ban efficient commercial practices. As efficiency is also a general concern in the SGP recommendations, it is safe to conclude that this concern is an important value in EU law.

What approach is developed in EU competition law to national security systems that amount to economic activities? The two most significant rulings concerning social security and EU competition law concern the *Albany* cases[136] and *AG2R* (already mentioned). The first cases are about supplementary pension schemes, whereas in the last case a supplementary health care scheme was at issue. It is apparent from these cases that the CJEU assesses social security schemes (constituting economic activities) under Article 106 (2) TFEU. Pursuant to this provision undertakings entrusted with the operation of a Service of General Economic Interest (hereafter SGEI) may restrict competition, if this is necessary with a view to the proper implementation of this task. In this respect, it should be noted that it is settled case law that not only the SGEI providers can invoke this exception but also Member States are entitled to do so.[137]

Correspondingly, the management of an 'economic' social security system is framed as a SGEI and competition restrictions are permitted, in so far as they are necessary. As Article 106 (2) TFEU regards, two important tests must be carried out: 1) a SGEI mission should be entrusted by the State to the enterprise concerned[138] 2) without restricting competition this SGEI provider cannot perform its task under economically acceptable circumstances.[139] In this respect, the CJEU has pointed out that restriction of competition is not justified if the SGEI mission at state concerns services that can be dissociated from the SGEI concerned and satisfy specific needs of economic operators.[140] How did the CJEU apply these tests to the two social security systems in question?

In *Albany* social partners had set up a supplementary pension scheme by means of a collective agreement. The management of this task was assigned to a Fund. Pursuant to Dutch law, affiliation to this Fund was compulsory. The CJEU found that the body managing the supplementary pension scheme was entrusted with a SGEI mission as it fulfilled an essential social function '... by rea-

136 Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Joined cases C-115/97, C-116/97 and C-117/97, *Brentjens' Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025 and case C-219/97, *Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I-6121.

137 See for example, Case C-203/96, *Chemische Afvalstoffen Dusseldorp v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075. See also A. Jones & B. Sufrin, *op. cit.*, p. 599.

138 See e.g. case C-159/94, EDF [1997] ECR I-5851.

139 See Case C-320/91, *Criminal proceedings against Paul Corbeau* [1993] ECR I-2533.

140 See para. 10 of *Corbeau.*

son of the limited amount of the statutory pension ...'.[141] What is striking about this reasoning is that it not only contains the CJEU's view on the level of benefits of the Dutch statutory pension scheme[142] but also fails to pay attention to the requirement of a clear act of entrustment of a SGEI task. Probably, the CJEU derived the special task from the exclusive right granted to the managing body concerned. It is apparent from the facts of the *Albany* cases that under Dutch law the management of supplementary pension schemes is granted as an exclusive right to particular providers. The CJEU also applied the test of the economically acceptable circumstances. It contended that restriction of competition was necessary because otherwise the progressive departure of 'good risks' would leave the managing body involved with an increasing share of 'bad risks'.[143] By stressing the risk profiles of the affiliates the CJEU showed its willingness to solve a serious market failure, i.e., adverse selection and the problem of cherry picking resulting from it. Unfortunately, the CJEU did not examine whether some services could be dissociated from the SGEI mission concerned. Then again, it cannot be ruled out that this was not necessary as the exclusive right to provide the supplementary pension scheme was well defined.

In *AG2R* collective partners had also set up a supplementary scheme, which in this case concerned the cover of health costs. As the applicable French laws were differently drafted from the laws at issue in the Dutch *Albany* case, the body, to which the task of the management of the scheme was assigned, did not have an exclusive (or special) right. The CJEU contended that this body was entrusted with a SGEI task, as the scheme at issue was characterized by a high degree of solidarity and particular constraints were imposed in order to ensure access for all.[144] Consequently, the entrustment was derived from the role that solidarity played in the scheme and the obligations that were imposed on AG2R. What is striking, is that in this approach no explicit act of entrustment is required. The problem is that, as a result, the boundaries of the SGEI mission are not clear. Therefore, it was difficult to carry out a good proportionality test. The CJEU found that the competition restrictions caused by the SGEI mission at stake were justifiable, as persons with a low risk profile should be prevented from taking insurance policies from other companies, which would leave the managing body with a too large share of persons with a high risk profile. Again, the problem of adverse selection and cherry picking was addressed. However, it is was not clear at all whether the cover provided by the managing body was too broad, since the boundaries of the SGEI mission were not well

141 See para. 150 of *Albany*.
142 Apparently, this level was too low in the eyes of the CJEU.
143 See para. 108 of *Albany*.
144 See para. 17 of *AG2R Prévoyance*.

defined. In other words, it remained unclear whether particular insurance services could be dissociated from the core task of the managing body concerned. In sum, the experience with applying the competition rules to social security systems is very limited at present. Nevertheless, the these rules will become relevant, if Member States introduce more competition in these systems in order to make them efficient, as is required in many recommendations issued by the Council under the SGP rules. In that case, it may be expected that many competition distortions will be identified, as compulsory affiliation is at the heart of many social security schemes and prevents other economic operators from providing similar cover. Consequently, the compatibility with EU competition law will then be highly depended on the interpretation of Article 106 (2) TFEU. It is worrying that to date no coherent approach to social security systems and SGEI is developed.

5. CONCLUSIONS

Competition is a central value in the EU rules on the SGP, the internal market and competition law. Therefore, this is an overarching value that ties the SGP measures on the one hand and the internal market and EU competition rules on the other hand together. One could consider this as a first step towards one comprehensive system of European economic law. An important element of competition is the enhancement of efficiency and as a result cost reductions, which leads savings on the public budgets, is also a significant component.

It is striking that all three areas of European economic law have impact on the national social welfare states. But the most sweeping steps are taken in the context of the SGP rules.[145] From the analysis of this paper it is apparent that all aspects of the social welfare states are targeted and the Member States are recommended to introduce competition in various social security systems in order to enhance their efficiency. These steps are, however, not isolated from the developments that have taken place in EU internal market and competition law. More in particular, the CJEU has not shied away from bringing social security systems within the ambit of the Treaty provisions on free movement and competition. As a result, by following the SGP recommendations the Member States are forced to observe these provisions with regard to their efficiency-based social security systems. In my view, an important transformation that could result from the SGP rules is the increasing importance of the free movement and competition rules for the social welfare states and, more in particular, for the social security systems. Admittedly, it is too early to draw this conclusion, as the six-pack measures were adopted only one year ago. But the 2012 set of recommendations gives an intriguing impression of the policy areas that are included in the economic analyses.

145 Cf. D. Adamski, *op.cit.*, p. 1363.

It cannot be excluded that the SGP could lead to competence creep into the social welfare states, as its point of departure is an integrated approach to the economic and financial state of affairs in a Member State. As the competiveness of a particular country does not only depend on the enforcement of the competition rules, but also on matters, such as the organization of social security, the SGP recommendations will, inter alia, be aimed at tackling important problems of the social welfare states. As a result, the division of competences between the EU and its Member States, as envisaged by the TFEU, will evolve. This is a great incentive for the EU institutions, such as the Commission and the CJEU, to interpret and to apply the competition and internal market rules even more expansively than they do now. Accordingly, the emergence of a coherent set of European economic rules, that integrate EU Competition and Internal Market law with the SGP rules, could have far-reaching consequences for national welfare policies.

It is important that consequences resulting from the application of the SGP rules are anticipated adequately. Although the CJEU has handed down some brave judgments, to date there is not much case law on how to apply the EU free movement and competition rules to the national welfare states. Consequently, it is necessary to further develop an EU approach to the application of these rules to the national welfare states.

Or to put it differently, it is inevitable that such an approach will be developed. The institutions involved in the enforcement of the SGP, free movement and competition rules are forced to come up with such an approach, as they are confronted with the question how to balance competition and social welfare state concerns. In my view, traces of the development of such an approach are already discernible in the current SGP recommendations and the case law on the competition and internal market rules.

As already pointed out, competition and efficiency are values acknowledged in EU law. But also values that are not, or at least not primary, of an economic nature are recognised in European economic law as well. Solidarity and access for all to essential services were, for example, mentioned both in the SGP recommendations and the CJEU's case law on competition and the internal market. In other words, European economic rules are used to develop social principles and values. Under EU internal market and competition law the spill over-effect was considerable between these rules on the one hand and the social welfare state on the other hand. With the SGP rules in operation, the floodgates are open.

Therefore, the economic and social values need to be elaborated on in order to develop a comprehensive set of economic rules that do justice to the highly competitive social market economy, on which the EU is built according to Article 3 (3) TEU.

To conclude, it should be noted that democracy is a very important value of EU law. The analysis carried out in this paper shows that the rules that determine the direction of the national welfare states in Europe are developed by EU institutions, such as the Council, the Commission and the CJEU. The involvement of the European Parliament and the national parliaments is very limited. This is a great concern, as the democratic legitimacy of the newly emerging area of EU economic law is at stake. Therefore, the development of a comprehensive set of values should be put high on the agenda in the years to come and absolute priority should be given to making the process of saving the euro and enhancing the competiveness of the EU more democratic.

In sum, much work needs still to be done, but the EU measures taken in the wake of the current financial and economic crisis could lead -not wholeheartedly, but rather step by step, pushing reluctant Member State with great budget deficits forward- to an even closer Union.