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Caroline Wehlander

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Series Information

The aim of the series *Legal Issues of Services of General Interest* is to sketch the framework for services of general interest in the EU and to explore the issues raised by developments related to these services. The Series encompasses, inter alia, analyses of EU internal market, competition law, legislation (such as the Services Directive), international economic law and national (economic) law from a comparative perspective. Sector-specific approaches will also be covered (health, social services). In essence, the present Series addresses the emergence of a European Social Model and will therefore raise issues of fundamental and theoretical interest in Europe and the global economy.

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Preface

During the years 2004–2010, I worked as a practitioner of Swedish public law on housing and waste treatment; this book was born out of that experience. As a legal advisor for local and regional authorities in Sweden, I faced the challenge of understanding what a service of general economic interest (SGEI) is and how the SGEI character of an activity affects the application of EU market rules to national measures affecting the activity. I was also able to witness the striking contrast between the intensity of the EU debate on services of general interest at an EU level and the loud silence on this topic in Sweden. Yet it was clear that in Sweden as anywhere else in the EU, market law implacably made its way into the Member States' regulation of social services, one of the most sensitive parts of national democracy. It was also clear that this evolution could explain the introduction of several new provisions on SGEI in the EU Treaties, first through the Treaty of Amsterdam 1997–1999 and a decade later through the Treaty of Lisbon 2007–2009.

This transformation of SGEI into a constitutional concept of EU law is the result of a political compromise and, unsurprisingly, the post-Lisbon Treaty framework on SGEI has not only brought up new legal issues but also left crucial legal questions unanswered. This book addresses some of the unsolved questions: in particular, what constitutes an economic activity for the purpose of EU market law and what is the legal meaning of the EU concept of SGEI? The debate on SGEI may not be particularly topical at the moment but it seems important to discuss the meaning and relevance of SGEI, especially because the EU Commission has a mandate to negotiate the international trade agreement between the Union and the USA. The book also proposes an analysis of the ambiguous relationship between the SGEI provisions in the FEU Treaty, as interpreted by the CJEU, and the EU procurement and state aid legislative package adopted within the frame of the Commission Communication on Services of General Interest 2012. Finally, in order to gain a better understanding of the strategic choices made in these legislative packages, the book focuses on the Swedish regulation of public social services in systems of choice and on the effects a strict application of the EU state aid rules would have on their liberalization.

The book would never have existed without enduring attention from Pr. Tom Madell and Pr. Ulla Neergaard, and precious guidance from Pr. Jörgen Hettne, Pr. Johan Lindholm, Pr. Gareth Davies, Pr. Johan van de Gronden and Pr. Erika Szyszczak. The cheering team was composed of Per Wehlander, my beloved husband, and my children, César and Lila. They have amply proved that they know what solidarity means.

Lucky and grateful.

Stockholm,
January 2016

Caroline Wehlander

Contents

Abbreviations

AC	Swedish Competition Act (Sw: *Konkurrenslagen* (2008:579))
AG	Advocate General
CJEU	Court of Justice of the European Union
EAGCP	Economic Advisory Group for Competition Policy
EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
EFTA	European Free Trade Association
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
FAQ	Frequently Asked Question
GC	General Court (of the EU), formerly Court of First Instance
IG	The Instrument of Government (Regeringsformen 1974:152), one of the four fundamental laws comprised in the Swedish Constitution
LGA	Swedish Local Government Act (Sw: *Kommunallagen* (1991:900))
LOV	Act on Systems of Choice in the Public Sector (Sw: *Lag om Valfrihetssystem* (2008:962))
LRAs	Local and Regional Authorities in Sweden
NESGI	Non-Economic Services of General Interest
Nyr	Not yet reported
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
PISA	Programme for International Student Assessment
PSO	Public Service Obligation
SALAR	Swedish Association of Local Authorities and Regions
SCA	Swedish Competition Authority
SEA	Single European Act
SGEI	Services of General Economic Interest
SGI	Services of General Interest
SPC	Social Protection Committee

SSGI	Social Services of General Interest
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
USO	Universal Service Obligation

Part I
No Exit from EU Market Law for Public Services

Chapter 1
Introduction: The Constitutionalisation of the EU Concept of SGEI as a Story of Exit, Voice and Loyalty for Public Services in EU Law

Abstract This introductory chapter outlines the legal and political context which has led services of general economic interest to become a constitutional concept of EU law, and the regulatory developments in the field of social services in the Union. It introduces the main objective of the book which is to find out whether it is possible to understand SGEI as a constitutional EU concept relevant throughout the EU Treaties, and whether a transparent and loyal enforcement of the Treaty principles attached to SGEI can restrict the Member States' discretion to liberalize social services and the expansion of a European market for social services. In order to answer this main research question, three sub-questions are formulated and addressed in the three main parts of the book. The chapter outlines the theory and method used in the study, which includes a case study on Swedish regulation of social services in part III.

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1.1 The Expansion of EU Law in the Field of Public Services, Including Social Services: Crucial Legal Issues Unsolved

In a letter addressed in 2014 to the Swedish State, the European Commission (hereinafter "the Commission") explained that it did not prioritize complaints alleging illegal state aid in the partial privatisation of municipal schools and primary healthcare entities to private owners.[1] The Commission closed the case on the motive that "the described measures, their beneficiaries and the markets involved seemed to be purely local".[2] Although independent schools—many of them run for-profit—are part of the Swedish education system, the Commission did simply not question their economic character. This is striking because national school systems have been regarded not only by the Member States, but also by the Commission, as a national "chasse gardée", consisting wholly of non-economic activities. This letter—not registered in its public database by the Commission—signals discreetly a major turn in EU law on public services: not only healthcare services but also other social services as politically sensitive as education in a national school system may in all the more cases be covered by EU rules on state aid and, more broadly, on competition.

While allowing for-profit schools in the education system is still a specifically Swedish experiment, liberalization of social services is a trend in many Member States, which gives rise to complaints from private competitors, for instance in Germany and the Netherlands about the financing of public long-term care providers.[3] A more visible part of this "legal iceberg" is the *IRIS-H* decision, where the Commission found that public hospitals in the Brussels region constituted undertakings in competition with publicly funded private hospitals, and that public

[1]The term "partial privatization" is used here as these entities, although privately owned, continue to be, for the most part, financed by public resources.

[2]See letter of the Head Section for Market and Competition Division at the Swedish Ministry of Enterprise, Energy and Communication, registered under reference COMP/H-2/BC—(2012)33624, dated 29.03.2012.

[3]Commission, "The Application of EU State Aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation", SEC (2011) 397, p. 30. In this paper, the Commission evokes the decisions without reference to their numbers, but underlines that the public financing was found to comply with EU state aid rules.

funding of their public service tasks was therefore subject to the Treaty rules on state aid.[4] This evolution owes much to the development of "mixed systems" for the supply of welfare services in the Member States. However, the applicability of EU market rules to social services would have been impossible without the "functional" definition of "undertaking" developed by the CJEU for the purpose of EU competition rules, i.e. "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".[5] In *IRIS-H*, the Belgian authorities were forced to justify this public funding by relying on Article 106(2) TFEU, which provides that the Treaty rules apply to undertakings entrusted with services of general economic interest (hereinafter "SGEIs"), but "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".

The "close encounter" between Member States' measures in the field of social services and EU law does not only take place in the field of state aid, where we find EU secondary law rules specifically designed for SGEI and even more specifically for social services, but today in all fields of EU market law[6]: in EU free movement law (the Patients' rights Directive[7]), and now in EU procurement law, as a new chapter on social services has been introduced in the 2014 procurement directives.[8] This Europeanisation of the legal framework for social services is striking, because it takes place in a field where the Member States have retained their policy competence. As observed by Krajewski, "autonomous domestic regulatory reforms and policy changes" explain this transformation, but it is undeniable that the CJEU's interpretation of EU market law "put[s] traditional models of supplying [public services] in particular on the basis of regional and local monopolies under enormous pressure". [9] The CJEU has played a major role in building the foundations allowing to integrate the internal market of public services, including social services, in particular through a very broad interpretation of Treaty notions such as "service", "good", "capital", "undertaking", and not least

[4]Commission Decision of 28 October 2009 on the public financing of Brussels public IRIS hospitals (Belgium) in case SA.19864 (ex NN54/2009)—2014/C. The first decision not to raise objections against the aid measures, annulled by the GC, is only available in Dutch and in French.

[5]Case C-41/90 *Höfner* [1991] ECR I-1979, para 21. In this study, the expression "competition rules" is meant "in a broad sense", in other words both EU competition rules (often improperly called "antitrust rules"), and EU state aid rules.

[6]By "EU market law" is meant here EU law on free movement, procurement, competition and state aid.

[7]Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (the Patients' rights Directive) [2011] OJ L88/45.

[8]In this study, the EU procurement directives adopted in February 2014 are referred to as "the 2014 procurement directives", while the EU procurement directive in force until April 2016 are referred to as "the EU procurement directives".

[9]Krajeswski 2009, p. 503.

"non-discrimination". The Court has multiplied free movement and competition based arguments which may be relied on to challenge Member States' statutory and administrative measures in the field of public services, and as observed by van de Gronden, the Court's approach is clearly also one of market opening.[10]

The CJEU's case law, and the Commission's decision practice, constitute the legal basis of the Europeanisation of public services—and now also social services –even if these decisions do not immediately have an impact on the Member States' systems. As noted by Sauter, the liberalizing pressure induced by the CJEU's broad interpretation of the notion of "economic activity"—inherent to the notions of "services", "goods" and "undertaking" in the Treaties—largely explains the growing importance of the notion of SGEI in the case law of the CJEU and in the European legal-political debate.[11]

1.1.1 The CJEU's Use of the EU Concept of SGEI in Article 106(2) TFEU to Address Member States' Concerns on the Expansion of EU Law in Their Fields of Competence

To be sure, the CJEU has not acted in a political vacuum, but rather accompanied the "public turn" of EU competition law launched by the Commission's 1992 Programme, where a major element was the integration of the Single Market through the elaboration of EU public procurement rules. This was followed by the adoption in 1986 of the Single European Act (SEA)[12] which, in Weiler's view, was not simply a programme removing barriers to free movement, but "a highly politicized choice of ethos, ideology, and political culture: the culture of 'the market'".[13] As Member States realized that this "eruption of significant proportions" would affect the demarcation of competences, the principle of subsidiarity was

[10]Van de Gronden holds that "the analysis of the CJEU's case law demonstrates that EU free movement law may force Member States to introduce elements of competition in their national schemes governing [social services of general interest (SSGI)]. Although it is for the Member States to regulate these services, the stance of EU law is not neutral in this respect; rather it is based on the view that competition should play some role in the national organisation and provision of SSGI." See van de Gronden 2013a, p. 156.

[11]Sauter 2008, p. 3.

[12]Commission, "Completing the Internal Market" (White Paper to the European Council, Milan: 28–29 June 1985) COM (85) 310 final. The SEA introduced Article 100a EEC (now Article 114 TFEU) allowing all measures for the establishment and functioning of the internal market to be adopted by a qualified majority through Article 100a, which was described as "the most important of the Act's internal market provisions, being probably more far- reaching in its implications than any other provision in the entire Act", see Ehlerman 1987, p. 381.

[13]Weiler has explained that, for different reasons, the European Parliament and the Commission were "far from thrilled" with the SEA, which in particular led Margaret Thatcher to characterize it as "a modest step forward". See Weiler 1991, p. 2455, 2459 and 2477.

introduced in EU primary law in 1992 through the Treaty of Maastricht.[14] Many of them expressed growing concerns that the *negative* integration of the internal market—driven judicially on the basis of proportionality assessments—restricted the exercise of their powers under the EU principle of conferral.[15] Relying inadequately on the argument of "subsidiarity"—a principle which is hardly helpful in relation to *negative* integration—they used their "voice" against the CJEU's expansive interpretation of EU primary and secondary law on free movement, procurement and competition.

Faced with the worries caused by its expansion of EU market law's scope in the field of public services, the CJEU has shown loyalty to the "masters of the Treaties" in several ways. Firstly, the Court has built up from the 1990s onwards, a case law applying the exemption rule for "services of general economic interest" (SGEIs) in Article 106(2) TFEU. In a series of seminal rulings, including *Corbeau,*[16] *Almelo,*[17] the so called "electricity cases",[18] *Altmark*[19] and more recently *BUPA,*[20] the Court has established that the SGEI-character of an activity constitutes a legitimate ground for state (or EU) intervention in the public sector, and developed a specific "soft test" under Article 106(2) TFEU, to assess measures such as authorization schemes, exclusive rights, public financing, and cross-subsidization of services in the public sector. By relaxing the tensions between market interests and general interests, this case law has facilitated the adoption of EU law in the sectors of energy, telecommunications, postal services and transport, aimed at market harmonisation and therefore based on Article 114 TFEU, but at the same allowing the imposition of public service obligations justified explicitly or implicitly on Article 106(2) TFEU.[21]

Although Article 106(2) TFEU has also been found applicable outside the field of competition law, in particular to justify statutory exclusive rights, its relevance

[14]As noted by Weiler, the Member States' urge for a clearer demarcation of competences was already clear from the Resolution of Parliament of July 12, 1990 (PE 143.504). See Weiler 1991, p. 2463 not 173.

[15]Integration theories distinguish between positive and negative integration. Positive integration implies that common rules are adopted by a higher authority to remove regional differences, while negative integration refers to the removal of barriers between countries. Weiler 2005.

[16]Case C-320/91 *Corbeau*, [1993] ECR 1-2563.

[17]Case C-393/92 *Almelo* [1994] ECR I-1477.

[18]Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699; Case C-158/94 *Commission v Italy* [1997] ECR I-5789; Case C-159/94 *Commission v France* [1997] ECR I-5815.

[19]Case C-280/00, *Altmark* [2003] ECR I –7747.

[20]Case T-289/03 *BUPA* [2008] ECR II-81.

[21]By contrast, large areas of the public sector in the Member States, although clearly or increasingly economic in character, are not subject to EU *sector* law clarifying the principles and conditions of public intervention—justified by objectives of general interest—in the *economy* of these sectors. This is for instance the case concerning waste and water management, covered by EU sector law of administrative nature not primarily aiming at harmonizing the internal market and/or ensuring undistorted competition.

to mitigate public procurement rules is both legally uncertain and politically controversial. However, the CJEU has found it appropriate to limit the scope of EU procurement rules (which it had contributed to expand), by formulating conditions allowing public authorities to provide services and goods with their own resources (the *Teckal* doctrine), and more recently, conditions allowing public authorities to cooperate, even on the basis of contracts, in the achievement of common "*public service tasks*", a term also used by the CJEU as synonym of SGEI *tasks*.[22]

There are today many judgments where EU free movement and/or competition rules have been found applicable to social services. In particular, the CJEU's very extensive interpretation of the notion of "remuneration" in Article 57 TFEU has led to find EU free movement rules applicable to cross-border healthcare provision, para-medical services and university courses. However, in those fields the Court has considered it appropriate to examine measures motivated by certain types of "overriding reasons related to the general interest" under a relaxed test which departs from its standard proportionality test in the field of free movement, and seems to transpose the test it commonly applies under Article 106(2) TFEU. This case law has allowed the adoption of the Patients' Rights Directive, a very rare example of sector-specific EU legislation in the field of social services.[23]

For Member States worrying about the expanding applicability of EU law in their fields of competence, it was important that the Court formulated in *Humbel* a doctrine exempting courses in national education systems from the scope of EU law.[24] Also, it could be comforting that the Court has developed a doctrine based on its *Poucet and Pistre* ruling, exempting the operation of social security services based exclusively on the principle of solidarity from the scope of EU competition rules.[25] Nevertheless, in many cases, the latter doctrine has not kept the Court from finding EU competition rules applicable to measures related to social security schemes despite the fact that they included many solidarity elements.

Cases on social services other than social security services are scarce in the field of competition, but as the notion of undertaking must be interpreted functionally in EU competition law, it must be expected that their provision will be seen as economic in national systems of supply "where there is an interplay between public and private", and in such mixed market systems, the SGEI character of the service constitutes an important ground to justify State intervention.[26] With the growth of markets in the sector of social services, the tension between internal market interest and social interests must be resolved in a special manner, which explains the importance of the Treaty rules on SGEIs in the development of EU procurement and state aid law applying to such services.

[22]Case C-480/06 *Commission v. Germany* [2009] ECR I-4747.

[23]One exception is the Patients Rights Directive.

[24]Case 263/86 *Humbel* [1988] ECR I-5365.

[25]Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-00637.

[26]De Vries 2011, p. 462.

1.1.2 The Progressive and (Too?) Subtle Approach of the CJEU: Two Important Legal Questions

As market mechanisms and markets develop in the field of public services, Member States must in more and more sectors explicitly or implicitly rely on the EU framework on SGEIs to motivate measures allowing them to conduct social and environmental policies in the frame of their powers. This picture emerges not only from the case-law of the CJEU but also from EU market law.[27] To secure the legality of their horizontal or sector-specific public service regulation, the Member States should be able to answer the two following questions:

a. What criteria determine that an activity in their public sector is covered by EU free movement rules and/or by EU competition rules?
b. Which margins of discretion does EU market law give them as legislators, and their public authorities as regulators and administrators, to secure the achievement of public service tasks defined statutory or administratively in the frame of their national legal system? In other words, is the fact that SGEI missions exist in national law relevant only to enable *market operators* to achieve public service tasks on the market, or is it also relevant to enable *public authorities* to achieve public service tasks on the market?

Regarding question (a), Davies has observed that, "for *convenience*, services falling within free movement and competition law are conventionally referred to as 'economic' services, while 'non-economic' services fall without".[28] This "convention" is undeniable but makes it very difficult to understand the scope of the Treaty market rules. In the Treaties, neither the free movement rules nor the competition rules contain the word "economic", as their scope is instead delineated by the notions of goods, service, capital, and undertaking. Indeed, the CJEU has established that an undertaking is any entity conducting an "economic activity", but the Court does not use the notion of "economic activity" (or the notion of "market") as an element in the definition of services or goods for the purpose of EU free movement and procurement rules. In fact, the Court seems to *avoid* the notion of "economic activity" to assess the applicability of the internal market rules to public services.

Thus, in evaluating the national legislators or administrators' freedom to intervene on general interest grounds in certain fields of activity, the "conventional question" is "whether it is an economic activity", although free movement rules can apply to activities which are non-economic in a Member State. From a democratic perspective, the "convenient convention" is problematical because it blurs

[27]Thus, healthcare and other social services are excluded from the scope of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (the "Services Directive") [2006] OJ L 376/36 , while all SGEIs—regardless of the sector at issue—are excluded from Article 16 in the Services Directive.

[28]Davies 2006, p. 16.

the legal political grounds for the applicability of EU principles of free movement to activities which are not—or cannot be—offered on the market in a Member State. In other words, the "convention" may conceal a mechanism which is welcomed by the "masters of the Treaties",[29] but also an *inconvenient* truth on the limits of their prerogatives in relation to "market powers" in the field of social services. From a rule of law perspective, the use of this convention is also problematic, because it implies that an "economic service" can be two things (one in the field of competition and another in the field of free movement), and logically also that a "non-economic service" can be one thing in the field of competition and another thing in the field of free movement. Under such circumstances, the Member States may certainly wonder what sense they can make of the following EU rules:

– Article 2 of the SGI Protocol providing that "[t]he provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest"
– The assertions made in the 2014 procurement directives that Member States "are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof", and the clarification (!) that "non-economic services of general interest should not fall within the scope of this Directive".

It is important to be aware that question (a) above - what does "economic activity" mean in EU law—is profoundly related to the notion of SGEI in two ways. First, because the economic character of the activity may trigger a necessity to rely on the SGEI tasks attached to this activity in order to justify state intervention. Second, because depending on the relation of the word "economic" in SG(E)I to the notion of "economic activity", the answer to question (b) above ("what is the meaning of the concept of SGEI") may differ. In other words, clarifying what an "economic activity" is, may have an impact on the meaning that the concept of SGEI should have, and on the derogations from a strict application of the Treaty-based rules which SGEIs should be able to motivate. As a result, a clarification of the meaning of the EU notion of "economic activity" is simply crucial for certain Member States' wish to obtain a broad public service exception, allowing them to retain more powers in the organisation of public services, and more particularly of publicly financed social services. Their wish that SGEI obtains a broad understanding is confronted to the Commission's determination "to avoid opening a Pandora's Box that could threaten the application of the market freedoms".[30]

The persistence of this uncertainty, and of a scholarly debate, is made possible by the CJEU's subtle use of the notion of "economic activity", never spelling out clearly which precise "generic" criteria make an activity "economic" (regardless

[29]This term is borrowed from Roth, see Roth 2011, p. 77.

[30]Sauter 2008, p. 1.

of the type of activity considered) and what relevance (if any) the economic character of an activity has for the applicability of the different Treaty market rules. The Court tends, instead, to focus on the "economic relevance" of the specific measures or transactions brought to its jurisdiction, in particular in the fields of free movement and procurement. By this approach, the Court has given itself a legal-technical space to expand the scope of the free movement, competition and procurement rules in accordance with the signals of political acceptance—or lack of acceptance—sent by the Member States for letting EU market rules constrain public intervention in public services.[31] Likewise, the tests used by the Court to allow exemptions from Treaty provisions and Treaty-based rules on free movement and procurement have so far been formulated in a manner that makes it very difficult to discern how it understands the EU concept of SGEI, although it is difficult to deny that SGEI is a concept of EU law.

The casuistic character and the "subtlety" of the CJEU's approach are arguably related to the Court's awareness of the *political* implications of having expanded the scope of EU market law, and of spelling too clearly how the EU concept of SGEI may be understood. When deciding if, and how, the Treaty market rules apply to public services, in particular social services, the Court must clarify essential questions left unsolved by the Member States, and does probably not always find appropriate to say what it does. As a result, what the Court means by "economic activity" and how it understands the EU concept of SGEI is still difficult to put in intelligible words.

1.1.3 SGEI: EU Debate and Constitutionalisation Through the Treaty of Lisbon 2007/2009

Acknowledging the existence of "worries about the future of [general interest services] accompanied by concerns over employment and economic and social cohesion", the Commission published in 1996 its first Communication on the European future of what it chose to call "services of general interest" (SGIs), and defined as "market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations".[32] This was followed by half a dozen other Communications, whereby the Commission added to its conceptual arsenal the term of "non-economic services of general interest" (NESGIs). In this conceptual architecture, services of general interest (SGIs) seemed to constitute the sum of SGEIs and NESGIs.

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[31]Such signals could be found in Treaty modifications, in the Commission's "public turn" in the field of competition, but also in EU legislation, for instance the procurement directives adopted on the basis of the White paper of 1985 (as an example of acceptance)—or the Services Directive (as an example of non-acceptance).

[32]Commission, "Services of General Interest in Europe" (Communication) 96/C 281/03.

During the consultation exercise for the Green Paper on SGIs, the actors of the social sector (local public authorities, service providers, representatives of the providers) expressed concerns about the lack of legal certainty as to whether social services were to be seen as economic or non-economic, which could imply the applicability of a different body of EU rules. In response, in it its White Paper of 2004, the Commission gave assurances that it would clarify the framework in which they operated, but could only come up in 2006 with a shallow Communication on "Social Services of General Interest" (SSGIs).[33] This Communication did not bring much of a legal clarification, but launched the neutral and non-legal notion concept of SSGI, which has been and still is a political key in the process of Europeanization of social services, as it builds on the neutral and generic concept of SGIs that overall has been a useful vehicle to develop a soft law discourse on the controversial concept of the European Social Model.[34] Also, given the complexity of the case law and given the considerable lack of certainty on what makes an SSGI "economic" (SGEI) or non-economic (NESGI), the notion of SSGI has served as a powerful support of communication on the issue of how the Member States can shield social services in their welfare systems from the full impact of EU market law.

This succession of communications has allowed the Commission to orchestrate a debate underpinned by the "big questions", in particular the welfare state v smaller state, and the national state's relevance in a European Social Model that for reasons not developed here must arguably be market-based. Although this debate was embedded in the neutral project to "clarify EU rules applying to SGEIs", its political dimension is evident. Very simplified, the debate is related to the confrontation between two socio-economic "models" for public services: a more liberal-oriented model, and a more solidarity-based model. The political dimension of the debate on SGEIs became fully visible when some Member States exercised pressure to introduce through the Treaty of Amsterdam 1997, "a general, rather than legally specific" Treaty objective for SGEIs, under Article 16 EC.[35] It was reaffirmed during the legislative process for the adoption of the Directive on services in the internal market (hereafter the "Services Directive"),[36] when SGEIs were partly left out and NESGIs wholly left out from its scope, a change of direction

[33]Bauby 2013, p. 26.

[34]This is the convincing explanation of Szyszczak who has shown how, in spite of the fact that policy competence has mostly not been conferred onto the EU in the field of social services, the Commission has since the 2000s, and very rapidly since the 2006 Communication on Social Services of General Interest in the European Union (COM 2006) 177 final), developed a new governance competence and capacity in the form of soft law and soft governance processes in that field of activities. Launching the term "social services of general interest" has been a very important step. See Szyszczak 2013, pp. 317–345.

[35]Bauby 2011, p. 27.

[36]Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

from the Commission's proposal which according to Neergaard was initiated by the Member States, but supported at an early stage by the European Parliament.[37]

While the Commission announced it would clarify the case law of the CJEU, its Communications do not really offer any pedagogic systematization, as its three consecutive "SGEI Guides" have taken the form of "Frequently asked questions".[38] Regarding the criteria determining that an activity is covered by EU free movement and/or EU competition rules, these guides are as casuistic as the case law they refer to. The "convenient" convention is upheld that only "economic activities" can be covered by the market rules of the Treaties.[39]

The EU debate on SGEIs had begun maturing when the draft Constitutional Treaty was rejected by French and Dutch voters in 2005.[40] The political re-negoti-

[37]See Neergaard 2008, pp. 97–98, where the author gives a detailed account of the approach to SGEIs in the context of the Services Directive, and explains the carving out of SGEIs and NESGIs by "tensions between what /…/ could be referred to as a more liberal point of view, situated mainly at the Commission, against a more protectionist point of view, situated at some of the Member States" which in her view have existed ever since the birth of the Community".

[38]The first Guide issued in 2007 was replaced by the Commission "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest "SEC(2010) 1545 final (hereinafter the "2010 SGEI Guide"), itself replaced in 2013 by the Commission "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest SWD(2013) 53 final/2 (hereinafter the "2013 SGEI Guide").

[39]The Commission issued two FAQs documents in 2007, see Commission, "Frequently asked questions in relation with Commission Decision of 28 November on the application of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, and of the Community Framework for State aid in the form of public service compensation" COM (2007) 1516; and Commission, "Frequently asked questions concerning the application of public procurement rules to social services of general interest" COM (2007) 1514. The second guide (hereinafter the "2010 SGEI Guide) was issued in 2010, see Commission, "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest" SEC(2010) 1545 final. The third guide (hereinafter "2013 SGEI Guide) was issued in 2013, see Commission, "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest" SWD(2013) 53 final/2. In the "2013 SGEI Guide" it is explained that "[g]enerally speaking, only services constituting 'economic activities' are covered by the Treaty rules on the internal market (Articles 49 and 56 TFEU) and the Services Directive", see point 223. Also, wishing to clarify the concepts of undertaking and economic activity, the Commission recalled in its 2011 Communication that "[b]ased on Article 107(1) of the Treaty, the State aid rules generally only apply where the recipient is an 'undertaking'" and that "[t]he only relevant criterion in this respect is whether it carries out an economic activity", see point 8 and point 9 para 2 of the 2013 SGEI Guide.

[40]"Constitutional Treaty" is the name usually given to the Treaty establishing a Constitution for Europe, signed on 29 October 2004 by representatives of the then 25 Member States. The rejection of the document by French and Dutch voters in May and June 2005 brought the ratification process to an end.

ation which followed led to the adoption of several new provisions on SGEIs through the Lisbon Treaty:

– Article 14 TFEU modifying Article 16 EC, imposing on the Union and the Member States to take care that SGEIs operate under principles and rules which enable them to achieve their missions, and introducing a legal ground for the adoption of such principles and rules.
– Protocol Nr 26 on Services of general interest (hereinafter the "SGI Protocol"), adopted under the pressure of the Netherlands and France.[41]
– Article 36 of the EU Charter on Fundamental Rights (EUCFR) which became binding on the Union through Article 6(1) TEU.

In Neergaard's words, these provisions were "almost desperately" wished for by some Member States. Others consented to them, seeing perhaps possibilities to relativize their effect on the liberalisation of public services, including social services. Indeed, some scholars have argued that the new provisions did not imply anything new, and on this premise, Vedder wondered "when and to what extent legal rules and judicial bodies become captured by politics".[42] However, Treaty modifications are evidence that politics have always been at the very heart of EU law. In the nuclear core of the negotiation of the Treaty of Lisbon 2007/09, we find some Member States' concern that public services based on national solidarity models may be rendered unmanageable by the integration of markets for public services—and social services. The legitimacy of this concern is highlighted by Dougan's observation, with reference to the *Commission v Austria* ruling which concerned Union Citizens' equal access to higher education in Austrian establishments, that once Community welfare policies that are "largely the resulting of elite choices" are superimposed on the national solidarity systems, they are "almost impossible to remove by any Member State unilaterally".[43]

The CJEU, entrusted with the exclusive prerogative to interpret the Treaties, is constantly forced to translate their political content into legal language, has certainly not understood Article 14 TFEU as "business as usual" but instead as "the promise of a shift in focus" of EU law. Why this "promise" had to be made, what it implies for the understanding of the EU concept of SGEI, and how EU institutions, in particular the Commission, integrate the signals sent by the CJEU on its understanding of the evolving Treaty framework related to public services, are the questions essentially addressed by this book. It is truly a challenge to analyse a legal transformation that takes place here and now, and is far from ended, but a premise is that the Court has many reasons not to address Article 14 TFEU as "nothing new". The main one is perhaps its own essential contribution to place

[41]On this element of negotiation, see Sauter 2014, p. 68.

[42]See Vedder 2008, p. 25. Vedder's view was that like Article 16 EC "[t]he Protocol on Services of General Interest attached to the Treaty of Lisbon has a similar political character without actually changing the legal framework". On the same path, see Jääskinen 2011, p. 599.

[43]Case C-147/03 *Commission v Austria* [2005] ECR I-5969.

public services in a legal paradigm which is miles away from what Member States and their peoples could imagine in 1957, or even in 1986 when the SEA was adopted. Of all EU Institutions, the Court should be the most aware that asking to introduce in the Treaties a welfare concept, apt to carry the "idea of the State" in the European construction, was certainly not welcomed by some State *member*s of the Union, but not an illegitimate request from other States that are also *Members* of this Union.

If the CJEU takes responsibility for the political cohesion of the Union, it must read the compromise enshrined in the Treaties, and in Weatherill's words, "breathe life" in the new provisions on SGEIs.[44] As Article 14 TFEU converts SGEIs from a derogation into an obligation, the CJEU must in relevant cases be expected to give—be it implicitly—its understanding on the normative effect of Article 14 TFEU, and thereby contribute to shape the EU concept of SGEI. In relevant cases, the Court may also have to clarify the role of Article 106(2) TFEU in the post-Lisbon configuration, in particular whether the principle of proportionality, present in Article 106(2) TFEU but not in Article 14 TFEU, has a role to play in liberalised public services.[45] Finally, with the emergence of SGEI as an important constitutional EU concept, the question of the definition of non-economic services of general interest (NESGIs) will probably sooner or later have to be clarified by the Court.[46] The clearer and the more explicitly the CJEU delivers its interpretation of the Treaty SGEI provisions, the more it will constrain the EU legislator in its approach of public services' harmonisation, which is now "en marche" in the field of social services.

1.1.4 Emerging EU Governance of Social Services in EU Procurement and State Aid Rules: The Unclear Relation Between the Quality Framework for SGI and the Treaty Framework on SGEI

Although SGEIs are considered by the EU as so "important" that they deserve a specific legislative basis, the Commission considers that legislation on the basis of Article 14 TFEU is not an immediate priority, and has instead embraced what it characterizes as a sector approach, framed in the 2011 Communication "A Quality Framework for Services of General Interest".[47] In substance, the SGI Quality Framework builds mainly on the reform of the state aid rules for SGEIs (a new

[44]Weatherill 1995, p. 185.

[45]Ross 2000.

[46]Van de Gronden 2013b, p. 283.

[47]Commission, "A Quality Framework for Services of General Interest in Europe" (Communication) COM (2011) 900 final, hereinafter called "the SGI Quality Framework".