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# Fine-tuning the Jurisprudence: The ECJ's Judicial Activism and Self-restraint

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**Abstract**

*Legal and political science scholars omit an important variable in explaining compliance with ECJ rulings: the fine-tuning in the follow-up cases. This paper shows with the Kohll/Decker social policy jurisprudence that, first, the Court applied the principles of free movement of services and goods to the Luxembourg health care system in the initial rulings in this series of cases and thereby challenged the institutional configuration of national welfare states. Step by step the ECJ extended the legal principles to other Member States and to similar cases. At the same time, however, the Court exercised self-restraint by narrowing the principles and by thus limiting the impact of its decisions largely to the less costly ambulatory sector. This fine-tuning of the jurisprudence influenced implementation processes and ultimately facilitated Member State compliance.*

**Keywords**

*Compliance, European Court of Justice, fine-tuning of rulings, judicial activism, judicial politics, judicial self-restraint, Kohll/Decker jurisprudence*

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## 1. INTRODUCTION<sup>1</sup>

Paul Pierson (2004) and others (see e.g. Abbott 2001; Mahoney and Rueschemeyer 2003) (re-) introduced the concept of time into political science in the early 2000s. Pierson claimed that while many important social processes unfold over longer periods of time, most scholars focus on the immediate (2004: 79). This paper will pay attention to this concern: It will start from the immediate (two leading European Court of Justice rulings) and examine the long-term process they caused (the fine-tuning of these two rulings).

The long-term process I will investigate started in April of 1998, when *Kohll* and *Decker*<sup>2</sup>, two key European Court of Justice (ECJ) social policy rulings, were decided. Initially, all EU Member States that had commented on these cases in the written and oral proceedings before the Court refused the implementation of the legal principles of these rulings (see e.g. Palm et al. 2000; Jorens and Hajdú 2005). The recurrent argument used was that these leading cases unjustifiably interfered in the organisation of domestic social protection systems, a domain reserved exclusively to EU Member States. Among other Member States, Germany, France and the United Kingdom (UK) refused to accept that the rulings, which were aimed at Luxembourg's social security system, were transferable to their own systems. The French government even went so far as to instruct its insurance funds to disregard the rulings altogether.<sup>3</sup> Concomitantly to the rejection by Member State governments, political and legal science accounts postulated – based on the doctrinal content of *Kohll* and *Decker* – the destruction of domestic social protection systems (see e.g. Ferrera 2005; Leibfried 2005; Martinsen 2005a). However, *Kohll* and *Decker* were only the beginning; follow-up rulings fine-tuned these cases.<sup>4</sup> Fine-tuning will be understood here as the extension and/or limitation of the scope of judicial doctrines elaborated in a leading case in the follow-up rulings.

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<sup>1</sup> I would like to thank the following persons for their comments and insights: Gerda Falkner, Stephan Leibfried, Klaus Sieveking, Reinhard Slepcevic and Peter Slominski.

<sup>2</sup> Case C-158/96, *Raymond Kohll vs. Union des Caisses de Maladie* [1998] ECR I-1931; Case C-120/95, *Nicolas Decker vs. Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

<sup>3</sup> See a circular of the *Ministère de l'Emploi et de la Solidarité* from 29 June 1998, in possession of the author.

<sup>4</sup> The series of rulings taken together will be referred to in short as the “*Kohll/Decker* jurisprudence”.

Despite the initial obstruction to the principles enshrined in *Kohll* and *Decker*, Germany, France and the UK incorporated them into their social codes in a later stage. It turned out that Member States did not have to alter core features of their social protection systems; the actual impact of the rulings was therefore rather modest when compared to the one postulated. What role did the ECJ's fine-tuning in the follow-up rulings to *Kohll* and *Decker* play in all this? Did the fine-tuning interact with domestic implementation efforts?

The present paper transcends existing models of judicial politics, understood as the impact of a court's case law on how legislators and administrators take decisions. Conventional models of judicial politics have conceived the ECJ either as a strategic rational actor that tries to accommodate Member States' preferences (see e.g. Garrett 1995; Garrett et al. 1998; Alter 2001; Hartley 2007), or as an autonomous judicial actor that exercises considerable discretion *vis-à-vis* Member States (see e.g. Burley and Mattli 1993; Stone Sweet 2004; Cichowski 2007). I argue that the ECJ in the *Kohll/Decker* jurisprudence oscillated between "judicial activism" and "self-restraint". According to Hjalte Rasmussen, judicial activism "connotes regular judicial policy-making in pursuance of policy-objectives which usurp the rule and policy-making powers of other branches of government" (1998: 26–27). The concept of judicial self-restraint is "commonly used to designate the situation in which judges defer their judgements to some extent ... to the political branches of government" (Rasmussen 1986: 33). I claim that the ECJ is both a strategic and an autonomous actor. It enjoys considerable autonomy from Member State interference and has its own agenda of applying EC law uniformly across Member States. At the same time, its autonomy is constrained by Member State interests, especially when their core functions are affected. Ultimately, the Court wants to ensure that Member States accept its rulings and incorporate them in their laws and administrative practices.

If we want to observe the (partially contradicting) aims of applying EC law uniformly and of guaranteeing compliance at work, we have to take a look at three distinct layers of judicial politics. The first layer consists of a leading case (or cases) in which the ECJ decides a

question of principle and lays down the material<sup>5</sup> doctrines with which the question at hand has to be answered. The second layer consists of an ensuing process of fine-tuning the principles developed in the leading case in follow-up rulings. Even though, outside the formal structure of interaction between the ECJ, national courts, the European Commission and Member State governments<sup>6</sup>, communication is categorically denied<sup>7</sup>, they engage in a subtle “dialogue” via the fine-tuning process. If the ECJ has delivered a key ruling for a specific question in a specific country, further questions about its actual scope remain open. To close this gap, national courts submit additional preliminary questions. This may either concern another Member State, potentially with a different system, or it may regard a different question related to the first ruling. The ECJ in the course of fine-tuning its decisions then applies the principles elaborated earlier to other Member States and other case constellations. At the same time, it further refines the already existing principles and adds new ones. This process of fine-tuning the jurisprudence leads to the third layer of judicial politics: interaction of ECJ rulings and implementation processes at the Member State level. The repeated interaction between national courts (as well as Member State governments in the proceedings) and the ECJ allows the latter to steadily refine its earlier rulings. In doing so, the Court is able to accommodate concerns and criticism by Member State governments. In turn, the fine-tuning may help to overcome Member State non-compliance, it may help governments and national courts to better understand the meaning and impact of the ECJ decisions, and it may allow governments to draw horizontal conclusions for their implementation.<sup>8</sup>

In the remainder of this paper I proceed as follows: First, I elaborate the different conceptualisations of judicial politics and their differences along the lines of legal uncertainty and its consequences, Member State preferences and ECJ precedent (1). Second, I explain how

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<sup>5</sup> I adopt the distinction between structural and material doctrines by Joseph Weiler. For him, a structural doctrine lays down a “normative framework that purports to govern fundamental issues, such as the structure of relationships between Community and member states,” whereas a material doctrine does “the same in relation to, for example, the economic and social content of that relationship” (1994: 512).

<sup>6</sup> See Section 4 EC Treaty, as well as the statute and the rules of procedure of the ECJ. For a detailed description of the procedural framework in preliminary rulings see Granger (2004: 5–7).

<sup>7</sup> Interviews in the framework of my doctoral thesis with an ECJ advocate general as well as with staff from the ECJ have confirmed this.

<sup>8</sup> With horizontal conclusions I do not only mean that Member States apply the principles elaborated by the ECJ to the same cases in their system but also to other similar cases.

the ECJ fine-tuned the *Kohll/Decker* jurisprudence and, in doing this, how it oscillated between activism and self-restraint (2). In section three, I present the fine-tuning and its impact on implementation in three Member States: France, Germany and the UK (3). The fourth part deals with my own conceptualisation of judicial politics (4). Finally, I conclude my paper with a short summary of the findings and their consequences for how we assess the impact of ECJ rulings on Member States.

## 2. DIFFERING MODELS OF JUDICIAL POLITICS

EU scholarship has brought forward several explicit and implicit models of judicial politics. These models differ along three lines: first, whereas for some authors legal uncertainty caused by ECJ rulings precludes policy reform, for others it is the very condition for understanding compliance. Second, according to some, the ECJ has developed a fragmented and incoherent case law, while for others the Court method was systematic. Third, some authors conceive the ECJ as a rational strategic actor that tries to accommodate political interests, whereas others see it as an autonomous judicial actor that has considerable discretion *vis-à-vis* Member States. These differences between the models of judicial politics will be further elaborated below.

Classical authors in legal philosophy and legal sociology such as Hans Kelsen (1992, reprint), Herbert Hart (1961) and Niklas Luhmann (1987, 3rd edition) have debated at length the problem of the indeterminacy which is imminent in law. EU scholarship has taken up this debate. Alec Stone Sweet held that “adjudication functions to reduce the indeterminacy of legal norms through (a) use, that is, argumentation, interpretation, application, and (b) the propagation of argumentation frameworks” (2004: 38). I argue that adjudication also causes legal uncertainty<sup>9</sup>, at least in the short run. This is the case for ECJ rulings that very often create a high degree of uncertainty for EU Member States as to how to implement them as well as for national courts as to how to apply them. This legal uncertainty is in principle similar to the one caused by an EU directive. Nevertheless, the degree and the kind of uncertainty are different. Usually, the room for manoeuvring in the case of a directive is more circumscribed than it is in a Court ruling, where the case at hand is quite clear, but the broader implications are disputed. Whereas a directive is typically formulated in a general way

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<sup>9</sup> Some authors speak of the “indeterminacy” of law (see e.g. Stone Sweet 2004; Blichner and Molander 2008). According to Lars Blichner and Anders Molander, “[i]ndeterminacy arises when it is unclear what rules to apply to a certain case or how a certain rule is to be interpreted” (2008: 45). Fritz Scharpf spoke of “[t]he ‘creative ambiguity’ created by the Courts’s dicta” (1997: 7). I prefer to use the term “uncertainty” because I do not study the law in a proper sense but ECJ rulings which cause uncertainty as to how to implement and apply them.



and binds all Member States, a Court ruling often relies on a general principle and applies it to a specific country and a specific case at hand.<sup>10</sup>

## 2.1. Legal Uncertainty and its Consequences

Scholars who assess the consequences of legal uncertainty – resulting from ECJ rulings – for compliance come to quite different conclusions. Lisa Conant argues that legal uncertainty has rather a “negative” effect on implementation. According to her, “[u]ncertainty about the extension of legal principles across cases precludes rapid policy reform” (2003: 52). In contrast, many authors state that legal uncertainty is important in understanding ECJ rulings and their implementation. Susanne K. Schmidt claimed that the Court consciously establishes fuzzy new principles of law. In a longer series of cases, the ECJ is then able to see the reactions and preferences of national courts, judicial commentators and politics in general, and can, if necessary, modify its jurisprudence (2004: 36). According to Schmidt, the implications of a ruling have to be translated to other cases in the follow-up jurisprudence in which the real scope of its doctrines is determined. This facilitates the acceptance of rulings. When follow-up cases are judged after a certain lapse of time, the original doctrines are already established (ibid: 37). Similarly, Ulrich Everling found that whenever the ECJ enters new terrain, it first decides in very general terms and then specifies, complements, restricts or rectifies its doctrines, dependent on the legal discussion and emerging problems (2000: 224). Trevor C. Hartley observed a pattern of the institutionalisation of legal principles elaborated by the ECJ:

A common tactic [of the ECJ, AJO] is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle, but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many

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<sup>10</sup> It is still contested whether ECJ decisions exert a formal binding effect *inter partes* or *erga omnes*. However, it is obvious that there is an informal binding effect, which generally makes national courts and EU Member States respect the ECJ principles. Some Member States have established centralised mechanisms, which are used to monopolise the interpretation of ECJ rulings and to decide on the further implications of those rulings. For instance, the Netherlands and the UK have such mechanisms. In the Dutch administration, every ECJ decision is analysed according to a fixed procedure by a group of civil servants that looks at the possible effects for national policy and legislation. Then a *fiche* is drawn and distributed among high civil servants and, if necessary, transmitted to the cabinet. This formal system amounts to an acceptance of the *erga omnes* effect of ECJ decisions.

protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed (2007: 76).

However, this rather prudent approach by the ECJ is – according to Hartley – only employed in cases in which its decisions present a challenge to the interests of national governments (ibid).

## 2.2. ECJ Rulings and Precedent

The ECJ, like all legal institutions, relies to a certain extent on precedent. The scope of this reliance on precedent, however, is debated; different conceptualisations of precedent are brought forward. On an abstract level, according to Stone Sweet, precedent allows judges to decrease indeterminacy (2004: 32). Formal argumentation frameworks, that is discursive doctrinal structures, “condition how litigants and judges pursue their self-interest, social justice, or other values through adjudication” (ibid: 34–35). On a more concrete level, according to Thorsten Kingreen, the ECJ inches its way forward in the area of free movement of services and social policy. Therefore, every interpreter of the jurisprudence on the basic freedoms runs the risk of reading too much into the ECJ rulings and of then deducing general statements which are changed in the follow-up jurisprudence (2003: 368). Vassilis Hatzopoulos noticed a “fragmented and apparently incoherent case law” of the ECJ specifically in the field of free movement of services. According to him, this “might be the result of the current tendency of the Court to give specific answers to specific questions, rather than to deliver generally applicable rules” (2000: 52–55).

Contrary to these views, Dorte Sindbjerg Martinsen depicted “a Court that applies a systematic method of ‘gap-filling,’ where the line of a legal principle is gradually being drawn and extended to a new policy field.” For Martinsen, “[t]he full scope and consequence of the legal deduction is revealed from case to case and, in the case of healthcare, evidently remains in a formative process” (2005b: 1036). Martinsen cited the two *Pierik*<sup>11</sup> decisions by the ECJ in the 1970s as evidence that “a judicial doctrine in formation ultimately must be politically

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<sup>11</sup> Case 117/77, *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland vs. G. Pierik* [1978] ECR 825; Case 182/78, *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland vs. G. Pierik* [1979] ECR 1977.

supported, and that, if individual litigation proceeds excessively in terms of financial and political implications, the member states will seek to mobilise joint action against the Court's interpretative course" (2005b: 1038).

Precedent not only shapes the behaviour of the ECJ but also that of actors before the Court. Margaret McCown found that for legal interinstitutional disputes between the European Parliament and the Council of Ministers, "the dynamics of precedent-based decision-making [by the ECJ, AJO] come to constrain even quite hostile actors" (2003: 978). To win a case, actors before the Court advance much of the precedent's arguments instead of fighting against the original case:

Litigants respond quite defensively to ECJ decisions: rather than devoting immense resources to challenging entire decisions, they tend to advance qualifying arguments in which they simply try to distinguish their case from a disliked precedent. In doing this, however, they are left implicitly acceding to the precedents (ibid: 980).

### **2.3. ECJ Rulings and Member State Preferences**

The question of whether the ECJ defers its rulings to Member State preferences is contested. For those who accept the political nature of ECJ rulings the actual extent of this deferral is debated.

Geoffrey Garrett outlined a rational model for government-ECJ interactions and conceived the ECJ as a strategic actor in this game. Its power "depends critically on the continuing acquiescence of national governments. As a result, the court's judicial activism is constrained by the reactions they [the justices, AJO] anticipate from [powerful, AJO] member governments to their decisions" (1995: 173). Garrett, Kelemen and Schulz investigated three lines of cases (non-tariff barriers to agricultural trade, equal treatment, and state liability for the violation of EU law), in which "Court activism has been tempered by the preferences of the member governments" (1998: 174). Also Karen Alter advocated a strategic and political role of courts. According to her,

[c]ourts act strategically vis-à-vis other courts, and vis-à-vis political bodies, calculating the political context in which they operate so as to avoid provoking a response which will close access, remove jurisdictional authority, or reverse their decisions (2001: 46).

In contrast, according to Stone Sweet, the ECJ possesses considerable discretion. This is so for three reasons: the Court received delegated powers from Member States; their control mechanisms toward the ECJ are weak; and the Court builds on previous jurisprudence (2004: 23–27). However, Stone Sweet also admitted that indirect controls are effective, but “only insofar as the judges internalize the interests of the contracting parties, or take cues from the revealed preferences of the latter, and act accordingly” (ibid: 26). Similar models also have pointed to the considerable autonomy of the ECJ to foster European integration (see e.g. Slaughter et al. 1998; Cichowski 2007).

That EU Member States have the power to overrule ECJ rulings is not contested. In fact, Member States have used this tool in several cases<sup>12</sup>: for instance in the two *Pierik* decisions and in *Barber*<sup>13</sup>. In the *Pierik* rulings at the end of the 1970s, the ECJ held that treatment abroad had to be authorised when the foreign treatment was recognised as necessary and effective, even if it was not offered in the health package of the state of insurance. As a reaction, the Council unanimously amended EC Regulation 1408/71, and inhibited the “regime-shopping” effects of the *Pierik* rulings (see Martinsen 2005b: 1037–1039). In the *Barber* case from 1990, “the Court ruled that sex-based differences in pensionable ages violated Article 119 [EC Treaty, AJO] and had to be eliminated” (Garrett et al. 1998: 166). Member States were “extremely worried by the enormous financial implications” of *Barber* and, therefore, added a protocol to the Maastricht Treaty that limited the retrospective application of the *Barber* principles (ibid: 166). These two examples show that EU Member States have the ability to constrain ECJ rulings especially in areas which are sensitive for Member States, such as social policy.

## 2.4. Models of Judicial Politics and their Shortcomings

The foregoing explicit and implicit models of judicial politics have three major shortcomings. First, the existing studies usually do not incorporate the proceedings before the Court, but rely

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<sup>12</sup> Damian Chalmers (2004: 14) identified four examples of amendments to the EC Treaty to counteract an ECJ decision. Though, he did not count amended secondary legislation.

<sup>13</sup> Case C-262/88, *Douglas Harvey Barber vs. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

solely on the rulings and the legal discussion around them (see e.g. Garrett et al. 1998: 162–169). As an exception, Stone Sweet draws his account from a data set on Member State and Commission observations and their power to presage ECJ rulings (2004: 43). However, he only determines the congruence of Member State observations and ECJ rulings superficially, without going into detail. Karen Alter cast doubt on our ability to establish governments' positions and interests regarding ECJ cases (2006: 314 and 327).<sup>14</sup> A second shortcoming is that even though many studies integrate lines of rulings (see e.g. Garrett et al. 1998; Stone Sweet 2004), especially legal science accounts tend to review singular cases without always paying attention to longer series of cases (see e.g. Becker 1998; van der Mei 1999; Künkele 2000). The third and most important shortcoming is that existing studies do not systematically incorporate the interaction between ECJ fine-tuning and Member State implementation. This neglect in particular stems from the difficulty of linking specific court rulings to national implementation.

This paper tries to remedy the identified shortcomings. First, I argue that it is necessary to investigate the proceedings before the Court systematically and also to consider Member States' statements on ECJ rulings. It does not suffice to establish the congruence of Member State observations and ECJ rulings as Stone Sweet and others have done, and then to deduce that Member States were "successful" (2004: 184–188). In order to be able to reconstruct Member State preferences, I investigated the opinions of the Advocate General who briefly summarises the oral and written proceedings, as well as the reports of the hearing that can easily be requested from the ECJ. Both sources shed sufficient light on the different initial positions of Member States, the European Commission and the ECJ, as well as their change in position. In addition, the available documents provided indications for answering the question as to whether and how the Court deferred its position to the preferences of Member States. A second improvement: I analysed a longer series of cases from 1998 to 2006

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<sup>14</sup> According to Marie-Pierre Granger, "assessing the influence of governmental observations on the Court's decisions is an impossible task, because of the complexity of the judicial decision-making which cannot be reduced to the interventions of a few factors and actors. Causal connections between observations and outcomes can not be objectively evidenced" (2004: 27). However, she concedes that "a detailed case study of legal developments in particular areas could provide more valuable evidence as to the actual influence of governments' observations" (ibid: 28).

in order to incorporate the ECJ's fine-tuning into the analysis. Thus, I am able to show the interaction between the development of the ECJ jurisprudence and Member State compliance. A third improvement is that I linked specific rulings to specific Member State policy responses in order to determine the effects of rulings on Member State policies. I assessed many different types of documents on Member State and EU-levels: legal texts dealing with legislative or administrative changes as a response to ECJ and national court rulings, ministerial circulars, press releases, parliamentary debates, European Commission documents, etc. Through careful process-tracing (see e.g. George and Bennett 2005), I attributed a specific policy response at the Member State level to a specific ruling. I paid special attention to the time sequencing of national changes and was thus able to separate the impact of court rulings from other possible factors, such as changing domestic policy preferences. The insights I gained were finally refined with the help of 25 problem-centred interviews with experts from both the Member State and EU-levels.<sup>15</sup> Thus, I could gain a more encompassing understanding of compliance with ECJ rulings.

In order to fulfil the above described task of improving our knowledge of judicial politics, I examined the refinement of a series of important social policy cases on patient mobility. This line of rulings started with *Kohll* and *Decker* in 1998 and was followed chronologically by *Vanbraekel* and *Geraets-Smits/Peerbooms* in 2001, *Müller-Fauré/van Riet* and *Inizan* in 2003, *Leichtle* in 2004, *Keller* in 2005, and most recently, *Watts* and *Acereda Herrera* in 2006.<sup>16</sup>

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<sup>15</sup> In the framework of my doctoral thesis I conducted 25 problem-centred expert interviews in Germany, France, the UK, Austria, Brussels and Luxemburg. On the one hand, I conducted interviews with actors on the supranational level: members of the legal staff of the DG Internal Market who were engaged in monitoring and promoting the implementation of EU Member States, staff members of the DG Employment, Social Affairs and Equal Opportunities who were monitoring the correct implementation of Regulation 1408/71, staff members of the DG Health and Consumer Protection who were keeping a watch on health being incorporated into all Community policies, and members of European interest groups, such as the *Association Internationale de la Mutualité* and the European Social Insurance Platform. On the other hand, more importantly, on the Member State level, in Germany, France, and the UK, I interviewed ministerial officials who were concerned with the implementation of ECJ rulings, officials of compulsory health insurance funds who were dealing with European law, and independent academic experts who followed the respective internal and European processes. The assembled expert interviews have been coded and analysed with the help of *Atlas.ti*, a qualitative document analysis software package. The results were incorporated into the analysis.

<sup>16</sup> Case C-368/98, *Abdon Vanbraekel and Others vs. Alliance Nationale des Mutualités Chrétiennes* [2001] ECR I-5363; Case C-157/99, *B.S.M. Geraets-Smits vs. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms vs. Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; Case C-385/99, *V.G. Müller-Fauré vs. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet vs. Onderlinge Waarborgmaatschappij*

### 3. FINE-TUNING DOCTRINES BY THE ECJ: JUDICIAL ACTIVISM AND SELF-RESTRAINT

The incremental unfolding of the *Kohll/Decker* jurisprudence is a paradigmatic example of how the ECJ fine-tunes its case law and thereby oscillates between judicial activism and self-restraint, and of how it behaves as both an autonomous and strategic actor.

#### 3.1. *Kohll and Decker* – Revolution or evolution?

*Kohll* and *Decker* had been expected by legal scholars for a long time. These two rulings redrew the borders between national and EC social security law, based on the basic freedoms of providing services and goods. In *Kohll*, a Luxembourg citizen was refused authorisation by his Luxembourg health insurance for an orthodontist ambulatory treatment in Germany for his daughter. His request was rejected because the treatment was not deemed urgent and could have been carried out in Luxembourg. In *Decker*, Nicolas Decker was refused reimbursement by his Luxembourg health insurance for a pair of spectacles he had bought in Belgium using a prescription from a Luxembourg ophthalmologist. The justification here was that Decker had not sought prior authorisation as demanded by the Health Insurance Code of Luxembourg at that time.

In the *Kohll* and *Decker* proceedings before the ECJ (1995–1997), all EU Member States agreed in their written observations – thirteen had submitted such an observation – that either the freedom to provide services did not apply to national social protection systems or that, if it applied, prior authorisation procedures for health care consumption abroad were justified.<sup>17</sup> Member States adopted two slightly different lines of defence. On the one hand, the

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ZAO Zorgverzekeringen [2003] ECR I-4509; Case C-56/01, *Patricia Inizan vs. Caisse primaire d'assurance maladie des Hauts-de-Seine* [2003] ECR I-12403; Case C-08/02, *Ludwig Leichtle vs. Bundesanstalt für Arbeit* [2004] ECR I-2641; Case C-145/03, *Heirs of Annette Keller vs. Instituto Nacional de la Seguridad Social* [2005] ECR I-2529; Case C-372/04, *The Queen on the application of Yvonne Watts vs. 1) Bedford Primary Care Trust 2) Secretary of State for Health* [2006] ECR I-4325; Case C-466/04, *Manuel Acereda Herrera vs. Servicio Cántabro de Salud* [2006] ECR I-5341.

<sup>17</sup> Stone Sweet and others examined the relationships “between the arguments contained in the observations filed by the Commission and the Member States, for each case, and the Court’s ultimate decision” (2004: 186). This

French and German governments claimed that an uncoordinated opening of the markets for pharmaceuticals, medical equipment, and medical care would seriously endanger the very structure of the national systems of social security (see ECJ, Rapport d'audience, *Kohll*: paras 53–60, 64–72; and *Decker*: paras 29–46, 53–64). The French government postulated that the equilibrium of all Luxembourg-style social security systems, such as its own, would be at stake, if the principle of territoriality was to be breached (see ECJ, Rapport d'audience, *Kohll*: para. 68). On the other hand, the UK government tried to differentiate its National Health Service from social security systems. It stated that Articles 49 and 50 EC Treaty did not apply to systems which are financed by public funds (ibid: para. 85).

The European Commission argued in the *Decker* proceeding that the free movement of goods precluded national restrictions (see ECJ, Rapport d'audience, *Decker*: para. 89). In *Kohll*, it stated that prior authorisation procedures violated the freedom to provide services in general, but that for reasons of general interest, restrictions were justified (see ECJ, Rapport d'audience, *Kohll*: para. 104).

In its *Kohll* ruling, the Court of Justice observed, first, that, “according to settled case-law, Community law does not detract from the powers of the Member States to organise their social security systems” (para. 17). However, Member States “must nevertheless comply with Community law when exercising those powers” (ibid: para. 19). Second, the ECJ determined that a national regulation, which made the reimbursement of dental treatment abroad dependent on the prior authorisation of the competent insurance institution, as it was in place in Luxembourg, did violate the (passive) free movement of services, Articles 49 and 50 EC Treaty, and was neither justified by the control of health expenditures nor by the balancing of the budget of the social protection systems (ibid: paras 35, 42 and 54). Even though the Luxembourg *Cour de Cassation* asked two rather general preliminary questions, the ECJ only

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effort aimed at answering the question of whether these observations presage or influence the Court's rulings. I have undertaken a similar effort for the cases *Kohll* and *Decker*. I have coded the observations in these two cases as “successful” or “unsuccessful” of predicting the final decision. The results of the examination are included in the following section. However, I refrained from iterating this for the follow-up rulings, mainly for two reasons: firstly, many preliminary questions entail more than one question; *Watts* for instance comprises seven questions. In addition, sometimes there was congruence only in a part of the questions. Therefore, it was impossible to code the observations in “successful” and “unsuccessful”. Secondly, the follow-up rulings are sometimes of such technical detail that it is not always possible to determine doubtlessly the (non-) congruence of observations and rulings.



responded to the very specific Luxembourg case at hand regarding dental treatment. In its preliminary *Decker* ruling, the ECJ held that requiring prior authorisation for the purchase of medical products abroad violated the free movement of goods guaranteed in Articles 28 and 30 EC Treaty (para. 36).

None of the thirteen written Member State's observations could presage *Kohll* and *Decker*. All Member States agreed that either free movement of services and goods could not be applied to social protection systems, or they perceived national restrictions as justified. The European Commission's observations could presage the ruling in *Decker* but only partly in *Kohll*. Thus, in these two rulings, the ECJ clearly did not defer its decisions to the preferences of Member States.

*Kohll* and *Decker* created a second avenue of cross-border health care in addition to EC Regulation 1408/71 on social protection for migrant workers (see Jorens 2002: 110): patients could from then on seek medical treatment in another EU Member State without depending on the discretion of their domestic insurance institutions. These two cases held that ambulatory treatment and spectacles could be purchased abroad, in social security systems organised like Luxembourg's that provide health care through cash reimbursement. The implications for national health systems and health insurance systems based on delivering primarily in-kind benefits, as well as the consequences for other types of benefits such as hospital care, were unclear. Initially, most Member States refrained from implementing the jurisprudence because of this uncertainty, i.e. they did not change administrative practices and the law in the social codes (see e.g. Palm et al. 2000). However, of more importance was that they saw the jurisprudence – as a whole – as an unjustified intrusion into their exclusive right to define the fundamental principles of their social security systems guaranteed in Art. 137(4) EC Treaty.

In the years following *Kohll* and *Decker*, an intense debate at political, administrative, and academic levels, both nationally and supranationally, took place on how these rulings had to be interpreted and what their expected impact would be. These controversial debates will be highlighted briefly in the following paragraphs.

In the debate at the political level, *Kohll* and *Decker* were considered an “explosive issue” (Gobrecht 1999: 17) and a “big bang” (Schulte 2005: 46) in 1998, provoking a major stir in many EU Member States. *Kohll* and *Decker* prompted vivid debates in the Council of Ministers and in the Administrative Commission on Social Security for Migrant Workers.<sup>18</sup> Some politicians called for political action at the EU-level to overrule or blockade these rulings. However, no joint action followed. According to Willy Palm et al., the government’s responses concerning the implementation of *Kohll* and *Decker* were “defensive and disorganised” (2000: 98). They also noted that “[e]ven though the Member States consulted each other, formally or informally, on the measures or stance to be taken following the rulings, in terms of public opinion the strategy taken was very much a conspiracy of silence and rejection” (ibid: 78). All in all, most Member State politicians rejected the jurisprudence as well as the application of it to their health system.

By contrast, in the scholarly legal debate, the rulings *Kohll* and *Decker* were not perceived as a novelty but rather a logical continuation of the dynamic development of EC law (see Jorens 2004: 380). Anne Pieter van der Mei found it even “remarkable that it took so long before the questions on the compatibility of prior authorisation rules ... were submitted to the Court” (1999: 14). Regardless of the assessment of *Kohll* and *Decker* “as a logical evolution and not as a revolution” (Schulte 2003: 170), many legal scholars ascribed a considerable (doctrinal and financial) impact on national systems to them.

Standing “on the shoulders of doctrinal writers” (Arnull 2008: 425), political scientists highlighted the groundbreaking potentials of the rulings *Kohll* and *Decker*. In the quasi-absence of “positive”<sup>19</sup> social policy integration at the EU-level, “innovative” and “pioneering” ECJ rulings were considered to be “path-breaking” in a positive or negative sense in that they would significantly change the internal institutional configuration of domestic social protection systems and would gradually weaken or tear apart the exclusive national spatial

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<sup>18</sup> The Administrative Commission on Social Security for Migrant Workers is composed of Member State representatives of the Ministries of Social Affairs, Employment and Health and assures the correct application of EC Regulations 1408/71 and 574/72.

<sup>19</sup> Stephan Leibfried distinguished between “positive” social policy initiatives “taken at the ‘centre’ by the Commission and the Council” to develop uniform social standards at the EU level, “negative” reforms “through the imposition of market compatibility requirements,” and “indirect pressures” of European integration (2005: 244–245).

demarcation lines and closure practices (see e.g. Ferrera 2005; Leibfried 2005; Martinsen 2005a). Stephan Leibfried, Maurizio Ferrera and others assumed that the ECJ rulings would provoke enormous political and financial costs. However, these assessments focused on the legal doctrines elaborated by the ECJ and not on the actual implementation of these doctrines. Therefore, Leibfried added that the real influence of ECJ rulings on social protection systems still remained “opaque and continuously contested” (2005: 265).

In the light of these assessments, what happened to the *Kohll* and *Decker* principles in the follow-up jurisprudence?

### **3.2. The Follow-up Jurisprudence: Extending and Narrowing down**

#### **Doctrines**

The aforementioned assessments were based on the originally rather broad material ECJ doctrines in *Kohll* and *Decker*: the free movement of services and goods precludes national rules in Luxembourg-style health systems which subject reimbursement of ambulatory treatment and health care products to prior authorisation. The following part will show that in the follow-up cases, these doctrines were both extended to other types of health care systems, to other states, and to additional areas, and simultaneously narrowed down.

After *Kohll* and *Decker* were decided in 1998, most EU Member States carried on their efforts to persuade the ECJ of the peculiar non-economic nature of their social protection systems and of the dangers of an unrestricted application of the basic freedoms. This can be seen in the proceedings before the Court in the pending cases *Vanbraekel* and *Geraets-Smits/Peerbooms*. However, the unanimous front of rejecting the *Kohll/Decker* principles altogether started to crumble slowly. Two groups of countries can be discerned. Whereas EU Member States like France, Belgium and Austria conceded that health care services were of an economic nature, the others continued to deny this (see Opinion of Ruiz-Jarabo Colomer, *Geraets-Smits/Peerbooms*, para. 32). All Member States agreed that in any case, prior authorisation procedures were justified.

*Vanbraekel* and *Geraets-Smits/Peerbooms* were finally decided in 2001, three years after *Kohll* and *Decker*. Despite the efforts of Member States in the proceedings, the ECJ found again that arguments, which stressed the non-economic nature of health care services and denied the application of the free movement of services to social protection systems, could not be upheld (see ECJ, *Geraets-Smits/Peerbooms*, paras 48–52). However, the ECJ partially accommodated Member State concerns in these two cases. In the Dutch case *Geraets-Smits/Peerbooms*, the ECJ admitted that viable justifications existed for excluding hospital care from the free movement of services. First, a national system of prior authorisation for hospital care was not per se violating European law; for the hospital sector, where planning is required, such a system was deemed both “necessary and reasonable” (para. 80). The ECJ thus reacted to substantiated Member State concerns, as can be seen in the following remarks:

Looking at the system set up by the ZFW [the Dutch Sickness Fund Act, AJO], it is clear that, if insured persons were at liberty, regardless of the circumstances, to use the services of hospitals with which their sickness insurance fund had no contractual arrangements, whether they were situated in the Netherlands or in another Member State, all the planning which goes into the contractual system in an effort to guarantee a rationalised, stable, balanced and accessible supply of hospital services would be jeopardised at a stroke (*Geraets-Smits/Peerbooms*, para. 81).

However, second, the ECJ regulated the hospital sector as well: prior authorisation may not be refused if an identical or equally effective treatment cannot be obtained without “undue delay” from an institution under contract with the competent sickness fund (*ibid*: paras 103–104).

*Geraets-Smits/Peerbooms* “unquestionably determined that systems based on the benefits in kind principle do fundamentally fall within the ambit of freedom to provide services” (Fuchs 2002: 541) and are thus also affected by the developing exportability of domestic health benefits. The ECJ referred primarily to the Dutch system, although according to the Court’s reading,

[i]t must be accepted that a medical service provided in one Member State and paid for by the patient should not cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another Member State’s sickness insurance legislation which is essentially of the type which provides for benefits in kind (*Geraets-Smits/Peerbooms*, para. 55).

Nonetheless, some states still wondered how the decision would impact on their health care system. In addition, *Geraets-Smits/Peerbooms* concerned hospital care and theoretically left

open whether ambulatory care in EU Member States with in-kind benefit systems had to be treated like in those operating with cash benefits. Because of the still undecided questions, for the time being, the UK and Germany did not implement the rulings, but only conceded negligible changes. The German Working Committee of the Central Associations of Statutory Health Insurance Funds even saw its position confirmed that the German in-kind benefit system was compatible with the ECJ requirements, when in fact it was not.<sup>20</sup>

The Belgian case *Vanbraekel* further specified the interpretation of EU patient mobility provisions: a patient, who had first been refused authorisation which was then granted ex post, had to be reimbursed up to the (higher) level of the state of insurance. To sum up *Vanbraekel* and *Geraets-Smits/Peerbooms*, the ECJ upheld its general principle of applying the free movement of services to social protection systems. However, the Court was partially responsive to Member State interests, because it conceded the first restrictions to the general principle.

Like the foregoing cases, *Vanbraekel* and *Geraets-Smits/Peerbooms* did not clarify the full scope of the ECJ patient mobility doctrines. To close this gap, a related case was already in the pipeline. In 2003, *Müller-Fauré/van Riet* confirmed that health care systems based on in-kind delivery were affected by the *Kohll/Decker* jurisprudence. Here, the free movement of services in the ambulatory sector was explicitly extended to Member States operating their health care systems in the in-kind benefit modus: Germany, Austria, and the Netherlands.

The then following rulings further refined the jurisprudence and applied it to an additional group of countries without altering the cornerstones of the doctrine. In *Inizan*, the Court further detailed the application of Article 22(2) EC Regulation 1408/71 and Articles 49 and 50 EC Treaty in that it held that if a treatment cannot be provided without undue delay, then referring patients abroad may not be refused.

*Leichtle* clarified that health cures and their indirect benefits were also within the scope of the *Kohll/Decker* jurisprudence; however it allowed authorisation procedures under certain conditions. Even though the case concerned the German social security system, the UK in its observation tried to push the ECJ to declare that its National Health Service was different and

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<sup>20</sup> See Working Committee of the Central Associations of Statutory Health Insurance Funds, Common press release, *Sachleistungssystem entspricht Europarecht*, 19 July 2001.

that the free movement of services thus did not apply to it (see ECJ, Bericht des Berichterstatters, *Leichtle*, para. 47).<sup>21</sup> The attempt was made in vain, as will be seen below.

In *Keller*, the ECJ decided, first, that insurance institutions were bound by the findings and decisions of those in other Member States in case of a referral abroad. Second, the Court held that “the cost of the treatment provided in that State must be borne by the institution of the Member State of stay in accordance with the legislation administered by that institution, under the same conditions as those applicable to insured persons covered by that legislation” (para. 72).

In *Watts*, the Court explicitly extended the principle of free movement of services to Member States operating a national health system, i.e. to all the other Member States. In the proceedings before the ECJ, those Member States that had a national health system argued against the application of the *Kohll/Decker* principles to their systems (Finland, Ireland, Malta, Spain, Sweden, and the UK). However, France and Belgium argued in their observations, in consent with the European Commission, that the free movement of services also applied to national health systems (see ECJ, Report for the Hearing, *Watts*, paras 55 and 57).

In *Acereda Herrera*, the last in this line of cases so far, the ECJ clarified that costs of travel, accommodation and subsistence were excluded from the scope of the *Kohll/Decker* jurisprudence.

In Table 1, I provide an overview of the above described cases and the principles they prompted.

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<sup>21</sup> In *Leichtle*, there was no oral hearing. Therefore, the report of the rapporteur substituted the report for the hearing.

**Table 1: ECJ Introduction of New Material Doctrine and Relevance for EU Member States**

ECJ ruling	Basic new material doctrines and their specifications introduced in the course of the jurisprudence	EU Member States to which the jurisprudence was directly relevant
<i>Kohll and Decker</i>	To require prior authorisation in the <i>ambulatory</i> sector in cash benefit systems is an unjustified restriction of the free movement of services (Articles 49/50 EC) and the free movement of goods (Articles 28/30 EC).	Luxembourg, France, Belgium
<i>Vanbraekel</i>	Specifies Article 22 of Regulation 1408/71: if prior authorisation has been wrongfully refused, the patient is entitled to be reimbursed directly by the insurance institution by an amount equivalent to that which would have been granted by the legislation of the state of residence if authorisation had been given in the first place; interprets Article 49 EC: if the reimbursement of medical costs incurred in a hospital in the Member State of treatment is less than the amount in the state of insurance, additional reimbursement covering the difference must be granted.	All Member States
<i>Geraets-Smits/Peerbooms</i>	A system of prior authorisation for the <i>hospital</i> sector may be justified; however, a system relying on prior authorisation has to meet certain criteria: national authorities have to take into account: all circumstances of each specific case, patient's medical condition, and past record.	The Netherlands, Germany, (Austria was at that time already in line with ECJ requirements)
<i>Müller-Fauré/van Riet</i>	Extends the free movement of services to health care systems relying on benefits <i>in-kind</i> in ambulatory care; specifies what the ECJ meant by "undue delay": national authorities have to take into account: circumstances of each specific case, patient's medical condition, degree of pain, nature of the patient's disability, and medical history.	All social security systems based on cash reimbursement and in-kind benefits
<i>Inizan</i>	Specifies Article 22(2) Regulation 1408/71 and Articles 49/50 EC: if treatment cannot be provided "without undue delay" referring patients abroad may not be refused.	All Member States
<i>Leichtle</i>	Articles 49/50 EC apply also to health cure costs.	All Member States
<i>Keller</i>	Specifies Article 22(1) Regulation 1408/71: the responsible institution in the state of insurance is bound by decisions of medical bodies in the state of treatment in case of prior authorisation through forms E111 or E112.	All Member States
<i>Watts</i>	Extends the free movement of services to national health systems.	National health systems
<i>Acereda Herrera</i>	Specifies Article 22 Regulation 1408/71: a right to be reimbursed for costs of travel, accommodation and subsistence is <i>not</i> conferred through prior authorisation with an E112 form.	All Member States

### 3.3. Member State Preoccupation with the *Kohll/Decker* Jurisprudence

All “old” 15 EU Member States, without exception, commented either in a written or oral observation at one point or the other on the *Kohll/Decker* jurisprudence in the proceedings before the Court. Table 2 illustrates this extraordinary preoccupation with the patient mobility case law: in total 74 observations in ten cases.<sup>22</sup> *Kohll* and *Decker* received a great deal of attention especially from Member States running a social security system, and to a lesser degree from national health systems. The interest in the follow-up cases was more equally distributed. Table 2 also indicates that legal and political mobilisation efforts by organised interest groups to push the jurisprudence forward were neither systematic nor strategic. Two aspects are striking: first, many Member States were involved with one or two cases: Belgium (1), France (1), Germany (1), Luxembourg (2), the Netherlands (2), Spain (2), and the UK (1). It follows that there was, second, no country from which ECJ cases originated *en masse*.

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<sup>22</sup> In his chapter on Sex Equality Law (with Rachel Cichowski) Stone Sweet counted only 142 Member State observations for 88 rulings (2004: 187).



**Table 2: Written or Oral Observations on the Kohll/Decker Jurisprudence by Member State**

Case	Date of Judgement	Referring Court	Social security systems based on benefits in kind			Social security systems based on cash reimbursement			National health systems									
			D	A	NL	F	B	L	DK	SF	GR	IRL	I	P	E	S	UK	
<i>Decker</i> C-120/95	28.04.1998	Conseil arbitral des assurances sociales (Luxembourg)																
<i>Kohll</i> C-158/96	28.04.1998	Cour de Cassation (Luxembourg)																
<i>Vanbraekel</i> C-368/98	12.07.2001	Cour du travail de Mons (Belgium)																
<i>Geraets-Smits/Peerbooms</i> C-157/99	12.07.2001	Arrondissementsrechtbank te Roermond (the Netherlands)																
<i>Müller-Fauré/van Riet</i> C-385/99	13.05.2003	Centrale Raad van Beroep (the Netherlands)																
<i>Inizan</i> C-56/01	23.10.2003	Tribunal des Affaires de sécurité sociale de Nanterre (France)																
<i>Leichtle</i> C-8/02	18.03.2004	Verwaltungsgericht Sigmaringen (Germany)																
<i>Keller</i> C-145/03	12.4.2005	Juzgado de lo Social nº 20 de Madrid (Spain)																
<i>Watts</i> C-372/04	16.5.2006	Court of Appeal (England and Wales) (United Kingdom)																
<i>Acereda Herrera</i> C-466/04	15.6.2006	Tribunal Superior de Justicia de Cantabria (Spain)																

Notes: The hatched cases stand for having commented with a written or oral observation in the specific case. A=Austria, B=Belgium, DK=Denmark, SF=Finland, F=France, D=Germany, GR=Greece, IRL=Ireland, I=Italy, L=Luxembourg, NL= Netherlands, P=Portugal, E=Spain, S=Sweden, UK=United Kingdom. In the rulings *Geraets-Smits/Peerbooms* and *Müller-Fauré/van Riet*, Norway and Iceland also submitted observations. In *Acereda Herrera*, Cyprus and Poland also submitted observations. In *Watts*, Malta and Poland also submitted observations.

### 3.4. Judicial Activism and Self-Restraint

In the *Kohll/Decker* jurisprudence we can see both judicial activism and self-restraint at work. The ECJ was an activist court in that it applied, against the unified interests of EU Member States, the basic freedoms of services and goods to health care and thereby challenged national welfare states. At the same time, when it came to the actual design of this intrusion into the domestic sphere of social protection, the Court exercised considerable self-restraint by limiting the impact of its decisions largely to the less costly ambulatory sector and by accepting – contrary to other policy areas – justifications of an economic nature for the restriction of free movement.<sup>23</sup>

Why did the ECJ restrain itself? First, from the beginning most Member States reacted very negatively toward the *Kohll/Decker* jurisprudence and refused to implement it. Only with the ECJ's fine-tuning and its application to one group of Member States while leaving the rest undecided did the united front of rejection start to crumble. The most visible sign of this development is the French position in the *Watts* proceeding. In earlier cases the French government had been fiercely opposed to the *Kohll/Decker* jurisprudence. Nevertheless, it finally implemented the jurisprudence. In *Watts*, the French government did not back the position of the UK government and all the other national health systems but claimed that the *Kohll/Decker* jurisprudence also had to be applied to the national health systems. A second reason for the ECJ's self-restraint was that the Member State reactions sensitised the Court to their concerns. It is plausible to assume that in the ECJ proceedings, Member State governments succeeded in persuading the Court of the peculiar nature of national social protection systems and the dangers of an unrestricted application of the basic freedoms, i.a. by

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<sup>23</sup> Before the 1990s, the ECJ rejected in numerous cases that aims of an economic nature were able to justify restrictions of free movement (see e.g. Case C-352/85 para. 30; Case C-353/89 or Case C-398/95 para. 23). In its reasoning in *Kohll* and *Decker* the ECJ signalled a change in this orthodox position. The ECJ held in *Kohll* that the maintenance of a balanced medical and hospital service could fall within the grounds of public health under Article 46 EC (para. 50). The acceptance of justifications by the ECJ can best be seen in the follow-up jurisprudence in which the Court was interested in obtaining evidence from Member States with regard to the impact of its former rulings.

providing empirical “evidence”.<sup>24</sup> The ECJ thus seems to have recognised the sensitivities in this area, which is one of the last exclusive domains of the Member States. In return, Member States implemented the narrowed requirements of the jurisprudence, as will be seen in the following part.

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<sup>24</sup> According to Advocate General Ruiz-Jarabo Colomer, the Dutch government informed the Court in the oral hearing in *Müller-Fauré/van Riet* that about 14.000 insured persons had made use of treatment abroad although prior authorisation was still required (see his Opinion) (<http://curia.europa.eu>).

## 4. FINE-TUNING AND ITS CONSEQUENCES FOR IMPLEMENTATION:

### GERMANY, FRANCE AND THE UNITED KINGDOM<sup>25</sup>

In Germany, France and the United Kingdom (UK) the fine-tuning of the jurisprudence by the ECJ – and along with that ECJ self-restraint – influenced implementation processes and outcomes, though to differing degrees.

#### 4.1. Germany

In Germany, *Kohll* and *Decker* were seen as an example of “activist” ECJ policy-making. Horst Seehofer, German Federal Minister of Health, commented on *Kohll* and *Decker* in a press release on the very day they were issued. He considered them to be highly problematic.<sup>26</sup> In the Administrative Commission on Social Security for Migrant Workers, Seehofer was less diplomatic and, according to participants, called for the immediate revision of the rulings. The German Ministry of Health, most of the statutory health insurance funds and also medical associations perceived the rulings as an intrusion into a sphere that was held to be under exclusive control of the Member States: the organisation of the fundamental principles of the social protection system. They feared that not only ambulatory but also unlimited and unconditioned mobility in the hospital sector would be triggered by the ECJ decisions. In this case the political and, more importantly, financial costs would have been considerable. Therefore, as a matter of principle, they initially rejected the entire jurisprudence on patient mobility. In the proceedings before the Court in the follow-up cases, the German government reiterated its position that health care services were not of an economic nature.<sup>27</sup> If the Court was to decide differently, the German government found prior authorisation procedures justified in the hospital sector.

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<sup>25</sup> A more detailed account of the impact of the *Kohll/Decker* jurisprudence on administrative practices and social codes in Germany, France and the UK can be found in Obermaier (2008).

<sup>26</sup> See Federal Ministry of Health, Press release, *Eine Auszehrung der deutschen Krankenversicherung muß verhindert werden*, N° 28, 28 April 1998.

<sup>27</sup> After the ECJ delivered *Müller-Fauré/van Riet* in 2003, Germany stopped commenting on the follow-up cases (see Table 2).

In the follow-up rulings, notably *Geraets-Smits/Peerbooms* (2001) and *Müller-Fauré/van Riet* (2003), the ECJ confined the scope of the jurisprudence *de facto* to the ambulatory sector, i.e. the Court extended the scope in principle to hospital cases, however, only under restrictive conditions. This narrowing down of the original broad *Kohll/Decker* doctrines convinced the German Ministry of Health and the other health care actors that the ECJ, first, acknowledged the complexities and specificities of domestic health care systems and, second, took into account Member States' concerns about the *Kohll/Decker* jurisprudence. Consequently, the scepticism toward the ECJ in general, and the *Kohll/Decker* jurisprudence in particular, decreased substantially. The self-restrained ECJ approach thus helped to overcome the most abrasive lines of resistance and paved the way for implementing the *Kohll/Decker* jurisprudence.

Despite the initial resistance, in 2003, the German government incorporated the requirements of the jurisprudence into its fifth book of the social code (*Sozialgesetzbuch*, SGB) with the help of the Statutory Health Insurance Modernization Act. Then, as a matter of principle, insured persons were entitled to care providers in other Member States of the EU/EEA<sup>28</sup>, and also entitled to choose cash instead of in-kind benefits in general, i.e. for all health care entitlements. In compliance with the ECJ jurisprudence, however, several important restrictions were built into the law. First, cash reimbursement was limited to ambulatory care. Hospital care abroad remained dependent on prior authorisation by the competent insurance fund. Second, before reimbursing, the insurance funds must deduct costs for administrative additional work and expenses and costs for the missing efficiency controls as well as other extra payments. Third, before choosing cash instead of in-kind benefits, the insured persons have to consult the insurance funds, and they have to stick to their choice for at least one year. Because of these conditionalities, the impact of the legislative changes was limited.

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<sup>28</sup> The European Economic Area (EEA) was founded in 1994. It comprises the EU Member States and the three EFTA Member States: Iceland, Liechtenstein and Norway.

## 4.2. France

In France, the constant refinement of the jurisprudence was not decisive for the pace of the implementation, but all the more for the outcome. The French case *Inizan* (2003), which was part of the fine-tuning process, was an additional element to take into account for the French government but not of great importance. Since the ECJ narrowed down the original doctrines, the changes in the French social code remained minor. The French government incorporated the requirements of the *Kohll/Decker* jurisprudence into its social codes (*Code de la Sécurité Sociale*, CSS; *Code de la Santé Publique*, CSP) in a slow and gradual process. Through circulars that invalidated or complemented preceding circulars, the French government adapted the CSS and CSP step by step. Finally, in 2005, new articles were inserted into the CSS (R. 332-3 to 6), in which for the first time, non-EU/EEA and EU/EEA cases were treated differently. Treatment can now be obtained in any EU/EEA Member State and reimbursement has to be provided. However, following the ECJ jurisprudence, unconditional reimbursement of costs incurred abroad was confined to ambulatory health care. In addition, in Articles L. 6211-2-1 and R. 6211-46 to 56 of the CSP, the French government determined that EU/EEA laboratories could offer their services to French patients under the same conditions as French providers. Overall, similar to Germany, the impact of the rulings was limited.

## 4.3. The United Kingdom

The UK government, similar to Germany and France, rejected the *Kohll* and *Decker* rulings and their transferability to the National Health Service (NHS). The refinement of the jurisprudence by the ECJ influenced both the implementation process and outcome in the UK. *Vanbraekel* and particularly *Geraets-Smits/Peerbooms* clarified in 2001 that, first, in-kind benefit systems fell within the scope of the free movement of services, and that, second, if a Member State could not provide a treatment “without undue delay,” it had to refer the patient to another Member State. Because of the NHS logic of rationing health care, waiting times for

an operation were extremely long for UK patients.<sup>29</sup> The question of what “undue delay” meant in practice was therefore of great importance to the UK government. The rulings *Vanbraekel* and *Geraets-Smits/Peerbooms* forced the UK to set in motion the first implementation steps in 2001/02. First, it repealed Section 5(2)(b) of the NHS Act from 1977 and gave the Secretary of State the possibility to contract with health care providers from abroad. In addition, the UK government amended Paragraph 15(A) of the NHS and Community Care Act from 1990. Second, the UK government started a centrally planned pilot scheme for treating patients overseas and amended the travel regulations. The ECJ follow-up ruling *Müller-Fauré/van Riet* in 2003 had additional direct consequences for the UK case *Watts*. The first-instance Administrative Court of the Queen’s Bench Division of the High Court ruled in *Watts* that *Müller-Fauré/van Riet* was applicable to the NHS. Although the government appealed the national court decision, it set further steps toward compliance: it developed detailed guidance to the public and to local health care commissioners on managing requests for overseas treatment and it reimbursed patients who received health care abroad on a discretionary basis. However, due to the restrained ECJ approach, the impact of the rulings was also minor in the UK.

To sum up, the ECJ’s fine-tuning influenced the implementation process in Germany, to a lesser degree in the UK. More importantly, the implementation outcome was affected by the fine-tuning of the *Kohll* and *Decker* rulings. All three countries allowed patient mobility to a certain degree, but only under restrictive conditions. Since the ECJ narrowed down the doctrinal content of the original rulings and limited the scope *de facto* to ambulatory care, the actual effect diminished accordingly. Ultimately, the tremendous impact which was postulated by legal and political science scholarship, that is the massive change of the institutional configuration of domestic health care systems, did not come true.

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<sup>29</sup> High waiting times for treatment were a central problem identified within the NHS. The government admitted in 2000 that „[a]t present the average wait to see a consultant for an outpatient appointment is seven weeks and the average time that people have been waiting for an operation is three months. But some people wait much longer than this – up to 18 months for inpatient treatment – and it is this which so concerns the public” (Department of Health, The NHS Plan, July 2000: 103).

## 5. A MORE ENCOMPASSING MODEL OF JUDICIAL POLITICS

Against the background of the empirical evidence presented above, the existing models of judicial politics have to be revised. They did take into consideration to a certain extent interactions between the ECJ, national courts, and private litigants, as well as the impact of these relationships on doctrinal outcomes. However, they did not assess legislative outcomes and the interaction between the follow-up rulings and the outcomes. The model proposed in this paper incorporates the interaction between the ECJ's fine-tuning and implementation processes at the Member State level.

I argue that the gradual fine-tuning of the content and scope of a ruling through the ECJ shapes the implementation behaviour and implementation outcome of Member States. The Court first establishes a new doctrine for a specific country case. Then, in order to guarantee its uniform application across the EU in the follow-up rulings, it tailors the doctrine and its consequences to the systems of other EU Member States. This on-going development, i.e. the fine-tuning of the jurisprudence (restriction and extension of the material doctrines) by the ECJ, is an important intervening variable that contributes, first, to the willingness of Member States to implement Court rulings and, second, to the pace of implementation.<sup>30</sup> The fine-tuning may kick-start, accelerate, or help finalize an implementation process, and this happens for three reasons: First, the refinement of the jurisprudence by the ECJ provides Member States with more information on what is required to comply with a ruling. The judicial uncertainty caused by a first ECJ ruling, which postulates new legal principles, decreases step by step with each subsequent ruling. However, follow-up rulings may also raise new questions. Second, with increased information on the scope of new ECJ doctrines, the potential and actual financial, administrative and political costs of the implementation of the Court ruling become more predictable for Member States. Third, in the process of fine-tuning its jurisprudence, the ECJ is responsive to criticism and practical problems that emerge in the

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<sup>30</sup> Other relevant variables to explain Member State compliance are: goodness-of-fit, domestic political preferences, national court rulings, as well as management and enforcement activities of the European Commission.



follow-up cases. To guarantee Member States' compliance, the ECJ is ready to exercise considerable self-restraint with regard to the concrete design of its doctrines.

The scope of the proposed model of judicial politics claims, however, only limited application. It particularly applies to policy fields which are of utmost importance to EU Member States. Social policy belongs to the core duties and responsibilities of Member States. Every EU-level intervention in this domain is seen as an unjustified intrusion. A second scope condition is that the proposed model does not apply to all ECJ rulings equally. The ECJ may also clarify a question in only one singular ruling without the need for further follow-up cases. However, most ECJ rulings seem to be part of longer series of cases.

## 6. CONCLUSION

Legal and, even more so, political science scholars expected a considerable impact of the *Kohll* and *Decker* rulings on domestic social protection systems. Scholars based this assessment on the far-reaching doctrines of the rulings. However, the scholarly and political criticism and concerns were absorbed by the ECJ in its follow-up cases which fine-tuned the *Kohll* and *Decker* principles. Consequently, the actual impact was minor compared to what was postulated.

Pierson distinguished between several types of slow-moving processes, one of them being a “cumulative” type, where a “change in a variable is continuous but extremely gradual” (2004: 82). The ECJ’s fine-tuning in the case of *Kohll* and *Decker* could be understood as such a process, in which the variable, the doctrines of the jurisprudence, changed gradually. Scholarly research has to take into account this slow-moving process of the fine-tuning of the jurisprudence by the ECJ. The impact of rulings with new doctrinal principles on the Member State level has to be seen against the background of this process.

By not paying adequate attention to the slow-moving process of the ECJ’s fine-tuning, scholars may overestimate the doctrinal content in rulings while missing the narrowing down of this content. The *Kohll/Decker* jurisprudence, which forms the essence of this paper, is certainly a good example for the potential effects of such an omitted variable bias on research.<sup>31</sup> However, this is certainly not the only example. Recent important social policy cases such as *Laval* and *Viking*<sup>32</sup> on collective trade union action and *Rüffert*<sup>33</sup> on the posting of workers, run the same risk of being systematically overestimated with regard to their impact on Member States.

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<sup>31</sup> According to Henry Brady and David Collier, an omitted variable bias exists „when a theoretically relevant explanatory variable is missing.“ As a consequence „the causal estimate for any given variable that is included may be too large, in which case the causal effect attributed to the included variable is at least partially spurious” (2004: 296).

<sup>32</sup> For the *Laval* and *Viking* rulings see e.g. Falkner and Obermaier (2008).

<sup>33</sup> Case C-346/06, *Dirk Rüffert vs. Land Niedersachsen* [2008], not yet reported.

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