Chapter 6
Social Services of General Interest and EU Law

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Abstract This paper explores the impact of EU law on Social Services of General Interest (SSGI) such as social housing. At first sight one could argue that it is for the Member States to regulate these services and that EU law does not play a significant role in this respect. However, it is apparent from the case law of the ECJ that many SSGI constitute economic activities and fall, therefore, within the ambit of the Treaty provisions on free movement and competition. Hence, EU Institutions, especially the ECJ and the Commission, have the opportunity to influence the provisions of SSGI. How do they make use of this opportunity? Attention is paid to both case law of the ECJ and the soft law approach of the Commission.

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6.1 Introduction

The Commission has issued several documents on Social Services of General Interest (SSGI),[1] revealing that EU law influences social policy measures of the Member States. Although the EU has only limited powers in the field of social policy, the EU Internal Market and competition rules affect the way social services are offered in the Member States. It is a well-known fact that the EU Courts interpret the Treaty provisions on the fundamental freedoms and competition extensively. As a result social services cannot escape from the applicability of these provisions. Then again, the provisions of significant social services should be protected from adverse effects that may result from the application of the 'market rules' laid down in the Treaty. No wonder that the Commission has started to develop a policy on SSGI.

This chapter explores how EU law affects the Member States' competences to regulate SSGI.[2] In particular, it examines the extent to which the EU Internal Market and competition rules force Member States to open up various branches of SSGI and/or to what extent the provision of SSGI must be made subject to market forces. This chapter sketches the main contours of the delicate interplay between the EU Internal Market and competition rules and SSGI.

The plan of the chapter is as follows. In Sect. 6.2, SSGI are defined. Subsequently the impact of the EU Internal Market law (the free movement rules and harmonisation measures such as the Services Directive) will be discussed. Then, attention will be paid to competition law. Furthermore, the soft law documents of the Commission regarding SSGI will be touched upon. Finally, some conclusions will be drawn.

6.2 What are Social Services of General Interest?

What are SSGI? To start with, SSGI in the sense of the present chapter do not relate to health services, as the EU is developing a special framework for the latter.[3] Following the Commission approach[4] this paper considers the following services as SSGI:

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[1] These documents will be discussed in Sect. 6.5.

[2] This chapter will not examine how national labour law is influenced by the Treaty provisions on free movement. After all, SSGI concern services that, although being of a social nature, are provided to the citizens of the EU Member States, whereas labour law aims at creating rights and obligations for employees and does not, as a consequence, regulate the provision of special services. On the impact of the EU free movement rules on labour law, see for example, Prechal and De Vries 2009 and Barnard 2006.

[3] At the time of writing, the Commission proposal for the Directive on the application of patients' rights in cross-border health care, COM(2008) 414 final, was subject to a (complicated) negotiation process.

[4] This approach is laid down in the soft law documents of the Commission discussed in Sect. 6.5 of the present paper.

(1) statutory and complementary social security schemes; and
(2) other essential services 'provided directly to the person'.[5]

The first category of SSGI covers the main risks of life such as those related to ageing and unemployment. The second category of SSGI aims at facilitating social inclusion and safeguarding fundamental rights.[6] An important example of such services is social housing (the availability of cheaper housing through rents or construction loans).[7] From the outset it is clear that the provision of social housing services is capable of integrating certain groups into society.

It should be stressed that under EU law, SSGI are not a legally distinct category service within Services of General Interest. The term SSGI is used only in policy documents of the Commission and not in primary and secondary EU law. Treaty provisions do not mention SSGI and EU harmonisation measures such as the Services Directive do not pay attention to these services. A distinction must be made between SSGI of an *economic* nature (SSGI constituting economic activities) and SSGI of a *non-economic* nature (SSGI constituting non-economic activities).[8] According to settled case law of the ECJ, every entity engaged in economic activities is an undertaking within the meaning of EU competition law.[9] Offering of goods and services in a market is regarded as an economic activity.[10] The ECJ deploys a comparable test in free movement cases. Services that are normally provided for economic consideration are services in the sense of Article 56 TFEU (ex Article 49 EC).[11] Irrespective of whether social services are qualified as SSGI by a Member State, these services constitute economic activities, if they meet the requirements set by the ECJ. Below, it is explained how the concept of economic activities is applied in free movement (Sect. 6.3) and competition law (Sect. 6.4).

[5] See, inter alia, Communication from the Commission. Implementing the Community Lisbon Programme: Social services of general interest in the European Union, COM(2006) 177 final, 4.

[6] Ibid.

[7] Cf., *Commission Staff Working Document, annexes to the Communication from the Commission on Social services of general interest in the EU*, SEC(2006) 516, 18.

[8] See Neergaard 2009, p. 32.

[9] See, for example, ECJ, Case C-41/90, *Höfner* [1991] *ECR* I-1979.

[10] ECJ, Case 118/85 *Commission* v. *Italy* [1987] *ECR* 2599.

[11] See, for example, ECJ, Case C-158/96 *Kohll* [1998] *ECR* I-1931; ECJ, Case C-120/95 *Decker* [1998] *ECR* I-1831; ECJ, Case C-157/99 *Smits en Peerbooms* [2001] *ECR* I-5473; ECJ, Case C-385/99 *Müller-Fauré* [2003] *ECR* I-4509 and ECJ, Case C-372/04 *Watts* [2006] *ECR* I-4325.

6.3 Free Movement and Social Services of General Interest

Two categories of SSGI should be distinguished: social security schemes and social services provided directly to the person. In this section the relationship between social security schemes and the EU free movement rules will be discussed first. Then, attention will be paid to the impact of these rules on the other social services. Subsequently, the consequences that EU harmonisation measures may have on the provision of SSGI will be examined.

6.3.1 Social Security Schemes and Free Movement

In *Freskot*[12] the ECJ had to decide on the applicability of the free movement rules to social security schemes. At issue was a Greek social security scheme in agriculture. Farmers established in Greece were subject to a compulsory insurance against damage caused by natural risks. The farmers were obliged to pay contributions, by which the body implementing this social security schemes, ELGA, was financed. The ECJ was asked to decide whether the services provided by ELGA did fall within the ambit of Article 56 TFEU (ex Article 49 EC). The Court held that this was not the case, as the characteristics of the contribution, including its rates, were determined by the national legislature, and the benefits, provided by ELGA, were framed in national legislation in such a way as to apply equally to all operators in agriculture.[13]

Remarkably, the analysis of the ECJ did not stop here. The Court continued by stating that it should be examined whether the implementation of the Greek scheme would give rise to a restriction of the freedom of insurers established in other Member States. In so far as the compulsory insurance scheme covers insurable risks, it might constitute a restriction of the free movement of services.[14] Insurance companies established in other Member States were hindered from offering their insurance services in Greece. In the view of the writer of this chapter, these considerations put forward by the ECJ in *Freskot* imply that compulsory affiliation to a social security scheme concerning insurable risks is likely to result in restrictions on the free movement of services, as foreign insurers are prevented from providing similar services to enterprises or other entities that are subject to this compulsory affiliation. It is surprising that in legal doctrine, not much attention is paid to the *Freskot* ruling. The consequences of the ECJ's broad reading of the free movement rules in this case are that in social security scheme cases, the scope of the Treaty provisions is extended beyond the concept of economic activities. As soon as a Member State introduces a social security scheme that covers insurable

[12] ECJ, Case C-355/00 *Freskot* [2003] *ECR* I-5263.

[13] See paras 57 en 58 of *Freskot*.

[14] See para 63 of *Freskot*.

risks (from the perspective of a foreign insurance company), it is forced to design this scheme in line with the Treaty provisions on free movement. In this regard it should be noted that a restriction of the free movement of services (caused by a social security scheme) may be justifiable in the light of the exceptions laid down in the Treaty (especially Article 52 TFEU (ex Article 46 EC)) or as developed in the case law of the ECJ[15] (overriding requirements of general interest, also referred to as 'Rule of Reason').[16] In *Freskot* the ECJ held that the Greek compulsory insurance scheme was justified by the Rule of Reason, because it pursued an objective of social policy. It was thought that the cover provided by this scheme was limited to the necessary minimum and that, as a result, Greek farmers were at liberty to supplement this cover by taking out additional policies.[17] It was not entirely clear whether the cover provided by the compulsory scheme did go beyond what is necessary. The ECJ stated that the national court had to investigate whether '… the financing of ELGA and, therefore, its primarily social objective would be compromised if Greek farmers were allowed to take out insurance policies with private insurers …'.[18] Consequently, the Greek scheme was not proportionate if it covered too many risks in the light of the social task assigned to ELGA. Hence, national social security schemes covering insurable risks are justifiable as long as the risks they cover are closely related to the social task of the managing bodies concerned. The cover of these schemes may not be dissociable from the essential functions of this task.

The approach developed by the ECJ in *Freskot* was confirmed by the *Kattner Stahlbau*[19] judgment. The latter concerned a German statutory insurance scheme against accidents at work and occupational diseases. In this case not only the German government but also the Commission contended that the introduction of compulsory affiliation to a social security scheme concerning accidents at work and occupational diseases belong to the sole competences of the Member States and do not fall within the scope of the fundamental freedoms. This contention was rejected by the ECJ. It held that Member States must comply with the Treaty provisions on free movement in designing social security schemes.[20] Moreover, in its view, the scheme at issue restricted the free movement of services, because it covered risks that also might be the subject of insurance contracts of private companies established in other Member States.[21] In other words, the German scheme at issue covered insurable risks and as a result it did not only fall within the

[15] This exception was acknowledged by the ECJ in Case 120/78 *Cassis de Dijon* [1979] *ECR* 649.

[16] See, for example, Mortelmans 2008, p. 59.

[17] See para 70 of the judgment in *Freskot*.

[18] See para 71 of *Freskot*.

[19] ECJ, Case C-350/07, *Kattner Stahlbau* v. *Maschinenbau- und Metall- Berufsgenossenschaft* [2009] *ECR* I-1513.

[20] See para 74 of *Kattner Stahlbau*.

[21] See para 82 of *Kattner Stahlbau*.

ambit of Article 56 TFEU (ex Article 49 EC) but it was also caught by the prohibition laid down in this Treaty provision. As in *Freskot*, the mere existence of insurable risks entails the applicability of the Treaty provisions on free movement of services and, virtually, automatically the violation of the prohibition of Article 56 TFEU (ex Article 49 EC). Nevertheless, the German scheme could be justified by the Rule of Reason provided that the principle of proportionality was met. The ECJ explicitly put forward that the minimal cover provided by the social security scheme at stake, which enables the affiliated undertakings to top up their cover by taking out supplementary insurance, is a factor in favour of the proportionality of this scheme.[22] So, if the German scheme provided for the cover of risks that are not necessary for the performance of the social task assigned to the managing bodies concerned, it is not in accordance with the principle of proportionality. It was for the national (referring) Court to apply this proportionality test. Then again, it must be noted that due account had to be taken of the requirements of financial equilibrium. The fair chance exists that commercially oriented private companies will deploy themselves to the most profitable activities, that is, the insurance of young and healthy employers, leaving the bad risks to the managing bodies entrusted with the performance of a social task, if the cover provided by these bodies is too minimal.[23] This problem of cherry picking may be solved by extending this cover to risks that are not strictly related to the social objectives at issue, which is in line with the principle of solidarity.

It is apparent from the foregoing discussion that Member States must take due account of the fundamental freedoms in designing social security schemes. In so far as these schemes cover insurable risks, they must be in accordance with the principle of proportionality. Especially, the national legislature must ensure that the cover is limited to what is necessary. However, in this respect considerations related to problems of cherry picking may justify a somewhat extended scope of the cover provided.

So far, attention has only been paid to statutory social security schemes by the ECJ in its free movement case law. As far as the writer of this chapter is aware, the ECJ has not handed down any judgments regarding free movement and *complementary* social security schemes. However, it may be derived from the above-analysis that the Member States enjoy less powers in regulating complementary schemes than in regulating statutory schemes. It may be assumed that complementary schemes relate to insurable risks, as these services may be offered in the market. Furthermore, the provision of services by entities managing these schemes is not connected with the essential features of social objectives. As a result, compulsory affiliation to complementary schemes is regarded to be in violation of Article 56 TFEU, and it is even questionable whether an exception may be invoked.

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[22] See para 89 of *Kattner Stahlbau*.

[23] See para 90 of *Kattner Stahlbau*.

The analysis has focussed on the obstacles that commercial (service) providers ('supply side') have to cope with in their attempt to compete with national social security schemes. Social security schemes may also prevent beneficiaries ('demand side') from moving to other Member States. Of special interest is the question whether beneficiaries who cannot exercise the rights conferred upon workers by the Treaty may invoke EU law. After all, in many cases persons depending on social security benefits for their living are not able to derive rights from their (former) status of worker. At this stage of the analysis the concept of European Citizenship comes into play. Can such beneficiaries rely upon the Treaty provisions on European Citizenship if they are not entitled to social security benefits, solely due to the fact they have moved from one Member State to another Member State? This intriguing question was at issue in the case *Chamier-Glisczinski*.[24] Although one would have expected a firm decision against the background of the progressive free movement judgments delivered in other social security cases, the ECJ shied away from interpreting the Treaty provisions on European Citizenship expansively in *Chamier-Glisczinski*. It held that disparities between social security schemes do not in themselves constitute an infringement of Article 21 TFEU (ex Article 18 EC). As long as the differences in the two schemes of the Member States concerned cannot be considered to be the cause of discrimination, this Treaty provision is not violated. Consequently, the Treaty provisions on free movement that lack an economic dimension, that is, the EU rules of European Citizenship, are not capable of breaking open national social security schemes, which stands in sharp contrast with the 'regular' free movement rules.

6.3.2 Other Social Services and Free Movement

The second category SSGI concerns services directly provided to the person. If they are normally provided for remuneration, these activities constitute services within the meaning of Article 56 TFEU. As a result, national laws governing these services must be in conformity with Articles 56 TFEU et seq., if these laws are capable of affecting the temporary provision of services by providers established in other Member States. Article 49-55 TFEU are relevant, in so far as these national laws affect the permanent provision of services by providers coming from another Member State.

6.3.2.1 General Remarks

The current case law of the ECJ on free movement and social services (directly provided to the person) is pretty diverse. In well-known cases of *Humbel*[25] and

[24] ECJ, Case C-208/07 *von Chamier-Glisczinski* [2009] *ECR* I-6095.

[25] ECJ, Case 263/86 *Humbel* [1988] *ECR* 5365.

Wirth[26] the ECJ held that services provided under the national education system cannot be regarded as services within the meaning of the Treaty provisions on free movement because by organising this system the State '… is fulfilling its duties towards its own population in the social, cultural, and educational fields.'[27] Furthermore, it is of importance that such a system is mainly financed by public means and not by the recipients of the educational services. Consequently, educational services provided in a traditional and public framework fall outside the scope of the free movement rules.[28] If commercial mechanisms are introduced into the way education is offered to, for example students, the national laws governing the educational organisation fall within the scope of the fundamental freedoms and must be line with these freedoms.[29]

Social care for elderly people is regarded as a service within the meaning of the free movement rules according to the ECJ in *Sodemare*.[30] The reasoning for the applicability of these rules was rather disappointing, as the ECJ only put forward that a company from Luxembourg attempted to pursue activities on a stable and continuous basis in the economic life of Italy. In any event, the aim of this company was to provide social services to elderly persons on a profit-making basis, which was not allowed under Italian law. The ECJ held that the non-profit condition laid down in Italian law was not contrary to the Treaty provisions on the freedom of establishment, as the implementation of the services provided to elderly people was based on the principle of solidarity. The ECJ took into account that this condition ensures that decisions taken by the providers of the services concerned are not influenced by the need to seek profit but by considerations related to social objectives. Furthermore, the present stage of the European integration process does not preclude Member States from making the provision of

[26] ECJ, Case C-109/92 *Wirth* [1993] *ECR* I-6447.

[27] See para 18 of *Humbel*.

[28] A Member State is not allowed to grant its citizens tax facilities that only apply to educational services provided in the Member State concerned and not in other Member States. In ECJ, Case C-76/05 *Schwarz and Gootjes—Schwarz* [2007] I-6849 and ECJ, Case C-318/05 *Commission* v. *Germany* [2007] *ECR* I-6957 the ECJ held that the Treaty provisions on free movement and on European Citizenship are violated if national legislation confers upon taxpayers, a right to a reduction in income tax by allowing them to claim the payment of school fees to certain private schools established in national territory, but excludes such rights in relation to school fees paid to a private school established in other Member States. These rulings, however, do not call into question the non-economic nature of the educational services concerned, because the point of departure was not the service provider but the service recipient (and tax payer). Cf. also Case C-56/09 *Emiliano Zanotti*, 20 May 2010, n.y.r.

[29] ECJ, Case C-153/02 *Neri* [2003] *ECR* I-13555.

[30] ECJ, Case C-70/95 *Sodemare* [1997] *ECR* I-3395.

social welfare services, such as care for elderly people, subject to a non-profit condition, as long as this condition is applied in a non-discriminatory way.[31]

6.3.2.2 *Sint Servatius*: The Facts

In *Sint Servatius*, the ECJ addressed the role that EU free movement law plays in social housing for the first time. This case concerned a preliminary reference made by the administrative court of the Dutch Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*). Sint Servatius, a Dutch social housing company established in Maastricht, decided to start a commercial housing project in Liège (Belgium). The Minister of Housing decided not to approve this project, since it was at odds with the social tasks assigned to Sint Servatius. According to Dutch law, the special tasks assigned to social housing companies concern activities carried out in the Netherlands and, in principle, the implementation of these tasks must, as a consequence, be confined to the Dutch territory. In turn, Sint Servatius started a procedure in order to annul this decision and claimed that the Minister of Housing violated the EU rules on the free movement of capital by preventing Sint Servatius from investing in the housing market of another Member State. Remarkably, in reaction to this point of view the Minister of Housing contended that she was not allowed to approve the investments of Sint Servatius on the Belgian market, as this company is financed by public means, which enables it to get loans at favourable rates. This would lead to an infringement of the Treaty provisions on state aid in the view of the Minister.

6.3.2.3 *Sint Servatius*: The ECJ's Decision

It was clear from the outset that in the *Sint Servatius* case many complicated issues of EU law were at hand. No wonder that the Dutch Council of State decided to send an impressive amount of preliminary questions (over 10 questions) to the ECJ. However, the judgment that the ECJ handed down in fall 2009[32] turned out to be a disappointment. Although the pattern of the first part of the ruling is in line with long-standing case law, the second part of the ruling fails to address all of the important issues raised by the Council of State.

As expected, the ECJ started with pointing out that the Dutch measure at stake constituted a restriction of free movement of capital, as it submitted cross-border property investment projects of housing corporations to a prior administrative authorisation procedure, in which these corporations must demonstrate that the

[31] In legal doctrine it is argued that judgments such as *Sodemare* show that the ECJ is prepared to uphold obvious restrictions on the basis that profit making could interfere with the provision of social services to persons who are depending on these services. See Hancher and Sauter 2010, p. 120.

[32] ECJ, Case C-567/07 *Sint Servatius* [2009] ECR I-9021.

investments concerned are in the interests of housing in the Netherlands. The ECJ moved on by contending that overriding requirements of general interest (the Rule of Reason) accommodate objectives of social housing policy and are, therefore, capable of justifying restrictions to free movement. However, in the present case the ECJ feared that the conditions governing the exercise of the Dutch authorities' powers to clear cross-border housing investments were not well-defined. If the discretion that public authorities enjoy in exercising their powers was unlimited, the principle of proportionality was not met. It was for the referring national court to determine this matter. So far, so good, one would say.

However, the ECJ refused to examine whether the concept of Services of General Economic Interest (SGEI) was capable of justifying restrictions of free movement of (in this case) capital caused by national social housing laws. It stated that the prior authorisation scheme at stake did not concern special or exclusive rights granted to corporations such as Sint Servatius, rather the national proceedings were about the lawfulness of a restriction to which social housing companies are subject.[33]

This point of view is hard to understand. Admittedly, the cross-border investments of Sint Servatius concerned commercial activities and were not related to the core business of social housing corporations. However, the Dutch Minister of Housing feared that the involvement in these commercial practices would prevent Sint Servatius from adequately performing the social tasks entrusted to this social housing corporation. Hence, the ECJ was called upon to make clear whether the concept of SGEI is capable of addressing problems resulting from conflicting interests of undertakings entrusted with special tasks. In this chapter it is outlined how the ECJ forces Member States to depart from a strong divide between core social services and services that may be made subject to market forces. But in *Sint Servatius* the ECJ failed to explain *how* the concept of a SGEI could help them to make a sharp distinction between both groups of services in an adequate way. This is a missed opportunity.

Further, the ECJ refused to examine whether allowing Sint Servatius to make cross-border housing investments could lead to violations of the Treaty provisions on state aid. This refusal is closely related to its position on the (ir)relevance of Article 106(2) TFEU: in both matters, the ECJ was not prepared to pay due consideration to the intertwined relationship between the social housing services and the commercial housing projects of Sint Servatius. However, it could not definitely be ruled out that Sint Servatius would reallocate the funding received for its social housing task to its commercial cross-border housing projects. In other words, Sint Servatius's practices could have led to conflicts of interests, in that in terms of financial resources this corporation would have given priority to its commercial activities. It is astonishing that the ECJ did not care about these problems at all in *Sint Servatius*, whereas, as will be outlined below, in other EU state aid cases Member States were obliged to require that social housing

[33] See point 46 of the judgment in *Sint Servatius*.

corporations, being engaged in both social and commercial activities, have a system of separate accounts.

6.3.2.4 Issues Open to Debate: SGEI and Free Movement

By refusing to answer the preliminary questions on the concept of SGEI, the ECJ has not addressed the issue as to whether Article 106(2) TFEU may be regarded as an exception in free movement cases. This is a contentious issue, discussed in Chap. 4 by Bekkedal. However, according to this Treaty provision undertakings, entrusted with the operation of SGEI are only subjected to the rules contained in the Treaty, in particular those on competition, in so far as the compliance with these provisions does not obstruct the special task assigned to them. Consequently, from the wording of Article 106(2) TFEU it could be derived that this Treaty provision allows Member States to derogate not only from the competition rules but also from other rules, including the free movement provisions. Furthermore, it is apparent from the ECJ's case law that Article 106(2) TFEU may be applied in cases involving free movement matters.[34]

In the view of the writer of this chapter, the concept of SGEI laid down in Article 106(2) TFEU is perfectly suited for accommodating considerations related to SSGI in free movement cases. In the discussion above, it is pointed out that in cases concerning social security schemes, the free movement of services may be restricted due to problems of cherry picking (*Kattner Stahlbau*). It is settled case law of the ECJ that Article 106(2) TFEU may be invoked if, without restricting competition, undertakings entrusted with a special task cannot perform this task under economically acceptable circumstances.[35] The condition of economically acceptable circumstances is closely related to problems of cherry picking. After all, by emphasising the economically acceptable circumstances, the ECJ protects undertakings having a SGEI mission against enterprises that are mainly occupied with services under the most profitable circumstances.[36] Exactly the same problem was at stake in *Kattner Stahlbau,* where a public body managing an insurance scheme against accidents at work and occupational diseases was protected from competition on the part of commercial insurance companies. Furthermore, in its landmark decision *Corbeau* (already mentioned) the ECJ specified that the exclusion of competition is not justified for services that are dissociable from the essential functions of the special task concerned.[37] A similar point of view was taken by the ECJ in *Freskot* where the Greek social security scheme at issue was

[34] See for instance: ECJ, Case C-266/96 *Corsica Ferries France* [1998] *ECR* I-3949 and ECJ, Case C-157/94 *Commission* v. *The Netherlands* [1997] *ECR* I-5699.

[35] See ECJ, Case C-320/91 *Corbeau* [1993] *ECR* I-2533, para 16.

[36] Cf. paras 17 and 18 of the *Corbeau* judgment.

[37] See para 19 of the *Corbeau* judgment.

justifiable in so far as it covered the risks that are not dissociable from the essential functions of the task assigned to the body managing this scheme.

Further, by refusing to apply Article 106(2) TFEU in *Sint Servatius*, the ECJ missed the opportunity to give guidance on the issue of the margin of appreciation. In its preliminary reference, the Dutch Council of State had explicitly asked whether a Member State has a wide margin of discretion in determining the scale of the SGEI concerned and the manner in which that interest is promoted. Furthermore, it wanted to know whether the fact that the EU has only limited powers in the social housing sector (if any), is of relevance in this respect. Unfortunately, these questions remain unanswered. However, it must be noted that in competition law cases the ECJ bases its proportionality test on the test of economically acceptable circumstances.[38] This approach is not as strict as the test of the less restrictive means, which is usually deployed in free movement cases in which it is scrutinised whether the conditions of the Rule of Reason or Treaty exceptions such as Article 52 TFEU (ex Article 46 EC) are met.[39] After all, it is not necessary under the *Corbeau* standard to prove that the undertaking entrusted with a SGEI mission can only survive if it is allowed to restrict competition. Unsurprisingly, in legal literature, it is argued that the ECJ does not strictly construe the exception contained in Article 106(2) TFEU.[40] All in all, it remains to be seen whether Member States have more leeway in regulating SSGI under Article 106 (2) TFEU than under the traditional free movement exceptions. Hopefully, the ECJ will shed more light on this matter in the near future.

6.3.2.5 Litigation in Market-Oriented SSGI Schemes

At the end of the discussion of the *Sint Servatius* case, it must be pointed out that this case illustrates that a Member State that introduces competition elements into its SSGI schemes may encounter problems resulting from undertakings (sometimes as in *Sint Servatius*—entrusted with a special social task) pursuing commercial activities in other Member States. Due to the market oriented setting of the SSGI schemes created by the Member States concerned, these companies are encouraged to be increasingly involved in commercial projects. At the moment that public authorities prevent these operators from undertaking such projects they may be tempted to invoke the Treaty provisions on free movement *vis-à-vis* the state in order to break away from the system. It goes without saying that this development is a significant challenge for both the Member States and the EU Institutions (for example the Commission, ECJ) in finding ways of dealing with these problems and, especially, methods of balancing the objectives of free competition and social policy.

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[38] See para 16 of the *Corbeau* judgment.

[39] See for example, Buendia Sierra 1999, pp. 319, 320.

[40] See for example Baquero Cruz 2005, pp. 193–198 and Cicoria 2006, p. 179.

6.3.3 Harmonisation and SSGI

As the EU is not competent to harmonise social security schemes and other social services, no EU legislation that explicitly deals with SSGI is in place. However, some EU Directives and Regulations could affect the competence of the Member States to regulate these matters. Therefore, some attention needs to be paid to the impact harmonisation may have on the provision of SSGI. Due to space constraints, only a few EU Directives can be discussed. It should be noted that the Social Security Regulation[41] will not be analysed here, since this piece of EU legislation aims at promoting the free movement of persons by coordinating social security schemes and not by harmonising them.

Of great importance are the Insurance Directives. A Member State may decide to privatise the implementation of a social security scheme, which implies that the modelling of such a market-oriented scheme must be in line with the applicable Non-life Insurance directives. Admittedly, pursuant to Article 2(1)(d) of the First Non-life Insurance Directive[42] insurance schemes forming part of a statutory system of social security of a Member State do not fall within the ambit if the Non-life Directives. Unsurprisingly, social security schemes that are (virtually) only based on the principle of proportionality are not covered by these Directives according to the ECJ.[43] However, in establishing the applicability of the Non-life Insurance Directives, the ECJ focuses on the substantive and constituent elements of a given insurance system and not on the formal place that such a system has in national law. Thus the ECJ ruled that the Belgian disability insurance schemes did fall within the scope of the Directive because these schemes were offered by insurers at their own risk.[44] This conclusion was not called into question by the fact that according to Belgian law, this insurance system was regarded as a social security scheme. This finding did not entail that the Belgian legislature was not entitled to impose obligations upon the insurers concerned, since in Article 55 of the Third Non-life Insurance Directive[45] an exception for compulsory insurance against accidents at work is contained. A similar exception for health care insurance is laid down in Article 54 of this Directive. In any event, it is clear that

[41] See Regulation 883/2004 of the European Parliament and of the Council on the coordination of social security systems, *OJ* 2004 L166/1, which have repealed Regulation 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community, *OJ* 1971 L149/2. However, the latter remains in force for a limited number of purposes related, for example, to agreements concluded with Switzerland.

[42] First Council Directive (73/239) on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, *OJ* 1973 L228/3.

[43] See ECJ, Case C-238/94 *Garcia* [1996] *ECR* I-1673 and the *Freskot* case.

[44] ECJ, Case C-206/98 *Commission* v. *Belgium* [2000] *ECR* I-3509.

[45] Third Council Directive (92/49) on the coordination of laws, regulations, and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC, *OJ* 1992 L 228/1.

Member States that privatise social security schemes must take due account of the obligations that are imposed upon them by the Non-life Insurance Directives.

As for social services provided directly to the person, the Services Directive[46] is of relevance. It must be pointed out that this Directive carves out several social services such as social housing and child care. These social services are excluded in so far as they '… are provided by the State, by providers mandated by the State or by charities recognised as such by the State …' It is not clear what is meant by 'mandated by the State': it is uncertain to what extent the private provision of the social services concerned benefit from this exclusion.[47] In the future, this issue needs to be clarified. Taken all together, it cannot be excluded that some SSGI that seem to fall outside of the scope of the Services Directive on first sight, will turn out to be covered by this piece of EU legislation due to a narrow interpretation of the 'carve-out provisions' of this Directive given by the ECJ in future cases.[48]

National laws governing social services that are not exempted from the scope of the Directive must, of course, comply with the provisions thereof. In this regard, however, it should be noted that Article 17 of the Services Directive exempts all SGEI from the obligation of the Member States to respect the freedom of providers to provide services laid down in Article 16. Member States may circumvent one of the core directive provisions by designating social services as SGEI. In other words, by modelling social services as SSGI in the sense that they constitute SGEI, Member States can escape the impact that Article 16 may have on their competences to regulate these services.[49]

Last but not least, European public procurement law may also come into play. If a public authority decides to externalise the provision of SSGI, the Directive for the award of public works contracts, public supply contracts, and public service contracts[50] could be applicable. A public authority could conclude a public service contract with a provider, which means it pays this provider a fixed remuneration. In that case, the Directive is applicable, provided that certain thresholds are met, and as a result the award of the contract should be made subject to the (limited) procedure that applies to Annex II B services.[51] However, if the public authority

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[46] Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* 2006 L 376/36.

[47] Barnard 2008, p. 341.

[48] Interestingly, Nistor argues that particular national health care laws may be caught by the Services Directive, as they are not related to services directly provided to patients. See Nistor 2009, p. 331 and 332.

[49] See Van de Gronden 2009, pp. 248–250.

[50] Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts, *OJ* 2004 L134/114.

[51] See Commission Staff Working Document of 20 November 2007, *Frequently asked questions concerning the application of public procurement rules to social services of general interest*, SEC(2007) 1514, 7.

externalises the provision of a SSGI by granting a service concession, the Directive is not applicable pursuant to Article 1(4).[52] In this regard, it should be noted that apart from the public procurement rules laid down in secondary legislation, Member States should also observe the EU principles of primary law such as the principle of transparency, equal treatment, and non-discrimination,[53] which are derived from the Treaty provisions on free movement.[54] All in all, European public procurement law could prevent Member States from awarding a SSGI task to the provider of their reference. It should be noted that the need to provide SGEI does not automatically lead to the non-applicability of the EU public procurement rules. If compliance with these rules is not be liable to prevent the accomplishment of SGEI tasks, the Member State concerned is oblige to follow the procedures prescribed by EU public procurement law.[55]

The analysis carried out above shows that it cannot be ruled out that harmonisation measures taken by the EU legislature may interfere with the powers of the Member States to regulate SSGI. However, the discussion of the Insurance Directives and the Services Directive makes it clear that explicit provisions dealing with the special position of SSGI could prevent the proper provision of these services from being put under pressure. Hence, paying due attention to the special position of social services during the process of drafting secondary EU legislation seems to be indicated. By so doing, the EU legislature is able to ensure that the provision of these services will not be put at stake.

6.4 Competition Law and SSGI

The competition rules contained in the Treaty only apply to undertakings. It is settled case law that every entity engaged in economic activities is an undertaking and addressee of these rules.[56] Economic activities are defined as the offering of goods or services on the market.[57]

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[52] See Commission Staff Working Document of 20 November 2007 'Frequently asked questions concerning the application of public procurement rules to social services of general interest', SEC(2007) 1514, 8.

[53] See about this matter: Drijber and Stergiou 2009, p. 805 et seq.

[54] See for example, ECJ, Case C-231/01 *Coname* [2005] *ECR* I-7287. It is apparent from cases such as ECJ, Case C-507/03 *Commission* v. *Ireland* [2007] *ECR* I-9777 that these principles also apply to Annex IIB services.

[55] See ECJ, Case C-160/08 *Commission* v. *Germany*, 29 April 2010, n.y.r.

[56] ECJ, Case C-41/90 *Höfner* [1991] *ECR* I-1979.

[57] ECJ, Case 118/85 *Commission* v. *Italy* [1987] *ECR* 2599.

6.4.1 Competition Law and Social Security Schemes

6.4.1.1 General Remarks

In several cases, the ECJ has examined whether the bodies managing social security schemes are engaged in economic activities. From this case law it could be derived that in social security cases, the ECJ has developed an approach that departs from the question of how significant is the role of the principle of solidarity.[58] It scrutinises how much room the national legislature leaves, for competition in the implementation of the social security scheme concerned and focuses on the role the solidarity principle plays.[59] If it finds that the principle of solidarity is predominant, the activities concerned are not regarded as economic. In various cases the ECJ considered it of great importance that a social security scheme operated on a redistributive basis,[60] that the rates were determined by law and that the benefits are also determined by national legislation (mechanical implementation of the rules). In these cases, it was assumed that the system of social security was almost completely based on the solidarity principle and, as a result, the implementing bodies were not considered to be undertakings.[61] In this regard it is remarkable that in the cases of *Freskot* and *Kattner Stahlbau*, where the ECJ progressively extended the scope of the EU free movement regime to insurable risks, the principle of solidarity played a decisive role in applying the concept of undertaking to the managing bodies concerned. It was examined with great care whether the implementation of their social tasks was mainly based on the principle of proportionality.[62] In *Kattner Stahlbau*, the ECJ paid attention to the supervision mechanisms of the State as well.[63] It is striking that the ECJ finally decided that the managing bodies concerned were not engaged in economic activities and that, therefore, competition law was not applicable, whereas at the same time it held that the free movement rules did apply.[64] Consequently, these judgments show that scope of free movement is broader than the scope of competition law.[65] The free movement rules are capable of breaking open social security schemes, whereas the role of competition law is limited in this respect.

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[58] See Buendia Sierra 1999, p. 52 et seq.

[59] See Hatzopoulos 2002, p. 710 et seq.

[60] Cf. Sauter and Schepel 2009, p. 89.

[61] See ECJ, Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] *ECR* I-637 and ECJ, Case C-218/00 *Cisal* (2002) *ECR* I-691.

[62] See paras 76–79 of *Freskot* and paras 44–59 of *Kattner Stahlbau*.

[63] See paras 60–68 of *Kattner Stahlbau*.

[64] See Sect. 6.3.1 supra.

[65] See also Szyszczak 2009, p. 210.

In the light of the foregoing it may be argued that the majority of the statutory social security schemes do not fall within the ambit of competition law. After all, it may be expected that with regard to the majority of the statutory schemes, the benefits granted by these schemes and the rates of the contributions that must be paid by the affiliated person are determined by national law, which is regarded as an expression of solidarity in the case law of the ECJ. In the view of the writer of this chapter, the situation is different, when the national legislature introduces elements of competition into a statutory scheme. For example, in the Netherlands basic health care schemes are managed by private insurance companies. Since they may be for profit and are capable of influencing the benefits granted to insured persons and the rate of the contributions to be paid by the affiliated persons, the Commission decided that private insurance companies are undertakings within the meaning of European competition law.[66]

What is the point of view of the ECJ on complementary social security schemes? Against the background of the case law on statutory schemes it is not surprising that in the view of the ECJ, complementary schemes amount to economic activities because, next to solidarity, elements of competition play a role in implementing these schemes. For example, in the *Brentjens* cases[67] it was pointed out that the Dutch pension schemes at stake were based on the principle of capitalisation, which means that the level of benefits largely depends on the financial results of the investments made by the managing organisation. Furthermore, it turned out that life insurance companies in certain circumstances were also entitled to offer competing products. In these circumstances the bodies managing the Dutch complementary pension schemes must be regarded as undertakings.[68] Hence, competition law is applicable if the national legislator in designing a social security system has opted for a mix between competition and solidarity.

As a consequence, the policies carried out by bodies managing complementary schemes must be in accordance with the EU competition rules. However, these policies may be at odds with the principles of free competition. Therefore, the concept of SGEI, as laid down in Article 106(2) TFEU, may be very helpful in order to solve these tensions. For example, pursuant to the provisions of Dutch law applicable in the *Brentjens* cases (already mentioned), the complementary pension schemes may only be offered by special institutions assigned with this task by the State (*bedrijfstakpensioenfondsen*) in certain industry sectors. So, exclusive rights to provide these services were created, which resulted in a violation of European competition law (Article 106(1) in conjunction with Article 102 TFEU). However,

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[66] See the Decision of the Commission of 22 December 2005 on the introduction of a risk equalisation system in the Dutch Health Insurance, N541/2004 and N542/2004—C (2005) 1329 fin.

[67] ECJ, Case C-67/96 *Albany* [1999] *ECR* I-5751; ECJ, Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens* [1999] *ECR* I-6025 and ECJ, Case C-219/97 *Drijvende Bokken* [1999] *ECR* I-6121.

[68] A similar approach was deployed by the ECJ, Case C-244/94 *FFSA* (1995) *ECR* I-4015.

the ECJ ruled that these exclusive rights were justifiable in the light of Article 106(2) TFEU, to protect the viability of industry sector pension schemes which could not be offered under economically acceptable conditions if low risk profiles left the scheme, which would leave the pension funds with high risk profiles only. In other words: the concept of SGEI contained in Article 106(2) TFEU enables the Member State to model complementary social security schemes in such a way that problems of cherry picking are addressed, even if this leads to restriction of competition. The ECJ's interpretation of Article 106(2) TFEU is tailored to address the problems of cherry picking and it is clear that these problems occur frequently in social security cases.

6.4.1.2 State Aid and Social Security Schemes

It should be noted that the concept of SGEI is also of great importance in State aid matters. In many cases Member States do not only confer special tasks (and rights) on bodies managing (complementary) social security schemes but also transfer financial resources to them. It goes without saying that this could entail state aid problems, as Article 107(1) TFEU precludes Member States from granting state aid to undertakings that distort competition on the Internal Market and influence intra-Community trade. In *Altmark*[69] the ECJ held that compensation granted by the State with a view to the performance of Public Service Obligation (PSO) does not constitute State aid, in so far as the following conditions are fulfilled: (1) the undertaking is charged with the execution of a clearly defined PSO, (2) the parameters of the amount of the compensation are established in an objective and transparent way, (3) the compensation goes not beyond what is necessary, and (4) in the case of absence of public procurement of the contract concerned, the amount of the compensation is determined on the basis of the expenses a well-run undertaking would have incurred.[70] The great advantage of the *Altmark* approach is that the compensatory measure at hand does not need to be notified to the Commission, as it does not constitute state aid within the meaning of Article 107(1) TFEU. What is more, it is not subject to the famous standstill provision, which may force Member States to recover illegal state aid from the companies involved.[71] Although *Altmark* does not give a carte blanche to Member States, it does extend the Member States' powers to finance PSO.[72]

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

[70] See paras 88–93 of *Altmark*.

[71] See for instance Case C-39/94 *La Poste* [1996] *ECR* I-3547.

[72] See Fiedziuk 2010, p. 280.

So far, the *Altmark* approach has only been applied in cases on health insurance[73] and not in (other) social security cases where a SSGI may be at issue.[74] As health care falls outside the scope of the present paper, because health care services are not regarded to be SSGI, this case law will not be elaborated on.[75] In this respect, however, it should be noted that the EU Institutions that took the decisions in these health care cases (the (then) CFI and the Commission) gave the Member States considerable leeway in financing a PSO.[76] In any event, the competent social security authorities of the Member States should be aware of the state aid problems that the transfer of financial means to managing bodies may cause. This implies that they have to model this transfer in such a way that the national social security schemes may benefit from the *Altmark* approach. Moreover, case law of the ECJ on this issue should be awaited. The concept of PSO may inspire the EU Courts, and in their slipstream the Commission, to further develop the concept of SSGI and to integrate PSO consideration into the constituent elements of this concept.

It is apparent from the *Freskot* case that apart from the transfer of financial resources to managing bodies, other State aid problems may occur. In *Freskot* the question was raised whether the compulsory social security scheme may confer benefits on the companies that are covered thereunder.[77] The ECJ put forward the argument that such benefits could entail State aid but it should be scrutinised whether in the absence of compulsory cover the agriculture enterprises concerned could have obtained cover from private insurers, to what extent the contributions correspond to the actual economic costs of the provided benefits and whether these benefits satisfy the condition of selectivity.[78] Unfortunately, the national referring judge did not provide the ECJ with the necessary information to address these questions, and as a result the ECJ did not give any answers with regard to the state aid questions. Nevertheless, the ECJ did give some guidance by considering that the benefits granted by the scheme at issue to the Greek agriculture enterprises may be justified in the light of the social objective of protecting these enterprises against the natural risks to which they are exposed.[79] In this writer's view, these

[73] See Case T-289/03 *British United Provident Association* (*BUPA*) [2008] *ECR* II-81 and the decision of the Commission of 22 December 2005 on the introduction of a risk equalisation system in the Dutch Health Insurance, N541/2004 and N542/2004—C (2005) 1329 fin.

[74] The *Altmark* approach is applied to other services than SSGI. In General Court, Case T-222/04, *Italy* v. *Commission* [2009] *ECR* II-1877, the CFI (now the General Court) held, that compensatory measures taken in order to finance public utility services cannot benefit from this approach, if the applicable national laws confine themselves to stating that the activities pursued are in public economic interest without clearly setting out what special service should be provided by a particular corporation.

[75] On this matter, see, for example, Van de Gronden 2009–2010, p. 5 et seq. and Sauter 2009, p. 269 et seq.

[76] See Van de Gronden 2008, pp. 754–757.

[77] See para 82 of *Freskot*.

[78] See paras 84 and 85 of *Freskot*.

[79] See para 86 of *Freskot*.

considerations could be brought into relation to the *Altmark* approach. However, further case law should be awaited and it remains to be seen to what extent the ECJ will be prepared to integrate PSO with the concept of SSGI.

6.4.2 Competition Law and Other Social Services

6.4.2.1 General Remarks

In several cases, the ECJ has decided that organisations providing social services directly to the person are engaged in economic activities. For example, in the famous *Höfner* case the Court decided that job placement services are economic activities and, as a result, institutions offering these services are undertakings within the meaning of EU competition law, even if these institutions are public authorities within the meaning of national law; this decision was confirmed by the ECJ in *Job Centre*.[80] The main reason for this finding is that employment procurement has not always been carried out by public institutions, and, what is probably more important, it is not necessary that such services are offered by public authorities.[81] It could be argued that social services provided to the person that can be offered on the market, are economic activities regardless of the way they are designed by the Member States (private or public law). In these cases, the ECJ does not pay much attention to the role that the principle of solidarity plays. This implies that many social services (provided directly to the person) constitute economic activities in the sense of European competition law.

This conclusion is endorsed by a Decision that the Commission took with regard to an Irish social housing case.[82] In Ireland municipalities carry out social housing activities by offering cheaper housing conditions through rents and construction loan to certain consumers. The Commission pointed out that, by doing so, the municipalities are in competition with other housing companies and, are therefore, engaged in economic activities. Irrespective of the fact that municipalities are bodies of public law and offer social housing service on the basis of the solidarity principle, they are considered to be undertakings within the meaning of competition law.

If the EU, Courts and the Commission further build upon this line of reasoning, it may be expected that many social services (directly provided to the person) constitute economic activities. After all, many of these services may be offered on the market. Possibly, this conclusion does not hold true for fundamental educational services offered by primary and secondary school organisations, by colleges of higher education and universities. It could be argued that these services are of

[80] ECJ, Case C-55/96 Job Centre [1997] *ECR* I-7119.

[81] See para 22 of *Höfner* and para 22 of *Job Centre*.

[82] See the Decision of the Commission of 3 July 2001 in Case N 209/2001—Ireland, SG (2001) D/289528.

(semi-)collective nature (in so far as they relate to the duties of the government '… towards its own population in the social, cultural, and educational fields…'[83]), which implies that they cannot be offered on the market. It goes without saying that educational services provided (by for example universities) in a market oriented context do constitute economic activities, because these services can be provided in competition with commercial operators.

What does the applicability of the Treaty provisions on competition entail? Social housing companies, institutions providing job placement services, etc., have to comply with the cartel prohibition (laid down in Article 101 TFEU) and the prohibition on the abuse of a dominant position (as contained in Article 102 TFEU). Furthermore, mergers between these organisations having an Internal Market dimension in the sense of the Merger Control Regulation[84] must be notified to the Commission, whereas in many occasions medium sized mergers (without an Internal Market dimension) must be approved by the competent national competition authority, as many Member States have aligned their merger control rules with European competition law.

Last but not least, it should be pointed out that State interventions regarding these social services must be in conformity with the EU regime on the State aid and competition law (Article 106(1) EC, Article 4(3) TEU in conjunction with Article 101–102 TFEU and Articles 107–109 TFEU). Due to space constraints, this contribution will further focus on the Treaty provisions on state aid (Articles 107–109 TFEU), as many social services are financed by public means, which could give rise to state aid problems.

6.4.2.2 State Aid and Social Services Directly Provided to the Person

As a result of the *Altmark* ruling, in 2005 the Commission took a Decision (based on Article 86(3) EC, now Article 106(3) TFEU), in which the SGEI conditions are tailored to, inter alia, social housing companies.[85] If the *Altmark* conditions are not fulfilled and, as a result, the compensation given to a social housing institution does not constitute PSO, this compensation could benefit from the exemption laid down in the 2005 Decision of the Commission. This means that it does not need to be notified to the Commission, in the same way that compensatory measures fulfilling the *Altmark* conditions do not have to be notified. The exemption of the Decision is applicable, if a SGEI mission is entrusted by way of one or more

[83] See para 18 of *Humbel*, supra n. 25.

[84] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), *OJ* 2004 L24/1.

[85] See the Decision of the Commission of 28 November 2005 on the application of Article 86(2) of the EC Treaty (now Article 106(2) TFEU) 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. In this regard, it should be noted that the term 'Decision' is misleading, as this official act provides general rules on matters of SGEI.

official acts of public authorities and the amount of the transfer of money does not exceed what is necessary for the performance of this special task.

It should be noted that from the outset that it is not clear *what* the additional value of this Decision is in comparison with *Altmark*. Similar conditions as outlined in the 2005 Decision play a role in the PSO context of *Altmark* as well. Possibly, a Member State could rely upon this Decision in order to justify a compensatory measure that do not meet the fourth Altmark criterion (the amount of the compensation does not exceed the costs of a well-run company). It is expected that the Commission will publish its review on the 2005 Decision in the course of 2010.[86] Hopefully the matter related to the fourth *Altmark* condition will be addressed in this review.[87]

In any event, it is clear that in EU law, the special task carried out by social housing companies is acknowledged and that this special task is capable of justifying the funding of these companies by the State. However, it is very important that Member States explicitly entrust social housing companies with the operation of SGEI missions. By doing so, they ensure that the PSO approach laid down in *Altmark* and the 2005 Commission Decision can be invoked. In other words, Member States must develop an explicit SGEI policy that outlines which social services are essential and constitute SGEI. Such a policy may contribute to the further development of SSGI in the EU. The following dispute between the Netherlands and the Commission on the financing of social housing activities shows what might happen if Member States fail to come up with explicit policy measures towards SGEI and social services.

In 2005, the Commission sent a letter to the Dutch government stating that compensation granted to social housing companies was not in line with the EU rules on state aid.[88] It was of the opinion that the SGEI mission concerned was not clearly defined. The activities of the social housing enterprises were not restricted to specific low-income groups or households but also encompassed services provided to high-income groups. The Commission clarified its point of view by explaining that social housing companies should base their activities on a clear and transparent division between their social tasks (newly built houses for low-income groups) and commercial housing services.[89] It goes without saying that only social tasks may be financed by public means.

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[86] Cf., Article 9 of the Decision of the Commission of 28 November 2005 on the application of Article 86(2) of the EC Treaty (now Article 106(2) TFEU) to State aid in the form of public service-compensation.

[87] Also the Monti Report, which was recently published in order to revitalise the EU's Single Market Strategy, claims that clarifying the conditions for compensating public services obligations is necessary, in particular to ensure that citizens have access to basic financial services. See Monti 2010, pp. 74, 75. http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf.

[88] See State aid E 2/2005 (EX-NN 93/02)—Financiering van woningcorporaties—Nederland, 18 July 2005.

[89] Bange corporaties, Financieel Dagblad of 7 September 2005.

The lack of a clear definition of the SGEI missions concerned, created a Dutch State aid problem in social housing.[90] Unsurprisingly, the Dutch Minister of Housing has promised the Commission to improve the financial transparency and to oblige social housing companies to introduce a system of separate accounts.[91] Furthermore, the commitment was made to change the Dutch laws on social housing in such a way that they will provide, inter alia, that 90% of the dwellings in each social housing company must be rented to a pre-defined target group of less advantaged persons.[92]

In December 2009, the Commission adopted a Decision on these new Dutch laws[93] and put forward that the clear definition of the target group (persons having an income below 33,000 euro per year) adequately addressed the problems outlined in its letter of 2005. The definition of the SGEI deployed in the (proposed) Dutch social housing laws clearly delimits the scope of the activities to socially less advantaged households and were, therefore, acceptable in the Commission's view.[94] Furthermore, the Commission was not opposed to the practice of renting out 10% of the dwellings to higher income groups, as this practice contributes to '… social mixity and social cohesion …' in cities and towns in the Netherlands[95] (it prevents some neighbourhoods from being populated solely by low income groups). Eventually, in 2009—after being involved in a heated debate with the Dutch authorities for over 4 years—the Commission approved the system of social housing on the basis of Article 106(2) TFEU, as this system will be made subject to a significant reform leading to a strong divide between the core social housing activities and other activities (of a commercial nature). On top of this, in its 2009 Decision, the Commission also approved aid for declining urban areas proposed by the Dutch authorities in order to improve the quality of life in the most deprived urban areas. The Commission found (again) that this aid was justifiable in the light of Article 106(2) TFEU.[96] Although the Dutch state aid measures were cleared, the Commission Decision was appealed against as it was believed that the Commission has not the authority to intervene with national policies on social housing and Services of General (Economic) Interest.[97] In this interesting and principal case the General Court, and possibly the European Court of Justice on appeal, will have the opportunity to shed light on the relationship between the EU state aid rules and social housing.

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[90] See De Vries and Lavrijsen 2009, p. 408.

[91] See the letter of the Minister of Housing of 13 September 2005, Woningcorporaties, Kamerstukken II (official parliamentary documents), 29 453, nr. 20.

[92] See Commission Decision in Cases No. E 2/2005 and N 642/2009 (The Netherlands, Existing and special project aid to housing corporations) of 15 December 2009, at point 41.

[93] Ibid.

[94] See Commission Decision in Cases No E 2/2005 and N 642/2009 (The Netherlands, Existing and special project aid to housing corporations) of 15 December 2009, at points 56 and 57.

[95] Ibid., at point 58.

[96] Ibid., at points 92–102.

[97] This appeal is registered as General Court, Case T-201/10, Case T-202/10 and Case T-203/10.

In an Irish case on social housing the process of approving the State aid at stake went much smoother.[98] At issue was a financial system that was operated in order to finance social housing activities. The Housing Finance Agency (HFA) raised funds at favourable rates on the capital market and, subsequently, transferred these funds to the authorities that provided social housing services to the most socially disadvantaged households. The task assigned to HFA may be supported by a state guarantee. As already mentioned, the social housing authorities were considered as undertakings within the meaning of EU competition law. They benefited from the funding raised by the HFA that in turn was supported by State guarantees. As a consequence, the Irish system concerned constituted state aid. However, the measure was justified because the housing corporations involved were entrusted with the operation of a SGEI. The Commission considered that the beneficiaries of the Irish scheme were socially disadvantaged households. Furthermore, the condition of entrustment was met, as the tasks of HFA were set out clearly in Irish legislation. Unlike the (old) Dutch system that was targeted by the Commission in 2005, the Irish measures financing social housing were based on clearly defined SGEI missions.

In this writer's view, the fact that social housing services were only provided to low-income households was of great importance. In this regard the EFTA case on the Icelandic Housing Financing Fund is of relevance. In this case, the EFTA surveillance authority was of the opinion that the State aid measures concerned were not justifiable, although the social housing services that were financed by these measures might be regarded as SGEI.[99] These measures did not pursue a sufficiently restricted social objective, because all households (low-income and high income groups) could benefit from the scheme concerned.

These cases show that the concept of SGEI plays an important role in bringing the funding of social housing activities in line with EU law. So, Member States that model these activities as SGEI may fairly assume that national measures aimed at financing these activities will be compatible with EU law. However, it is of great importance that the group of beneficiaries is restricted to low-income households and does not encompass wealthy people.

6.5 Soft Law: Communications from the Commission

In the light of the case law analysed in the previous sections it is not a surprising that the Commission noted in its White Paper on SGEI of 2004 that, although the SSGI belong to the competences of the Member States, EU law has an impact on the

[98] Decision of the Commission in case State aid N 209/2001—Ireland, Guarantee for borrowings of the Housing Finance Agency, 3 July 2001.

[99] See the decision of the EFTA surveillance authority in case No 406/08/COL to initiate the formal investigation procedure with regard to the relief of the Icelandic Housing Financing Fund from payment of a State guarantee premium, 27 June 2008.

instruments for their delivery and financing.[100] On the one hand, the Commission contended that the special features of SSGI should be fully recognised. On the other hand it was put forward that the distinction between missions and instruments needs to be clarified in order to assist Member States which make use of market-based systems in order to deliver social services.[101] On top of this, the Commission put forward that in future communications the development of social services will be described and monitored in close cooperation with the Member States.[102]

In 2006, the Commission issued its first Communication dedicated to SSGI.[103] This Communication recognises the special characteristics of SSGI by stressing, inter alia, that they operate on the basis of the solidarity principle, that they aim to protect the most vulnerable, that they are not for profit and that they are strongly rooted in (local) cultural traditions.[104] However, it is striking that in the view of the Commission, the fact that the provision of SSGI increasingly fall under the EU rules on the Internal Market and competition is '… a sign of the trend towards modernising social services, via greater transparency and greater effectiveness in organisation and financing.'[105] In other words: the introduction of competition elements into various national SSGI schemes is supported by EU law and should even be regarded as a manifestation of modernisation of social policy. Furthermore, in the 2006 Communication the application of the EU Internal Market and competition rules to SSGI is briefly touched upon.[106]

In order to monitor the developments with regard to SSGI, the Commission commissioned a study. According to this study, social services have been expanding and this expansion was accompanied by the introduction of new steering mechanisms that are, inter alia, market-oriented.[107] The study also contends that the way EU Internal Market and competition law should be applied to SSGI is frequently misperceived in many Member States, and that therefore EU action in the form of advancing monitoring and documentation of good practices may be very helpful.[108] As a result of this study, Member States and stakeholders

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[100] See the Communication from the Commission of 12 May 2004, White Paper on Services of General Interest, COM(2004) 374 final, 16. See Chap. 3 by Neergaard.

[101] Ibid.

[102] See the Communication from the Commission of 12 May 2004, *White Paper on Services of General Interest*, COM(2004) 374 final, 17.

[103] Communication from the Commission of 26 April 2006. *Implementing the Community Lisbon programme: Social services of general interest in the European Union,* SEC(2006) 516.

[104] Ibid., at 4 and 5.

[105] Ibid., at 6.

[106] A comprehensive discussion of the interplay between SSGI and these EU rules can be found in the Commission *Staff Working Document accompanying the 2006 Communication on SSGI*, COM(2006) 177 final.

[107] Study on Social and Health Services of General Interest in the European Union, by Manfred Huber, Mathias Maucher, Barbara Sak, Prepared for DG Employment, Social Affairs and Equal Opportunities, DG EMPL/E/4, VC/2006/0131, 5.

[108] Ibid., 6.

were asked to give their views on the relationship between SSGI and EU law. The feedback report showed that the majority of the respondents were not in favour of the adoption of binding European laws on SSGI.[109] However, monitoring and coordination[110] by the EU was welcomed.[111]

In 2007, in the slipstream of the launch of its policy for 'a single market for 21st century Europe', the Commission issued a new Communication that, inter alia, dealt with SSGI.[112] In this Communication the applicability of the internal market and competition rules to, inter alia, SSGI is discussed. According to the Commission, only services provided for remuneration (services having an economic character) are caught by the free movement rules.[113] However, this point of view is not supported by the analysis carried out in Sect. 6.3 of this chapter. This section pointed out that according to the case law of the ECJ insurable services, even those provided in a state-regulated context, fall within the scope of the Treaty provisions on free movement. So, the scope of the fundamental freedoms is broader than assumed by the Commission. In its 2007 Communication, the Commission again recognised the special nature of SSGI and stressed once more the point that the provision of these services is subject to a modernisation process.[114] In this process market considerations and compliance with the EU rules on the internal market and competition play an important role. Furthermore, the Commission has put forward that it wants to contribute to the development of a methodology to set, monitor, and evaluate quality standards.[115] Apart from this, the Commission will support 'cross-European bottom-up initiatives' aimed at developing these (voluntary) standards and exchanging good practices.[116] Interestingly, the Commission stated that the Protocol on Services of General Interest annexed to the Treaty of Lisbon 2009 will serve as a bench mark for reviewing EU and national actions regarding SGEI.[117] So, since 1 December 2009 (the date the Treaty of Lisbon entered into force) EU principles of primary law governing SGEI including SSGI are in place. The Commission kept its promise with regard to its monitoring commitments and published its first biennial report on SSGI in 2008.[118] Once

[109] Feedback report to the 2006 questionnaire of the Social Protection Committee (available at: http://ec.europa.eu/employment_social/spsi/docs/social_protection/2008/feedback_report_final_en.pdf), 15.

[110] It was explicitly put forward that the Open Method of Coordination could contribute to the field of SSGI and the focus should be on the exchange of good practices.

[111] Feedback report to the 2006 questionnaire of the Social Protection Committee, 17.

[112] Communication from the Commission of 20 November 2007, *Services of general interest, including social services of general interest*: *a new European commitment*.

[113] Ibid., 5.

[114] Ibid., 7 and 8.

[115] Ibid., 13.

[116] Ibid.

[117] Ibid., 9.

[118] Commission Staff Working Document, *Biennial Report on social services of general interest*, SEC(2008) 2179/2.

again, in this report attention was paid to the modernisation process of SSGI and the need to clarify the consequences that the EU Internal Market and competition rules have for SSGI.

In this regard it should be noted that in 2007 the Commission also issued two Frequently Asked Question (FAQ) documents. The first FAQ document relates to public service compensations[119] and the second FAQ document concerns issues of public procurement and SSGI.[120] The aim of these documents is to give guidance to the Member States' competent authorities on how to deal with state aid and public procurement matters in relation to SSGI. The guidance given by the Commission was evaluated by the Social Protection Committee. It turned out that the FAQ documents are generally welcome but the evaluation report also specifies various questions which should be taken into account when the Commission updates these FAQs.[121]

The recent Monti Report acknowledges that it is for the Member States to ensure that SSGI are provided but claims that the EU can 'assist Member States in modernising these services and adapting them to a changing environment and to the evolving needs of citizens regarding their scope and quality.'[122] This Report also points to the modernisation process to which SSGI have been subject to over the last two decades. Interestingly, the Monti Report does not only pay attention to 'traditional SSGI' but also points to services to which citizens should have access in modern society, such as basic banking services and access to broadband Internet connection.[123] It is even proposed to make the State aid and public procurement rules more flexible with a view on these essential services. At the writing of this chapter the official reaction of the Commission to this Report was not available.

It is apparent from the analysis carried out above that a red thread running through the Commission's soft law approach towards SSGI is that the provision of these services is subject to a modernisation process. An important aspect of this process is the introduction of market-driven elements into SSGI schemes. It is this writer's view that the Commission appreciates this aspect of the SSGI modernisation process, as it considers the application of the EU Internal Market and competition rules to SSGI as a significant manifestation of this process. Consequently, it may be assumed that future Member State action aiming at liberalising

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[119] Commission Staff Working Document of 20 November 2007, *Frequently asked questions in relation with Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to undertaking entrusted with the operation of services of general economic interest, and of the Community Framework for State aid in the form of public service compensation*, SEC(2007) 1516.

[120] Commission Staff Working Document of 20 November 2007, Ibid.

[121] See the Operational Conclusions of the Social Protection Committee on the application of Community rules to SSGI, SPC 2008/17-final, 21.

[122] See *A New Strategy for the Single Market. At the Services of Europe's Economy and Society, Report the President of the European Commission by Mario Monti*, 9 May 2010, 73. Available at: http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf.

[123] See the Monti Report, supra n. 122, at 75 and 76.

and privatising SSGI schemes will be welcomed by the Commission.[124] Furthermore, the Commission refrains from proposing legally binding European laws for SSGI but it does continue issuing all kinds of soft law documents and setting up voluntary cooperation frameworks. By doing so, the Commission is influencing the way SSGI are modelled and provided in the Member States.

6.6 Conclusions

The Treaty provisions on free movement are capable of opening up national social security systems, as far as these systems concern insurable risks. The *Freskot* and *Kattner Stahlbau* cases show that the distinction between non-economic and economic activities is not a clear dividing line for applying these rules to social security schemes. In contrast, competition rules such as the Treaty provisions on state aid are only of relevance if the social security scheme at hand operates on a mix of solidarity and competition elements. If this is the case, the funding of the managing bodies concerned could be questionable in the light of the EU State aid rules. However, like the funding of social services directly provided to the person, the concepts of PSO and SGEI may help the Member States in designing a 'EU law compatible policy' of transferring financial resources to these managing bodies.

The diverging ways of applying the free movement and competition rules to SSGI could even give rise to tensions. Above it is argued that compulsory affiliation to complementary schemes may be at odds with the free movement rules. But in the *Brentjens* case law, the compulsory affiliation to the Dutch complementary pension schemes was not in violation of the applicable competition rules.

The key to reconciling these conflicting findings might be the concept of SGEI. It is argued that the exception of Article 106(2) TFEU gives more leeway for Member States to regulate SGEI than the traditional free movement exceptions do. The restriction of competition that was at stake in *Brentjens* was justified by Article 106(2) TFEU. Probably, a similar restriction of free movement could also be justifiable in the light of this Treaty provision. In this regard it should be noted that the insertion of Article 16 into the EC Treaty, now Article 14 TFEU, according to which the proper provision of SGEI should be ensured, shows a shift from a market-centred approach to an approach in which social values also are of importance.[125] Furthermore, it should be pointed out that according to Article 36 of the Charter on Fundamental Rights of the EU[126] the EU should recognise and respect access to SGEI. Against this background, it is a pity that in the *Sint Servatius* case, which concerned the relationship between social housing services and free movement, the ECJ failed to clarify the role Article 106(2) TFEU may

[124] See also Karayigit 2009, p. 581.

[125] See Prosser 2005, p. 553.

[126] *OJ* 2000 C 364/1.

play in national SSGI policies. The constitutional dimension of this Treaty provision and its significance for SSGI were not elaborated in the case.

It is clear that the issue of dissociablility of the non-essential services from essential social services plays an important role in the case law of the ECJ. National SSGI policies leading to restrictions in the provision of 'dissociable services' are regarded to be incompatible with EU law in many of the ECJ judgments. It could be argued that the Commission has further built on this finding of the ECJ in its soft law documents. The introduction of competition elements is regarded by this EU institution as a manifestation of the modernisation process of SSGI. The Commission further encourages the Member States to design their SSGI schemes in a clear and transparent way.

What are the future prospects of the SSGI in the EU? In this writer's view, rethinking this concept is of eminent importance. Admittedly, the term SSGI could give rise to conceptual confusion,[127] but it is also capable of solving problems that occur in legal practice. Member States can protect social services from adverse effects resulting from the application of the EU Internal Market and competition rules by designating these services as SGEI. This means that a constituent component of SSGI should be the entrustment of a special task by the State. After all, the requirement of entrustment is an essential condition for relying upon the concept of SGEI as laid down in Article 106(2) TFEU and for relying upon the *Altmark* approach (PSO). So, social services constituting economic activities must be modelled as SGEI in so far as they are regarded by the Member States to be of special interest for their citizens. This means that SSGI should be designed in a clear and transparent way. By doing so, the Member States make clear which services should be provided on the market and which services, being SSGI, should be protected from market forces. In this regard the protecting measures of the Member States should be confined to what is necessary for the fulfilment of the social objectives concerned.

To conclude, it seems inevitable that elements of competition will be introduced into schemes for the provision of services that now have a social dimension in many Member States. EU law will force Member States to reconsider the designs of these schemes. It may be assumed that in the future national policies aimed at protecting essential social services will only be successful if Member States transform these essential services into SSGI, in the sense that these services are SGEI. Hence, the future development of essential social services depends largely on the way Member States make a distinction between essential social services (SSGI) and other services.

[127] See Krajewski 2008, p. 386.

References

Baquero Cruz J (2005) Beyond competition: services of general interest and European Community Law. In: De Búrca G (ed) EU law and the welfare state. In search of solidarity. Oxford University Press, Oxford, pp 193–198

Barnard C (2006) EC employment law. Oxford University Press, Oxford

Barnard C (2008) Unravelling the Services Directive. CMLRev 45:341

Buendia Sierra JL (1999) Exclusive rights and state monopolies under EC law. Article 86 (Former Article 90) of the EC Treaty. Oxford University Press, Oxford

Cicoria C (2006) Non-profit organizations facing competition. The application of United States, European and German Competition Law to not-for-profit entities. Peter Lang Publishing, Frankfurt am Main

De Vries SA, Lavrijsen S (2009) Netherlands. In: Krajewski M, Neergaard U, Van de Gronden JW (eds) The changing framework for services of general interest in Europe. Between competition and solidarity. T.M.C. Asser Press, The Hague, p 408

Drijber BJ, Stergiou H (2009) Public procurement law and internal market law. CMLRev 46:805

Fiedziuk N (2010) Towards a more refined economic approach to services of general interest. Eur Public Law 16:280

Hancher L, Sauter W (2010) One step beyond? From Sodemare to DocMorris: the EU's freedom of establishment case law concerning healthcare. CMLRev 47:120

Hatzopoulos VG (2002) Killing national health and insurance systems but healing patients? The European market for health care services after the judgments of the ECJ in Vanbraekel and Peerbooms. CMLRev 39:710

Karayigit MT (2009) The notion of services of general economic interest revisted. Eur Public Law 15:581

Krajewski M (2008) Providing legal clarity and securing policy space for public services through a legal framework for services of general economic interest: squaring the circle? Eur Public Law 14:386

Monti M (2010) A new strategy for the single market. At the service of Europe's economy and society. Report to the President of the European Commission by Monti M, 9 May 2010, 74 and 75. http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf

Mortelmans KJM (2008) Chapter VIII The functioning of the internal market: the freedoms. In: McDonnell A, Kapteyn PJG, Mortelmans KJM, Timmermans CWA (eds) The law of the European Union and the European Communities. Kluwer International, Alphen aan den Rijn, p 59

Neergaard U (2009) Services of general economic interest: the nature of the beast. In: Krajewski M, Neergaard U, Van de Gronden JW (eds) The changing legal framework for services of general interest in Europe. T.M.C. Asser Press, The Hague, p 32

Nistor L (2009) Public services and the European Union. A study of the impact of community law on health care. Dissertation, Health Insurance and Educational Services, Groningen

Prechal S, De Vries SA (2009) Seamless web of judicial protection in the internal market. Eur Law Rev 51:5

Prosser T (2005) Competition law and public services: from single market to citizenship rights? Eur Public Law 11:553

Sauter W (2009) Case comment on Case T-289/03, British United Provident Association. CMLRev 43:269

Sauter W, Schepel H (2009) State and market in European Union law. The public and private spheres of the internal market before the EU Courts. Cambridge University Press, Cambridge

Szyszczak E (2009) Modernising healthcare: pilgrimage for the Holy Grail? In: Krajewski M, Neergaard U, Van de Gronden JW (eds) The changing legal framework for services of general interest in Europe. T.M.C. Asser Press, The Hague, p 210

Van de Gronden JW (2008) Cross-border health care in the EU and the organization of the national health care systems of the Member States: the dynamics resulting from the European Court of Justice's Decisions on free movement and competition law. Wisconsin Int Law J 26

Van de Gronden JW (2009a) The Services Directive and services of general (economic) interest. In: Krajewski M, Neergaard U, Van de Gronden JW (eds) The changing legal framework for services of general interest in Europe. T.M.C. Asser Press, The Hague, pp 248–250

Van de Gronden JW (2009–2010) Financing health care in EU Law: Do the European state aid rules write out an effective prescription for integrating competition law with health care? The Competition Law Rev 6(1):5