

This monograph, which was also designed as a short reference book for specialized undergraduate and graduate courses on EU law, intends to shed light on, and legally frame, the evolution of the doctrine of services of general economic interest (SGEIs). The book emphasizes the pivotal role played by SGEIs in striking a fair balance between market and social objectives. To this end, the book claims, first of all, that SGEIs have a dual nature inasmuch as they act as a limitation to/derogation from the free market and, simultaneously, as a value and positive obligation addressed at national authorities, undertakings, and EU institutions. The EU notions of access to public services and universal service are the clearest signal of such phenomenon. Secondly, the book claims that the transfer of competences from the Union to the Member States and the reaffirmation of Member States' sovereignty in crucial sectors of the economy are not the only solutions to foster social rights. In fact, this narrative is apt to undermine the foundations, spirit, and purpose of the process of European integration, especially at a time like the present, when new forms of populism and anti-Europeanism are on the rise, and when a European response is imperative to counter the spread of the coronavirus in European countries. The book concludes that SGEIs' regulation is an area of law where the EU institutions have generally successfully put into action and consolidated the social market economy principles on which the EU was founded. This is even further proof that the EU is not merely the reflection of interests linked to market completion, but also and foremost a 'Community based on the rule of law'.

Daniele Gallo is Jean Monnet (Full) Professor of EU Law at the Law Department of Luiss University (Rome), where he is Vice Dean for International Law Programs and Co-Director of the LLM in European Law and Policies. He sits on the Steering Committee of the ENGAGE.EU Alliance of European universities funded by the Erasmus+ and Horizon2020 programs. Prof. Gallo is also Research Fellow at the University of Lisbon. He has been, *inter alia*, Jean Monnet Fellow (EUI), DAAD Scholar (Max Planck Institute for Comparative Public Law and International Law), EU Fulbright Schuman Scholar (Fordham Law School), Global Governance Fellow (KU Leuven), and Visiting Recurring Professor in several universities across Europe (e.g., *Université Toulouse Capitole* and *Université Panthéon-Assas*) and the US (American University College of Law).

Daniele Gallo is Of Counsel at *Studio Legale Zoppini e Associati*.

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PUBLIC SERVICES AND EU COMPETITION LAW
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PUBLIC SERVICES AND EU COMPETITION LAW

THE SOCIAL MARKET ECONOMY IN ACTION

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When the market is abandoned
to its self-normative nature,
it knows only the dignity of the thing
and not of the person.

Max Weber, *Wirtschaft und
Gesellschaft*, 1921

*To my daughters
Ester and Matilde*

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FOREWORD

The book is the result of my research on the public law facet of EU competition law initially conducted, as a Ph.D. student, at Sapienza University of Rome, later developed, as Jean Monnet Fellow, DAAD Scholar, EU Fulbright Schuman Scholar, Recurring Adjunct Professor of EU Law, *Professeur invité de droit de l'Union européenne*, *Ricercatore*, *Professore associato* and *Professore ordinario di diritto dell'Unione europea*, at the following institutions, respectively: European University Institute, *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*, Fordham Law School, American University Washington College of Law, *Université de Toulouse* and *Université Panthéon-Assas*, Luiss University's Law Department.

The volume is inspired by a monograph I wrote in Italian on *I servizi di interesse economico generale. Stato, Mercato e Welfare nel diritto dell'Unione europea* (2010, Milan, Giuffrè, 898 p.). It also builds upon several articles of mine on services of general economic interest (in Italian, English and French) published in the last years in law journals and edited volumes, amongst which, most recently: *Social services of general interest*, in L. Hancher, T. Ottervanger, P. J. Slot (eds.), *EU State Aids*, London, Sweet & Maxwell, 2021 (with Caterina Mariotti), 307-385; *Functional Approach and Economic Activity in EU Competition Law, Today: The Case of Social Security and Healthcare*, in *European Public Law*, 2020, 569-586.

The work, which was produced with the co-funding from the Erasmus+ Program (Jean Monnet Chair on *Understanding EU Law in Practice: EU Rights in Action before Courts*/Project Number 620360-EPP-1-2020-1-IT-EPPJMO-CHAIR), is construed and designed as both a short monograph and reference book for specialized undergraduate and graduate courses on EU competition law and the public sector, covering public services and State aid. It is updated to May 2021.

ABBREVIATIONS

Antitrust Bull.	The Antitrust Bulletin
Antitrust Law J.	Antitrust Law Journal
CDE	Cahiers de Droit Européen
Colum. J. of Eur. L.	Columbia Journal of European Law
Common Mkt. L. Rev.	Common Market Law Review
Competition Pol'y Newsl.	Competition Policy Newsletter
Eur. Bus. L. Rev.	European Business Law Review
Eur. Bus. Org. L. Rev.	European Business Organization Law Review
Eur. Compet. Law Rev.	European Competition Law Review
Eur. Competition J.	European Competition Journal
Eur. Const. Law Rev.	European Constitutional Law Review
Eur. J. Risk Regul.	European Journal of Risk Regulation
Eur. L. J.	European Law Journal
Eur. L. Rev.	European Law Review
Eur. Papers	European Papers
Eur. Pub. L.	European Public Law
Eur. State Aid Law Q.	European State Aid Law Quarterly
Harv. Int'l L. J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
Int'l & Comp. L.Q.	International and Comparative Law Quarterly
J. Common Mark. Stud.	Journal of Common Market Studies
J. of Compet. L. & Practice	Journal of European Competition Law & Practice
J. of Empirical Legal Stud.	Journal of Empirical Legal Studies
J. of L. & Soc'y	Journal of Law & Society
Law & Contemp. Probs.	Law & Contemporary Problems
Leg. Issues of Econ. Integration	Legal Issues of Economic Integration
Merc. conc. reg.	Mercato Concorrenza e Regole
Mod. L. Rev.	Modern Law Review
Oxf. J. Leg. Stud.	Oxford Journal of Legal Studies
Rev. Aff. Eur.	Revue des Affaires Européennes
RFDA	Revue française de droit administratif
Riv. dir. ind.	Rivista di diritto industriale
Riv. It. Dir. Pubbl. Comun.	Rivista italiana di diritto pubblico comunitario
RMCUE	Revue du Marché Commun et de l'Union Européenne

RTD eur

Socio-Economic Rev.

Vanderbilt Law Rev.

West Euro. Pol.

World Compet.

Yearb. Eur. Law

Revue trimestrielle de droit européen

Socio-Economic Review

Vanderbilt Law Review

West European Politics

World Competition

Yearbook of European Law

Introduction

BACKGROUND, AIMS, SCOPE AND STRUCTURE OF THE BOOK

This work is about public services, or services of general economic interest (SGEIs), under EU competition law. In this respect, a preliminary clarification is needed: the two terms will be used interchangeably throughout the book inasmuch as SGEIs is the European Union (EU) term, enshrined in the Treaties, secondary law, as well as in the Court of Justice of the EU (CJEU) jurisprudence, to mean public services, i.e. a core concept dear to many Member States' legal orders.

The key to the reading of SGEIs regulation is the quest, from a legal perspective, for a fair balance between market concerns and social aims implied in the provision of essential services. In this perspective, this book sheds light on the true essence of the doctrine of SGEIs to better grasp the relationship between the (public and private) spheres of the market and welfare in the EU legal order.¹

The analysis stems from the assumption that the EU approach to SGEIs has evolved over decades and that such evolution is the effect of the socio-economic transformations which have occurred in many Member States since the 1980s, among which there is the (partial) erosion of the public/private divide in the spheres of the market and welfare.² This erosion

¹ As recently noted by Jarleth M. Burke, *A Critical Account of Article 106(2) TFEU: Government Failure in Public Service Provision* 21 (Oxford, Hart 2018) "the demarcation between state and market is continuously in flux, with SGEIs often positioned at their intersection." In general, on the function of competition law "in balancing the relative role of private and public power in the marketplace," see also Anu Bradford *et al.*, *The Global Dominance of European Competition Law Over American Antitrust Law*, 16 J. of Empirical Legal Stud. 731 (2019).

² On the public/private dichotomy in economic law, with special attention to EU law, accord, Carol Harlow, *Public and Private Law: Definition and without Distinction*, 43 Mod. L. Rev. 241 (1980); see also Cosmo Graham & Tony Prosser, *Privatising Public Enterprises – Constitutions, the State and Regulation in Comparative Perspective* (Oxford, Oxford University Press 1991); Nicholas Bamforth, *The Public Law-Private Law Distinction: A Comparative and Philosophical Approach*, Administrative Law Facing the Future: Old Constraints and New Horizons 136 (Peter Leyland & Terry Woods, eds., Oxford, Oxford University Press, 4th ed. 1997); Paul Craig, *Public Law and Control over Private Power*, *The Province of Administrative Law* 196 (Michael Taggart, ed., Oxford, Hart, 1997); Dawn Oliver, *Common Values and the Public-Private Divide* (London, Butterworths 1999); Jody Freeman, *Extending public law norms through privatization*, 16

entailed a redefinition of crucial principles of the European economic and social constitution.³ This redefinition is also the result of a process of *Europeanization* of values, obligations and rights instrumental to the fulfilment, by public authorities and undertakings, of missions of general/public interest.

For lawyers, judges and jurists, balancing between market efficiency and social welfare represents the core struggle in EU competition law. This struggle is presently vital due to the post-2008 economic crisis and the need for the EU to deploy SGEIs regulation in order to alleviate the poverty created by the instability of financial markets. This is even more manifest in respect to the current socio-economic crisis caused by the surging of the coronavirus disease in Europe. In this respect, the action taken by the EU, first and foremost by the European Central Bank and the European Commission, reveals that EU institutions have departed from austerity and the policies inspired by budgetary constraints embraced during the 2008 crisis. More particularly, although not in specific relation to SGEIs, the latest measures adopted in 2020 by the European Commission, including above all a new Framework on State aid, aim at ensuring greater discretion in the enforcement of EU law by national authorities to better support their

Harv. L. Rev. 1285 (2003); *The Public Law/Private Law Divide: une entente assez cordiale?* (Mark Freedland & Jean-Bernard Auby, eds., Oxford, Hart 2006); *The Public-Private Law Divide: Potential for Transformation?* (Matthias Ruffert, ed., London, BIICL 2009).

³On such constitution, examined also in respect to SGEIs, *accord*, Miguel Poiarés Maduro, *We, the Court – The European Court of Justice and the European Economic Constitution* (Oxford, Hart 1998); Wolf Sauter, *The Economic Constitution of the European Union*, 4 Colum. J. of Eur. L. 27 (1998); *see generally* Julio Baquero Cruz, *Between Competition and Free Movement. The Economic Constitutional Law of the European Community* (Oxford, Hart 2002); Christian Joerges, *What is left of the European Economic Constitution? A Melancholic Eulogy*, 30 Eur. L. Rev. 461 (2005); Okeoghene Odudu, *The Boundaries of EC Competition Law. The Scope of Article 81* (Oxford, Oxford University Press, 2006); Erika Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (London, Hart 2007); Wolf Sauter & Harm Schepel, *State and Market in European Union Law: The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge, Cambridge University Press 2009); Armin Hatje, *The Economic Constitution within the Internal Market*, Principles of European Constitutional Law 589 (Armin von Bogdandy & Jürgen Bast, eds., Oxford, Hart, 2nd ed. 2010); European Economic and Social Constitutionalism after the Treaty of Lisbon (Dagmar Schiek *et al.*, eds., Cambridge, Cambridge University Press 2011); Tony Prosser, *The Economic Constitution* (Oxford, Oxford University Press 2014); Clemens Kaupa, *The pluralist character of the European economic constitution* (Oxford, Hart 2016); Ordoliberalism, *Law and the Rule of Economics* (Josef Hien & Christian Jörges, eds., Oxford, Hart 2017); Robert Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford, Oxford University Press 2017).

economies, also with regard to the provision of SGEIs.⁴ Indeed, well-targeted public support is needed to make sure that sufficient liquidity remains available in the markets, to counter the damage suffered by healthy undertakings and to preserve the continuity of economic activities.

Against this background, SGEIs have a dual nature. On one hand, they act as a limitation to and derogation from free movement of services/rights to establishment/freedom of capitals, antitrust law, and the prohibition of State aid. On the other hand, SGEIs identify with an ensemble of rules and obligations addressed at national authorities, undertakings, and EU institutions. The concept of universal service, which derives from European Community (EC) law rather than “simply” Member States’ legal traditions,

⁴For further insights on the European response to the coronavirus crisis, see *Coronavirus response* European Commission (28 Apr. 2020) (last visited 22 May 2021), https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response_en, where it also reports the adoption, on March 19, 2020, of a State aid Temporary Framework to boost the economy in the context of the COVID-19 outbreak, Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, COM (2020) 1863 final (19 Mar. 2020); Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, COM (2020) 2215 final (3 Apr. 2020); Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, COM (2020) 3156 (8 May 2020); Communication from the Commission Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, COM (2020) 4509 (29 June 2020); Communication from the Commission 4th Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance, COM (2020) 7127 (13 October 2020); Communication from the Commission Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance 2021/C 34/06, COM (2021) 564. The consolidated version of the Communication adopted on 19 March 2020 will be referred to hereafter as “Temporary Framework Communication.” In this Framework, the Commission lays out the compatibility requirements to be considered when evaluating COVID-19-related State aid measures. The Temporary Framework was amended on five occasions (3 April, 8 May, 29 June, and 13 October 2020, and 28 January 2021) and it is envisaged to apply from 19 March 2020 to 31 December 2021. It is part of the coordinated response of the EU as described in Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank, and the Eurogroup coordinated economic response to the COVID-19 outbreak, at 9, COM (2020) 112 final (13 Mar. 2020).

is the clearest signal of such phenomenon and operates as both a symptom and means of *positive* European market and rights integration. Certainly, the consolidation, at the EU level, of a positive, rather than “simply” negative/derogatory, function of SGEIs represents a “point of no return” at this time for any investigation about the type of economic and social constitution most suitable for reconciling social development and competitiveness. Furthermore, it constitutes the axle around which the so-called European social model – whose SGEIs are a founding value – takes shape and evolves. After all, these services lie at the heart of a regulation defined by social purposes,⁵ whose intervention cannot be restricted only to cases of market failures as a second-best tool to market allocation. To the contrary, regulation, when functioning in socially and politically “sensitive” sectors, follows endogenous principles and criteria that are autonomous from the market.

From this point of view, the infiltration of the EU *acquis* into “social national spaces”⁶ gains new features when analysed in view of the progressive overlap between public economic services, social services, and healthcare. It also gains new features when analysed in relation to the “expansionism” of EU law in areas that were previously immune to its application. Along these lines, the research, in examining the changing nature of the interaction between Member States and the Union, challenges the idea that such interaction could be (re)designed by means of reaffirming the socio-economic sovereignty of States in areas in which the EU holds relevant powers and competences.⁷ This reasoning risks undermining the founda-

⁵On this kind of regulation, *accord*, Christopher D. Foster, *Privatization, Public Ownership and the Regulation of Natural Monopoly*, at 292-332 (Oxford, Blackwell 1992); see also Tony Prosser, *Law and the Regulators*, at 58 (Oxford, Clarendon 1997); Tony Prosser, *Regulation and Social Solidarity*, 33 J. of L. & Soc’y 364 (2006); Juan Jorge Piernas Lopez, *Services of General Economic Interest and Social Considerations, The EU Social Market Economy and the Law: Theoretical Perspectives and Practical Challenges for the EU* 166 (Delia Ferri & Fulvio Cortese, eds., Abingdon, Routledge 2019).

⁶On this term, see Maurizio Ferrera, *Social Europe and its Components in the Midst of the Crisis: A Conclusion*, 37 West Euro. Pol. 825 (2014); Francesco Costamagna, *National social spaces as adjustment variables in the EMU: A critical legal appraisal*, 24 Euro. L. J. 163 (2018).

⁷On this topic, see, *inter alia*, Koen Lenaerts & Tinne Heremans, *Contours of a European Social Union in the Case-Law of the European Court of Justice*, 2 Eur. Const. Law Rev. 101 (2006). *Contra*, see, amongst most prominent authors, Fritz Wilhelm Scharpf, *The European Social Model: Coping with Challenges of Diversity*, 40 J. Common Mark. Stud. 464 (2002); Fritz Wilhelm Scharpf, *The asymmetry of European integration, or why the EU cannot be a ‘social market economy’*, 8 Socio-Economic Rev. 211 (2010). Recently, see also the critical account by Perry Anderson, *The European Coup*, 42 London Review of Books 24 (2020).

tions of the European project and, by so doing, questions the originality and autonomy of the EU as a unique system of integration.⁸ As a matter of fact, contrary to what Eurosceptics and Sovereignists profess, arguing that national rather than supranational governments are better suited to address the problems of those left behind by economic globalization, the Union was not founded on neoliberal ideals and values.⁹ The EU is not simply the reflection of interests linked to market completion but is also (and foremost) a “Community based on the rule of law.”¹⁰ In this respect, the overall response put into place by the European Commission to ease the socio-economic impact of the coronavirus outbreak on MS’ economies, including sectors relevant for the provision of SGEIs, is a sign of a policy shaped on social concerns rather than on a redeeming view of the market and its inherent dynamics. The Package on State aid supported and will continue to support Member States to take effective action in supporting citizens and undertakings, notably small and medium enterprises, facing economic difficulties due to the COVID-19 crisis. To this end, EU State aid control remains, of course, in force because it ensures that the EU internal market is not questioned by its fragmentation and the level playing field is preserved.

Chapters I-IV of the book are devoted to the constitutional law profiles of SGEI regulation, while Chapters V-VI are dedicated to the substantive profiles of such regulation, from the standpoint of EU competition law, as

⁸With regard more specifically to public services, see Daniele Gallo, *I servizi di interesse economico generale. Stato, Mercato e Welfare nel diritto dell’Unione europea* 87-233 (Milan, Giuffrè 2010).

⁹On the meaning and scope of neoliberalism see, *ex multis*, *New Constitutionalism and World Order* (Stephen Gill & A. Claire Cutler, eds., Cambridge, Cambridge University Press 2014); David Singh Grewal & Jedediah Purdy, *Law and Neoliberalism*, 77 *Contemporary Legal Problems* 1, at 6-7 (2014); Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York, Zone Books, 2015); Jonathan David Ostry, *et al.*, *Neoliberalism Oversold?*, 53 *Finance & Development* 38 (2016); *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Honor Brabazon, ed., New York, Routledge 2017); *Destabilizing Orders: Understanding the Consequences of Neoliberalism*, Proceedings of the MaxPo 5th Anniversary Conference, Paris, January 12-13, 2018 (Jenny Andersson and Olivier Godechot, eds., Paris, MaxPo 2018). See, not least, the accounts provided in Jürgen Habermas, *The Crisis of the European Union: A Response* (Cambridge, Polity Press 2013); Mark Neocleous, *The Universal Adversary: Security, Capital and “The Enemies of All Mankind”* (London, Routledge 2016); Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, Harvard University Press 2018); *Legal Trajectories of Neoliberalism: Critical Inquiries on Law in Europe*, 43 *EUI Working Paper RSCAS* (Margot E. Salomon & Bruno de Witte, eds., 2019).

¹⁰On the meaning of ‘Community based on the rule of law,’ see Case 294/83, *Les Verts v. Parliament*, EU:C:1986:166, at para. 23.

far as antitrust law and State aid are concerned. In this context, the study focuses on EU primary and secondary law as well as on the case law of the CJEU. In this respect, three preliminary remarks shall be made on the scope of the book. Firstly, as anticipated, since the latest State aid measures enacted by the European Commission to tackle the coronavirus crisis do not specifically target SGEIs, they will not be at the heart of this contribution. However, as far as they affect SGEIs, references to them will be drawn throughout Chapter VI.

Secondly, this text will not deal with EU sector-based law concerning different categories of public services. Yet, some remarks will be made in connection with sectorial legislation, as well as with various across-the-board or non-binding initiatives, undertaken by the Commission starting in the mid-1990s.

Thirdly, as EU competition law is at the core of this book, the EU freedoms of movement, including the controversial topic of public procurement, will not be covered.

Chapter I analyses the essential aspects of EU case law concerning the concept of economic activity, investigated in light of the overlaps between SGEIs and other socially relevant activities, with emphasis on the notion of remuneration and the private investor principle.

Chapter II aims to examine the structure and rationale of Article 106 TFEU's three paragraphs, i.e. of a *sui generis antitrust* provision naturally designed to reconcile the interests of the free market with the pursuance of extra-commercial and collective values, within the mutual relationship existing between competition and the provision of public services.

The purpose of Chapter III is to identify the logic and the main features regarding the change of perspective on SGEIs at the EU level, which originated from the Treaty of Amsterdam and was consolidated with the Lisbon Treaty. This change was designed to consider these services in a different dimension compared to the purely derogatory perspective which considers them as a limit to the market and competition. Particular attention is paid to the interplay between SGEIs, social and territorial cohesion, EU citizenship, solidarity, and fundamental rights.

Chapter IV deals with the division of competences between EU institutions and Member States, with reference to the definition and regulation of SGEIs in harmonized and non-harmonized sectors, as well as in sectors more or less directly linked to the sustainability of national welfare systems.

Chapter V emphasizes the centrality of Article 106(2) TFEU as an exception applicable in cases of abuse of a dominant position by public un-

dertakings and undertakings with special and exclusive rights, as well as its *de facto* irrelevance in the context of Article 101 TFEU.

Chapter VI focuses on a second area of EU competition law, i.e. State aid, deemed as a privileged *sedes materiae* to emphasize the peculiarities of SGEIs under EU law. The main question is when and to what extent the compensation of public service obligations should not be considered an aid under Article 107 TFEU and, in the case where it is, when and to what extent it should be considered compatible with the Treaties, given the risk of distortions it generates on the EU market. In this Chapter, attention will be devoted to the recent State aid Package adopted by the European Commission to boost the economy in the context of the coronavirus outbreak.

The book ends with some concluding remarks aimed at explaining that SGEIs regulation is an area of law in which the EU institutions have generally successfully consolidated the social market economy principles on which the EU is founded, as illustrated by the overall response to the socio-economic consequences stemming from the COVID-19 pandemic.

