The other side of the coin: The privatization phenomenon and realization of public welfare in a Single European Health Care System? A sketch from the perspective of the economic theory of law

Janoska, Wilfried

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Wilfried Janoska

The commonwealth cannot be equated with the state nor can the common good of society be sustained by government action alone. Rather, the activities of all members of society are crucial importance. Such private sector activities also define the development of national healthcare markets in the convergence to a single health care market in the EU. The desired result of securing reliable and socially equitable provision of the people was associated with considerable costs for responsible administrative units. Especially in times of weak economic activity, this led to a significant burden on public budgets. Thus, the disadvantages of state activities typically form the starting point for privatizations. The contribution is about the consequences of privatization in the area of public services, particularly public hospitals. It is based on the methods of economic theory of law and introduces the importance of the reservations of the "desired" and "feasible" towards the creation of a mandate to the EU in the health sector. Question is whether and to what extent the state is losing its influence on public health structures, and what consequences it can have, if the services are not permanently guaranteed by any other means. Such a transformation process raises the question whether the reversal of privatization, i.e. of a hospital, does fall within the remit of the EU. In the alternative, whether an obligation of the EU arises, to create a (buffering compensatory) framework for such community projects. The parallels are obvious to the financial sector.

Keywords: privatization/socialization, EU health care mandate, law and economics

1. Introduction

To enforce their public interests, purposes and objectives European Member States [1] influence the economy in many ways. One way is to fulfill the tasks by state agencies. The other is to influence economic activities by regulating private business activity. In some areas they themselves do business and often intervention is provided by public, i.e. state-owned enterprises. The public sector can influence these companies as a shareholder (see, e.g., through participation in the banking sector during the financial crisis), or due to any other rights, directly or indirectly exercise a dominant influence. For this purpose the Member States can use public capital, by investing in public or private companies or transform state enterprises into private ones. However, no enterprise has so far been nationalized except through an acquisition governed by private law (Lübke, 2010). In addition, they may only take regulatory action. Both aspects of state interventions and its effects are the subject of this article, which also includes the possible role of the EU as a regulatory institution with a guardian function.

In recent years, private sector initiatives in the state were increasingly viewed as a panacea to solve all the ills of government activities on the market-based forces. The Economist (2012, p. 11) recently

[1] The concept of the state is here understood in a broad sense. For Germany, for example, it includes the state union, the states and the municipalities.

noted about successfulness and consequences of state capitalism that “state agencies or state companies would use capital less efficiently than private ones, and grow more slowly”, and „as they have to produce ideas of their own they will become less competitive, and, in contrast, the world’s great centers of innovation are usually networks of small start-ups.”

Given the (current) global financial crisis although, this estimation falls to falter. Nevertheless, in the recent past it has shaped the general attitude towards private participation in the implementation of public welfare (Haarländer, 2007). This basic tenor of the privatization calculus dominates the debate in the law rather than a counterpart (Broß, 2007) that sees the integration of private forces as an uncontrollable risk.

However, the debate on the role of the public healthcare system in the state structure and its privatization has an important merit: It recalls that the state does not generally occur in the market as the owner of hospitals because he could provide better management with the same objectives (such as profit maximization). Rather, the state must combine his ownership role with a public mission, and this benefit must be offset against the potential costs. If public hospitals are doing exactly just that, private hospitals do, they should be subject to the same economic policy frameworks on the market.

In the field of general interest changes have an impact by shaping public companies or by influencing the economic policy at the state’s mandate of the supply of services. This is important cross-border and national among public and private services as well as between national institutions and their users. According to Slot (2011), the ratio of private and public sectors in Europe is characterized by various mixed situations in the Member States, because they define what they consider to be public interests: Such interests identify goods and services that are deemed to be so vital that government has to secure their provision; the provision of such goods and services constitutes a fundamental aim of government policies and legislation; general interests as goals are found in some of the constitutions of Member States, others wrote them down in legislation or basic policy documents. Thus, Member States have created a wide range of instruments to secure the provision of public goods and services as well as the conditions under which this should take place. The intensity, that is to say the degree of intervention in the market mechanism, of these instruments varies (Slot, 2011). Already at this point it should be noted that not all Member States share the same public interests, which are also not effected with the same instruments in each Member State, even if they follow the model of social market economy (Slot, 2011).

But, it is not a novelty in hospital care to involve private providers in the performance or financing of public services of general interest. A quarter of German hospitals are already in private ownership, and rising (Federal Office of Statistics, 2011). Also, medical services outside the core area are passed by many hospitals in the form of outsourcing to private providers. After all, the German hospital landscape has been under pressure for a long time. The tense situation of the public sector, i.e. the public budgets leads to the fact that the German federal states increasingly withdraw from their responsibility for financing hospital investments (Haarländer, 2007).

In this paper, the public hospitals and their current tasks are considered. First, the role of "public" and "private" sectors in health care is discussed. Then the “general interest “as a policy area of the European Union is striped. The EU also has to face new challenges.

2. The requirements and the demarcation of public and private sector

The health systems, funding structures and the healthcare markets of the European Member States are very different, just like their state organizations, their political and cultural traditions. Because of the events in the aftermath of the crisis and to try to determine the responsibilities of the state in free markets, one may first have a look at the guarantees were given by the state in the banking sector. In other words, the public authority in any market economy must first secure the conditions for the free exchange of products and services. Since this exchange is realized by means of money, the state must ensure that the money used in trade fulfills its task; otherwise the functioning of the market economy would be jeopardized. The role of the guarantor, the European Member States have played since 2008 in the banking sector, is one side of the coin and not durable when it comes to concerns of market, economic and budget terms (Triantafyllou, 2010). The problems of the banking sector have been "nationalized" with the takeover of their debts by the state, which could in turn result from the banking crisis to fiscal and monetary crises (Triantafyllou, 2010).

After this brief detour, however, it seems tempting to assign this position of guarantor on health care. It also appears useful if states could fulfill their public mandate by shifting higher government spending, such as economic inefficiencies, while displacing health funding to private providers in the market. It then recommends privatization of hospitals.

That said the starting point must be the nation-state perspective on the situation of public interest and pursuit of private economic activity. So, a look at the German constitutional law may be useful to distinguish public and private sectors in the discussion about the general interest in general and services of general economic interest in particular, especially from the perspective of the German welfare state in compliance with the principle of proportionality. This forms the basis of normative jurisprudence to arrive at normative economics (Janoska and Thöni, 2009)

2.1. Constitutional Requirements and the Requirement of State Economic Activity

With regard to the use of state-owned enterprises, the German constitution law [2] contains only a few restrictions. The basic law is characterized by economic neutrality, and does not favor the decision of a particular economic system, but it leaves it to the legislature to decide, within the context of other constitutional principles (Federal Constitution Court, 1954). This neutrality is particularly evident in the fact that the constitution makes no statement on the economic system in general or in particular to distinguish between public and private sectors. The state then contributes, in part because of the social state principle (Art. 20 GG), a fundamental constitutional responsibility for providing key infrastructure services in general (Möstl, 2011). In principle, this is fulfilled through regulation; the state does not have to provide the necessary services itself, but merely guarantee by law and administrative regulations an appropriate offer by private suppliers. As an intermediate result, it can be noted that the government is constitutionally required only to guarantee important services, but not to render them itself. Under current constitutional law there is neither public fulfillment of services of general interest nor an economic activity of the state in generally prescribed by the constitution.

2.2. The Boundaries of State Economic Activity and the Social State Principle

Conversely, the basic law allows a more extensive state economic activity. It does not reserve certain operations to the private sector. Nor, the state's economic activity is not constitutionally subsidiary to

[2] Basic law, Grundgesetz (GG)

the private economic activity. But the basic rights of private operators restrict the economic activities of government; the state should intervene only in accordance with the principle of proportionality (European Court of Justice, 1991a). These restrictions apply in general, not just about sector lines. The restrictions do not help, however, in the case of mere intensification of competition caused by addition of state competitors. If the government makes private economic activity impossible or unreasonable, especially in the case of public monopolies, private agents (actors) may raise court proceedings, citing the infringement of fundamental rights. At this point, the rationality requirement of the law by the principle of proportionality is realized (Führ, 2002), that is therefore perhaps better translated into the privatization discussion with the prohibition of excessiveness or rule of reasonableness. It can be embellished as a highly rational assessment program that includes a legal test sequence, which is addressed in the core to undergo the relation between the intended purpose and the means used to a rationality test: anyone who is exposed to this test appears to itself as to be disciplined by substantive law, because his approach is clamped in a means-end relation (Führ, 2002). The law goes back to a formal principle, the intention to optimize the end-means relation and a restriction on the use of funds to the level of just what is necessary to fulfill the purpose (Führ, 2002). The optimization intention is the interface to the economic theory and touches on the economic principle of efficiency. The efficiency principle also applies to the means-end relation, and therefore is aimed to achieve the most favorable ratio of these two quantities; its mission is to provide an objectively legitimate use of social resources (Führ, 2002).

2.3. General Interest and the Public Service Mission of the State

The economic principle is to be observed also in healthcare. Its two variants can be described as optimizing or maximizing utility use. In the maximum variant it is about ensuring a given allocation of resources to the highest possible level of achievement. This is the rule for optimists, because one opts for the alternative that brings the greatest benefit. In the minimal variant a given goal shall be realized with a minimum of resources. It is the decision of pessimist and goes out of maximum security against disappointment. People choose the variant that brings in the most unfavorable condition the highest profit. So, one decides for the best of the worst situations and alternatives.

One can look at health economics as an application of economic methods to the needs of healthcare. If one does, it has to be critically examined whether transferability of the results into practice is given. The reason lies in the fact that possible extreme experiences related to diseases do not allow the unchecked transmission of economic methods. Rapid changes of preferences without equally rapid reaction of markets, the importance of high standards for healthcare providers and a far smaller scale survey of the empirical basis for decisions, Lauterbach et al. (2010) say, stand for the fact that economic models may not (or perhaps should not) achieve the effects, as they do in other sectors. But, for the political decision on whether a health system should be performed privately or publicly, it cannot matter what diseases should be treated. Then the problem is that the observed economic phenomena of a health system with its single components must be analyzed in the context of its manifestations, processes and consequences. For, if it is not possible to approach a kind of infrastructure for the health market, worsens the damage caused by unexpected events and hinders the reliable performance.

2.4. On the Debate about the General Interest and its Fulfillment

A basic discussion of the distinction between public and private sector in Germany is part of the privatization debate, especially since the 1990s of last century. For example, the privatization of state holdings should serve the one hand, fiscal consolidation, on the other hand, however, create jobs and stimulate competition and lead to a new division of responsibilities with the necessary changes in the

relationship between public and private sectors (Federal Finance Office, 2000). As part of a comprehensive modernization of the state, the state should withdraw from entrepreneurial activity and be active rather than where private initiative can at least fulfill these tasks equally well (Federal Finance Office, 2005). Accordingly, in Germany the corporate industrial involvement of the federal government or a single federal state requires an important state interest, which will be reviewed regularly. Naturally, this assessment is subject to changes because the economic environment is constantly changing.

Parallel to the ongoing privatization process, the question of its limits emerges. In recent years, privatization and privatization projects have repeatedly failed to achieve the desired effects. The question of the limits of privatization is linked to the concept of general interest: Against the background of the social state principle (i.e. Articles 20 (1), 28 GG), the state has to vouch for the fact that, in economic terms, private suppliers cannot provide coverage of services everywhere, although it concerns services which the individual needs essentially "to secure a decent livelihood" (Federal Constitution Court, 2008).

Services of general interest can be either market-related or non-market-related (European Commission, 2000), depending on whether the service is marketable or excluded by the nature of things. Due to their autonomy the municipalities provide the services to a large extent. According to traditional understanding the general interest includes the supply of energy and water, waste and sanitation, public transport, the basic provision of public broadcasting services, post and telecommunications, but also community facilities as non-economic enterprises such as saving banks, hospitals, etc. It was initially accepted that the state should provide these services itself, e.g. in Germany for saving banks and hospitals because of their common roots as non-profit state agencies with the purpose of caring for the poor (Matschke and Hering, 1998). Meanwhile, the consequence out of an assignment of a service to the field of general interest is only that the state has to ensure that it is provided and that the services of general interest work purposively (public service obligation of the state, public order). Due to the guarantee of local autonomy the communities may be allowed to get rid of the affairs of the local sphere by transmission to any third party. Nevertheless, it may not be complete instead they must retain their influence and control options to keep coping tasks. As another interim result can be stated that the general interest is located at the level of self-organization and self-management which can be viewed as essential characteristics of the commons (Orstrom, 2011).

2.5. The European Union’s Concept of Services of General Interest

The range of services that citizens need to guide their life-style has played a major role in the states of the European Union in political, economic and cultural aspects. Although, the importance of general interest considerably varies from the view of the different traditions of one Member State to another, the European Commission (2000) qualified the existence of such general interest services as part of a true (and total) European social model. Unlike in other parts of the world, all European countries were concerned with facilitating the conduct of individuals, which is inevitable in modern societies and goes beyond the nation state territoriality. Brenner (2009:3) sees the reasons ”by the intensification of interspatial competition between urban regions; and by a growing differentiation of national political space among distinctive urban and regional economies, each with their own unique, place-specific economic profiles, infrastructural configurations, institutional arrangements, and development trajectories”. These efforts occur mainly in the form of state economy, partly as a market organization within a normative framework. The “external” European environment offers the single Member State even though no external frame, on which he could line up. The comparison in the transnational field between Member States is predominant here. The recorded matters affect traditional infrastructures

and their use in the areas of water, energy and transportation. More recently, technological and demographic changes evoke new challenges and force to develop new solutions. However, they are not questioning the basic approach that provision of services is up to the free market and the market forces. Consequently, in the words of Flecker et al. (2011), who emphasize the importance of regulation to liberalization and privatization, "to ensure access to affordable high-quality public services for all", describe liberalization as a process that "aims at building competitive market structures, in which many providers compete with each other in an integrated and easily accessible market" (Flecker et al., 2011). The primary European law reflects this special situation, since the Treaty of Rome (Majone, 2005). Already in the original version of the Treaty of the European Economic Community (EEC) the exception for services of general economic interest was provided (cf. Article 86 (2) EC Treaty). The European law applies not to such services, as far as it would act as a disincentive.

Following the Amsterdam Treaty, the Treaty of Lisbon turns out clearly the importance of services of general economic interest. The changes of the contractual basis are showing both the common interest of Member States and the EU as well as the high political relevance of these services of general interest, but without establishing a specific level of performance determined in normative terms. With coming into effect the European Charter of Fundamental Rights (ECFR) adds the objective guarantee of the Treaty on the Functioning of the European Union (TFEU) and the Protocol on services of general interest to a subjectively legal dimension in European law. The concrete expression seems not to correspond with the apparent character of article 36 ECFR as an entitlement. With the initial award of a directly relevant legislative competence for the EU, the general interest and its equivalents from other Member States was finally established at the European level (Knauff, 2010). Despite this, and even if the initial creation of a competence base for the EU lead to tensions in the area of general interest, the Treaty of Lisbon strengthens the possibilities for Member States to reach independent decisions in the area of public interest. The frequently emphasis on the primary of Member States' de facto design strengthens particular traditional structures that can be looked upon as far from the market. Also, the explicit recognition of the local self-government as the dominant element of the national identities of Member States at least strengthens purely argumentative the keepers of traditional performance models. Hence, the Treaty of Lisbon makes it easier to maintain traditional Member State structures for the provision of basic services (Knauff, 2010). A high level of commitment by the state in the provision of services of general interest is not only still possible, but also protected in a special manner from access by European law.

Whether a certain approximation is done in the future on the basis of Article 14 TFEU for the provision of basic services of the legal framework cannot predict. Because of the failure of efforts to agree on a framework directive on services of general interest a rapid use of the newly created basis of competence by the EU seems unlikely (Knauff, 2010). The importance of the innovations by the Treaty of Lisbon, which relate to the public services, directly or indirectly, is therefore not primarily legal, rather than political. The commitment of the EU and the Member States, which is evident from the rules and their normative integration, about the need for high quality and citizen-oriented services of general economic interest as part of a social Europe (Hantrais, 2007), significant performance deterioration cannot appear in Europe as a viable option. From the design freedom of the Member States is to be concluded that the traditions of service delivery should have its own value at the national level. However, a reorganization of the provision of basic services is possible. The Member States function, so to speak, as experimental laboratories for the development of task-appropriate concepts. In the competition between systems best solutions may arise. Such a meta-system could eventually be reflected in the European framework regulation on the basis of article 14 TFEU, and the

union citizens who (have to) use the services of such competition could be winners (Knauff, 2010). Articles 14 and 106 TFEU include the notion of services of general economic interest within the meaning of EU law, according to the understanding of the European Commission (2000), which is only a subset of the performance of general interest, namely the market-related services. Preconditions for the existence of a service of general economic interest is that it is not provided in the private interest of individuals or groups, but in the public interest (European Court of Justice, 1991b). Furthermore it must be an economic activity. Meanwhile, the Union law contains no precise definition. Instead, Member States shall determine what has to apply as a general economic interest. The member States may therefore designate certain services as services of general economic interest (European Court of Justice, 1993). This allows them to privilege enterprises which are preoccupied with such services by EU law.

This can be transferred to public hospitals. Public hospitals can provide services of general economic interest, e.g. by restoring the health of workers and employees. They ensure this task by spatial covering the needs of the population with health services and coping with the growing demand for ever higher standards of health care.

3. Methodical framework – Economic methods of assistance

3.1. The Range of Law and Economics and the Economic Analysis of Legal Institutions – the Design of Regulation

As Posner (2007) outlines, the concept of economic analysis of law is the general application of economic theory to various fields of law, including the associated policies. With the application of the economic analysis of law therefore also apply the new institutional analysis with its subfields of agency theory (Jensen and Meckling, 1976), transaction cost theory (Williamson, 2010) and the property rights theory (Alchian and Demsetz, 1972), the approaches of political economy (Stilwell, 2006) and the constitutional political economy (Brennan and Buchanan, 1993).

The aim of the economic-legal-institutional analysis (Bizer, 2002) is to give the legislature an aid in the design of regulatory instruments. For this it uses the economic model that allows instrument-specific impact analysis. Given that there is any proposed legislation project, it requires the legal review of proportionality with its three criteria appropriateness, necessity and reasonableness. In that case, the connection of proportionality and the rational choice theory appears as the cross disciplines normative link of the legal-economic institution-analysis (Bizer, 2002); as a methodical bridge between law and behavioral sciences (Führ, 2002). Who wants to design and apply legal standards relies on behavioral science as an empirically based “real science”. On the basis of the evaluation of expediency the economic principle and the principle of proportionality proves to be the lowest common denominator of interdisciplinary normative understanding. Economics provides the basis for a behavioral model that is based on the rational-choice-theory and also considers influential institutions as preference and decision-making limiting factors and thus embeds the individual in its institutional environment (Bizer, 2002; Führ, 2002). From there it is almost inevitable, in reverse, to move from the individual utility maximization on questions of utility maximization of whole societies (Brennan and Buchanan, 1993).

3.2. The Privatization Phenomenon and Rational Choice

Since ancient times, it is said that man should be guided in his decisions and his actions of sense and reason. The modern version of this maxim is the doctrine of rational action, or rational choice theory.

According to this theory, man is in his decisions and actions as economically as possible, by making a thorough cost-benefit analysis and is guided by the principle of profit maximization. In other words, he tries to reach with minimum effort for maximum success, benefit or pleasure. For this he uses appropriate calculations, a so-called benefit calculus that shows him how he is going perfectly in achieving his goals. Such an approach is regarded as rational. Conversely, a behavior is viewed as irrational, which seeks to achieve an existing goal with incorrect or inadequate resources, or at the wrong place at the wrong time and therefore achieves a suboptimal result.

Preconditions for rational action are, firstly that he knows exactly what he wants or will do at first, and knows what he wants or will do if the first target is not feasible or has already been reached (i.e. if he has an order of preference); secondly, that he has alternative courses for action (i.e. if he has no choice, he does not need to optimize); and thirdly, that he knows the probabilities of events he must take into account (Braun, 2010).

The rational choice theory says something about the most appropriate approach, but nothing about the rationality of goals, i.e. it tells how to decide the best way to achieve certain goals, but not whether the goals themselves are rational (or justified). Weber (1922) created the term “purpose-rationality”, referring to a sober, rational pursuit of achieving a goal that is not clouded by error or strong feelings. He has distinguished the rationality from the so-called value rationality. According to Esser (2002), this means that each actor is confronted with a clearly defined set of alternative courses of action and both clearly have a defined, consistent and complete preference order for all possible situations that could occur through their actions. Furthermore, assumed is that every agent of all future events can assign a common and consistent distribution of probabilities for which he then selects the alternative that, if one exists, maximizes the expected utility formed out of the preferences and probabilities (Esser, 2002).

No man can know exactly all the details of knowledge that are necessary for optimal decision of a complex problem. So one cannot figure out exactly how the health care market develops in a region. Only experience can be starting position, and actors are not completely preserved in front of a letdown. One can only know exactly the intensity of use, not even assess the development of demography, because this is determined by the policy (particularly in health policy and economic policy) in addition to the incalculable risks of global and technological progress. Something else may apply if the public order of the state can be included in the calculation as a reliable date. After all, and out starting a supply order of the state as an expression of the social state principle, interference potentials of action of the state are given. This is irrespective of whether he is acting as fulfiller or as guarantor.

Once there are gaps in knowledge, constraints of time and material costs, and legal limitations, there are also limits to the rational approach. This leads to the concept of bounded rationality. Simon (1955) has criticized the neoclassical paradigm and emphasized the impossibility of living humans of being able to collect and process full information about each and everything. Instead of the postulate of rational agents, the importance of bounded rationality was emphasized in cases when the mentioned prerequisites of fully rational agents cannot be met (Lorenz, 2009). It is assumed that the optimal rationality itself is constrained by a number of factors. As mentioned above, there are important limitations, such as the factual or principled limitation of knowledge of the constraints and boundary conditions and the predictability of each decision (Simon, 1955). Further limitations are (Simon, 1955), the “endowment effect”, the “fear of risk or the inertia”, “myopia” and a phenomenon called “satisficing”.

Table 1: Boundaries in Decision-making Process

Endowment effect	People tend to estimate higher the value of what they have, than that what they could achieve by changing their actions, even if the economic value of both goods is objectively equal.
The fear of risk or the inertia	People tend to continue their previous behavior even at considerable cost, if alternative behavior is associated with incalculable risks.
Myopia	Temporally close events subjectively have a higher weight than more distant events in time, and obvious targets are prosecuted rather than more distant goals – no matter what abstract rationality.
"Satisficing"	People usually consider only a few alternatives, usually only two, and not all which would be considered reasonable. They stop weighing, when they came across a reasonably satisfactory solution, even if there is a real chance that there are still much cheaper solutions.

Source: Own illustration, content adapted from Braun (2010)

According to Esser (2002), this catalog is supplemented by what he called the "Elias-effect", namely that, the more confusing and expensive the consequences of an action, the more people will be cautious and calculating. Are there clear fronts and is not much to gain with caution, reflection and rational calculation, following ones passions is easy. More than that, it is literally obviously vital not to wait too long what one does. Bounded rationality means, therefore, that human action is based on a cost-benefit analysis, including weighing the benefits of rationality and effectiveness (Braun, 2010). The use of reason and understanding is bound to have adequate access to information that can be limited, and requires time and effort. The cost of the use of reason and understanding must, thus, also be taken into account. Sometimes it is better to react spontaneously or on a basis of a rule of thumb (Lorenz, 2009) instead of analyzing too long.

Becker (1999) emanates from the economic point of view that all human behavior can be treated as if there were actors who maximize their utility, based on a stable system of preferences in different markets and gain optimum configuration for information and other factors. Becker (1999) goes on to say that then in this case the economic approach provides a unified framework for the analysis of human action. Becker (1999) emphasized, however, that core of this approach is not rationality, based on a consciously thinking, but a deeper rationality of action. Here there are parallels with the rationality of procedures, according to Luhmann (2008).

Further and following Selten (2001) bounded rationality is not simply a weak version, but structurally different, because people are not able to perform all their actions on the basis of a utility maximization calculus. Procedures may help them, but definition-makers often do not know exactly what they want. The cognitive abilities are also far from enough to asses risks precisely or to determine probabilities exactly. Rather, in making decisions they are guided by collective quality criteria and seek solutions as simple as possible ("rule of thumb"). Emotions can play a major role in the decision-making behavior, for example, by restricting, or at least preventing the attention strongly against potential risks (Selten 2001). The search goes also in the socio-emotional direction with the goal of a socially acceptable and balanced solution or cooperation, even if optimal solutions would be achieved without cooperation. Based on previous decisions, people gather certain experiences through which they develop a certain "level" for future decisions and actions that they adapt to each of success or failure. A typical sentence, for example, reads as: "We have always done it that way, so it cannot be wrong." In a real decision situation a solution is not usually found strictly rational, but on the basis of experience in similar situations, and one decides intuitively. Finally, it cannot be decided rationally between competing goals because these goals cannot be compared quantitatively. Again, the decision maker can proceed only emotionally, checking for instance, with which solution he can live better. This means, in contrast

to the economic theory of decision, that people do not act rationally and choose the best alternative. Normally, they do not learn from their mistakes, remain in a given course, cannot draw from their expectations and are only forced to give up habits. At the end there is again predictable, but irrational human behavior (Ariely, 2008). In reverse and in between, it can be concluded from this irrational behavior on the defectiveness of actions in the implementation of privatization decisions, if they become manifest. These consequences can be estimated by considering the legal consequences, leading to more transparency in the privatization phenomenon.

3.3. The Privatization "Scene" as a Complex System

Since economics aim at describing the behavior of actual, living human beings, feedback processes have to be seen in a different light as the law, ideally. Although it is trivial to stress that individuals react to changes in their economic environment in their own particular manner, it is a useful exercise to emphasize a few essential difference between *homo economicus* and human agents living in an interdependent economic world. Dörner (2002) was able to prove, that, in complex situations people know very well that their actions could have fatal consequences. Because people avoid correcting their errors for reasons of self-protection or a lack of alternative courses of action, they unconsciously describe their perceptions and decisions to be correct. They construct a "psychic" reality in order to protect the feeling of competence from injuries and losses. In the present context of privatization projects due to, for example, savings measures, one can with Dörner (2002) see that the inadequacy of human information processing, which tempts as shown in the following table to favor rash behavior instead of a useful and purposeful behavior.

Table 2: Behavior due to deficiency of human information processing

Rashly behavior	Useful and purposeful behavior
Getting started and act quickly	Analyzing the initial conditions and plan further action
Ignoring the relationship between various problem elements	Work out the interaction between problems and determine their influence
Focus on the nearest event	Investigating the side-effects of long-distance effects of actions
If the chosen path turns out to be less successful, taking increasingly radical measures	Changing the approach and seeking new paths

Source: Own illustration, content adapted from Dörner (2002)

People perceive preference for what they expect or know well or secretly desire. They react under pressure with narrowing of perspectives and seek safety in simplicity and familiarity. Objectivity, rationality and reason are thus not to be expected when making decisions. The logic of failure (Dörner, 2002) or the logic of unreason (Mérö, 2007) is that people follow seldom rational and objective considerations, because they are always influenced by motives, attitudes and feelings, which depend in turn in experience and learning processes. Consequently, people do not decide based on an absolute scale, but relative to their individual experiences, interests, social contexts, and standards (and relative to their emotional state). This may be reflected on the respective EU Member state and its people and the perceived importance of general interest.

But decisions are influenced not only by the personality of the decision maker they can also have an impact on the long term situation of the decision-maker himself. He is held responsible for bad decisions and faces new unfamiliar situations. Outsiders make him responsible for their exclusion. The governing dynamical system in health care strives in the hospital area as well as in the funding sphere for certainty, stability and sustainability. Economic, as shown above, is different. Economic

environments are permanently due to innovations, changing demand etc. Political ideologies may find their routes to academic convictions (and vice versa).

4. Political framework conditions

The European social model is strongly influenced by the ideas of the welfare state. It is its fundamental and distinguishing feature; nevertheless, the voices accumulate, demanding to withdraw from spending on the welfare state (Pestieau, 2006). According to Pestieau (2006) it is up to two main charges: that the welfare state fails to achieve some of its main objectives, and that it is responsible for a decline in economic performance. Especially, health care in Europe is public and faces huge financial problems, so it becomes problematic to maintain its financial soundness and its universal accessibility (Pestieau, 2006; Kersting, 2008).

4.1. The Health Policy Viewed as an Economic Policy

The traditional instruments of economic policy can be tested for suitability for control of the health system, if the health care system is seen as a market that is generally accessible to the competition (Lauterbach et al., 2010). This combination is not far-fetched, even for Europeans who are accustomed to a caring health care. Regularly, less regulation means more market forces. Hence, the transferability of general economic policies in the health care needs closer examination. Thus, health policy would initially be based on models of economic policy, especially on the assumptions on the behavior of actors. These are especially the self-interest of actors, the rationality of acting with utility maximization under limited information, the opportunity cost principle and the adoption of risk-averse behavior, as mentioned above. An orientation of economic policy, consequently, allows the application of competition theory, the theory of decisions under uncertainty, the economic theory of policy, management theory, institutional economics and transaction cost theory (Graf von der Schulenburg, 2008). Key objective of health policy limiting the market power and the possible establishment of a functioning market or competition would be about efficiency. Efficiency is understood as the best allocation of available resources on the field of use (see above).

On an abstract level, therefore, structural similarities between economics, law and management can be found. Questions about interactions and contexts in European law, on constitutional principles, simple legal rules, legal and social norms can be analyzed at all in the health sector with the economic analysis of law. For that, the economic analysis of law relies on the rational principle ("rational choice theory"), the principle of efficiency ("efficiency") and on the analysis of legal consequences to measure the effectiveness of health policy. Simultaneously, the recourse to economic policy means that an intervention of the health policy can only be derived if a market failure occurs.

4.2. The Pursuit of Efficiency

Health policy as an economic policy offers the tantalizing prospect that is created with a unique set of conditions an ideal health care in terms of welfare economists, and then this system is competitive, acting under the actors for a balance and maximizes the benefits to society (Lauterbach et al., 2010). In theory, there are the appropriate models, such as health care should look like. These models of market foresee that health care is limited to the allocation of resources according to the willingness and ability to pay. Unless a patient does not have sufficient financial resources, the necessary redistribution takes place within the tax system or the social security system (Eidenmüller, 2005). To what extent the tax system (or fiscal policy) is able to provide funds, actually, is ruled out of the models as an external frame.

Essential for the understanding of health policy as economic policy would be to eliminate or at least alleviate the market failures. Market failure is manifested in particular by external effects, lack of consumer sovereignty or the lack of market transparency. The occurrence of all these problem areas can be assumed in the healthcare industry. Market failure in health care means, that there are several areas where the market forces are not able to achieve efficiency. As the crisis in the banking sector (Stiglitz, 2011), especially the lack of market transparency seems to be a decisive criterion for the failure of the functioning of markets in health care (Lauterbach et al., 2010).

Supporters of market-based models argue that the elimination of market imperfections must be at the forefront of health policy efforts. This would still be more efficient than to execute the turnaround in the market place and return to state control. True is that market failure does not always imply a government intervention. Rather, the loss of benefits to the population due to market failure must be compared with the possible loss of value due to the alternative possible state failure. State failure expresses itself in very different ways and it can range from over-regulation to the delayed introduction of long overdue innovations (Eidenmüller, 2005).

Proposed solutions for markets are almost always based on the creation of transparency. Such solutions, however, ignore the monitoring of induction of transparency, therefore, for the production of functioning markets. Here, the EU can play a significant role, which can therefore be designed as a mandate in health care. The derivation of possible points of departure for health policy action remains within the economic model of welfare maximizing the benefits for society as a whole.

Both positions seem to be inappropriate according to the current state of research. Empirically, no health care system has so far shown that a market-based control may have advantages compared to regulation; in particular, rapid growing financial needs while growing inequalities cause problems in market-based systems (Lauterbach et al., 2010). In other words, in understanding the limitations of resources, one has to ask the question whether the resources one has are being rationally allocated, and what percentage of them are being squandered on problems that should be dealt with in other ways. Having entire populations dependent on healthcare for treating even the slightest ailment or injury does not seem ethically, financially or practically attractive or viable. These issues need to be the subject of long-term, expertly managed social debate on health care as a service area of general interest (Kersting, 2008). The issue of empowering populations to take responsibility for their own health is beyond the scope of this contribution, but it relates to practical issues and to communications on the EU level. Lack of retention decisions can affect the democratic formation of opinion and therefore on electoral success. These relationships are often analyzed with sociological approaches. Here, the economic theory of politics is essential.

4.3. The Normative Foundation of the Privatization Phenomenon

Private contributions have always been essential for the performance of public tasks. Not only because many private activities have a reflexive relation to the public sector, but also because significant parts of the society act altruistically.[3] The health care system is no exception. After all, many individuals give free results of their work force to the public.

[3] Since this paper is about the development of statehood in relation to the development of capitalism, the (eminent) position of non-profit organizations remains free. One can describe the relationship between hospital operators in Germany shortly: The private institutions will usually generate long-term return on invested capital. For the non-profit, mostly church institution the charitable order is in the foreground, however, losses may not be approved. Economically, the result is the temptation to seek only so much efficiency, as it is currently required

These private activities show that the (state or municipal) administration cannot ensure a balanced performance of all public functions alone and in itself, but only together with the forces of society (Orstrom, 2011). Yet, after its image as a modern welfare state, Germany was continually increasing the provision of essential services acquired through its own administrative activities since the 1960s (Burgi, 2008). The provision sought by the guarantee of a reliable and socially equitable supply of the entire population was associated with significant costs for the responsible administrative units. Especially in times of weak economic activity, this led to a significant burden on public budgets, and, consequently, to a continually rising public debt, which may be able to be classified as critical in the wake of the financial crisis and the current development of the Member States' national debts.

The strengthening of public finances by increasing the tax burden is difficult to convey to the people and meets on economic concerns about side effects. Given these obstacles to increasing the public revenues, the reduction in expenditure has been the goal of many reform ideas. A crucial starting point is the concentration of state activity on so-called core tasks, while the remaining areas should be covered again by the independent civil society (cf. Orstrom, 2011). Since the 1980s the slogan "Lean State" refers to an increased extent of privatization (Janoska and Thöni, 2009). It is not expected that this effort could be hampered by the current aversion under the heading of "market fundamentalism", i.e. the belief that free markets produce economic prosperity and economic growth on their own (Stiglitz, 2011). As far as the involvement of private actors is conceived as an opportunity for saving costs and the transformation of the administration into efficient and service-oriented authorities, the same expectations lead to the idea of increasing efficiency in the health sector. Especially from the purifying effect of competitive pressure in a free market, positive impulses are expected for what is perceived as cumbersome government service delivery.

5. Shaping public policy alternatives in the hospital care

The aim of the economic analysis of institutions in public law is to assist the legislature in the design of regulatory systems (Bizer, 2002). Whether privatizations are advisable can be detected by an integration of the German welfare state principle into the economic analysis of (constitutional) law (Janoska and Thöni, 2009). The privatization process in the hospital sector in Germany stands for a rollback of the state from a range of important public interest. This means not only a change of the reference object but also a change of institutions of public law. Even if it seems as if the state loses his influence in the hospital care through the privatization process, the public mandate remains as an expression of the social state principle. In other words, regardless of the public or private nature of the "dosage form", the existence and access to sufficient quantity and quality of medical care facilities must be ensured. The social state principle, thus, only legitimizes the role of public hospitals in society (Kies, 1998). The public mandate in hospital care can be understood as a call to action, to safeguard the hospital care through administrative action if no adequate private provider is available (Janoska and Thöni, 2009). A priority can be made for the private provision of hospital services, if later on the allocation in the healthcare market is more efficient. From the social state principle is then given a design order for the legislative with the right and the duty due to the creation of social justice (Federal Constitution Court, 1996). In turn, the government must commit itself to improving health care. The German Basic Law does not specify what is meant by social justice. Even so, the order to design health care is equipped with a double reservation: the reservation of the feasible (henceforth: "feasibility"), in particular the financing (Federal Constitution Court, 1972) and the reservation of the

for balanced results. For the public, mostly lokal actors, the political significance of the facility is in the foreground.

desired (henceforth: “desirability”, in the meaning of desired condition, target status), i.e., the freedom of the state in implementing the mandate to provide, for example, public utilities (Federal Constitution Court, 1982).

From the perspective of economic theory of law the desired can be used toward implementing state goals and public responsibilities under rationality considerations. The legitimacy of the welfare state principle unfolds through the recourse to the goals and preferences of members of society. Normative decisions can be traced back to the choices of individual actors in order to define the social objectives more precisely (normative individualism, legitimization approach).

From a legal perspective, the analysis of preferences is addressed to the efficiency target as a competitive goal besides the goal of distributive justice. Considering the privatization phenomenon as efficiency-oriented, it realizes the “desirability” when the advantages outweigh the disadvantages and therefore maximize the benefits without causing any deterioration. If the preferences of society include accomplishing the aim of distributive justice it must be asked where and with whom advantages and disadvantages occur. One of the most important tasks in any market economy is, therefore, that the tension between efficiency and equity is moderated and is on the understanding that social stability can be achieved only if the national product (wealth) is generated and distributed relatively equitable (Eidenmüller, 2005). For the problem of distributive justice in the hospital care it is about the affordability of access be redistribution in the tax and social security sector. With the principle of solidarity in the social security is targeted another area of the social state principle, namely the financing (Kingreen, 2003). From the perspective of efficiency, the Pareto criterion is sufficient as a normative measure for determining the economist role of the state and its effectiveness in the hospital care. The Pareto criterion is a decision criterion for the evaluation of different social statuses. It is used to describe the preference for a condition A (e.g. hospital care in the regulatory state) form a different condition B (e.g. hospital care by means of a state production). The condition A can be described as Pareto-superior if at least one individual prefers it and everyone else either will do or is indifferent between A and B. A is Pareto-optimal if there is no other social condition, which at least one individual prefers and no one else rejects. Main case of application is the market mechanism. The market mechanism works “ideal” if it leads to equilibrium in which the conditions of any market participant can be improved only if simultaneously worsens the position of another. In that regard, on the initial equipment with economic resources of the participants depend what specific equilibrium can be reached. If the initial situation is changing, a different equilibrium is reached. Any equilibrium can be achieved, depending on how the initial endowment is modified (Eidenmüller, 2005; Posner, 2007; Cooter and Ulen, 2008). In the German hospital care the state behaves regardless of the chosen form of hospitals always as a market participant, as long as other providers are present in the market. Based on the close interdependence with the market mechanism, the Pareto criterion is recommended almost to make assessments of alternative models for service provision in hospital care and changes due to the privatization process (Janoska and Thöni, 2009).

5.1. Privatization and Feasibility

If it is assumed for the analysis of the welfare state that the “desirability” may well correspond to the provision of care at the hospital market is exclusively influenced by private providers and redistribution through the tax and social legislation by the state to establish a fair distribution in the hospital care, so in the next step will be asked whether the privatization process can be measured on efficiency, namely as a state withdrawal from the hospital sector.

The subject of the "feasibility" plays a dual role, as it produces its effects on different allocation levels. On the one hand, it is an absolute limit to the overall framework of public revenue and expenditure, because it can only be distributed, because what is available can only be distributed. On the other hand, performance rights are subject to it in the sense of what the individual can reasonably claim from society (Federal Constitution Court, 1972). This varies with the conditions of a society. The reservation is not an absolute limit of "feasibility", but appeals to the allocation and weighing of opposing legitimate interests in the use of existing resources. The consequent balancing of interests can be understood in three different allocation levels: First, it is significant as the distribution of existing on the individual tasks carried out in the state (macro allocation); second, a set volume of funding can be offered, which is available for matters within a certain area (allocation on a meso-level); at the third level, when scarcity is changing the entitlement of individuals to an equal participation in each of the specific total allocation by the other stages (micro allocation) (Heinig, 2008). It differs from mere participation by the constitutional claims, however, binding effects, which are deployed at the level of meso-allocation. In that regard, the "feasibility" is just not about a right to equal participation in the status quo of public services, but also to the moderate control of health assets. The public sector is bound by it at the level of meso allocation a greater extent than at the macro level of total funding. Thus, "feasibility" is fitted into an instrument with which the freedom-functional concerns of the welfare state in the whole range of state involvement are under conditions of scarcity of state resources (Heinig, 2008). Looking not only at the limiting function also has the "feasibility" a balancing function. If at the end of the assessment process, it is clear that a quantitative and qualitative supply of hospital care through private is possible in a more efficient manner, it may therefore result from the social state principle a dictate of reason for privatization.

5.2. Alignment of the Privatization Process on Efficiency

If the focus is on expenditure of resources, the privatization process must be aligned, so the allocation of resources will be directed optimally to the different uses and that a level of care is achieved for all users in the hospital system, which cannot be further increased. As the ongoing privatization trend in Germany (Federal Office of Statistics, 2011) shows, there are no such condition in the public hospital care. Under the aspect of procedural rationality (Luhmann, 2008) the privatization process leads in itself to a relief of public budgets, if the public task will be fulfilled reliably by private providers so that there would be a need only to regulate the process of transmission. This only happens if the task of hospital care can definitely be transferred with the care facility to a reliable private provider. This allows the release of long-term funds in public budgets. With the concrete actions of representatives of public hospitals in the privatization process and the occurring problems and opportunities in terms of that goal attainment an effective and efficient policy of privatization can be implemented as a measure of economic policy (Janoska and Thöni, 2009).

Released funds can be used to tackle other tasks. Afterwards, the actors involved in health care have to make cost considerations, which may be made in cost-benefit analysis of current and future conditions of hospital care. The cost-benefit analysis is about the ex-ante evaluation of state projects where costs and benefits are compared which do not occur only today but also in the future and, accordingly, affect society as a whole. The rule of positive net benefits (Pareto improvement) as a decision criterion is applied her, with the aim of creating a socially decision (Pareto optimum).

With the application of the principle of efficiency in the privatization process, moreover, a description of the current state of health care in the hospital sector is possible, when the privatization trend must be stopped, because an increase in efficiency is no longer possible. The (political and bureaucratic) procedural justification for the privatization process itself is limited by the latest entry privatization as

a result of inefficiencies. The economic theory of law therefore can give recommendations for the control of government failure (or market failure) (Engel, 1998; Kerber, 1998). It also serves on the analysis of legal and real consequences as an indicator to identity, early privatization negative consequences, such as the formation of monopoles. Then there is also a tool at hand to decide about a reversion or other state inventions to prevent negative consequences for health care and to escape from misallocation.

6. Conclusion and outlook: The substrate of the care order of the state

Many politicians tend to recommend the market order of Adam Smith for all private property and the Leviathan of Thomas Hobbes for all communal goods. Furthermore economic theories see the welfare state as replacing insurance markets to compensate for market and information failure. But to choose an institutional framework, the core of rational decision is to compare the advantages and disadvantages of alternatives objectively, to evaluate the benefits on the basis of a calculation and to select the alternative with the greatest benefit. The financial crisis of 2008 and its aftermath demonstrate errors, rather a failure, from which one can for the sectors of the real economy derive models of functioning systems under either public or private auspices. The lack of transparency and the lack of overview of consequences, even if they can be anticipated, can make sense of an overarching coordinating body, how the EU is already occupied in competition law. It is not about replacing the powers of the Member States, but about harmonization of living standards in the EU. Anyway, for the health systems and the challenges to overcome, it appears very rational to align and to promote transnational cooperation between the Member States. It may follow two positive effects, in the short term the market opening to entrepreneurs and in the long run opening up opportunities for resolving crisis situations.

In order to establish in the health care market more open market economy and to give entrepreneurs an economic perspective, it is necessary to create reliable conditions. This includes not only reliability in the region that already belongs to the private market. But also in the area that would benefit from acquisitions. The hospital market is an area of mixed economy. This mixed economy has also to suffer from the turmoil in international financial markets. The consequences are not yet visible for patients. It is even questionable whether these problems even become visible to patients, since the view of the patient will already be restricted by the disease. The consequences of the financial crisis depend in public budgets and are partly, in the health care sector, covered by the obvious problems in the healthcare market. Increasingly, it seems questionable whether the public sector can fulfill the service obligation, the policy has prescribed it. In this context it is natural to question the extent to which individual market participants may perceive their service obligations. In the privatization process the public sector should act rationally and transparently. Actors should not only react on repercussions of a measure but on the consequences. The economic analysis of law provides the tools.

As soon as the healthcare environment changes, because of privatization, the former conception can change as well (changes such as environmental catastrophes will be ignored, but as a cause for the arising of the hospital sector to be kept in mind, e.g. due to pandemics, war, poverty relief, etc.) and innovations in the form of changes in the institutional framework in which activities take place “might require that economic actors adapt their individual behavior to these changes in order to perform optimally in this new environment” (Lorenz, 2009). When such innovation in an array of services is restricted to visible time spans during which daily experiences converged to a new scenario, the same qualitative description of the particular economy may be appropriate as before (cf. Lorenz, 2009). If

innovations represent a permanent disturbance in a succession of environments, the overall picture changes in time.

As the financial crisis in 2008 showed the classic crisis management is not enough for today's crises. This also applies to health care systems. The difference between crisis management and the leading of crises lies in the timing. Crisis management is applied after the crisis has occurred, so only reacts to the occurring difficulties. By contrast, in order to lead crises, proactive measures are operated before the crisis admission, are therefore preventive. Even if no crises are threatening, carefully worked out plans are ready to address them. As the financial crisis demonstrated since 2008, soon as possible one should provide an idea of what might occur as crises. Which body should be more appropriate for coordinating and conducting crises in a single health market, than the institutions of the EU? This requires creating a self-learning and self-correcting culture that may imply a balance between centralization and decentralization. It can be built on two elements - the structure and the systems. The structure, from a political perspective, is particularly the style of health care, e.g. embodied in public or private law, designed with state-owned or private companies. This includes the arrangement of component parts: the number of facilities, the size of companies, divided into regions and so on. From the viewpoint of a hospital it is the external environment comprises the whole range of economic, social, political, and technological factors. Thus, the structure is the sum of its parts. In addition, a health care consists of its systems. These include the employees, the supply of energy, sanitation, treatment facilities, financing system and so on. The systems create the space in which the task of health care can be fulfilled. Only when something breaks, we consider the systems. Privatization is concerned, if the financing of public tasks cannot be guaranteed. Without funding, there is a danger for the fulfillment of tasks by the systems. If the systems do not work, there are only a few parts that do not fulfill the desired function. The errors can be detected, when the structure and the systems are reviewed. This presupposes an idea of the errors in the systems. In turn, this implies the need to recognize that the initiation of cultural change in the systems is required. The process of cultural change has at least two sides. One side is the "bottom-up" effect that many changes can be effected by those people who do the practical work at the level of EU Member States. The other side is the "top-down" reality that changes are caused by the instructions from above. This reality is also to observe at the level of EU Member States. Finally, a change on organizational culture requires a commitment to the health systems at all allocation levels. The culture is so altered by a series of small steps that must be made at all allocation levels, Therefore, for a reasonable assessment of the different opinions about the design of a future common health market one looks best at the actual lines of development and the background of the privatization first. Thereafter a discussion with the normative and economic foundation of the privatization phenomenon and its consequences for an EU policy can take place.

In the aftermath of the crisis can be conclusively confirmed that the joy of a money economic national product is overshadowed by the fearful question: "Can we afford this?" And not just because of the illusion of a too-generous money-creation, but by an arduous multiplication and best arrangement of the elements of production: Human activity, natural gifts and productive capital. The economic costs of goods that are to be distinguished sharply from the monetary economic costs are critical to the long term behavior of the individual, especially entrepreneurs – not vice versa. Certainly, the strength of desire, the will and ability of individuals and entire groups is not without significance for the economic debits and credits. But the key is still the willingness and ability of someone who desires to make sacrifices.

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