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**EU governance and social services of general interest:
When even the UK is concerned**

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Abstract: The level of autonomy afforded to Member States to define certain services as 'services of general interest' and to shelter them from the market so as to promote social objectives has become in recent years a highly sensitive topic among EU and national policy actors and organisations. The increased activity in this area of the European Commission and the general absence of guidance on the conditions necessary to render such services of general interest by the European Court of Justice (ECJ) have resulted in uncertainty concerning the interaction of EU law with social services and more generally public services in the EU Member States. By focusing on the EU regulation on social services of general interest, the paper evaluates how the nature and provision of such services in the UK has been susceptible to changes as a result of the Services Directives, EU public procurement and competition law. The implementation of liberalisation plans in the UK well before any EU initiatives in this area meant that such services have been open to market forces well before other Member States. However, this has not led to the absence of concerns regarding the precise impact of EU law in this area. Recent policy initiatives by the Coalition government may expand further the degree of marketisation and increase the scope for interaction between EU and national-level regulation.

Keywords: law; Europeanization; governance; provision of services; U.K.; social policy.

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Introduction

The nature and provision of the so-called ‘services of general interest’ (SGI) are tightly interlinked with the central question of the role that public authorities play in the market economy. According to the Commission (2010: 15), ‘the concept of SGI refers to services, whether ‘economic’ or not, that the Member States regard as being of general interest, and which therefore subject to specific public service obligations’. Policy efforts at EU level have gradually led to the opening up of competition in a number of sectors in which services of general economic interest (SGEI) have been provided, such as those of energy and transport. The question of how to distinguish between economic and non-economic services (so-called ‘social services of general interest’ (SSGI) has often been raised. In principle, public authorities in the Member States have considerable discretion when defining what they regard as SGEI and SSGI. In this way, they can protect them from the opening up of the internal market so as to pursue social objectives. However, limits on such discretion are imposed by European Union (EU) law and manifest error of assessment.

Partly as a result of the complexity arising out of frequent developments in this area and partly due to the nature of the services under question, the issue of SGI constitutes an interesting empirical example of the functioning of EU governance in the area of social policy. As we shall see, the development of EU governance in this area rests primarily on the first instrument in the categorisation of EU governance instruments provided by Barbier and Colomb (see introduction to the special issue), that is legislation. Through the development of primary and secondary legislation as well as case-law, SGI have become increasingly subject

to the EU regulatory framework that is applicable in the areas of freedom of movement of services, public procurement and competition. At the same time, the increased activity in this area of the European Commission and the general absence of guidance on the conditions necessary to render such services of general interest by the European Court of Justice (ECJ) have increased the uncertainty concerning the interaction of EU law with social services and more generally public services at national level.

In this context, the paper critically assesses the nature and extent of the interaction between EU law and policy and SSGI in the UK. Such a study may serve to highlight the complex interplay of a multitude of factors operating to generate or reduce legal and sociological certainty among a variety of actors that are involved in the definition and provision of such services (see Barbier and Colomb in this issue). On the basis of the need to illustrate the socio-legal implications of EU law and policy, the present paper draws on existing legal and policy literature (see for instance, Boeger and Prosser, 2009) and presents an up-to-date discussion of the areas where EU-level developments present implications for national social protection systems. In order to highlight the areas where the application of EU law may be controversial and uncertain, the paper goes beyond a purely legal discussion and provides an analysis of the issue on the basis of documentary material issued by the main stakeholders and interviews that were conducted with the representatives of the Cabinet Office, the Local Government Association (LGA), which represents local authorities in England and the Wales, and Unison, the trade union for public services¹.

Owing to the particularities of the political and regulatory regime in the UK, one would expect that implementation of EU liberalisation plans in relation to social services would be less controversial than in Continental Europe (Boeger and Prosser, 2009). Nonetheless, as we shall see, a number of SGI, mainly of social nature, continue to constitute sensitive policy areas. On the one hand, the increasing interest of the European Commission in this area of regulation has meant that the impact of EU law has grown in importance for the main actors involved in the definition and provision of SSGI, mainly national and local authorities, charity organisations, trade unions and user groups. Coupled with recent policy developments at domestic level that are oriented towards the further opening of public services, it will be suggested that the scope for interaction between EU law and UK public services will increase significantly with important consequences for the nature and extent of the regulation of social and healthcare services in the future.

The paper continues with a brief analysis of the definition and provision of SSGI in the UK. Section 2 then proceeds to an examination of three distinct areas of EU law, namely the Services Directive, competition law and public procurement, in order to highlight the nature and extent of interaction with the UK conception of social services. Drawing on the specific

¹ In total, five interviews were conducted: one with the Cabinet Office, two with LGA and two with Unison. All interviews were semi-structured. As such, they had predetermined questions but the order was modified based upon the interviewers' perceptions of what seemed most important for their organisation.

issues of social housing and social care, section 3 critically evaluates how EU law and policy influences developments in the definition and provision of such services and the implications of such developments for a range of actors. The final section concludes with an analysis of the prospects for further interaction between EU law and UK public services in light of the recent policy proposals of the Coalition government.

1. Definition and provision of social services of general interest in the UK

The way in which states define, fund and provide SSGI varies greatly across the EU (for a review, see Mangenot, 2005 and Bauby and Similie, 2010). A general distinction is sometimes made in the literature between the very pragmatic concept of ‘public services’ developed in the northern states from the more conceptual one in the Romanist states (Mangenot, 2005). For instance, in Germany, an example of a northern state, the term ‘public services’ refers instead to a type of activity in the material and economic sense, but it is not a legal concept (Bauby and Similie, 2010: 34). In contrast, in France, a Romanist state, the adoption of a specific concept of ‘public services’ by the French state has led to a development of a solid legal doctrine that defines a public service as an activity of general interest ensured or assumed by a public entity.

In the UK, which broadly belongs in the northern states, the developments of public services has taken place in a more pragmatic way as a conglomeration of various essential facilities, the provision of which is mainly protected by political means and political discretion (Prosser, 2005). This had as a result that the choice of structure was predominantly an ‘empirical matter or a matter of political convenience rather than based on any coherent principle or approach’ (Boeger and Prosser, 2009: 358). A further distinctive feature of the UK public services is the lack of a distinct body of public service law (Boeger and Prosser, 2009: 358; see also Birkinshaw, 2006). Consequently, the ‘public interest’ was protected as a matter of political discretion, which Prosser describes as ‘remarkably ineffective’ (2005: 42). In addition, private companies, local authorities and public enterprises can be deemed corporations. In further contrast to jurisdiction in continental Europe and the EU discourse on SGI, the view of social solidarity as a regulatory rationale, with the exception of the National Health Service (NHS) and public service broadcasting, has not been taken up significantly by UK authorities (Prosser, 2010: 15).²

Similar to the situation in other Member States (see Barbier and Colomb in this issue), there is no legal notion of SGI in the UK. The EU term ‘services of general interest’ is only used in the Competition Act 1998 (paragraph 4 of Schedule 3 of the Act). In the context of the political debate concerning the Commission’s 2004 White Paper on Services of General

² Contrast this with the situation in France, where social solidarity has acquired directly legally enforceable form (for an analysis, see Prosser 2005).

Interest, the Government of the United Kingdom ('UK government') UK government seemed unwilling to provide clarity concerning the distinction between different types of services. In the October 2004 report on this White Paper by the House of Lords, it was noted that the Minister was 'not convinced that it [a list of services] would be a useful exercise' (House of Lords, 2004: 12). In response, the House of Lords registered its dismay that 'the Government appeared unable to list those services which might be designated services of general interest, as opposed to services of general economic interest' (emphasis in original) (2004: 13).

It is useful to stress here that under EU law, social services can be of an economic or non-economic nature depending on the activity under consideration. Although they are not defined, the 2006 Commission Communication identified two broad types of social services: firstly, statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability; secondly, other services provided directly to the person such as social assistance services, employment and training services, social housing or long-term care (Commission, 2006). There is no commonly-agreed national definition of SSGI in the UK, as the term arises primarily in the EU context. Similarly there is no set definition of 'social services' in the UK. The generic term 'public services' is the most usual term to correspond with SGEI as well as SSGI and SGI in the UK (Bauby and Similie, 2010: 431).

The British system of public services has been described as 'most open for fundamental reforms' (Bahle, 2008: 29). Before the development of competition, a common form for the provision of public services was that of a statutory monopoly administered by a public corporation (Boeger and Prosser, 2009: 358). However, the adoption of a pragmatic attitude to the development of public service values (Boeger, 2009: 459), the significant legislative powers of the UK central government vis-à-vis local communities and the dominant position of local communities in service provision meant that there were few limits on the processes of privatisation and liberalisation in the public services. Similar to the situation in other Member States, the process of privatisation and liberalisation has relied on systems involving the authorisation of enterprises to operate in a particular market. Authorisations or licenses are issued by ministers or by independent regulators. The conditions are then enforced by the regulators (Boeger and Prosser, 2009).

Overall, the organisation of SSGI depends on the extent of devolution and decentralisation.³ Social care, social housing, childcare services, care of disabled and elderly care are regulated at the level of local self-governments. Following the 1990 National Health Service and Community Care Act, local authorities started to contract out public services to private providers. However, the fact that services continued to be determined and financed by the public purse meant that only service provision has been 'market privatised' (Bahle, 2008: 30), whilst financing, coordination and control remains in the hands of the local authorities. As a

³ As a result of devolution, the main part of the analysis is concerned with the English position only.

result of the 1990 Act, the number of local authority-run residential homes and NHS geriatric long-stay beds decreased dramatically during the 1990s. In contrast, the number of private sector providers increased significantly. A large number of local authority homes were sold off to the private sector. Local authorities now purchase more home care services from the private and non-profit sector than they deliver themselves. Partly drawing on the findings of the market study by the Office of Fair Trading in 2005, Prosser (2010: 123) suggests that ‘the provision of social care operates in a highly market-based system, with an extensive role of private providers and privately funded provision subject to the ordinary competition authorities’.

Social housing provision in the UK has been allocated traditionally according to need (the so-called residual model of social housing). According to Scanlon (2008: 8), the residual model focuses on the citizens who are the least well off and thus sees social housing as a safety net service. In this context, the role of local authorities was significant for the most part of the development of social housing. Until the 1970s, one-third of the British population lived in housing owned by the state. In the 1980s, the Thatcher government introduced the Right to Buy, which meant that qualifying tenants were given the right to buy the property in which they had been living at a discount of at least 33 percent. Moreover, the state transferred their property to housing associations on a large scale. As a result of these changes, social housing has been provided through a mixed economy comprising the residual council stock, private landlords and housing associations (Cowan and McDermont 2008: 166).

In assessing the nature of regulation in SSGI, it is important to bear in mind that there is sometimes overlap between different services. Social work and social care are becoming increasingly embedded in health services (Penna and O’Brien, 2006). For this reason, the paper addresses the issue of healthcare where it intersects with SSGI. In brief, responsibility for the UK National Health System (NHS) is devolved to the component countries, with England, Scotland, Northern Ireland and Wales each responsible for administering the NHS in their respective countries. The model of health services has been traditionally constructed around the notion of a universal service for all based on clinical need, not ability to pay. It is important to recognise that the UK health system is financed out of general taxation, compared to those health insurance systems on which the ECJ has issued rulings. But due to a number of far-reaching changes in the last years, which were largely motivated by the need to introduce different forms of competitive market and to augment patient choice, ‘the system has moved from one organised on the basis of solidarity to one to which competition law applies’ (Boeger and Prosser, 2009: 367).

2. Interaction of UK regulation of public services with EU law

2.1. The Services Directive

The Services Directive aims to break down barriers to the trade in services and make it easier to set up a business or offer services in another Member State. It is useful to recall here that in response to the first draft of the Directive that was produced by the Commission, a number of EU institutions, including the European Parliament (2006), proposed the explicit exclusion of SGI from the scope of the new legislation. In the UK, these proposals were met with strong criticism by the House of Lords. The 2005 House of Lords Report stated: ‘such a blanket exclusion... could be used as a means of circumventing competition. Where governments and public bodies in Member States do engage in services of general economic interest (purchase services from suppliers for remuneration to be made available to recipients for reduced or no charge) then in general we would expect such purchases to be transparent and open to competition. The supply of such services should be a market opportunity for businesses from any Member State unless there are over-riding and justifiable reasons of national interest’ (House of Lords, 2005: 14).

A number of UK organisations, such as the LGA and trade unions, lobbied for the removal of social services from the scope of the first draft Services Directive⁴. While the final text of the Directive excludes the welfare services from its scope of application, its exact influence on SGEI is still unclear. For the directive to apply the activity must normally be provided for remuneration; in other words, it must be of an economic nature. This is assessed on a case-by-case basis for each activity. On the specific issue of social services, the Commission’s handbook (2007: 13) stated: ‘The social services in art 2(2)(j) are excluded to the extent that they are provided by the State itself, by providers which are mandated by the State and are thus under an obligation to provide such services, or by charities recognised as such by the State.’

The Services Directive was transposed into UK legislation by the Provisions of Services Regulations 2009. In the guidance published by the Department for Business Innovation (BIS) (2009), clarifications were provided with respect to the services which are not covered by the Regulations. According to the guidance, the exclusion of services of temporary work agencies from the scope of the Regulations covers only the hiring out and placement of workers in temporary work; other relevant services provided by the same agency are covered. With respect to healthcare services, these are considered to be excluded from the Directive ‘whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level, or whether they are public or private’ (emphasis in original) (BIS, 2009: 7). Finally, social services relating to social housing, childcare and the support of families in need, where these are provided by the State, by providers mandated by the State or by charities recognised as such by the State are also

⁴ Reportedly, there was initially division of opinion between different UK government departments. The then Department of Trade and Industry (now BIS) was in favour of the Services Directive covering healthcare while the Department of Health favoured the exclusion of healthcare from the scope of the Directive. The UK government adopted finally the view advocated by the Department of Health.

excluded from the scope of the Directive⁵. The BIS guidance goes on to state that '[housing] services provided on a commercial basis by registered charitable organisations or their trading subsidiaries are, however, in scope of the Directive' (BIS, 2009: 7).

While health and social services are excluded from the scope of the Regulations, it is interesting to note that the UK government's website BusinessLink⁶, which provides support services for organisations wishing to provide services in the UK, contains information concerning the authorisation of licences for a number of social services, healthcare services and social housing. There is limited evidence that the Services Directive has impacted on the provision of welfare services in the UK. The introduction of the implementing Regulations has so far promoted a cultural change in the public sector as local authorities have begun to structure their services so as to address also issues related to foreign service providers (LGA interview notes). However, the practical difficulties in delivering such services in the absence of a UK base/office may account partially for the lack of foreign services providers being active in this area. Still uncertainty exists, especially since there is absence of a clear-cut definition of social services in the UK legal context (Unison interview notes).

Notwithstanding the ambiguities concerning the scope of the Services Directive, the Commission came back to the question of the legal regime of social services with its Communication on services of general interest in 2006. In the latter, the Commission noted: 'in practice, apart from activities in relation to the exercise of public authority, to which internal market rules do not apply by virtue of Article 45 of the EC Treaty, it follows that the vast majority of services can be considered as 'economic activities' within the meaning of the EC Treaty rules of the internal market (COM, 2006: 5). The response of the LGA to this was even-handed. In its LGA guide to EU legislation affecting local authority services, it was stated that 'whilst welcoming competition in the social services sector, the LGIB (Local Government International Bureau) and its partners will work to send a clear message to the European institutions that it is primarily a matter for Member States and their public authorities, rather than the EU, to decide how best to define, organise and finance their social services' (Rowles, 2006: 5).

2.2. Public procurement rules

The EU rules on public procurement do not require public authorities to outsource social services of general interest. Instead, they apply only if a public authority decides to entrust the

⁵ In the UK, there is no general legal prohibition on charities delivering public services, such as social housing and social care, under a funding agreement with a public authority or using their own funds to do so. Charities are a significant part of a wider sector in society known as the voluntary sector or voluntary and community sector. Not all voluntary and community organisations are charities. The voluntary and community sector includes all organisations that are neither part of the UK government (public or state sector) nor the private (for profit) sector.

⁶ <http://www.ukwelcomes.businesslink.gov.uk/bdotg/action/home?site=2000> (accessed on 28 September 2011).

provision of a service to a third party in return for payment. In the UK, the use of procurement at the level of central and local government has been a characteristic feature of public services for a number of years.⁷ In the 1980s, health and local authorities became compelled to submit various defined activities to external competition through Compulsory Competitive Tendering (CCT) legislation. The result of this was that emphasis shifted from the state as a welfare provider to the state as welfare enabler through contract provision (McMaster, 1995: 409). CCT was abolished with the 1999 Local Government Act that was introduced by the then newly-elected Labour government. However, the Act introduced a legal duty on councils to attain 'best value' for local public services, which, essentially, makes it extremely difficult for councils not to tender contracts competitively, unless there are good reasons to the contrary; in practice, public authorities are thus unlikely to be able to demonstrate best value to the satisfaction of auditors and the Secretary of State by following just the 'traditional route' (Vincent-Jones, 2006: 56). At central government level, the procurement policy is also founded on the 'value for money' principle. The obligations arising from the procurement legislation are enforceable in the High Court principally by unsuccessful bidders or potential bidders, which have been wrongly excluded from a competition.

Specific problems have been identified concerning the application of EU public procurement rules in the UK. Firstly, the absence of a public law/private law distinction in conjunction with the lack of a special regime of public law contracts means that 'it is often difficult to translate European procurement concepts into domestic law; in theory we only have a single regime of private law for contracting, although in practice contracting is used as a means for the organisation of public services and for meeting public policy goals' (Boeger and Prosser, 2009: 360). Further, according to the LGA, a number of ECJ decisions had a negative impact on the way local authorities can share services, including, for instance, payroll, IT support, benefits processing, or human resources functions (LGA interview notes). In these cases, an EU-wide tendering exercise may be required if the financial amounts involved exceed certain thresholds. This is because the local authority is effectively buying the service from another local authority and private sector providers may want the opportunity to compete.

In 2009, the ECJ decision on the *Hamburg case*⁸ gave more freedom to public bodies and resulted in the dropping a number of cases pending before the Court. A more recent decision this time by the UK Supreme Court⁹ indicates that there is flexibility in local authority contracting arrangements. The case resulted from arrangements made by local authorities to establish a mutual insurance company (LAML) and to receive insurance services from the company. The arrangements were challenged on the basis that the local authorities had acted outside their powers in participating in the company and that it was in breach of public procurement legislation for the local authorities to arrange to receive services from the company without going through a procurement exercise. When the case reached the Supreme

⁷ Directive 2004/18/EC has been implemented in the UK by the Public Contracts Regulations 2006, as amended.

⁸ C-480/06 *Commission v Germany* [2009] ECR 2009 I-04747.

⁹ *Brent LBC (Harrow LBC appellant) v RISK Management Partners Limited* [2011] UKSC 7-9 February 2011.

Court, the ECJ case law on the purpose and scope of the exemption was reviewed and it was held that Directive 2004/18/EC is not intended to protect the commercial sector by forcing public authorities to obtain the services which they need on the commercial market. Accordingly, the directive does not apply where the authority obtains the services from its own resources, nor – following *Teckal*¹⁰ – does it apply where the authority obtains services from a separate body, which is so closely connected it should be regarded as still obtaining the services in-house. The decision was particularly welcomed by the local authorities, as it is interpreted as paving the way for public sector bodies to join together and deliver shared services in a wider context.

Further, in response to the Commission's consultation on the modernisation of EU Public Procurement Directives 2004/18/EC and 2004/17/EC, the LGA has called for the review to 'result in more coherent, consistent and above all significantly simplified legislation' (LGA, 2011, point 6). In order to reduce the complexity of the procurement process, it is specifically suggested that EU procedural and administrative requirements, particularly detailed award procedures, must be reduced by simplifying the Directive and increasing flexibility for local authorities. Finally, the scope to promote social and environmental consideration in the context of public procurement constitutes an area of increased concern, especially for trade unions. A prime example is the impact of the ECJ decision on *Rüffert*¹¹ on the Living Wage Campaign in the UK. The campaign calls for every worker in the country to earn enough to provide their family with the essentials of life. The Office for Government Commerce (now part of the Cabinet Office) interpreted the decision as meaning that 'imposing a contract condition requiring the payment of the London Living Wage to workers on a contract creates the risk of legal challenge against the UK, on the basis that is restricting the freedom to provide services' (OGC, 2009). It was thus recommended that such minimum wage requirements should only be pursued on a voluntary basis. The most recent guidance produced by the Commission in this area has not reduced the uncertainty surrounding these issues, as it is interpreted as providing a relatively weak basis for the promotion of social considerations in public procurement (Unison, interview notes).

2.3. EU competition rules

Under Articles 106 and 107 TFEU, the compensation granted by public authorities for the performance of a SGEI is subject to state aid scrutiny, unless the four cumulative conditions laid down by the Court of Justice in its *Altmark* judgment are fulfilled. SSGI, which can be both economic and non-economic in nature, are only subject to EU competition law where they are indeed economic. According to Article 2 of Protocol 26: 'the provisions of the

¹⁰ Case C-107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [1999] ECR I-8121.

¹¹ C-346/06 *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG V Land Niedersachsen*, [2008] ECR I-1989.

Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.’ Providers of SGEI are only subject to competition rules, in general, and to State aid rules in particular, insofar as the application of those rules does not obstruct the fulfilment of their tasks. For social SGEI, the compatibility assessment is based on the Package. No sector-specific EU rules exist. Under the SGEI Decision, though, aid to social housing undertakings and hospitals is exempted from notification regardless of the amount of compensation involved, provided that the conditions of the SGEI Decision are met.

In the UK, the Office of Fair Trading (OFT) is responsible for enforcing EU competition law. The Competition Act 1998 extended EU competition law prohibitions to cases, which only affect trade within the UK. The Department for Business, Innovation and Skills (BIS) has lead responsibility within the UK government for the co-ordination and development of state aid policy. This includes providing advice and guidance on state aid rules, and co-ordinating and advising on complaint cases and formal investigations. The OFT guidelines state that the term ‘undertaking’ will be interpreted broadly to include any natural or legal persons capable of carrying on commercial or economic activities relating to goods or services. This approach reflects the ‘functional’ concept of an undertaking adopted by the ECJ, which has held that articles 106 and 107 cover any activity directed at trade and goods or services irrespective of the legal form of the undertaking, and regardless of whether it is intended to earn profits.

As Boeger and Prosser (2009: 363) suggest, in the past little attention was paid by UK authorities to EU state aid law. This changed following the 2003 *Altmark*¹² decision and the post-*Altmark* reform package, which was issued in 2005. Local and central government in the UK welcomed the post-*Altmark* reform package of 2005 ‘to the extent that it clarifies the application of the EU state aid regime’ (Boeger and Prosser, 2009: 364). All the same, the liberalisation in the provision of social care services in the UK may mean that competition law now applies to the activities of local authorities in the area. The official OFT position is that local authorities can qualify as ‘undertakings’. The position of the LGA is different and the association maintains that local authorities must not face a situation where competition law would undermine their flexibility as regards different commissioning and delivery models. It remains that the lack of guidance by the central state authorities concerning the impact of EU law has increased the costs for legal advice at local government level, as each individual authority has to either have in-house expertise or to contract legal advice in order to resolve any related issues.

Overall, the effects in the UK of the application of competition-law related EU rules have been relatively limited due to the extensive liberalisation already taking place as a matter of national policy. According to the OFT (2004a, point 1.12), ‘due to the extent of deregulation and liberalisation of the economy that has occurred in the United Kingdom, it is unlikely that

¹² Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

there will be a significant number of cases in which previous European Commission decisions will be directly relevant when considering whether the exclusion applies in the United Kingdom'. At a general level, Boeger and Prosser (2009: 360) comment that even though the EU case law 'has led to some anxiety, especially among local authorities, so far, there have been few areas where concrete legal conflicts have arisen'. In view of the forthcoming reform of state aid regulation at EU level, the Commission is currently revising the Monti-Kroes package of measures on state aid as compensation of public services. In this context, the LGA lobbies for social services to be added to the state aid exemptions. Such an amendment, which would be in line with the procurement and legislation and Services Directive, would bring, according to the LGA, greater consistency (LGA interview notes).

3. Specific examples of the interaction between EU law and social services in general interest in the UK

3.1. Social housing

At the end of the 1990s and the beginning of 2000, certain Member States, including the Netherlands, Germany and the UK began reporting their systems of funding and state aid for social housing to the Commission. This activity was the result of growing uncertainty about the impact of EU law with respect to state aid and by reporting, Member States aimed at obtaining the legal certainty required for the development and modernisation of the state aid systems for social housing (Ghékière, 2008: 275). There is no evidence of particular concerns about the application of state aid rules in the area of social housing. It is interesting to note though that in its response to the Commission's Consultation on the functioning of the 2005 SGEI State Aid Package, the UK government stated that case law can be helpful in this area and welcomed the Commission's decisions that send out a clear message that there must be a clear 'social objective'. In this respect, the UK government made specific reference to the statement made in the Dutch Housing Associations case¹³ that 'the Commission feels that letting homes to households that are not socially deprived cannot be regarded as a public service.'¹⁴ The UK agrees with this view as 'it balances the needs of Member States to support public services with the need to prevent abuse and maintain a level playing field for competition' (UK Representation to the EU Brussels, 2010).

As a result of a move away of local authorities from being direct providers of social housing, new forms of provisions of social housing have emerged. Today, social housing can be provided by the so-called 'arms-length management organisations' (ALMOs), in which the local authority retains the housing stock but the day-to-day management is transferred to a

¹³ NN 93/02, E 2/2005 and N/642/2009.

¹⁴ Paragraph 39 (NN 93/02).

third party. For the purposes of EU procurement rules, the latter, i.e. housing associations, are currently classed as ‘bodies governed by public law’. This classification, which was based on a comparison with the French Habitats à Loyers Modérés (HLMs), is rejected by the National Housing Federation. Its members believe that this definition is not correct¹⁵ and would like the UK government to reopen discussions with the Commission on the status of housing associations. According to the Federation, ‘housing associations are more akin to Dutch corporations, private sector bodies which are not subject to EU procurement rules, and should therefore not be considered as public bodies’.

The implications from the implementation of EU Directive 2007/66/EC (the Remedies Directive) have recently created some concern among housing providers. The directive require the courts to make a declaration of ineffectiveness for any public sector and utility contracts awarded in breach of certain fundamental EU public procurement rules. In contrast to the previous regime, contracting authorities or utilities that have acted in breach of those rules will also be liable to financial penalties. The National Housing Federation stressed that ‘since the implementation of the remedies directive last December, housing associations have reported receiving implied threats from suppliers during the tendering process and seen willingness from unsuccessful contractors to challenge the outcome. This has led to more money being spent on legal advice to ensure legal action is avoided. These funds could be better used and injected in improving local neighbourhoods. This could be addressed if there was a restriction on the reasons for challenge.’ The repercussions of the Remedies Directive for social housing providers were also noted by CECODHAS, the federation of public, cooperative and social housing, in its 2011 response to the EU policy in public procurement. More particularly, the organisation noted that ‘the fear of complaints (via the Remedies Directive) is so extreme in some countries, like in UK, that it deters the production of social housing through more flexible tendering procedures such as the negotiated procedure’ (CECODHAS, 2011: 3). The increase in challenges of procurement decisions by private companies also means additional costs and time for the local authorities that own the housing stock (Unison interview notes).

3.2. Social services

The UK care market is comprised of local authorities, the voluntary and private sectors on the provider side, and local authorities (on behalf of individuals) and privately contracting consumers on the other. In the context of EU public procurement law, social care is called a Part B service and is in annex excluded from most of the requirements applicable under the public procurement rules. This exclusion is considered helpful for the LGA as it grants the authority ‘a greater degree of flexibility to interact with and form agreements with social

¹⁵ The rejection of the classification is based on the argument that the regulator of social housing in England at the time of the Commission’s opinion in 2002 (Housing Corporation) and the current regulator (Tenant Services Authority) did not exercise ‘management supervision’ as in the case of the French HLMs.

service providers' (LGA interview notes). There is some evidence that because Part B services are still expected to comply with the Directive principles of non-discrimination, equal treatment and transparency, a number of contracting authorities of social and health services are using the Official Journal of the European Union (OJEU) process to avoid legal challenge. In response to the Commission's recent proposals in the Green Paper on the Modernisation of Public Procurement (Commission, 2011) to abolish the distinction between Part A and Part B services and apply the full extent of the procedural rules to all services, the LGA plans to emphasise the usefulness of the present list of exclusions in protecting social care from the full operation of internal market law.

Another area of EU law that influences social care is the rules on state aid. At present, social care is not excluded from the Monti-Kroes package. The LGA argues for the state aid that is provided in the case of social care to be exempted from the application of EU law, as is the case at present for social housing and healthcare. In 2002, the interaction between social services and competition law came to the fore with the case of *BetterCare Group v Director General of Fair Trading*.¹⁶ In this case, Belfast Health and Social Services Trust, North and West ('the trust'), purchased long-term residential care for the elderly from the private and voluntary sectors (such as BetterCare) on terms substantially lower than the costs they incurred in supplying similar care themselves, in-house. No public procurement was undertaken by the trust. The OFT rejected the complaint on the basis that the Trust was not an undertaking for the purpose of competition law. On appeal of the OFT's decision by BetterCare, the Competition Appeal Tribunal (CAT) decided the trust had acted as an undertaking, both in the purchasing of services from BetterCare and the direct provision of elderly care by its own statutory homes (in-house). The CAT remitted the complaint to the OFT for investigation and the latter found that the Trust's conduct did not constitute an abuse of a dominant market position as the trust did not set the prices it paid for care for the elderly.

BetterCare was interpreted by some commentators as suggesting that the activity of purchasing in the market could be sufficient for a public sector body to qualify as an 'undertaking' (Munro, 2006: 357). According to Pollock (2003: 237), private companies could challenge the purchasing power of the NHS and local authorities when using such power as bulk buyers to drive down prices; additional pressure would apply to increase user charges and top-up fees for users since the trusts could be forced to pay higher prices for nursing home care if it were found to be abusing their dominant position in a legal challenge to a public pricing policy; and, commercial hospitals and foreign investors would be given a mechanism for challenging the prices paid for secondary and tertiary inpatient care. As Pollock (2003) also reported, private healthcare companies were planning to exploit the decision. For instance, the Federation of Independent Nursing Agencies stated: 'We've been waiting for this decision. The way is now open for the OFT to resolve our complaint that the

¹⁶ Case 1006/2/1/01 *BetterCare Group Limited v Director General of Fair Trading* [2002] CAT 6, [2002] Comp.A.R. 229.

NHS is unfairly discriminating against private nursing agencies by favouring NHS Professionals, which operates at uneconomic rates' (quoted in Pollock, 2003: 237).

In a later case before the ECJ,¹⁷ it was found that in examining whether an entity is engaging in economic activity there is no need to dissociate the purchasing activity from the subsequent use to which those purchases are put. Boeger and Prosser suggest that this decision does not overrule *BetterCare*, the reason being that it had not been established whether the institutions in question did compete with private organisations, as this fact was not pleaded (2009: 374).¹⁸ In August 2004, the OFT issued a policy note with the intention of clarifying its position. According to the note, the OFT was likely to close cases concerning public bodies that are engaged only in purchasing and not involved in the direct provision of goods or services in the market, on the grounds such bodies are not undertakings for the purpose of the Competition Act 1998. In addition, the OFT was unlikely to take forward cases concerning public bodies, which are engaged in a mixture of purchasing and direct provision of goods and services for non-economic purposes (OFT, 2004b).

With respect to childcare services, one can speak here of a private market, since the private institutions that offer such services are not also directly subsidised by the state (Bahle, 2008: 39). In fact, the English and Welsh system is dominated by private, in most cases commercial, institutions. But the preschools, which have developed exponentially during the last years, are in their vast majority public institutions. With reference to the application of the Services Directive, the Report of the House of Lords stated that 'most childcare in the UK is offered privately and would not be considered a 'social service' and therefore would be covered by the Services Directive. For example the Directive will cover the Extended Schools Scheme, which is where Local Authorities coordinate the provision of after school care, but the parents, except in special circumstances, pay for the childcare, which is offered by either the Local Authority, voluntary or private providers. It is important that these services are carefully regulated to improve quality and maintain the safety of the child' (2006: 36).

In the wider context of public services, recent policy proposals may promote further the marketisation of public services and lead to the expansion of the application of EU law in this area. In July 2011, the UK government published its White Paper on Open Public Services (Government, 2011).¹⁹ The White Paper is based on five principles: increased choice,

¹⁷ Case C-205/03 P (on appeal from Case T-319/99). FENIN is an association of undertakings involved in the marketing of medical goods used in Spanish hospitals. The European Commission (the Commission) had dismissed a complaint by FENIN that various public bodies which were responsible for the management of the Spanish health service (SNS) had abused their position as dominant purchasers of the goods produced by FENIN members. The Commission's grounds for dismissing the complaint were that the public bodies in question did not act as undertakings when they purchased goods from FENIN members.

¹⁸ For a detailed analysis on whether the FENIN decision determines that competition law is not applicable to the NHS, see Cragg (2011) http://38degrees.3cdn.net/63442740413df6b835_clm6ib678.pdf (accessed on 28 September 2011).

¹⁹ The FT reported that the White Paper, which was originally due for publication in January 2011, was delayed in the face of opposition from the Liberal Democrats and public concern over the privatisation of health and social care (Parker and Timmins, 2011).

decentralisation, diversity, fairness, and accountability. With respect to diversity, the stated aim is to open up the majority of public services provision, moving away from public sector monopolies to a range of new and innovative providers of different sizes and sectors. The delivery of public services can take place by institutions that are voluntary, community, private or new style public service mutuals, which will all compete to offer a better service and raise standards. The UK government places this initiative in the context of incentivising the voluntary sector. However, there are concerns that such changes will actually result in private companies moving into the newly created markets (Unison, interview notes). In view of the multi-faceted implications of procurement, Unison has consistently argued for public bodies to deliver public services in-house (Unison interview notes). In a different note, the LGA considers that diversification of service provision could be beneficial provided third sector groups could succeed in securing such contracts (LGA interview notes).

In the context of the UK government's intention to overhaul the provision of public services, a number of developments took place recently that may alter significantly the provision of healthcare services in the future, influencing also indirectly social services. In July 2010, the Department of Health (DoH) published a white paper '*Equity and Excellence: Liberating the NHS*', which set out radical proposals to reform the NHS. Following consultation, the Health and Social Care Bill²⁰ (Bill) was introduced in the House of Commons in January 2011. The Bill outlined a number of significant changes including the creation of an independent NHS Board to allocate resources and provide commissioning guidance, the increase of General Practitioners' (GPs) powers to commission services on behalf of their patients and the promotion of patient choice.

The government proposals were met with strong criticism by a number of actors, who concentrated, amongst others, on the risk that the measures may expand the influence of EU law. A contribution to the *British Medical Journal* suggested that 'the reforms further open up the NHS to EU competition law' (Dunbar-Rees and McGough, 2011). In a similar vein, Unison argued that the NHS would become increasingly subject to European competition law, 'meaning that instead of devolving responsibility to the local level, government plans will permit the EU a greater say in the way the NHS is organised' (Unison, 2011). While the Department of Health's impact assessment on the reforms did not consider the effect of EU competition law, such claims were not rejected by the UK government. The Health Minister Simon Burns held that 'as national health service providers develop and begin to compete actively with other NHS providers and private and voluntary providers, UK and EU competition laws will increasingly become applicable'.²¹

In light of strong criticisms, the UK government set up an independent group to review the Health and Social Care Bill known as the NHS Future Forum. The group, which reported its

²⁰ <http://services.parliament.uk/bills/2010-11/healthandsocialcare/documents.html> (accessed on 28 September 2011).

²¹ House of Commons, written answers, 7 March 2011, Simon Burns MP response to Tom Blenkinsop MP.

findings to the UK government in June 2011, made a number of recommendations, including the removal of the provision in the Bill for Monitor to ‘promote competition’ (NHS Future Forum 2011). In response to further criticisms concerning the applicability of domestic and European competition law to the NHS (Cragg, 2011), the DoH responded: ‘We have consistently said that competition law would apply where it applies, with or without this Bill. However, we have also acknowledged that there is legal uncertainty as to when competition law would apply in the NHS due to the absence of relevant case law. We do, however, disagree with the conclusions drawn in the opinion from the BetterCare case, namely that “it is more likely than not that a Court or Tribunal ... would now conclude, as in BetterCare, that PCTs [Primary Care Trusts] are undertakings for the purposes of competition law’ (Department of Health, 2011: 5). The Bill received the backing of the majority of the Members of Parliament in its third reading in September 2011 but there are indications that further changes will be made to it by the House of Lords.

Conclusion

The ambiguity surrounding basic concepts in this area of European social policy such as ‘public service’, ‘service of general interest’, ‘service of general economic interest’ and ‘social service of general interest’ has been reflected in an increasing number of EU acts, contributing to the legal uncertainty prevailing in the sector. In the absence of a clear operating framework, the risk to have recourse to judicial interpretation acts as a hindrance to the achievement of maximum legal certainty. While a number of actors agree on the need to clarify the concepts in question, significant divergences exist concerning the optimal means for doing this. Both the previous and the current UK governments have consistently opposed any attempts to introduce EU legislation in this area. When the 2003 Green Paper on Services of General Interest was issued by the Commission, the UK government stated that it did not believe that the Commission’s analysis had established the case for a Community role that would provide greater clarity and greater benefit for Member States and their citizens in the area of SGI. In the response to the questionnaire distributed by the Commission for its 2006 Communication on Social Services of General Interest, the UK government indicated its preference for ‘a more targeted approach – looking at issues known to need addressing (primarily health care in the light of various ECJ judgments) and avoiding issues where the SSGI dimension is not known to create any *appreciable* difficulties (e.g. in the UK context, at least, the provision of social housing, or public education services)’ (emphasis in original) (Government, 2006).²²

On the other hand, Unison has called for the adoption of a framework directive. While the trade union recognises the limitations of such a directive, it has indicated that it would support

²² http://ec.europa.eu/employment_social/social_protection/docs/replies/uk_en.pdf (accessed on 28 September 2011).

such a proposal provided it recognises the need for public services obligations of the providers and that it respects the diversity existing in different Member States (Unison interview notes). Based on different grounds, LGA is in favour of more alignment between the different areas of law that interact with public services. For instance, the creation of a more common list of exemptions that apply in the cases of state aid, public procurement and free movement of services would ensure greater consistency and bring legal certainty for the local authorities that are responsible for managing the relevant contracts and grants (LGA interview notes). In contrast, any attempts to adopt a single directive is considered by the association as ineffective on two accounts: first, the landscape of public services is constantly changing and as such it will be difficult for a single directive to be able to reflect such developments; secondly, the significant diversity in the definition of the social services in the Member States means that it will be very difficult to reach a conclusion on a single list of such services at EU level.

Any development at EU level will take place against a constantly evolving regulatory framework of SSGI at domestic level. As discussed in the previous section, the recent proposals by the Coalition government, if approved, have the potential to transform a significant part of public services, including SSGI, and increase the scope for interaction between EU law and national regulation. It is interesting to note that the UK government's plans on public services were published on the day that private care home company Southern Cross announced it was closing down. The closure of Southern Cross, which was a care home provider, was attributed to its failure of its business model of leasing back homes from landlords. The crisis, which put at risk services for 31,000 residents, sparked concern across the UK government and the social care sector about the risks to service users of private companies delivering care declaring bankruptcy. Aside from the impact of this failure to users, concerns were also voiced for the Southern Cross workforce, particularly after the provider announced 3,000 job losses and changes to working conditions, which unions said would damage the quality of care. The case points to a central issue underlying any discussion on the distribution of competence between the EU and Member States in the area of SSGI. This is the question of how best to situate the concept of SSGI in order to uphold citizens' fundamental rights and respect for human dignity. In the absence of such a discussion at EU level, any effort to bring greater legal certainty will be undermined by the discourse framing any initiative in the area.

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