BOOK REVIEW:

Published in Common Market Law Review 47, 2010

Markus Krajewski, Ulla Neergaard and Johan van de Gronden (Eds.), *The Changing Legal Framework for Services of General Interest in Europe – Between Competition and Solidarity.* The Hague: TCM Asser Press, 2009. 522 pages. ISBN: 978-90-60-74308-3. GBP 80.

The first comprehensive studies on the *régime* of public services in Europe – or Services of General Interest (SGIs) in the Community jargon – have been published in French (see, prominently, Louis, Rodrigues (Eds.), *Les services d'intérêt économique général et l'Union Européenne* (Bruylant, 2006)). However, the Dutch, the British and the others are also interested – and the book under review is the absolute state-of-the-art and, to my knowledge, the most comprehensive book (in English or else) dealing with SGIs in the EU.

There are at least three things which are remarkable about this book. First, the fact that the editors have managed to bring together "la crème de la crème" as far as authoring about SGIs in the EU goes. Second, that the structure and the contents of the book extensively cover the three overarching questions about SGIs: defining SGIs and their scope (Part One), financing and organizing SGIs (Part two) and regulating SGIs (Part Three). Third, that the last Part (four) of the book comprises a series of nine national reports concerning the way in which the EU rules on SGIs have affected the provision of such services in Member States. This last part is

so rich and dense that it could be a book on its own. Hence the book under review offers "two for the price of one", but, more importantly, has triple value: a) exhaustive information about the SGIs in the EU, b) extensive information on how nine national systems provide SGIs and c) important insight as to the interaction between the Union and the national levels.

The First Part of the book offers the definitional and ideological background putting into perspective how complex, but at the same time, how crucial for European integration, the concept of SGIs is. In Chapter 1, Neergaard sails through the different Treaty (pre and post Lisbon) texts, ECJ cases, directives and Commission documents and tries to come up with unitary definitions of the different concepts: services of general interest, services of general economic interest, social services of general interest, universal service, public service obligations etc. Her task is a daunting one, all the more since, as she observes, the same terms may be used with different meanings by the various EU Institutions (p. 41) and different texts make reference indifferently to either "services" or "tasks" of general interest (p. 43). Despite her best efforts, and her very meaningful classifications and proposals for the future, she concludes that, as things stand right now, we are facing "a conceptual disaster". This conceptual disaster, however, has not held back the EU Institutions from adopting measures, deciding cases and promoting their vision about SGIs – in particular economic ones (SGEIs) – in Europe. This is the topic dealt with by Wernicke in Chapter 3. He goes through the same texts of hard and soft law as Neergaard, but does not look for concepts and definitions but, in a more pragmatic way, for the applicable rules. He reaches the conclusion that "in the ongoing debate SGEI will less be thought about in terms of an 'exception' ... but instead as a *sui generis,* positive concept of public services for the Union citizen" (p. 79). Ross steps on this last finding and explains "The value of solidarity in European Public Service Law" (Ch. 4). Building on his previous work on the topic ("Promoting solidarity: from public services to a European model of competition", 44 CML Rev. 1057–1080) he looks into the concept of solidarity, through the philosophical and political science literature and finds that, while being reminiscent of old-fashioned ideas, solidarity is a highly dynamic concept which may "coalescence around choices and beliefs rather than, for example, race, ethnicity or gender" (p. 86). As such, it may be a working concept within the EU as "it goes further than non-discrimination or equal treatment but works to address disadvantage" and may be used next to citizenship and fundamental rights (p. 88). Therefore, "solidarity may be the concept more suited to performing the transformative work involved in redefining what it is that is meant by a single market or, per the Lisbon Treaty, a social market economy" (p. 93). This deeply thought-provoking Chapter (which should be read in tandem with the excellent "In search of the Role of 'Solidarity' in Primary Law and the Case Law of the ECJ", by Neergaard, in Neergaard, Nielsen and Roseberry (Eds) *The Role of Courts in Developing a European Social Model* (DJOF, 2010), 97–138) is completed by yet another very provoking – even provocative – Chapter by Davies (Ch. 2). He writes about "what does Article 86 actually do?" and analyses the case law of the Court on solidarity (*Albany*, *FENIN* etc), on overriding reasons of general interest (*Wouters*, the healthcare cases etc) and on State aids (*Altmark* etc), as well as the "rule of reason" in the application of Article 81 EC and the notion of "abuse" in Article 82 EC. He finds that all these rules achieve a fair balance between the application of market principles and the protection of consumers of SGIs. "And this leaves Article 86 as an unnecessary Cassandra, promising protection from threats that do not exist, slandering economic law with the implication that it takes no account of the public interest, and trying to recreate old divisions between the economic and the social. The Treaty, and society, would be better if it was gone" (p. 67).

Part Two of the book looks at how SGIs are financed and organized. In Chapter 5, Thouvenin reflects on *Altmark* and its consequences. With the benefit of hindsight, five years after the actual judgment, he comments on developments triggered by the *Altmark* judgment and the ensuing legislative package of 2005, both at the EU and the Member State (France) level (cf. Renzulli, "SGEIs: the post-*Altmark* scenario" 14 EPL, 399–432). He finds that the law concerning financing of public services "appears to be reasonable, if somehow complicated,

compromise" (p. 115): the *Altmark* criteria are very difficult to meet, but the Commission's package does offer some safe harbours from the application of the State aid rules, while the Courts, both at the EU and the national level, have applied *Altmark* in quite a relaxed manner. In Chapter 6, judge von Danwitz offers a (quite self-praising) overview of the solutions adopted by the Court in relation to State aid rules, in particular in respect of privatized undertakings. In Chapter 7, Fehling focuses on problems of cross-subsidization from the view point of competition law. He explains that cross-subsidization is not *per se* an abuse, but is only prohibited when combined with some other abusive conduct. While under Article 82 EC the notion of abuse is unitary both for public and private undertakings, the rules on State aids are not adapted to take into account the public nature of undertakings involved in the provision of SIGs: the "private investor test" upon which lays the application of the application of the State aids rules "should be modified towards a public investor test, which recognizes politically defined reasonable public goals as a justification for cross-subsidization, as long as the other *Altmark Trans* criteria [on transparency and overcompensation] are fulfilled" (p. 145). Thus, recourse to Article 86(2) would become unnecessary – on this point Fehling rejoins the argument developed by Davies in Chapter 2. The special role of entities involved into the provision of public services is further – and in quite some depth – examined by Bovis in Chapter 8. He writes on "the conceptual links between State aid and public procurement in the financing of SIEGs". Building on his previous work (Financing SIGs in the EU: How do public procurement and state aids interact to demarcate between market forces and protection? 11 ELJ, 79–109) he explains that "public procurement in the common market represents not only the procedural framework for the contractual interface between public and private sectors, but it also reflects on the character of activities of the State and its organs in pursuit of public interest" (p. 149). He expertly discusses the leading ECJ cases concerning the notion of "contracting authority" and shows that it is intrinsically linked to the provision of public service. He finds that "public procurement indicates the necessary link between State financing and services of general interest, a link which takes State aid out of the equation ... State aid regulation could be applied, as a surrogate system of public procurement, to ensure that distortions of competition do not emerge as a result of the inappropriate financing of services" (p. 168). Frenz and Schleissing (Ch. 9), indulge in the ongoing debate about "in-house contracts" and their treatment under the public procurement rules and principles. They find that the recent case law of the ECJ, culminating with the judgment in *Coditel Brabant*, (provisionally) settles the longstanding legal uncertainty and set the scene for "public-public partnerships".

Part Three of the book deals with the issue of "Regulating Services of General Interest". In Chapter 10 Szyszczak offers a very inspiring piece on "modernizing healthcare". She starts by acknowledging that the way that healthcare services are provided no more correspond to the "traditional idea of healthcare as a social activity firmly rooted in a notion of national social and economic cohesion with redistributive welfare qualities" (p. 193). She also finds that solidarity *was* the common principle underpinning healthcare provision in Western Europe (p. 193) but is gradually being replaced by "the rapid coalescence of the new Citizenship of the Union whereby the citizen through accessing public welfare markets can cohere around a new set of consumer-citizenship rights" (p. 194). In the light of the above (or in order to illustrate them) she examines a) the impact of the free movement case law, b) State aid and procurement law and c) the competition rules. She concludes that "there may be a role for EU to define an inner core of healthcare public services which are of significant social value to protect them from the full thrust of the free market rules. This could be achieved by adopting a rule of reason approach in the case law but such an approach may not give enough *ex ante* guidance to healthcare authorities. A better way of setting out an EU normative framework could be achieved by sector specific guidelines for healthcare authorities and providers" (p. 213). In Chapter 11, Rott turns to the role that private law may occupy in securing users' rights in the field of SGIs. He identifies the many ways in which contracts for the provision of SGIs have been varied, under the influence of EU law, in order to privilege the consumer and to secure

the basic characteristics of public service: quality, continuity and affordability. Looking into the various sectors of SGIs, harmonized and non-harmonized, he reaches the conclusion that "the balance between protection through competition and the necessity through universal service obligations appears to vary greatly between the different services of general interest, and this is not only owed to different degrees of competition in the different markets but also to the varying degree to which consumers are able to make reasonable choices" (p. 232). In Chapter 12, Van de Gronden examines the ways the Services Directive affects the provision of SG(E)Is. He finds that one of the (unintended) effects of the protracted negotiations on this text is that, while it imposes a high level of Member State discipline in relation to the establishment of the providers of SG(E)Is, it gives States virtually *carte blanche* when it comes to the occasional service provision. This, read together with the *BUPA* judgment, where the CFI, endorsing previous Commission practice, accepts that several (if not all) service providers present in a given market may be entrusted with the provision of SG(E)Is, may make it "even more tempting for Member States to circumvent Services Directive Article 16 by designating all kinds of services as SGEI" (p. 250). In order to avoid such a risk, he thinks that an EU Framework for the provision of SGEIs should be adopted. Such a framework could a) offer more precise a definition of the scope of SGEIs, b) explain how derogations to the Treaty rules would apply in order to accommodate SGEIs and c) illuminate the relationship between the EU public procurement regime and SGEI. "Moreover, the drafting of a Framework on SGEI would create a wonderful opportunity to contribute to the development of the European social model in which the socio-economic aspect would play a significant role" (p. 254). Rodrigues (Ch. 13), takes up and expands the idea of a Community Framework for the provision of SGEIs. He thinks, contrary to the current Commission's position, that "the Treaty of Lisbon may be considered as not the end of the story but as a new start giving some substance both to revitalize political interest in the question and to make it easier for the legal framework to adopt such a general instrument" (p. 256). He finds that political support for such a horizontal project could be gathered and that there are good reasons for such an approach. He thinks that, even before the entry into force of the Lisbon Treaty, Article 95 EC did provide the necessary legal basis, but that Article 14 TFEU, as it now stands, is as solid a legal basis as one can hope for. He also puts forward some concrete ways in which such instrument(s) could offer added value. Indeed, he thinks that "a plural and gradual approach must be recommended, combining thematic and sectoral dimensions that would lead to the adoption of a number of instruments", (p. 265).

Part Four of the book consists of nine national reports on "experiences in the Member States". The States are chosen in a way to represent a) Bismark and Beveridge traditions, b) north, south, Scandinavian and Mediterranean countries, c) countries advanced with their social security reform programmes and others which lag behind, d) old and new, as well as e) big and small Member States: France, Italy, Spain, Germany, the UK, the Netherlands, Sweden, Poland, Bulgaria. A very interesting fact is that, despite the apparent lack of strict guidelines, authors of the various national reports end up in discussing the same basic questions. The same lack of a rigid structure allows authors the freedom to adapt their presentations and hierarchize the issues they deem important. Therefore, the French report focuses more on judicial developments in relation to the EU requirements, while the Italian one gives priority to regulatory adjustments. Each report merits being read attentively, since their authors succeed in distilling the most relevant elements of their national legal orders in relation to the regulation of SGIs. The general impression left from the national reports is that, overall, there is strong complementarity between mutations and reforms undertaken in the internal sphere, with the stimuli offered by the EU case law and legislation. Indeed, the interaction between Member States and the EU is two-way and not necessarily linear, since experimentalism is a common feature at both the national and the EU levels. What is more, Member States may prove more or less resilient to EU pressures, depending on their Constitutional settings and legal traditions. Indeed, a brief comparison of the national reports shows that bigger/older Member States tend to adapt more "on their own terms" to the EU requirements: France (and

to a lesser extent Spain) is strongly marked by its own "service public" tradition, Germany by its constitutional arrangements (concerning the federal structure of the State, as well as its social function), the UK by its tradition for flexible, pragmatic and non-formal arrangements, Sweden by some sort of "superiority complex" as far as social issues are concerned, Italy by the rigidity of its administrative structures etc.

The book under review is one of a "trilogy" of volumes published in 2009 on the broader issue of SGIs, edited by "the usual suspects": Neergaard, Roseberry and Nielsen, *Integrating welfare functions into EU law – From Rome to Lisbon* (DJOF 2009) and Van de Gronden, *EU and WTO Law on Services, Limits to the Realization of General Interest Policies within the Services Market*, (Kluwer, 2009). The book reviewed here, however, is the most comprehensive one, covering not only definitional and institutional aspects, but also the practical implications of the definition of SGIs, both at the EU and the Member States' level. It is nicely set up, well written and attentively edited. It is an absolute "must read" for anyone inquiring into the way SGIs affect the application of EU rules, both from a theoretical/scholarly and from a practitioner's point of view. It also offers important comparative insights on the Member States' efforts to "modernize" their systems of social protection under the pressure of globalized needs and EU rules.

Vassilis Hatzopoulos
Athens