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EU and WTO Law on Services

Limits to the Realization of General Interest
Policies within the Services Markets?

Johan van de Gronden

Editor

63

EUROPEAN MONOGRAPHS



Wolters Kluwer
Law & Business

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AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.care@aspENpubl.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-2809-6

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Printed in Great Britain.

Preface

In December 2006 the Services Directive was published in the Official Journal of the EU. The drafting process of this directive gave rise to much controversy and illustrated that more knowledge on the dynamics resulting from the EU and WTO law on services needed to be gained. Therefore, the Europa Institute of the Utrecht University organised a conference on this subject matter at the end of 2006. This book is published as a result of that.

I would like to thank all authors for their interesting and stimulating contributions. It is beyond all doubt that their articles provide valuable analyses of issues related to services. Furthermore, I am very grateful for the money I received from the *EMSF* Fund of the Utrecht University in order to organise the conference (when I was employed at this university). I would also like to show appreciation for the work done by Louise Smit (Utrecht University) who conscientiously corrected the English text of all contributions.

The book was edited in the course of 2008 at the Department of International and European Law of the Radboud University Nijmegen (which is my current employer). In this respect, I would like to express gratitude to Marion Grevinga, Fiorina Argante and Hannie van de Put (all Radboud University Nijmegen) for their excellent editorial work. In a relatively short period of time they carried out this work.

I hope that this book will contribute to a better understanding of the EU and WTO law and services and will stimulate both practitioners and scholars to reflect on this fascinating issue.

Johan W. van de Gronden (editor)
Professor of European Law (Radboud University Nijmegen)

Nijmegen 25 June 2008

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Chapter 1

Prologue

*Professor Johan W. van de Gronden**

1 INTRODUCTION

The present book addresses services both from an EU and World Trade Organization(WTO) law angle. The central question of this book is how to balance the proper functioning of the services market in a European and international context, and the realization of general interest issues.

2 SERVICES IN EU LAW

In EU law, the integration process mainly takes place through market integration. The establishment of the internal market and a system ensuring that competition is not distorted play a key role in this respect.¹ Although the competition phrase is removed from the beginning of the new Treaty of Lisbon,² it is still clear from the outset that economic integration is predominant in the European integration process. After all, the Protocol on the internal market stipulates that the internal

* Professor at the Radboud University Nijmegen.

1. See Art. 3(1) sub c and sub g EC.

2. Cf. the letter of M. Petite, the Director General of the European Commission's Legal Service of 27 Jun. 2007 in the *Financial Times*. See in this respect also A. Riley, 'The EU Reform Treaty and the Competition Protocol: Undermining EC Competition law', *European Competition Law Review* 28 (3) (2007): 703 et seq.

market, which is still regarded as one of the key issues of European law, includes a system ensuring that competition is not distorted.³

It could be argued that the stance of Community law towards the economy is rather liberal. The main elements of European substantive law consist of economic rules: free movement and harmonization, competition and state aid. For instance, the Commission has far-reaching powers in the field of competition law and since the entering into force of Regulation 1/2003⁴ a network exists of national competition authorities applying European Community (EC) competition rules. Furthermore, the Community legislature has adopted important directives in order to liberalize services sectors such as the electricity sector and the telecommunication sector.

A major development is the adoption of the Services Directive⁵ by the Community legislator. According to the initial draft (initiated by the former Commissioner Bolkestein),⁶ the principle of country of origin applied to services, and therefore providers of services operating in different EU Member States only had to observe the national laws of their home country. Host countries were not allowed to impose obligations, for instance, connected to the public interest, upon them. Conversely, during the drafting process the original proposal was heavily amended. An important change was the replacement of the principle of country of origin by the principle of 'freedom to provide services'. Although the original draft has been thoroughly altered, the goal of the directive remains the same: the removal of obstacles to the free movement of services.

However, the ongoing liberalization process faces a lot of resistance in the European Member States. It appears that tensions are emerging between the goals of the European market and general interest objectives at the level of the Member States. Especially within the context of services the question concerning the relationship between market and general interests rises. An important recent development is the entering into force of several Commission measures on Services of General Interest (SGI) and state aid.⁷ However, compared to goods there is less knowledge and experience regarding the liberalization of services and the rules on the proper functioning of the market, and the role of general interests. This is surprising, as the services sector plays a major role in Europe's economy.

3. See the Protocol on the Internal Market and Competition, annexed to the Treaty of Lisbon.

4. Regulation 1/2003 of the Council of 16 Dec. 2002 regarding the execution of the competition rules of Arts 81 and 82 of the Treaty, OJ 2003 L1/1.

5. Directive 2006/123/EC of the European Parliament and of the Council of 12 Dec. 2006 on services in the internal market, OJ 2006 L376/36. The Services Directive entered into force on 28 Dec. 2006 and must be transposed by 28 Dec. 2009.

6. See the proposal of the Commission of 25 Feb. 2004, COM(2004) 2 final.

7. See the Community framework for state aid in the form of public service compensation, OJ 2005 C297/4; the Decision of the Commission of 28 Nov. 2005 on the application of Art. 86(2) 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, OJ 2005 L312/67 and Commission Directive 2005/81 of 28 Nov. 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings OJ 2005 L312/47.