

Chapter 1

Introduction: De-territorialization versus Justice Contained

Welfare state change is among the most important and most controversially debated social and political issues of our times. Many authors argue that welfare states in the European Union (EU) have succumbed to numerous pressures and have changed their systems of social security accordingly. In the on-going de- and re-structuring pressure stemming from the EU-level, the rulings of the European Court of Justice (ECJ) have been identified as a major source for change. In the existing literature on the ECJ there is a clear-cut divide between those who affirm the destructive potential of ECJ interference and those who deny it.

Two Opposing Camps

On the one hand, in the quasi-absence of “positive” social policy integration at the EU-level, “innovative” ECJ rulings are considered to be “path-breaking” in a positive or negative sense in that they significantly change the internal institutional configuration of domestic social security systems and gradually weaken or tear apart the exclusive national spatial demarcation lines and closure practices of domestic systems (see, for example, Ferrera 2005, Leibfried 2005, Martinsen 2005a).¹ However, scholars who voiced these concerns also conceded that the actual influence of ECJ rulings on social security systems remained “opaque and continuously contested” (Leibfried 2005: 265).

On the other hand, ECJ rulings are believed to be systematically “contained” by the Member States, understood as the application of legal innovation to the individual ECJ rulings at hand, without acknowledging the broader implications, specifically when it comes to social benefits (see, for example, Conant 2003, Kingreen 2003).²

1 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).

2 Lisa Conant (2003) introduced the concept of “justice contained,” that was developed particularly in the study of the law in the United States, into the studies of the ECJ (on this transfer, see Wincott 2003). It means that compliance with an ECJ ruling is consciously and systematically contained by Member States. They typically apply legal

Did EU Member States – through implementing ECJ rulings – weaken or abolish the principle of providing social benefits exclusively within their territory? Did they have to alter the internal functioning of their domestic welfare states? If this is the case, what does this impact look like, and have these changes really taken place because of the ECJ jurisprudence? If the assumptions of those scholars who affirm the destructive potential of ECJ rulings hold (partially) true on empirical grounds, the consequences for the structure and the financing of domestic social security systems will be enormous. And this will only be the beginning: in the quasi-absence of “positive” social policy initiatives at the EU-level, it is foreseeable that the ECJ and national courts will be increasingly concerned with social policy issues in the future. Ultimately, a court-driven process could change the very structure of social security systems as we know them today. These issues are therefore central to the future of European welfare states and will be elucidated in the present publication.

This book will challenge both of the aforementioned views on ECJ rulings. The detailed analysis of the *Kohll/Decker* jurisprudence – a key series of ECJ rulings – and its implementation will allow me to fulfill this task. This line of decisions on patient mobility started with *Kohll* and *Decker*, both decided by the ECJ on April 28, 1998. The two rulings challenged Article 22 (which deals with health care entitlements abroad) of one of the oldest EEC regulations, that is Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the European Community.³ Also, the ECJ applied the passive free movement of services, that is the freedom to receive a service, and the free movement of goods to patients moving within the Community and thus provoked a new challenge for the EU Member States. *Kohll* and *Decker* were so important that according to an anecdote from the German Ministry of Health, the very day of the pronouncement of the rulings, a high-ranking official drove by car to Luxembourg in the middle of the night to obtain the written version of the rulings, which was only available in English at the time. In the following weeks, months, and years, these ECJ decisions were intensely discussed and contested in the political, administrative and academic arenas, as well as in the media. Many articles and books were written on *Kohll* and *Decker* and their potential impact (see, for example, Eichenhofer 1999, Hervey and McHale 2004, Jorens 2004, Kaczorowska 2006, Leibfried 2005, Nihoul and Simon 2005, Palm et al. 2000, Sieveking 2007). In some accounts, the possible destruction of the domestic social security systems was evoked (see Ferrera 2003), while others reacted in a much more reserved way (see Becker 1998). However, *Kohll* and *Decker* were only the beginning: follow-up rulings fine-tuned these cases, extending and limiting

innovations only to the individual ECJ decisions at hand and negate further legislative and administrative implications.

3 Regulation (EEC) No 1408/71 of the Council of June 14, 1971 applies social security schemes to employed persons and their families moving within the Community, Official Journal L 149, July 5, 1971, p. 0002–0050.

their scope simultaneously. The so-called *Kohll/Decker* jurisprudence that has emerged comprises eleven rulings which were delivered between 1998 and 2007; of high importance were the consequences of this jurisprudence for the principle of territoriality enshrined in the national social security systems. In addition, the financial, political and structural costs of the implementation of the *Kohll/Decker* jurisprudence were considered to be extremely high. Therefore, this series of cases was contested by most of the EU Member States; its impact on the individual social security systems was denied and implementation refused. Despite this initial fierce resistance by governments/administrations and the majority of health care actors, the ECJ jurisprudence was fully incorporated into domestic legislation in France and Germany and partially incorporated in the UK. Why could the opposition against the *Kohll/Decker* jurisprudence be overcome? What role – if any – did national court cases play in the implementation processes?⁴

In the book I show, first, that Member States indeed had to relax their territorial principles to a minor degree. However, the internal functioning of their social security systems has remained unharmed: Member States continue to exert considerable control over their domestic systems. Secondly, I demonstrate that this rather minor impact is mainly due to the ECJ's fine-tuning of the jurisprudence.⁵

I argue thus that the UK, Germany, and France put themselves in conformity with the *Kohll/Decker* jurisprudence through rather minor adjustments. Member State governments and insurance funds representatives, as well as political and legal science scholars feared from the beginning that this series of ECJ rulings could not be limited to cross-border cases but that, on the contrary, these rulings would endanger the principle of territoriality. In addition, they feared that *Kohll* and *Decker* would affect the domestic functioning of the delivery of health care and thus destabilize entire social security systems. In the course of the implementation, though, the limitation to cross-border cases turned out to be feasible. Legislative and administrative changes were necessary to comply with the jurisprudence, but they were not far-reaching. In addition, the most important health reform projects since the 1990s in the UK, France, and Germany were either not concerned with these rulings at all or they needed only minor adjustments in order to implement them. The national reform trajectories followed their own paths and were not driven by ECJ rulings, be they even as important as the *Kohll/Decker* jurisprudence. In the short and middle run the postulated tremendous impact of these rulings can thus be considered rather minor. In the long run, though, their general destabilizing potential remains a threat.

4 I speak of processes because implementation involves three steps: interaction among multiple types of political or private actors; interpretation and settlement of disputes; and internalization of EU law into domestic legal systems (see Siegel 2007).

5 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.

Innovative Contributions

This book is located in the intersection of political and legal sciences and contributes to both worlds equally. It makes four innovative contributions to the fields of Europeanization, implementation of/compliance with EU law, and social policy research.⁶ First, I analyze in detail how EU Member States implemented ECJ rulings at the national level and what impact this had on their social security systems. Most scholars focus on the legal doctrines elaborated by the ECJ and their potential impact, and not on the actual implementation of these doctrines. The latter is of extreme importance, though, because without such analyses, scholarly research can only speculate and the actual impact will remain opaque. I am able to overcome these shortcomings by tracing the political processes in detail and by linking specific rulings to specific policy responses.

My second contribution is that I do not discuss isolated influential rulings in one single country as is often done by (legal) scholars (see, for example, Becker 1998, van der Mei 1999), but I examine a longer series of rulings – the *Kohll/Decker* jurisprudence – from 1998 to 2007, and I do so for three selected EU Member States: France, Germany, and the United Kingdom. Examining such a line of cases allows me to integrate the dynamics of the development of the ECJ jurisprudence – a key variable in understanding implementation processes and outcomes – into the analysis.

Thirdly, in contrast to existing studies with a bias toward single causes, in order to explain implementation I focus on the combination of factors such as domestic political preferences, enforcement through national court rulings, enforcement and management strategies of the European Commission, and the fine-tuning of the jurisprudence by the ECJ.

And lastly, I contribute to the debate of whether the established historical periodization of the role of the ECJ (early “judicial activism” versus “self-restraint” in a later phase) is tenable, or whether it has to be modified.⁷

EU implementation/compliance studies usually focused on directives (see, for example, Börzel 2000, Héritier et al. 2001, Falkner et al. 2005, Linos 2007).⁸ This book treats compliance with ECJ rulings. This “third form of compliance” started

6 “Europeanization” has been defined as the formal and qualitative changes induced by European decisions in domestic policies, politics and polity (see Héritier 2001: 3). The majority of the abundant literature on Europeanization deals with the effect of EU institutions on the political systems of the Member States and their efforts to adapt to European requirements. ECJ jurisprudence is only a subfield in this literature but will be in the focus here.

7 Judicial activism refers to ECJ rulings that usurp the rule and policy-making powers of the Member States. Judicial self-restraint describes situations in which ECJ judges defer their rulings to some extent to the objections of the Member States.

8 EU directives – in contrast to regulations which are directly applicable – are binding on the Member States as to the result to be achieved, but leave it to them to decide the means.

to receive increasing attention in the late 1980s and early 1990s (see Tallberg 2003: 48–52).⁹ In 2005, the European Commission characterized compliance with ECJ rulings as being of utmost importance:

In a Community governed by the rule of law, it is of utmost importance that judgments of the ECJ are fully complied with by the Member States. Otherwise, legal certainty, individual rights, the conditions under which market participants operate in various parts of the Community, equal treatment of the 25 Member States as well as the balance of rights and obligations of Member States under the Treaties could be seriously called into question. Non-compliance with a judgment of the ECJ thus strikes at the heart of the legal order of the Community. (2005a: 1)

Case Selection

I am interested in the question of whether ECJ rulings perforate or abolish the principle of territoriality of domestic social security systems and de-structure their internal functioning. In order to investigate these contested questions I had to select a series of cases that was critical to the concept of increased de-territorialization and de-structuring triggered by ECJ rulings (for the relevance of choosing crucial cases see, for example, Eckstein 1975: 118, Gerring 2001: 219–221, 2007).

I collected all the relevant rulings first to get an insight into the universe of ECJ rulings. In the course of gathering the rulings, an interesting line of cases came to the fore: the *Kohll/Decker* jurisprudence. These rulings do not fall into the usual ECJ social policy categories, such as free movement of workers, free movement of third country nationals, and worker's protection and equal treatment, but they concern the passive free movement of services and the free movement of goods of patients moving within the European Community. 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, *Watts* and *Acereda Herrera* in 2006, and *Stamatelaki* in 2007.

If ECJ rulings do trigger de-territorialization and internal de-structuring, we should detect both effects in the implementation outcomes of the *Kohll/Decker* jurisprudence. This jurisprudence concerned health care systems in general and patient mobility in particular. *Kohll* and *Decker* determined that domestic health care systems had to be operated in a way that was compatible with the free movement of services and goods. Health care is indeed only one aspect of social policy (see Hatzopoulos 2005: 112–113). However, Leibfried has estimated that

⁹ The first form is compliance in the implementation of directives, the second compliance in the practical application of EU rules.

the importance of the health area with regard to the struggle between domestic and European rules is particularly high:

The health area is a first, *and crucial* [emphasis in original, AJO], Europe-wide testing ground for the turf battle between national welfare states and the EU plus the market, as represented by private insurance, producers, etc. (2005: 268)

Leibfried points to three reasons for this particular role of health:

Compared with pensions, health insurance has more ‘market traces’ in most national systems, is more fragmented by provider groups already operating in markets (medical instruments, pharmaceuticals), or quasi-markets (doctors in sick fund private practice), and has been traditionally exposed to substantial private provision in most countries. In recent decades, national reforms have pointed increasingly to ‘market cures’. (2005: 268)

From the overall EU impact on the health area, I will isolate and analyze the influence of the *Kohll/Decker* jurisprudence which supposedly undermined important elements of the sovereign welfare states: the exclusive control of Member States over the beneficiaries of benefits, over the territorial borders of the consumption of benefits and over the design of the respective policies, that is whether a social benefit is delivered in cash or in kind (see Leibfried and Pierson 1995). *Kohll* and *Decker* and subsequent rulings were supposed to show that the ECJ had a direct impact on the way social policy is organized in the Member States, in this case the reimbursement of health care costs. Maurizio Ferrera stated that *Kohll* and *Decker* “are unquestionably of great importance for the neutralization of territoriality conditions in EU health care systems.” According to his assessment, from the rulings originated “a destructuring potential that ... may lead to significant changes in the institutional configuration of this sector of the welfare state” (2003: 22). Hans Vollaard equally considered the *Kohll/Decker* jurisprudence as being “à l’encontre du principe de territorialité” [being in opposition to the principle of territoriality, AJO] (2005: 230). With regard to compliance with the *Kohll/Decker* jurisprudence, Derek Beach found that

the faithful implementation of the rulings has potentially extremely high costs for EU governments ... as the doctrine can in theory undermine national attempts to contain health care costs by enabling citizens to avoid waiting lists and poor service in their home countries by seeking medical treatment abroad, with the bill being footed by the citizens’ own national health care system. (2005: 114)

The main interest of this study is to examine whether or not all these developments took place and what impact the ECJ rulings had on domestic social security systems.

Country Selection

In order to show the differential responses of EU Member States to the ECJ jurisprudence, I examined France, Germany, and the United Kingdom. These EU Member States represent three distinctive European social (health care) systems. When we compare them we can distinguish between two ideal types: a Beveridge model (national health service) and a Bismarck model (social insurance system). The Beveridge model covers all citizens and is marked by a direct state-run administration, financing through taxes and service provision through public law organizations, whereas the social insurance Bismarck model relies on a solidaristic self-governed financing structure based on income. These two models, though, do not exist in their pure form. In order to oversimplify, in the “old” EU-15, nine have a national health service, three a social security system based on the provision of cash benefits, and three a social security system based on the provision of in-kind benefits. The health care systems of the Scandinavian countries (Denmark, Finland, and Sweden) with strong communal and regional autonomy and those from Anglo-Saxon countries (UK and Ireland) marked by centralist control are financed predominantly through taxes. Four southern European countries (Greece, Italy, Portugal, and Spain) have at the same time tax-based as well as contribution-based financed components. Predominantly financed through contributions are the systems in the remaining six countries. While cash benefits dominate in Belgium, France, and Luxembourg, in Austria, Germany and the Netherlands in-kind benefits prevail.¹⁰

In addition to the theoretically grounded reason for the country case selection, it should be noted that in the internationally booming comparative literature on welfare states political scientists rarely do the comparison between Germany and France. France is especially not among the intensely researched countries (see Lepperhoff 2004: 23–24).

Method

I examine a critical line of ECJ social policy decisions: *Kohll* and *Decker* and subsequent rulings from 1998 to 2007. With these innovative rulings, the ECJ supposedly challenged the exclusiveness of domestic social security systems and enhanced the exportability of welfare state benefits with the help of the fundamental freedoms. How these ECJ decisions were implemented in France, Germany, and the UK, and which effects were triggered by the jurisprudence, will be the central questions of this book.

There is a multitude of different pressures exerted on EU Member States when it comes to the (re)shaping of their welfare state features. I am specifically

¹⁰ For an overview of the different health care systems in the EU see for example Knieps (1998a, 1998b), Kingreen (2003), and Palm et al. (2000).

interested in the impact of ECJ rulings. Through careful and detailed process-tracing (see, for example, George and Bennett 2005) I attribute a specific policy response at the Member State level to a specific ruling. I pay special attention to the time sequencing of social policy changes and I can thus separate the impact of ECJ rulings from other possible factors, such as changing domestic policy preferences.

I gathered and analyzed both national and EU-level documents. At the national level: rulings by national courts, legal texts dealing with legislative or administrative changes as a response to ECJ and national court cases, legal text drafts, ministerial circulars, parliamentary debates, newspaper articles, press releases, documents from the domestic insurance funds, and documents from other concerned actors. Complementary to this, I assembled and analyzed documents from the EU-level in order to be able to show the interaction between domestic and supranational processes: the ensuing ECJ rulings, the concerned EC regulations, European Commission documents that deal with the implementation of the ECJ jurisprudence, documents from the European Observatory on Social Security for Migrant Workers, and other relevant documents.

Having analyzed these various documents I then refined my findings with the help of 25 problem-centered expert interviews in Germany, France, the UK, Austria, Brussels and Luxembourg. 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 interviewees are listed in the annex. The expert interviews helped me to fill missing links in my analysis and generated information that was partly not deducible from the examined documents. The assembled expert interviews have been coded and analyzed in “atlas.ti”, a qualitative document analysis software package. The results were incorporated into the analysis.

Structure of the Book

In Chapter 2, I theorize implementation processes of ECJ rulings. I develop the three main questions of my book and the theoretical approaches used to answer

them. First, I want to know how EU Member States implement ECJ rulings. I argue that contrary to conventional assessments, even crucial ECJ cases like *Kohll* and *Decker* are implemented in a comparatively timely and correct fashion. There seems to be a growing implicit *erga omnes* effect. Second, I ask about the driving forces behind the implementation of the ECJ jurisprudence. The goodness-of-fit approach will help me to evaluate the *Kohll/Decker* jurisprudence. The most promising explanations for the implementation are domestic party political preferences, national court litigation, the fine-tuning of the jurisprudence by the ECJ in follow-up decisions, and the management and enforcement activities of the European Commission. Several of these factors have to interact with each other in order to guarantee smooth compliance with the ECJ jurisprudence. Lastly, I put forward an answer to the central questions of the book, whether the implementation of the *Kohll/Decker* jurisprudence perforated or abolished the territorial principle enshrined in domestic social security systems, whether the rulings caused internal de-structuring processes, and whether the implementation of the rulings caused financial destabilization.

In the third chapter, I discuss the different concepts of the ECJ as a policy-maker in general and in social (health care) policy in particular. This allows me to evaluate the implementation of the *Kohll/Decker* jurisprudence.

In Chapter 4, I describe the secondary law that inspired *Kohll* and *Decker*, that is the Coordination Regulation 1408/71 for migrant workers, and then detail the series of cases central to this book, as well as the legal discussion surrounding that line of cases. Starting with the rulings *Kohll* and *Decker*, continuing with *Vanbraekel* and *Geraets-Smits/Peerbooms*, and so forth, I show how the originally rather general material ECJ doctrines, which were directed toward countries providing health care predominantly through cash benefits, were progressively extended to other types of health care systems, to other countries, and to additional areas.¹¹ I show how simultaneously the doctrines were narrowed and restricted step by step by the ECJ.

In Chapters 5 to 8, I present the empirical results of the implementation of the *Kohll/Decker* jurisprudence. In Chapter 5, I assess the implementation in twelve “old” EU Member States in order to provide an overall picture. In Chapters 6 through 8, I detail the story of the implementation of the *Kohll/Decker* jurisprudence in three EU Member States: Germany, France, and the UK. The three detailed case studies follow a common structure: first, I very briefly describe the central principles of the respective health care system and the individual cross-border provisions which existed prior to the *Kohll/Decker* jurisprudence; then, I determine the status quo against which the following changes have to be seen, that

11 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” (1994b: 512).

is the degree of misfit with the jurisprudence; finally, I chronologically scrutinize the different pathways of the implementation in the three countries.

In Chapters 9 and 10 I look at the interaction between the supranational and domestic levels. The fine-tuning of the jurisprudence by the ECJ (Chapter 9), that is the restriction and extension of the material doctrines, and the initiatives of the European Commission (Chapter 10) both influenced domestic implementation processes and outcomes.

I make sense of the empirical results in Chapter 11. I explain the reasons for the initial non-implementation of the *Kohll/Decker* jurisprudence, then compare the diverse pathways of the implementation processes, examine the driving forces behind the implementation, and lastly look at its de-territorializing, internal de-structuring and financially destabilizing effects. In the concluding chapter, I draw five lessons from the findings of the book.