

Chapter 19

Social Services of General Interest in Germany

Ulrich Becker

Abstract This chapter presents a brief overview of the organisation and regulation of SSGI in Germany. It locates the subject in its historical context (Bismarckian Welfare State), but also shows how the current regime deviates from its classical model. The chapter shows that the German system always depended on private service suppliers for the provision of SSGIs and that private sector involvement was not only caused by EU law and recent reforms. The chapter also discusses how recent reforms have changed the old system which may have implications on the application of EU law, in particular the application of competition and procurement law.

Contents

| | | |
|--------|--|-----|
| 19.1 | Introduction..... | 498 |
| 19.2 | Welfare State and SSGIs in Germany..... | 499 |
| 19.2.1 | A Bismarckian Welfare State..... | 499 |
| 19.2.2 | Concept of Social Services in Germany..... | 499 |
| 19.2.3 | Social Benefits Systems..... | 501 |
| 19.3 | Regulation of the Delivery of SSGIs in Germany..... | 501 |
| 19.3.1 | Personal Social Services as Part of Administrative and Social Law..... | 501 |
| 19.3.2 | The ‘Social Benefits Delivery Triangle’..... | 502 |
| 19.3.3 | Admission of Providers and Regulation of Their Activities..... | 504 |
| 19.4 | Recent Developments with Regard to SSGIs in Germany..... | 506 |

U. Becker (✉)
Max-Planck-Institut für Sozialrecht und Sozialpolitik,
Amalienstraße 33, 80799 Munich, Germany
e-mail: becker@mpisoc.mpg.de

U. Becker
Law Faculty of the Ludwig Maximilians Universität, Munich, Germany

| | | |
|--------|---|-----|
| 19.4.1 | Social Benefits Schemes..... | 506 |
| 19.4.2 | Delivery of Social Services..... | 507 |
| 19.5 | Conclusions..... | 508 |
| 19.5.1 | General Remarks..... | 508 |
| 19.5.2 | Concrete Examples..... | 508 |
| 19.5.3 | EU Law Consequences of Marketisation..... | 509 |
| 19.5.4 | Overall Perspective..... | 509 |
| | References..... | 510 |

19.1 Introduction

The following lines pursue the goal to give a comprehensive, but necessarily very rough overview, on SSGIs in Germany. By so doing, I hope to shed as much light as possible on the German landscape of social services, although one has to keep in mind that this approach will obviously be subject to shortcomings: many details will be missing, and some aspects may seem overestimated, while others might need more room for explanation in order to become more easily understandable.

Before moving on to the national level, two general observations should be made which take up the underlying assumptions of the overall project. First, the relations between the national level and the European level are rather complex. At least as far as social policy is concerned, there is no one-way street leading from Brussels to the capitals of the Member States. Notwithstanding a certain asymmetric architecture with a view to the role of economic and social laws and the respective allocation of powers, we can observe a process of mutual influence (or impact) between national and EU social law. Social policy is gaining in importance on the European level, but the evolving common values are still deeply rooted in national policies and institutions, even if they will not leave these policies and institutions untouched.¹ This is why, at least in the short run, there will be neither the necessity to restructure all national social benefits systems² into tax financed ones, nor will national welfare states get lost in an inevitable European process of reckless marketisation.³

My second preliminary observation concerns the various welfare state models and the question as to how much emphasis should be put on modelling. We all know the different models, and we also know the criticism which has been put forward against these models for years now. Nevertheless, welfare state models keep being used,⁴ and there is a grain of truth in the assumption that they can be

¹ For details Becker 2010a, pp. 313 et seq.

² See for possible consequences of globalisation and Europeanisation in general Scharpf and Schmidt 2000, pp. 310, 335 et seq.

³ But see also Supiot 2010, pp. 38 et seq.

⁴ See for a categorisation of European welfare states Obinger et al. 2005, pp. 1, 23 et seq.

seen as the expression of certain general values and attitudes governing a given political community. Yet, they turn out to be much too schematic when it comes to a more detailed analysis.⁵ In many countries, old age security and health care benefits follow very different institutional paths, to give just an example. Sometimes, a certain path is being left, blurring the architecture of a given model as a consequence. The recent reforms of the Swedish⁶ and the Norwegian old age security schemes can serve as a good example here.

The chapter is organised as follows: The next sections locate the analysis of the SSGI in Germany in the larger historical and political framework. Based on this, the following part of this chapter highlights the differences between social security insurance and social benefits and indicates the importance of the social services triangle. Subsequently, a few reforms of SSGI in Germany are discussed. Lastly, the contribution offers a number of further improvements and points for future analysis.

19.2 Welfare State and SSGIs in Germany

19.2.1 A Bismarckian Welfare State

Having said this, I shall risk a little contradiction by adding that the German ‘social state’, as we put it in Germany,⁷ can rather doubtlessly be characterised as belonging to the so-called *Bismarckian* welfare states. Quite obviously, it does not make sense to deny that there is a certain relation between *Bismarck*, the type of social insurance being tagged with his name, and Germany.⁸

It is true that German social insurance systems are still employment based today, and that especially old age pensions insurance is earnings related and aimed at ensuring to maintain the individual living conditions for the elderly, although this has to be linked rather to *Adenauer* than to *Bismarck*.⁹ But there are also some changes to be reported later on, and there are other social services than social insurance benefits that might deserve mention.

19.2.2 Concept of Social Services in Germany

This last point leads to the question which SSGIs can be found in Germany today. In the framework of this project, a rather broad and unspecific concept of SSGIs serves as a starting point. As long as one does not concentrate on one particular

⁵ See also Schmidt 2005.

⁶ See Westerhäll and Köhler in: Schlachter et al. 2005, p. 67 et seq. and p. 85 et seq.

⁷ See Articles 20(1) and 28(1) of the German Constitution (Basic Law—*Grundgesetz*).

⁸ See for the historical development Zöllner 1982, pp. 1, 9 et seq.

⁹ See for the ground-breaking pension reform of 1957, Hockerts 1980, pp. 320 et seq.

aspect, such as the scope of application of the social service exemption of the Services Directive,¹⁰ for example, this approach seems to be very much suitable.¹¹ Its openness allows the inclusion of a vast number of services and developments, thus leading to a rather comprehensive picture. Following this approach, I will not discuss whether social services can be of a non-general interest at all, or under what circumstances such a conclusion could be held true, nor will I try to give an account of the debate as to which German social services may fulfil the requirements of a given EU concept.¹²

It has to be added that there is no German law on social services as such. The concept of social services [*Soziale Dienste*] is quite well known but somewhat unclear.¹³ It means services provided in person which will be called herein social services in a strict sense.¹⁴ Sometimes, their understanding is limited to the context of social work, local communities' actions or counselling, concentrating on the support for particularly vulnerable persons. Yet, such approaches do not help to gain a better understanding: They are still too broad if it comes to sector specific aspects like the explanation of particular institutions rooted in history. And they are too restricted if the general question of how to organise a proper protection of general interests in our post modern societies is concerned.

As a conclusion, for the purpose of the following observations, most services in the field of vocational training, pensions, long-term care, rehabilitation, and healthcare will be included. But such a substance-based overview has to be accompanied by an institutional-based one, which means that I will concentrate on social benefits which can be brought into a systematic order according to the characteristics of the relevant social benefits schemes. Generally speaking, social benefits are those benefits which are provided by the Government, or for which at least some form of public responsibility of Government has been established, and which pursue a particular social objective. This social objective is different from that of other social measures in a wider sense, e.g., the setting up of a certain infrastructure for public transport or the provision of certain goods such as water.¹⁵

¹⁰ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, *OJ* 2006 L 376/36.

¹¹ It corresponds with the Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM(2006) 117 final, 26 April 2006, p. 4, which defines social services—apart from health services—as ‘statutory and complementary social security schemes “and ”other essential services provided directly to the person’.

¹² See Rixen 2010a, pp. 5 et seq.

¹³ See for example the different contributions in the non-comprehensive work of Evers et al. 2011.

¹⁴ The term ‘soziale Dienste’ is mentioned in Sect. 17 para 1 No. 2 of Social Code Book I in accordance with the concept followed within this project: it simply means all (personal) social services needed in order to provide social benefits.

¹⁵ For details Becker 2010c, pp. 607, 614 et seq.

19.2.3 Social Benefits Systems

Germany has a broad variety of social benefits schemes, and these schemes cover the major part of the population and react to different situations of social needs. They can be grouped into four categories.¹⁶

The first consists of benefits that are granted because a certain precaution has been taken, or to put it simply, because contributions have been paid. Benefits are risk-related, and they appear in the form of the well-known social insurance schemes [*Sozialversicherungssysteme*]. Leaving aside particular systems for the agricultural sector and civil servants, there are five different branches, each of them covering one or more social risks: health insurance (sickness) [*Krankenversicherung*], occupational accident insurance (industrial injuries) [*Unfallversicherung*], pension insurance (old age, invalidity, death) [*Rentenversicherung*], unemployment insurance (unemployment) [*Arbeitslosenversicherung*], and long-term care insurance (need for care or dependency on the latter) [*Pflegeversicherung*].

Second, there are benefits which aim at supporting people in specific situations of need [*Förderleistungen*], such as child support in a broad sense, child benefits and child raising benefits in particular, educational grants, housing subsidies. They are typically tax-financed and non-means-tested (or means-tested on a comparatively higher level).

Third, there are benefits which compensate for a specific loss or damage, such as war and crime victims compensation [*Entschädigungsleistungen*].

Fourth and last, there is a safety net which consists of social assistance benefits [*Hilfeleistungen*]. Their characteristics are, more or less, the same worldwide: They are paid out of the general budget, they are means-tested, and they are of a subsidiary nature in the sense that other benefits have to be provided first.

19.3 Regulation of the Delivery of SSGIs in Germany

19.3.1 Personal Social Services as Part of Administrative and Social Law

As can be seen from this enumeration, there are many social benefits. But what about social services in a strict sense? In the framework of some benefits schemes, only cash benefits are granted. This holds true for housing, education, and child benefits. It follows from this institutional setting that services concerning housing, education and child care are not regulated by social law, but by specific statutes and statutory instruments. Primary schooling, for example, takes place in institutions which mostly belong to government or local authorities, but there are also

¹⁶ Fundamentally, but slightly different, Zacher 1987, pp. 571, 583 et seq.

private entities involved. State laws provide for support as state governments take over the costs of infrastructure and personnel.¹⁷ This holds true for both private and public schools (in the literal sense of the latter).¹⁸ Kindergartens are something in-between. They are partially regulated through social law (child and youth welfare, [*Kinder- und Jugendhilfe*]),¹⁹ but also through state statutes on child care,²⁰ which are the primary legal sources when it comes to financial support of the respective institutions. At the same time, this example points out the peculiarities of the German federal system and the melange, if not the muddle, of federal, state and local communities' powers. Lastly, in some sectors like housing, there are very few regulations in the sense of governmental intervention at all.²¹ To a very large extent, housing is left to the market.²²

Taking into account the different situations of 'mixed' regulations, I will concentrate on services in a strict sense that form part of social insurance and social assistance schemes. They do so to very different degrees. Unemployment benefits and social assistance are mainly provided as cash benefits, but there are also labour market services and vocational training [*Arbeitsförderung* including *berufliche Bildung*]. The situation is quite similar with regard to pensions. Whereas pensions consist of cash transfers, the competent authorities also have to grant, in the framework of both pension insurance and occupational accident insurance, benefits in kind such as rehabilitative measures. Benefits in kind form the most important type of benefits as far as health insurance is concerned.

Although focussing on services in a strict sense, I will not leave out cash benefits totally. It should be noted that the German health and old age pension insurances are based on a mixture of public and private schemes.²³ This opens up, or leaves room for, an insurance market, and as the activities of insurance companies also have to be qualified as services—at least in the sense of the fundamental freedoms of the EU,²⁴ I will briefly come back to this mixture later on.

19.3.2 The 'Social Benefits Delivery Triangle'

Most social services that form an integral part of social benefits schemes are not provided for by the competent authorities directly. These authorities, either

¹⁷ E.g. Articles 6 and 15 of Bavarian Law on School Financing (*Bayerisches Schulfinanzierungsgesetz*), GVBl. 2000, S. 455.

¹⁸ With a specific constitutional background, see Article 7 para 4 Basic Law (*Grundgesetz*).

¹⁹ S. 22 et seq. of Social Code Book (*Sozialgesetzbuch*) VIII.

²⁰ E.g. Articles 18 et seq. of Bavarian Law on Child Education and Care (*Bayerisches Kinderbildungs- und Betreuungsgesetz*), GVBl. 2005, S. 236.

²¹ See Law on Housing Subsidies (*Wohngeldgesetz*).

²² But not without some sort of state subsidies (*Wohnungsbauförderung*) regulated (or not) by state laws.

²³ See *infra* Sect. 19.4.1.

²⁴ Article 56 TFEU.

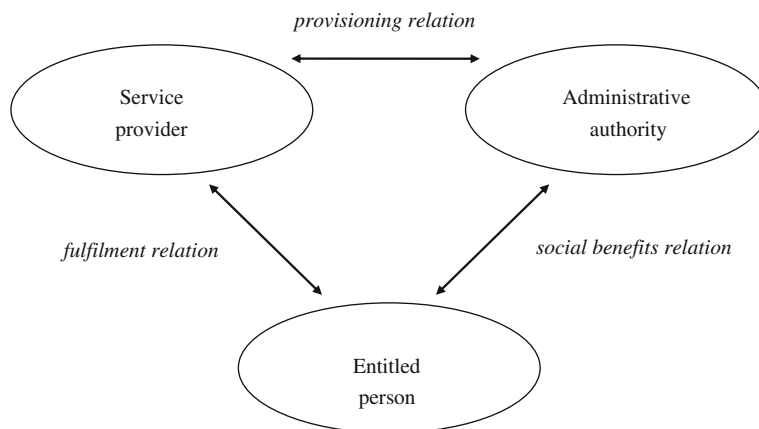


Fig. 19.1 The social benefits delivery triangle

autonomous administrative bodies following the principle of self-government [*Körperschaften mit Selbstverwaltung*] or local communities, own the necessary infrastructure only to a very small extent. They do so namely in the areas of hospital care in general, of stationary care for victims of industrial injuries, and of rehabilitation for persons insured under pension insurance. In all other areas, they involve private actors for the purpose of benefits provision.

This model is being used for the sake of efficiency on the one hand, but it also has a normative basis on the other as it leaves space for economic activities of individuals. It is important to stress the fact that this model is a very traditional one which has been practised over decades. Thus, it is not a new element following postmodern developments in governmental action, and it is not an expression of neo-liberalism or economisation, although it has undergone some recent changes. Therefore, the often used terms 'privatisation', 'out-sourcing', or 'contracting out' are not suitable to properly describe the cooperation between administrative authorities and private actors, at least as far as this cooperation as such is concerned (Fig. 19.1).²⁵

For analytical purposes,²⁶ it is helpful to stress the connections between the three different actors involved: the administrative authorities, the service providers, sometimes called 'suppliers', and last but not least, the individual in need (entitled person, 'right holder'). There are legal relations between these actors, and these relations form a triangle, the 'triangle of social benefits provision' (or 'social benefits delivery triangle'). Every legal relation follows its own rules, and also has a specific statutory background. Yet, they do not exist to their own ends. Their

²⁵ An example of a misleading view: COM(2006) 117 final, p. 5: 'general aspects of this modernisation process can be seen... the outsourcing of public sector tasks to the private sector, with the public authorities becoming regulators, guardians of regulated competition and effective organisation at national, local or regional level'.

²⁶ For a detailed analysis, see Becker et al. 2011.

common basis is a political decision: the decision of a political community and its government to protect an individual, and this political decision constitutes a public or general interest. Social protection will be promised in the form of a social benefit, and a rights-based jurisdiction will consequently create a respective enforceable right of the individual who fulfils the legal requirements ('social benefits relation') [*Leistungsverhältnis*]. If this right is a right to a service, and if the competent governmental body does not own the necessary institutions or personnel for providing such services, the latter has to make some sort of arrangement in order to ensure that a private provider will take over the duty to fulfil the right. Usually, the competent administrative body does not purchase the service from a private actor in a stricter sense, but it will merely create a legal basis for service provision ('provisioning relation') [*Beschaffungs- und Bereitstellungsverhältnis*]. The actual fulfilment of the social right will take place on the basis of a legal relation between the private benefit provider and the individual 'right holder' ('fulfilment relation') [*Erfüllungsverhältnis*].

The connections between social benefits relations on the hand, and the relations between an administrative authority and a social benefits provider on the other, has led to the jurisdiction of the CJEU (*FENIN*), according to which EU competition law is not applicable and the competent authority does not act as an undertaking in the sense of the said rules, when contracting with a private provider²⁷ because, as the Court states:

the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.²⁸

It is remarkable that the CJEU uses the term 'purchase' and 'purchasing activity'. It might have understood that term in a rather broad sense, but it is still disputable what forms of legal relation between an administrative authority and a private provider actually fall under this concept.

19.3.3 Admission of Providers and Regulation of Their Activities

What do the above-mentioned legal relations look like in German practice?²⁹ There are no general rules as the regulatory instruments differ from one sector to

²⁷ On the background of the disputable, but standing jurisprudence according to which social activities have a different quality compared to economic ones, see first CJEU, Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637; most recently CJEU, Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513.

²⁸ CJEU, Case C-205/03 *FENIN* [2006] ECR I-6295, para 26. See for an analysis Krajewski 2007, p. 111 et seq.

²⁹ For details Becker et al. 2011.

another. In most cases, service providers need some form of admission. Admission can be obtained either by way of unilateral action, a so-called administrative act [*Verwaltungsakt*] issued by the competent authority, or by way of cooperation, contractual agreements of public law character [*verwaltungswirtschaftliche Verträge*] between the two parties involved. General rules concerning the fixing of tariffs and prices, the provision of services and their quality, can be found either in statutes or statutory instruments or in so-called framework agreements [*Rahmenvereinbarungen*] which have to be concluded between the administration and the providers' unions. Competent authorities may be governmental departments, social security funds including their federal organisations, or local communities, depending on the social benefits sector involved. In this respect, statutes, corporatist agreements and individual measures go hand in hand. This results in an onion-like, complex construction of different layers of regulations, and the German federal system does not help to reduce this complexity.

With regard to EU law in general, and public procurement directives in particular,³⁰ it has to be stressed that most of the aforementioned regulations between administrative authorities and private providers do not have the effect of closing markets or distributing market shares. Whether a provider runs an operating risk or not very much depends on the contents of a specific admission or agreement. The case law of the CJEU illustrates the necessity to look at every single relation very closely. In the *Oymanns* case, which dealt with a so-called 'integrated provision scheme' that was provided for in par. 140a–140e of Social Code Book V, the Court has qualified the agreement between the sickness funds and *Oymanns*, a specialist shoe manufacturer, as being a framework agreement within the meaning of Article 1(5) of Dir. 2004/18.³¹ In the *Krankentransport Stadler* case, the CJEU had to decide on the consequences of an award of service contracts in the field of rescue services. It stated that *Stadler* was fully remunerated by persons other than the contracting authority which awarded the contract concerning rescue services, and that *Stadler* ran an operating risk, albeit a very limited one. Therefore, the contract in question had to be classified as a 'service concession' within the meaning of Article 1(4) of Dir. 2004/18.³² Although rescue services have a very specific institutional background—as it is a governmental body and not the sickness funds that is responsible for the admission of providers—the same result holds true for most of the legal relations between administrative authorities and private providers in the area of social benefits.³³

³⁰ Directive 2004/18 of the European Parliament and of the Council of 31 March 2001 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, *OJ* 2004 L 134/114.

³¹ CJEU, Case C-300/07 *Oymanns* [2009] *ECR* I-4779.

³² CJEU, Case 274/09 *Krankentransport Stadler* [decided on 10 March 2011, nyr], paras 29 et seq.

³³ See Sormani-Bastian 2007; Heinemann 2009; Engler 2010; Lange 2011; Thüsing and Forst 2011.

19.4 Recent Developments with Regard to SSGIs in Germany

19.4.1 Social Benefits Schemes

Moving on from the institutional settings of service provision, I will turn to a very rough overview on recent developments in German social benefits law. I will do so by giving a bird's eye view of the German social benefits landscape, thus concentrating on a few, and the most important, reforms of social benefits schemes over the last couple of years.

(a) The first groundbreaking reform that should be mentioned here concerns old age security. It was brought about by a bundle of statutes in 2000.³⁴ Their intended effect is to cut back the level of old age pensions, and to strengthen, if not to build up, a second pension pillar. It does so by introducing the employed earners right to occupational pensions on the one hand, and by subsidising private pension plans on the other. Consequently, it makes more room for private insurance companies, even if security in the second pillar is not obligatory.

(b) A second measure concerns healthcare insurance. Germany has a unique and rather strange institutional arrangement, as social protection is based on a 'dual system': statutory health insurance for most of the population, and private health insurance for the remaining part. This private health insurance is not (only) complementary, but also provides the insured persons with all necessary treatments. It used to be voluntary.³⁵ This has changed.³⁶ Since 2009, Germany has had, for the first time, a really comprehensive compulsory health care system, covering the whole population. Private insurance companies still own a market share, but they have to offer a special tariff, and they are no longer allowed refuse protection for the already sick or disabled. In this regard, they nowadays have to fulfil a social task, i.e., they must act in the general interest.³⁷

(c) Third, Germany has also followed the 'activation policy' path, flagged out as 'Agenda 2010'. It is especially benefits for the unemployed that have undergone dramatic changes. Unemployment allowance was abolished in 2005,³⁸ a new means-tested, tax-financed benefit has been introduced which became known, but not popular, under the name of 'Hartz IV'. Together with the introduction of this particular social assistance, the obligation of the unemployed to accept job offers

³⁴ See Becker 2004, pp. 846 et seq.

³⁵ See Becker 2005, pp. 3 et seq.

³⁶ Through the Law on Enforcement of Competition in the Statutory Sickness Insurance (*Gesetz zur Stärkung des Wettbewerbs in der gesetzlichen Krankenversicherung—GKV-WSG*) of 26 March 2007, Bundesgesetzblatt (BGBl.) I, 378.

³⁷ For its constitutionality see German Federal Constitutional Court (BVerfG), decisions (E) 123, 186.

³⁸ Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt v. 24.12.2003, BGBl. I, 2954.

and also to accept any other measures in order to qualify for the labour market, including additional work, has been reinforced.³⁹

19.4.2 Delivery of Social Services

And there are also some general developments as far as social services in a stricter sense and their delivery are concerned. In an overall assessment, they may be characterised as steps on a ‘marketisation’ process.

(a) In most areas, the delivery of social services is organised in the form of markets. State or public monopolies have never been very strong,⁴⁰ and they were abolished where it seemed necessary, for example concerning placing services, on the basis of a decision of the CJEU.⁴¹ So-called third sector organisations used to be quite dominant in other areas, especially in providing social assistance and support for children and the youth. This was due to a legislation that gave preference to these organisations over profit-oriented actors.

Things have changed, and the choice between all private actors now has to be based on price, quality, or to a certain degree on other objective criteria.⁴² Only as far as particular institutional funding is concerned, especially tax subsidies, third sector organisations still enjoy certain advantages over profit organisations.⁴³ Finally, as far as institutional settings are concerned, we can still observe a tendency towards corporatist arrangements. The most prominent example is that physicians inscribed with the statutory health insurance have to be members of a public entity which is in charge of negotiating the circumstances of service provision.

(b) With these institutional changes, competition is one instrument that is used to organise social benefits markets more efficiently.⁴⁴ There remain few areas, like rehabilitation for persons insured under the statutory pension insurance, where providers owned by pension funds are in place, and it is not clear whether competition works in these areas.

In others, especially hospital care, profit-oriented providers have been able to enlarge their market shares even though local communities have a legal duty to guarantee sufficient supply, i.e. the existence of care facilities.⁴⁵

³⁹ See Becker 2008, pp. 39 et seq.

⁴⁰ In the framework of the long term care insurance, private providers have clear priority over public ones, s. 11 Para 2 s. 3 of SGB XI.

⁴¹ CJEU, Case C-41/90 [1991] ECR I-1979.

⁴² See e.g. s. 78b para 2 of SGB VIII, s. 75 para 2 s. 3 of SGB XII.

⁴³ Rixen 2010b, pp. 53, 67 et seq.; see in general von Boetticher 2003.

⁴⁴ See Becker 2010b, pp. 11 et seq.

⁴⁵ E.g. Article 51 para 2 of Bavarian Law on Administrative Districts (*Landkreisordnung*), GVBl. 1998, S. 826.

And notwithstanding the already mentioned corporatist architecture of German health services, the possibility to conclude individual contracts and to offer additional benefits allow for competition, even if up to now to a comparatively small degree. In contrast, competition between sickness funds—introduced in 1996 as a rather unique phenomenon⁴⁶—does not automatically induce competition between service providers (as can be seen from a judgment of the CJEU⁴⁷).

19.5 Conclusions

19.5.1 General Remarks

Let me stop here with our *tour d'horizon* on the German social services. In my conclusions, I would like to come back to my initial question: What is the impact of the law and policies of the European Union on German social policy and social law, and on the delivery of social services in particular?

It is obvious that such an impact often remains unclear. Causality in policy matters is always hard to prove. What is more, social law reforms are based on a variety of factors, and most of these factors, e.g. the ageing of society, or changes in family role models and the labour markets, are common to nearly all EU Member States. This makes it very difficult to distinguish between internal and external factors of social policy reforms. Therefore, it may be helpful to assume a gradation of European influences which goes from the more concrete cases to more general assumptions.

19.5.2 Concrete Examples

The impact of Union law is easily observable with regard to few, and quite restricted examples:

- one concerns the opening up of a market for placing services, which has already been mentioned before⁴⁸;
- another is cross-border health care: there are new rules in Germany due to the effect of basic economic freedoms to overcome territoriality within the European Single Market⁴⁹;

⁴⁶ See Becker 2001, pp. 7 et seq.

⁴⁷ CJEU, Case C-264/01 et al. *AOK Bundesverband et al.* [2004] ECR I-2493.

⁴⁸ See supra Sect. 19.4.2a); it has to be stressed though that the respective state monopoly already had been discussed for internal reasons before, see Walwei 1993, pp. 285 et seq.

⁴⁹ S. 13 paras 4–6, s. 140e of SGB V.

- and, I would like to add another one as an example for the growing importance of the European citizenship and the free movement of persons which is only rarely taken into account: the widening of the personal scope of application in crime victims compensation.⁵⁰ Here, the impact of basic economic freedoms goes hand in hand with the principle of non-discrimination.

19.5.3 *EU Law Consequences of Marketisation*

With a view to the delivery of social services, sort of an ‘intermediate’ observation can be made. More and more emphasis is being placed on transparency, especially as far as a choice between benefits providers has to be made. There is a growing awareness to adhere to

- first, public procurement law in some sectors of healthcare provision, as well as in cases where care homes and rehabilitation facilities have a part to play⁵¹;
- second, the prohibition of state aids which are incompatible with the internal market⁵²; this is a cause for concern especially in the hospital care sectors,⁵³ but also in all other areas where subsidies for the realisation of a specific infrastructure can be paid.

19.5.4 *Overall Perspective*

My third and last point deals with general developments of social benefits schemes as they were described earlier. Here, it is impossible to testify a certain European influence. But we can at least observe common results and tendencies within the European Union. There is, for example, a clear convergence in the field of old age security. And a more in-depth analysis would reveal common European values and common principles as forming a basis for national social benefits systems.⁵⁴

Again: as Union actions in the field of social security consist to a great extent of soft law, such as the Open Method of Coordination, we cannot prove what causes what to actually happen.⁵⁵ For example, there is no evidence that the recent

⁵⁰ S. 1 para 4 No. 1 Law on Crime Victims (*Opferentschädigungsgesetz*) (BGBl. I 1985, S. 1).

⁵¹ See *supra* Sect. 19.3.3

⁵² Article 107 TFEU.

⁵³ See Cremer, GesR 2005, S. 337 ff.; Becker 2007, p. 169 et seq.

⁵⁴ For details Becker 2010d, p. 89, 105 et seq.

⁵⁵ See Becker 2011, p. 19 et seq. with further references.

reforms in German health insurance would have been triggered by the European principle of access to health care.

What remains and leads back to my starting point is that the process of the European integration is also a process of mutual influence between national and EU social law and social policies. National social law has to adapt to the mechanisms of the internal market. But it is also true that the European Union is, especially with the Lisbon Treaty, developing a social dimension which seems to deserve more and more recognition. The internal market will have to become a 'social market economy', even if a 'highly competitive' (Art.3 par 3 subpar 1 TEU). That does not mean that it will leave the national social benefits systems untouched. But there is now a common European goal behind it.

References

- Becker U (2001) Maßstäbe für den Wettbewerb unter den Kranken- und Pflegekassen (Standards for competition among sickness and care funds). *Soziale Sicherheit und Wettbewerb*, Schriften des Deutschen Sozialrechtsverbands (SDSRV) 48:7 et seq
- Becker U (2004) Private und betriebliche Altersvorsorge zwischen Sicherheit und Selbstverantwortung (Private and occupational old-age insurance between security and self-determination), *Juristenzeitung (JZ)*, pp 846 et seq
- Becker U (2005) German health and long-term care insurance—legal aspects. In: The role of private actors in social security. MPISoc Working paper 1/2005, pp 3 et seq. Available at: www.mpisoc.mpg.de
- Becker U (2007) EU-Beihilfenrecht und soziale Dienstleistungen (European state aid law and social services), *Neue Zeitschrift für Sozialrecht (NZS)*, pp 169 et seq
- Becker U (2008) Sozialmodell und Menschenbild in der Hartz-IV Gesetzgebung (Social model and idea of man in the "Hartz IV"-Legislation). In: Behrends O, Schumann E (eds) *Gesetzgebung, Menschenbild und Sozialmodell im Familien- und Sozialrecht*, Abhandlungen der Akademie der Wissenschaften zu Göttingen, Berlin, New York, pp 39 et seq
- Becker U (2010a) Der Sozialstaat in der Europäischen Union (The Social State in the European Union). In: Becker U, Hockerts H, Tenfelde K (eds) *Sozialstaat Deutschland—Geschichte und Gegenwart*, Dietz, Bonn, pp 313 et seq
- Becker U (2010b) Funktionen und Steuerung von Wahlmöglichkeiten und Wettbewerb im Gesundheitswesen (Functions and steering of options of choice and competition). In: Becker U, Ross F, Sichert M (eds) *Wahlmöglichkeiten und Wettbewerb in der Krankenhausversorgung, Steuerungsinstrumente in Deutschland, den Niederlanden, der Schweiz und den USA im Rechtsvergleich*, Nomos, Baden-Baden, pp 11 et seq
- Becker U (2010c) Sozialrecht und Sozialrechtswissenschaft (Social law and social law studies). *Zeitschrift für Öffentliches Recht (ZÖR)*, vol 65. pp 607 et seq
- Becker U (2010d) Standards und Prinzipien des Europäischen Sozialrechts (Standards and principles of european social law). *Sozialrecht in Europa SDSRV*, pp 59:89 et seq
- Becker U (2011) The Open Method of Coordination in the field of pensions—interim results from a scientific point of view. In: Pensions in Europe. The open method of coordination in the field of pensions—outcome and prospects. *Deutsche Rentenversicherung (DRV) Schriften Bd*, vol 92. pp 19 et seq
- Becker U/Meeßen/Neueder/Schlegelmilch/Schön/Vilaclara (2011) Strukturen und Prinzipien der Leistungserbringung im Sozialrecht (Structures and principles of the provision of services in social law), *Vierteljahresschrift für Sozialrecht (VSSR)*

- Cremer W (2005) Krankenhausfinanzierung im europarechtlichen Kontext (Financing Hospitals in the European context), *Gesundheitsrecht, GesR*, pp 337 et seq
- Engler U (2010) Die Leistungserbringung in den Sozialgesetzbüchern II, III, VIII und XII im Spannungsverhältnis zum europäischen und nationalen Vergaberecht (Providing services in Social Code Books II, III, VIII and XII between European and national procurement law), Nomos, Baden–Baden
- Evers A, Heinze R, Olk T (eds) (2011) *Handbuch soziale Dienste (Handbook social services)*. VS Verlag, Wiesbaden
- Heinemann D (2009) Die Erbringung sozialer Dienstleistungen durch Dritte nach deutschem und europäischem Vergaberecht (Providing social services through third parties according to German and European procurement law). Nomos, Baden–Baden
- Hockerts H (1980) *Sozialpolitische Entscheidungen im Nachkriegsdeutschland (Social policy decisions in Germany after the war)*. Nomos, Stuttgart
- Krajewski M (2007) Non-economic activities in upstream and downstream markets and the scope of competition law after FENIN *ELRev* 32:111 et seq
- Lange H (2011) *Sozialrecht und Vergaberecht (Social law and procurement law)*, Baden–Baden
- Obinger H, Castles F, Leibfried S (2005) Introduction. In: Obinger H, Castles F, Leibfried S (eds) *Federalism and the welfare state*. Cambridge University Press, Cambridge, pp 1 et seq
- Rixen S (2010a) Die Dienstleistungsrichtlinie—ein trojanisches Pferd zur „Deregulierung“ sozialer Dienstleistungen? (The Services Directive—A trojan horse to deregulate social services?) *Zeitschrift für Europäisches Arbeits- und Sozialrecht (ZESAR)*, pp 5 et seq
- Rixen S (2010B) Die Bedeutung des EU-Wirtschaftsrechts für die Erbringung von Sozialleistungen (The relevance of European economic law for the provision of social services), *Soziale Sicherheit und Wettbewerb, Schriften des Deutschen Sozialrechtsverbands (SDSRV)*, vol 59, pp 53 et seq
- Scharpf W, Schmidt V (2000) Conclusions. In: Scharpf W, Schmidt V (eds) *Welfare and work in the open economy*, vol I. Oxford University Press, Oxford, pp 310 et seq
- Schlachter M, Becker U, Igl G (eds) (2005) *Funktion und rechtliche Ausgestaltung zusätzlicher Alterssicherungssysteme (Function and legal implementation of additional old-age security systems)*. Nomos, Baden–Baden
- Schmidt V (2005) *Sozialpolitik in Deutschland (Social policy in Germany)*, 3rd edn. VS Verlag, Wiesbaden
- Sormani-Bastian L (2007) *Vergaberecht und Sozialrecht (Procurement law and social law)*. Peter Lang, Frankfurt am Main, u.a.
- Supiot A (2010) *L'esprit de Philadelphie: la justice sociale face au marché total*. Seuil, Paris
- Thüsing G, Forst G (2011) *Europäisches Vergaberecht und nationales Sozialversicherungsrecht (European procurement law and national social insurance law)*. Duncker & Humbolt, Berlin
- Von Boetticher A (2003) *Die frei-gemeinnützige Wohlfahrtspflege und das Europäische Beihilfenrecht (Non-profit welfare provision and European State Aid Law)*, Nomos, Baden–Baden
- Walwei U (1993) Zum Regulierungsbedarf bei Zulassung privater Arbeitsvermittlung (The need to regulate the access of private employment placement services). *Mitteilungen aus der Arbeitsmarkt- und Berufsforschung (MittAB)*, pp 285 et seq. Available at: http://doku.iab.de/mittab/1993/1993_3_mitt-ab_wal-wei.pdf
- Zacher H (1987) Grundtypen des Sozialrechts (Basic types of social law). In: Fürst W, Herzog R, Umbach D (eds) *Festschrift für Zeidler*, vol 1, Berlin, New York, pp 571 et seq
- Zöllner D (1982) Germany. In: Köhler P, Zacher H and Patington M (eds) *The evolution of social insurance 1881–1981*, London, New York, pp 1 et seq