

# COMMON MARKET LAW REVIEW

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**Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Ulla Neergaard, Erika Szyszczak, Johan Willem van de Gronden and Markus Krajewski (Eds.), *Social Services of General Interest in the EU*. The Hague: T.M.C. Asser Press, 2013. 622 pages. ISBN: 978-90-6704-875-0. EUR 158.95.

If services of general economic interest (SGEIs) have constituted a legal category since the inception of the EEC (what is now Art. 106 TFEU has always existed in the Treaty) and services of general interest (SGIs) together with non-economic services of general interest (NESGIs) have been given legal status by the Lisbon Treaty, social services of general interest (SSGIs) are more of a mystery. These have only been discussed by soft law instruments and incrementally touched upon by some texts of secondary legislation. And yet, the organization, delivery and funding of SSGIs becomes an increasingly complex task for Member States to carry out. Economic constraints imposed by failing public finances push towards greater involvement of the private sector in service delivery. This, in turn, raises the issue whether and to what extent the EU rules on competition, State aid and public procurement should be applicable to the provision of social services.

This is precisely the topic of the book under review: to explore the “mysterious” nature of SSGIs and to examine whether/how SSGIs should/could be dealt as a special legal category under EU law. In order to explore the confines and legal implications of the concept of SSGIs, the book adopts four viewpoints: Part I offers “General Perspectives” in relation to the definition and legal characteristics of SSGIs. Part II examines the extent to which the qualification of a service as being an SSGI affects the application of EU free movement and competition rules. Since, however, case law on that specific matter is scarce and it is not possible to draw a comprehensive legal status for SSGIs, Part III delves into the more abundant secondary and soft law. Given that SSGI is essentially an EU concept, Part IV dives into national “case studies” in order to appreciate its impact (if any) on the ways in which social services are organized and regulated at the Member State level. Part V proposes some concluding remarks.

After a general Introduction by the editors, Part I boasts a comparison between the size and content of social services in the Member States (by Bauby). Chapters 3 and 4 (by Martinsen and Schiek, respectively) discuss the apparent antagonism between “traditional” welfare States,

built around national boundaries and the more “cosmopolitan” “social Europe”. Martinsen thinks that such antagonism is inevitable since it is rooted in the ongoing ‘Europeanization’ of welfare thus limiting national choices. Schieck, on the other hand, reasons in more symbiotic terms and puts forward the idea that national social services could be complemented by services offered at the transnational/regional level (especially in border areas), ideally with the participation of civil society. In the final chapter of this first Part of the book, Ross offers yet another demonstration of the way in which the concept of solidarity, inherent in all social services, could be used as a legal yardstick for determining their status under EU law. Part II examines to some depth the way in which SSGIs are affected and/or affect themselves the application of the EU rules on free movement of services and establishment (van de Gronden), citizenship (Tryfonidou) and free movement of capital (Flynn). By way of transition Neergaard examines the relationship between the free movement and the competition rules and conveys her perplexity as to why the two sets of rules do not seem to be affected in the same way by SSGIs. Thereafter follow another three chapters on competition law: Slot writes on the State Action Doctrine, Heide-Jørgensen on private conduct (essentially Art. 101 TFEU infringements) and Baquero Cruz on State aids. A basic question common to all the contributions is the distinction between economic and non-economic activities and the extent to which this distinction is reflected on the identification of SSGIs. Although the approaches of the various authors differ and their viewpoints diverge, they all reach the conclusion that the economic vs. non-economic divide is extremely casuistic and uncertain and does not make for clear-cut legal solutions. Another point which emerges from the combined reading of these chapters is that free movement rules tend to be more restrictive for Member States’ social policy choices than the competition rules. This conclusion, in my view, is only partly substantiated from the relevant case law and secondary legislation – and as Neergaard explains, does not seem to be justified from a normative viewpoint. Another part of the explanation lies with the approaches followed by the authors: while van de Gronden opts for a maximalistic reading of the case law and the Services Directive thus restricting Member States’ social policy choices, Baquero-Cruz finds that the rules on State aids (and competition more in general) only marginally impair national choices. Baquero-Cruz also finds – and in this he contradicts conventional wisdom as expressed *inter alia* by Fritz Scharpf – that there is no asymmetry and that social and economic considerations are equally taken on board by the EU legal order.

Part III of the book starts with a chapter by Szyszczak, whereby she explains how “a range of soft law measures is used by the Commission to create an agenda of common concerns, *inter alia*, Member State and EU interests, the creation of a community of stakeholders, the creation of principles/indicators/best practices/iterative processes as well as underlying themes which run through the different soft law processes: modernization, quality and citizenship” (p. 327). Then follows a chapter by Manunza and Berends on the “transparency” case law and related soft law in the area of public procurement, concessions etc. Their analysis is so thorough that they get carried away to the point of raising the question “whether a modern economy would not benefit from the introduction of rules subjecting the choice of public authorities between performing certain tasks themselves and awarding their performance to third parties to objective, transparent and non-discriminatory criteria” (p. 379). By way of case-studies, follow three chapters on the “Patients’ Rights Directive” (Baeten and Palm), the draft “Pensions Directive” (Van Meerten) and the various texts governing longevity insurance in the EU (Schelke). Each of these case studies is highly instructive for the relevant topic, but all taken together show that there is no single policy design behind the EU’s action in the field of social services, but rather a piecemeal and pragmatic approach.

This lack of coherence is further substantiated in Part IV of the book (by Wehlander, Madell, Becker, Davies, Costamagna and Koldinská) on SSGIs in Sweden, Germany, the UK, Italy and the Czech Republic. Indeed, the bottom line of these extremely interesting national case studies, covering countries from both north and south, Bismark and Beveridge systems, old and new Member States, is that reform there is only loosely (if at all) connected to developments in the EU sphere, and even less so to the EU rules and principles developed around the concept of SSGIs.

This book is the third in the series *Legal Issues of Services of General Interest* published by TMC Asser press, and edited by the same editors. Like the others, it relays the papers of a conference where extremely competent academics met with some practitioners. The book reviewed here is more progressive and forward-looking than the previous ones, to the extent that it tackles a more “primitive” – i.e. less developed judicially or otherwise – topic than the previous two; yet the book is by no means premature. Like the previous two books of the series, this one offers excellent analyses of the various topics and, at the same time, an exhaustive account of “everything about” SSGIs. This exhaustiveness comes at the price of some repetitions, especially in Part II of the book, where the various free movement rules are examined and the line between economic and non-economic is traced again and again by the various authors. Repetitions, however, seem unavoidable in relation to a topic as ill-defined in legal terms as SSGIs. Indeed, as Baquero-Cruz contends, “the category of social services, therefore, is a purely descriptive notion with no normative added value. The notion may be very relevant in terms of policy or soft law, to set priorities and to guide the practice of the Commission with regard to social services” (p. 309). On the same wavelength Szyszczak considers that “to date neither the European Courts, nor the other EU Institutions, have defined SSGIs sufficiently for them to emerge as a special legal category in EU law” (p. 319). These considerations explain the difficulties of the editors and the authors to overcome basic definitional problems and to avoid repetitions. These same considerations underline the value of the book which, in order to offer a complete overview of the topic, ventures beyond hard law and into soft law and polic- making processes and puts the spotlights on new actors. In this account the book, both by its structure and by its content, offers a paradigm of modern scholarship, whereby the law is not examined in isolation, but rather as an active component of an evolving society. This effort would have been even more valuable (or should I say: invaluable?) had it taken more actively into account the actual effects of the ongoing economic crisis on social services in the Member States.

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