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Erika Szyszczak, Jim Davies, Mads Andenæs, Tarjei Bekkedal (Eds.), *Developments in Services of General Interest*. The Hague/Berlin: T.M.C. Asser Press/Springer, 2011. 266 pages. ISBN: 978-90-6704-733-3. EUR 79.95.

The book under review deals with the legal problems, both institutional and substantive, which emerge from the study of services of general interest (SGIs). The regulation and provision of SGIs cover a number of issues facing the European Union, in its internal and external dimension, as well as the global market and economy. SGIs raise crucial questions concerning the relationship between the public and the private spheres, the State and the market, economic rights and welfare/social rights. In this sense, they represent an essential element of every national economic and social constitution, as well as of the EU.

These issues, together with many others, are fully taken into account in the book. The chosen perspective is new and interesting and the analysis developed therein insightful and very well structured. In the introductory Chapter Szyszczak assesses that SGIs constitute a challenge for the European integration project and explores to what extent they have been and are still viewed as a "persistent irritant in the European public debate" (M. Monti, *A new strategy for the single market*, 9 May 2010, p. 73).

Part I of the book, related to the background issues on SGIs, begins with Chapter 2 by Bauby ("From Rome to Lisbon: SGIs in primary law"). The author, firstly, provides a definition of the terms used in some of the official languages of the EU to identify public services. He rightly observes that a univocal glossary in this field cannot be established. The content of public service, in fact, is geographically, culturally and historically determined. Within this diversity, however, there is in Europe "a profound unity" (p. 21). In this regard, the author observes that, notwithstanding the Europeanization process occurred in this area especially due to the Treaty of Amsterdam and the Lisbon Treaty, "it will require a strong political pressure" (p. 33) for all the amendments introduced therein to lead to action so that the numerous uncertainties could be clarified through the adoption of a framework act of secondary law.

Neergaard's Chapter is devoted to the analysis of the Commission's soft law initiatives concerning SGEIs, starting from the 1996 Communication and concluding with the 2007 Communication. The study takes into consideration the political agenda and developments of the EU, leaving aside the Commission's role in the context of the proceedings under Article 258

TFEU or Article 106(3) TFEU. Among the different aspects of the five sources of soft law, Neergaard charts the Commission's approach to a legislative framework in the area of SGEIs and, in doing so, she notes that, "although having had to launch" (p. 57) the idea of a framework Directive, in reality the Commission has been reluctant towards this proposal and, as stated in the 2007 Communication on SGIs, it now rejects the idea. The author notes that the continued use of non-binding instruments, despite being a tool of balance between EU institutions and Member States, may eventually prove to be problematic in itself. Now, although not stressed by Neergaard, it is worth highlighting that, instead of sectoral directives, the adoption of regulations is, by nature, capable to confer on citizen-users of SGEIs directly invokable rights.

Chapter 4 by Bekkedal ("Article 106 TFEU is dead. Long live Article 106 TFEU!") raises the question of the purpose of Article 106 TFEU, focusing on the derogating scope of Article 106(2). Bekkedal observes that, as is shown by the most recent ECJ case law (*MOTOE*), its addressees are only undertakings and not (also) Member States, that is to say that derogations from free movement rules are possible through their own exceptions and justifications, never by Article 106(2). The arguments proposed by the author against the qualification of Article 106(2) as a general clause are: the economic nature of its objectives, to be seen in contrast with the freedom of movement's derogations and exemptions directed at non-economic aims; the flexible interpretation of the proportionality principle developed by the ECJ, to be seen in contrast to the narrow "traditional" interpretation of the same principle under Arts. 49 et seq. TFEU. Bekkedal's original approach raises four points which are not extensively examined in his contribution: Is the overlap between ultimate non-economic aims (the social function constituted by the provision of fundamental services to people) and instrumental economic aims (the preservation of a financial equilibrium) an inevitable feature of all public services, regardless of the area concerned (competition, State aid or free movement)? Is the so-called "doctrine of non-economic considerations" still a dogma of ECJ case law? Is it still true that non-economic aims can never penetrate the field of antitrust, notwithstanding the *rule of reason* shaped in *Albany*, *Pavel Pavlov*, *Wouters* and *Meca-Medina*? Is it really easier to transform public services' needs into jurisprudential mandatory clauses rather than applying Article 106(2)'s principle of proportionality with different degree of flexibility depending on the rules at stake (Art. 101 and 102 et seq. or Art. 49 et seq.)?

Skovgaard Ølykke (Chapter 5 – "The Definition of a 'Contract' under Article 106 TFEU") makes a preliminary observation that the fact that the public procurement Directives apply to contracts for the provision of SGEIs ensures transparency in entrusting missions of general interest. On this basis, he raises the question whether the privileges set out in Article 106, in case of public undertakings, undertakings granted with special or exclusive rights and undertakings entrusted with the operations of SGEIs, are covered by EU directives. In this regard, the author notes that SGEIs and public service obligations provided through in-house arrangements or entrusted to third parties through a legislative act are outside the scope of the rules on public procurement "because no 'contract' is present" (p. 119). A different set of problems, instead, arises when a service concession is involved. In this field, Skovgaard Ølykke, in contrast to many commentators' scepticism – among whom Bekkedal's – *vis-à-vis* the application of Article 106 in areas other than competition law, convincingly argues that the recent case law could be the basis for the intervention of Article 106 towards SGEIs even where the *Teckal* criteria are not fulfilled.

Part II of the book, relating to the new dimensions of SGIs, begins with Chapter 6 by Van de Gronden ("Social services of general interest and EU law"). The author aims at exploring the interplay between EU law and the welfare systems of the Member States. To this end, he focuses on the incidence of both competition and free movement rules on the regulation, provision and funding of social services of general interest (SSGIs). Starting from the right assumption that "SSGIs are not a legally distinct category in EU law" (p. 125), van de Gronden analyses the case law whereby issues concerning these services are examined by the ECJ. Unlike the conventional view, he argues that many SSGIs constitute economic activities and, for this reason, fall within the scope of the Treaty, with the result that the way such services are offered in the Member States can be strongly affected by EU law. In this context, unlike the great majority of

commentators, the author underlines, first of all, the divergences between free movement and competition, and secondly the blurring of the "economic" line as to the application of free movement rules to social security schemes (*Freskot* and *Kattner*). According to van de Gronden, the best key able to reconcile the case law's various asymmetries is the revaluation of Article 106(2) TFEU, i.e. a concept, such as SGEI, too often neglected in the field of SSGIs (*Sint Servatius*). This assessment represents an important contribution to the current doctrinal debate. In fact, it is the notion of "economic" in itself in the field of SSGIs to reveal the emergence of a rigid and traditional functional approach within free movement, in contrast with the attenuation of such approach, developed by the ECJ under competition rules, as a consequence of the revaluation of the public/private distinction with regard to the financing of the service provided (*FENIN*).

Chapter 7 by Davies and Szyszczak ("Universal service obligations: Fulfilling new generations of Services of General Economic Interest") deals with the evolution of universal service obligations (USOs) in the liberalization carried out by EU institutions. The authors stress the potentialities of the USOs from both a social and commercial perspective, considering this concept as a clear symptom of the Europeanization process and, in doing so, they observe its evolving and changing nature. USOs place the user-citizen at the heart of public services, but they do not contribute only to the development of a more *social* European private law, being also a tool of "*effectiveness* of the benefits brought by an Internal Market" (p. 155). Davies and Szyszczak conclude by observing that the evolution of public service obligations has caused a shift away from triangular relationships involving the State-provider-consumer to more complex networks of multi-level political and economic relationships. The approach to USOs developed by the two authors is stimulating and innovative. What is not included in the analysis are the legal implications deriving from the emergence of two kinds of universal service obligations (and the subsequent reaffirmation, once again, of the so called public/private divide), as inferred from the *BUPA* case (in particular para. 186). The General Court seems, in fact, to have admitted, at least in the field of social security, that, when a national system is private, a more flexible conception of universal service must apply, whereas when the system is public or in any case the product of an exclusive right, the criteria are different, in the sense that a stricter and more traditional conception of universal service applies.

Henning in Chapter 8 ("Public service obligations: Protection of public service values in a national and European context") firstly notes that, unlike SGIs and SGEIs, the term "public service obligation" (PSO) has not received the same amount of attention from legal scholars and practitioners in the last decade. He then examines the concept in France and UK in order to show the differences between the two regimes. In particular, in France public services have a constitutional status, while, in the UK, public values are protected thorough political rather than legal mechanisms. Finally, the author focuses on Article 93 TFEU on transport and State aids, i.e. the only provision of the Treaty containing an explicit reference to the term PSO rather than to SGEI. This is an occasion for him to submit that the replacement of the first term in EU law for the insertion of SGEI "undermines the mission of protecting common shared values in the EU" (p. 192).

Part III of the book is dedicated to issues of global nature regarding SGIs. It is divided in Chapter 9 ("Public private partnerships and government services in least developed countries: Regulatory paradoxes"), written by Schwartz, and Chapter 10 by Markus ("Universal service provisions in international agreements of the EU: From derogation to obligation?"). Schwartz, on one hand, argues that in least developed countries (LDCs) the freedom to define SGIs is a crucial task to be executed by their governments, and, on the other, points out the difficulty to reconcile their exemption from the application of standard regulatory mechanisms with the need for transparent measurable standards. The *sedes materiae* chosen by the author are the public-private partnerships (PPPs). Schwartz interestingly distinguishes the way how PPPs were firstly developed in industrialized States from their diffusion in LDCs. Then, by concentrating her analysis on the health care sector, she sketches a legal model in order to reach a fair balance between the commercial interest underpinning PPPs and the goals of public policy.

Krajewski deals, first of all, with the place given to public services within the GATS framework, using the telecom sector as a privileged tool of investigation, being an important model for liberalization and development of universal obligations. In doing so, he highlights that the pivotal role of SGIs in the EU's internal dimension is present in its external policies as well. Krajewski draws attention to the position attributed to the provisions on public service and universal obligations in the EU secondary legislation and reveals that the social values which define them are reflected in the transparency and non-discriminatory provisions inserted, for instance, in Article 115 of the EC-Chile Agreement. At the end of his contribution, Krajewski makes a very interesting assessment that such obligatory provisions mirror the current process of redefinition and "socialization" of Article 106(2) TFEU.

As observed by Davies in the last chapter of the book, "[i]t will be for future policy makers and commentators" to assess the degree to which new legislation, non-binding instruments and case law support the idea that a new "organizational model for an essential services paradigm" has finally emerged (p. 259). In conclusion, this highly recommendable book, regarding also the international context but clearly focused on EU law, indeed allows to detect a new paradigm in the field of SGIs, whose content and contours have been brilliantly shaped by the different contributors. A paradigm capable to stress the dual legal nature of SGIs. Such services act not only as a derogation to market and competition rules, but also as a positive obligation upon Member States and EU (and international) institutions. This gradual change of perspective is clearly examined in the book. Its *spirit* consists precisely of refusing a preconceived relationship of "subjection" between, on one side, SGIs and, on the other, competition and free market principles. All these principles must, in fact, interact in the ambit of a relationship of mutual functionality, in accordance with the idea that there is no conflict *per se* between the interests of the EU and the general interest, as public services are included among the elements and objectives on which the common interest is based. The tendency to view the transfer of responsibilities and powers from the EU to Member States as the only way of offering citizens/users more protection by attenuating the neoliberal principles that supposedly modulate EU policies as a whole is consequently open to criticism. In this regard, the book reveals that at the core of any investigation on the so-called "European social model" lies the problem of competence distribution between EU institutions and Member States, that is to say the quest for a fair balance between market demands and social values implied in the concept of SGIs. A concept, as it is confirmed by the (European) notion of universal service, to be intended as a positive method (and symptom) of market and rights integration.

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