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Legal Issues of Services of General Interest

Social Services of General Interest in the EU

Ulla Neergaard
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Markus Krajewski *Editors*

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Editors
Ulla Neergaard
Faculty of Law
University of Copenhagen
Copenhagen K
Denmark

Johan Willem van de Gronden
Faculty of Law
Radboud University
Nijmegen
The Netherlands

Erika Szyszczak
School of Law
University of Leicester
Leicester
UK

Markus Krajewski
Fachbereich Rechtswissenschaft
Universität Erlangen-Nürnberg
Erlangen
Germany

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Series Information

The aim of the series *Legal Issues of Services of General Interest* is to sketch the framework for services of general interest in the EU and to explore the issues raised by developments related to these services. The Series encompasses, inter alia, analyses of EU internal market, competition law, legislation (such as the Services Directive), international economic law and national (economic) law from a comparative perspective. Sector-specific approaches will also be covered (health, social services). In essence, the present Series addresses the emergence of a European Social Model and will therefore raise issues of fundamental and theoretical interest in Europe and the global economy.

Series Editors

Ulla Neergaard
Faculty of Law
University of Copenhagen
Schillerstraße 6
1455 Copenhagen K
Denmark
e-mail: ulla.neergaard@jur.ku.dk

Johan Willem van de Gronden
Faculty of Law
Radboud University
Comeniuslaan 4
6525 HP Nijmegen
The Netherlands
e-mail: j.vandegronden@jur.ru.nl

Erika Szyszczak
School of Law
University of Leicester
University Road
LE1 7RH Leicester
UK
e-mail: ems11@leicester.ac.uk

Markus Krajewski
Fachbereich Rechtswissenschaft
Universität Erlangen-Nürnberg
Schillerstraße 1
91054 Erlangen
Germany
e-mail: markus.krajewski@jura.uni-erlangen.de

Preface and Acknowledgments

This book is part of the series *Legal Issues of Services of General Interest* that publishes topical issues arising from the underpinning research project: the *Transformation of the Market and the State* (ToMaS). *Social* services of general interest (SSGIs) are a new concept in EU terminology. As the chapters in this book reveal the concept is not used in national law or policy. However, it is a concept that is emerging as a special category of Services of General Interest in the EU. SSGIs are not a legal concept and do not have a clear definition in either EU legislation, policy documents or soft law. Indeed EU legislative competence in the field is limited. Often SSGIs are conceptualised as exemptions or exclusions in EU law. Yet the economic downturn in Europe alongside attempts by the European Commission to modernise public and social services and introduce efficiency have propelled issues of the regulation of SSGIs to a prominent position in EU policy-making. They are a central concern of the modernisation of the internal market project, embracing issues of state aid, procurement and competition policy. We believe that this topic is currently one of the most politically sensitive, controversial and legally complex topics in the EU.

EU policy, alongside the case law of the European Courts has led to the fragmentation of the various policy responses towards SSGIs at the EU level. Thus, it appeared timely that research should be undertaken in the area to chart the EU—and national—responses. This book represents an initiative in this field. It has been an ambitious project, co-ordinating some 21 authors, pulling together common underlying themes and emphasising divergence and difference. We would like to thank all the authors for their stimulating contributions which constitute important first steps in grasping the challenges of the area.

The book is the outcome of an international conference held at the University of Copenhagen in May 2011. We would like to thank the University of Copenhagen, including in particular the Faculty of Law. We are especially grateful to the Dean, Henrik Dam, and the research centre Welma for the generous financial support (granted through the University's research program 'EURECO'). The research centre Welma focuses its research on legal studies in welfare and EU market integration. We would also like to thank the staff at the Faculty of Law, especially

Mona Bundvad and Tina Futtrup Borg, for organisational and administrative support. In addition, we are also very grateful for the financial support from the Danish law firm Kammeradvokaten and in particular our contact person, managing partner Peter Biering. This legal practice is the exclusive legal advisor to the Danish government.

The book was edited mainly during 2011 with a good working relationship between the four editors. As with all edited books the final manuscript can only be delivered when the last chapter is complete. Many authors delivered their manuscripts soon after the conference in May 2011. Where possible we have updated information when necessary to reflect recent developments. We have also discussed how much 'editing' of work written in English when English is not the first language of the author should take place. We have agreed that a light touch should take place to allow each author to express their views from national linguistic perspectives. Grateful thanks are owed to Rasmus Bogetoft, who has been extremely helpful and meticulous in the compilation of indexes, reference checking and transforming chapters into house-style. Thanks are also due to Dr. Jim Davies who also provided editorial assistance.

Finally, we are grateful for the support of the publishing team of *T.M.C. Asser Press*, especially, Philip van Tongeren, Marjolijn Bastiaans and Antoinette Wessels. Their enthusiasm for our project has led to a series of timely publications.

Ulla Neergaard
Erika Szyszczak
Johan Willem van de Gronden
Markus Krajewski

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Contributors

Rita Baeten Master of Social Sciences, is a senior policy analyst at the OSE. Her research activities focus on the impact of European integration on national healthcare systems and on their social character. Her research topics include themes such as patient mobility in the EU; healthcare services in the internal market; EU pharmaceutical policies and EU-level co-operation in the field of healthcare. She is work leader for the OSE contribution to EU research projects such as ECAB (2010-2013) and *Europe for patients* (2004–2007). Both projects address cross border care and are financed by the European Commission under its Framework Programs for Research. Rita Baeten advises the Belgian federal authorities on EU policy developments that may have an impact on healthcare in Belgium. She also coordinated the scientific preparation and follow-up of several international and ministerial conferences on these topics.

Julio Baquero Cruz is a Member of the Legal Service of the European Commission. He holds a Spanish law degree, an LL.M. (College of Europe, Bruges) and a Ph.D. from the European University Institute (Florence). From 2000 to 2004 he was a *référendaire* at the Court of Justice of the European Union, first in the chambers of President Rodríguez Iglesias, then with Advocate General Maduro. He was García Pelayo Fellow at the Centro de Estudios Políticos y Constitucionales (CEPC, Madrid, 2007–2008), Associate Professor at Universidad Carlos III (Madrid, 2007–2008), and Marie Curie Fellow at the Robert Schuman Centre (EUI, 2005–2006). He has been a guest professor at the Academy of European Law in Florence. He is currently a visiting professor at the École de Droit of Sciences Po (Paris), CEPC and Universidad San Pablo (Madrid). He has published extensively on EU law, including his book *Between Competition and Free Movement* (Oxford, Hart, 2002).

Pierre Bauby is researcher and Professor of Political Science (Paris 8 University, SciencePo Paris, French National School of Public Administration (ENA), Centre National de la Fonction Publique Territoriale). He holds a Ph.D. degree in Political Science from Institut d'Etudes Politiques of Paris. He is Special Advisor on

Services of General Interest of the General Secretariat of CEEP (European Centre of Employers and Enterprises providing Public Services) and expert of the Rapporteur on Services of General Interest of the European Economic and Social Committee (EESC). He is Chairman of the French Association Reconstruire l'Action Publique and member of the International Scientific Commission *public services—public enterprises of CIRIEC* (International Centre of Research and Information on the Public, Social and Cooperative Economy). His main publications focus on the reform of the State and on Services of General Interest. His main publications include: *L'européanisation des services publics*, (Presses de SciencePo, Paris, 2011); *Service public, services publics*, (La Documentation Française, Paris, 2011); *Europe: une nouvelle chance pour le service public*! (Fondation Jean Jaurès 2010); *Mapping of the Public Services in the European Union and the 27 Member States*, a study commissioned by CEEP Bruxelles for the European Commission (2010); *Les services publics en Europe, Pour une régulation démocratique* (2007); *Reconstruire l'action publique* (Syros, 1998); *Le service public* (Flammarion, 1997); *L'Etat-stratège*, (Editions ouvrières, 1991).

Ulrich Becker is the Managing Director of the Max Planck Institute for Social Law and Social Policy in Munich, Germany. He took his First State Examination in Law in 1984 and his Second State Examination in Law in 1989. He received his LL.M. from the European University Institute (EUI) in Florence, Italy (1991), his Ph.D. (1989) and his habilitation (1994) in Public Law, European Law and Social Law from the Faculty of Law at the University of Würzburg, Germany. From April 1996 to August 2002 he was full professor at the University of Regensburg and holder of the chair for Public Law, German and European Social Law. Since 2002, he has been a Scientific Member of the Max Planck Society as well as Honorary Professor for Public Law, European Law and Social Law with the Law Faculty of the Ludwig Maximilian University Munich, Faculty of Law, Germany. He has authored and edited many books and numerous articles in domestic and international journals and is a member of various executive and advisory boards pertaining to international organisations for social security and social law.

Wouter Jan Berends is a Ph.D. candidate in Public Economic Law at the Europa Institute of the University of Utrecht Law School. Since 1 August 2011, he has been working on a research project entitled: *Towards a consistent and efficient EU legal framework for public procurement*. After obtaining his LLM degree in European Law in 2010, he worked for the Europa Institute as a junior lecturer, teaching courses on EU law and competition law. The Dutch European Law Society (NVER) awarded him with the annual thesis prize for his LLM thesis on the interpretation of multilingual EU legislation by the European Court of Justice.

Francesco Costamagna is Assistant Professor in European Union Law at the Law Faculty of the University of Turin. He has been Post-doctoral fellow in International Law at the same University. He holds a Ph.D. in International Economic Law from the L. Bocconi University of Milan. The research topic was on *International Protection of Public Infrastructure Investments and State*

Sovereignty. His research focuses on the relationship between economic and social rights and international economic norms, as well as the EU internal market rules. He is the author of a monograph (in Italian) on *Social and Health Services, Competition and Freedom to Provide Services in the EU Legal Order*. He has also published articles and other works on these issues. He has been visiting scholar at the Centre for Energy, Petroleum and Mineral Law and Policy (University of Dundee).

Jim Davies is a Senior Lecturer in Law at the University of Northampton. He obtained his LLB in 2006 from the University of Northampton, and an LLM in 2008 and Ph.D in 2010 from the University of Leicester where he was the holder of a Modern Law Review Scholarship for doctoral research. His Ph.D. research has been developed into a monograph published by Palgrave Macmillan in September 2011 under the title of: *The European Consumer Citizen in Law and Policy*. He contributed to, and was joint editor of, *Developments in Services of General Interest* (with Professor Erika Szyszczak, Professor Mads Andenaes and Dr. Tarjei Bekkedal) published by TMC Asser Press in 2011. His current research interests are in the area of European Law and, more specifically, the developing role for individual citizens as consumers in the internal market. Before reading law as a mature student he spent many years as a senior manager in the telecommunications industry and has expertise in organisational change and strategic process development.

Leo Flynn is a graduate of the National University of Ireland and of Cambridge University, has been a member of the Legal Service of the European Commission since 2002. He currently works in the State aid team, where he concentrates on the banking sector, transfer to the State of social charges and procedural issues. Prior to joining the Commission, he had been a Legal Secretary at the Court of Justice for five years. From 1992 to 1997, he lectured at King's College, London and remains a member of its Centre for European Law. He has written widely on EU law, especially on selected competition law issues, free movement of capital, social policy and on EU law in national courts.

Johan W. van de Gronden is Professor of European law at the Radboud University of Nijmegen since September 2007. He teaches European and competition law. His research focuses on EU free movement, internal market and competition law. His publications concern inter alia the relationship between internal market and competition law and issues of general interest, the impact of EU law on health care, and the Services Directive. He has published in many leading European law journals, *inter alia, the ECLRev, European Constitutional Law Review* and *LIEI*. He is one of the editors of the TMC Asser Press Series, *Legal Issues of Services of General Interest*. Until September 2007 he worked at the Europa Institute of Utrecht University (from 2003–2007 as senior lecturer). The subject of his Ph.D. Thesis was the implementation of EC Environmental law by decentralised authorities. He is also a deputy judge at the district court of Rotterdam (competition law). Furthermore, he is member of the Committee for Consumer Affairs of

the Social and Economic Council of the Netherlands (Social-Economische Raad) and of the Committee of International Affairs of this council. He is one of the founding members of the ToMas research project.

Caroline Heide-Jørgensen is professor of Competition Law and Law of Unfair Competition at the Law Faculty at Copenhagen University. She holds a Ph.D. (2000) on liberal professions and competition law and is dr.jur. (2008) on a thesis on advertising law and freedom of speech. Her main focus within competition law is on private distortions on competition and the general framework of competition law. She also specialises in law of unfair competition, consumer law and general EU law. Before joining the faculty in 1995 she trained as a lawyer in a Copenhagen law firm, and she has also worked as a judge in the Danish High Court. She is a member of the Danish Competition Council (Deputy Chairman) and the Danish Radio- and Television Board. She is affiliated with and director of Centre for European Studies in Economic Law (CESEL) at the Law Faculty in Copenhagen.

Kristina Koldinská is an associated professor at the Charles University Faculty of Law. Since 1997 she works at the Department of labour law and social law, where she teaches social security law and labour law and she guarantees and teaches courses on coordination of social security in the EU and on EU social law. She publishes extensively in the Czech Republic (especially with the publishing house C.H. Beck) as well as with various foreign publishing houses (Ashgate, Routledge) and legal reviews. Her research interests include gender equality, EU social law, coordination of social security, social assistance. She is a member of Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women and TRESS (Training and Reporting on European Social Security), where she was a member of a think tank in 2009, and is currently a member of the networks' steering group. Both constitute long-lasting projects run by prestigious European universities and financed by the EU Commission.

Markus Krajewski is professor of public and international law at the University of Erlangen-Nuremberg (Germany). Before taking up this chair Markus Krajewski held positions at the universities of Bremen and Potsdam and at King's College London. He has been a visiting professor at the World Trade Institute's MILE and summer programs and lectured at postgraduate programs on European Law in Berlin and the Academy of European Law in Florence. Markus Krajewski obtained his doctoral degree and his post-doctoral qualification (Habilitation) from the University of Hamburg. His research interests cover international and European law, in particular constitutional and institutional issues of WTO law, trade in services, external relations of the EU and the treatment of public services under European and international law. Markus Krajewski is a regular consultant on international trade law for governmental institutions and non-governmental organisations. He is one of the founding members of the ToMas research project.

Tom Madell (Juris Dr, LLM) is Professor of Law at the Department of Law, Umeå University, Sweden, with a focus on teaching and research in the twilight zone between private law, public law and competition law. He is an ordinary member of the Group of independent experts on the European Charter of Local Self-Government, Congress of Local and Regional Authorities of Europe at the European Council. He has been a visiting researcher at Flinders University, South Australia. He has been a member of the board for public procurement at the Swedish Competition Authority and he has also been working as a judge at the Court of Appeal for Northern Norrland. He is currently working on the research project: *Welcome to the Twilight Zone'—between Competition and Solidarity: Consequences of EU Law on Scandinavian Welfare States*, especially in the Field of Services of General Interest.

Elisabetta Manunza is Professor of International and European Public Procurement Law, Europa Institute, Utrecht Law School. Before working in the field of European and Public procurement law, she worked in the fight against criminal organisations, in particular in crown witness cases. She holds a Ph.D. from the Vrije Universiteit Amsterdam, for her thesis: *Problems of EC Public Procurement Law in the case of privatisation and the fight against corruption and organised crime* (2001, in Dutch). Her dissertation, together with the Parliamentary Committee of Enquiry on the Construction Sector, was the subject of a Parliamentary debate, and its analysis of the screening opportunities in public procurement procedures contributed to the introduction of a new legal administrative screening system—the Policy Rules for Integrity and Exclusion in Public Procurement in the Construction, Environmental/Waste and ICT Sectors (*Beleidsregels in BIBOB-sectoren*). In 2002, her research project: *Questioning the Fundamental Legal and Economic Presuppositions and Principles Underlying the EC Public Procurement Directives* was rated 'excellent and innovative' by the Netherlands Organisation for Scientific Research (NWO) and the Royal Netherlands Academy of Arts and Sciences (KNAW) and received a substantial grant. Nowadays, her research interests and publications concentrate on public procurement law. She is a member of the editorial board of the journal Aanbestedingsrecht (Procurement Law), a member of the scientific editorial board of the Tijdschrift voor Bouwrecht (Construction Law Journal), a board member of the Dutch Association for Procurement Law (NVvA), a.o. She is a consultant for government institutions, municipalities and joint ventures, law firms and other companies. She is one of the founding members of the Academisch Genootschap Aanbesteden, an academic interdisciplinary board on public procurement consisting of economists and lawyers.

Dorte Sindbjerg Martinsen is Associate Professor at the University of Copenhagen, Department of Political Science. Her research focuses on welfare policy developments in the European Union and their implementation in the Member States, as well as studies of the EU executive, judicial policy making and Europeanisation. She has recently been awarded the Sapere Aude research grant from the Danish Research Council to examine the inter-institutional dynamics of health

care regulation, focusing on the patients' rights directive, and its subsequent implementation in selected Member States. Her publications have appeared in a wide set of political science journals on European politics and administration such as *Public Administration*, *American Review of Public Administration*, *Journal of European Public Policy*, *JCMS*, *West European Politics and European Union Politics*

Hans van Meerten is a lawyer at Clifford Chance LLP, Amsterdam. He holds a Ph.D. in European Law (2004). Within his practice, he advises on pension pooling structures in the Netherlands and abroad. Hans van Meerten has extensive knowledge of the various aspects of EU-legislation and processes. One of his special areas of expertise is the EU and Dutch legislation regarding pensions and the cross-border activities of financial institutions. In 2007–2010, Hans van Meerten worked at the Dutch Ministry for Finance and co-wrote the legislation regarding a new Dutch pension fund, the Premium Pension Institution (PPI). This institution has a European IORP passport and can freely offer its services throughout the EU and non-EU countries. In 2000–2007, he was involved in, inter alia, the Brussels negotiations on the Services Directive, the Solvency II Directive, the EU Treaty negotiations of Nice and the European Constitution. Hans van Meerten publishes regularly in national and international journals on retirement and financial legislation, institutional EU law and EU internal market issues. In 2007 he was national *rapporteur* for the Netherlands regarding the FIDE report on the Services Directive. In 2011, he published a paper to the think tank Netspar (*Regulation pensions—why the European Union matters*). He has also published in EC Tax Law Review and European Company Law.

Ulla Neergaard is Professor of EU law at the Faculty of Law, University of Copenhagen, Denmark. She holds a Ph.D. from the European University Institute, Florence, Italy. Her doctoral thesis is in the area of competition law. Since 1998 Ulla Neergaard has been an academic at the Law Department at the Copenhagen Business School, Denmark, most recently as professor of competition law, but for several years with the responsibility of fundamental EU law teaching and administration. Since 2009 Neergaard has been professor at the Law Faculty at the University of Copenhagen. Also, since 1999 Neergaard has been an expert member of the Danish Council of Competition and since 2005 (until 2011) also of the Danish Energy Regulatory Authority. She has since 2011 been the president of the Danish Association for European Law (subsidiary of F.I.D.E., *Fédération Internationale pour le Droit Européen*). She has published widely in EU competition law as well as in the more fundamental EU law. She has been involved in the international research project: *Blurring Boundaries*: *EU Law and the Danish Welfare State*, which has led to several books. At present, she is involved in the international research projects concerning: (1) *Towards a European Legal Method*: *Synthesis or Fragmentation*; and (2) *ToMaS: Transformation of Markets and States*. She is one of the founding members of ToMaS. Her research interests

include free movement law, EU competition law, European legal method(s), and services of general interest.

Willy Palm is the Dissemination Development Officer of the European Observatory on Health Systems and Policies. He is responsible for organising and leading policy dialogues with policy-makers in European countries on various health systems related issues. As a lawyer specialised in European social security law, he has been analyzing national and Community regulations and policies covering access to health care. More specifically, his research covers the impact of the EU integration process on health services and systems. Before joining the Observatory in April 2006, Willy Palm was the Managing Director of the International Association of Mutual benefit societies (AIM). He also lead the research and development department of Belgium's largest sickness fund.

Malcolm Ross is Professor of European Law in the School of Law, Politics and Sociology at Sussex University and was Head of the Law Department 2003–2007. He was formerly a Jean Monnet Chair at the University of Leicester until 2000. He has written widely on EU competition law, especially in relation to state aid and services of general economic interest, EU citizenship and state liability. He has also acted in a consultative capacity to the European Commission as well as being involved in a number of judicial training programmes in the Member States that acceded to the EU in 2004. His primary research interests are the interface of social and market objectives in the EU and, in particular, the conceptualisation of solidarity as a principle in EU law. Recent publications include a jointly-edited collection of essays, *Promoting Solidarity in the European Union* (OUP, 2010). He is on the editorial advisory board of the Journal of Common Market Studies.

Waltraud Schelkle is a Senior Lecturer in Political Economy at the European Institute, London School of Economics and Political Science, since 2001. She is also an Adjunct professor of economics at the economics department of the Free University of Berlin where she did a post-doctorate degree (Habilitation) in 1999 with a thesis on *The new theory of monetary integration* (published in German in 2001). She is interested in the political economy of European integration, in particular economic governance, and in the interaction of financial markets and welfare systems in Member States. Her recent publications include *A crisis of good governance or a good crisis for governance*? *A comparison of the EU and the US* in the Review of International Political Economy (February 2012); and *A crisis of what*? *Mortgage credit markets and the social policy of promoting homeownership in the United States and in Europe* in Politics & Society (March 2012).

Dagmar Schiek is Director of the Centre for European Law and Legal Studies, Chair of European Law and holds an *ad personam* Jean Monnet Chair. She has been a visiting professor and guest lecturer at various universities, including the London School of Economics and Maastricht University. Her research interests lie in the field of European Economic and Social constitutionalism, new forms of governance in the EU involving civil society and European and international

equality law. Her recent publications include: *European Non-Discrimination Law and Intersectionality* (Schiek and Lawson eds, Ashgate 2011) and *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Schiek, Liebert and Schneider eds, Cambridge University Press, 2011). Her next book is forthcoming in May 2012 and is entitled: *Economic and Social Integration*: *The Challenge for EU Constitutional Law* (Cheltenham: Edward Elgar). She is a member of the IUS COMMUNE research school (founded by the Universities of Utrecht, Leiden, Amsterdam, Maastricht and Rotterdam) and on the editorial board of the Maastricht Journal for Comparative and European Law and of Kritische Justiz (Critical Legal Studies, Germany).

Piet Jan Slot University of Leiden, was a full time professor until March 2009. He is now part time professor in Leiden. Until September 2010 he was director of the Europa Institute of Leiden University and editor of the CMLRev. He has published extensively on Competition law, State aid and general EU law. Competition law and the State is one of his subjects of research. This includes several articles on Services of General Economic Interest. He was visiting professor in Stanford University (2000–2001), Paris II, Panthéon-Assas (1997), Master of European Regulation of Network Industries, University of Bonn (2004–2011), visiting Jean Monnet professor at the Reinische Friedrich Wilhelms University Bonn, Germany 1990 and 1996. He was three times General Rapporteur for the prestigious bi-annual FIDE conference. He has written many opinions for national court and arbitration procedures, for the General Court, the Court of Justice of the European Union as well as for major law firms. Most recently, he has been involved in a considerable number of high profile arbitration proceedings. All assignments involved major arbitral disputes in Central European countries. In 2009 and 2010 he has advised the Nederlandsche Bank (the Dutch Central Bank) in matters relating to the state aid given to ING in the time of the financial crisis. He has extensive experience in advising national energy companies as well as foreign companies on matters of European law in particular competition, state aid and energy law. He also advised the German Network Authority on trans-border electricity connections.

Erika Szyszczak LLB, LLM, Ph.D., is Jean Monnet Professor of European Law *ad personam* at the University of Leicester, where she is the Director of the Centre for European Law and Internationalisation. She is a practising barrister at Littleton Chambers, Temple, London and an ADR accredited mediator. She is one of the founding members of the ToMaS research project. She is interested in the relationship between free movement and competition and liberalisation in the EU. She is currently writing a second edition of her book *The Regulation of the State in Competitive* Markets in the EU (Hart Pub). She recently edited: *Research Handbook on European State Aid Law*, published by Edward Elgar in 2011.

Alina Tryfonidou is a Lecturer in Law at the University of Reading since September 2011. She was previously a Lecturer at the University of Leicester (2007–2011) and, prior to that she was teaching European Law as a Visiting Tutor

at King's College London (2005–2007) whilst pursuing her Ph.D. studies at the same institution. Alina Tryfonidou obtained her LLB (2001), LLM (2002) and Ph.D. (2008) from King's College London and is an Associate of King's College (AKC) since 2008. She is a non-practising member of the Cyprus Bar since 2003, a Fellow of the Centre of European Law at King's College London since 2007, and an Associate of the Higher Education Academy since 2010. In 2004, Alina Tryfonidou completed a traineeship (stage) at the European Commission, at the Internal Market Directorate General, and in 2010–2011 she was an IALS Visiting Fellow. Alina Tryfonidou's main research interests are in the area of European law and, in particular, the law of the European Internal Market and Union Citizenship. She has started working on her second monograph *Constitutionalising the Market Freedoms*: *Towards Meaningful Union Citizenship* to be published by Hart in 2014.

Caroline Wehlander has been serving as a legal expert at the Swedish Association of Local and Regional Authorities, an organisation representing all of the Swedish local and regional authorities in Sweden. She was mostly working with EU law on free movement, procurement, state aid and services of general interest, representing the Association by CEEP (the European Center of Employers and Enterprises providing Public Services) and CEMR (Council of European Municipalities and Regions). Since 2010 she has been researching on a Ph.D. at the Department of Law of Umeå University, Sweden. Her Ph.D. thesis has the preliminary title: *Who is afraid of Services of General Interest*? *Services of General Interest in A Swedish Local and Regional Perspective*.

Abbreviations

AEIP	European Association of Paritarian Institutions
AG	Advocate General
BUPA	British United Provident Association
CEEP	Centre européen des enterprises à participation pubiques et des entreprises d'intérêt économique général (European Centre of Employers and Enterprises providing Public Services)
CELSIG	European Liaison Committee on Services of General Interest
CESCR	Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the EU
CJEU	Court of Justice of the European Union
CPV	Common Procurement Vocabulary
DG	Directorate General
DG SANCO	Directorate General for Health & Consumer
DWP	Department for Work and Pensions
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECR	European Court Reports
ECRI	European Commission against Racism and Intolerance ECSC Treaty establishing the European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
ENAR	European Networks Against Racism
EP	European Parliament
EPSU	European Federation of Public Service Union
ESSPROS	The European System of Integrated Social Protection Statistics
ETSGI	Educational and Training Services of General Interest
ETUC	European Trade Union Confederation

EU	European Union
EU 27	The 27 Member States of the EU
FAQ	Frequently Asked Question
GC	General Court (of the EU)
GDP	Gross Domestic Product
GUE/NGL	European United Left/ Nordic Green Left
HLG	High Level Group on Health Services and Medical Care
HSGI	Health Service of General Interest
HM Government	Her Majesty's Government (UK)
HTA	Health technology assessment
ISTAT	Italian Institute for Statistics
IORP	Institutions for Occupational Retirement Provision
ILO	International Labour Organisation
NESGI	Non-Economic Service of General Interest
NGO	Non-Governmental Organisation
NHS	National Health Service
Nyr	Not yet reported
OJ	Official Journal
OMC	Open Method of Coordination
PES	European Socialists
PFI	Public Finance Initiative
PIP	Personal Independence payment
PISA	Programme for International Student Assessment
PPP	Public Private Partnership
PSO	Public Service Obligation
SANCO	Santé et Protection des Consommateurs (Health and Consumer Protection Directorate General of the European Commission)
SGEI	Service of General Economic Interest
SGI	Service of General Interest
SPC	Social Protection Committee
SSGI	Social Service of General Interest
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
USO	Universal Service Obligation

Part I
General Perspectives

Chapter 1
Introduction

Ulla Neergaard, Erika Szyszczak, Johan W. van de Gronden and Markus Krajewski

Abstract The chapters in this book reveal the concept SSGIs may be viewed in a wider context to embrace a range of social services organised at the national level. The concept is also emerging in a different context through a range of exemptions or special treatment given to social services in European Union (EU) secondary law and soft law policy documents. The current economic crisis in Europe has highlighted the important role that social services play in the historical and cultural tradition of Europe. Traditionally, such services are closely linked to citizenship and nationality entitlements within the 'bounded' nation-state and are underpinned by the principle of solidarity. The Court of Justice of the European Union (CJEU) has taken the view that EU law does not limit the powers of the Member States to organise their social welfare systems.

U. Neergaard (✉)
The Law Faculty of the University of Copenhagen, Copenhagen, Denmark
e-mail: ulla.neergaard@jur.ku.dk

E. Szyszczak
The University of Leicester, Leicester, UK
e-mail: ems11@leicester.ac.uk

J. W. van de Gronden
Faculty of Law, Radbouw University Nijmegen, Nijmegen, The Netherlands
e-mail: j.vandegronden@jur.ru.nl

M. Krajewski
Faculty of Law, University of Erlangen-Nuremberg, Erlangen, Germany
e-mail: Markus.Krajewski@jura.uni-erlangen.de

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Contents

1.1 Introduction

In a critical review of doctrinal legal research in Europe van Gestel and Micklitz observe:

> For legal scholarship herd behaviour implies that researchers choose to follow 'hot topics' and trends, often initiated by policymakers (e.g. the European Commission) instead of developing their own agendas. What is worse it that they often do it without questioning the preconceptions on which these choices rest and also without realizing the importance of taking an autonomous approach…[1].

By taking as its point of departure the concept of Social Service of General Interest (SSGI) this book unashamedly addresses a 'hot topic' originally launched as a concept by the European Commission in 2001.[2] This is a challenge that we hope to meet by creating a discussion and a dialogue through critical analysis. SSGIs are not a legal concept identified in EU law. The term is also not a familiar concept at the national level. SSGIs are a construct created from European Commission soft law documents. SSGIs are mentioned for the first time on a political agenda in 2001 in the Commission Report to the Laeken European Council. Services of General Interest.[3] They have been identified by the European Commission as having a set of characteristics:

- they operate on the basis of the solidarity principle;
- they are comprehensive and personalised, integrating the response to differing needs in order to guarantee fundamental human rights and protect the most vulnerable;
- they are not for profit;
- they include the participation of voluntary workers;

[1] Van Gestel and Micklitz 2011, p. 39.

[2] COM(2001) 598.

[3] Ibid.

- they are strongly rooted in local cultural traditions. This finds its expression, in particular, in the proximity between the provider of the service and the beneficiary;
- there is an asymmetric relationship between the provider and the beneficiaries of the service that cannot be assimilated to a 'normal' supplier/consumer relationship.[4]

The chapters in this book reveal the concept may be viewed in a wider context to embrace a range of social services organised at the national level. The concept is also emerging in a different context through a range of exemptions or special treatment given to social services in European Union (EU) secondary law and soft law policy documents. The current economic crisis in Europe has highlighted the important role that social services play in the historical and cultural tradition of Europe. Traditionally, such services are closely linked to citizenship and nationality entitlements within the 'bounded' nation-state and are underpinned by the principle of solidarity. The Court of Justice of the European Union (CJEU) has taken the view that EU law does not limit the powers of the Member States to organise their social welfare systems.[5]

The European integration project, and in particular the role of free movement and competition law to challenge territorial restrictions on the provision and access to social services that have an economic nature, has created a dilemma for judges and policy makers. Territorial and nationality restrictions may be barriers to achieving a single market but even in Member States where social services have been liberalised there is a tendency to create such services as a special form of marketised services, protected from the full force of the market rules.

The Treaty of Lisbon 2009 heralded a new era in the EU where a different balance between economic and social values could be achieved.[6] The Treaty introduced a new legal concept of a 'highly competitive social market economy' with a set of new values for the Union. These values are established in Articles 2 and 3 TEU with clear indications of the role of solidarity in Europe, adding to the traditional values of liberal constitutionalism introduced by the Treaty of Maastricht 1993. Articles 2 and 3 TEU are enhanced by a number of horizontal clauses in the Treaty on the Functioning of the European Union (TFEU) which serve to entrench specific social values into all areas of policy of the Union, binding the socioeconomic dimension and acting as a public emblem of the Union.

Little legal guidance is provided in the Treaties as to how this concept should be interpreted. To date the European Courts have not provided a definition, or used the concept in case law, but the concept is used in speeches by the President of the Commission, reports of the European Parliament and policy documents from the European Commission. For example, the President of the European Commission, Barrosso, has observed that:

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[4] Communication from the Commission: '*Implementing the Community Lisbon programme: Social services of general interest in the European Union*' COM(2006) 177 final.

[5] CJEU, Case 238/82 *Duphar* v. *Netherlands* [1984] *ECR* 523.

[6] Szyszczak 2012. See the chapter by Schiek.

> The [financial] crisis has induced some critical reconsideration of the functioning of markets. It has also enhanced concerns about the social dimension. The Treaty of Lisbon… make[s] it explicit for the first time—though the principle was already clearly set out in the preamble of the Treaty of Rome—that 'the Union […] shall work… for a highly competitive social market economy'. All this calls for a fresh look at how the market and the social dimensions of an integrated European economy can be mutually strengthened.[7]

Among the challenges facing the EU SSGIs are seen to play a key role.[8] However, there is also a tendency towards the modernisation of social services, particularly where social security issues are involved. Removing the idea that to access such services requires a nationality or national citizenship link raises wider issues of the financing of SSGIs. Moreover, there is a growing tendency to see such services from a consumer perspective and also from the perspective that such services can be provided by bodies other than the state, and for payment. One idea that has been launched is that the EU rules on universal services contain the nucleus of an emerging social European private law. All these developments raise concerns over ability to pay, universal access and coverage and what influence this will have on the quality of protection.[9]

The transfer of the delivery of SSGIs away from the State in some Member States alters the structure of the delivery of SSGIs across the EU and this is a politically sensitive issue that has led to political and legal reaction. For the most part, the legal response is one of exemption or special treatment of SSGI. Protocol No. 26 to the TEU and TFEU 2009 states that the provisions of the Treaties do not affect, in any way, the competence of Member States to provide, commission and organise non-economic services of general interest (NESGIs), a concept which may be viewed to include SSGIs. The Services Directive, 2006/123/EC[10] does not apply to NESGIs,[11] or to certain health care and social services. Furthermore, in

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[7] Mission letter from the President of the European Commission José Manuel Barrosso to Professor Mario Monti, in *A New Strategy for the Single Market at the Service of Europe's Economy and Society. Report to the President of the European Commission José Manuel Barroso. By Mario Monti*, 9 May 2010.

[8] See as examples: Council, *Council Conclusions 'Social Services of General Interest: at the heart of the European social model,' 3053rd Employment, Social Policy Health and Consumer Affairs Council meeting Brussels*, 6 December 2010; Commission, *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions. Accompanying the Communication on 'A single market for 21st century Europe.' Services of general interest, including social services of general interest: a new European commitment*, COM(2007) 725; Commission, *Commission Staff Working Document. Frequently asked questions concerning the application of public procurement rules to social services of general interest. Accompanying document to the Communication on 'Services of general interest, including social services of general interest: a new European commitment,'* SEC(2007) 1514; and Commission, *Communication from the Commission. Implementing the Community Lisbon programme: Social services of general interest in the European Union*, COM(2006) 177.

[9] See Davies and Szyszczak 2011; Micklitz 2011.

[10] *OJ* 2006 L 376/36.

[11] See the chapters by von de Gronden and Szyszczak.

the recent revised package on the EU state aid rules for the assessment of public compensation for SGEIs,[12] special treatment is accorded to compensation for the provision of services of general economic interest meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups.[13] In contrast, new positive provisions addressing services of general economic interest (SGEIs), health care and social security and social assistance have emerged with the Charter of Fundamental Rights of the European Union.

The European Courts continue to render important judgments which challenge the balance between solidarity and competition. At the same time, more and more secondary law and soft law of relevance to SSGIs is being implemented, or may be expected. Thus with this trend in legal developments, with associated political implications, is crucial to critically examine, explain and understand. These issues reveal the many paradoxes and challenges surrounding SSGIs and why we can justify the choice of a topical issue for the subject of an international conference and this book.

The Copenhagen conference in May 2011 was a natural development from three previous conferences organised firstly in Potsdam in 2008 resulting in the book: The Changing Legal Framework for Services of General Interest in Europe. Between Competition and Solidarity, published by TMC Asser Press in 2009.[14] The Potsdam conference unearthed a wide range of issues on the provision and delivery of SGIs. The second conference was held in London in 2009, addressing general and global developments in SGIs and resulting in the book: Developments in Services of General Interest.[15] The issue of healthcare as a special form of SGEI/SSGI was addressed at a conference held at Radboud University, Nijmegen, organised around the protracted attempt to introduce an EU Directive to regulate the growing soft law, soft governance and litigation in an area where EU competence for legislation was limited but the impact of the free movement and competition rules was gnawing away at national competence, with fears of undermining national social solidarity.[16] This conference resulted in the book: Health Care and EU Law.[17]

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[12] Available at: http://ec.europa.eu/competition/state_aid/legislation/sgei.html

[13] Commission, *Commission Decision of 20.12.2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest*, C(2011) 9380, Article 2, 1c.

[14] Edited by Markus Krajewski, Ulla Neergaard and Johan van de Gronden.

[15] Edited by Erika Szyszczak, Jim Davies, Mads Andenaes and Tarjei Bekkedal.

[16] The Directive was finally adopted as Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the Application of Patients' Rights in Cross-Border Healthcare, *OJ* 2011 L 88/45.

[17] Edited by Johan Willem van de Gronden, Erika Szyszczak, Ulla Neergaard and Markus Krajewski 2011.

1.1.1 Aims and Structure of the Book

The aim of the book is to critically present, analyse, and indicate the implications of the changing role of SSGIs at the national and EU level. The focus is to offer a deeper understanding of this area of law and policy at different levels. The approach of the book is deliberately inclusive. For example, it presents the way in which the use of liberalisation in the EU has broken down or blurred traditional boundaries of the state provision of goods and services in the social sector. National and EU perspectives, internal market law and competition law perspectives are taken. Concepts used in EU law, for example, citizenship, economic activity and undertakings are deliberately used as organisational concepts. We are aware that this is a pioneering book taking the issue of SSGIs as an organisational concept and unravelling the different ways the concept is emerging in EU law and policy alongside tensions with the national understanding and regulation of the area. It is not an exhaustive account: law and policy is constantly evolving.

The book is organised as follows. **Part I** contains general perspectives; **Part II** focuses on free movement and competition law perspectives; **Part III** addresses the fragmentation and inconsistency of treatment of SSGIs created by EU secondary and soft law; **Part IV** provides a range of examples of regulation of SSGIs in national law. **Part V** draws conclusions from the discussions and issues raised.

1.1.2 General Perspectives

Part I presents general perspectives bringing the concept of SSGIs into its general legal, economic and political context. The first chapter in this part of the book is written by *Pierre Bauby* with the telling title: 'Unity and Diversity of SSGIs in the European Union.' On the basis of the study commissioned by CEEP Bruxelles for the European Commission, 'Mapping of the Public Services in the European Union and the 27 Member States' undertaken in 2009–2010, Bauby discusses the role of SSGIs in the EU and in the Member States by considering the relationship between diversity and unity. Paradoxically Bauby brings a general, but also concrete, picture of what is understood by the concept of a SSGI at the national level. Bauby takes his point of departure in the problems associated with a lack of clarity as to the central definitions at the level of EU law and then moves on to explain what kind of essential knowledge may be deducted from the 'Mapping of Public Services' Study. This chapter provides useful statistical evidence. For example, Bauby explains that SSGIs represent more than 30 % of employment in EU 27, with nearly 80 % of that accounted for in health and the social services. Public administration and education each account for more than 7 % of employment. Not surprisingly, certain Member States are well above the average: Belgium, Denmark, France, the Netherlands and Sweden. Bauby also provides an account of the indicators of social protection and health. In this respect, it is

pointed out that the gross average expenditure on social protection in the EU27 accounted for 27.9 % of GDP. In addition, an average of only 35.4 % of all benefits expenditure in the EU 27 represented social benefits paid in kind (i.e. goods and/or services).

A significant finding of the study is that the term SSGI, now adopted in EU documents, is not a term integrated into the law of the Member States, nor is it a common term in the national vocabulary.

Bauby also notes the diversity between the different constructions of SSGIs in the Member States. Thus, the concept under scrutiny in this book may be understood and applied in different ways. It is also noted that many changes in policy towards SSGIs have occurred in recent years, including an increasing role for local authorities and private initiatives in the provision of conventional notions of a SSGI and evolving notions of the concept.

Bauby offers a brief analysis of four, essentially geographical, approaches for the organisation of social services, on the basis of some particularly significant examples. Bauby draws conclusions from his analysis of the study with the suggestion that a framework directive (or similar instrument) for SSGIs should be adopted by the EU, but at the same time warns that because both unity and diversity exist within, and across, so many of the areas of European social services it would in fact be difficult to apply common rules. However, because of the uncertainties that the actors in this area experience Bauby believes it could be preferable to seek clarification at the EU level for each of the most important categories (such as health, social protection, social housing and education and training) where other chapters in the book reveal conflicts between national and EU law are emerging.

Dorte Sindbjerg Martinsen examines the tensions between welfare states and the role of 'social Europe.' This approach is based on the view that SSGIs constitute core institutions of the welfare state, traditionally rooted in the same logic of 'closure' as the welfare state in general. She explains how, historically, the national construction of the welfare state has been closely linked to the formation and consolidation of the nation-state. Now a social dimension has also become part of the EU identity, or what it would like to be. In principle, Sindbjerg Martinsen maintains, that the competence to decide on the content, scope and organisation of welfare policies remains within national competence in the EU as long as the exercise of that competence does not contradict EU law. Despite the reticence of Member States to transfer legislative competence the reality is that gradually EU law now has an impact on the Member States' policy choice competence in this area. Thus, Sindbjerg Martinsen finds it suitable to label the development that has taken place as a 'Europeanization of welfare,' where 'Europeanization' is used as an analytical concept in EU studies and defining a national change or processes of change caused by European integration. She analyses healthcare and long-term care as examples of two kinds of SSGIs which, despite being bound to traditional national borders and citizenships, have been 'Europeanized' along with many other important SSGIs. These case studies demonstrate that although Member States attempt to create 'safe havens' for their social services, these may not prove

to be lasting firewalls against the 'creeping competences' of the EU. Altogether, one of the important conclusions of this contribution is that over time SSGIs have become Europeanised in the sense that the scope and policy options for national politicians and national administrations have been limited.

Dagmar Schiek analyses SSGIs within the EU competence regime introducing the idea of the 'constitution of social governance.' This idea is derived from the new value base of the EU constructed in the TEU and TFEU after the Treaty of Lisbon 2009. Schiek points to the prevailing contradiction between the EU's enhanced values and objectives in the social policy field and its under-developed competence base. Instead of concluding, as many authors in academic writing do conclude, that the protection of national prerogatives for shaping welfare states against EU intervention at all costs is necessary, she submits an alternative proposal. That an EU constitution of social governance should create mixed responsibilities so that the EU, Member States and civil society actors support each other in creating the preconditions for social integration in the EU. According to Schiek, any other solution would be counterproductive for the progress of the EU project. Schiek also asserts that the new legislative competence in Article 14 TFEU is unduly narrow.[18] In her view this is particularly problematic for SSGIs, in so far as they are a sub-category of SGEI, because the restrictive competence regime of social policy seems to exclude comprehensive EU legislation. She finds that this contrasts with the enhanced relevance of social values after the Treaty of Lisbon 2009. To conclude, she argues that the concept of a constitution of social governance thus provides a framework for expanding EU competences, and in particular the competences of non-commercial and non-state providers of SSGI for developing transnational and EU dimensions of SSGI provision.

Malcolm Ross elaborates on SSGIs in the light of solidarity and the new legal concept of a social market economy in the EU. At the overall level, he argues that the developing legal framework for SSGIs represents a particularly powerful catalyst for realigning the constitutional relationship between economic and social values in the EU. He sees SSGIs in a dynamic relationship with two evolving concepts in EU law, namely 'solidarity' and the 'highly competitive social market economy.' Both concepts are viewed as having acquired considerable normative potential by virtue of their elevated status and pervasiveness following the changes made by the Treaty of Lisbon 2009 to the legal architecture of the EU.

Ross sees a new legal framework for SSGIs emerging in the form of an enabling and dynamic environment of joint EU-national responsibility in which the interdependence of social and economic priorities can be mediated and reviewed. On this basis, he takes us on a journey, dismantling the legal barriers to a social market economy as well as a journey analysing solidarity while discussing whether this constitutes an active antidote to the fragmentation of SSGI roles as a

[18] Article 14 TFEU states: '…The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.'

result of EU intervention. Ross concludes that it may be emphasised that solidarity, in fact, is visible in the bottom-up engagement of iterative and interactive exchanges and best practice/quality discourse that are already increasingly developing. On the other hand, he points out that some legal foundation to solidarity is required in order to activate and steer (and subsequently defend) the social aspect of EU commitments and the particular prioritisation of effective SSGIs. The time is ripe for some creative legal thinking to embed and sustain the connections between local and EU forces for a common European public interest; solidarity is a suitable tool and in the arena of SSGIs contains a great potential.

1.1.3 Free Movement Law and Competition Law Perspectives

In **Part II** of the book the perspective moves away from the general level into the areas of primary economic law addressing free movement and competition law and policy. The first contribution in Part II is delivered by *Johan van de Gronden*. He elaborates on the free movement of services and the right of establishment in the Services Directive 2006/123/EC with particular interest taken in the issue as to whether EU internal market law transforms the provision of SSGIs.[19] Observing that Member States are under the obligation to observe EU law and, as a consequence, their national SSGI measures and policies must be compatible with the EU rules for the internal market, the central issues raised in this contribution then become whether EU internal market law gives rise to incentives for the Member States to transform their national laws governing the provision and organisation of SSGI and to what extent Member States are forced to reconsider and change the design of their SSGI schemes, which are predominantly based on non-market values.

The striking conclusion of the analysis of the case law of the CJEU is that EU free movement law may force Member States to introduce elements of competition in their national schemes governing SSGIs. Van de Gronden finds this paradoxical. On the one hand, the CJEU repeatedly recites the mantra that the competence to regulate these services lies with the Member States.[20] On the other hand, the stance in EU law is not neutral. The CJEU recognises that competition should play a role in the national organisation and provision of SSGIs. Van de Gronden explains that Member States can retain control over the organisation and provision of SSGIs if they can make a clear distinction between essential and non-essential services, thus designating specific SSGIs as SGEIs.

In the contribution by *Alina Tryfonidou*, the focus shifts to another area of free movement law: the impact of the free movement of workers provisions and Union citizenship. This chapter considers how this area of law imposes constraints on the

[19] *OJ* 2006 L376/36. See Chap. 13 by Szyszczak.

[20] See supra n 5.

Member States' autonomy with regard to the provision of certain kinds of SSGIs, namely education and the provision of social assistance. Tryfonidou examines how the CJEU has responded to the tensions between the aims of the free movement of workers and the citizenship provisions, on the one hand, and the autonomy of the Member States, on the other hand. Among the important findings in this chapter is that the CJEU has gradually increased the influence of EU law on Member State action in this sphere. Although the provision of SSGIs is still an area of activity which to a large degree lies within the autonomy of Member States, they no longer retain complete freedom to regulate this area of law. In many instances, they are now in fact called upon to extend the availability of social services to nationals of other Member States who are lawfully present in their territory. This may extend to members of the family of the worker or Union citizen, even where the family member is not a national of one of the Member States. As Tryfonidou points out, Union citizens can often expect to have access to certain SSGIs in the host state under equal terms as those imposed on that state's own nationals. Thus, the freedom of Member States has been reduced as they will have to respect the principle of non-discrimination on the grounds of nationality and free movement.

The impact of the free movement of capital on SSGIs is analysed by *Leo Flynn*. This chapter explores the impact that the free movement of capital can have on the mechanisms by which SSGIs are delivered. At the general level, Flynn points out that Member States possess a broad discretion as to how to organise the delivery of what they consider to be SSGIs. He points out that if a Member State decides that it will provide a SSGI using public law bodies for the provision of the service in question, then the principle financing mode will probably be from general taxation or from purpose specific levies. In such situations, the financing of SSGIs is drawn from State resources to the possible benefit of the service provider. There are no questions of infringement of the rules on the free movement of capital. However, issues of state aid could arise. In other situations, Flynn demonstrates how the free movement rules can be of relevance, for example, in the situation of tax advantages for donations. It is emphasised that the sensitive nature of the role of tax policy as a symbol of national sovereignty and part of a state's overall economic policy, to finance public spending and redistribute income, must always be considered. Flynn discusses the possible role of Article 106(2) TFEU on the interaction of free movement of capital and SSGIs, concluding that the state of law here should be similar to the role regarding the other freedoms. In conclusion, the free movement of capital is an area of EU law still in infancy in its development and application to SSGI, but it has the potential to play an important role even if the exact contours are unclear.

Ulla Neergaard critically analyses the central concepts from the perspective of EU competition and free movement law. She provides an account of the development of SSGI as a concept in EU law and relates it to other central concepts, including in particular SGEI, SGI and NESGI. All these terms are legal concepts, although SGIs and NESGIs started out as non-legal concepts. The concept of SSGI is not found in any binding EU legal text. Then, she examines the impact of EU competition and free movement law on SSGI. She finds that, as rule, the free

movement rules apply to SSGI, whereas the CJEU is far more reluctant to bring these services within the scope of EU competition law. Similarly, the prohibitions laid down in the Treaty provisions on free movement constitute a much harder regime for national SSGI policies than the EU competition rules. In contrast, justification of anti-competitive restraints on economic grounds is more likely to happen than exempting restrictions of free movement on these grounds. Nevertheless, non-economic interests play a significant role in applying the exception in free movement law, whereas in competition law it is controversial to assume that restrictive practices could be justifiable on grounds other than those related to economic considerations. Additionally, in the free movement rules the proportionality test is well developed, but in competition law this test is still in its infancy. It cannot be ruled out that Article 106(2) TFEU, which contains an exception based on the access to SGEI for all, is capable of not only justifying anti-competitive practices but also restrictions of free movement. She also points out that because the concept of SSGI is, in principle, meant to be used horizontally in EU law it may give rise to difficulties. Many of the problems related to the asymmetries could be solved if it is accepted that Article 106(2) TFEU applies not only in competition law, but also in free movement law.

Piet Jan Slot's contribution sketches the relationship between Article 106 TFEU and the state action doctrine and SSGIs. He notes that SGEIs have grown in importance in EU law since the entry into force of the Treaty of Lisbon in 2009. However, competition law does not apply to every SSGI. If a Member State decides to supply a particular service such services are likely to not have an economic nature. In that case, as is apparent from the *AOK* judgment,[21] that the entities providing the services concerned are not undertakings within the meaning of competition law. If the provision and organisation of a particular SSGI is based on market conditions, competition law must be observed. As a result, Member States must comply with Article 106 TFEU and the state action doctrine. Slot argues that these two regimes give Member States considerable discretion in establishing and shaping SSGI. A case in point is the *AG2R* judgment.[22] This ruling shows that Member States enjoy a wide margin in defining SGEI/SSGI. Furthermore, many restraints imposed by Member States on various operators in order to ensure the proper delivery of SGEI/SSGI are justifiable in the light of Article 106(2) TFEU. Given the limited interpretation by the CJEU to the state action doctrine (Articles 101 and 102 TFEU in conjunction with Article 4(3) TFEU), only egregious cases of governmental interference by means of actions of undertakings are prohibited. Slot's final conclusion is that Member States are, and will remain, in the driving seat to establish and maintain SGEI/SSGI.

Caroline Heide-Jørgensen examines the relevance of Article 101 TFEU for SSGIs. She starts with analysing the CJEU's case law on the concept of undertaking

[21] Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] *ECR* I-2493.

[22] Case C-437/09 *AG2R* v. *Beaudout* [decided on 3 March 2011, n.y.r].

and focuses on cases concerning social security. She finds that if a body managing a particular social security scheme applies the principle of solidarity and is subject to state supervision, this body is not an undertaking for the purposes of EU competition law. Remarkably, the CJEU has not given a comprehensive definition of the principle of proportionality, although it has pointed to some characteristics, such as the absence between the contributions due and the level of the benefits an insured person is entitled too. She then moves on by discussing the case law on health care and the concept of undertaking. She points to a lot of uncertainties caused by this ambiguous case law. One of the questions is how much competition needs to be included in a particular scheme in order to be caught by the Treaty provisions on competition? Heide-Jørgensen notes considerable reluctance on the part of the European Courts to apply the competition rules to SSGIs. A possible explanation for this is that these rules do not contain public interest specific exceptions. However, she points to interesting developments in EU competition law, which could lead to justifications that are capable of striking an adequate balance between the concrete competition rules and SSGI. It is argued that the test developed in *Wouters*[23] and *Meca-Medina*,[24] where the CJEU found that restrictive effects that are inherent in the pursuit of particular objectives of general interest (professional ethics of the legal profession respectively anti-doping rules), could be useful. *Wouters* and *Meca-Medina* could provide a better avenue for accommodating SSGIs concerns than the concept of undertaking, the application of which leads, after all, to drawing an artificial line between competition law and public policies.

Another possibility is to base the interpretation of Article 101(3) TFEU (which provides that restrictive agreements are exempted from the cartel prohibition if certain conditions are met) on a reading that allows for the taking into account objectives of general interest. Agreements that contribute to the proper provision of SSGIs could benefit from such an interpretation. The problem, however, is that in the Commission's view Article 101(3) TFEU mainly serves to exempt efficiencies from the cartel prohibition.[25] However, this does not mean that Article 101(3) TFEU cannot be invoked by parties to an 'SSGI agreement,' as the introduction of the concept 'social market economy' in the EU Treaties clearly indicates that social values now play an important role in EU law. Finally, Heide-Jørgensen concludes that the case law on the concept of undertaking gives only limited guidance, when it comes to SSGIs, and, therefore, she suggests that the approach developed in *Wouters* and *Meca-Medina* and Article 101(3) TFEU could be a more reliable way for balancing concerns related to SSGIs and competition law.

Julio Baquero Cruz explores the impact of the EU state aid rules on SSGI. His aim is to examine whether the EU tends to favour economic objectives over social

[23] CJEU, Case C-309/99 *Wouters* [2002] *ECR* I-1577.

[24] CJEU, Case C-519/04 P *Meca-Medina and Majcen* [2006] *ECR* I-6991.

[25] See Commission, *Communication from the Commission, Notice, Guidelines on the Application of Article 81(3) of the Treaty* [now Article 101(3) TFEU], *OJ* 2004 C 101/97, para 42.

policy objectives. An important aspect of this analysis is the notion of economic activity. The Treaty provisions on state aid only apply to undertakings, that is, entities engaged in economic activities. The notion of economic activity is broad, but this will not damage the proper provision of SSGIs according to Baquero Cruz, as the state aid rules applicable to these services are interpreted in a way that solves the tensions between economic and social values. When it comes to the application of the state aid rules contained in Article 107 TFEU, he notes that the Commission routinely authorises social aid to be granted to individuals. Furthermore, in *Altmark* the CJEU held that compensation given to finance the performance of Public Service Obligations (PSO) imposed on undertakings does not amount to the state aid, provided that the following conditions are met: (1) the undertaking concerned must be entrusted with the execution of the PSO concerned (2) the parameters for the compensation must be established in a transparent way and in advance (3) there is no overcompensation and (4) in absence of a public procurement procedure the benchmark for calculating the costs must be based on the costs of a well-run company.[26] Baquero Cruz contends that from the perspective of the socio-economic model of the EU the *Altmark* ruling is a neutral decision, as it achieves a reasonable balance between the economic interest in avoiding aid that distorts competition and the legitimate policy aims pursued through SGEIs.

After *Altmark* more flexibility has been introduced in the area of state aid and PSO. An important development was the adoption of the *Altmark*–Monti-Kroes package by the Commission.[27] The review of the *Altmark*–Monti-Kroes package took place during the preparations for the conference and the writing of this book. On 20 December 2011 the Commission adopted a revised package of measures to regulate the financing of SGEIs in the EU. The new measures comprise a Communication, a revised Decision and a Communication on a Framework applicable from 31 January 2012 and the promise of a new de minimis Regulation for SGEI by the Spring of 2012.[28] The measures reflect the

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

[27] See Commission, *Commission Decision of 28 November 2005,* C(2005) 2673, *on the Application of Article 86(2) of the EC Treaty to State Aid in the Form of Public Service Compensation Granted to Certain Undertakings Entrusted with the Operation of Services of General Economic Interest*, *OJ* 2005 L 312/67 and the Community Framework for State Aid in the Form of Public Service Compensation, *OJ* 2005 C 297/4.

[28] *Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest*, *OJ* 2012 C 8/4; *Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union 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* 2012 L 7/3; *Communication from the Commission, European Union framework for State aid in the form of public service compensation, OJ* 2012 C 8/15; *Draft Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ* 2012 l C [Finally adopted on 25 April 2012, *OJ* 2012 L 114/08].

changing economic and constitutional climate of the EU as well as a modernisation and 'more economic' approach towards regulating the financing and operation of SGEI in Europe.[29]

In these measures the Commission, inter alia, introduced a soft necessity test that tried to reconcile social policy aims and competition. Furthermore, in the review process of the *Altmark* package, the Commission decided to focus more on large enterprises and to give more leeway for aid given to small and medium sized companies and to SSGI operators.[30]

The General Court (GC) has shown that it is prepared to apply the *Altmark* conditions with great flexibility. In *BUPA*,[31] it granted a large discretion to State authorities with regard to both the definition of the PSO and the setting of the parameters of the compensation concerned. The final conclusion is that the rules developed in the framework of Article 107 TFEU reach a reasonable balance between social policy and SSGIs on the one hand and competition at the other hand. He even argues that relative precedence is given to social aims over economic objectives. As a result the main issues (related to SSGI)—in his opinion—are not in the hands of the European judiciary, but in those of the Union and national legislators.

1.1.4 Secondary and Soft Law

The first contribution in **Part III** concerning secondary and soft law is written by *Erika Szyszczak*, who focuses on the soft law approach of the Commission to SSGIs. She explains that SSGIs have emerged as a special form of SGEIs, but, to date the concept is not defined as such as a special legal category in EU legislation and case law. Nevertheless, in her contribution she shows that the Commission has assumed a central role in driving an EU agenda for the modernisation of SSGIs. The Europeanisation of SSGIs has taken shape by, inter alia, the adoption of several soft law measures explaining the impact of EU law on SSGIs and stressing the importance of the modernisation of the provision of these services. Since 2006, the Commission has consolidated the Europeanisation process of SSGIs. This process has enabled the Commission to create an agenda of common concerns, a community of stakeholders and principles for SSGIs. In its agenda setting the

[29] See VP of the European Commission Joaquim Almunia, Speech to the College of Europe, Bruges, 30 September 2011, 'SGEI Reform: Presenting the draft legislation.'

[30] According to the Press Release of the Commission: 'The new package clarifies key state aid principles and introduces a diversified and proportionate approach with simpler rules for SGEIs that are small, local in scope or pursue a social objective, while taking account of competition considerations for large cases.' *State aid: Commission adopts new rules on services of general economic interest (SGEI)* IP/11/1571, 20/12/2011.

[31] GC, Case T-289/03 *BUPA* v. *Commission* [2008] *ECR* II-81.

Commission has involved other EU actors, such as the Social Protection Committee, the European Parliament and the Committee of the Regions.

The Europeanisation of SSGI has also taken place through the creation of safe havens in binding EU measures. By introducing a number of exclusions or special regimes for 'social' services the Commission and the Council have contributed to the emergence of the concept of SSGI as a special category of SGEI (although the term SSGI is not used in any piece of EU legislation). Erika Szyszczak teases out some of the anomalies that emerge in the fragmented approach towards SSGI in EU secondary and soft law. For example, with regard to some social services the exclusion only holds, if their provision by private parties is mandated by the State. The question arises whether 'mandated providers' for the purposes of the Services Directive[32] is the same concept as 'undertakings entrusted with a SGEI mission' within the meaning of Article 106(2) TFEU and the *Altmark* case law. Strikingly, the Commission fails to give adequate guidance on this question. Erika Szyszczak notes that the ambiguous relationship between these two concepts is just one example of the great number of inconsistencies in the EU rules applicable to SSGI. Given the complex procedures for changing legislation at EU level, it may be expected that these inconsistencies will not be solved. However, she contends that the use of soft law has allowed for SSGI to be placed on the EU agenda and ensured that the SSGI can be modernised.

Elisabetta Manunza and *Wouter Jan Berends* examine the way in which EU public procurement law impinges upon the manner in which national (and local authorities) provide SSGIs. They point out that normally SSGIs are not simply 'purchased' by public authorities. Quite often such services are provided in-house or in co-operation with other public authorities. Such services are often local and sensitive to the needs of the immediate population with a historical and cultural bias. Thus, in many instances the commission of SSGIs can avoid the application of EU law. The procurement of SGIs is now part of the European Commission's review of the single market, taking place in the changing context of the new values introduced by the Treaty of Lisbon 2009 and the concept of a highly competitive social market economy. Elisabetta Manunza and Wouter Jan Berends examine the proposals to modernise procurement policy, with a new emphasis upon competition based upon quality as well as the traditional price competition criterion. The authors argue that an objective test should be introduced to assess the in-house provision of SSGIs, since this would increase the quality of decision making by public authorities and be in the interests of citizens and service providers.

Rita Baeten and *Willy Palm* examine the extent to which the Directive on Patients' Rights in Cross-border Healthcare succeeds in addressing the imbalance between the internal market objectives and the aims of general interest in health care.[33] They argue that from the onset the political debate on the implications of

[32] Directive 2006/123/EC.

[33] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the Application of Patients' Rights in Cross-Border Healthcare, *OJ* 2011 L 88/45.

the case law of the CJEU for health care was not primarily on the number of patients seeking treatment abroad but rather on the implications for the national organisation of health care. They contend that although the CJEU has accepted that general interest issues are capable of justifying restrictions of free movement, the Member States are faced with a high burden of proof with regard to raising health care concerns, as the necessity test to be fulfilled is relatively strict. Nevertheless, the CJEU has held that planning reasons may constitute a justification for restrictions of the free movement of hospital services. To this exception, the Directive has added two new justifications related to quality and safety.

The Directive provides greater legal certainty on the interpretation of the judgments of the CJEU on health care. But it does not expand beyond the issues of patient mobility. One of the most pressing concerns at the heart of the political debate, namely, the steering capacity of the Member States, is not solved by the Directive. Additionally, when it comes to cross-border health care, some important access hurdles to receiving care, such as problems of reimbursement, are not overcome.

Other important issues are covered by the Directive. It bears the potential to set in motion a process of cooperation between Member States on standards and guidelines on quality and safety. This process could go beyond the provision of cross-border health care, but its success is highly dependent on the political will of the public authorities of the Member States. Strikingly, at the moment, there is nothing to suggest that this willingness exists. At the end of their analysis, Rita Baeten and Willy Palm point to a paradox in which Member States are caught: in order to preserve their national autonomy and their steering capacity, the Member States should allow more EU intervention into their health care policies.

Hans van Meerten contends that pensions are high on the agenda of companies, employees, pension providers, governments and the EU. The internal market for pensions is regulated by the IORP Directive.[34] The demarcation of the scope of this Directive touches upon the essence of pensions, including issues such as: what are pensions; which kinds of pensions are governed by EU internal market law; etc. By exploring these issues, Hans van Meerten attempts to clarify some important issues. From the wording of the Directive it is apparent that it applies to all institutions that provide occupational retirement benefits, including pension funds, insurance companies and investment funds. This broad scope does not do justice to the wide variety of pension systems that are in place in the EU Member States and this could lead to adverse effects and even to facilitating the circumvention of particular restrictions on illiquid investments.

The applicability of EU internal market measures is contingent upon an economic activity taking place. Therefore, van Meerten discusses various important cases dealing with pension funds and EU free movement and competition law. It is apparent from this case law that classification of pensions as ‘economic’ or

[34] Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, *OJ* 2003 L 235/10.

'non-economic' activities is a matter of degree.[35] Some elements are of great importance for this classification, most notably the role of solidarity and the level of State control. If a pension scheme is predominantly based on solidarity and the State control is substantial, the scheme concerned does not amount to an economic activity. Strikingly, in cases such as *Freskot* and *Kattner Stahlbau* the CJEU seems to have accepted that, although competition law does not apply to schemes managed by bodies not engaged in economic activities, free movement law could be of importance: in so far as compulsory affiliation prevents insurance companies based in other Member States from offering cover for insurable risks, the Treaty provision on free movement may be infringed.[36]

In the light of his analysis of the case law of the CJEU on free movement and competition law, Hans van Meerten proposes to make a sharp distinction between non-economic and economic pensions. He argues that the IORP Directive should be replaced by two regimes. The first regime should be a soft law code that should govern certain non-economic pension services. This code could, inter alia, explain the degree of solidarity needed in order to escape from the EU rules on free movement and competition. The second regime should be a new Directive that regulates pension services that qualify as economic activities. This Directive should contain provisions on important matters, such as solvency issues, governance and information. The advantages of such a two-tired regime are that not only the competences of the Member States will be clearly delineated and respected but also that a set of binding EU rules that is capable of preventing a race to the bottom will be in place.

A case study on a particular social service from the perspective of a political economist is provided by *Waltraud Schelkle* in her chapter on the regulation of longevity insurance, i.e. public and private pension schemes. She argues that the political and social relevance of old-age security in Europe can hardly be overestimated. Waltraud Schelkle argues that the application of the canonical distinction between *non-economic* services of general interest and services of general *economic* interest to this sector is at odds with the economic rationale of regulating these services. Furthermore, the existing EU provisions regulating longevity insurance defy the conceptual divide between economic and non-economic services and seem more in line with the economics of insurance regulation than one would assume. Waltraud Schelkle conceptualises public old-age pension systems, occupational pension funds and commercial life assurance as insurances against the risk of longevity (i.e. outliving the available means to sustain oneself). Applying insurance economics to these systems allows her to show the different functions of each type of longevity insurance for European (and market)

[35] See e.g. CJEU, Case C-67/96 Albany [1999] *ECR* I-5751, CJEU, joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] *ECR* I-2493; CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513 and CJEU, Case C-437/09 *AG2R* [2011], n.y.r.

[36] CJEU, Case C-355/00 *Freskot* [2003] *ECR* I-5263; and CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513 and CJEU, Case C-437/09 *AG2R* [2011], n.y.r.

integration. Importantly, she argues that insurance economics does not support the proposition that unfettered competition delivers the desirable amount of insurance across Europe due to the particularities of insurances (asymmetric information and uncertainty). Furthermore, the portability of public pensions as provided for by Regulation 883/2004/EC[37] (and its predecessors) is an important factor contributing to labour mobility and hence to the creation of the internal market. In addition, public pensions create markets for (additional) private insurances for the better-off. Public and private pension schemes, therefore, need to be regulated for different, albeit connected economic reasons. For Waltraud Schelkle, the different European legislative frameworks for the coordination of social security systems, the supervision of occupational retirement funds and commercial insurance (Solvency II Directive[38]) reflect these different regulatory requirements. The distinction between non-economic services (i.e. public pensions), services of general economic services (occupational retirement schemes) and financial services (commercial insurance) is not helpful in this context. Furthermore, the creation of 'safe havens' for non-economic social services creates the impression that considering the economic significance of these services would threaten their social character. Waltraud Schelkle claims that in the end the search for conceptual clarity regarding the economic/non-economic divide is not only futile, but also becomes an obstacle to the full appreciation and understanding of the existing EU regulatory framework of longevity insurance.

1.1.5 Examples of Regulation of SSGIs in National Law

Part IV of the book contains in-depth studies of the development and current status of SSGIs in five selected Member States (Sweden, Germany, United Kingdom, Italy and the Czech Republic). As the chapter by Bauby reveals, there is no uniform understanding, let alone a coherent concept, of SSGI in the EU, It is imperative to complement the 'horizontal parts' of this book, i.e. the analysis of different areas of EU law relating to these services, with chapters focusing on the situation in specific countries. The five country studies indicate that the actual effect of EU rules on social services of general interest differs from country to country. Our choice of countries had to be selective as we could not cover all 27 Member States in detail without turning this collection into a multi-volume handbook. Our studies, therefore, supplement comparative studies with the larger sample of countries in the 'Mapping of Public Services' exercise described by Pierre Bauby in his contribution to this volume.

The country chapters in this volume can go deeper in their analysis and thus enable us to compare the developments in different countries more specifically. In

[37] *OJ* 2004 L66/1.

[38] Directive 2009/138/EC, *OJ* 2009 L335/1.

selecting our sample of countries we tried to capture different geographical regions, constitutional settings, welfare state models and different intergenerational issues, without claiming that our sample of countries is representative or that each country stands for one typical approach. When comparing the developments in the different Member States one does not only note a large degree of variety, but also some striking similarities. These include a greater reliance on service providers other than the state (or its entities) including non-profit organisations, the voluntary sector, as well as private businesses. Furthermore, the welfare state underwent fundamental changes in all five countries in recent years induced both by internal developments as well as by 'external'[39] pressure from EU law.

Caroline Wehlander and *Tom Madell* highlight the transformation of the Swedish welfare state from a 'strong state' which would invest substantially in social services and provide many of them directly through municipal institutions to a more lenient system relying more on the provision of services by private companies. This shift triggers the application of procurement law which became an important governance instrument for the provision and regulation of social services in Sweden. The authors note that this shift did not lead to a dismantling of the welfare state, but to a transformation of its instruments. In particular, local authorities remain responsible to ensure access to, and provision of, social services, but contract the provision of these services out to other—often private—entities. The needs of the recipients of social services and a competitive framework for their provision come together in the 'free choice' policy pursued recently in Sweden which allows service recipients to choose from a wider selection of service providers. This policy was also introduced in the education sector leading to an increase of independent schools operated by private companies and organisations. This in turn raised questions about the nature of the activity according to EU law: is education in this context still a non-economic service? This issue was also part of a Commission investigation into the nature of education services in Sweden. So far no formal infringement procedures seem to have followed from that inquiry.

The chapter by *Ulrich Becker* on SSGIs in Germany contains another story of the transformation of a traditional welfare state model. The Bismarckian model of the German social state traditionally based on statutory social services insurances and corporatist governance structures increasingly incorporates elements of competition and marketisation with private and commercial service providers seeking ever greater market shares. Yet, unlike other welfare state models, the German system always relied on private service providers which were integrated into the delivery of social services through the so-called 'social benefits delivery triangle.' Becker challenges the often-rehearsed view that the cooperation between public authorities and private service suppliers is only an element of recent

[39] It should be noted that EU law is an integral part of the law of each Member State which makes the distinction between 'internal' and 'external, i.e. EU influence,' somewhat arbitrary. Nevertheless, there is a difference between changes in the welfare state based on national debates and policy choices and those based on the impact of EU law.

reforms and modernisation processes. Becker stresses that reforms of the social benefits systems in Europe do not always follow from the impact of EU law, but are often based on domestic policy changes as well. Furthermore, Becker insists that the proverbial 'road to Brussels' is not a one-way street, but allows for mutual influence. The introduction of the goal of a 'social market economy' through the Treaty of Lisbon 2009 seems a clear indication of this process. The development of EU law and policies affecting social services, therefore, needs to accommodate this goal and its underlying rationale.

Another account of the transformation of a classical welfare state model is given by *Jim Davies* in his chapter on the developments in the United Kingdom. The British system, based on the social reforms of Beveridge in the 1940s, was characterised by health and social services typically provided for 'free at the point of delivery' (though needs based in many cases), financed through national or local taxes and provided by public authorities.

Jim Davies shows that the process of modernisation and private sector involvement in social services lead to the increasing characterisation of these services as economic activities and hence as SGEI according to EU law. Similar to changes described by Wehlander and Madell concerning Sweden, the introduction of greater (consumer) choice for social services in the UK leads to a transformation of the provision and organisation of these services. Jim Davies illustrates this point by using social housing as an example where a shift took place from operating large housing estates by local authorities to enabling service recipients to rent houses from the private market. While other contributions to this volume show that such a shift may raise procurement law issues, Davies is concerned with the impact of this shift on the relationship between the service recipient and the provider. That relationship seems no longer be governed by public law (and would therefore subject to judicial review based inter alia on human rights law and principles). Instead, the relationship is based on private law principles which treat the relationship like a normal commercial and contractual arrangement. This has serious consequences in the case of elderly care as aptly shown by Davies.

In conclusion, the contribution highlights once again that changes in the welfare state are often less induced by EU law and depend to a greater extent on domestic policy reforms. The results of these reforms, i.e. increased competition between service providers, may lead to a greater impact of EU law which in turn may reinforce these changes.

Francesco Costamagna's contribution on the provision of social services in Italy underlines the relevance of the combination of domestic and European influences on these services. He considers the recent federalist reforms of the Italian constitutional system as well as EU internal market law, in particular concerning public procurement, as decisive factors of the reshaping of the Italian welfare system. Costamagna points out that this system—like other Southern European systems—combines features of typical corporatist regimes with nationally centralised elements such as a national health service. He also highlights that the Italian system's capacity to deliver social services has been severely affected by the recent economic and financial crisis. One important element of the Italian system is the traditional

involvement of private, third sector institutions, typically non-governmental and non-profit entities providing social services. Like many other European systems, the Italian system is confronted with a growing influence of public procurement which is partly based on EU law and partly on changes of the domestic legal system. Interestingly, the changes of the domestic Italian law sometimes went beyond the requirements set by EU law and were in at least one case even erroneously justified with reference to EU law. Costamagna reasons that the Italian system is currently exposed to a multitude of unsettling factors. These, the author concludes, can create opportunities to enhance the efficiency of the system, but may also have devastating effects on social cohesion and citizenship in Italy.

Focusing on social services in the Czech Republic, *Kristina Koldinská* presents a picture which differs from the experience of many Western European welfare states, but which seems to bear similarities with other Central and Eastern European countries. The experience of these countries is shaped by the transformation from a centrally planned and managed social state to a modern social security system. In the course of this transformation, EU law does not seem to have played a dominant role. Regarding a possible influence of the experience of the post-communist countries on the development of the European social model, Kristina Koldinská argues that the example of these countries shows that reforms of the welfare systems may be possible within a relatively short period of time even without external pressure if there is a domestic social and political consensus. This is an important finding for the discourse in many Western European countries which sometimes perceive their welfare systems as structurally unable to reform. Another fascinating aspect which emerges from Kristina Koldinská's chapter is the impact of European integration on the development of social rights and social cohesion in Central and Eastern European countries. This concerns labour rights and anti-discrimination standards, but may also affect attitudes and policies towards hitherto socially excluded and deprived minorities. Using the example of the Roma population in the Czech Republic, Kristina Koldinská shows how EU law in the wider sense (i.e. including the European Convention on Human Rights, other Council of Europe instruments as well as the Charter of Fundamental Rights and EU legislation) can have a positive influence on the social development and well-being of members of this group. This is an important aspect of an emerging European social model with significant potentials for the transformation of traditional national social models.

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Chapter 2
Unity and Diversity of SSGIs in the European Union

Pierre Bauby

Abstract At the start of the 2000s, a new category of SGIs appeared in European debates: *social* services of general interest (SSGI). This is a new category that brings with it at least two new research questions: what services may be characterised as SSGIs and do they form a legal category to which one could apply a consistent body of rules? To address these questions, this paper, on the basis of the study 'Mapping of the Public Services' 2009–2010, discusses SSGI in the EU by considering the relationship between diversity and unity, in the context of the available empirical data, through four distinct 'approaches'.

Contents

P. Bauby (✉)
Paris 8 University, 66 rue de Rome, 75008 Paris, France
e-mail: bauby.pierre@orange.fr

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2.1 Introduction

The study 'Mapping of the Public Services in the EU and in the 27 Member States',[1] was conducted between 2009 and 2010 on the whole range of SGIs in the 27 Member States of the EU. The study provides us with an analytical grid of the European public services and their evolution since the process of Europeanization began almost 30 years ago, an evolution marked by tensions and interactions between unity and diversity. In this Chapter, the data are used specifically to consider the SSGIs, their characteristics and the challenges they raise.

On the basis of the information gathered at the time of the study 'Mapping of the Public Services', this Chapter first addresses the problematic issues of the terms and concepts that can be attributed to, and that help to define, SSGIs (Sect. 2.2). The discussion then turns to a consideration of the unity–diversity ratio (Sect. 2.3) before analysing the empirical data that we collected in four geographically diverse 'approaches' (Sect. 2.4). The Chapter then draws to a conclusion with a consideration of the final research question regarding whether it is possible to define or establish a European general framework for all SSGI (Sect. 2.5).

2.2 European Union Norms and Problems of Definition

During the consultation exercise for the Green Paper on services of general interest in 2003,[2] the actors of the social sector (local public authorities, service providers, representatives of the users) expressed a growing legal insecurity with regard to the developing bodies of European legal norms to which they were subject, taking into account the specific nature of the social services provided. They stressed that they belonged to a 'grey area', that sat, in particular, between services clearly described as 'economic' and others that could be considered as 'non-economic'. The distinction is important since the one and the other do not belong to the same body of the European rules. This was a lack of clarity that appeared to the actors of the social sector as prejudicial to the achievement of their missions.

In response, the Commission, in its White Paper of 2004,[3] proposed 'a systematic approach in order to identify and recognise the specific characteristics of social and health services of general interest and to clarify the framework in which they operate and can be modernised'. The White Paper led to several

[1] Bauby and Similie 2010.

[2] Commission, *Green Paper on Services of General Interest*, COM(2003) 270, 21 May 2003.

[3] Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, *White Paper of Services of General* Interest, COM(2004) 374, 12 May 2004.

Communications[4] and studies[5] whilst, at the same time, the Directive on services in the internal market[6] excluded most of them from its field of application and the European Parliament asked for the development of a sectoral secondary law on several occasions.[7]

The description given by the Commission in its Communication of 2006 on the implementation of the Lisbon programme[8] leaves unanswered the question of what we should understand by the term 'social services' in the European Union. In addition to health services, which are not covered by this Communication, they can be attached to the one of the two main categories:

- statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability;
- other essential services provided directly to the person. These services that play a preventive and social cohesion role consist of customised assistance to facilitate social inclusion and safeguard fundamental rights. They comprise, first of all, assistance for persons faced by personal challenges or crises (such as debt, unemployment, drug addition or family breakdown). Second, they include activities to ensure that the persons concerned are able to completely reintegrate into society (rehabilitation, language training for immigrants) and, in particular, the labour market (occupational training and reintegration). These services complement and support the role of families in caring for the youngest and oldest members of society in particular. Third, these services include activities to integrate persons with long-term health or disability problems. Fourth, they also include social housing, providing housing for disadvantaged citizens or socially less advantaged groups. Certain services can obviously include all of these four dimensions. Then, the Communication specifies in a note that 'education and training, although they are services of general interest with a

[4] Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM(2006)177, 26 April 2006; Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Accompanying the Communication on 'A Single Market for 21st Century Europe', Services of General Interest, Including Social Services of General Interest: a New European Commitment*, COM(2007)725, 20 November 2007.

[5] See in particular Hubner et al. 2008.

[6] 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.

[7] *EP, Report on the Commission White Paper on Services of General Interest*, Rapporteur: Bernhard Rapkay, 2005/2101(INI), 14 September 2006; EP, Report on Social Services of General Interest in the European Union, Rapporteur: Joel Hasse-Ferreira, 2006/2134(INI) 6 March 2007; and EP, Report on the Single Market Review: Tackling Barriers and Inefficiencies through Better Implementation and Enforcement, Rapporteur: Jacques Toubon, 2007/2024(INI), 23 July 2007; Conclusions of the Lisbon SSGI Forum of 17 September 2007.

[8] See COM(2006) 177.

clear social function, are not covered by this Communication' which leave open the question of knowing if they are SSGIs. We will return to this idea.

The Communication adds that:

> although, under Community law, social services do not constitute a legally distinct category of service within services of general interest, the list above demonstrates their special role as pillars of the European society and economy, primarily as a result of their contribution to several essential values and objectives of the Community, such as achieving a high level of employment and social protection, a high level of human health protection, equality between men and women, and economic, social and territorial cohesion. Their value is also a function of the vital nature of the needs they are intended to cover, thus guaranteeing the application of fundamental rights such as the dignity and integrity of the person.

Consequently, the Communication advances a series of 'organisational characteristics' applying to SSGIs 'they operate on the basis of the solidarity principle,[9] which is required, in particular by the non-selection of risks or the absence, on an individual basis, of equivalence between contributions and benefits; they are comprehensive and personalised integrating the response to differing needs in order to guarantee fundamental human rights and protect the most vulnerable; they are not for profit and in particular to address the most difficult situations and are often part of a historical legacy; they include the participation of voluntary workers, expression of citizenship capacity; they are strongly rooted in (local) cultural traditions; this often finds its expression in the proximity between the provider of the service and the beneficiary, enabling the taking into account of the specific needs of the latter; an asymmetric relationship between providers and beneficiaries that cannot be assimilated with a 'normal' supplier/consumer relationship and requires the participation of a financing third party'.

The Communication adds that social services constitute a booming sector and they are 'the subject of an intensive quest for quality and effectiveness'. It specifies that 'all the Member States have embarked upon modernisation of their social services to tackle the tensions between universality, quality and financial sustainability'.

Here, we consider if SSGI may constitute a specific legal category to which one could apply the same body of rules. Obviously, they all have social objectives as their outcomes and one could refer to the European concept of 'social cohesion' defined in Union primary law in the Single European Act of 1986. Yet, neither the Treaties nor the secondary law contain the expression 'social services of general interest'— nor do they give a definition of this as a subcategory of services of general interest.

With no distinct general European legislative framework applicable to SSGIs they are subject to the same legal regime as SGIs. As a consequence the distinction existing today in the primary law between SGEIs and NESGIs lead one to try to distinguish between economic and non-economic social services of general interest. The term SSGI cannot be reduced to a definition whereby 'non market services are [merely] equivalent to social services of general interest',[10] the

[9] See the European case law cited below.

[10] See, Gallo 2011, pp. 4–5.

reduction is too simplistic. As is the assertion of the Commission in 2006 according to which 'almost all services offered in the social field can be considered 'economic activities' within the meaning of Articles 43 and 49 of the EC Treaty'.[11] The public authorities and the service providers in the field of SSGI recognise the constant evolution of the CJEU's jurisprudence and, in particular, the evolution of the notion of 'economic activity' as a source of uncertainty: '[w]hilst the case law and Community legislation have endeavoured to reduce this uncertainty or clarify its impact, they cannot do away with it completely'.[12] In its communications,[13] the Commission distinguishes *within* the category of social services, the fields of social protection (compulsory and complementary), access to employment, health, social housing, teaching, education and training. The list of activities is not exhaustive and some of the categories mentioned are questionable in the light of some national approaches to the qualification service provision as one of social service, especially services regarding education.[14]

These communications from the European Commission have appeared after several years of Union jurisprudence that has brought some clarification to the economic or non-economic nature of certain social services. According to the European jurisprudence, social services are regarded as being non-economic activities concerned with the management of compulsory insurance regimes that pursue an exclusively social goal, that function according to the principle of solidarity, or that offer insurance services independent of the contributions.[15] For the CJEU, the criterion marking the non-economic character of the activity is not due to the status of the service provider, or the organisation,[16] nor the nature of the

[11] See COM(2006)177, p. 7.

[12] Ibid.

[13] COM(2006) 177; COM(2007) 725.

[14] In the questionaire of consultation addressed to Member States in 2004, the European Commission noted that 'it is clear that some… fields go beyond "social protection" in the narrow sense. But nevertheless e.g. also education and training or access to placement services could form part of the social services (e.g. vocational training, training of handicapped persons) or have similarities to social protection…'.

[15] CJEU, Case C-109/92 *Wirth* [1993] *ECR* I-6447; CJEU, Case C-355/00 *Freskot* [2003] *ECR* I-5287; CJEU, Case C-263/86 *Humbel* [1988] *ECR* 5365; CJEU, Case C-159/91 *Poucet et Pistre* [1993] *ECR* I-637; CJEU, Case C-218/00 *INAIL* [2002] *ECR* I-691, paras 43-48; CJEU, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] *ECR* I-2493, paras 51–55.

[16] CJEU, Case C-172/98 *Commission* v. *Belgium* [1999] *ECR* I-3999; CJEU, Case C-70/95 *Sodemare* [1997] *ECR* I-3395: 'Articles 52 and 58 of the Treaty do not preclude a Member State from allowing only non-profit-making private operators to participate in the running of its social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature. As Community law stands at present, a Member State may, in the exercise of the powers it retains to organise its social security system, consider that attainment of the objectives pursued by a social welfare system which, being based on the principle of solidarity, is designed as a matter of priority to assist those in need, necessarily implies that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making.' .

service.[17] It has regarded as an economic activity those regimes of voluntary insurance that function according to the principle of capitalisation, even where they are provided by not-for-profit organisations.[18] These organisations include medical departments within or without a hospital framework,[19] emergency services and the transport of patients,[20] and the placement services carried out by public employment offices.[21]

It seems necessary, however, to position the uncertainty raised here because, on the one hand where a service is described as 'non-economic', it is clear that it 'is not subject to the rules of the treaty relating to the internal market and competition'. However, if, on the other hand, the service is regarded as 'economic', it becomes subject to the norms of the internal market and competition only 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them' (Article 106 TFEU). Thus, rather than worrying about the division between economic and non-economic, the question should focus on the public authority responsible for the activity concerned that should have, as an requirement, an obligation to attempt to define clearly and precisely the 'particular mission' of the service that it entrusts to a service provider, and in what particular way that service may be obstructed 'in law or in fact' by the application of the rules of the internal market and competition.

In *BUPA*, the GC, relying on what is now Article 5(2) TEU (the principle of subsidiarity), confirms the Member States' competence to determine the nature and scope of a SGEI mission in those areas of specific action that is not within the competence of the Union, or which are based on a shared competence.[22] According to the Court:

> the national authorities were entitled to take the view that certain services were in the general interest and must be provided by means of SGEI obligations when market forces were not sufficient to ensure that they would be provide that the national authorities were entitled to take the view that certain services were in the general interest and must be provided by means of SGEI obligations when market forces were not sufficient to ensure that they would be provided.[23]

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[17] The fact that a provision falls within the field of social security or of health does not in itself lead to exclude the application of the Treaty rules. CJEU, Case C-157/99 *Smits and Peerbooms* [2001] *ECR* I-5473.

[18] CJEU, Case C-244/94 *FFSA* [1995] *ECR* I-4013, paras 17-22; CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751, paras 80–87.

[19] CJEU, Case C-157/*99 Smits and Peerbooms* [2001] *ECR* I-5473, para 53; CJEU, Joined Cases 286/82 and 26/83 *Luisi et Carbone* [1984] *ECR* 377, para 16; CJEU, Case C-159/90 *Society for the Protection of Unborn Children (IVG)* [1991] *ECR* I-4685, para 18; CJEU, Case C-368/98 *Abdon Vanbraekel* [2001] *ECR* I-5363, para 43; GC, Case T-167/04 *Asklepios Kliniken* [2007] *ECR* II-2379, paras 49–55.

[20] CJEU, Case C-475/99 *Glöckner* [2001] *ECR* I-8089, para 20.

[21] CJEU, Case C-41/90 *Höffner* [1991] *ECR* I-1979, para 21.

[22] GC, Case T-289/03 *BUPA* [2008] *ECR* II-917.

[23] Ibid. para 42.

The Court identifies that:

> the health sector falls almost exclusively within the competence of the Member States. In this sector, the Community can engage, under Article 152(1) and (5) EC, only in actions which is not legally binding, while fully respecting the responsibilities of the Member States for the organisation and provision of health services and medical care. It follows that the determination of SGEI obligations in this context also falls primarily within the competence of the Member States.[24]

Because of their precise nature, some EU norms impose on categories of SSGI a different legal regime. The Services Directive,[25] for example, provides for the exclusion from its field of application *NE*SGIs; the services of *temporary work agencies*; *healthcare services* 'whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private'[26]; and *social services* 'relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State'.[27] In addition, in this context, NESGIs constitute a category *distinct* from that of social services and the *social* attribute is not attached to healthcare services. However, no definition of *social services* is to be found in the Directive.

The study 'Mapping of the Public Services' did not have as an objective a specific analysis of SSGI or of each category of social services identified in the EU Member States. Nor was it able to assimilate the effects of the financial and economic crisis that started to impact on this sector in 2008. However, the statistical categories used[28] allow for an estimation of the weighting to be applied to certain categories of social services, healthcare and education, in terms of the numbers of employees and contribution to GDP, in each Member State and at the European level.

Table 2.1 presents the data resulting from the Mapping study and shows, on the one hand, the percentage of persons employed and, on the other hand, the contribution to GDP (added values for the network sectors, expenditure for the other activities) for those sectors identified as Public Administration and social

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[24] Ibid. para 167.

[25] Directive 2006/123/EC.

[26] Ibid. Article 2(2)(f).

[27] Ibid. Article 2(2)(j).

[28] NACE rev. 1, Section L 'Public Administration and Defence; Compulsory Social Security', Section M 'Education' (primary, secondary, higher education, adult and other education), Section N 'Health and Social Work' (including veterinary activities). Section J 'Financial Intermediation' contains '66. Insurance and Pension Funding, Except Compulsory Social Security'.

Eurostat statistics on the social protection take into in the structure of expenditure of social protection benefits in kind (in goods or services) the healthcare expenditures (direct provision and reimbursement of in-patient and out-patient healthcare, including pharmaceutical products) and social services (Social services with accommodation, assistance with carrying out daily tasks, rehabilitation, child day care, vocational training, placement services and job search assistance, etc.).

Table 2.1 Source: mapping study

Countries	Persons employed by SGI providers (in % of the total number of employees)					Expenditures or added value by SGI sector (in % of GDP)				
	Public Adm %	Education %	Health %	Total 3 sectors %	Total SGI %	Public Adm %	Education %	Health %	Expenditures 3 sectors	Total SGI %
Austria	6.4	5.8	8.7	20.9	28.2	4.3	5.1	10.1	19.6	25.6
Belgium	9.9	8.8	12.4	31.1	40.0	3.6	5.6	10.3	19.4	24.9
Bulgaria	7.2	6.9	5.3	19.4	27,2	7.9	11.2	7.2	26.3	35.5
Cyprus	8.4	6.9	4.0	19.3	?	5.6	7.9	6.3	19.7	25.7
Czech Republic	6.8	6.0	6.8	19.6	27.0	6.6	7.6	6.9	21.1	29.5
Germany	7.8	5.8	11.4	25.0	31.8	4.2	4.3	10.6	19.1	24.7
Denmark	6.0	7.6	17.5	31.1	39.9	8.7	5.8	9.6	24.1	29.2
Estonia	6.0	9.1	5.8	20.9	25.9	6.6	7.6	5.1	19.3	27.0
Spain	6.2	5.6	6.0	17.8	22.7	5.0	4.7	8.4	18.1	22.8
Finland	5.6	6.9	15.0	27.5	35.1	9.1	5.3	8.2	22.5	27.7
France	9.6	7.1	12.2	28.9	37.4	5.1	5.0	11.0	21.2	27.0
Greece	8,6	7.4	5.1	21.1	?	4.8	?	9.5	?	18.5
Hungary	7.6	8.2	6.9	22.7	30.5	7.0	9.1	8.3	24.4	30.6
Ireland	5.1	6.6	10.0	21.7	26.2	5.1	4.0	7.1	16.2	19.1
Italy	6.3	6.9	6.8	20.0	25.2	5.2	4.6	9.0	18.8	23.5
Lithuania	5.1	8.8	7.1	21.0	27.4	5.9	9.0	6.2	21.1	27.3
Latvia	8.1	8.1	4.7	20.9	32.1	6.8	9.0		?	22.6
Luxembourg	5.4	4.7	7.7	17.8	26.6	3.1	3.0	7.3	13.4	18.7
Malta	9.4	8.1	7.6	25.1	?	5.6			?	?
Netherlands	6.5	6.4	15.4	28.3	39.6	7.2	5.1	9.7	22.0	27.9
Poland	6.3	7.8	6.0	20.1	25.7	6.0	9.1	6.2	21.3	27.9
Portugal	6.9	6.2	6.4	19.5	23.6	4.1	6.5	10.2	20.7	26.1

(continued)

Table 2.1 (continued)

Countries	Persons employed by SGI providers (in % of the total number of employees)					Expenditures or added value by SGI sector (in % of GDP)				
	Public Adm %	Education %	Health %	Total 3 sectors %	Total SGI %	Public Adm %	Education %	Health %	Expenditures 3 sectors	Total SGI %
Romania	5.4	4.4	4.1	13.9	181	6.4	?	4.5	10.9	16.6
Sweden	5.7	11.1	16.1	32.9	40.1	9.6	5.7	9.2	24.5	29.7
Slovenia	6.1	7.7	6.3	20.1	25.8	6.2	7.7	8.3	22.2	27.7
Slovakia	7.0	7.2	6.7	20.9	27.3	5.7	6.9	9.1	21.7	30.8
United Kingdom	7.0	7.2	6.7	20.9	33.7	11.8	4.7	8.5	25.0	32.1
Total EU	7.2	7.0	9.6	23.8	30.1	6.4	4.9	9.4	20.7	26.4

Source Mapping of the Public Services, 2010

security, Health and social services, and Education and that are regarded here as SSGI. The figures, mostly drawn from Eurostat analysis, are global and relate to the year 2006, the most recent datasets available at the time of the study. They do not specifically distinguish *social services* from within the whole spectrum of each statistical category, nor are social housing or complementary social security services included as they are not subject to data collection.[29] The data presented should be understood in terms of its comparative value, as between the Member States, given the uncertainty and incompleteness inherent in the source datasets. The Table does however show both the importance of SSGI in all EU Member States and a broad diversity between the Member States that reflects, for example, different levels of prosperity, social protection systems, unemployment rates and demographical trends.

SGIs represent more than 30 % of employment in the 27 Member States, with nearly 80 % of that accounted for in health and the social services (9.6 % of total employment) whilst public administration and education each account for more than 7 %. Five countries are clearly above the average: Sweden, Belgium, Denmark, the Netherlands (particularly in the health and social services sectors) and France. One finds the data somewhat different with regard to the national contribution to GDP, primarily because certain of the more recent Member States of Central and Eastern Europe the contribution of the education sector is particularly high (Bulgaria, Hungary, Poland, Lithuania and Latvia).

For a more detailed representation of the importance of the social services in the Member States, we can further consider the indicators of social protection and health. In 2006, Eurostat data,[30] indicates that the gross average expenditure on social protection in the EU 27 accounted for 26.9 % of GDP of which, 38.5 % was attributable to old age benefits, 28.1 % attributable to sickness benefits, 7.7 % attributable to family and child care benefits, 7.2 % attributable to disability benefit, 5.9 % attributable to survivors, 5.4 % attributable to unemployment benefit, 2.2 % attributable to housing benefit and 1.3 % attributable to social exclusion. In 2006:

- 7 Member States, France 31.1 %, Sweden 30.7 %, Belgium 30.1 %, Netherlands 29.3 %, Denmark 29.1 %, Germany 28.7 % and Austria 28.5 % devote more than 28.5 % of GDP expenditure on social protection.

[29] They are part of the Section J 'Financial Intermediation', subdivision 66 « Insurance and pension funding, except compulsory social security ».

[30] The European System of Integrated Social Protection Statistics (ESSPROS). Available at: http://epp.eurostat.ec.europa.eu/portal/page/portal/social_protection/introduction

Expenditure on social protection contain: social benefits, which consist of transfers, in cash or in kind, to households and individuals to relieve them of the burden of a defined set of risks or needs; administration costs, which represent the costs charged to the scheme for its management and administration; other expenditure, which consist of miscellaneous expenditure by social protection schemes.

- In contrast, 10 of the new 12 Member States from the 2004 and 2006 enlargements, together with Ireland, devote less than 20 % of GDP on social protection.

In terms of expenditure per capita purchasing power standard (PPS) the differences are more pronounced.[31] Luxembourg is identified with the highest expenditure (13.458 PPS per capita), followed by the Netherlands and Sweden (around 9.000 PPS per capita). With the lowest levels of GDP attributed to social protection, Romania and Bulgaria had the lowest expenditure (respectively 1.277 PPS and 1294 PPS per capita), followed by the Baltic countries (all with less than 2.000 PPS per capita), more than three times less than the EU 27 average (6.349 PPS per capita).

Based on the 2006 data, an average of only 35.4 % of all benefits expenditure in the EU 27 represented social benefits paid in kind (goods and/or services). However, large differences exist between those Member States with less than 20 % of expenditure made in kind, for example Poland, and those Member States with more than 40 % of expenditure made in kind, for example, Ireland, Sweden, the United Kingdom and Denmark. In only three countries (Sweden, Denmark and Finland) the level of the social benefits paid in kind for healthcare was similar with those paid in kind for social services (assistance, rehabilitation, child day care, vocational training, placement services, etc.). In 2006, the lowest expenditure in kind for social services, other than for healthcare, is found in Poland, followed by Romania, Italy and Estonia.

With regard to health services, a recent study[32] shows that in 2006, the countries best endowed with hospital beds had seven or eight beds for every 1,000 inhabitants (Germany, Austria, the Czech Republic, Hungary, Lithuania, Latvia and Finland), whereas the United Kingdom and the countries of the Southern Europe (i.e. Portugal, Spain, Italy and Greece) had low health facility levels per inhabitant and more marked regional differences (five hospital beds for every 1,000 inhabitants for the areas best equipped, two or three in other areas). However, the authors of the study suggest that the density of social infrastructure is not the best indicator of the provision for social services, since the satisfaction of the user is linked to the quality of the service provided.

Expenditure on social protection (as % of GDP)[a]

Countries	EC 6 1962	EC 9 1973	EC 10 1981	EC 12 1986	EC 15 1995	EC 15 2000	EC 25 2004	EU 27 2006
Total EC/EU	15.3	19.8	24.4	24.2	27.1	26.2	27.2	26.9
Belgium	14.6	19.1	26.9	26.7	26.6	25.3	29.3	30.1

(continued)

[31] Eurostat, Total expenditure on social protection per head of population. PPS. Available at:http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tps00100

[32] DEAS, CIRIEC International, CSIL and PPMI, Study for the European Parliament, 2010.

(continied)

Expenditure on social protection (as % of GDP)[a]

Countries	EC 6 1962	EC 9 1973	EC 10 1981	EC 12 1986	EC 15 1995	EC 15 2000	EC 25 2004	EU 27 2006
Germany[b]	16.5	22.2	26.3	25.5	27.8	28.5	29.8	28.7
France	15.4	18.5	25.2	27.0	29,0	28,3	31.3	31.1
Italy	13.4	19.3	20.1	21.3	23.9	24.3	26	26.6
Luxembourg	14.9	16.9	27.6	22.4	22.9	20.2	22.2	20.4
Netherlands	13.2	22.9	29.9	30.2	29.2	25.7	28.3	29.3
Denmark		21.8	28.3	25.2	31.3	28.0	30.7	29.1
Ireland		15.3	20.7	22.5	18.1	13.4	18.2	18.2
United Kingdom		16.6	22.7	22.9	26.9	25.8	25.9	26.4
Greece			13.9	18.5	21.5	25.5	23.5	24.2
Spain				18.2	21.4	19.6	20.7	20.9
Portugal				13.0	18.5	20.2	24.7	25.4
Austria					28.7	27.9	29.3	28.5
Finland					30.9	24.4	26.6	26.7
Sweden					35.0	31.7	32	30.7
Cyprus							18.1	18.4
Czech Republic							19.3	18.7
Estonia							13	12.4
Hungary							20.8	22.3
Lithuania							13.3	13.2
Latvia							12.9	12.2
Malta							18.6	18.1
Poland							20.1	19.2
Slovenia							23.4	22.8
Slovakia							17.2	15.9
Bulgaria								15
Romania								14

[a] Eurostat, cf. Bento et al. 2003; for 2004 and 2006, Puglia 2009.
[b] Up to September 1990: West-Germany, since 3 October 1990: Germany

2.3 Diversity and Unity of SSGI in the European Union

The 'Mapping' study showed that the use of Union concepts, in particular the term SSGI (and even less the categories of NESSGI and SSGEI), are not integrated into the law of the Member States, nor are they common in the national vocabulary. In some countries, some of the European concepts (in particular SGI, SGEI or public service obligations) may have entered into the national legislation through EU law but still play a very minor role compared to national ones (for example, in Finland, France, Ireland, Portugal, Romania). In others, there also seems no generally agreed translation available of European terms (for example, in the case of Slovakia or Hungary).

We should not confuse the category *social services*, such as it exists in the Member States, with that of 'social services of general interest', nor should we equate all 'social services' with the provision of a public service mission. Few Member States seem to lack a particular conceptual category for social services, the term 'public service' being the term of reference for services having a social nature (for example, in Slovenia). In many Member States, the term 'social services' is applied at the legislative level and/or in practice but often without any specific legal conceptualisation or definition. Across the Member States several terms are used: for example, in Cyprus, 'services of social welfare' applies to services fulfilling goals of social cohesion or the more general concept of social protection, related to the notion of the Welfare State; in France, the terms 'social services' and 'socio-medical services' are used in the legislation; in Greece, the terms 'social care' and 'social welfare' are both often used; in Hungary the term 'social public services' is sometimes understood to refer only to 'other essential services provided directly to the person' and 'human public services'.

The expression 'social services' may appear to have a uniform presence in the terminology of the Member States but the national interpretation and definition of the expression carries different meanings:

- in Finnish legislation 'social services' relates to all social actions other than the allocation of subsidies[33];
- in the Italian legal order, there was no distinction between industrial or commercial services and social services until the end of the 1980s when the notion of social services became defined in terms of any action corresponding to the constitutional aims of physical and mental welfare development of the population, or to activities concerning the supply of services—free or with fee—that help to satisfy specific needs and difficulties of life, excepting those provisions guaranteed through the welfare and health systems, and by the administration of justice (Article 128 of D.Lgs. n° 112/1998). According to the Law on Social Services as it now stands, 'Social services shall be the services aimed at providing assistance to a person (family) who, by reason of his age, disability, social problems, partially or completely lacks, has not acquired or has lost the abilities or possibilities to independently care for his private (family) life and to participate in society';
- Lithuanian Law defines two kinds of social services: (1) social services of general interest (*Visuotinės svarbos socialinės paslaugos*—literal translation) (information, counselling, mediation and representation, social and cultural services, organisation of transportation, organisation of catering, provision of necessary clothes and footwear as well as other services) and (2) special social services (social attendance and social care). Special social services are provided when social services of general interest are insufficient to provide for an individual to meet the care needs of his family or to participate in society;

[33] Article 17 of the Law No.1982/710.

– in Latvia, social services are generally defined by the Law on Social Services and Social Assistance (approved on 31 October 2002) as services of social care, social rehabilitation, professional rehabilitation and social work;
– in the Czech Republic, social services are defined as 'An activity providing support to socially disadvantaged people in social integration and protection against social exclusion with the aim of enabling them to integrate into regular life of society and use its systems in a way which is normal for other people (e.g. housing, schooling, healthcare, employment services, etc.). Social services is a public service'.[34]

According to the various interpretations applied in the Member States, the definition of 'social services' appears very diverse. In some countries, for example in Lithuania, services such as counselling, mediation and representation, farming services are considered within the framework of social services. In the UK 'social services' are limited to care for the elderly, the disabled and vulnerable children. They do not include social housing or education or health, all considered as SSGI in European terminology. According to the German definition, educational and training measures are not social services as the State's educational mandate is not directly derived from the principle of the social welfare state, but from the State's supervision of the school system and of the institutional guarantee applicable to institutes of higher education (Article 7 and 5 of the Basic Law).

According to a survey conducted on the definition of terms such as 'social services of general interest' in some EU Member States, 'it became first of all clear that a concrete definition of the term "social services of general interest" does not seem to exist in most Member States and local territories. Moreover, the term appears to be rarely used. Public and private actors often simply speak of "social services".[35]

The categorisation of beneficiaries also varies between the Member States. According to the Swedish law, a person is not entitled to social assistance if he/she is able to meet his/her own needs or get them met through other means and a series of conditions exist for the financial assistance. There is a tension between universal coverage and the definition of specific categories of beneficiaires. Thus, in the social housing sector, whilst the European Commission considers it is only addressed to 'disadvantaged citizens or socially less advantaged groups',", some Member States (such as the Netherlands or France) promoted a more general approach (in France, to ensure social mix/*mixité sociale*). Each national construction has a distinctive approach anchored in its own history, tradition, social and political power struggles, institutions (centralisation or de-centralisation, separation of powers, etc.).

At the same time, all the European countries give considerable attention to social services in the same fields and/or sectors. They all recognise the social rights of each inhabitant, set up social protection systems, establish institutions and

[34] Ministry of Labour and Social Affairs, Standards for Quality in Social Services, 2002, p. 23. Avaiable at: http://www.mpsv.cz/files/clanky/2057/standards.pdf.

[35] REVES 2009, p. 2.

public services or services of general interest to guarantee the respect of these rights. The references in the European Treaties to services of general interest as 'common values of the European Union', or to the 'social market economy' find here their full meaning. Even if each Member State has, in its history, built its own 'social model', there is also a 'European social model', which is characterised by solidarity and socialisation, the collective assumption of responsibility within the fields essential for life. Thus, as the European Commission underlines,[36] that although social services are organised very differently in the Member States, certain general aspects of a modernisation process can be seen:

- the introduction of benchmarking methods, quality assurance and the involvement of users in administration,
- decentralisation of the organisation of these services to local or regional level,
- 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,
- the development of public–private partnerships and use of other forms of funding to complement public funding.

This general modernisation process is introducing a more competitive environment that takes into account the special needs of each person and creates a favourable climate for a 'social economy', marked by a recognition of the importance of non-for-profit providers, but also confronted with the requirement to embrace the effectiveness and transparency of private sector provision.

As underlined in EU case law (*Poucet and Pistre* and *Kattner Stahlbau*), 'EU law does not detract from the powers of the Member States to organize their social security systems'. In a judgment of 1987, concerning the effect of the social objectives of the Treaty (now, in substance, Article 3 TEU) the Court appreciates that:

> the promotion of an accelerated raising of the standard of living, in particular, as one of the aims which inspired the creation of the European Economic Community and which, owing to its general terms and its systematic dependence on the establishment of the common market and progressive approximation of economic policies, cannot impose legal obligations on Member States or confer rights on individuals.[37]

The Court, in this case made reference to the 'objectives of social policy laid down in Article 117 [EEC]' that were 'in the nature of a programme'.[38]

Article 118 of the Treaty of Rome in 1957 provided the historical platform whereby, 'without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close co-operation between Member States in the social field, particularly in matters relating to: employment; labour law and working conditions; basic and advanced

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[36] COM(2006) 177.

[37] CJEU, Case 126/86, *Fernando Zaera* v. *Institut Nacional de la Seguridad Social and Tesorería General de la Seguridad Social* [1987] *ECR* 3697, para 11.

[38] Ibid. para 14.

vocational training; social security; prevention of occupational accident, and diseases; occupational hygiene; the right of association, and collective bargaining between employers and workers'. It was a platform that allowed for a developing co-ordination of national social security systems within the Union since the 1970s[39] and the adoption of national social security measures necessary to facilitate freedom of movement for workers to ensure that social security benefits are not lost when workers move from one Member State to another.

The aim of achieving a high level of social protection and healthcare become a policy initiative with the Treaty of Maastricht 1993[40] and, with the Treaty Amsterdam an objective of the Union.[41] The Treaty of Amsterdam also refers explicitly to the European Social Charter of 1961 and the Charter of Fundamental Social Rights of Workers of 1989. The Treaty of Nice amended the Social Chapter of the EC Treaty by adding 'the modernisation of social protection systems' to the list of areas where the Council may adopt measures designed to encourage cooperation between Member States.

With ongoing reform, the Lisbon European Council of March 2000 endowed the EU with the open method of coordination (OMC) to fulfil, common objectives agreed by all Member States, including, in the area of social protection, an objective that has become established as one of the pillars of the Lisbon Strategy. According to the European Council, 'the European social model, characterised in particular by systems that offer a high level of social protection, by the importance of the social dialogue and by services of general interest covering activities vital for social cohesion, is today based, beyond the diversity of the Member States' social systems, on a common core of values'.[42]

According to the Lisbon Treaty, in force since 1 December 2009, the EU:

> shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.[43]

Whilst the shared competences between the Union and the Member States applies to the social policy,[44] the Union has competence to ensure coordination of

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[39] Council Regulation No. 1408/71 of 14 June 1971 on the Application of Social Security Schemes to Employed Persons, to Self-Employed Persons and to Members of their Families Moving within the Community, *OJ* 1971 L 149/2 and Council Regulations No. 574/72 of 21 March 1972 Laying Down the Procedure for Implementing Regulation No. 1408/71 on the Application of Social Security Schemes to Employed Persons, to Self-Employed Persons and to Their Families Moving within the Community, *OJ* 1972 L 74/1.

[40] The Protocol on Social Policy and Article 136 EC [now Article 151 TFEU] stating for the objective of a 'proper social protection'.

[41] According to Article 2 EC, one of the Community's tasks is to promote 'a high level … of social protection'.

[42] Council, Presidency Conclusions, Nice European Council 7-9 December 2000, SN 400/00, Annex I European Social Agenda.

[43] Article 3(3) TEU.

[44] Article 4(2)(b) TFEU.

the employment policies of the Member States[45] and with regard to the protection and improvement of human health the 'Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States'.[46] Also, the Treaty requires that:

> in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.[47]

According to Article 151 TFEU the:

> Union and the Member States, having in mind fundamental social rights…shall have as their objectives…proper social protection…and the combating of exclusion…To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union's economy. They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems…

Ongoing Treaty revisions have gradually extending Union competencies with regard to social services. Article 48 TFEU provides for the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to adopt measures in the field of social security as are necessary to provide freedom of movement for workers. On a broader front, measures concerning social security or social protection may be adopted in reinforcement of the right of Union *citizens* to the free movement provisions.[48] A dividing line in this evolving framework of shared competence is however highlighted in Article 153 TFEU, where, with a reference to the objectives of the social policy set out in Article 151 TFEU provides that 'the Union shall support and complement the activities of the Member States in…social security and social protection of workers'.[49] However, the Treaty further provides that 'the provisions…shall not affect the right of Member States to define the fundamental principles of *their* social security systems and must not significantly affect the financial equilibrium thereof, shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties'.[50]

With the coming into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the EU gained the same legal status as the Treaties. Amongst the provisions of the Charter, there is explicit recognition of Union citizens' entitlement to national 'social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case

[45] Article 5(3) TFEU.

[46] Article 6(a) TFEU.

[47] Article 9 TFEU.

[48] Article 21(3) TFEU.

[49] Article 153(1)(c) TFEU.

[50] Article 153(4) TFEU [emphasis added].

of loss of employment…[entitlement] to social security benefits and social advantages…[and, in] order to combat social exclusion and poverty… the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.'[51] In Article 35 of the Charter, the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices is recognised, together with an undertaking that a:

> high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities'. For citizens with disabilities, the Charter also endorses, in Article 26, a Union recognition and respect for 'the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

2.4 Geography and the Four Approaches

Empirical work undertaken within the last few years,[52] as in the study 'Mapping of the Public Services', show that social services in the Member States have experienced important changes in relation to demographical trends, to new requirements for adaptation to meet the needs of individuals, and in relation to quality expectations: all within a changing context marked by an increasing role for local authorities and private initiatives.

The conceptual construct of social services in the Union is understood or applied in different ways in the different Member States. According to their institutional structures, welfare traditions or stakeholders awareness, there is a variable definition of SSGI within different institutional settings between the Member States, and on the sub national levels, within which social service provision is operating.[53]

There is no attempt here to establish an EU typology of SSGI by gathering them into large categories of 'models' from the 27 Member States. If 'national models' of reference for social services could be admitted, it is clear that 25 years of committed reforms have now largely destabilised former references and make current models more complex. The combination of reciprocal national influences and the process of Europeanization (bringing with it the phenomenon of hybridization) is current and explains the lack of previously understood paradigms. What this Chapter does offer is a brief analysis of four, essentially geographical,

[51] Article 34 CFR (Social security and social assistance).

[52] See in particular Hubner et al. 2010; DEAS, CIRIEC International, CSIL and PPMI, Study for the European Parliament, 2010; REVES 2010.

[53] Hubner et al. 2010.

approaches for the organisation of social services, on the basis of some particularly significant examples.

2.4.1 Northern Europe and Local Socialisations

Social services, in their development and form constitute an important and specific part of the Swedish Welfare State.[54] The conception and the importance attached to social services are probably the most distinctive elements of the Swedish model. They are largely universal (according to the needs, independent of resources) and are strongly subsidised, in order to guarantee the same access and the same quality of services to the entire population. Compared to other countries, Sweden is also characterised by the fact that expenditure in the field of social protection remains more largely directed towards such services.

In Sweden, the Constitution mentions that the State is responsible for the well being of its citizens. Local administration has a long tradition in Sweden and it is responsible for a significant proportion of public services. The principle of local self-government is one of the fundamental principles of the Swedish democratic system and forms the basis of activities undertaken by municipalities.[55] Social service provision is primarily the responsibility of the local authorities and encompasses financial allowances or material support for people who need special assistance, for vulnerable groups and care services for elderly (social and healthcare) and for the disabled. The mandatory tasks of municipalities in the social fields include, in particular, child-care, schools, elderly care,[56] and long-term healthcare. The county councils are responsible for providing healthcare (hospitals), dental services and mental healthcare. There are no hierarchical conflicts of power between the counties and the communes,[57] as each one holds responsibility for different, specific, activities. In 2005, about 54.1 % of the local public sector budget was apportioned to health and social services.[58]

Municipalities and county councils are free to decide the legal forms in which services may be organised (direct management, municipal companies, private

[54] A 'service State' as opposed to 'transfer states' that offer mainly cash benefits. Compared to France, for example, in 1990, about one-third of social spending in Sweden were devoted to services contrary to a bit more of a ninth only in France (Gøsta Esping-Andersen, *op.cit.*, p. 85).

[55] Madell 2009.

[56] A new provision of the Social Services Act, in force since 1 January 2011, stipulates the 'dignified life within elderly care' (*Värdigt liv i äldreomsorgen*) to be provided by social services, to guarantee an appropriate response according to the needs and requirements of every individual and by taking into consideration the various cultural, ethical and other particular conditions associated with the person's identity.

[57] The size of the municipalities is very different (from 2.800 to 740.000 inhabitants, on average 15.000 inhabitants).

[58] Hoorens 2008, p. 671.

entrepreneurs under contract, co-operative companies, associations and individuals). Where, since the early 1990s, municipalities have been turning to the private sector for the provision of some services, social services are still mainly provided by the public sector. Some provision exists today through the contracting out of service provision to several providers in order to introduce user choice (without the privatisation of the services' funding). Whether provided by public or private operators, municipalities and county councils are considered to be the responsible authorities. Financing is based on the principle of solidarity such that services are provided free or at a limited cost for individual, to ensure equal access and equal standards for all inhabitants. Health and medical care services are mainly provided by the public sector and mainly publicly funded.

A new law (Act on System of Choice in the Public Sector 2008:962[59]), entering into force on 1 January 2009, reinforces the system of choice and competition in health and social services. It applies when a public authority opens up some activities to competitive contracting (obligatory for primary care conducted by county councils but voluntary for municipalities; it also concerns the National Public Employment Service). With such an approach to procurement, the municipality sets a fixed level of quality and price and thus operators are encouraged to compete based on the highest quality instead of the lowest price. The funding system continues to be tax-based but the financing flows to the provider chosen by the user. With regard to some labour-market activities (e.g. for immigrants), the system of choice is mandatory since 1 May 2010. The system of choice is supervised by the National Competition Authority.[60]

The Swedish welfare system also provides for the right to decent housing for all citizens as a policy choice to stimulate integration and avoid segregation. In 2006, some 22 % of all households in Sweden were provided by either municipally owned, non-for-profit housing companies, or by private housing companies.

Voluntary organisations (charitable, church organisations etc.), play only a minor role in Swedish social services provision.

2.4.2 *Federal and Regionalised States*

In Germany, SSGIs are the responsibility of the *Länder*, but are operated to a large degree by local authorities and by independent welfare organisations (in particular charitable organisations).[61]

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[59] Available at: http://www.notisum.se/rnp/sls/lag/20080962.htm

[60] The list of service contracts also includes rail and water transport services, investigation and security services, education and vocational education services, etc. Available at: http://www.kkv.se/upload/Filer/ENG/Publications/System_of_Choice.pdf.

[61] At the origins of the formal recognition of the role of these organisations in the provision of social services, according to the 'subsidiarity principle' the state should get engaged in these services only if the families and the 'charitable' organisations fail.

According to Article 28 of the Basic Law, for protecting the autonomy of local authorities, the municipalities have the right to determine the organisation and financing of services. Municipalities, cities and rural districts are active in the field of child and youth assistance, basic security for unemployed persons, social assistance and assistance for elderly, disabled persons and persons at risk, hospitals, long-term care facilities and kinder gardens. Hospital health services are typically the responsibility of local administrations but regional specialised university hospitals also exist.

The charitable activity (in particular of the Churches and their charitable associations) is constitutionally protected (Article 4 and Article 140 of the Basic Law, Article 137 of the Weimar Constitution [WRV]) and is concerned with a broad spectrum of social services: health, long-term care, family, youth, elderly care, children and disabled persons. Unlike the Scandinavian model, in Germany, the not-for-profit sector has traditionally played a dominant role in the provision of social services where the responsibility of the local authorities has been less comprehensive.[62]

New Public Management reforms have seen an increase in the number of private operators in the field of social services where, particularly in the hospital sector, the provision of supply from the public sector has been reduced. A significant number of hospitals are owned by churches or belong to non-profit organisations although, in the context of budget deficits, sectoral restructuring policies, in particular of financing systems, has seen the privatisation of a growing number of hitherto public hospitals. Private companies have also begun to enter the health market and there is a trend for public hospitals to be taken over by private companies. Childcare services and elderly care fall under the voluntary competency of municipalities and are mostly provided for by public institutions although the private sector provision of elderly care is increasing. In social housing, partnership between private companies and charity organisation plays an important role.

The Bismarkian social insurance system, originating in Germany at the end of the nineteenth century, provided for health insurance and obligatory retirement, it established a system of welfare for workers having low incomes that were primarily financed through employers' and employees social security contributions. The main principles of the Bismarkian system of horizontal redistribution and benefits both dependent on and related to past contributions or earnings have since been incorporated in several European countries. Nevertheless, in comparison with the universalistic egalitarian ideals that later come to define the United Kingdom's Beveridge plan or the Scandinavian model, the early architects of Bismarkian social policy were 'authoritarian, étatist, and corporativistic'.[63] Today the welfare states that had their origins based on the Bismarkian model seem to retain more of a social insurance orientation than the Scandinavian countries. On the other hand, the provision of social services through private non-for-profit actors is a particular important feature of the actual German system.

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[62] Wollmann and Marcou 2010.

[63] Esping-Andersen 1996, p. 66.

2.4.3 Centralised and Unitary States

France represents the typical example of a centralised unitary state in which social services were traditionally defined by the State with reference to the basic principles of solidarity and equality even if their management was often decentralised, in particular, to the departmental level of administration (since the Revolution of 1789–1799 France has been divided in 100 departments). Responsibility for public services was traditionally assumed by the State or local communities whilst some sectors, such as water, gas, social and health services,[64] and local transport, have seen a modernisation of service provision throughout the twentieth century that has entailed a broader recognition of the involvement of private sector service providers and a diversification of delegation procedures, whilst preserving the essential role of public actors.

The large fields of social policy are compulsory social security (basic and complementary), complementary social protection (optional), health and medico-social actions, social housing and a series of personal services (for children, disabled people, elderly people, people in need, etc.). The system of 'national solidarity' was developed as a general regime for health and social security. In the field of social security, it was only in 1988 that the 'Minimum Revenue for Inclusion' (RMI, *Revenu Minimum d'Insertion*) was introduced; until then the 'excluded' people were not covered, the general social security schemes being restricted to an employment-based coverage that reflected the traditional role of the family and of the voluntary and local initiatives in the social protection. The RMI was subject to frequent reform and procedural change. On 1 June 2009 a new instrument came into force, the revenue for active solidarity (RSA, *revenu de solidarité active*), which combines the approach of the old RMI, granted to unemployed people, with a welfare benefit designed to support those on low incomes (RSA 'activity'). Recently, new proposals have been launched by the political majority concerning, in particular, the role and funding of the RSA role that are questioning the obligation placed on RSA recipients to realise between five and ten working hours of social service per week.

In France, the process of decentralisation (of the Central state towards the territorial collectivities—Regions, Departments, Communes) launched at the beginning of the 1980s had important implications in the field of social and medico-social welfare provision. In particular Law n° 2004–809 of 13 August 2004, relating to local freedoms and responsibilities,[65] which reinforced the role of the departments with regard to social welfare. Now, the competences of the State for the organisation and the provision of the social and medico-social actions

[64] The French doctrine and jurisprudence do not distinguish the category of social public services because traditionally they were organised according to administrative law procedures. Nowadays, the terms 'social services/*services sociaux*' and 'socio-medical services/*services sociaux-médicaux'* are used in the French legislation. See Bauby 2011a, b, p. 114.

[65] Available at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000804607&dateTexte

(allowances to disabled adults, social rehabilitation and lodging centres) and the design of the national housing policy are shared in, particular with the departments, as regards the organisation of infant maternal protection, some social security benefits; and the financing, assistance and rental of housing equipment. The regions are concerned in particular with the provision of hospital public services, the high schools' infrastructure and the financing of actions concerning housing and habitat. The communes have responsibility for children's infrastructure services (cribs buildings and recreation centres), and optional social services that embrace, the financing, infrastructure and assistance for housing.

If decentralisation was aimed at improving the provision of social services by organising it on a level closer to the users it also increased the financial burden for local communities which, as a consequence of State debt and in the context of the current broader economic crisis, have led to important problems for financing. On 20 April 2011, set within the framework of a conflict between the general councils (departmental level) and the State with regard to compensation for the transfer of competence, the Council of State began legal proceedings in the Constitutional Council concerning, as a priority, the constitutional questions relating to the financing of the principal welfare benefits of solidarity.

To some extent, French decentralisation of social services responsibilities has consisted of entrusting local communities with the management of the social aspects of the great economic and societal welfare transfers related to European integration and globalisation, whereas the Central State preserved for itself the main powers of orientation and macro-economic control.[66] Private operators play an important role in the provision of social services whilst, at the same time, not-for-profit associations provide a whole series of social services to the user in a public/private hybrid of service provision (in health, elderly homes, etc.). Particularly, in the field of health, the public institutions together with private or not-for-profit associations established under the law of 1 July 1901 on associations as mutual organisations or foundations take part in the delivery of hospital public services.[67] Private commercial establishments (associations, foundations, companies) also offer healthcare services. In 2008, public hospitals represented 64,5 % of the total number of beds.[68] The healthcare institutions are in general financed by the social security budget, refunding the cost of care of patients on the basis of the principle of the free choice of the establishment by the patient. A new law reforming the regional healthcare system and hospital organisation in relation to patient care came into effect in July 2009.[69] The four parts of this new law concern

[66] See Bauby 1998.

[67] In France, hospital services accounted in 2006 for almost half of the health expenditure in France.

[68] Direction de la recherche, des études, de l'évaluation et des statistiques (DREES), *Le panorama des établissements de santé. Édition 2010,* 2011.

[69] *Loi No. 2009-879 portant réforme de l'hôpital et relative aux patients, à la santé et aux territories.* Available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020879475&categorieLien=id.

hospitals, improving access to healthcare, prevention of ill health and the regional organisation of the healthcare system. The new established regional health agencies—*Agences régionales de santé*—are concerned with all regional healthcare services, including medical care, medical and social welfare and prevention. This law also consecrates the category of 'private health establishments of general interest' (*établissements de santé privés d'intérêt collectif*), private establishments with no commercial purpose that participate to health public service such as defined by law.[70]

Many services which are not dealt with by public authorities or the market concerning that section of the population at risk, in serious social difficulty or at with the loss of their independence (disabled persons, elderly, homeless, etc.) are provided for by social and medico-social structures mainly managed by not-for-profit organisations (Code of the social action and families), including volunteers. The private commercial operators are particularly active in the urban and suburban areas. These services are financed by public authorities and the social security offices and/or by contributions, donations, legacies or directly by users.

In the area of low-cost social housing, a 'service of general interest' defined by Article L411-2 of the Code of construction and habitat has as its objective the construction, acquisition, modernisation, attribution, management and transfer of rental residences at rents appropriate for people whose incomes are below the level at which they could afford the maximum rental ceilings fixed by the administrative authority for rental residences. The legal framework extends to people with intermediate income providing for access to property where their income is lower than the fixed maximum rental ceilings, and to the management or acquisition of property for resale in joint ownership or under a plan of protection.

2.4.4 Central and East European Countries

During the totalitarian regime in the countries of the Central and Eastern Europe the State was conceived of as the sole instrument required to meet the needs of the population by directly organising the production and distribution of services. As in other areas, social policy was statist and hierarchical. Political ideology did not acknowledge unemployment or social problems such as poverty or homelessness. Basic social services for childcare, the disabled, elderly people, and health was subject to state provision.

After 1990, these countries were faced with new challenges of unemployment, developing social inequality and poverty, economic down turn and change, financial deficit and new demographical trends. The available data shows that these new Member States are among the lowest spenders on social protection. Amongst these

[70] See in particular the public service mission defined by Article L6112-1 of *Code de la santé publique*.

new Eastern Member States, in 2006, Slovenia spent the most on social protection but still less than the EU 27 average. Furthermore, in the context of the decentralisation process' developed in these countries after 1990, local expenditures on social protection remain much less important than in other EU Member States (between 13.3 % of GDP in Lithuania, 13.1 in Romania and 3.2 in Slovakia). However, with the exception of Slovakia, the share of the local public sector expenditure on social protection in these new Member States is somewhat higher that in some of the EU southern countries: Portugal (2.3 % of GDP), Luxembourg (4.0 % of GDP), Italy (4,6 % of GDP), and Greece (5.5 % of GDP).[71]

Slovenia, as one of the smallest Member States of the EU, and a country that from the end of the World War II until June 1991 formed part of the Federal Republic of Yugoslavia. In its recent history as an independent state Slovenia has undergone a complex transition, from a socialist to a market economy, from a regional to a national service economy and, since 2004 membership of the EU. The actual unitary state is based, at territorial level, on a dispersed state administration (districts—*upravna enota*) and on a decentralised level of local administration that exercises its competences and responsibilities on the basis of the principle of local self-government. The process of establishing a regional level, as a second level of local administration, was initiated by the constitutional revision of 2006. According to the Constitution, 'Slovenia is a state governed by the rule of law and a social state' where its citizens have the right to social security (including a pension), to healthcare under conditions provided by law and the obligation of the state to create opportunities for citizens to obtain proper housing. It also guarantees rights of protection and work-training for disabled persons, and special protection and care for children.

The Slovenian legal system uses the concept of public service (*javna služba*) whilst the term 'social public service' (*socialna javna služba*) is also sometimes used. Provision of services, for example, in the areas of education, health and social care, and social insurance are considered as non-commercial public services typically organised through not-for-profit organisations. They are provided either by public institutions or by way of concessions. There is no established list of activities that define the category of public services but most services are statutory. A list of all SGIs providers is prepared each year by the Slovenian Ministry of Finance.

There is a shared competence in the field of social services between the state and the local administration. The state in particular is responsible for adult disabled services, for the special protection of children, and for the institutional care for elderly. Local communities competence extends to the field of care for the elderly at home, primary healthcare, and primary and secondary education. Where the compulsory education service has budgetary funding, the home care services for elderly services are, in the main, paid for by users or may be partly subsidised by the local community on the basis of the solidarity principle.

[71] Hoorens 2008.

In the field of social housing the Slovenian approach has established either not-for-profit rental housing (for lower and middle income earners) or subsidised rents. A special public fund has also been established for the construction and maintenance of housing that is supplemented by municipal funds and commercial bank credits. Not-for-profit rental housing is usually provided by municipalities and other private organisations which are required to allocate a large majority of their profits to the acquisition of not-for-profit rental housing.

In the field of healthcare, health services are performed as public services under equal conditions by public health institutes and private entities of the basis of concessions. Some health services can only be performed as public services. Concessions may be granted, for example, for primary healthcare. All health services which are qualified as public services either provided by public or private operators are publicly funded.

2.5 What European Framework for SSGI?

A request for a sectoral secondary law for all SSGI has been expressed. But, if one includes, as the Commission suggests, all of those services that embrace health, social protection, social housing, education and training, as well as personal services within a single class, it is difficult to see how the request for secondary legislation could be satisfied: both unity and diversity exist within and across so many of the areas of European social services that it would appear difficult to apply common rules. Even the concept of a SSGI framework directive seems challenging, especially as there is no clear European competence in the majority of these fields. However, such a conclusion does not address the uncertainties which the actors in the social services feel. It would undoubtedly be preferable to seek answers for each category listed, starting with personal social services which share a common fundamental characteristic that rests on the personal relationship between a provider and a recipient. These services cannot thus be 'normalized' with service contracts similar to those that apply to telephone services or electricity supply. Nor are personal social services sufficiently definite or precise to draft specifications with regard to mandates or invitations to tender. It should be recognised that personalisation is at the heart of service provision, even if it is considered that these services can be qualified as 'economic' it is necessary to explicitly exclude them from the provisions of Article 106 TFEU: they cannot be subject to the common competition law of the internal market, because that would obstruct the achievement of their particular mission.

For the other fields of SSGI—health services, social protection, social housing, education and training—it is on a case-by-case basis and in a pragmatic way that it is necessary to specify the particular missions they are charged with and to adapt the European rules to these outcomes.

More generally, taking into account all the national and sectoral diversities, a framework directive could not be clearer than the Protocol No. 26 on services of

general interest. In any case, there can be no majority within the Council or the European Parliament, given the three opposing positions currently present:

a) those who argue for subsidiarity and who do not want more powers ceded to the EU and to the Commission;
b) those who think that market will solve everything (market oriented); and
c) and those who think that we should have only sectoral approaches.

Following the works of the third Forum on SSGI[72] which took place on October 26–27, 2010 in Brussels, the Belgian presidency of the Council of the EU addressed 15 recommendations to the European Parliament, the Council and the Commission of which some were repeated by the Council in its Conclusions.[73] The Council invites the Member States and the Commission 'to clearly identify European policies and measures having an indirect but significant impact on social services of general interest'; the Commission to clarify 'the concept of affecting trade between Member States in the field of the application of the rules on state aids to social services of general interest of economic nature'. According to the Council, the SSGI 'play a preventive and socially cohesive role, which is addressed to all women, men and children and which is based on the idea of universality, and have aims which are reflected in the ways these services are organised, delivered and financed'.

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Chapter 3
Welfare States and Social Europe

Dorte Sindbjerg Martinsen

Abstract This chapter examines the tensions between welfare states, on the one hand, and social Europe on the other, and the colliding principles in their historical setting. In particular, this chapter focuses on SSGIs as core institutions of the welfare state and the political response to the European impact on these public services, looking in particular at health care and long-term care. The findings point out that that although Member States attempt to create 'safe havens' to protect their welfare policies from European law, these may not prove to be lasting fire-walls against the 'creeping competences' of the EU. Over time SSGIs have become Europeanized, limiting the scope and policy options for national politicians and national administrations. Additionally, the administrative space of SSGIs is increasingly multi-level, forcing administrators at all levels to take EU rules into account, when welfare programs are designed, adopted, and administered.

Contents

D. S. Martinsen (✉)
Department of Political Science, University of Copenhagen,
Øster Farimagsgade 5, 1353 Copenhagen K, Denmark
e-mail: dm@ifs.ku.dk

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3.1 Introduction

The competence to decide on the content, scope, and organization of welfare policies remains within national competence in the EU *as long as* the exercise of that competence does not contradict EU law. The trick is to balance 'welfare sovereignty' and EU law; this constitutes a central dilemma for contemporary welfare states in the EU. The dilemma has only intensified over the years.

Historically, the welfare state construction has been closely linked to the formation and consolidation of the nation-state.[1] The demarcation of the nation, and the territorial borders, of the state has traditionally defined social citizenship, i.e., who, when, and where to be protected against social risks. In its gradual development, welfare came to constitute a decisive means of national integration, where material rights and obligations linked the state and civil society together. Generally, the modern welfare state has been proposed, created, and developed for the nation, historically aiming at national integration and coherence:

> … the welfare state has always been a national state and this connection is far from coincidental. One of the main factors impelling the development of welfare systems has been the desire on the part of governing authorities to promote national solidarity. From early days to late on, welfare systems were constructed as part of a more generalized process of state building. Who says welfare state says nation-state.[2]

From a formal point of view, Member States of the EU still possess *social* sovereignty. Despite a generally intensified process of European integration, social policies have long appeared as a remaining stronghold of the sovereign nation-state against the influence of EU law and policy: 'an island beyond its reach'.[3]

The historical meaning of the welfare state in part explains why European integration of welfare is ripe with tensions, contradictions, and reluctance, since it challenges the original national embeddedness of welfare. From a historical point of view, welfare *states* and social *Europe* contradict one another. National welfare states are underpinned by a logic of 'closure', whereas the EU is guided by a logic of 'opening'.[4] Whether the tensions between those two logics can somehow meet and reconcile in future social Europe remains to be seen.

This chapter focuses on the tensions between welfare states on the one hand, and social Europe on the other, but also on how the two entities have gradually been brought together, albeit sometimes in an incoherent and conflicting manner. In particular, this chapter focuses on SSGIs as core institutions of the welfare state and the political response to the European impact on these public services. Section 2 below examines Social Europe, its scope and content. Section 3 turns to two

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[1] Eichenhofer 1999a, 2000; Ferrera 2003.

[2] Giddens 1994, pp. 136–137.

[3] As formulated by AG Tesauro in his Opinions of 16 September 1997 in CJEU, Cases C-120/95 *Decker* [1998] *ECR* I-01831 and C-158/96 *Kohll* [1998] *ECR* I-01931; Eichenhofer 1999b, p. 102.

[4] Ferrera 2005, 2009.

specific welfare provisions, defined as social services of general interest; health care and long-term care and examines the political response to their European integration. Section 4 analyzes the Europeanization of welfare. Finally, some concluding remarks are provided.

3.2 Social Europe

The existence and reach of social Europe has long been debated. Formally regarded, the organization of welfare continues to be a national prerogative, and 'social Europe' has been laid down as 'the road not taken'.[5] Member States have acted as very skeptical gatekeepers when welfare initiatives have had to be approved in the Council of Ministers, in this way forcefully protecting their prerogatives.[6] Throughout the decades of European integration, welfare policies have continued as one of the few policy areas where national governments have usually 'resisted losses of political authority, not least because of the electoral significance of most social programs'.[7] An apparent lasting asymmetry has thus been created:

> …the course of European integration from the 1950s onward has created a fundamental asymmetry between policies promoting market efficiencies and those promoting social protection and equality.[8]

Ideas and initiatives on social Europe have thus not been received lightheartedly by welfare state representatives. In its content and scope, social Europe contains different dynamics and meanings, being pushed forward by some binding laws adopted in the Council, by means of judicial policy-making, soft law measures, and negative integration. Negative integration has been argued to be especially characteristic for Social Europe; a process where national welfare policies are integrated when EU laws oblige Member States to abolish barriers to the constitutive principles of the Community.[9] A welfare policy constituting such a barrier is, therefore, against the objectives and means of the EU policy and must be reformed, causing negative integration.

As part of a negative integration process, 'social integration' means constrained policy options for the national welfare state more than a positive built-up of a European social polity.[10] Indeed this asymmetry still exists.[11]

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[5] Von Maydell 1999, p. 9; Scharpf 2002, p. 645.

[6] Leibfried 2010.

[7] Leibfried 2010.

[8] Scharpf 2002, p. 665.

[9] Scharpf 2002, 2010.

[10] Leibfried and Pierson 1995, p. 65; Scharpf 2002, p. 666; Maduro 2000, p. 327.

[11] Scharpf 2010.

Positive integration by means of political decision-making encounters many obstacles and veto-positions to be overcome before a compromise can be established. First, the Commission has to internally agree to formulate and present a proposal. Second, the Council of Ministers shall negotiate a common position on the ground of unanimity or, increasingly, qualified majority voting between 27 Member States. Third, increasingly the Council has to use the co-decision procedure with the European Parliament, numbering some 737 members, organized into 7 political groups. An initiative developing Social Europe has a long way to go before it emerges as law, and policy processes have tended to be rather cumbersome with many thresholds. In this context of cumbersome decision-making, the policy-making process tends to produce outputs where many compromises are contained in the written text, ambiguously phrased and open to interpretations. Other means to compromises are by inserting an exemption or opt-out in secondary legislation or Treaty Protocols, thus bringing on board Member States who are likely to veto proposals, in order to establish a common position. As decision-makers in the Council, welfare state representatives often act as reluctant players with skeptic attitudes when social initiatives are on the table.[12]

Despite the reluctance and concerns of politicians, social integration has taken place, even at considerable speed. The CJEU has furthered integration, interpreting the 'law of the land' beyond what national governments could at first accept, but gradually have come to terms with.[13] This dynamic where the Court comes first, opening up for politicians to sometimes codify what the Court has already laid down, appears to be a main integrative logic of social Europe. Such integrative logic comes out historically as well as in more contemporary dynamics.

The Treaty of Rome 1957 had very little social content. One Article was inserted at the request of Italy, in order to support the free movement of workers, setting out that when a worker moved from one Member State to another, s/he had the right to both access the social security schemes of other Member States as well as export already earned social security rights to other Member States.[14]

Another Article was written into the Treaty on the initiative of France, setting down that men and women were entitled to equal pay for equal work.[15] Despite the rather sparse social content, both Articles came to spur social integration significantly. First, for migrant workers' social security rights, the CJEU became decisive in expanding the personal and material scope of cross-border entitlements. In addition, the Court was crucial in expanding the regulatory meaning of equal pay and went further in linking equal treatment with maternity/parental rights. The politicians gradually came to respond, revising or adopting secondary legislation to codify the case law.

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[12] Leibfried 2010.

[13] Martinsen 2005a, 2009.

[14] Article 51 Treaty establishing the EEC 1957; Holloway 1981; Romero 1993.

[15] Article 119 Treaty establishing the EEC 1957; Cichowski 2001, pp. 116–117; Martinsen 2007, pp. 548–549.

Despite much Member State reticence, the binding norms of EU social regulation have expanded. Falkner has counted 80 binding norms in the three main fields of EU social regulation.[16] In addition, about 90 amendments and geographic extensions had been adopted to these binding norms and approximately 120 non-binding norms, consisting of soft law measures, recommendations to the Member States etc.[17] Health care has also come under the scope of EU regulation. Concerning the recently adopted Directive on patients' rights, the integrative logic resembles the one described above. The CJEU initiated the process of including health care issues within EU law. At first, a large majority of Member States were opposed to binding measures but as the case law chipped away at sovereignty and competence in the area of health care they gradually came round to accepting that EU-level legislation was necessary. Thus in co-decision with the EP a first Directive on patients' rights in cross border health care has been adopted in March 2011.[18] Section 3.3 below will look further into the political response to this process.

3.3 *Social* Services of General Interest

The social services of the welfare state build on the same logic of 'closure' as welfare in general. It can even be argued that their exposure to European integration and the dynamics of EU law are especially sensitive as SSGI mirror the institutional core of the modern welfare state; health care, statutory, and complementary social security schemes, as well as personal services; social assistance, housing, child care and long-term care.[19]

Therefore integration of social services has often been marked by rather fierce political battles and opposition. Politically there have been attempts to rebound social services and shield it against the general forces of integration. The heads of government thus inserted a Protocol 26 on SGIs as an annex to the TFEU. The Protocol speaks of the national concerns with SSGI, and was inserted in the wake of pressure especially from France, the Netherlands and Belgium.[20] The Protocol emphasizes:

> Article 2
> The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission, and organize non-economic services of general interest.

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[16] Falkner examines what she terms as the main fields EU social regulation as health and safety, other working conditions and equality at the workplace. Falkner 2010, p. 293.

[17] Ibid.

[18] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the Application of Patients' Rights in Cross-Border Healthcare, *OJ* 2011 L 88; van de Gronden et al. 2011; Martinsen 2009.

[19] Ferrera 2009.

[20] Ibid. p. 227.

Although the Treaty sets out explicitly that *non-economic* social services[21] are special, and henceforth should be governed by special rules, they are de facto integrated and increasingly part of the supranational regulatory scope as the case-stories of health care and long-term care below details. These two social services also bear witness of considerable political resistance and opposition along the process of integration.

3.3.1 Health Care

Health care constitutes a SSGI[22] and its European integration has been greatly disputed as such. When it was laid down by the CJEU that health care is a *service* within the meaning of the Treaty,[23] it was by no means welcomed by the health ministers of the member states. The former German Minister of Health, Seehofer, argued quite impetuously in the wake of the judgments, saying that the member states had to overturn the rulings through a Treaty amendment and that Germany would not comply with the premises of the judgments.[24] The former Minister found the *Decker/Kohll* case law 'revolutionary' and argued that if Germany adopted its premises, it would be a long-term threat to the sustainability of the German health system.[25] A Treaty amendment detailing that internal market principles did not apply to health care was called for.[26] As we now know, such a Treaty amendment was never adopted. In the end, Member States did not prioritize the matter sufficiently when negotiating the Treaty of Nice, and the Treaty clarification exempting health care from the internal market was not inserted.[27]

This initial outburst was then later met by significant silence and a long period of no EU initiative. The Member States evidently waited for the Commission to take the lead and point out some kind of direction. In the meantime, the CJEU moved further in its interpretations on patients' rights and cross border health care. In the *Geraets-Smits and Peerbooms* case,[28] the Court clarified that internal market principles also apply to hospital care, provided as benefits in kind. In the following case of *Müller-Fauré and Van Riet,*[29] the CJEU proceeded by drawing a

[21] For a conceptual discussion of social services of general interests, see the Chap. 9 in this volume, by Neergaard.

[22] See the Chap. 15 in this volume, by Baeten and Palm for a detailed account on the preservation of general interests in health care.

[23] In the CJEU, Cases C-120/95 *Decker* [1998] *ECR* I-01831 and C-158/96 *Kohll* [1998] *ECR* I-1931.

[24] Langer 1999, p. 54.

[25] Der Spiegel 17/98, Fokus from 4 May 1998; Eichenhofer 1999b, p. 114.

[26] Martinsen and Falkner 2011.

[27] Ibid.

[28] CJEU, Case C-157/99 *Geraets-Smits and Peerbooms* [2001] *ECR* I-5473.

[29] CJEU, Case C-385/99 *Müller-Fauré* [2003] *ECR* I-4509.

distinction between hospital care and non-hospital care. For hospital care prior authorization (where the competent national institution has the authority to certify a reimbursable right to cross border treatment) may under certain condition be justified. For non-hospital care it is, however, found to be an unjustified barrier to the free circulation of services. In *Müller-Fauré and Van Riet*, the Court thus settled that for the wide scope of treatment which can be provided without hospitalization, internal market principles rule.

The first attempt to respond to the Court's rulings came when the Commission, rather unsuccessfully, attempted to integrate the health care area in the proposal for a Directive on services in the internal market.[30] As a precise reproduction of the Court's decisions, Article 23 of the Directive proposal set out:

(1) an internal market for non-hospital care, where the patient has a right to seek treatment in another member state without prior authorization and subsequently have the costs reimbursed by the competent national institution,
(2) a right to hospitalization in another member state, provided that the State of affiliation offers the same treatment, and that authorization has been granted beforehand.

The health ministers, refused to have their policy area regulated as part of a general Directive on services, placed under the responsibility of DG Internal Market.[31] Article 23, and thus the health care area, was taken out of the Directive. In general, the adopted version of the Services Directive was a much watered down version compared to the original proposal.[32]

Consequently it appeared clear that European health care could not be regulated from an overall internal market perspective, but the case law of the Court still called for political codification and more transparency. In September 2006, DG Health (SANCO) communicated a consultation procedure on health services. One year later, the Commission made its first attempt to present a proposal. DG SANCO announced that the proposal would be presented on 19 December 2007. However, on the very same day the Commission decided to withdraw the proposal.[33] It remains unclear exactly what triggered the withdrawal, but the political tensions and concerns that the proposal evoked stand out.

Many different actors and organizations worked behind the scene in the run-up to the presentation of the proposal.[34] Also the Commission was split internally on the proposal. The College of Commissioners disagreed strongly internally on the proposal and its principles. Various cabinets appear to have intervened against the proposal just before it was presented, expressing concerns on the impact on

[30] Commission, *Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market*, COM(2004) 2, 5 March 2004.

[31] Szyszczak 2011, pp. 116–117.

[32] Jensen and Nedergaard 2011.

[33] EU Observer, 19 December 2007.

[34] Martinsen 2009.

national health systems.[35] Others were concerned about how the proposal would be received by the public, suggesting that it could cause protests similar to the ones on the Services Directive, which again would be damaging during the process of ratification of the Treaty of Lisbon 2009.[36] Furthermore, members of the EP intervened in the process. Apparently key members of the European Socialists (PES) group urged the Commission to withdraw the proposal, arguing that it would have considerable negative consequences for national health care systems.[37] PES members linked the proposal with the ratification of the Lisbon Treaty, arguing that the timing was badly chosen since the Lisbon Treaty remained to be ratified in several member states.[38] In the end, the Commission decided not to present the proposal.

However, it did not take more than half a year to ease the pressure on the Commission and to internally agree that a new proposal could be presented. On 2 July 2008, the Commission was successful in proposing the Directive on patients' rights.[39]

Also the subsequent negotiation process has been tense and ripe with conflicts on different dimensions of the proposal. The European Parliament has had its difficulties to establish a majority position. The PES group in the Parliament was divided internally on various issues, especially on the fundamental question of the correct legal base for the Directive and the issue of prior authorization. Also the Greens and the united left GUE/NGL were against that the legal base of the Directive was proposed as the internal market Article 114 TFEU and not Article 168 TFEU dealing with public health.[40] In June 2009, the Commission agreed to meet the Council and Parliamentary concerns to some extent, for example by agreeing to remove long-term health care from the regulatory scope of the proposal and to include Article 168 TFEU as part of the legal base.[41] The Council of Ministers continued its disputes on the content of the proposal. A significant number of Ministers expressed concerns on national sovereignty, and wished to tighten national control in cross border care by means of prior authorization. Especially Southern Europe expressed concerns, and in December 2009 Spain led a blocking minority against the Swedish Presidency compromise text, and the Council thus failed to reach an agreement. However, during 2010 disagreements were eased. The Council reached a common position during the Spanish Presidency and the EP gathered a majority on their second reading January 2011. By March 2011 the Directive was adopted by both Institutions. The adopted text

[35] EU Observer, 7 February 2008.

[36] Martinsen 2009.

[37] Dagens Medicin, 1 February 2008; Politiken, 11 January 2008; Politiken, 19 January 2008.

[38] Politiken, 10 January 2008.

[39] Commission, *Proposal for a Directive of the European Parliament and of the Council on the Application of Patients' Rights in Cross-Border Health Care*, COM(2008) 414, 2 July 2008.

[40] EurActiv, 24 April 2009.

[41] Szyszczak 2011, p. 118.

differs from the original proposal by the Commission on several aspects. A dual legal basis has been reached. The internal market legal base Article 114 TFEU constitutes the main legal basis,[42] but Article 168 TFEU (on public health) has also been inserted. Another significant compromise is that prior authorization is accepted as means of national control, but only allowed for:

(1) care subject to planning; hospitalization or use of highly specialized or cost-intensive medical infrastructure or equipment;
(2) treatments involving a particular risk for the patient or the population;
(3) providers raising serious concerns relating to quality and safety (Article 8 (2) of the Directive).

The process which finally reached a compromise on patient rights in cross border care substantiates that it took the representatives of the welfare states in the Council and a considerable part of European Parliamentarians quite some time to accept that health care as a SGI falls under the rules of the internal market. The politicians managed to negotiate some exemptions to the general rule of free movement, but the process also substantiates that despite such political reservations, it is now a European binding norm that health care constitutes a service within the meaning of the Treaty, with all its implications. The transposition and practical application of the directive in EU 27 will probably confirm that the reach of Social Europe goes much beyond what the member governments thought they signed to in the Council, March 2011.

3.3.2 Long-Term Care

Long-term care is another SSGI representing one of the core institutions of the welfare state. As with health care, its integration into EU law and policy has not been lightheartedly received by the Member States, which have long resisted that long-term care should be regulated by the EU. The adoption of the patient rights' directive stands out as the recent example of the political unwillingness to integrate long-term care into the EU regulatory scope.[43] Despite such resistance, long-term care is in fact regulated by EU rules, both through soft and hard law mechanisms.

Long-term care benefit represents one of those social services which could not easily have been appreciated back when the first building blocks of social Europe were laid down.[44] The first regulations coordinating the social security rights of

[42] Directive 2011/24/EU, para 2 of the preamble lays down that; 'Article 114 TFEU is the appropriate legal basis since the majority of the provisions of this Directive aim to improve the functioning of the internal market and the free movement of goods, persons and services'.

[43] Szyszczak 2011, pp. 116–117.

[44] Martinsen 2005b.

migrant workers did not include long-term care as part of their material scope.[45]Although today it is a core part of many European welfare states and a social benefit, which receives much attention in times of an aging European population, long-term care took quite some time to be defined as a social service.[46] Despite the fact that 'reliance on care' has always existed as a social phenomenon, long-term care did not figure as an independent or conceptualized social security risk in European or international conventions at the end of the 1970s.[47] Although by no means being a 'new' social task, it is a social service which, in some member states, has only lately become a part of public welfare, and has been institutionalized beyond the more immediate care provided by the family.

Today, however, long-term care is regulated in the EU by the OMC. This soft law measure focuses on the access, quality and sustainability and compares long-term care policies in the Member States. The service is provided very diversified within the EU. Long-term care may be delivered in long-stay institutions, i.e. residential long-term care services, within day centers or within individual homes, i.e. home care service.[48] Also the service availability differs across Europe. In Scandinavia there is a high reliance on formal care, whereas in for example Southern Europe, long-term care has traditionally been provided by family members and formal care remains limited.[49] Furthermore, the financing of long-term care differs considerably. In Germany, Luxembourg and Spain public schemes are financed by social insurance. In the Nordic countries and Latvia by means of taxes. UK and Cyprus has means tested schemes. Belgium, France and Greece provide long-term care by means of a mixed financing system which combines insurance and taxes.[50] When addressing sustainability, these financing systems become crucial. In the current time of financial and economic crisis, it can only be expected that the EU will gather further momentum to address the sustainability of long-term care schemes, not least with the prospects of an aging population.

Whereas, the OMC is the new approach to place long-term care on the European agenda, the social service has, for more than a decade, been regulated by hard law as part of the scheme coordinating social security rights of migrant persons.[51] As with health care, the inclusion of long-term care within the scope of EU law was not initially welcomed by the Member States, and again exemplifies how

[45] I.e. Regulation No. 1408/71 of the Council of 14 June 1971 on the Application of Social Security. Schemes to Migrant Workers, *OJ* 1971 L149, and its predecessor Regulation No. 3 of 25 September 1958, *OJ* 1958 30.

[46] Szyszczak 2011, pp. 120–122.

[47] Also emphasized in the Opinion of AG Cosmas of 9 December 1997 in CJEU, Case C-160/96 *Molenaar* [1998] *ECR* I-843; Igl 1998.

[48] See Commission, *Commission Staff Working Paper, Second Biennial Report on Social Services of General Interest*, SEC(2010) 1284 final, 22 October 2010, p. 40.

[49] Ibid.

[50] Commission, *Commission Report, Long-Term Care in the European Union,* 2008, p. 10.

[51] Regulation No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, previously Regulation No. 1408/71, *OJ* 2004 L 166/1.

SSGI are key concerns to the national politicians, preferring to maintain these benefits outside the reach of EU law.

Regulation 883/2004 (former Regulation 1408/71) on the coordination of social security rights applies to all EU citizens as well as their family members. The Regulation is based on a principle of equal treatment, meaning that persons covered by the regulation are equal in terms of the social rights and obligations provided for by the national legislation. Furthermore, the Regulation is based on a principle of exportability according to which one can export/maintain the social security rights that one has achieved in one member state if moving to another Member State. This principle of exportability came to clash with the residence requirements of both the German and Austrian long-term care program, and again mirrors a process where the CJEU furthered the meaning and scope of European law beyond what the national politicians thought they had agreed to.

Germany adopted its law on long-term care ('Pflegeversicherungsgesetz') as late as 1995, thereby for the first time recognizing long-term care as an independent social risk.[52] Before the adoption of the care insurance law, long-term care was publicly granted as a social assistance benefit, or privately provided and financed.[53] With its long-term care law, any person in Germany insured against sickness is compulsory insured in the long-term care scheme. The service was financed by contributions from both workers and employers. A social insurance member reliant on care became entitled to care in a nursing home or in his/her own home. If one should desire home care, the law also designated a possibility to choose either care as a benefit in kind, or as a monthly allowance, i.e. 'Pflegegeld' where an individual should purchase the care.

The monthly cash allowance quickly turned out to be the preferred form of home care. From the outset, 80% of those in home care chose the cash benefit.[54] However, the German politicians inserted a residence requirement in the law, setting out that the entitlement to the German 'Pflegegeld' was suspended if one took up residence abroad. The law thus demarcated the social provisions within national borders.

Whether the territorial demarcation of the German 'Pflegegeld' contradicted EU law was examined in *Molenaar*.[55] The case discussed the right to 'Pflegegeld' of Mr and Mrs Molenaar, a Dutch, German couple, working in Germany but living in France. They were both voluntarily insured against sickness in Germany and were, from January 1995, required to pay care insurance contributions, which they did. However, on application, they were informed by the competent German social security fund that they were not entitled to care insurance benefits due to their French residence.

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[52] Martinsen 2005b.

[53] Igl and Stadelmann 1998, p. 37.

[54] Igl 1998, p. 23.

[55] CJEU, Case C-160/96 *Manfred Molenaar and Barbara Fath-Molenaar* v. *Allgemeine Ortskrankenkasse Baden-Württemberg* [1998] *ECR* I-880.

The CJEU initiated its legal reasoning by referring to previous case law, stating that a benefit was to be regarded as a social security benefit if granted 'on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4 (1)' of Regulation 1408/71.[56] It added that the list of Article 4 (1), laying down the material scope of the regulation, was exhaustive, meaning that a branch of social security not mentioned in this article was not part of the regulatory scope. Long-term care, such as the German 'Pflegeversicherung', was to be regarded as a sickness benefit within the meaning of Article 4 (1) (a) of Regulation 1408. Having in this way included the care allowance within the material scope of 1408/71, the Court continued by examining whether the residence clause of German law could be justified against the Community principle of exportability.

Article 19 of Regulation 1408/71 made a distinction between benefits in kind and benefits in cash. The competent institution was—and is—obliged to export sickness benefits in cash, but not benefit in kind.[57] Although a monthly cash allowance, 'Pflegegeld' was defined as a benefit in kind in German law, thus according to German law exempting it from exportability. From the drafting of the law, it appears to have been a deliberate and important consideration to define a de facto 'cash benefit' as a 'benefit in kind'. More specifically, the draft of the 'Pflegeversicherungsgesetz' defended the point of view, setting out that the care allowance constituted a 'benefit in kind-substitute', a 'Sachleistungssurrogat'.[58] Nevertheless, the CJEU did not accept the national classification, but ruled that the German care allowance was indeed a benefit in cash.[59] As a consequence thereof, the overall conclusion was that the residence clause in German law conflicted with the principle of exportability of Regulation 1408/71.

The later case of *Jauch*[60] confirmed that long-term care falls within the scope of European law and is exportable in accordance herewith. *Jauch* concerned a German national, residing in Germany, but who had worked in Austria where he was affiliated to the social security scheme. The Austrian welfare state had, however, denied him long-term care, since he was not a habitual resident in Austria, and since Austria had specified that long-term care was a non-exportable social service.[61] The Austrian government argued before the CJEU that because the member governments had decided that the benefit was exempted from exportability in accordance with a special rule of non-exportability inserted in Regulation 1408/71,

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[56] Ibid. para 20.

[57] Huster 1999, p. 12.

[58] Zuleeg 1998, p. 172.

[59] CJEU, Case C-160/96 *Manfred Molenaar and Barbara Fath-Molenaar* v. *Allgemeine Ortskrankenkasse Baden-Württemberg* [1998] *ECR* 1998 I-880, para 36.

[60] CJEU, Case C-215/*99 Frederich Jauch* v. *Pensionsversicherungsanstalt der Arbeiter* [2001] *ECR* I-1901.

[61] In concrete, the Austrian government had listed the benefit in Annex IIa of Regulation 1408/71, an Annex according to which the member governments in the Council of Ministers could insert certain benefits and thus make them non-exportable.

the residence clause of Austrian law did not contravene EU law. The CJEU nevertheless ruled against the Austrian position, laying down that the character of the Austrian care allowance was no different from the German 'Pflegegeld';

> … while care allowance may possibly have a different legal regime at the national level, it nevertheless remains of the same kind as the German care insurance benefits at issue in Molenaar, and is likewise granted objectively on the basis of a legally defined situation.[62]

The *Molenaar* and *Jauch* cases thus exemplify the attempts of Germany and Austria to exempt their welfare benefits from exportability, and so to speak to construct 'safe havens' in both national and EU law.[63] The cases also demonstrate that such 'safe havens' may not prove to be lasting firewalls around national social services in the long run. It can be argued that it becomes increasingly difficult to remain insulated on the island or in the 'safe haven', protected from the waves and dynamics of EU law.

3.4 The Europeanization of Welfare

Health care and long-term care both constitute SSGIs which despite their traditional national boundedness, have been Europeanized. Europeanization has become a prominent analytical concept in European Union studies, defined as a national state change or processes of change caused by European integration.[64] When examining the impact of the EU on national politics and law, the Europeanization framework is helpful in setting out how national institutions are changed and why EU induced processes of change may not lead to convergence of domestic schemes. A Europeanization approach details that EU imperatives of change, be they case law from the CJEU, soft law mechanisms or the binding law of a Directive, do not automatically lead to national change.[65] Between an EU decision and de facto national change there is a long list of intervening variables which can be decisive to the actual EU impact. Judicial policy-making by means of CJEU case law may meet severe national obstacles and national re-interpretations of what the Court actually said, for which reason a significant case may not cause national change in the first place. On the other hand a case, or Directive, may be used strategically by domestic actors to justify why a reform is needed.[66] At a first glance the implementation of a Directive or Regulation may appear more straightforward and less open to national interpretations. Nevertheless, also the implementation of Council decision-making has proven to leave a significant

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[62] CJEU, Case C-215/*99 Frederich Jauch* v. *Pensionsversicherungsanstalt der Arbeiter* [2001] *ECR* I-1901, para 26.

[63] Chapter 13 in this volume, by Szyszczak.

[64] Börzel and Panke 2010, pp. 405–418.

[65] Schmidt 2002; Radaelli 2003; Caporaso 2007, pp. 23–35.

[66] Martinsen and Vrangbæk 2008; Kallestrup 2005.

scope of maneuver to the national executive when the measures are to be transposed into national law and practices. However, when adding the long-term perspective, non-compliance with European law is likely to be addressed by the different enforcement mechanisms of the EU; infringement procedures by the Commission, EU law enforced in national courts or preliminary references to the CJEU which review, monitor and eventually sanction a disobedient Member State. Compared to other international organizations, the EU has developed efficient enforcement-management mechanisms, through which detected and pursued, non-compliance is pointed out to be a merely temporal phenomenon.[67] In sum, the Europeanization approach tells us that we should not expect EU decisions to impact directly on national welfare states, but instead expect EU induced change to be filtered and influenced by national institutions and actors. Compliance studies add to this perspective, detailing that the EU polity has unique instruments of enforcing and managing eventual national non-compliance.[68] These instruments reduce the national scope of maneuver over time, potentially leading welfare states to gradually change in accordance with their European obligations.

Welfare Europeanization is likely to be reluctant, strongly influenced by national forces, but also checked and balanced by national and supranational enforcement institutions. Europeanization involves at least four steps of change before the output takes a more finalized form. First of all, the EU cause differs. National actors and institutions may decide to simply ignore a soft law measure as there are no formal sanctions linked to such, and obligations vary as to whether the EU cause of change is set out in case law or a Directive. As a second step, transposition allows for governments, administrations and interest organizations to respond to and (re)interpret the EU imperative laid down. Transposition lays down the judicial implementation where EU decisions by means of hard law become national legislation. Thirdly, in the phase of practical application local, regional or central parts of the administration will transcend the law into practice. Even rules may, however, often transcend into uneven practices, depending on administrative capacities, understandings of EU obligations and/or different cultures of compliance at the sublevels of European administration.[69] Fourthly, the ability to detect and prosecute non-compliance is decisive to the extent the EU polity can render implementation deficits into sufficient compliance with European obligations.[70] Evaluation and enforcement at the end of the Europeanization process is thus fundamental to the extent to which a correct output is produced, and objectives and means become de facto impact. Together the four steps of Europeanization demonstrate that a process of EU induced change is far from automatic, but one with high thresholds and significant discretionary scope (Fig. 3.1).

[67] Tallberg 2002, p. 614.

[68] Tallberg 2002, 2003.

[69] Falkner et al. 2005; Versluis 2007.

[70] Tallberg 2002, 2003; Slepcevic 2009.

Fig. 3.1 Processes of welfare Europeanization (Treib 2008; Martinsen 2005a)

Over the years a significant Europeanization of welfare and SSGIs, has taken place. The market building process of the EU implies considerable social integration through the abolition of national barriers to the internal market.[71] Free movement principles and competition law[72] are thus fundamental challenges to the traditional logic of 'closure' to the Member States.[73] Furthermore, the principle of non-discrimination prohibits the traditional demarcation of solidarity in the welfare states, where solidarity has been for 'members only', i.e. the citizens of the state.[74] European integration implies a fundamental challenge to the 'right to bound', meaning 'the right of each national welfare state to autonomously determine who can/must share what with whom'.[75] Today all European citizens can legitimately access the welfare communities of other Member States. Held against the traditional logic of 'closure', this is indeed a major EU impact on the traditional organization of the welfare state.

Specific policies such as health care and long-term care are affected by European integration. The two core institutions of the welfare state can no longer be reserved to the national population, nor can they be preserved within the national borders. Concerning health care, national administrations have lost the upper hand of control. In the future, they will continuously have to justify if a health care service can only be consumed at home. If they refuse a cross border treatment, the European citizen has a right to challenge the refusal by means of judicial redress. Furthermore, national providers' ability to plan will need to take outflows but also a potential inflow of foreign patients into account. In addition, welfare authorities will have to set up national contact centers with the task to inform European patients of national health care supplies, prices and quality. Health care packages and services thus need to be comparable across borders. This may set off new dynamics where patients acting as voters demand different standards or types of national treatments. New demands will be voiced and national health care packages will be compared with the supply from other Member States. That changes in supply go hand in hand with changes in demand is already evident in the global growth in medical tourism, where patients travel abroad for health care not available in their home state or cheaper elsewhere.[76]

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[71] Leibfried and Pierson 1995, p. 51.

[72] See Chap. 9 in this volume, by Neergaard.

[73] Ferrera 2005, 2009.

[74] Martinsen 2005a.

[75] Ferrera 2009, p. 221.

[76] Szyszczak 2009.

Regarding long-term care, the cases of *Molenaar* and *Jauch,* examined above, have already set out how the case law of the Court impacted on the way long-term care was organized, and demarcated, in Germany and Austria. The cases demonstrate that although the German and Austrian welfare states deliberately attempted to exempt these social services from the principle of exportability, the 'safe havens' they constructed were not lasting preemptions. The idea to construct a 'benefit in kind-substitute', a 'Sachleistungssurrogat' did not stand the test before the Court.[77] This demonstrates that in the longer run, the discretionary scope of the national executive on how to organize their SSGIs is indeed limited. European integration impacts on both the transposition and practical application of SSGIs. In this way, EU law limits the policy options of the welfare states. When national policies are drafted several ideas are likely to end as non-decisions in order to prevent the impact of EU law. Welfare politicians and bureaucrats are likely to think more than twice on whether to design long-term care as a 'benefit in cash', knowing that such service will then be exportable to pensioners who have taken up residence in, for example, Southern Europe or elsewhere beyond national borders.

The administration of social services has in this way been Europeanized, which implies considerable challenges to the national bureaucracy at all administrative levels. From an overall perspective the EU's regulatory competences on SSGIs are diffuse, differing between direct or indirect hard law measures and non-binding comparisons and recommendations. The individual provision may not fundamentally challenge the administration of welfare, but added together the different bits and pieces of regulation becomes rather deep intervention in the administrative autonomy of the welfare state. The fact that social services fall within the scope of EU law implies that welfare administrations EU-wide have to take the rules into account, when welfare programmes are designed, adopted and administered. Additionally local public authorities have to apply EU rules on state aid and public procurement as well as administer their national laws of social services in accordance with EU law and policy. Thus we find Europeanization at the ultimate end of the administrative order, and the different units of local authorities are unlikely to posses the administrative capacity to take Europe into account in their daily practices. The lack of capacity is substantiated when public authorities notify the Commission that the application of the relevant EU rules to the national policies on social services causes problems.[78]

Local authorities especially have found the application difficult, viewing the different EU rules as an obstacle to organize and finance high quality social services. The Commission has responded that the difficulties are mainly caused by the lack of awareness or misinterpretation of the rules rather than the rules themselves. Disregarding such disagreements on reasons, the discussion substantiates that the administrative space of social services is no longer demarcated

[77] Zuleeg 1998, p. 172.

[78] See for this discussion, SEC(2010) 1284 final, pp. 70–74.

by national borders or to national communities, but is increasingly Europeanized—at all levels.

3.5 Conclusions

SSGIs are core institutions of the welfare state, traditionally rooted in the same logic of 'closure' as the welfare state in general. From the outset the constitutive principles of the welfare *state* and social *Europe* are contradictions in terms, the former building on a logic of 'closure' and the latter on a logic of 'opening'.[79] The historical logic of the welfare state can, in part, explain the tension when it meets with Social Europe. Having once been a key means of national integration, it is now gradually obliged to Europeanize. Both social integration and Europeanization has taken place. By means of negative integration, separate Council decisions, judicial policy-making, and soft law measures, the EU impacts on the core of the national welfare state. Over time, a Social Europe has been conceived, albeit sometimes in an incoherent and conflicting manner.

This chapter has focused on the tense interaction between the welfare state and Social Europe, looking into the political responses to the integration and Europeanization of SSGIs. Despite political reluctance and veto-positions, welfare state representatives have gradually had to accept the reach of EU law. The case studies of health care and long-term care demonstrate that although Member States attempt to create 'safe havens', these may not prove to be lasting firewalls against the 'creeping competences' of the European Union.[80] Over time SSGI have become Europeanized, limiting the scope and policy options for national politicians and national administrations. The administrative space of SSGIs is increasingly multi-level, forcing administrators at all levels to take EU rules into account, when welfare programs are designed, adopted, and administered. Much has happened since SSGIs were islands beyond the reach of European law.[81]

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[79] Ferrera 2009.

[80] Pollack 2000.

[81] See AG Tesauro's Opinions of 16 September 1997 in CJEU, Cases C-120/95 *Decker* [1998] *ECR* I-01831 and C-158/96 *Kohll* [1998] *ECR* I-01931.

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Chapter 4
Social Services of General Interest: The EU Competence Regime and a Constitution of Social Governance

Dagmar Schiek

Abstract In discussing the potential role of the EU, the Member States, their composite parts and civil society organisations in establishing social services of general interest at sub-national, national, transnational and EU wide levels, this chapter explores the EU competence regime for social services of general interest. Its analysis contradicts a tendency in academic writing to demand protection of national prerogatives for shaping welfare states against EU intervention at all costs, because this would be counterproductive for the progress of the EU project. It submits that an EU constitution of social governance should create mixed responsibilities so that the EU, states and civil society actors support each other in creating preconditions for social integration in the EU. It uses the field of social services of general interests as an example of applying this general theoretical concept.

Contents

D. Schiek (✉)
School of Law, University of Leeds, Leeds, LS2 9JT, UK
e-mail: d.g.schiek@leeds.ac.uk

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4.1 Introduction

From the EU perspective, the provision of SSGIs has traditionally been seen as the responsibility of the Member States, which had to abide by EU Treaty law and any secondary EU legislation in fulfilling this responsibility. The resulting constraints were more severe if these services were classified as economic services. Such a distribution of competences is congruent with a conservative model of supporting economic and social elements of the European integration, according to which the EU drives market making and economic liberalisation, while Member States drive social policy within the constraints of EU economic law which, after all, enjoys supremacy. This model has been accused of decoupling social policies from the European project,[1] whose consequences for social policy in general have been heavily criticised in recent years. Many authors have argued in favour of protecting the Member States' competences and their autonomy in policy making.[2] The concept of the constitution of social governance proposes an alternative to this in that the EU, states and regions as public actors and regional, national and transnational societal actors are enabled to engage on different levels to realise economic and social integration with the EU.[3] The concept shall be used as a base for an analysis of EU and national competences in the field of SSGIs.

The chapter is thus focused on the competence regime for SSGIs, including under this notion judicial competences. It enquires how the EU constitutional framework after the Treaty of Lisbon 2009 relates to the question how SSGIs can be maintained at national level or developed where they are lacking,[4] in how far they need to be complemented by EU policy, and what EU policy, including adjudication can contribute to achieve what is needed. To that end, it compares the competence regime for SSGIs before and after the Treaty of Lisbon, and evaluates the difference against the 'constitution of social governance' and its demands on the EU constitution of competences.

The chapter will proceed as follows: it will first outline the constitution of competences as perceived under the notion of an EU constitution of social governance, and briefly develop a notion for SSGIs. It will then look at the change in competence regime and values engendered with the Treaty of Lisbon 2009 (in

[1] Scharpf 1999; 2002.

[2] Joerges 2010; Rödl 2010; Scharpf 2010; Syrpis 2007.

[3] Schiek 2012, pp. 229–243 ms.

[4] On the distance in some new Member States to re-establish social services that were dissolved with the demise of socialism see Rodrigues 2009.

particular through Articles 9 and 14 TFEU and the Protocol on services of general interest) and develop a few ideas how this change could be utilised to come closer to a constitution of social governance.

4.2 A Constitution of Social Governance

The idea of a constitution of social governance is derived from the new value base of the EU after the Treaty of Lisbon 2009, which seems to contrast with the competence regime of the preceding Treaties, which is largely maintained. On the one hand, the new value base established by Articles 2 and 3 TEU adds considerably to the traditional values of liberal constitutionalism already contained in the Treaty of Maastricht 1993 (liberty, democracy, respect for human rights and fundamental freedom). The new values comprise human dignity and minority rights (Article 2 TEU first sentence) as well as pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men (Article 2 2nd sentence TEU). The latter values are clearly more related to social than merely liberal constitutionalism.[5] Some ambiguity is inherent in Article 2 TEU, whose 2nd sentence states that its values are 'common to the Member States in (their) society'.[6] However, Article 3 TEU further underlines the new social commitment of the EU: for the first time, the EU's objectives include the strive for social justice, which certainly requires solidarity to be one of the EU's and not only the Member States' values. Article 3 paras 3 and 4 TEU specify further social aims for the new EU, including social progress, a social market economy, full employment, social inclusion (derived from the combat of social exclusion) and social cohesion. This is only partly counterbalanced by elevating the establishment of the internal market and of monetary and economic union to EU objectives in their own right (Article 3 TEU), while the Treaties before the Treaty of Lisbon 2009 maintained a merely instrumental character of these aims (ex Article 1 EC).[7] Overall, the EU has gained in social values. The TFEU adds to this by expanding the number of horizontal clauses, including a horizontal social clause in Article 9 TFEU,[8] which has been the base of great hopes for a more social EU.[9]

This gain, however, is not matched by a gain in legislative competences. Generally, the Treaty of Lisbon introduced a national tilt into the EU competence regime by adding a Union obligation to respect the Member States' national identity and essential state functions (Article 4 (2) TEU) to the Member States' obligation to ensure fulfilment of their own obligation and refrain from

[5] Craig 2010, p. 312.

[6] See more detail Schiek 2012, pp. 218–223.

[7] More detail on this specific comparison Schiek 2010.

[8] On its evolution Piris 2010, p. 310.

[9] Ferrera 2010; Dawson and de Witte 2012, pp. 55–57.

compromising the EU's objectives (Article 4 (3) TEU, ex Article 10 EC), and by the enhanced relevance of the subsidiarity clause through a specific control competence of national parliaments (Article 5, 12 TEU, see also Article 352 TFEU). Further to this, it maintains all the EU's competences in favour of economic integration, adding a little more commitment in the field of economic policy. It does not, as a rule, expand competences in the social policy field—with the exception of a limited new competence for the protection of public health (Article 168 (4) TFEU) and the new Article 14 TFEU on SGEI, which will be discussed in more detail below.

The apparent contradiction between the EU's enhanced values and objectives in the social policy field and its only scarcely developed competence base can be resolved. The EU's Treaty constitution has always been complemented by its judicial constitution. Mainly as a consequence of the Court's own case law, judicial competences are less constrained than legislative competences. The Court operates a standing formula according to which the Member States are bound to observe primary Treaty law even in fields that are explicitly outside the EU's legislative competence.[10] Thus, although the EU had until recently had no competence to legislate in the field of SGEI, Member States were under an obligation to define their SGIs in line with EU law, and to oblige with its economic law (mainly consisting of competition rules, state aid and economic freedoms) in organising this field. In the absence of detailed Treaty norms the Court frequently cannot avoid fulfilling a quasi-legislative role. The Commission's guidelines on SGEI may go beyond the Court's case law, but they firmly have their base in that case law. Thus, judicial competences can be developed into a reconciling mechanism: the Court could refer to the value base in order to ease justifications b Member States for retaining national control over policy fields in which the EU has no regulatory competence, thus implicitly strengthening national social policy competences.

The constitution of social governance further argues that national and EU legislation are not the only ways to achieve the social values now proclaimed by the EU. Article 2 EU specifies that these values are also common to the Member States and their societies. This may be read as an acknowledgement of the self-regulatory capacity of societies at national, transnational and possibly EU level. In the social reality of many Member States, social life is governed not only by state legislation from different levels, but also by rule-making of social intermediaries—and these are not restricted to trade unions. The constitution of social governance can thus be brought about by on the one hand, relying on the EU's citizens to create such rules that are sensible to follow. On the other hand, any such societal activity must not be de-legitimised[11] by judicial over-constitutionalisation. In other

[10] CJEU, Case C-290/04 FKP *Scorpio* [2006] *ECR* I-9461, para 30 (tax law); CJEU, Case C-372/04, *Watts* [2004] *ECR* I-4325, para 94 (public health).

[11] The notion was inspired by the notion of 'de-legalisation' (Joerges 2008), but goes beyond it in that it considers the legitimacy of different forms of legislation, e.g. statute (through parliament), collective agreement (through a process of counterbalancing of forces) and rules made in inherently legitimate interest organisations.

words, the EU's new value and competence regime demands that judges all over the EU and also in the Court respect the potential of social governance through societal law making.[12] The second mechanism to reconcile the new values and social commitments of the EU with its lack of legislative competences in the field thus consist of allowing the incremental growth of a constitution of social governance, in which societal actors at national, transnational and ultimately EU level can create social regulation (as an alternative to the public social state).

The field of SSGI shall now be scrutinised as an exemplary field for establishing/implementing the new EU constitution of social governance. From the outset, this field promises to be specifically interesting, but also atypical for two reasons. First, it is one of the few fields related to social policy where the Union's competences were expanded with the Treaty of Lisbon 2009, and second, in this field non-state actors have traditionally had a strong position nationally and regionally.

4.3 SSGI After the Treaty of Lisbon

4.3.1 Notion of SSGI

While the definition of SSGI is covered in several other chapters, it is still useful to recollect the most important elements for the sake of the argument in this chapter.

The Commission defines SSGIs as comprising two elements: on the one hand 'statutory and complementary social security systems' addressing 'main risks of life', and on the other hand 'essential services supplied directly to the person'.[13] Both parts of the definition are slightly restrictive: risks are only those that lead to a loss of income for employees—illness, old age, unemployment, work place injury or accident and (the youngest one) disability. The 'services provided to persons' are those replacing familial services, or also related to risks, and in any case only extended to socially disadvantaged persons. All these seem to mirror a narrow conception of the welfare state in the literal sense, according to which it addresses social risks once they realise, with limited preventive aspirations, let alone aspirations to achieve an inclusive society.[14] In a wider notion, social policy aims at de-commodification of human beings and enabling all citizens to fully participate in politics and society. Under this perspective SSGI would have a

[12] Schiek 2012, pp. 229–243.

[13] Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM(2006) 177 final, 26 April 2006, p. 4, on additional elaborations of the concept and its daughters see Chaps. 9 and 13 in this volume, by Neergaard and Szyszczak.

[14] Maydell et al. 2006, pp. 5–12, for an overview of the emergence of wider social policy aims, Damjanovic and Witte 2009, pp. 53–56, for a critique of narrow approaches see Schiek 2001, 2012, pp. 34–38.

more encompassing mission. They would not be restricted to the poorer part of society, or only extended to those whose family cannot afford to sustain them, but rather provide public services in an egalitarian manner while still containing redistributive elements. In this sense, postal services, a functioning railway system or a publicly financed education system are also SSGIs.[15]

The narrow definition preferred by the Commission in practice curbs the range of justifications available to Member States when they exempt SSGIs from state aid rules or public procurement Directives, for example. An ongoing conflict between the Commission and the Netherlands illustrates the point: the Dutch social housing provision originating from 1901, originally meant to maintain a subsidised housing sector through independent housing associations to the benefit of the Dutch population in general. On demand of the Commission, this scheme has now been amended to only cover 43 % of the population.[16] This can only be classified as 'generous'[17] if one accepts up front that egalitarian social policy is no longer an option for Member States in the EU internal market. Under the same logic one could say that free primary schools should only be provided to the poorer section of the populace. Obviously, this would have devastating consequences for any truly republican education, which presupposes a number of social institutions in which the whole population participates without division by class.[18] Similarly, providing social housing only for the poorer part of the population will have the effect of class segregation in cities and villages. Of course, this effect is much more severe in countries where social housing of very poor quality is only provided to the very poor who then live in ghettos considered dangerous by the rest of the population—but the Netherlands were forced to move one step into that direction.

The wider definition of SSGI, which allows for SGIs to be provided generally and without means testing, is preferred here.

4.3.2 EU Values, Objectives and Competences Around SSGI

Following the idea of the constitution of social governance, it is first necessary to consider the EU's values and objectives around SSGIs, and to consider how the competence regime can be used to achieve these objectives while being guided by the values. This shall be provided by comparing the pre-Lisbon Treaty state of affairs with the post Lisbon Treaty situation.

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[15] Leibfried and Starke 2008; Huffschmid 2005, pp. 65–70 and 235–243; Damjanovic and de Witte 2009.

[16] Commission, *Decision of 15 December 2009*, E 2/2005, N 642/2009, *The Netherlands, Existing and Special Project Aid to Social Housing*, now under judicial scrutiny (GC, Case *IVBN* v. *Commission* T-201/10 pending), see on this van de Gronden 2011, p. 145.

[17] Chap. 12 in this volume, by Baquero Cruz.

[18] Schiek 2012, p. 34; Busemeyer and Nikolai 2010.

4.3.3 Values

Before the Treaty of Lisbon, values informing the provision of SSGIs in Member States were not wholly absent from the EU's Treaty base. The Union had the objective to promote economic and social progress, among others through strengthening an area without internal frontiers (Article 2 TEU pre the Treaty of Lisbon 2009), and the EC had as its task, among others, to promote a high level of social protection (Article 2 EC). Under Article 16 EC the Community and the Member States were already committed to taking care that services of general economic interest could operate on the basis of principles and conditions enabling them to fulfil their missions. The same provision stressed that services of general economic interest occupied a place among the values of the Union, and that they had an important role in promoting economic and social cohesion.

After the Treaty of Lisbon 2009, the Union ascribes to more values and pursues more objectives which may warrant using SSGIs. These include solidarity and social justice in addition to social cohesion. Also, the value base for SSGIs, even beyond general economic interests, has been enhanced. The new Article 14 TFEU repeats Article 16 EC, specifying that the financial conditions are of particular importance for SGEI. Protocol 26 on Services of General Interest goes beyond Article 14 TFEU in that it applies to both economic and non-economic SGI. It stresses that commissioning and organising services of general economic interest as closely as possible to the needs of the users are part of the shared values of the EU and its Member States. It also supports diversity between various services which is beneficial in responding to their users' different needs and preferences resulting e.g. from different geographical, social or cultural circumstances. In addition, equal treatment, universal access and a high level of quality, safety and affordability characterise SGI EU style.

Accordingly, values supportive of SGEI have gained weight with the Treaty of Lisbon. The corresponding increase in social objectives to be pursued by the EU should also be favourable to maintain and establish SSGIs.

4.3.4 Competences

Before the Treaty of Lisbon 2009 there was no Community competence for regulating services of general (economic) interest. This did not exclude that harmonising regulation based on other competence bases impacted on (social) SGEI.[19] Also, other competence bases were used to regulate specific fields where the EU wished to phase out public services and introduce commercial markets, which again forced Member States to use SGEI instead of NESGIs in these fields

[19] Van de Gronden 2011, pp. 135–137.

(e.g. electronic communication, telecommunication and provision of energy).[20] These latter competences were not used for SSGIs. Under that heading, the Commission only submitted reports and general policy documents,[21] which also contained its own legal analysis on how the Court's case law on state aid, competition rules and freedom to provide services would restrict the Member States' policy choices in this field.[22] Neither the reform of the social security coordination Regulation[23] nor legislation on EU citizens' rights[24] was used in any way to go beyond coordination of independent national insurance systems. As a result, the Member States provided SSGIs, and any national practice or legislation—as required in some constitutional democracies—had to abide by EU law. As other chapters discuss in more detail, freedom to provide and receive services, citizenship rules, state aid rules and other competition rules are the main provisions which may clash with SSGI provision at national level, in particular where the Member States rely on non-state providers and introduce market elements into their provision. The judicial competence, as developed above, to dismantle or challenge national SGI is complemented by the EU Commission's competence to take the initiative not only in infringement procedures, but also through immediately binding decisions in the field of state aid.

Thus, there was a shared, but hierarchical competence for regulation, and a tradition of Member States providing SSGIs, which was so far also mirrored in the competence regime. Such distribution of competences resembles a rather conservative model of reconciling economic and social elements of European integration: market making and economic liberalisation is reserved for the EU level, and at the same time social policy is reserved for and restricted to the national level. This competence regime may originally have been based on the ideas of embedded liberalism.[25] However, combined with the doctrine of EU law's supremacy or primacy,[26] this distribution of competences implies that market

[20] Hancher and Larouche 2011.

[21] On these see Chap. 13 in this volume, by Szyszczak.

[22] Arguably, these legal analyses were partly biassed in order to support Commission policy choices, and thus portrayed the Court in a less favourable light than could have been possible. See Chap. 12 in this volume, by Baquero Cruz.

[23] Now Regulation No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, *OJ* 2004 L 166/1.

[24] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family members to move and Reside Freely within the Territory of the Member States amending Regulation No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ* 2004 L 158/77.

[25] See Giubboni 2006, pp. 15–56.

[26] For a recent analysis see de Witte 2011; for a preference of the term primacy over supremacy in an attempt to promote a heterarchical relation between EU and national law Avbelj 2011, for a long-standing proposal to re-conceptualise EU constitutionalism along the lines of conflicts of law see Joerges 2007; for a skilful defence of supremacy in a hierarchical model see Baquero Cruz 2008.

making and economic liberalisation, because they are conducted at EU level, will challenge any alternative principles that the Member States may employ in their national social policy. While Member States (occasionally on behalf of private providers) can defend and justify their social policy choice, the initial position of the Treaties in favour of competition and free movement is not subject to justification in individual cases. For this reason, the competence regime for SSGI prior to the Treaty of Lisbon 2009 left only limited scope for non-competitive governance which has been acknowledged as more efficient in relation to common goods.[27] It also made it difficult for Member States to introduce a mix of market principles and public provision into their SSGI policy.

The first thing that needs to be said about the competence regime after the Treaty of Lisbon 2009 is that much of the pre-Lisbon state of affairs remains intact. As Treaty law on competition and free movement has not been changed substantially,[28] the judicial competence regime also remains unchanged. The Court is likely to continue enforcing free movement rights in relation to some SSGI, notwithstanding some contradictions and exceptions.[29] The Commission and the Court will also impose public procurement schemes on social security institutions, such as occupational pension schemes for public employers.[30] If Member States convey a monopoly on a public or private actor for providing an SSGI, they may find themselves in conflict with Article 102 TFEU.[31] As a matter of course, the EU Commission retains its competences as EU competition authority. In addition, the enhanced role of subsidiarity and national autonomy impact on this field, as they do on all others.

The novelty lies in the creation of a new competence to legislate. The new Article 14 TFEU, while repeating Article 16 EC, also adds a decisive third sentence, which requires (not only empowers) the EP and the Council to establish the principles and to set out the conditions under which services of general economic interest should fulfil their missions. At the same time, it stresses that the Member States retain the competence to 'commission and fund' such services—in line with Article 36 of the Charter of Fundamental Rights, according to which the EU respects the access to SGEI provided at national level. The new competence is somewhat unusual, though. First, the Treaties do not commonly contain an

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[27] Ostrom 2010.

[28] There has been some academic debate whether the omission of undistorted competition in the internal market as an objective of the EU as well as a means to achieve their aims from the Treaty text itself, and the subsequent re-introduction in protocol No. 27 has changed the importance of competition for the EU's values (for the field of SGEI see Fiedziuk 2011, pp. 230–231). As Protocols have the same value as the Treaties, this change is purely cosmetic (Piris 2010, pp. 307–308).

[29] Again this is discussed in Chap. 6 in this volume, by van de Gronden.

[30] CJEU, Case C-271/08 *Commission* v. *Germany* ('Riester Rente') [decided on 15 July 2010, nyr].

[31] CJEU, Case C-437/09 *AG2R*[2011] ECR I–7091, concerning an occupational health insurance scheme. The Court accepted the justification by France, which was based on the economic necessity to avoid 'cherry picking'.

obligation to legislate, as is suggested by the words 'shall establish'.[32] Second, the Treaty very infrequently states that a legislative competence can only be used for regulations—as in the case of Article 14 TFEU. Even if this were an error, which has been copy-pasted from the draft Constitutional Treaty to the Treaty of Lisbon 2009,[33] it would still be legally binding.

The difficulty to provide for leeway for national diversity through a Regulation has led to the assumption that this competence will not be used, which is seen as the ultimate motive behind only providing for a regulation.[34] However, combinations of regulations and directive are not unheard of. For example, the legislative package around the European Company (Societas Europae) consisted of a regulation establishing the SE and a directive on employee involvement in the SE governance.[35] As the Treaty provides for a legislative competence re workers involvement—if 'only' by Directive (Article 137 para 2 EC, now Article 157 TFEU), the Regulation did not contain any competence norm for creating a Directive. It is probably not beyond normative argument that such a competence could be read into the competence for creating a Regulation. After all, the Treaties seem to suggest that the Directive is the dominant form of EU legislation, and that this would also be in line with the principles of subsidiarity and respect for national identity. As an alternative, flexible choices for Member States can also be introduced into a Regulation (as was the case in the SE regulation), in order to avoid unsuitable rigidity. In any case, there would still have to be agreement on the main points of a regulation defining principles and conditions for SGEI. Given the fact that even the EP, which is the institution most supportive of legislation for SGEI, has not proceeded beyond proposals by one of its factions,[36] this is not very likely.[37]

Beyond the new legislative competence, there are limited possibilities to legislate specifically for SSGIs. According to Article 153 TFEU, any legislative measures aiming to combat social exclusion or to modernise social protection systems are excluded, while (of course) legislation on social security and social protection of workers is possible (Article 153 (1) c TFEU and Article 46, 48 TFEU), as well as legislation concerning social security and social protection for

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[32] Craig 2010, p. 328.

[33] Danwitz 2004, p. 266, only referring to the Draft Constitutional Treaty.

[34] Knauff 2010, p. 734.

[35] Council Regulation No. 2157/2001 of 8 October 2001 on the Statue for a European Company (SE), *OJ* 2001 L 294/1, and Council Directive 2001/86/EC of 8 October 2001, Supplementing the Statute for a European Company with Regard to the Involvement of Employees, *OJ* 2001 L 294/22.

[36] EP, Socialist Group, *Proposal for a Framework Directive on Services of General Economic Interest*, 2006. The Socialist and Democrats group has also already produced a draft for a SGEI Regulation (see Rapporteur: Proinsas De Rossa: Report on the Future of Social Services of General Interest, PE 438.251v02-00 A7-0239/2001, p. 20).

[37] Consequently, the EP has stressed that 'an EU framework regulation on SGEI, permissible under Article 14 TFEU, is not the central issue at this time' (EP Resolution of 5 July 2011 on the Future of Social Services of General Interest, 2009/2222(INI), para 48.

free moving citizens (Article 21 (3) TFEU). Further, EU Commission Regulations under Article 106 (2) TFEU remain an option. Given the EU's preference for so called 'soft law' in the field of social policy, it is not very likely either that these competence norms are used for legislation expressly on SSGI. The reluctance to legislate expressly has not hindered the EU legislator to restrict legislator options for Member States concerning SSGI through other Directives.[38]

4.4 A Constitution of Social Governance for SSGI

A constitution of social governance consists of two elements: on the one hand the political governing of markets, rather than leaving them to their own devices, and on the other hand the involvement of socio-economic actors with some independence from states in processes engendering social justice. It presupposes that political steering should make use of all levels of the EU polity (i.e. states, regions, municipalities and the EU), and that the same should apply potentially for socio-economic actors. In discussing how this could take shape in the field of SSGI, this chapter now turns to the utopian—aiming to maintain in the area of realistic utopia, though.

Applied to SSGI, the issue can be translated to the question whether the EU level actors such as the Commission and the Court should continue to have the competence for restricting SSGI policies in the name of economic concepts, while the Member States are left to find sufficient resource for SGGI in a global crisis and also the imagination to adapt them to changing societal demands. While the constitution of social governance challenges such a competence regime in principle, a discussion for the sensible use of available competence regimes needs to be discussed for each sector separately. It is then the responsibility of EU actors, consisting of the EU legislator, the EU Commission and the Court, to not stand in the way of developing true multi-level governance for individual fields.

4.4.1 The Role of the National Level and Its Limits

As regards SSGIs as part of a comprehensive policy towards enhancing social justice, there is certainly some argument for maintaining a major role for levels below the European level.

First of all, for many SSGI, especially those responding to personal needs, it is vital that they are provided close to the needs, and in line with any regional culture. This clearly seems to imply that SSGI should be developed locally or in regions rather than from the EU level. Also, there is an element of path dependency here: because of the EU's obstinacy to take over any responsibility for providing the

[38] See Chap. 6 in this volume, by van de Gronden.

preconditions of modern and inclusive SSGI, the Member States have continued to develop their national systems in this field. These now diverge vastly, as a result of which any uniform EU level solution would engender unreasonable adaptation costs.

Depending on the cultural propensity to centralism or decentralisation, regions and municipalities also play a decisive role. Also, there are a number of national traditions in which the social institutions not governed publicly are contributing to SSGI.

On the one hand, there is a tradition of trade union involvement. Derived from the guild tradition preceding capitalism, protection against wage loss in cases of unemployment and old age, but also ill health originated from solidarist mutual support of workers through their trade unions and other organisations in many Member States.[39] In the field of unemployment insurance, a mixed system by which states subsidises voluntary trade union run unemployment insurance was introduced in 1901 in the Belgian town Ghent. This system continues to have some influence in Scandinavian Member States as well as in Belgium, in the face of legislative efforts aimed at curbing trade union membership in Scandinavian countries.[40] Also, trade unions and employers' associations continue to play an active role in the provision of old age pensions, in particular in the field of occupational pensions,[41] which frequently are based on collective agreements. There are more emanations of trade union involvement in social insurance as has been evident in the Court's case law on freedom to provide services and the relation of collective agreements to Articles 101 and 102 TFEU.[42]

First emerging from the tradition of religious and charitable provision of services such as care (whether at home or in institutions), and later on independent organisations, many Member States fund voluntary sector organisations in order to provide some of the SSGIs they consider necessary. National traditions vary considerably on this point, and there is certainly still need for research. However, the contribution of voluntary sectors to SSGI also provided for in national legislation is particularly strong in Germany, the Netherlands and Sweden, and decisive contributions of voluntary sectors can also be seen in Italy and Spain.[43]

Thus, provision of SSGI is based not only on states, but also on regions, municipalities as well as civil society organisations such as trade unions and the voluntary sector.

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[39] On the role of collective self-help of workers see Eichenhofer 2007, pp. 31 and 48; Ritter 1991, pp. 88–95.

[40] See Clasen and Viebrock 2008; Rie et al. 2011.

[41] Ebbinghaus 2011.

[42] The German system of extending obligations under collectively agreed holiday payment schemes to foreign service providers seconding workers to German building sites was (unsuccessfully) attacked before the CJEU in Case C-409/04 *Commission* v. *Germany* [2007] *ECR* I-7797; French legislation enabling collectively agreed provision of additional health insurance in certain artisan branches was (likewise unsuccessfully) attached in CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], a Dutch system of occupational pensions insurance was at stake in the CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751.

[43] See the contributions in Kendall 2009.

If there is so much national and regional diversity, one could ask, why introduce any transnational or EU level at all? Would it not be preferable to strengthen national provision of SSGI? Could not the problem resulting from a rights-based system of EU economic integration be avoided by introducing an immunity of SSGI from such economic integration?

While demands for national closure in the field of social policy abound, there are in this author's view two conceptual problems with this. First, nation states are vulnerable to economic globalisation—a process to which they also contribute by advocating policies favouring market liberalism above all other strategies of governance. Expanding on this view would go beyond the scope of this chapter, and possibly also beyond the disciplinary competence of its author. Thus, the main argument made here remains at a normative level.

Normatively the project of European integration holds out the promise of uniting a continent under a polity regime among others aiming to enhance social justice also beyond state borders. It is easy to see how the project loses its credibility if there are only demands for allowing free movement for economic actors and flows of goods and services, but to withhold the free movement of citizens as workers and in other capacities. The individual rights of EU citizens to enjoy university education in across the EU,[44] to have access to high quality medical services in more advanced Member States although their citizenship derives from one of the poorest,[45] the (albeit imperfect) guarantees for free moving workers to combine their pension and unemployment benefit claims accrued in different Member States all contribute to this dimension of solidarity.[46] Engendering social justice and social inclusion are now also constitutional demands, since the Treaty of Lisbon. These constitutional demands enhance the normative credibility of the EU project, besides being legally binding. Welfare regimes (including provision of SSGI) that are based on national closure have their limits in contributing to these

[44] This was defended by a number of claimants in the action leading to the CJEU decision in CJEU, Case C-73/08 *Bressol* et al. [2010] *ECR* I-2735 and by the Commission in CJEU, Case C-147/03 *Commission* v. *Austria* [2005] *ECR* I-5969.

[45] See the facts underlying the ruling in CJEU, Case C-173/09 *Elchinov* [decided on 5 October 2010, nyr]: A Bulgarian citizen, suffering from a malignom in his right eye, was told by his health fund that the only treatment available was removal of the eye. Upon travelling to Berlin after deterioration of his condition, he received radiotherapy and now still has two eyes. Relying on former case law, the Court held that the Bulgarian health fund could not deny the reimbursement only on formal grounds, such as the requirement of the decision being taken before the actual treatment. Thus, the positive outcome from the perspective of the patient could have been avoided by the Bulgarian health fund by arguing that the fund's sustainability would be threatened by upholding their claims (this is the essence of the NHS justification for withholding hip replacement from Mrs Watts, who, unable to endure constant pain any longer, sought relief in a French hospital; CJEU, Case C-373/04 *Watts* [2006] *ECR* I-4325, paras 103–105).

[46] On solidarity as a constitutional paradigm new for the EU see Ross 2010, and Chap. 5 in this volume, by Ross.

aims. They will reintroduce two-tier citizenship,[47] which gives full access to SSGI to nationals and potentially (reluctantly) to long-term residents still maintaining their foreign nationality of a different Member State.

Thus, relegating SSGI provision to the national level is not sufficient—although this is the least challenging solution for Member States able to afford SSGI due to their strong economic performance.

4.4.2 The Role of EU and Transnational Levels

If only based on the new constitutional values of the EU, there is thus a role for the EU level in the field of SSGI. Alternatively, the limits of national policy provision could also be partly tackled by establishing transnational governance, especially in border regions. Both levels shall be treated together here.

4.4.2.1 Free Movement Rights and Ensuring the Capability of National SSGI

Traditionally this role has been to ensure free movement, and to limit withholding solidarity to the stranger. While the Court has at times been generous with entitlements based on citizenship,[48] it has been rightly noted that most of the times the access of economically inactive citizens to SSGI in host states has been granted only reluctantly. Thus, a student who had married a national of the country where she studied was denied any support payments that reduced the university fees for nationals after she lost her side job—relying on the insufficient degree of her integration into Dutch society.[49] Likewise, a woman needing long-term care was denied the 'export' of her entitlements from the German compulsory care insurance, although she also relied on derived rights from her husband, who was economically active.[50] Nevertheless, the Court granted access to SSGI for EU citizens from other Member States once they resided in a host state for economic purposes, and in addition expanded rights to consume healthcare in other Member States reliant on public funds from one's own Member State. These rights are attractive to the European cosmopolitan elite[51] as well as to benefit recipients.

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[47] This notion of two-tier citizenship does not discuss the rights of non-EU nationals ('third country nationals'). This is only in order not to exceed the scope of a single chapter (on this division see Marzo 2011).

[48] One example for such generosity is the *Zambrano* case (CJEU, Case C-34/09 *Ruiz Zambrano* [decided on 8 March 2011, nyr]), where the Court derived a right to a work permit from a child's right to reside with his non-EU citizen parents.

[49] CJEU, Case C-158/07 *Förster* [2008] *ECR* I-8507.

[50] CJEU, Case C-208/07 *Chamier-Glisczinski* [2009] *ECR* I-6095, para 85.

[51] Fligstein 2008 has made the valuable point that the positive aspects of European integration are experienced more widely by a small elite making use of their free movement rights.

They certainly add a social leg to economic freedom, which convert into rights to participate in (or profit from) SSGI provided in other Member States.

The downside of these aspects of free movement rights is, however, that they can have negative effects on social budgets nationally.[52] With the widening gaps between the poorest and the richest Member States this aspect of ensuring free movement between different SSGI becomes ever more disruptive. When Mrs Müller Faure preferred treatment by a German dentist over that of the Dutch one at her place of residence,[53] and the Court found that disallowing her to choose a foreign dentist would impinge on freedom to provide services, the subsequent transfer of funds occurred between health funds of comparable financial soundness. When Mr Elchinov[54] was able to claim reimbursement for having his eye rescued in Berlin through a specialist treatment not available in his native Bulgaria, the transfer of funds was from a health fund commanding about a faction of the wealth of the German health fund at the receiving end. Under these circumstances, more than safeguarding free movement seems necessary in order to enhance social justice.

While it would be difficult to justify for Bulgarians to continue losing their diseased eyes while the common wealth of the EU allows for them to be cured, having a poor country's public health funds pay for these treatments may prove unsustainable. Short of denying citizens of poor countries the advantage of their country being part of a larger union, a system of transnational solidarity between public health funds could be established. This would only be one way in which the EU could contribute to ensuring that national health funds retain the capacity of supporting the social side of free movement rights. In border regions, especially if they are thinly populated, cooperation of health funds might also allow to invest in only a limited number of specialist hospitals, rather than forcing patients to travel far within the boundaries of nation states in order to guarantee that the capacity of all hospitals in one nation is used. Of course, all this requires careful exchange of information and best practice between health funds of different nations. Once these deliberations would lead to devising a working system of cooperation between public health systems of different countries which at the same time supports free movement rights, it would be a worthy object of legislation under Article 14 TFEU. Health services are covered by Article 14 TFEU: due to the enormous economic weight of health care, the Court will probably continue to qualify them as economic services. Even if they are based on a solidarity principle, the provision of their services will compete with marketized provision of health care Thus, the regulation establishing principles and conditions for providing SGEI's could be used in order to ensure the capacity of national health funds to comply with free movement rights.

The problem of the Dutch housing market and the provision of affordable housing is another case which demonstrates the need of a complementary EU level

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[52] Deftly summarised in the heading 'Killing national health and insurance systems but healing patients' Hatzopoulos 2002.

[53] CJEU, Case C-385/99 *Müller-Faure* and *Riet* [2003] *ECR* I-4509.

[54] CJEU, Case C-173/09 *Elchinov* [decided on 5 October 2010, nyr].

dimension of SSGI. As mentioned, a procedure aimed at enforcing Article 107 TFEU has led to a redefinition of the Netherlands system to provide social housing which emerged in the early twentieth century. Originally, it provided for public credit guarantees and subsidies for housing cooperatives to provide social housing for the major part of the population. Upon intervention by the Commission, the Netherlands have restricted the faction of the population who can profit from this to those earning up to 33 000 € annually (43 % of the Dutch population). The housing cooperatives also rent out space for general purposes such as neighbourhood centres, youth centres, women's shelters and similar. Using the state aid rules, the commission has thus effectively forced the Netherlands to scale down an established system of social services. The question is whether this approach, which is focused on enhancing competitiveness on markets, tackles any of the actual problems emerging from the Dutch housing policy under internal market perspectives, especially considering the situation of EU citizens migrating to the Netherlands to work there. Due to the limited availability of space in this country, access to subsidised housing rents can usually only be gained after a considerable time of residence in a certain municipality. While the resident population registers upon achieving maturity, the migrant population is referred to the free housing market with exorbitant rents for dwellings often lacking basic amenities such as full roofing, working toilets or kitchens. Obviously, what would be needed are transnational cooperation schemes which give migrants access to the housing market taking into account their residence or workers' identity in other Member States. This cannot be achieved through commercialising the Dutch system. Rather it would require establishing an EU level mechanism for transferring social housing entitlements under consideration of the situation in the host state.

Health funds and social housing provision were only raised as examples here. Surely there is more scope for developing measures of mutual support which would ensure the capacity of national SSGI to serve citizens of other states, and at the same time ensure citizens' access to those SSGI which could best serve their needs.

4.4.2.2 EU and Transnational Level SSGI?

The cooperation between national SSGI in order to make free movement rights sustainable is in principle a coordinative step, although it certainly goes beyond the coordination of social security systems through merely individual rights as we know it today. A further step would consist in creating EU level[55] or transnational (regional) SSGI.

[55] Establishing EU level SGIs is a long-standing demand of the European Economic and Social Committee in an own initiative report *What Services of General Interest Do We Need to Combat the Crisis*? 2010, the committee reinforced the opinion that EU level SGI were necessary, *OJ* 2010 C 128/65, points 4.4–4.6. However, the report exempts SSGIs from these demands.

4.4.2.3 EU Level and Transnational SSGI

Several proposals in this regard have been discussed in academic writing. Taylor has already in 2008 proposed to establish a European unemployment fund,[56] arguing that the EU was already engaged in the combat of unemployment through its structural funds, and that an EU level fund would have the advantage of furthering transnational strategies of creating employment.

Before the Treaty of Lisbon 2009, the EU had established a legislative framework for cross-border institutions for occupational retirement provision,[57] based on the internal market competence. This directive was seen as a first step towards creating transnational welfare institutions.[58] However, its specific aim was to create an EU wide market for occupational retirement schemes, in which entrepreneurs must be free to offer pension schemes in countries other than their place of corporate domicile. This piece of legislation is thus not related to any SSGI; it rather contributes to erase obstacles to commercial engagement in the field of occupational pensions. It was also based on a rather prescriptive approach, in that it forced Member States to create legislation for occupational pension providers on their territory although these same Member States did not use occupational pensions in their social security provision.[59] Thus, this piece of legislation is not a model for establishing EU level SSGI.

Its clash with national traditions in the field underlines how important it is to respect these national traditions. Given the great differences between unemployment systems in the Member States, it is open to debate whether establishing an EU level institution replacing those national institutions would be practical. A more realistic way to achieve EU level SSGI would be to choose a field where Member States' activities can be complemented rather than replaced. The EU Capital Grant for Youth[60] might be a more positive example: this proposal envisaged a sum of money to be paid to each new born EU citizen. Also, providing an additional pension fund which does not replace existing national systems (a 28th system) might be a way forward.

Another way to establish a dimension of SSGI beyond national borders would be the use of regional cooperations. The European Grouping for Territorial Development[61] might provide a framework for the development of such

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[56] Taylor 2008, p. 165.

[57] Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on activities and supervision of occupational retirement provision. *OJ* 2003 L 235/10, based among others on Article 95 EC (now 114 TFEU). The Directive is presently under review.

[58] Ferrera 2009, p. 228.

[59] Accordingly, the Czech Republic and Latvia did not implement the Directive initially, but only the Czech Republic was brought before the Court, losing its case (CJEU, Case C-343/08 *Commission* v. *Czech Republic* [2010] *ECR* I-275.

[60] See on this Ferrera 2009, p. 230.

[61] Council Regulation No. 1086/2006 of 11 July 2006, Amending Regulation No. 2866/98 on the Conversion Rates between the Euro and the Currencies of the Member States Adopting the Euro, *OJ* 2006 L 210/19.

transnational co-operations. So far, this instrument is used for co-operations that are not specifically focused on SSGI, but most cooperations make reference to social policy issues.[62] Given the fact that EGTD allow the issuing of binding legal instruments for their members, these certainly seem an opportunity for cooperation also in the social field.[63]

4.4.2.4 EU and Transnational SSGI and Provision by Civil Society

So far, the EU policy around SSGI is placed between only two poles: the market and the state. This contrasts with the wide variety of involvement of social partners and the voluntary sector in SSGI at national level. This involvement goes far beyond a role of policy advisor. In several Member States, SSGI are provided by either trade unions or voluntary sector organisations. The question arises whether and how the provision by non-commercial actors or their involvement should be mirrored by EU and transnational level SSGI. So far, civil society has been involved by the Commission in their discussions of SSGIs, for example through their involvement in SSGI *fora*. Drawing on the expertise of civil society obviously is an important step. The question to be addressed as regards provision of EU or transnational level SSGI is in how far societal actors could take charge of this, instead of commercial actors or public institutions, or at least lead SSGI funded by the EU or some of its Member States. So far, EU level voluntary organisations and trade unions are not providing large scale SSGIs, although they are involved in delivering programmes under the EU social and regional funds. There is also an increasing Eurocracy of those 'third sector' organisations.[64]

If any of these EU voluntary sector organisations, a number of national voluntary sector organisations or EU social partners would combine in order to provide transnational or EU wide SSGI, there might be repercussions from the EU judicial constitution as it stood before the Treaty of Lisbon. For example, an EU university league may agree on a system to raise contributions to a fund, from which universities that are more sought after than others for student exchange might retrieve any overburdening. Or health funds organised by voluntary sector organisations in several Member States might combine to establish a similar risk-spreading fund, which helps citizens insured in poorer health funds to receive specialist treatment from the richer health fund, if this is not or not readily available at home. Depending on the question whether the universities or the health funds would be considered as undertakings or delivering an economic activity, their actions might be open to challenge under EU competition law, possibly also under free movement rules. If any state funding for the provision of

[62] Ferrera 2009.

[63] Pechstein and Deja 2011.

[64] Will and Kendall 2009. See also Chap. 13 by Szyszczak.

their activities is involved, state aid law or public procurement rules might also be invoked to make things difficult.

In the absence of any EU legislation clarifying any of the questions, this would be a matter for the judiciary. Under any regime invoked, there is always scope for justifying cooperation. If the common fund by universities or by independent health funds is seen as cartel, or as an infringement of Article 102 TFEU, this would be difficult to argue though—if the institutions creating the fund are considered as undertakings, they would have to achieve having their cooperation qualified as only incidentally involving an agreement affecting interstate trade in an anticompetitive way.[65] For fundamental freedoms, there is the general and public interest justification as well as Article 106 TFEU, which provides the only way of justifying a deviation from state aid or competition law rules. The idea of the constitution of social governance can serve as an additional element in the argumentative arsenal before the Court: the CJEU would be required to give maximum scope to any potential furthering of SSGI provision, in particular in fields. Similar (and potentially more reliable) results might be achievable through legislation, e.g. under Article 14 TFEU.

The contribution to an EU or transnational level SSGI provision through the voluntary sector or trade unions thus offers scope for unconventional strategies in order to offer SSGI beyond national borders in sustainable ways.

4.5 Conclusion

The Treaty of Lisbon 2009 amended the competence regime for SGEI by introducing Article 14 3rd sentence TFEU. In allowing for an EU Regulation establishing principles and specifying conditions under which SGEI are provided, this competence is unduly narrow. For SSGI, in so far as they are a sub-category of SGEI this is particularly problematic because the restrictive competence regime of the social policy chapter seems to exclude comprehensive EU legislation. Also, while the substantive law relating to SGEI remains unchanged, the EU judiciary and the Commission can continue to restrict Member States' scope for providing SSGI.

This reluctant competence regime contrasts with the enhanced relevance of social values after the Treaty of Lisbon, including the enhanced relevance of SGEI, and the recognition of NESGIs through protocol 26 TFEU. SSGI, which are partly a sub-category of SGEI, are particularly important to further social inclusion and social protection at national levels. However, if the EU is to achieve its new objectives of social justice and social inclusion, it is not sufficient to pursue these objectives at national levels. Welfare regimes based on national closure will lead

[65] CJEU, Case C-309/99 *Wouters* [2002] *ECR* I-1577.

to two-tier citizenship rights, and inhibit free movement of persons throughout the EU.

One role for the EU in the field of SSGI lies in ensuring sufficient capacity of national SSGI even though Member States must extend the solidarity on which these are based to citizens of other Member States. EU level mechanisms of transferring entitlements and balancing risks if they realise unevenly throughout the EU would counteract the danger that some national SSGI would become unsustainable. Presently, this danger is counteracted by curbing citizenship rights especially for those who are not economically active, thus reducing the relevance of the EU for larger parts of the populace. Insofar as SSGI are also SGEI the new competence in the Treaty of Lisbon could be used to achieve these aims.

Another role of the EU for SSGI could lie in establishing SSGI beyond national levels. In order not to curb Member States' competences in defining SSGI, this would be best placed in fields where Member States are not yet active. The guarantee of universal access to internet services is one such example, as would be the introduction of a European Grant for the Youth. However, most likely EU level SSGI are one step too far too early. Potentially voluntary arrangements between non-state actors for risk-spreading would be possible with time. Here, the EU would not have any regulatory competence, but possibly—if the relevant providers are classified as undertakings—their activities would be open to challenge under EU competition and free movement law. In this regard, the constitution of social governance would mandate to expand the justifications available in these fields.

The constitution of social governance thus provides an argumentative framework for expanding EU competences, and in particular the competences of non-commercial and non-state providers of SSGI for developing transnational and EU dimensions of SSGI provision.

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Chapter 5
SSGIs and Solidarity: Constitutive Elements of the EU's Social Market Economy?

Malcolm Ross

Abstract This chapter argues that the developing legal framework for SSGIs represents a particularly powerful catalyst for realigning the constitutional relationship between economic and social values in the EU as part of an evolving social market economy for the purposes of Article 3(3) TEU. In particular, growing political consensus in favour of a holistic approach to the issues relating to SSGI, coupled with the increasing receptiveness in EU law after the Treaty of Lisbon 2009 to a more 'social' orientation and the fragmentation of legal boundaries and methodologies, invite analysis of how those trends might be harnessed at law. This chapter proposes that the concept of solidarity, referred to frequently by the Treaties and the CRFEU, is a credible general principle of constitutional status in EU law for that purpose. Solidarity, it is argued, is an activator that requires a joint legal responsibility across purportedly hard-line boundaries of competence between different actors (EU institutions, national and subnational agencies) to secure effective SSGIs in an EU society that values and protects citizenship and social inclusion.

Contents

M. Ross (✉)
School of Law, Politics and Sociology, University of Sussex,
BN1 9SP Brighton, UK
e-mail: M.G.Ross@sussex.ac.uk

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5.1 Introduction

This chapter argues that the developing legal framework for SSGIs represents a particularly powerful catalyst for realigning the constitutional relationship between economic and social values in the European Union. The political opportunity—and impetus—for that claim has been created by the turbulence of economic downturns and their attendant insecurities, together with increasingly vocal concern about the quality and sustainability of public services in the face of (over-)marketisation. The distinctive legal substance of the argument, developed in this chapter, positions the regulation of SSGIs in a dynamic relationship with two evolving concepts in EU law, namely 'solidarity' and the 'highly competitive social market economy'. These two ideas have acquired considerable normative potential by virtue of their elevated status and pervasiveness following the Lisbon Treaty changes to the EU's legal architecture. On the one hand, solidarity is mentioned extensively in the TEU and the CFREU. On the other hand, Article 3(3) TEU trumpets the highly competitive social market economy as one of the bases of the EU. However, both concepts lack detail in the Treaties—thus requiring some trigger event or process to clarify and embed their meaning. SSGIs, pivotally positioned at the intersection of a number of legal orthodoxies and narratives, represent the focus for crystallisation of any reconfigured approach to the ongoing search for the EU's soul[1] and the means for its legal expression.

This chapter claims that a new legal framework for SSGIs is emerging in the form of an enabling and dynamic environment of joint EU/national responsibility in which the interdependency of social and economic priorities can be mediated and reviewed. The doctrinal significance of this, it is argued, is that the refashioning of legal discourse is characterised by a more flexible and holistic approach than is permitted by more familiar tools such as competence allocation between EU and national levels. Crucially, this emerging discourse also opens up possibilities of being freed from the baggage or imprint of competition and market law. In this sense, there is value in concepts of solidarity and the social market economy as *activator* and *anchor,* respectively to bring together and strengthen disparate 'social' parts of the Treaties and overarching EU policies. In particular, those concepts can harness the potential of legal weapons such as the new 'cross-cutting' social protection clause[2] of Article 9 TFEU and the ever-expanding institution of

[1] Echoing 1998, p. 8, where the soul of the (then) EC was still 'a mystery'.

[2] Opinion of AG Villalón of 5 May 2010 in CJEU, Case C-515/08 *Santos Palhota and others* [decided on 7 October 2010, nyr], para 51.

EU citizenship,[3] whilst firmly pegged to the social and territorial cohesion and social inclusion priorities and targets of the EU's Lisbon 2020 strategy.[4] The result is a productive legal environment for SSGIs to flourish that stops short of—indeed, it could be said, actually obviates the need for—specific legal bases for EU 'social' action.

In elaborating upon this combination of activator and anchor, this chapter takes account of and positions itself against a number of wider contexts and themes. More specifically, the tools and means for achieving a reconstituted relationship between economical and social values affirm the destabilisation of a number of boundaries that have previously marked—or dogged—the conceptualisation of the contours of European law, such as the economical/non-economical basis of competences, the public/private character of particular rules or their vertical/horizontal application. Instead, the approach taken in this chapter identifies a more functional trend in adjudication in which reforms at Treaty level enable—and indeed require—social values to be accessed, whilst solidarity as a putative constitutional principle engenders a responsibility to meet threats or risks to shared core values (those values now extending to social inclusion). This emphasis upon the positive responsibilities of solidarity distinguishes the analysis adopted in this chapter from other commentators who have also discerned a more 'integrative' methodology at work in the legal management of SGEIs.[5] Moreover, the position adopted below canvasses the proposition that a solidarity-led approach to the conceptualisation of the EU social market economy is capable of embedding a more substantive enjoyment of social protection than, for example, ideas premised upon justice through access.[6]

The chapter proceeds in Sect. 5.2 by first reviewing the legal barriers to the development of a more 'social' market economy. It demonstrates that orthodox approaches towards demarcation between national and EU competences on the one hand, and the balancing of social and economical values in competition and single market contexts on the other, are already out of step with prevailing patterns more generally in EU law, especially the most recent citizenship case law. This section is thus used to establish two things: (i) that a direction of travel is already visible in the methodology and interpretation of the Treaties that questions the primacy of market priorities and attempts to move conceptually beyond the ad hoc pragmatism of effectiveness; and (ii) that, specifically, a leitmotif can be discerned in that methodology which engages with the protection of core constitutional values.

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[3] Although the extent and direction of travel is still contested: see in particular Shaw 2011; Nic Shuibhne 2010; Kostakopoulou 2007; Borgmann-Prebil 2008.

[4] See Commission, *Communication from the Commission, Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, COM(2010) 2020, 3 March 2010; European Council, *Conclusions*; SPC, *SPC Opinion on the Social Dimension of Europe 2020 Strategy*, SPC/2010/10/7 final, 17 June 2010. Note 'inclusive growth' as a key EU priority and 'promoting social inclusion' as a headline target. See generally Marlier and Natali 2010.

[5] In particular, see Hancher and Larouche 2011, p. 744.

[6] Notably H–W Micklitz, especially 2011A. See also Joerges and Rödl 2004.

In other words, this first section sets up the receptiveness of EU law—in its ordering of values and aspirations—to a more socialised view of the relationship between markets and the lives of European citizens.

However, pointing out the tension between historical interpretations and emerging trends does not itself explain whether such changes are evidence of a fundamental and enduring transition in what the EU is really for Sect. 5.3 of the chapter accordingly develops the constitutional significance of solidarity in the manifestation and sustainability of any such process. This is done in two stages. First, discussion of institutional and political positions identifies an increasing readiness to engage with solidarity as an idea of political and legal potency; albeit without too much consensus among those sources as to what specific applications might be or lead to. Hence, in the second subsection, the argument takes up the legal lacuna that can be filled by a more substantiated concept of solidarity as an EU principle. That discussion addresses why citizenship and fundamental rights—already familiar institutions in EU law and given additional weight by the Lisbon changes and case expansion—cannot do the job unaided. Instead, the position postulated in this second section is that solidarity provides both the justification for, and the flexible means to adjust, the character and scope of the joint responsibilities of EU, Member State and regions in relation to SSGIs. Thus, solidarity, as the shared commitment at different institutional and political levels to the value and effectiveness of SSGIs, conceptually forms the legal linkage that mediates the acceptable range of diversity in models and methods for their promotion and protection. In this way, the argument runs, the legal framework satisfies a legitimacy need by meeting the political imperatives of subsidiarity whilst at the same time maintaining a sufficient degree of 'hard' law framework to ensure the essential tasks of SGIs generally (and SSGIs specifically) are delivered. The novelty, and distinctiveness, of this claim is found in the active nature of solidarity responsibilities which takes them beyond simply loyal compliance with the Treaties to a more holistic concept that is more about *connecting* different layers (competence, hard and soft law, institutions and individuals) rather than demarcating between them. In this sense a solidarity discourse, by focusing upon collective and institutional responsibilities to enable effective SGIs, does different work conceptually from the individualised focus of market, citizenship and fundamental rights.

5.2 Dismantling the Legal Barriers to a 'Social' Market Economy: Overcoming Orthodoxies

Orthodox narratives portray the EU as the driver and champion of market integration and liberalisation whilst Member States have historically been the custodians of social policies and 'closed' welfare systems. This view has been buttressed, indeed entrenched, by three layers of line drawing that, if taken cumulatively and extrapolated to the post-Lisbon context, would produce the seemingly unpromising proposition that any path towards an EU 'social market

economy' must traverse a landscape that requires the social to remain largely beyond the reach of the EU or, at the very least, overshadowed within it. Those key boundaries, or contrasts, comprise questions of EU or national competence, the dynamics of the market/social relationship and which element should prevail in the event of conflict, and the methodologies of choice for policy development and implementation, especially as between 'hard' and 'soft' law. The first and second of these issues are discussed further below for the purposes of contextualising the scale and significance of the changes in approach that are canvassed in this chapter, whilst at the same time demonstrating that the legal soil and climate are reasonably conducive to their growth. The third element is intimately connected to the elaboration of how the principle of solidarity might be actively applied; discussion is therefore postponed until the third section of this chapter.

It is hardly controversial to state that some of the most enduring and high profile of the EU's positive legislative competences relate to the single market and competition policy and have been crucial in developing the Commission's (and EU's) own sense of self-importance.[7] An expansive interpretation of the scope of those rules by the CJEU has in turn cemented the supranational character of marketisation.[8] By way of contrast, as Barnard has noted,[9] the question as to the role of, or justification for, EU-level 'social' policy has bedevilled the EU since its inception. Yet even if this polarisation of market and social based on competence allocation was ever truly the design of the founding Treaties, its sustainability has been undermined by successive political and legal developments. As is well documented,[10] these include particularly the application of EU liberalisation and competition policies to a wide range of previously shielded national regimes of health care and other SSGIs. For the purposes of this chapter, the important point is not to measure the exact degree of exposure or erosion that has taken place but instead to understand the limitations and inadequacies of the boundary-marking discourses that have produced those effects.

Nonetheless, at first sight the binary blueprint for market and social regulation competences appears to have inspired the renovations and extensions that have been applied under the TFEU and TEU to the specific edifice comprising services of general interest. On the one hand, Article 14 TFEU sits at the extreme, hard law end of the spectrum by conferring an additional EU competence to issue Regulations to establish the principles and set the conditions on which on which services of general *economic* interest shall operate. Adopting the same technique, but with a manifestly

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[7] Akman and Kassim 2010.

[8] Particularly by a less than rigorous approach to the 'inter-state trade' jurisdictional elements of competition law and the notions of market access 'restrictions' in relation to the single market. The former stretches back to CJEU, Case 56/65 *Société Technique Minière Ulm* v. *Maschinenbau* [1966] *ECR* 235. National measures occasionally fail to constitute restrictions for the purposes of the single market when they are too remote or contingent: e.g. CJEU, Case C-190/98 Graf v. *Filzmoser Maschinenbau* [2000] *ECR* I-493.

[9] Barnard 2011, p. 641.

[10] De Búrca 2005; Damjanovic and De Witte 2009; Neergaard et al. 2009; Hervey 2011.

contrary intention, Article 2 of Protocol 26 makes the bold claim that 'The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise *non-economic* services of general interest'. However, although the aspiration to establish a bright-line distinction is clear enough, the device to draw it is notoriously unreliable and unpredictable in its application. As a number of authors have pointed out,[11] there are enough questions about the consistency of 'economic activity' as a test as between the competition and single market rules of the Treaty, without going further and trying to turn it into the determinant of the parameters of a European civil society. Even if SSGIs are measured in terms of the two groups identified by the Commission in its 2006 paper,[12] it remains a contested question whether they are *per se* to be regarded as non-economic (as Member States might predictably prefer) or whether they are to provide yet another tranche of interminable case law as individual situations arise.

Regardless of whether hard-line demarcation of competences between EU and national levels is a worthy pursuit, two factors have rendered it well-nigh impossible to achieve. First, as explained in much more depth elsewhere in this volume,[13] the outer edges of EU activities are not drawn consistently. The resulting asymmetries—notably between the gate-keeping points of competition and single market regimes—prolong uncertainty and invite incessant challenge. Second, and this point is of critical importance to the approach explored in this chapter since it broadens the terrain in which regulation of SSGIs can be situated, the Court's interpretative style has ensured that the 'passive' effects of EU law are distinctly more far-reaching than direct, 'active' legislative powers. This technique, it must be noted, is not confined to particular types of policy or areas of activity and conduct. For example, it was used at an early point in the European project with regard to curtailing the unfettered exercise of national intellectual property rights.[14] In more recent years, some 'big picture' questions have been approached in this way by the CJEU—especially those which raise huge political controversy as to the EU/national division of competence. Or, to put it another way, some of the most sacred cows of national sovereignty or policy discretions have been tamed, or at least herded into gated pastures, by the Court's use of

[11] Chapters 9 and 11 in this volume, by Neergaard and Heide-Jørgensen, respectively; also Gallo 2011.

[12] Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM (2006) 177 final, 26 April 2006. The first category of SSGI consists of statutory and complementary social security schemes covering the main risks of life such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability. The second group covers other essential services provided directly to the individual, including rehabilitation, assistance with debt or addiction and social housing. See generally, Neergaard 2009, p. 27 et seq.

[13] See Chap. 9 in this volume, by Neergaard.

[14] Thereby, restricting the impact of the bald declaration in Article 345 TFEU that 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'.

bridging principles to establish or maintain the supervisory capacity of the EU legal order.

Three particular illustrations, each contributing a different dimension, are useful to lend credibility to the argument about SSGIs that follows. First, as a classic example of a broad-brush, effectiveness-led foray into national legal systems, is the approach of the Court to national procedural autonomy. Put in its widest terms, *any* rule of national law—whether substantive or procedural—is capable of being challenged (and avoided) where it constitutes a sufficiently serious impediment to enjoyment of EU rights.[15] This line of case law demonstrates the extended reach of EU law by the use of an 'effectiveness' standard to review such obstacles. The second example relates to the EU's Area of Freedom, Security and Justice, where the partial 'mainstreaming' of these matters as a result of the Lisbon Treaty does not detract from the importance of preceding developments in exposing the vulnerability of criminal law to EU-level review.[16] Since criminalisation and sentencing choices reflect deep-seated national variations in culture, morality and identity, the nature and extent of this exposure may be relevant when contemplating the regulation of SSGIs against a practical environment containing widely diverse political and cultural judgments and preferences about public services.[17] Finally, and this is the thread that will be picked up in the discussion below, the development of EU citizenship has also expanded beyond what might have reasonably been expected to have been the intentions of the Member States as to its limitations. As citizenship not only constitutes the illustration most closely related to SSGIs but also contains the most interesting of recent judicial revelations and hints about more holistic approaches to competences, a little more detail is necessary.

Two recent cases stand out: *Rottmann*[18] and *Ruiz Zambrano*.[19] Although both cases have deep significance for the direction and substance of citizenship itself,[20] their significance for this chapter consists more in the methodology deployed to connect the national decisions at stake to EU law and in the speculation they invite as to exactly what it is that the Court is seeking to protect by making those links. Without going into detail on the facts of the two cases, it should nevertheless be noted that the matters at issue—the statelessness of a Member State national in *Rottmann* and the 'irregular' migration of a non-EU national seeking indefinite leave to remain and unemployment benefits in *Ruiz Zambrano*—were politically contentious to say the least and centred upon national decisions that had been unilaterally made. Indeed, both cases could arguably have been disposed of by saying that

[15] Recognised from CJEU, Case 33/76 *Rewe-Zentralfinanz* [1976] *ECR* 1989; CJEU, Case 45/76 *Comet* [1976] *ECR* 2043.

[16] Baker 2009; Peers 2011.

[17] See CEEP, Public Services in the European Union and in the 27 Member States, 2010, for statistics and analysis. See also the chapter by Bauby.

[18] CJEU, Case C-135/08 *Rottmann* [2010] *ECR* I-1449.

[19] CJEU, Case C-34/09 *Ruiz Zambrano* [decided on 8 March 2011, nyr].

[20] Hailbronner and Thym 2011; Konstantinides 2010.

EU law had no relevance[21]—in *Rottmann* by virtue of the fact that the determination of nationality is, according to international law, a matter for the Member State, and in *Ruiz Zambrano* on the basis that EU citizenship is tied to movement and the Belgian children of non-EU parents had so far remained in Belgium.

In terms of reasoning, the importance of *Rottmann* stems from the way that the Court linked the exercise of a Member State's own nationality-conferring (or withdrawal) powers to EU law by reference to 'the nature and consequences' of EU citizenship and its deprivation.[22] This approach was in marked contrast to that taken by Advocate General Poiares Maduro, who had based the relevance of EU law on the fact that the individual in question had moved from Austria to Germany and thus exercised rights of free movement. Unsurprisingly, this decoupling of movement from citizenship rights of residence in the *Rottmann* judgment became part of the arguments in the later *Ruiz Zambrano* case, particularly in AG Sharpston's Opinion. It is difficult to be definitive as to how far the two cases are identical or congruent, especially since the Grand Chamber supplies in effect only ten paragraphs of judgment in *Ruiz Zambrano*. Claiming to be deriving its position from *Rottmann*, it asserted the jurisdiction of EU law on the basis that Article 20 TFEU 'precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[23] Whether this formula is indeed no more than a corollary of the 'nature and characteristics' statement in *Rottmann* is a question that has significant ramifications for EU law boundaries generally and the discussion of the legal framework for SSGIs in particular.

Whilst it has swiftly become clear that the Court itself is not inclined to move too quickly too soon,[24] the potential power of these two Grand Chamber decisions is remarkable. If it is indeed the case that threats to the genuine (effective?) enjoyment of the substance of citizenship form a legitimate and sufficient basis to assert EU review, then a whole raft of scenarios hoves into view for possible consideration despite any semblance initially of being purely internal matters for Member States' determination. It is important to stress that this approach is different from the more formalistic existence/exercise approach that marked the old intellectual property cases and—on the narrowest view—*Rottmann*. Instead, the *Ruiz Zambrano* position seems to be premised upon the protection of core EU

[21] Even the European Commission denied EU jurisdiction in both cases.

[22] CJEU, Case C-135/08 *Rottmann* [2010] *ECR* I-1449, para 42.

[23] CJEU, Case C-34/09 *Ruiz Zambrano* [decided on 8 March 2011, nyr], para 42.

[24] Chambers of the Court have subsequently been as cautious as the Grand Chamber was bold; see CJEU, Case C-434/09 *McCarthy* [decided on 5 May 2011, nyr] and CJEU, Case C-391/09 *Runevic-Vardyn & Wardyn* [decided on 12 May 2011, nyr]. Cf. the CJEU's own earlier approach in CJEU, Case C-208/07 *Petra von Chamier*-Gliszczinski v. *Deutsche Angestellten-Krankenkasse* [2009] *ECR* I-6095, where it had not adopted AG Mengozzi's citizenship-led arguments in the SSGI context of care-home costs.

values that are placed under threat by national measures.[25] Put another way, this is a bold claim by the Grand Chamber that is arguably a greater attestation to its avowed view of citizenship as a 'fundamental status'[26] than the rather piecemeal case law on accessing welfare benefits that has occupied much recent literature. As explored further below, the *Ruiz Zambrano* line of thinking presented here offers considerable mileage in the context of SSGIs. For if services of general interest generically constitute core EU values then threats to their effectiveness become a matter of EU concern (regardless of the distribution of positive legislative competences) and the possibility of duties to secure access to and enjoyment of such services also become more firmly tenable—especially when allied to arguments based on solidarity principles. In other words (and evidenced by the recognition given by political documents referred to in the third section of this chapter), SSGIs are public interest goods recognised at a pan-EU level on a par with citizenship and, accordingly, to be protected against threats and devaluation.

Moreover, post-Lisbon, it is not just a matter of arguing the core value attached to SSGIs alongside citizenship in this way but of emphasising their position as *part of* citizenship, a connection explicitly made in Article 36 of CFREU between access to SGEIs and social and territorial cohesion of the Union. Recalling the orthodoxies at the start of this section, there would be a potential paradox in asserting the particular importance of SSGIs, such as social housing, to the institution of citizenship whilst at the same time putting the design and delivery of such services beyond the reach of EU supervision. How can it be that those aspects of personal deprivation and vulnerability which most threaten explicit Treaty goals of social inclusion and cohesion are specifically excluded from direct EU support or intervention? In a climate of recession and (especially) public budget cuts, the risks of leaving the tasks of SGIs to Member States on a completely unaccountable basis seem obvious. In classic subsidiarity terms, choices as to form and methods are likely to be rooted in local cultural conditions and traditions; but this is not incompatible with a foundational responsibility at a supranational level upon all lower subunits (national, regional, local) to ensure that SGIs are valued and supported.[27] In other words, at the very least, the *effectiveness* of SGIs seems to be a question that falls properly within the ambit of EU law and policy. This of course still leaves open the issue of *when* that obligation is

[25] Cf. CJEU, Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat International Foundation* v. *Council and Commission* [2008] *ECR* I-6351, where the Court proceeded on the basis of the threat to fundamental rights protection of an EU standard by an international law measure.

[26] CJEU, Case C-184/99 *Grzelczyk* [2001] *ECR* I-6193, a formula frequently repeated since by the Court to the point where it now states that citizenship of the Union is 'intended' to be the fundamental status of nationals of the Member States: see CJEU, Case C-34/09 *Ruiz Zambrano* [decided on 8 March 2011, nyr], para 41. This seems a stronger statement than the use of 'destined' in the original *Grzelczyk* ruling.

[27] This approach might be contrasted with the explanation offered by the Belgian Presidency 2010, p. 6, where it talks of the '28th scheme' at EU framework level, on which Member States could draw when authorising players in the SSGI fields. That model perhaps plays down the nature of the obligation expressed in Article 14 TFEU as to the joint responsibility of the Union and the Member States.

breached—a task currently measured by tests of proportionality that vary in terms of their intensity[28]—but for the moment the key observation is that the exercise of local competences remains under some degree of supranational jurisdiction and supervision.

On one level, this argument may not seem so far removed from the Court's interpretative practice in relation to the single market.[29] In other words, the conclusion from *Ruiz Zambrano* could be restricted to a nutshell argument that obstacles to the enjoyment of EU citizenship are challengeable. Indeed, it might be restrictively argued that the burden of satisfying such a test to trigger EU review is still more difficult than that to fall within the scope of the single market rules on the basis that 'depriving' citizens of the substance of their rights is a stiffer requirement than the 'hinder' or 'render less attractive' thresholds customarily applied in free movement cases. However, the claim being made here in fact goes further. In particular, the protectable core of citizenship is 'genuine enjoyment' rather than access to opportunities. Thus, challengeable threats to citizenship embrace restrictions affecting not just access to, but the substance of, rights. Perhaps most importantly, in terms of possible future developments and with particular implications for the social market economy concept, ring-fencing the core of citizenship in the way envisaged in *Ruiz Zambrano* is at the very least a symbolic statement about the weight to be attached constitutionally to the EU's social values. In other words, (national) rules and practices become measurable against citizenship as much as against market liberalisation criteria. Of course, constructing the argument in this way does not of itself resolve the question of how the 'social' and 'market' elements are to be balanced or prioritised in given cases. Nevertheless, and this is the key shift that may be occurring, by extending the *scope* of EU law on the basis of social concerns the Court is committing the legal framework to a greater analysis of the market/social relationship when it comes to the reviewability and compatibility of EU, national or local policies and decisions.

Hitherto, that relationship has tended to be analysed in the context of the single market and the use of social considerations as part of 'rule of reason' exceptions to free movement. Given the context and the structural characteristics of that type of investigation, it is hardly surprising that the Court's track record does not offer much by way of a strong 'social' input—the famously insipid answers to the *Viking*[30] and *Laval*[31] cases are too well documented to warrant restating here.[32] All that need be reiterated is that some degree of mutual dynamic was recognised in these cases even if its actual application was resolved in favour of the market

[28] E.g. GC, Case T-289/03 *BUPA* [2008] *ECR* II-81, where an extremely light touch was applied ('manifest error').

[29] Borgmann-Prebil 2008.

[30] CJEU, Case C-438/05 *Viking* [2007] *ECR* I-10779.

[31] CJEU, Case C-341/05 *Laval* [2007] *ECR* I-11767.

[32] Inter alia, Syrpis and Novitz 2008; Barnard 2011.

considerations: i.e. that the market element qualifies the social *and* vice versa, rather than any trumping of one over the other as a matter of principle.[33]

However, the changes brought about by the Lisbon Treaty have affected the fundamental configuration of that mutual relationship. Most obviously, the introduction of a new provision in the form of Article 9 TFEU,[34] together with the 'upgrade' of the Charter of Fundamental Rights to primary law status, alter the departure point for analysis by moving it away from any assumptions about the secondary nature of social values. As AG Villalón has remarked:

> In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions of the Treaties… is expressed in practical terms by applying the principle of proportionality.[35]

On this view, social concerns are accordingly no longer 'exceptional' in relation to the single market.[36] One consequence, as the AG envisaged in relation to the posted workers involved in that particular case, is that national rules with social objectives are now more likely to withstand the impact of EU market requirements. But, and this complements the points made about the recent citizenship cases above, Member States are acting under the 'authorisation' of a reconfigured social/market relationship under the Treaties. In other words, the point is not that Member States have (re-)acquired extensive new competences but that the compatibility of national measures with the values of EU law is more likely within an evolving social market economy.

Of course, if Article 9 TFEU as a horizontal clause impacts upon the single market in this way, the same argument ought equally to apply to the EU's competition rules as well, most obviously in relation to Article 106(2) TFEU albeit within the more limited context of SGEIs. Other commentators have developed broader aspects of this Article,[37] but perhaps one note of caution should be entered for the purposes of the social/market balancing discussed in this chapter. Perhaps paradoxically, the kind of weighing exercise that might now be required by virtue

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[33] Azoulai 2008.

[34] Obliging the institutions 'to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.

[35] Opinion of AG Villalón of 5 May 2010 in CJEU, Case C-515/08 *Santos Palhota and others* [decided on 7 October 2010, nyr], para 53.

[36] Although the judgment of the 2nd Chamber in this case adopted a proportionality-based application of the protection of workers as a justification for the restriction on services: see judgment 7 October 2010.

[37] E.g. Sauter 2008; Fiedziuk 2010; Schweitzer 2011.

of Article 9 TFEU generally may actually be put at risk in the context of Article 106 TFEU because of the direction of travel of competition law modernisation. Thus, the case law under Article 106(2) TFEU which, if anything, had already[38] moved away from measuring the 'obstruction' to performance of tasks presented by compliance with Treaty competition rules in terms of economical viability towards the making of a clearer value judgment about the nature of the entrusted undertaking's universal service obligations, is now at risk of 'reverting' to a more efficiency-oriented assessment.[39] This is because a value-driven weighing exercise glaringly does not fit the 'modernisation' agenda for competition law avowedly endorsed by the Commission, although still at an imperfectly and unevenly applied stage of development.[40] Understood as an effects-led, more economically-evidenced approach to competition law and policy, modernisation does not easily facilitate a balancing of competition and non-competition (including social) concerns as the principal question when discussing the compatibility of SGEI matters with EU law. Advocates of modernising Article 106(2) TFEU choose instead a different priority: the imposition of greater discipline on Member States to ensure that taxpayers' money is not wasted on inefficient provision of SGEIs.[41]

If this claim for modernisation prevails, then it would seemingly both denude the impact of Article 9 TFEU and reinforce the significance of classifying SSGIs according to an orthodox, purportedly ring-fenced, distinction between economic and non-economic activities. However, as the following section argues, a different approach might recognise the interpretation and application of Article 106(2) TFEU as having to be made against a broader test of the *joint* responsibilities of EU, national and local authorities in a social and territorial cohesion context. That claim rests upon analysis of the concept of solidarity and its potential power to make connections across, or without reference to, competence boundaries. The next section accordingly takes up this challenge.

5.3 Solidarity: An Active Antidote to Fragmentation?

As a microcosm of EU law and politics, a study of SSGIs reveals fragmentation on a number of levels, both of substance and process. The preceding section demonstrated that hard-line distinctions based on the allocation of competences or the supremacy of the market over social concerns are unsustainable in the light of developments in both the Lisbon Treaty and the case law of the Court of Justice.

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[38] See; inter alia, CJEU, Case C-320/91 *Corbeau* [1993] *ECR* I-2533; CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751.

[39] See GC, Case T-289/03 *BUPA* v. *Commission,* n. 28 above; further, Ross 2009A, cf. Sauter 2009.

[40] The modernisation of Article 102 TFEU, for example, is arguably nowhere near being on a par with earlier reform approaches to Article 101 TFEU and merger control.

[41] Fiedziuk 2010.

Yet, in terms of discourse, it must be recognised that there is political capital in persisting with that kind of binary rhetoric that trumpets national or subnational power and importance, conveniently ignoring the permeability of boundaries and the uneven contours of the reach of EU law and institutions. Maintaining what amounts to a deception upon European citizenry in this way invites a quest to explain and house the patterns of fragmentation within the EU landscape—a task that is fully consistent with promoting the effective subsidiarity advocated by sub-EU agencies. The point being made here is that the pre-Lisbon legal tools failed to provide sufficient *connection* between different approaches. The result, typically an endless pursuit of the chimera that seeks 'better' definitions of the 'economic/non-economic' boundary, amounts to no more than treading water as far as solving the regulatory issues attached to SSGIs is concerned. Instead, the challenge for law—and EU law in particular—is in how to build the capacity to satisfy those political imperatives whilst at the same time providing analytical concepts of sufficient explicatory power to harness and sustain diversity and effectiveness of SSGIs in an increasingly fragmented environment.

This concern is made all the more important by trends in methodology and process, key questions of governance. In particular there are challenges presented by the increased prevalence of 'soft' law and greater diversity in the methods by which SSGIs are regulated by, or exposed to, EU law. Crucially, as Szyszczak demonstrates in this volume,[42] such developments have in fact contributed to the Europeanization of SSGIs despite rhetoric favouring the opposite direction in terms of the 'ownership' of approaches. The opaqueness of this reality is compounded by more general controversies over deficiencies and limitations of soft law.[43] As Dawson has recently observed,[44] the 'third wave' of EU 'new governance' may be with us, in the sense of a greater need for complementarity between hard and soft law approaches—especially in the context of the Europe 2020 strategy. This insight has particular resonance with the contention of this paper that a legal device is needed to provide coordination of the social/market relationship in policy development and application. This does not necessarily signal a change from 'integration through law' to 'integration without law'; instead, the path towards balancing social and economical priorities may be constructed as a learning and evaluative process in which active cooperation, founded in law as well as politics, between EU institutions and Member States is an essential part. In this sense, the solidarity-led argument being canvassed here as legal doctrine is entirely consistent with the 'reflexive governance' and 'democratic experimentalism' claims to be found in different disciplines and literature.[45] On this view, put shortly, local levels are encouraged to experiment in how to tackle problems common to all units and to pool the learning from those experiences. But optimum results may require higher

[42] See Chap. 13 in this volume, by Szyszczak.

[43] E.g. Dawson 2009; Shore 2011.

[44] Dawson 2011.

[45] In particular Sabel and Zeitlin 2008, 2010; Zeitlin 2010; De Schutter 2010.

(EU) level of institutional support. As De Schutter has observed in calling for an 'active subsidiarity' that might inform and elaborate how that institutional niche for better learning might work:

> We are not fatally entrapped in the apparent dilemma between a decentralised protection of social rights, with the associated risk of regulatory competition and a 'race to the bottom', and re-regulation at EU level, leading to the super-imposition of a European Welfare State over and above the national Welfare States.[46]

An institutional framework should, in De Schutter's view, meet the expectation that institutions justify their positions in the light of the broader European public interest.

In the argument that follows, solidarity is placed centre-stage for this purpose. In embarking upon this task, a number of dangers or obstacles must be acknowledged and addressed before a useful function and meaning can be attributed to the concept. First, although solidarity can be seen as a fresh idea for the EU in the sense of the explicit and extensive Treaty references to it as a result of the Lisbon changes, including its insertion into the list of EU values set out in Article 2 TEU, it is an idea with considerable history and baggage that has in equal measure both engaged and troubled scholars across many disciplines.[47] Agreement upon a general notion of solidarity is perennially difficult—although recurring elements for those seeking some kind of essentialist interpretation typically include a shared commitment and belonging to a group or values set in which there is reciprocity of interest and responsibility given expression through political engagement. I have set out more detailed thoughts on conceptualising solidarity elsewhere,[48] but for the purposes of this chapter the task is to establish its worth as an impetus for institutional improvements to the operation of SSGIs.

A second hurdle to be overcome is of more immediate historic and EU relevance, namely the fact that solidarity itself has been deployed as a way of *restricting* EU impact upon national domains. This has been the case both in competition law[49] and in single market law so far as it has related to free movement and EU citizenship.[50] In other words, express references to solidarity

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[46] De Schutter 2010, p. 142.

[47] On historic (though non-EU) traits of solidarity, see Stjernø 2005; for an interdisciplinary collection, see Karagiannis 2007.

[48] Ross 2007, 2009b, 2010, 2011.

[49] Thus 'solidarity' based systems/arrangements will not necessarily be classed as 'undertakings' for the purposes of the EU competition rules: e.g. CJEU, Case C-160/91 *Poucet and Pistre* [1993] *ECR* I-637; CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751; CJEU, Joined Cases C-264/01, C-306/01, C-345/01 and C-355/01 *AOK Bundesverband* [2004] *ECR* I-2493. It seems increasingly apparent that solidarity is not of itself determinative; the degree of state supervision is also relevant: see Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513; Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], See van de Gronden and Sauter 2011.

[50] In particular, the thread running through cases in which migrants have tried to access national welfare systems and the extent to which Member States owe solidarity to such migrants; see O'Brien 2008.

pre-Lisbon have at times been used to mark out hard-line binary distinctions of the very type which this chapter seeks to debunk. However, at the same time, it might be noted that even these examples demonstrate a very pertinent aspect of solidarity as discussed here—namely, that it can cut both ways so that national or EU responsibility is the outcome in a given context (e.g. the social aspect of certain State schemes taking them out of competition rules, the citizenship rights of migrants enabling them to secure access to host financial benefits). Solidarity is not absolute and part of the post-Lisbon challenge is in identifying the processes that enable the appropriate degree of solidarity to be constantly iterated and agreed.

This in turn leads to a third observation. Solidarity has a multifaceted capacity that makes it vulnerable to accusations of being too flexible or unspecific to do useful work. However, it is not unique in this regard—effectiveness and proportionality spring to mind immediately as crucial EU principles, which have arguably occupied the kind of boundary management role that is being envisaged for solidarity below but which have many nuanced applications. Fourth and finally, there may be doubts as to the justiciability of solidarity. Where does it fit in the established jurisprudence of the Court—is it directly effective (and for and against whom), is it a general principle, constitutional value, a standard of judicial review or source of interpretative inspiration? The only certainty, perhaps, is that the Court of Justice, sooner or later, will be presented with either the opportunity or the inescapable obligation to pronounce upon the contours, dimensions and constitutional significance of solidarity as a legal idea. Moreover, given the highly politicised nature and contentious consequences that flow from the application of solidarity responsibilities it is just as likely—indeed desirable—that *national* courts will also engage in the meaning, scope and impact of solidarity obligations. Indeed, as the Eurozone crisis currently demonstrates, the mutuality aspect of solidarity is of particular significance when it means financial commitment—a question recently alluded to by the *Bundesverfassungsgericht*.[51] But, for the moment, as Neergaard has observed, 'transparency and predictability as to [solidarity's] use is not very apparent… The present conceptual framework appears far from complete in terms of dealing with the many complexities involved'.[52]

Having established the task for solidarity—explaining and synthesising political and legal fragmentation in order to enable SGIs, and especially SSGIs, to perform their key contribution to European civil society—the discussion can now move on to the evidence for solidarity being a credible candidate for this role, bearing in mind the reservations and questions identified above. The argument adopts a dual approach, first setting out the political and institutional evidence to legitimise an increasingly constitutional status for solidarity before progressing to a legal proposal based on joint responsibility that could give effect to those political

[51] Judgment of 7 September 2011, 51 Bundesverfassungsgericht, Case 2 BvR 987/10, para 129, in which the Bundesverfassungsgericht considers the EU a 'stability community'. Available at: http://www.bverfg.de/entscheidungen/rs20110907_2bvr098710.html

[52] Neergaard 2010, p. 137.

shapes. In this sense, the arguments being advanced in this chapter represent a legal analysis that maps on to and invigorates a politically feasible understanding of the normative structures that inform SSGI development and regulation.

5.3.1 Political and Institutional Perspectives

An examination of the political discourse around SSGIs, solidarity and the social market economy reveals strong agreement about the intrinsic worth of SSGIs in the EU (in social *and* economic terms) and a general tendency to present solidarity as a 'good thing'—at least when it underpins a particular purpose, usually to secure subsidiarity in methods or to enhance social concerns. But the institutional discourse also confirms the problems and caveats identified above in relation to solidarity. In particular, little consensus emerges over where the limits to solidarity responsibilities lie or whether, indeed, the notion of solidarity has a legal content at all. Crucially, however, there is an increasing wealth of political and institutional evidence in support of a holistic view of SGIs as a 'good' to be protected by the EU, its Member States and regions. As a consequence there is a clear recognition of the mutual dependence of the various levels of SSGI-related interventions that may be needed—and in this sense the need for a cooperative and enabling framework is at the very least universally implicit from the examples below.

Thus, at a high political and institutional level, the Council of the EU's Conclusions from its December 2010 meeting on Employment, Social Policy Health and Consumer Affairs make particularly interesting reading—not least their subtitle 'Social services of General Interest: at the heart of the European social model'.[53] The Conclusions emphasise that SGIs particularly underscore 'the principle of a sufficient supply of affordable and sustainable quality services accessible to all citizens'. Whilst the Conclusions admittedly continue the definitional debate by inviting the Commission to clarify SSGIs as economic or non-economic, a significant number of other points acknowledge explicitly or implicitly that a subtler and multifaceted approach to SSGIs is required for an effective contribution to a range of EU goals. Thus, for example, Point 4 concedes that even though the organisation and financing of social services are a national competence, they are 'to be performed in conformity with EU rules when they are applicable'—again a testament to the passive reach of EU law values and principles discussed in the first section of this chapter.

The holistic view of SGIs can also be seen in the Opinion of the European Economical and Social Committee expressed in 2010:

[53] Council of the European Union, Council Conclusions, Social Services of General Interest: at the Heart of the European Social Model, 6 December 2010.

> All services of general interest, irrespective of whether or not their nature and mission are economical, contribute to the achievement of the European Union's objectives, in particular the continued improvement in the wellbeing of its citizens, the guarantee of their rights and the conditions for the exercise of these rights.[54]

Putting this into more detail (again without any sub-categorisation), the Opinion further states:

> In accordance with their role as a pillar of the European social model and the social market economy, SGIs should, through interaction and the integration of economic and social progress:
>
> – Guarantee the right of each inhabitant to have access to fundamental goods and services;
> – Ensure economical, social, territorial and cultural cohesion;
> – Safeguard social justice and inclusion, establish solidarity between regions, generations and/or social categories and promote the general interest of the community;
> – Ensure equal treatment for all citizens and inhabitants;
> – Create conditions for sustainable development.[55]

SGIs, and their subset SSGIs, are thus given value and focus with the EU's institutions. The more contentious question is *how* to recognise, promote and safeguard those prized services without unacceptable degrees of prescription, uniformity or hierarchical structures. The familiar tension confronting any multilayered approach to reach common objectives by diverse routes is neatly captured by the most recent resolution from the European Parliament on SSGIs.[56] Describing SSGIs as 'an essential pillar of the European social model and as the basis for a good quality of life and for the achievement of EU employment, social and economic objectives',[57] the resolution expressly recognises two contrasting factors which need to be reconciled:

> … on the one hand, the principle of subsidiarity, which upholds the national public authorities' freedom to define, organise and finance SSGI as they see fit, in conjunction with the principle of proportionality, and, on the other hand, the responsibility incumbent on the Community and the Member States for their respective areas of competence under the Treaty.[58]

In the same Resolution that tension is expressed more specifically as follows in point 12 which:

> Emphasises that SSGI are funded mainly by the Member States, as they fall *primarily* within their field of competence; considers nevertheless that the European Union can play an important role and assist member States in their modernisation and adjustment to new conditions, and *possibly give voice to citizens' requirements* regarding the quality and scope of such services [emphasis added]

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[54] European Economic and Social Committee, Opinion, 'What Services of General Interest do We Need to Combat the Crisis?' 2011, point 4.2.

[55] Ibid, point 2.4.

[56] EP, *Resolution on the Future of Social Services of General Interest*, 2009/2222(INI), 5 July 2011.

[57] Ibid, recital E.

[58] Ibid, point 2.

In the context of this chapter, the tone of the European Parliament's resolution in these two extracts is strikingly in tune with the arguments being advanced in support of the need for a harnessing principle that corrals the divergent strands of action to promote and develop SSGIs.

The institutions are less forthcoming as regards the role of solidarity. Unsurprisingly, the Commission purports to see significant mileage in it, having proclaimed that 'Solidarity is part of how European society works and how Europe engages with the rest of the world'.[59] But it is also true that solidarity appears to be downgraded in the same Renewed Social Agenda document, playing second (or even third) fiddle to access and opportunities in strategic terms. Indeed, Barnard identifies five different usages of solidarity in that single Commission document.[60] The ambivalence towards solidarity is perhaps most neatly captured by the European Parliament's resolution, which '[s]tresses that SSGI help to enable citizens to exercise their rights and are geared to ensuring social, territorial and economic cohesion through the implementation of various forms of solidarity'.[61] There is a deafening silence as to what those forms might be, although it may be noted that the quoted observation is made in a section of the resolution headed 'economic contribution' and to that extent may point to solidarity being targeted towards inclusive labour markets and gender equality.

What, then, can usefully be concluded from the institutional perspectives for the purposes of legal analysis? In particular, what is there of substance to offset claims to denigrate solidarity as never more than rhetorical fluff? Three points are worth noting. First, the emphasis of the institutional drive is towards acknowledgement of the place of SSGIs as a public good worthy of pan-EU protection and enhancement; this is notable for its functional focus in identifying shared values (a bonding characteristic typical of the strongest forms of classic solidarity[62]) and as such an important foundation to moulding the dynamics of any emerging social market economy. In other words, the social market might really be qualitatively different as a goal from its single market predecessor. Second, the institutions connect SSGIs to citizenship in a broad sense rather than specific rights that might flow from Articles 20–21 TFEU,[63] thus further underscoring how the orientation of the social market economy might tip. Third, and perhaps most crucially for the solidarity discussion below, the institutional commitment to joined-up thinking about SSGIs is itself arguably more a manifestation of solidarity-as-fact than the explicit references to other (especially financial) types of solidarity mentioned in

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[59] Commission, *Communication from the Commission, Renewed Social Agenda: Oppurtunities, Acces and Solidarity in 21st Centrury Europe* COM(2008) 412, 2 July 2008, p. 6; forcefully critiqued by Barnard 2010.

[60] Barnard 2010, p. 94 et seq. She identifies solidarity being used as an objective, an interpretative principle, a means, a process and an instrument.

[61] Resolution 2009/2222(INI), point 17 (and located under the 'economic contribution' section).

[62] Stjernø 2005.

[63] Cf. Shaw 2011, who draws the significant distinction between citizenship of the EU for the purposes of those Treaty Articles and a much deeper idea of citizenship *in* the EU.

the various institutional documents. Solidarity is accordingly a driver of processes as well as a principled commitment to the value of social inclusion, a characteristic that is highly significant for the methods of embedding that commitment.

5.3.2 *Solidarity at Law: Towards a General Principle of Joint Responsibility?*

Thus far, this chapter has identified changing—and increasingly fragmented—patterns of regulation and organisation whilst also establishing the centrality of SSGIs within the bigger picture of the EU's social market economy aspiration. Evidence has been adduced in support of political interest in, and a receptive legal environment for, a facilitative mechanism capable of sustaining positive SSGI policy actions within a subsidiarity discourse. In this subsection, the credentials of solidarity are examined more closely in this legal role.

So, what kind of legal principle is solidarity, and in what sense can it be invoked or relied upon? It has already been acknowledged at the start of this section that solidarity can be (mis)understood in many ways. Indeed, it should be stressed that the manifestation being claimed and developed here is only one of its branches but—I argue—the most constitutionally significant at the current time. This is not to say that solidarity between citizens might not 'take off' at some future point.[64] Rather, the context of the current claim is that a solidarity which reconfigures or crosses erstwhile boundaries at institutional and political levels is an essential prerequisite to laying the confidence conditions that can allow citizens to recognise and espouse a soul to the EU. It is therefore essential to consider what the particular attractions and special advantages of solidarity might be when compared to other, existing, weapons in the EU armoury.

The parallels between solidarity and subsidiarity as legal concepts are instructive. The latter may do more useful work as a nagging political parrot on the shoulder of the EU institutions urging reflection prior to adopting measures than as a tool for judicial review of EU legislation once adopted. Yet subsidiarity's legal—and, indeed, constitutional—status would be difficult to deny. The Lisbon Treaty changes, concentrating on strengthening the role of national Parliaments,[65] have tried to beef up the process elements that can give effect to more effective political application. It is submitted that solidarity, in the sense being pursued in this chapter, exhibits a similar tension between political and legal utility and might be expected to develop in a similar way. On the one hand, solidarity is meaningless

[64] Fontanelli 2011, who sees recent case law on general principles as suggesting responsibilities upon citizens for the protection and implementation of fundamental rights.

[65] Article 12 TEU and, especially, Protocol (No. 1) on the Role of National Parliaments in the European Union and Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

without expression—in other words, *doing* something (essentially a political commitment) is the proof of lived solidarity, whether that is between Member States, citizens or some other multilayered complexity of relational levels. A legally significant solidarity, on the other hand, may be a way of testing the processes that enable those acts to take place or, further, bringing those processes into existence. Solidarity, in these terms, is both a political discourse and a legal principle positively to connect EU shared values (citizenship, SSGIs, social market economy) to practical measures for their benefit and implementation.

Solidarity thus described does not easily map exactly on to any of the 'standard' techniques that have featured in the jurisprudence of the Court to develop the EU's legal order. The likeliest affinity is to be found with general principles—whilst accepting that these are not uniform in character themselves. Thus, framing the argument in the context specifically of SGIs and SSGIs, the freedom of action of both Member States and EU institutions is constrained by the application of solidarity. Acts of those agencies are subject to interpretation and compatibility with the Treaties on the basis of solidarity obligations in the form of a joint responsibility to protect core shared values, of which the safeguarding and quality of SSGIs is one. It is this particular aspect that allows solidarity to perform its boundary-crossing function in the greater interest of preserving the public goods in SSGIs. In other words, solidarity is being canvassed here not only as a general principle but one endowed with a constitutional significance because of its focus upon elucidating and protecting core values embraced by a social market economy.

Nonetheless, it might be asked whether such a general principle is superfluous given other more established or more specific sources of EU law. After all, even before the Lisbon changes it could have been argued[66] that a specific solidarity obligation existed in relation to SGEIs in the formulation (retained now in Article 14 TFEU) that 'the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions…' However, the key distinction in the present argument is that the implicit—and limited—joint responsibility of Article 14 has been expanded by the numerous references to solidarity in the TEU and TFEU and the political will manifested in the evidence cited in the previous subsection. Furthermore, the recognition in an EU primary source (Protocol 26) of non-economic SGIs as a relevant group adds to the view that a holistic view of SGIs, and accordingly a coherent supervisory arrangement, is required. In this sense the practical value of solidarity as a principle is that it acts as the boundary to the margin of appreciation to be enjoyed by Member States and the EU when acting within their purportedly separate competences.

Seen this way, solidarity as a principle resembles the way the Court has used effectiveness in the past to extend the reach of EU law to supervise seemingly domestic national actions. But, again, there are key differences. In particular,

[66] Ross 2000.

effectiveness is always to some extent a secondary or parasitic concept: there must be another, pre-existing, EU law right that is in some sense being restricted or rendered ineffective (typically in obstacles to obtaining effective remedies within the national legal system in relation to fundamental individual Treaty rights). Solidarity, on the other hand, is concerned with the preservation of the core legal values enshrined in the Treaties rather than with personal rights and attaches to the responsibilities of legislators and decision makers. The other important distinction to be drawn is that whilst effectiveness has played a huge role in the Court's rationalisation of important case law extensions of individual protection,[67] it is more difficult to ascribe this most pragmatic of approaches a truly constitutional role. Solidarity, however, if understood as a channelling force to achieve and protect the highest constitutional values of the EU and Member States, presents a more compelling case for such recognition. Moreover, it should be added, this notion also goes further than the general significance of the 'sincere cooperation' clause now expressed as part of Article 4(3) TEU.[68] Historically, the duty on Member States to facilitate the achievement of the Union's tasks and refrain from jeopardising its objectives has largely been used to attach to national courts in the implementation of individual EU rights. It has not particularly been used more proactively to extend into joint responsibilities to find processes that secure core values.

5.4 Conclusions and Outlook

This discussion has tried to elaborate why solidarity is important for the legal determination of the content and balance of the 'highly competitive social market economy' envisaged in the TEU.

The case has been made for construing solidarity as a general principle of constitutional significance to mainstream 'social' elements by exerting pressure upon all levels of decision makers in the form of a joint responsibility to secure and protect core values (especially in the context of this volume, SSGIs). The contestation of the new (for the EU) concept of a 'highly competitive social market economy' is already witnessing a focus upon whether it is the methodology and concepts of market and competition law that will be the drivers or whether other benchmarks (such as citizenship) will prevail. If, as this chapter claims, the social market economy represents the constitutional capture of particular—and indeed distinctive—value choices for the EU, then it would seem paradoxical to develop that foundational concept on the basis of only half a box of ammunition

[67] E.g. in relation to cornerstones of case law developing state liability in damages and the principle of consistent interpretation.

[68] Formerly Article 10 EC and frequently cited by the Court to justify obligations, especially on national courts.

(i.e. classical boundary-marking such as the attempt to distinguish EU-regulated SGEIs from nationally-supervised non-economic SGIs). This observation, calling for a more holistic view, seems equally pertinent to those who are seeking to further the 'market' bit of the social market economy idea, just as much as for those advocating a more social emphasis. Interestingly, (even) an employers' organisation puts the challenge in the following terms: 'Policy on SGIs should not be influenced by regulatory policy orientated primarily towards competition, liberalisation, deregulation and, in the end, privatisation but should instead be considered as the humus needed for successful economic development and that way also for European competitiveness'.[69]

Endorsing solidarity as the general principle to provide active coordination of the myriad issues around SSGIs signals a more transparently constitutional orientation—doctrinally and functionally—than the unabashed pragmatism deployed by the Court of Justice down the years in the name of effectiveness.[70] However, that is not to say that creative methodologies used by the Court cannot, or will not, be relevant to this direction of travel. Indeed, one of the key legal tests for the viability of the ideas set out in this chapter will be whether the Court is prepared to provide the infill for the excavations made by the Lisbon legislative changes. In this sense, a reconfigured approach to SSGIs provides a prototype for a discourse and analytical toolkit that aspire to lay more principled foundations for a highly competitive social market economy as a matter of law. Both rhetorically and substantively, the challenges surrounding SSGIs present the Court with something of a dilemma in mediating EU law's role, reach and boundaries. On the one hand, that function may be reduced to ensuring that an effective 'social' is recognised in the conceptualisation of the social market economy, although this in itself would admittedly still represent much more than a negligible shift. On the other hand, harnessing the politically legitimated changes under Lisbon to the development of notions of responsibility and solidarity might yield a more open interrogation of constitutional pluralism[71] and a more embedded adherence to social priorities. At the same time, it should be stressed that solidarity in the sense presented in this chapter is not an EU-centric or harmonising tool. Rather, it is about active consensus-building for the protection of fundamental public interest goods. Solidarity may mean less EU intervention rather than more—how much action (and at what level) is needed is not predetermined as a matter of jurisdiction but is a consequence of learnt institutional experience gained via engagement with solidarity responsibilities. As argued in the context of soft law, solidarity is politically subsidiarity-friendly; the key point is the responsibility to generate coherent strategies for SSGIs regardless of the preponderance therein of EU,

[69] CEEP, Opinion Services of General Interest Shaping the Future—Guidelines for the New European Approach, 2010, point 1.3.

[70] Set out more fully in Ross 2006.

[71] From the huge literature, particularly pertinent are: MacCormick 1993; Walker 2002; Sabel and Gerstenberg 2010.

national or local initiatives. Solidarity in this sense, additionally, should not run counter to the (new) obligation in Article 7 TFEU that the Union shall 'ensure consistency between its policies and activities'.

Solidarity is not being canvassed here as a unique panacea or magic bullet. It does, however, have an especially strong utility in both political and legal environments. The chicken-and-egg aspect of their interrelationship maps on to the multifaceted nature of solidarity. On the one hand, solidarity in fact is visible in the bottom-up engagement in the kinds of iterative and interactive exchanges and best practice/quality discourse that are already emerging to an increasingly prolific degree. Thus, the Social Protection Committee[72] has recently presented overarching principles for social services provision–availability, accessibility, affordability, person-centredness, comprehensiveness, continuity and outcome orientation—together with a methodology for developing tools for the definition, measurement and evaluation of social services quality. An even stronger and more detailed example can be seen in the European Parliament's recommendations in its July 2011 resolution concerning the establishment of a high-level multi-stakeholder working group as recommended by the 3rd SSGI Forum.[73] On the other hand, some legal foundation to solidarity is required in order to activate and steer (and subsequently defend) the social aspect of EU commitments and the particular prioritisation of effective SSGIs. The time is ripe for some creative legal thinking to embed and sustain the connections between local and EU forces for a common European public interest: solidarity offers that opportunity. It is hard to see a better test-bed for its potential as a binding agent than the arena of SSGIs, already politically recognised as an indispensable foundation of a social market economy.

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[72] See, inter alia, SPC, A Voluntary European Quality Framework for Social Services, SPC/2010/10/8 final.

[73] EP Resolution 2009/2222(INI), para 50.

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Part II
Free Movement Law and Competition Law Perspectives

Chapter 6
Free Movement of Services and the Right of Establishment: Does EU Internal Market Law Transform the Provision of SSGI?

Johan W. van de Gronden

Abstract This chapter explores the impact of EU internal market law on SSGI. Does this area of EU law lead to the transformation of the organisation and provision of SSGI? EU harmonisation measures, most notably the Services Directive, and the Treaty provisions on free movement are examined. It is argued that in the CJEU's case law substantial State control is a strong argument for accepting the validity of national SSGI regulations. Furthermore, the CJEU assigns great value to principles of good governance. It has developed a flexible approach towards SSGI laws that are drafted in a consistent and systematic way. Nevertheless, the introduction of some competition in the provision of these services seems inevitable. However, the Member States can retain control of the organisation and the provision of SSGI, if they manage to make a clear distinction between essential and non-essential services. In this respect the key question is whether the Member States will be able to designate (specific) *S*SGI as SG*E*I.

Contents

J. W. van de Gronden (✉)
Faculty of Law, Radboud University Nijmegen, Nijmegen, The Netherlands
e-mail: j.vandegronden@jur.ru.nl

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6.1 Introduction

EU internal market law aims at opening up national markets and removing protective national measures. At its heart is the free trade in services and goods. Conversely, Member States have based the organisation and the provision of most SSGI on non-market-oriented principles. These services are supplied in a protective and intensively regulated environment. Their provision is subject to many constraints, obligations and limitations. This does not necessarily mean that SSGI escape from the ambit of EU internal market law, since the CJEU has construed the concept of service within the meaning of the Treaty expansively.[1] Thus, many SSGI may fall within the ambit of EU internal market law. As a result, a clash between national SSGI measures and policies on the one hand, and EU internal market law on the other hand, is inevitable. National legislation in the area of SSGI is based on the paradigm of protection: persons vulnerable to social risks are entitled to receive support from social institutions operating in a non-competitive environment. In contrast, the paradigm of EU internal market law is the freedom to provide services in a competitive environment.

Member States are under the obligation to observe EU law and, as a consequence, their national SSGI measures and policies must be compatible with the EU rules for the internal market. This raises the question whether EU internal market law gives rise to incentives for the Member States to transform their national laws governing the provision and organisation of SSGI. To what extent are Member States forced to reconsider and change the design of their SSGI schemes, which are predominantly based on non-market values?

This chapter will address this question as follows. It will start with exploring which SSGI fall within the scope of EU internal market law. After that, attention will be paid to the relationship between EU harmonisation and national SSGI measures. Case law has shown that national laws governing policies subject to harmonisation should be assessed in the light of the Directive or Regulation concerned (and no longer in the light of the Treaty provisions on free movement). Given the importance of the Services Directive the present paper will mainly confine itself to exploring the impact of this Directive on SSGI. Other harmonisation measures will only be touched upon. Subsequently, the influence of the

[1] On this matter, see Sect. 6.2.1.

Treaty provisions of free movement on SSGI will be examined. Finally, some conclusions will be drawn.

In this respect, it should be pointed out that the present contribution takes the definition of SSGI from Commission documents on this subject and defines this concept as:

1 social security services; and
2 services directly provided to the person.[2]

Accordingly, a wide variety of social services is covered by this concept.

6.2 The Scope of EU Internal Market Law and SSGI

Do SSGI fall within the scope of the EU rules on the internal market? It should be recalled that in its case law the CJEU has put so much emphasis on the establishment and functioning of the internal market that it did not shy away from extending the scope of the free movement rules. It is apparent from its settled case law that services that are normally provided for remuneration[3] are services within the meaning of Article 57 TFEU.[4] It was clear from the outset that this broad definition was capable of covering a wide variety of activities, including services of the welfare state and, as a result, SSGI. Below, this case law will be discussed, followed by its relevance for the applicability of the Services Directive.

6.2.1 The Applicability of the Treaty Provisions on Free Movement to SSGI

In the 1980s, the CJEU was called upon to shed more light on the question of to what extent services provided in the context of the welfare state could be caught by free movement law. First the case law on services directly provided to the person will be examined, followed by the case law on social security services.

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[2] See Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM(2006) 177 final, 26 April 2006, p. 4 and Commission, *Commission Staff Working Document, Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in Particular to Social Services of General Interest*, SEC(2010) 1545 final, 7 December 2010, p. 16.

[3] See e.g. CJEU, Case C-159/90 *SPUC* v. *Grogan* [1991] *ECR* I-4685.

[4] See also Barnard 2010, p. 362.

6.2.1.1 Services Provided to the Person

Landmark decisions were made in the cases of *Humbel*[5] and *Wirth*.[6] These cases concerned educational services provided by, respectively, public institutions and private organisations. In other words, the decisions taken in *Humbel* and *Wirth* were about SSGI provided directly to the person, as the recipients of these services, i.e., the students, directly go to institutions in order to get education. In *Humbel,* the CJEU held that public education did not constitute services as they were financed out of the public purse and the State was fulfilling its social and cultural task towards its population. The contributions to be paid by the students or their parents only covered a marginal part of the entire costs. Consequently, the absence of a direct and substantial link between the educational service concerned and the contribution due led the CJEU decide that this service had not an economic dimension. In *Wirth* the CJEU further clarified its position by pointing out that educational services (predominantly) financed by private means do constitute services within the meaning of Article 57 TFEU. This implies that national laws governing these services must be in line with EU free movement law. Therefore, in *Neri*[7] the CJEU held that the educational services at issue were covered by EU free movement law, as they were provided in a commercial setting.

In its famous healthcare judgments delivered in the first decade of 2000 the CJEU refined its approach.[8] An important landmark decision was the *Smits-Peerbooms* case.[9] In this case, the CJEU rejected the view of the Advocate General that the economic nature of the service concerned is determined by the way its provision is framed in national legislation. In particular, the approach of the Advocate General was based on the degree of solidarity present in the social

[5] CJEU, Case 263/86 *Humbel* [1988] *ECR* 5365.

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

[7] CJEU, Case C-153/02 *Valentina Neri* v. *European School of Economics (ESE Insight World Education System Ltd)* [2003] *ECR* I-13555.

[8] See e.g. CJEU, Case C-158/96 *Raymond Kohll* v. *Union des caisses de maladie* [1998] *ECR* I-1931 and CJEU, Case C-120/95 *Nicolas Decker* v. *Caisse de maladie des employés privés* [1998] *ECR* I-1831; CJEU, Case C-157/99 *Smits and Peerbooms* [2001] *ECR* I-5473; CJEU, Case C-385/99 *Müller-Fauré* [2003] *ECR* I-4509; CJEU, Case C-372/04 *Watts* [2006] *ECR* I-4325; and CJEU, Case C-345/09 *Van Delft* et al. [decided on 14 October 2010, nyr]. On this case law, see e.g. Baquero Cruz 2011, p. 79 et seq.; van de Gronden 2009A, p. 710 et seq.; Dawes 2006, p. 167 et seq. and Hatzopoulos 2002, p. 685 et seq.

[9] CJEU, Case C-157/99 *Smits and Peerbooms* [2001] *ECR* I-5473.

scheme at issue.[10] Rather than following this view, the CJEU assigned great value to the abstract question of whether the SSGI concerned can be provided on the market. It stressed the point that every service, which is normally provided for economic consideration, should be regarded as a service in the sense of Article 57 TFEU.[11] The CJEU assigned great value to the general and also abstract question of whether the SSGI concerned can be provided on the market. It held that the:

> …the essential characteristic of the remuneration lies in the fact that it constitutes consideration for the service in question…[12]

Therefore, as soon as a service may be made subject to market forces EU free movement law applies. It is not of any relevance whether a Member State has adopted laws in order to protect these services from market constraints or has refrained from doing so. To put it differently, the word 'normally' in the definition of the concept service turned out to bear a significant characteristic of a service within the meaning of EU free movement law. The market dimension of a service is not dependent on the way its provision is framed in the welfare regulations of a Member State. Rather, the market dimension is derived from the theoretical point of view whether 'in an ideal world' the service concerned can be provided in a market environment.

It is clear from the outset that the great advantage of this approach is that the applicability of EU free movement law to SSGI is not dependent on the model of a particular national welfare state, which varies from Member State to Member State. Consequently, the CJEU's approach to the definition of service ensures the uniform application of the Treaty provisions on free movement. However, the setback to the route chosen by the CJEU is that the applicability of these provisions may force Member States to change, or even to put an end to, arrangements of providing SSGI, even if these arrangements are based on democratically legitimised consensus. The question is: who judges which services may be provided on the market? Or to rephrase the question, could EU free movement law lead to removing all kinds of national regulations that are deemed –at least in the eyes of the Member State concerned—necessary in order to guarantee the provision of SSGI to persons who are in need of care? The extent to which this risk will materialise remains to be seen, as the consequences of the applicability of EU free movement law may be moderated by the way the concrete Treaty provisions are

[10] The AG drew a cross-reference to the case law on the concept of undertaking, which embarks on the question whether a particular scheme is predominantly based on solidarity in order to establish whether Articles 101 and 102 TFEU apply to the bodies managing this scheme. As the AG was of the opinion that the Dutch healthcare system that was then in place was entirely based on this principle, he found that the Treaty provisions on the free movement of services were not applicable. In this regard it should be noted that in 2006 the Dutch government introduced a market oriented healthcare system, which assigns a significant role to private health insurers. On this system, see e.g. Hamilton 2005, p. 8 et seq. and Sauter 2011, p. 337 and seq.

[11] See Gekiere et al. 2010, pp. 465 and 466.

[12] See CJEU, Case C-157/99 *Smits and Peerbooms* [2001] *ECR* I-5473, para 58.

applied and interpreted. This issue will be explored in the Sect. 6.4. In any event, the expansive interpretation of EU free movement law by the Court has started a process of Europeanisation of the provision and organisation of SSGI.

6.2.1.2 Free Movement and Social Security Services

The process of Europeanisation has not stopped with the CJEU's case law on social services directly provided to the person. The CJEU has also applied the Treaty provisions on free movement to social security schemes. In *Freskot*[13] the CJEU was called upon to assess the compulsory affiliation of Greek farmers to a social security scheme providing cover of natural risks. The CJEU started by acknowledging that the body managing this scheme did not provide services given the nature of the (intense) regulation by the State (the fund was financed by taxes and the benefits were fixed in national legislation). Given the background of the case law discussed above it is not surprising that the analysis of the CJEU did not stop at this point. In line with its previous case law, the CJEU examined whether the cover provided by the body managing the Greek social security scheme under review can be offered in a market environment as well. The CJEU[14] made clear that this comes down to scrutinising whether such a scheme covers insurable risks.[15] If so (commercially oriented) insurance companies may be interested in offering similar services and are prevented from doing so by the compulsory affiliation to the body that has been assigned with the task to provide the cover for the insurable risks concerned. This remarkable point of view was confirmed by the CJEU in the *Kattner Stahlbau* case.[16] At issue was compulsory affiliation (laid down in German law) to a body providing insurance against accidents at work and occupational diseases. In this case, the CJEU also contended that the Treaty provisions on free movement come into play if the social security scheme under review covers risks that are insurable by private insurance companies.[17]

The position adopted by the CJEU fosters the uniform application of EU free movement law to SSGI. However, as with the social services provided directly to the person, in many cases it may be difficult to establish whether the risks covered by a particular social security scheme may be insured by a private or commercial provider as well. Consequently, a great deal of uncertainty and fierce debate may surround the management of social security schemes that fulfil an essential function in the national welfare state.

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

[14] Ibid. para 63.

[15] See de Vries 2006, p. 31.

[16] CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513.

[17] See Ibid. paras 80 and 82.

In any event, social security schemes are not immune from EU free movement law.[18] The Treaty provisions on free movement may, at least theoretically, even give rise to the free movement of *particular* social security services. But, as was also pointed out with regard to the case law concerning social services directly provided the person, the main issue is *how* the CJEU applies the Treaty prohibitions on the restriction of free movement to national social security schemes. This question will be addressed in Sect. 6.3.

6.2.2 EU Harmonisation Measures and SSGI: The Example of the Services Directive

Another important issue concerning the scope of EU internal market law is related to harmonisation measures. This section focuses on the Services Directive, as the aim of this legislation is to provide a comprehensive and (virtually) all-embracing set of harmonised rules for services. Given this aim, it is clear that the Services Directive is capable of covering a broad range of SSGI.

The point of departure of the Services Directive is that it applies to *all* services within the meaning of Article 57 TFEU, which in essence comes down to incorporating the definition of the concept service given by the CJEU in its case law. The Directive explicitly provides that *NE*SGIs do not fall within its ambit.[19] However, this carve-out is not necessary, as the (implicit) reference to the CJEU's case law on the concept of service entails that these NESGIs are not caught by the Directive. Similarly, the SSGI that are not provided for economic consideration and do not, therefore, constitute services in the sense of Article 57 TFEU, are not governed by the Services Directive.

As was pointed out above, the expansive interpretation of the applicability of the EU free movement rules covers all services that could be provided on the market and, as a result, also a great deal of the SSGI. In other words, many SSGI are construed as having a market value in the CJEU's case law. This has significant consequences for the applicability of the Services Directive, because, in principle, this Directive applies to a large group of *economic* SSGI. It should, however, be noted that Articles 1–3 exempt various services, including some SSGI, from the scope of the Services Directive. On this matter Article 2 provides the clearest guidance by enumerating a list of services that are exempted from the scope of this EU harmonisation measure, such as, healthcare services and services of temporary agencies. As was mentioned above some social security services are services within the meaning of the Treaty, i.e., when they cover insurable risks. However, these services are not caught by the Directive, since Article 2 (2) (b) exempts them

[18] See van de Gronden 2011, pp. 126–129.

[19] See Article 2(2) and recital 17 of Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on Services in the Internal Market (Services Directive).

from the scope of this piece of EU legislation. This provision explicitly stipulates that insurance and re-insurance, occupational or personal pension do not fall within the scope of the Directive. In essence, social security services come down to insurance or pension activities. Consequently, the Services Directives does not apply to the first category of SSGI defined in the introduction of the present contribution: the social security services.

For the second category of SSGI, services directly provided to the person, Article 2 (2) (j) is of special interest. This provision refers to social services, which is defined by the Directive as encompassing the services:

> …relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised by the State…

Some particular categories of social services are exempted, but this exemption is based on a specific view as to how their provision and organisation have taken shape in national law. The involvement of the State—be it as provider of the social services concerned, be it as regulator of the private providers of these services-—is crucial.[20] The Services Directive does acknowledge the role of private initiative in providing social services, but it requires that the State should have the final say, if the task to provide SSGI is delegated to entities outside the pubic domain. Therefore, private parties not acting under substantial State supervision do fall within the scope of the Services Directive.[21] The Commission takes the view that every provider that is under an obligation to provide a service (for example as a result of a tendering procedure or service concession) can be regarded as a provider 'mandated by the State'.[22] Endorsement by the CJEU is awaited. In any event, Member States, where private providers of SSGI operate on a relatively independent basis, are forced to live up to the requirements laid down in the Services Directive when regulating these services, while Member States, where a tradition of State control with regard to SSGI exists, have fewer difficulties with observing these requirements.

Of further interest are Articles 1 and 3 of the Services Directive. It should be noted that in rather general and also ambiguous words Article 1 provides that the Services Directive does not affect a number of matters, such as criminal law and employment law. This Article *inter alia* states that the Directive:

> …does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services.[23]

This carve-out is of importance for SSGI. The same is true for the third section of Article 1, which provides that the Services Directive '…does not deal with the

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[20] Cf. also SEC(2010) 1545 final, pp. 80–82.

[21] See the Commission's Handbook on Implementation of the Services Directive, Luxembourg: Office for Official Publication of the European Communities, 2007, p. 13.

[22] SEC(2010) 1545 final, p. 83.

[23] See Article 1(2) Services Directive.

abolition of monopolies providing services…' and does not affect the freedom of Member States to designate SGEIs and to regulate their provision and organisation. Although the subjects governed by these two exemptions are related to SSGI, it is not clear to what extent these exemptions make national measures on SGEIs immune from the impact of the Directive. First, the exemptions only apply to particular national interventions such as liberalisation and monopolies. Second, Article 1 uses vague words such as 'does not affect' and 'does not deal'. This leaves room for interpretation and gives the CJEU the possibility to moderate the contours of the exemption. After all, Article 1 does not say that the Directive is not applicable to national measures such as monopolies and liberalisation, rather it put forward the hypothesis that particular results (e.g. abolition of monopolies) will not be realised by this piece of EU legislation.[24] In other words, it is not guaranteed that the Services Directive will not have any impact on the Member States' policies concerning monopolies, liberalisation and SGEIs. The concrete analysis of the specific obligations imposed upon the Member States, which will be carried out in the next section, will reveal whether the 'hypothesis' of Article 1 holds true. In any event, in terms of shielding national laws on SSGI from the impact of the Services Directive Article 1 is only of limited and uncertain value.

Mention should also be made of Article 3 (1). This Article provides the mechanism for solving conflicts between the Services Directive and other pieces of EU legislation by giving the provision of the specific EU act priority over the Services Directive, which is more of a general nature. Article 3 (1) explicitly stipulates that the Social Security Coordination Regulation[25] prevails in case of concurrence with the Services Directive. In essence, Article 3 does not shield SSGI from the impact of EU harmonisation, as it confines itself to determining which EU Directive or Regulation applies. The second section of Article 3 concerns rules of private international law and is, therefore, not relevant for SSGI.

In sum, the Services Directive applies to a broad range of SSGI constituting services within the meaning of Article 57 TFEU. Only the SSGI mentioned in Article 2 of this Directive escape its applicability, provided that the schemes governing the provision of these services are based on substantial control by the State.

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[24] Cf. Davies 2007, p. 233.

[25] Reference is made to Regulation No. 1408/71 of 14 June 1971 of the Council on the Application of Social Security Schemes to Employed Persons and Their Families Moving Within the Community, *OJ* 1971 L 149/2. This Regulation has been repealed by Regulation No. 883/2004 of 29 April 2004 of the European Parliament and of the Council on the Coordination of Social Security Systems, *OJ* 2004 L166/1. But it should be noted that Regulation No. 1408/71 remains in force for a limited number of purposes related, for example, to agreements concluded with Switzerland.

6.3 Harmonising the Provision of SSGI by the Services Directive and Other EU Measures?

The previous section made clear that a considerable number of harmonisation measures apply to national laws dealing with SSGI. As the aim of EU harmonisation measures is to level out competition distortions, it should be explored which side effects result from these measures on the national organisation of SSGI.

This section is mainly dedicated to the Services Directive due to the importance of this piece of EU legislation for the trade in services on the internal market. At the end of this section some other EU measures will be touched upon.

6.3.1 Services Directive: Harmonising SSGI?

In legal doctrine it is outlined that Articles 16 and 9 constitute the core provisions of the Services Directive.[26] Article 16 imposes upon Member States obligations with regard to the temporary provision of services. The point of departure of Article 9 is the concept of authorisation schemes and, as a result, it applies to the permanent provision of services.

6.3.1.1 Article 16 and SSGI

Article 16 (1) of the Services Directive obliges Member States to respect the freedom to provide services and from refraining making the access to, or exercise of, a service activity in their territory subject to compliance with requirements of national law. In other words, it is not permissible for host States to impose obligations upon service providers of other Member States.[27] Furthermore, Article 16 (2) of the Services Directive lists as unacceptable, national requirements such as the obligation to obtain an authorisation and also prohibits Member States from imposing these requirements upon service providers.

Consequently, SSGI providers pursuing service activities in another Member State can rely upon Article 16 (1) in order to challenge national regulations that prevent them from entering the market of this Member State. For example, companies could try to provide childcare services in another Member State, in so far as in this Member State the provision of these services is not subject to substantial State control within the meaning of Article 2 of the Services Directive. A national requirement to apply for prior authorisation with the competent authorities is not in line with Article 16 (2) of the Services Directive, whereas

[26] See Barnard 2010, p. 408.

[27] Barnard 2008, p. 362.

national legislation restricting the number of providers or setting specific qualitative requirements are at odds with Article 16 (1) of the Services Directive. Consequently, modelling the provision of SSGI, which is not caught by the Article 2 carve-out, could be very problematic. In this regard, it should be noted that SSGI that are not mentioned in the list of excluded social services of Article 2 fall within the scope of Article 16 (1) as well. Welfare services, such as the care for elderly people, services which are absent in the exemption of Article 2, are subject to Article 16 (1). As a rule, it is prohibited for Member States to impose national requirements governing the provision of these services on operators from other Member States pursuing these services on a temporary basis.

However, Article 16 (3), Article 17 and Article 18 contain exceptions to the prohibition not to prevent foreign providers from entering services markets. Due to the social nature of SSGI only the exceptions contained in Article 16 (3) and Article 17 (1) Services Directive are of relevance. Article 16 (3) of the Services Directive allows Member States to impose obligations that are necessary in order to achieve objectives of public policy, public security, public health, environmental protection and employment conditions including those laid down in collective agreements. In line with settled case law of the CJEU on the 'Rule of Reason', these exceptions can only be invoked successfully, if the national measures concerned do not go beyond what is necessary.

A clear deviation from this case law is the limited number of public interest justifications.[28] Some national laws with regard to SSGI may be justified if they aim at protecting, for example, the environment or public health. However, apart from the outcome of the proportionality test, many national SSGI laws cannot be framed as environmental or public health measures. Consequently, their compatibility with EU law is entirely dependent on Article 17 (1) of the Services Directive. This Article provides that Article 16 does not apply to: '…services of general economic interest which are provided in another Member State, inter alia…' postal services, services provided in the electricity sector, services provided in the gas sector, services related to water distribution and supply and the treatment of waste. The examples named in Article 17 (1) of the Services Directive do not concern SSGI. However, decisive for the interpretation of this provision are the words 'inter alia'. The reference to these words entails that the list of SGEIs is not exhaustive. Rather it confines itself to giving a few examples. Consequently, all SGEIs are excluded from Article 16. It is noteworthy that no reference is made to Article 106 (2) TFEU, which presents the concept of SGEI as exception to the EU free movement and competition rules. Nevertheless, it may be assumed that both concepts are identical[29] and, as a result, Article 17 (1) should be interpreted in the light of the CJEU's case law on Article 106 (2) TFEU. It is apparent from settled case law that entrustment of a special task by the government is a

[28] See Barnard 2008, p. 365 and van de Gronden and de Waele 2010, pp. 409 and 410.

[29] See Neergaard 2008, p. 78.

constitutive element for these services.[30] Therefore, national laws on SSGI are immune from Article 16, in so far as the provision of these services is rooted in a SGEI mission of the State.[31]

Until recently, such a mission requires an explicit act of entrustment by a public body.[32] However, in recent judgments involving SGEI both the CJEU and the GC seem to be willing to derive tasks of providing SGEI from general obligations and conditions laid down in national legislation.[33] Striking is the recent judgment that the CJEU handed down in the *AG2R* case,[34] where the CJEU derived a SGEI mission from obligations and constraints imposed upon an insurer in order to guarantee solidarity and access to the supplementary health scheme concerned for all. Noticeably, in its proposals for the reform of the *Altmark* package the Commission holds on to the requirement of an explicit act of entrustment. It even intends to tighten up this requirement by stipulating that the acts of entrustment must specify the content and duration of the SGEI missions and indicate which undertakings are entrusted with the mission concerned.[35]

These confusing developments with regard to the requirement of an explicit act of entrustment lead to problems as to how to interpret and apply the concept of SGEI. For the compatibility of the national SSGI laws with the Services Directive this matter is even of greater urgency. As the analysis above shows, the validity of these national laws is dependent on Article 17 (1) for a great deal and the concept of SGEI is at the heart of this provision.

If a SGEI mission can be derived from the general obligations laid down in public laws or, preferably, from explicit acts of entrustment, the SSGI concerned does not fall within the ambit of Article 16 of the Directive. Due to the unconditional carve-out from this core provision, it could even be argued that the temporary provision of the services covered by Article 17 are not harmonised, and, as a result, national measures taken in order to organise their provision must be addressed in the light of the Treaty provisions on free movement of services.

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[30] See for example CJEU, Case C-159/9 *EDF* [1997] *ECR* I-5851.

[31] See van de Gronden 2009b, p. 247–250.

[32] See for example CJEU, Case C-159/94 *Commission* v. *France (energy monopolies)* [1997] *ECR* I-5815.

[33] See e.g. GC, Case T-289/03 *BUPA* [2008] *ECR* II-81 and CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr].

[34] Ibid.

[35] See Commission, *Draft Communication from the Commission on the Application of the European Union State Aid Rules to Compensation Granted for the Provision of Services of General Economic Interest*, para 46. Available at: http://ec.europa.eu/competition/state_aid/legislation/forms_docs/sgei_draft_communication_en.pdf) and

Commission, *Draft Decision on the Application of Article 106(2) of the Treaty to State Aid in the Form of Public Service Compensation Granted to Certain Undertakings Entrusted With the Operation of Services of General Economic Interest*, Article 3. Available at: http://ec.europa.eu/competition/state_aid/legislation/forms_docs/sgei_draft_decision_en.pdf). At the time of writing of this chapter, the Commission had not adopted the final versions of these measures yet.

In contrast, if the SSGI at hand does not constitute any SGEI mission, it entirely falls within the scope of Article 16 of the Directive. It means that Member States are forbidden from imposing obligations on providers of these services from other Member States. Suppose that childcare services of a particular Member State do not benefit from the exemption of Article 2 due to the absence of substantial State control and that the provision of these services can also not be construed as a SGEI mission. In that case Article 16 Services Directive obliges the Member State concerned to open-up the markets for companies providing these services on a temporary basis. This means that the Services Directive could lead to liberalisation of the provision of SSGI that are not provided in a State controlled environment.

This is a striking finding, but it may be expected that the consequences of Article 16 of the Services Directive for the provision of various SSGI will be limited. Persons depending on SSGI need access to the provision of these services on a continuous basis. In other words, SSGI providers are under an obligation to guarantee access to their services on a permanent and standby basis. As a result, public authorities will impose obligations and constraints upon these providers in order to ensure that such access will be given. As a result, it could be argued that from these universal access-type constraints SGEI mission could be derived, which entails that the carve-out of Article 17 (1) of the Services Directive applies. Nevertheless, a Member State relying on this flexible interpretation of the concept of SGEI risks that in the future in a particular case the CJEU (or even a domestic court) will contend that the particular obligations and/or constraints imposed upon a SSGI provider are not sufficiently linked to a specific SGEI mission and, therefore, will review the schemes at stake in the light of Article 16 of the Services Directive. Consequently, designating a SGEI mission by an explicit act of entrustment is preferable to relying on the willingness of (European and domestic) courts to derive such a mission from a body of rules and regulations.

6.3.1.2 Article 9 and SSGI

Article 9 of the Services Directive governs the permanent provision of services. The starting point of this provision is the concept of an authorisation scheme. National interventions that do not qualify as authorisation schemes[36] continue to fall within the reach of the Treaty provision on the freedom of establishment. However, in various Member States the provision of many SSGI is subject to some form of obligation to apply for prior authorisation. In order to guarantee universal coverage based on solidarity every operator has the duty to apply for prior authorisation for providing services such as social housing, childcare and care for elderly people.

[36] Pursuant to Article 4(6) of the Services Directive, the term 'authorisation scheme' refers to any procedure under which a provider is required to obtain a formal decision or an implied decision from a national authority in order to get access to the service activity concerned.

Consequently, national authorisation schemes concerning SSGI that are not mentioned in Article 2 of the Directive or, although being listed in this provision, are provided in absence of substantial State control, must be compatible with Article 9 and further provisions of the Directive. This entails that the authorisation scheme must be proportionate, non-discriminatory and justifiable with a view to an overriding reason related to the public interest. Strikingly, Article 9 does not put down the need to provide SGEI as reason for having authorisation schemes in place.[37] Therefore, authorisation schemes for providing SSGI must be framed as necessary and proportionate measures for achieving a public interest in order to escape from incompatibility with the Services Directive. If a Member State fails in proving that no less restrictive means are available for ensuring the provision of SSGI, it must open up the market for that particular service and also consider abolishing the authorisation scheme concerned. This could even lead to the abolition of monopolies providing particular services.

Consequently, the claim of Article 1 of the Services Directive that this piece of EU legislation does not deal with the liberalisation of SGEI nor with the abolition of monopolies providing SSGI proves false, since Article 9 does not explicitly carve-out from its scope authorisation schemes that limit the number of providers. As a result, it cannot be ruled out that in practice legal problems could occur, because Article 9 does not pay any attention to the special characteristics of SGEI (compared with Article 17 in respect of the provision of services on a *temporary* basis).

In my view, Article 9 provides (commercially oriented) enterprise with a powerful tool to break open national SSGI authorisation schemes. Admittedly, in many cases national authorities will be able to put forward overriding evidence of the necessity of these schemes. But, there will be also cases, where such evidence will not be produced. In any event, Article 9 enables foreign providers to call into question a wide variety of national SSGI interventions that are based on authorisation schemes.

6.3.1.3 Evaluation

Although the Services Directive, the aim of which is to establish a single European market for services, does not come up with a comprehensive approach to SSGI, it does harmonise some aspects of the organisation and provision of SSGI. Above, it is outlined that SSGI schemes based on substantial State control benefit from the carve-out of Article 2. Therefore, in the long run this provision will stimulate Member States to introduce a considerable degree of State control in the provision

[37] According to Article 15(4) the obligation to evaluate national requirements with regard to their compatibility with the Services Directive does not apply in so far as such an operation would put the proper provision of SGEI under pressure. This Article only acknowledges that SGEI constitute an exception for an obligation of an institutional nature (carrying out evaluations). No reference is made to the substantive rules on the freedom of establishment, which are laid down in Article 9 of the Services Directive.

of SSGI and, as a consequence, State control will constitute an important element of the European way of regulating these services. Further, in so far as SSGI provided in absence of considerable State involvement are concerned, Member States will be forced to introduce as much competition elements as possible. After all, an authorisation scheme may only remain in place, if no less restrictive means for providing the service concerned are available. In other words, the model, where private operators placed at arm's length of the government are the providers of SSGI, is put under pressure. So, the keywords seem to be 'State control' and 'competition' for services that are not provided under supervision of the State.

6.3.2 *Harmonising the Provision of SSGI by Other EU Measures?*

Although the Services Directive could have a considerable impact on the provision of SSGI, other EU harmonisation measures may also be relevant for these services. In particular, it should be examined whether the EU has adopted Directives or Regulations that apply to particular social security services, since these services are exempted from the Services Directive. The first example that springs to mind is the Directive on the application of patients' rights in cross-border healthcare.[38] However, as this Directive is at the heart of the analysis of the chapter by Baetens and Palm, it will not be discussed here.[39]

Another piece of EU legislation that should be analysed is the Social Security Coordination Regulation.[40] As is apparent from its title, this (highly complicated) Regulation confines itself to coordinating the social benefits to which a worker or a self-employed person engaged in cross-border activities is entitled under various national social security schemes. In this regard, it should be noted that the CJEU has (partly) based its famous case law on cross-border healthcare on this Regulation.[41] However, from cases such as *Van Delft*[42] it is apparent that the Social Security Coordination Regulation does not target distortions resulting from differences between the various social security systems of the Member States. It respects the Member States' competences to organise the provision of SSGI and, therefore, it will not be subject of further analysis in this contribution.

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[38] Directive 2011/24/EU of the European Parliament and the Council of 9 March 2011 on the Application of Patients' Rights in Cross-Border Healthcare, *OJ* 2011 L 88/45.

[39] On this Directive see also the contributions of Szyszczak 2011, p. 108 et seq.; Pennings 2011, p. 147 et seq.; Hervey 2011a, p. 163 et seq. and Davies 2011, p. 191 et seq.

[40] Regulation No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, *OJ* 2004 L 166/1.

[41] See e.g. CJEU, Case C-56/01 *Inizan* [2003] *ECR* I-12403 and CJEU, Case C-372/04 *Watts*, *ECR* [2006] I-4325. On this case law on the Social Security Coordination Regulation and cross-border health care, see van de Gronden 2009a, pp. 728–731.

[42] CJEU, Case C-345/09, *Van Delft* [decided on 14 October 2010, nyr].

Of special interest for social security services are the Non-life Insurance Directives. Member States wishing to privatise one or more schemes of their social security systems must pay due consideration to these Directives. Article 2(1) (d) of the First Non-life Insurance Directive provides that insurance schemes forming part of a statutory system of national social security are not caught by this piece of EU legislation. In *García*[43] the CJEU based its interpretation of this provision on the concept of an undertaking within the meaning of EU competition law. It referred to *Poucet et Pistre*,[44] where the concept of undertaking within the meaning of Article 101 TFEU was interpreted. Then, it held that, as with Article 101 TFEU, the Insurance Non-Life Directives do not apply to schemes that are entirely based on the principle of solidarity. By linking Article 2(1)(d) of the First Non-life Insurance Directive to the concept of undertaking in the sense of EU competition law, the CJEU has assigned great value to the way the national legislature has organised a particular social security scheme. As is apparent from settled case law on this concept,[45] if a Member State has virtually left no room for competition but has introduced a solidarity-based system, the Treaty provisions on competition do not apply.[46] From the drafting of Article 2(1) of the First Non-life Insurance Directive it must be derived that this Directive does not cover such systems either. This implies that social security schemes that do cover insurable risks but are not market driven do not fall within the ambit of these Directives. Accordingly, these schemes are not harmonised and remain fully subject to the Treaty provisions on free movement. However, if the national legislature has opted for a mix of competition and solidarity, the Insurance Non-Life Directives do apply and the national laws governing the (partly) market driven schemes must be compatible with these Directives. In *Commission* v. *Belgium*[47] the CJEU held that the Belgian disability insurance schemes at stake did fall within the scope of these EU harmonisation measures, as these schemes were offered by insurers at their own risk. As a result, Member States that involve private initiative for providing social benefits must scrutinise whether their national social security laws have fully and correctly implemented the Insurance Non-Life Directives. For example,

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[43] CJEU, Case C-238/94 *José García and Others J. García* v. *Mutuelle de Prévoyance Sociale d ' Aquitaine and Others* [1996] *ECR* I-1673. A similar decison on the applicability of the Non-life Insurance Directives is taken by the CJEU in CJEU, Case C-355/00 *Freskot* [2003] *ECR* I-5263.

[44] CJEU, Joined Cases C-159/91 and C-160/91, *Poucet and Pistre* [1993] *ECR* I-637.

[45] See e.g. Ibid.; CJEU, Case C-244/94, *Fédération Française des Sociétés d'Assurance* et al. v. *Ministère de l'Agriculture et de la Pêche (FFSA)* [1995] *ECR* I-4015; CJEU, Case C-67/96, *Albany* [1999] *ECR* I-5751, CJEU, Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens' Handelsonderneming BV* v. *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] *ECR* I-6025 and CJEU, Case C-219/97 *Maatschappij Drijvende Bokken BV* v. *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] *ECR* I-6121; CJEU, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] ECR I-2493 and CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr].

[46] See, for example, van de Gronden and Sauter 2011, pp. 218–223 and Kersting 2011, pp. 474 and 475.

[47] See CJEU, Case C-206/98, *Commission* v. *Belgium* [2000] *ECR* I-3509.

in a recent judgment the CJEU held that the Belgian supplementary healthcare schemes were not in line with these Directives.[48] Furthermore, in another recent ruling the CJEU found that Ireland had failed to fulfil its obligations under EU law by not applying the Insurance Non-Life Directives to its SSGI system of Voluntary Health Insurance.[49]

It should be pointed out that the applicability of the Insurance Non-Life Directives does not entail that the Member States are not allowed to impose constraints upon SSGI providers, as these Directives contain exceptions for specific (social) services. Article 54 of the Third Non-life Insurance directive,[50] for example, provides that Member States are allowed to require that providers of health insurance must comply with healthcare specific obligations. Article 55 of this Directive lays down a similar exception for compulsory insurance against accidents at work.

6.4 Free Movement and SSGI: Breaking Away from National Social Arrangements?

National SSGI measures that are not covered by the Services Directive (or any other EU harmonisation measure) must be reviewed in the light of the residual Treaty provisions on free movement, in so far as they constitute services that are provided for economic consideration. As already mentioned, Member States have adopted restrictive regulations in order to protect the operators that are entrusted with the task to provide a particular SSGI. Providers of services from other Member States could decide to enter the market in order to offer the same services. They could challenge this national legislation before national courts by invoking EU free movement law in order to obtain access to the domestic market. It depends on the facts of the case concerned which free movement rules are applicable. The temporary provision of services is caught by Articles 56 TFEU and further (free movement of services). If a supplier wishes to pursue service activities on a continuous and stable basis in another Member State, challenges of national SSGI regulations should be based on the EU principle of freedom of establishment, as laid down in Article 49 TFEU et seq. Provision of SSGI could even take shape as investment projects, which may lead to the applicability of the Treaty provisions on the free movement of capital (Article 64 TFEU et seq.).

In several cases, the CJEU was called upon to decide on the claim of foreign providers that national SSGI regulations were in violation of EU free movement law.

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[48] CJEU, Case C-41/10, *Commission* v. *Belgium* [decided on 28 October 2010, nyr].

[49] CJEU, Case C-82/10, *Commission* v. *Ireland* [decided on 29 September 2011, nyr].

[50] Third Council Directive 92/49/EEC of 18 June 1992 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.

In these cases it dealt with different kinds of national restrictive requirements. An important set of national rules concerned the compulsory affiliation to a particular body charged with the management of a SSGI scheme. It is clear from the outset that the rationale of compulsory affiliation is solidarity,[51] as affiliation of persons with a low risk profile or a high income contribute to the financing of the provision of particular SSGI to persons with a high risk profile or low income (cross-subsidisation). Nevertheless, compulsory affiliation prevents foreign providers from entering the domestic market. Another set of national rules that has been subject of the review by the CJEU is constituted by national authorisation schemes. Many SSGI providers are under the obligation to apply for prior authorisation. Both the conditions attached to an authorisation and the duty to apply for authorisation have been assessed by the CJEU. Below the judgments on compulsory affiliation, which mainly concern the first category of SSGI (social security schemes), and the rulings on authorisation schemes, which mainly relates to the second category of SSGI (services provided directly to the person) will be examined. Recently, the CJEU handed down significant judgments on the application of EU free movement law to service concessions and exclusive rights. As concessions and exclusive rights play an important role in the organisation and provision of SSGI, this case law will be explored at the end of this section.

6.4.1 Compulsory Affiliation Challenged

The aim of social security schemes is providing cover of the costs of the main risks of life. Their *raison d'être* is solidarity between the various groups of persons who (may) benefit from the schemes; compulsory affiliation is one of the constituting components of the majority of these schemes. Challenging compulsory affiliation to a particular social security scheme calls into question the entire structure of the scheme concerned. Nevertheless, by accepting that schemes covering insurable risks fall within the scope of the Treaty provisions on free movement, the CJEU has opened the door to such challenges. How does the CJEU deal with these challenges?

6.4.1.1 The Approach Developed in *Freskot* and *Kattner Stahlbau*

It is apparent from rulings such as *Freskot*[52] and *Kattner Stahlbau*[53] that compulsory affiliation restricts free movement (in these cases Article 56 TFEU provided the relevant framework for the review conducted by the CJEU). This finding does not come as a surprise, as insurers from other Member States are prevented from offering

[51] Cf. Hervey 2011b, p. 186.

[52] See CJEU, Case C-355/00 *Freskot* [2003] *ECR* I-5263, para 63.

[53] See CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513, paras 83 and 84.

any form of cover of the risks concerned. It is settled case law[54] that every national measure that renders the access to a domestic market more difficult is caught by the EU free movement rules.[55] This market access test also applies to the way national security schemes are modelled.[56] Consequently, the validity of social security schemes (that fall within the ambit of the Treaty provisions on free movement) is entirely dependent on the exceptions, more specifically on the 'Rule of Reason'.

The CJEU has accepted in its case law that compulsory affiliation to a social security scheme may be justified by an objective of social policy,[57] or the need to ensure the financial equilibrium of a social security scheme.[58] The CJEU has acknowledged that solidarity, which is at the heart of social security schemes, requires that persons with high and low risk profiles or with high or low incomes are grouped together.[59] Accordingly, one of the main features of social security, solidarity between different groups, is regarded as a decisive argument for not finding compulsory affiliation in breach of the EU free movement rules.

It goes without saying that the drafting of a particular social security scheme should also be in line with the principle of proportionality. The requirements imposed on providers and recipients may not go beyond what is necessary. In both *Freskot* and *Kattner Stahlbau* the CJEU assigned great value to the fact that the social security schemes under review provided only minimal cover. The persons and companies insured were allowed to top up this cover by taking out supplementary insurance policies from other providers. Consequently, in the CJEU's view it was of great interest that a (substantial) part of the services was subjected to market forces and that compulsory affiliation was limited to the core social security services.

But this raises the question how to draw the line between the services that have to be made subject to solidarity-based obligations and services that must be provided in competition. To what extent are Member States forced to open-up insurable 'social security services'? It is clear from the outset that this is a politically sensitive matter, which is capable of affecting the Member States' competences to organise the provision of various social security schemes. Applying the classical test of the less restrictive means, as developed in the well-known settled case law of the CJEU on EU free movement law, could have resulted in an impetus for Member States to liberalise social security schemes considerably.

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[54] See for instance CJEU, Case C-76/90 *Manfred Säger* v. *Dennemeyer & Co. Ltd* [1991] *ECR* 4221 and CJEU, Case C-384/93 *Alpine* [1995] *ECR* 1141.

[55] See e.g. Barnard 2010, pp. 377–380.

[56] See CJEU, Case C-208/05 *ITC Innovative Technology Center GmbH* v. *Bundesagentuur für Arbeit* [2007] *ECR* I-181, para 55.

[57] CJEU, Case C-355/00 *Freskot* [2003] *ECR* I-5263, para 66.

[58] See CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513, para 85.

[59] See ibid. para 87.

However, the CJEU took a different route in modelling the proportionality test in cases involving free movement and social security. It embarked on the predominant role that solidarity plays in social security by pointing out that it should be prevented that insured persons who are at good risks would leave a particular scheme, which could have negative consequences for insured persons who are bad risks.[60] According to the CJEU the test to be carried out was whether the social objective pursued by the scheme concerned would be compromised, if insured persons or companies were allowed to take insurance polices from other providers. In other words, the CJEU does not require that a Member States shows that the body managing the social security scheme concerned would be bankrupted, if particular constraints were not imposed on the affiliates. What seems to matter the most, is whether the task of providing this cover can be carried out under acceptable circumstances. This approach has a great resemblance to the settled case law of the CJEU on the concept of an SGEI, as laid down in Article 106 (2) TFEU. After all, in cases such as *Corbeau*[61] the CJEU held that it is permissible to restrict competition, if this is necessary in order to provide SGEI under economically acceptable circumstances.[62] Accordingly, the CJEU has developed for SGEI a test that is less strict than the classical approach of the less restrictive means.[63] The main reason for this flexible proportionality test is that the problem of cherry picking, resulting from the policy of commercially oriented enterprises deploying themselves to profitable activities and leaving the unrewarding activities to the operators having a special task, must be solved.[64] It seems that the CJEU has transplanted 'its *Corbeau* approach' of Article 106 (2) TFEU into its case law on free movement and social security.[65] This means that, at the end of the day, a considerable margin of appreciation is left to the Member States.[66] Many risks could be covered by national schemes based on compulsory affiliation, as long as this is necessary in order to tackle problems of cherry picking. But if a link between the cover of the specific risks of a particular scheme and cherry picking is manifestly absent, a Member State is prohibited from making affiliation to this scheme compulsory. In other words, the clear absence of a connection between risks covered by a social security scheme and this kind of problems appears to constitute the dividing line set out by the proportionality test as developed by the CJEU in cases such as *Kattner Stahlbau* and *Freskot*.

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[60] See ibid. para 87.

[61] CJEU, Case C-320/91 *Corbeau* [1993] *ECR* I- 2533.

[62] See Sauter and Schepel 2009, p. 179 et seq.

[63] See Buendia Sierra 1999, pp. 319 and 320.

[64] van de Gronden 2006, p. 125.

[65] This approach does not come as a surprise as the interests protected by the 'Rule of Reason' overlap with those protected by Article 106(2) TFEU. See Buendia Sierra 2007, p. 644. Cf. also CJEU, Case C-266/96 *Corsica Ferries* [1998] *ECR* I-3949.

[66] Cf. Baquero Cruz 2005, p. 193–198 and Cicoria 2006, p. 179 en 180.

6.4.1.2 The Approach Adopted in ITC

The margin of appreciation guaranteed by the *Corbeau*-based approach of the CJEU to free movement and social security does not imply that Member States are entirely free with regard to the design of social security schemes. In particular, they should be aware that the CJEU still strongly rejects national policies leading to direct or indirect discrimination. For example, in *ITC*[67] the CJEU found a German law on the payment by the State to private sector recruitment agencies incompatible with the EU free movement rules, as no payments were made if employment was found in another Member State. Germany had adopted special laws that granted financial compensation to recruitment agencies that had found a job for an unemployed person. However, no fees were paid in respect of jobs offered outside Germany. In the view of the Court this policy restricted both the free movement of workers and the freedom to provide services, since it was less attractive for unemployed persons to take up activities in another Member State than in Germany and recruitment agencies were discouraged from placing workers to other countries.

Further, it was held that no 'Rule of Reason' could be relied upon. Of particular interest is the Court's reasoning on the protection of the German social security system concerned. Unsurprisingly, Germany's concern was that social security contributions would be lost, as non-German employers would benefit from the German policy of getting unemployed people back to work. This point of view is based on an approach to solidarity, which takes as its starting point the ties between different groups within one Member State. After all, the system is financed by contributions of the same groups, i.e., persons residing in Germany. The reply of the CJEU to this argument was not a great surprise either. Although it was prepared to respect the national competences on these matters, the Court could not simply accept the arguments of Germany, as these arguments would entirely close off the German market. In other words, the CJEU was in search of a line of reasoning that both paid due consideration to the national dimension of social security and the EU interest of free movement, which on first sight seems virtually impossible given the tensions caused by the interests at stake. Eventually, the tensions between the interests of the German social security system and the EU internal market were reconciled by the Court by pointing to the benefits for the German system resulting from free movement. First, recruitment of an unemployed person in another country entails that the competent German authorities are no longer required to pay unemployment benefits,[68] which, apparently in the CJEU's view, compensates for the lost of the fees paid to the recruitment agency. Second, the departure of a German worker to another Member State may be counterbalanced by the arrival of a worker of another Member State on the

[67] CJEU, Case C-208/05 *ITC Innovative Technology Center GmbH* v. *Bundesagentuur für Arbeit* [2007] *ECR* I-181.

[68] See ibid. para 43.

German labour market.[69] Accordingly, in the view of the Court, allowing persons to break away from a national social security system does not lead to problems of financing the national system concerned, as nationals coming from other Member State will replace the persons who have left. The fees paid by these new comers will contribute to the financial balance of the system of the Member State concerned. So, in this view solidarity is partly shifted from national to EU level and, what is also remarkable, mixed with elements of competition.

In sum, given the advantages resulting from free movement the CJEU is not willing to accept (indirect) discriminatory measures, even not if they are adopted in order to realise solidarity in a social security scheme. On the one hand this approach is clearly in line with the fundamental principles of EU law, which attach great value to both free movement and non-discrimination. On the other hand, this jurisprudence does not sit well with the settled case law on the free movement of hospital services. After all, in well-known cases such as *Müller-Fauré*, *Smits-Peerbooms* and *Watts* (all cases already mentioned), the CJEU has held that Member States are entitled to refuse to reimburse the costs of hospital care undergone by patients in other Member States, as long as these patients can get treatment by domestic hospitals without undue delay. Consequently, if the level of the provision of the hospital service meets particular minimum standards, patients could be prohibited from breaking away from their national healthcare system, although it is clear that the refusal to reimburse the costs of hospital care received abroad at least leads to indirect discrimination. Viewed from the perspective of EU internal market law this is a generous approach.[70] Recently, the EU legislature has confirmed this approach by adopting the Directive on patients' rights in cross-border healthcare.[71] According to Article 8, Member States are entitled to subject the reimbursement of the costs of cross-border healthcare to prior authorisation, in so far as planned care is involved (defined as care involving overnight hospital accommodation or requiring complicated medical infrastructure or equipment).[72]

Given the flexible EU approach towards free movement of hospital services it should be awaited to what extent the CJEU will maintain its strict stance to social security schemes and discrimination. It cannot be ruled out from the outset that in the future the CJEU will decide to moderate the approach adopted in *ITC* and to allow Member States to take measures in order to prevent their nationals from leaving their social security systems with no good reason.

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[69] Ibid.

[70] See Szyszczak 2009, p. 201.

[71] Directive 2011/24/EU.

[72] On this Directive, see Chap. 15 in this volume, by Baeten and Palm.

6.4.2 Authorisation Schemes Challenged

In many Member States the provision of SSGI are subjected to authorisation schemes. These schemes allow the national authorities to exercise control over e.g. the number of providers, the coverage of the provision of particular services on their territory (in order to guarantee universal access to these services for all) and the quality of the services provided to the public.

However, these schemes prevent foreign providers from accessing the market of the Member State concerned. As many SSGI constitute services within the meaning of the Treaty, authorisation schemes governing them could be challenged in the light of EU free movement law. In this respect, it should be noted that the review of these schemes must be based on Article 9 and further of the Services Directive in so far as they govern SSGI covered by this directive. Section 6.3 addresses this issue.

6.4.2.1 Free Movement Law and SSGI Authorisation Schemes

In *Sodemare*[73] the CJEU was called upon to assess whether the Italian laws on the management of a home for old people was in line with the EU freedom of establishment. Authorisations would only be granted to providers, which were 'not for-profit' providers and, therefore, an Italian commercial company owned by a Luxembourg-based corporation was refused authorisation. The key question seemed to be whether it would make sense to apply the Treaty provisions on free movement to the kind of social welfare services at issue in *Sodemare*. The CJEU decided that the main aim of these Treaty provisions is to stimulate the take-up of business activities in other Member States. As a result, the EU freedom of establishment applied to the Italian ban on commercial old people's homes. However, the CJEU stressed that at the current state of the European integration process it was for the Member States to organise the provision of social welfare services and to impose not for profit conditions upon providers.[74] Strikingly, the CJEU did not specify whether the Italian ban on profit making should be qualified as a measure that did not impede free movement at all, or as a measure that does have some restrictive effects that were nevertheless justifiable.[75] In other words, it was not clear whether the Italian policy at stake was saved by the non-applicability of the prohibition not to restrict the freedom of establishment or by the exceptions laid down in the Treaty or acknowledged in the 'Rule of Reason' case law of the CJEU. The line of reasoning of the CJEU was unclear and needed further clarification. But it was obvious that national authorisation schemes governing SSGI were not immune from EU free movement law.

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

[74] Cf. also SEC(2010) 1545 final, p. 79.

[75] Szyszczak 2009, p. 198.

6.4.2.2 The Good Governance Approach of *Hartlauer*

In recent years, the CJEU has shed more light on free movement and authorisation schemes for SSGI[76] in cases such as *Apothekerkammer des Saarlandes and Others*.[77] In these cases, the CJEU has refined and clarified its approach. In my view, of great importance is the *Hartlauer* case,[78] which concerned an Austrian scheme of prior authorisations applicable to outpatient dental clinics. Under Austrian law outpatient dental clinics must apply for prior authorisation for setting up an establishment in a particular city or region. The competent authorities based their decision on an economic needs test in order to guarantee that providers of dental care were equally spread over the territory of Austria. The CJEU made clear that such an authorisation scheme constitutes two types of restrictions. First, the scheme itself amounts to restrictions of the freedom of establishment, as providers from other Member States are obliged to be engaged in administrative (and burdensome) procedures to obtain a licence. Consequently, irrespective of on which conditions authorities base their decision to grant a licence, in the CJEU's view an authorisation scheme contains by its nature impediments to free movement. Second, an economic (or social) needs test limits the number of providers operating on a given market and, therefore, providers from other Member States may be denied access to this market. Accordingly, the freedom of establishment is restricted.

In *Hartlauer* the CJEU also examined whether the restrictions at stake were justifiable. It accepted that a Member State has in place an authorisation scheme for dental care in order to plan the provision of this care. It is settled case law that national laws derogating from the fundamental freedoms must be proportionate, that is, they must be appropriate for attaining the objectives pursued and may not go beyond what is necessary. In principle, in the CJEU's view, it is acceptable that Member States plan the establishment of dental clinics by requiring prior authorisation to guarantee that patients have access to the welfare services concerned.[79] As a result, the CJEU carried out a marginal proportionality review, in the sense that it did not examine with great care whether less restrictive means were available. By doing so, it allows Member States an appreciable margin in shaping their SSGI authorisation schemes. However, the CJEU argued that such schemes must be consistent and systematic in order to be regarded as appropriate. Two special features of the Austrian system made the CJEU rule that the requirements of consistency and systematic approach were not met. The first problem was that the authorisation scheme did not apply to group practices of dentists, although these practices offer similar services to dental clinics.

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[76] On this case law see Hancher and Sauter 2010, p. 117 et seq. and Baeten and Palm 2011, p. 389 et seq.

[77] CJEU, Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] *ECR* I-4171.

[78] CJEU, Case C-169/07 *Hartlauer* [2009] *ECR* I-1721.

[79] See ibid. paras 51–53.

The second problem was that no objective and non-discriminatory criteria known in advance applied to decisions taken by the competent authorities. The CJEU noted that the criteria on which these authorities based their economic needs test varied from region to region in Austria, which was not a surprise given the federal structure of this Member State. At the end of the day, the conclusion was drawn that the Austrian system was not in tune with EU free movement law.

In my view it is apparent from the *Hartlauer* judgment that, on the one hand, the CJEU allows Member States a wide margin of appreciation by not carrying out a full proportionality review but, on the other hand, it requires that Member States draft their national SSGI regulations in line with good administration-type principles. These national regulations must meet principles of consistent and systematic drafting, transparency and non-discrimination. It seems that as long as these principles are respected, Member States enjoy considerable freedom in regulating SSGI. It is apparent from legal doctrine that principles of good administration contribute to good governance in the EU market. As such, principles ensure that the exercise of competences by both the EU Institutions and the Member States meet particular basic requirements.[80] Therefore, in cases such as *Hartlauer* the CJEU has further elaborated on the EU approach towards good governance by developing general principles that must be observed by the Member States on the EU internal market, even in the case they exercise their power to organise the provision of SSGI.

In my view this approach has a great advantage, as it is capable of striking a good balance between free movement and the national organisation of providing SSGI. However, two problems must be named. First, national SSGI regulations may concern (highly) sensitive and political matters involving interests of a great number of stakeholders and could, as a result, induce much controversy. Accordingly, in some cases the national legislature is forced to make compromises, which may go to the detriment of the consistent and systematic drafting of a particular piece of SSGI legislation. The room for reaching compromises might come under pressure due to the good governance approach developed by the CJEU. Second, some Member States have delegated the provision of SSGI to regional or local authorities due to their constitutional structure. However, these Member States risk that the CJEU will find that the decision making process is not in line with the principles of transparency and non-discrimination, as the decisions taken by the competent authorities may vary from region to region.

6.4.2.3 Refining the Good Governance Approach: *Blanco Pérez*

The approach adopted in *Hartlauer* was confirmed by the CJEU in the case *Blanco Pérez*,[81] which concerned a license system for pharmacists issued by a regional

[80] Kadelbach 2002, pp. 181–186.

[81] CJEU, Joined Cases 570/07 and C-571/07 *José Manuel Blanco Pérez and María del Pilar Chao Gómez* [2010] *ECR* I-4629.

authority in Spain. This authority also issued licences to a limited number of providers and based its decisions on the rule that in each pharmaceutical area only one pharmacy could be opened per unit of 2.800 inhabitants. It goes without saying that in the CJEU's view, as in the *Hartlauer* case, such a licence system amounts to restrictions of the freedom of establishment. Further, the CJEU accepted that the need to plan the provision of the social welfare services concerned could justify these restrictions. Again the CJEU stressed the significance of consistent and systematic drafting in respect of the proportionality and appropriateness test.[82] In this case, the CJEU assigned great value to the adjustment measures that were allowed in order to mitigate the application of the distance rule of 2.800 inhabitants. For example, in areas with a high population density the competent authority was entitled to derogate from this rule in order to ensure the access for all to pharmaceutical services. Consequently, the fact that an authorisation scheme is based on a set of sophisticated and detailed rules adapted to the relevant circumstances may help the CJEU to find that the scheme concerned is appropriate for attaining the objectives pursued. Accordingly, the (somewhat sweeping) statement on differing, and therefore arbitrary, decisions taken by regional authorities made by the CJEU in *Hartlauer* is moderated in *Blanco Pérez*. If the differences in the approaches taken in various regions are justified by the circumstances of the regions concerned, the consistent and systematic drafting of the authorisation scheme under review is not called into question. By contrast, it could even be argued that these differentiated approaches are deemed necessary for some schemes in order to mitigate the strictness of some national rules. This prevents the CJEU from finding that the unconditional and stringent application of such rules to every case has deprived the scheme at stake from its consistent and systematic character! In other words, regional authorities are only allowed to differentiate if the regional circumstances require so; but if they fail to come up with a differentiated approach if indeed such circumstances are present, they violate EU free movement law. Consequently, the Member States and their authorities have to walk a fine line when adapting SSGI authorisation schemes and their implementation measures to regional and local circumstances.

6.4.2.4 SSGI Providers Breaking Away from National Authorisation Systems?

So far, the discussion in the case law on SSGI providers has focused upon cases where the provider is seeking *access* to the social services systems of other Member States. Surprisingly, there is also case law on SSGI providers trying to *break away* from their own national authorisation system in order to pursue business activities in other Member States. Making a profit on free markets of other Member States may seem an attractive option for these providers.

[82] Ibid. para 94.

Nevertheless, Member States have set up an extensive and cost-intensive organisation for providing SSGI. They may fear that providers leaving this system could jeopardise the proper functioning of this system. Therefore, it is likely that Member States will not approve cross-border (commercial) activities of entities that are supposed to provide SSGI to the domestic population. However, such disapprovals could have an effect on the trade between Member States. As a result, SSGI providers trying to set up cross-border business activities can challenge these disapprovals by invoking the EU free movement rules.

In the case *Sint Servatius*[83] the CJEU was called upon to shed more light on a dispute between the Dutch government and a Dutch social housing company, Sint Servatius, which wished to pursue business activities in another Member State. Sint Servatius was of the intention to start a commercial housing project in Liège (Belgium), but the Dutch Minister of Housing refused to approve this project, as it feared that involvement in commercial activities abroad would prevent Sint Servatius from performing properly the social housing tasks entrusted to this provider. Sint Servatius contended that the Minister's refusal restricted the free movement of capital. In turn, the Minister argued that her decision was justifiable in the light of Article 106 (2) TFEU, as Sint Servatius was entrusted with a SGEI mission, i.e., providing housing to low-income groups. The CJEU was of the opinion that the free movement of capital was restricted, as the Dutch policy at stake submitted cross-border property investment projects of a housing corporation to a prior authorisation scheme and authorisation would not be given if the project concerned were not in the interest of Dutch housing. Consequently, the validity of the national SSGI regulations under review was entirely dependent on the applicability of the exceptions. In the CJEU's view the 'Rule of Reason' accommodates objectives of social housing policies and is, as a result, capable of justifying restrictions caused by national social housing regulations. However, the competence of the Dutch Minister of Housing to decide on applications related to cross-border investment projects was not properly drafted, as the conditions governing its exercise were not well defined and allowed for too much discretion. Therefore, as in *Hartlauer,* the CJEU stressed the importance of the design of the SSGI regulations at stake and insisted that Member States must comply with good administration-type principles.

What is striking about the CJEU's ruling in the *Sint Servatius* case in my view, is the Court's reaction to the claim of the Dutch government that not granting authorisation for cross-border housing activities was justified by the concept of SGEI. The CJEU argued that in the present case the concept of SGEI was not at issue since the only question to be addressed concerned the lawfulness of a restriction (regarding commercial activities pursued in another Member State) to which social housing companies are subjected. Therefore, it did not go into the SGEI arguments put forward by the Dutch government, as the SGEI mission concerned was not related to these commercial activities but rather to Sint

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

Servatius' social housing task. However, as commercial and social housing tasks are closely interlinked, especially when these tasks are performed by the same provider, it is hard to understand why, in its reasoning, the CJEU isolated the investment project of Liège from the other activities of Sint Servatius. After all, the main point of the Dutch government was that the proper performance of the SGEI mission concerned (i.e. social housing) could be jeopardised, if Sint Servatius were to give too much priority to its foreign commercial investment projects. At least, the CJEU could have clarified whether such line of reasoning holds true or cuts no ice. Solidarity presupposes that SSGI providers entrusted with special missions and financed by public means are concentrated on the target groups assigned to them, that is, people in need. Why should these providers be entitled to special treatment in national law (exclusive rights, financial support, etc.), if their core business is not the highest priority for them? In my view, applying the well-known Treaty provisions on free movement to SSGI providers without paying any attention to solidarity (by, for example, explaining the role that Article 106 TFEU may play in the present case) comes down to ignoring the problems that Member States encounter in organising the provision of SSGI in a market setting. All in all, it is a missed opportunity that the CJEU did not elaborate on the SGEI arguments put forward by the Dutch government.

What lessons could be learned from the *Sint Servatius* case? Not only denying providers from other Member States access to a particular SSGI system could constitute an infringement of EU free movement law, but also preventing domestic SSGI providers from (partly) leaving such national system could amount to a violation of this area of EU law. As a result, national authorities must draft their laws governing applications from *domestic* providers for cross-border projects with great care. The powers to grant or refuse permission should be well-defined and based on transparent[84] and non-discriminatory criteria, not leaving a too wide margin of appreciation to the competent authorities. In other words, also in matters of domestic providers trying to leave a particular SSGI system good administration-type principles play a decisive role.

6.4.3 The Transparency Principle and Competitive SSGI Procedures

At the end of this section attention must be paid to developments that took place in EU public procurement law.[85] If a public authority externalises the provision of SSGI, the Directive for the award of public works contracts, public supply

[84] Cf. Krajewski 2009, p. 500.

[85] The contribution from Manunza and Berends, Chap. 14 in this volume discusses the consequences of EU public procurement law in full extent. This section will mainly focus on the interplay between EU free movement law and the public procurement rules.

contracts and public service contracts[86] comes into play. If it concludes a contract with a service provider and pays this provider a fixed remuneration, this Directive is applicable, provided that the thresholds set by this piece of EU legislation are met. The agreement concluded must be regarded as a public service contract.[87] A comprehensive set of public procurement rules applies to public service contracts listed in Annex IIA of the Directive. However, the majority of the SSGI falling within the scope of the Directive for the award of public works contracts, public supply contracts and public service contracts are listed in Annex IIB. The award of these contracts is subjected to a very limited number of rules,[88] as only the Directive provisions requiring non-discriminatory treatment and publication of the results of the award are applicable.[89]

Of special interest is the situation, where a public authority externalises the provision of a SSGI by granting a service concession. The Directive for the award of public works contracts, public supply contracts and public service contracts clearly stipulates that it does not apply to service concessions.[90] However, it should be noted that the CJEU has not shied away from deriving obligations inspired by EU public procurement law from the Treaty provisions on free movement and from applying the principles found to service concessions. So, here EU free movement law turns out to be relevant. In my view, the general approach developed towards free movement and service concessions has important consequences for national SSGI policies. Over the last few years, the CJEU has delivered significant and far-reaching rulings on service concessions and also exclusive rights to provide particular services. These cases mainly concerned national regulation of games of chances.[91] However, the principles derived by the CJEU from the Treaty provisions on free movement are formulated in such a general way that these principles must be supposed to apply to other service concessions and exclusive rights as well.

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[86] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, *OJ* 2004 L134/114.

[87] See Article 1(2) Directive 2004/18/EC.

[88] See e.g. Commission, *Commission Staff Working Document, Frequently Asked Questions Concerning the Application of Public Procurement Rules to Social Services of General Interest, Accompanying Document to the Communication on 'Services of General Interest, Including Social Services of General Interest: a New European Commitment'* {COM(2007) 725 final}, SEC(2007) 1514, 20 November 2007, p. 7.

[89] See Stergiou 2009, pp. 161 and 162.

[90] See Articles 17 and 1(4) Directive 2004/18/EC.

[91] See, for example, CJEU, Case C-260/04 *Commission* v. *Italy* [2007] *ECR* I-7083; CJEU, Case C-203/08 *Sporting Exchange Ltd (trading as 'Betfair')* v. *Minister van Justitie* [2010] *ECR* I-4695; CJEU, Case C-258/08 *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd* v. *Stichting de Nationale Sporttotalisator* [2010] *ECR* I-4757 and CJEU, Case C-64/08 *Ernst Engelmann* [decided on 9 September 2010, nyr].

6.4.3.1 The Transparency Principle Developed in the CJEU's Case Law

The rulings in *Telaustria*,[92] *Coname*[93] and *Parking Brixen*,[94] are the starting point where the Court ruled that EU free movement law requires that concessions to provide a particular service (or to supply a particular good) should be awarded in accordance with the so-called Transparency principle.[95] This means that national authorities are obliged to make the grant of these rights subject to a competitive procedure.[96] In *Betfair*[97] the CJEU extended its Transparency case law to exclusive rights. Irrespective of whether the right to provide a particular service is framed as an exclusive right or as a service concession, the grant of it should be made subject to a competitive procedure in the opinion of the CJEU. In sum, although service concessions are explicitly excluded from the scope of EU public procurement rules, the competent authorities of the Member States must give providers from other Member States the opportunity to compete for these rights in open and transparent procedures (alongside with domestic providers). Nevertheless, the CJEU has overtly stated that its case law on the Transparency principle does not necessarily give rise to an obligation to launch an invitation to tender.[98] So, it looks like a duck, it sounds like a duck but it is not permissible to call it a duck. In any event, the Transparency case law has made clear that the Member States are not at liberty to grant service concessions or exclusive rights to provide services to the operator of their preference without involving operators from other Member States in the relevant procedures. As a result of this groundbreaking case law the Commission has issued an interpretative communication on *inter alia* how to apply the Transparency principle.[99]

In recent cases the Court held that the principle of transparency:

> …requires the concession-granting authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed.[100]

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[92] CJEU, Case C-324/98 *Telaustria Verlags GmbH, Telefonadress GmbH* v. *Telekom Austria AG* [2000] *ECR* I-10745.

[93] CJEU, Case C-231/03 *Consorzio Aziende Metano (Coname)* v. *Comune di Cingia de' Botti* [2005] *ECR* I-7287.

[94] CJEU, Case C-485/03 *Parking Brixen GmbH* v. *Gemeinde Brixen and Stadtwerke Brixen* [2005] *ECR* I-8612.

[95] See Stergiou 2009, pp. 167 and 168.

[96] On these cases see Drijber and Stergiou 2009, p. 805 et seq.

[97] CJEU, Case C-203/08 *Sporting Exchange Ltd (trading as 'Betfair')* v. *Minister van Justitie* [2010] *ECR* I-4695.

[98] See CJEU, Case C-231/03 *Consorzio Aziende Metano (Coname)* v. *Comune di Cingia de' Botti* [2005] *ECR* I-7287, para 21.

[99] See the *Commission Interpretative Communication on the Community Law Applicable to Contract Awards Not or Not Fully Subject to the Provisions of the Public Procurement Directives*, *OJ* 2006 C179/2. This communication was challenged by Germany but its appeal was rejected by the GC. See GC, Case T-258/06 *Germany* v. *Commission* [2010] *ECR* II-2027.

[100] See e.g. CJEU, Case C-64/08 *Ernst Engelmann* [decided on 9 September 2010, nyr], para 50.

It should be noted that the Transparency principle, as developed by the CJEU, does not only set out institutional obligations (such as making known in advance the conditions applicable to a particular exclusive right) but also contains a significant substantive obligation. On balance, as a general rule Member States must allow providers from other Member States to compete for exclusive rights to provide services. Admittedly, in EU free movement law exceptions laid down in the Treaty or developed in the 'Rule of Reason' case law (overriding requirements of general interest) play an important role. In principle, the restrictive effects resulting from not subjecting the grant of exclusive rights or concessions to a competitive procedure could be justified by these exceptions. However, the CJEU held in *Betfair* that a distinction must be made between the detrimental effects caused by competition between various operators and the procedure leading to the issue of a licence.[101] In regulating games of chance Member States are allowed to restrict the number of operators (for example to one, single, provider) for public interest reasons, and may make the provision of specific services subject to special conditions. However, the procedure leading to the issuing of a license does not have any effect on the achievement of the objectives pursued. Therefore, the need to regulate the provision of services of a special nature did not justify the restrictive effects resulting from the absence of a competitive procedure. As a result, the grant of the exclusive right to provide these services must be made subject to such a procedure and providers from other Member States must get the opportunity to compete for it.

However, the Court formulated one important exception to this rule. If the management of the public operator concerned is subject to direct State supervision or if a private operator is subject to strict control by public authorities, the Transparency principle does not apply,[102] as, in essence, the operator concerned is considered to be part of the Member State concerned. In public procurement law this situation is known as '(quasi) in-house'.[103]

Remarkably, in its case law the CJEU has made clear that the Transparency principle applies not only to services concessions and exclusive rights but also to the so-called IIB services (which are, as already mentioned, only governed by a 'light' public procurement regime pursuant to the Directive for the award of public works contracts, public supply contracts and public service contracts).[104] In *An Post*[105] the CJEU held that the award of IIB services in absence of transparency and without prior advertising is not in line with the Treaty provisions on free movement. However, for these Treaty provisions to be applicable the contracts concerning these types of services must present 'certain cross-border interest'.

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[101] See CJEU, Case C-203/08 *Sporting Exchange Ltd (trading as 'Betfair')* v. *Minister van Justitie* [2010] *ECR* I-4695, para 58.

[102] Ibid. para 59.

[103] See Drijber and Stergiou 2009, p. 833.

[104] Drijber and Stergiou 2009, pp. 811 and 812.

[105] CJEU, Case C-507/03 *An Post* [2007] *ECR* I-9777.

Contracts with only an impact on local markets are, therefore, not caught by the Transparency principle. It should be noted that a similar requirement of cross-border effect was also formulated by the CJEU in cases on services concessions.[106]

6.4.3.2 SSGI and Competitive Procedures

What relevance does the case law on the Transparency principle have for SSGI? To start with, it should be pointed out that many IIB services constitute SSGI, such as personnel placement and supply services, education and vocational education services, and, last but not least, health and social services. If the public authorities of a Member State externalise the provision of these services, the grant of the public contracts concerned must be made subject to a competitive procedure, in so far as an effect on the trade between the Member States is present. Providers from other Member States must get the opportunity to compete for the grant of such contracts. The case *An post* (mentioned above), where the CJEU made clear that the award of IIB services contracts fall within the scope of the Transparency principle, concerned a contract on collecting payments from post offices by persons entitled to various social benefits. As the award of this contract was not advertised, the Commission started an infringement procedure against Ireland. The claim of the Commission was rejected on the sole ground that no convincing evidence on the effect of trade between the Member States was produced. Of particular interest is *Commission* v. *Germany*,[107] where the CJEU held that local authorities that contract out the management of occupational old-age pensions for their employers to a private provider must comply with the rules laid down in the Directive for the award of public works contracts, public supply contracts and public service contracts. Consequently, in the CJEU's view contracting out such SSGI amounts to public service contracts within the meaning of this Directive, which entails that the public authorities concerned are under the obligation to organise public procurement procedures.

However, it may be assumed that in the majority of the Member States the management of the provision of SSGI such as social security services, is not contracted out. Rather, the management of these services is more likely to be framed as a system of compulsory affiliation of persons entitled to particular benefits to a special body. As was pointed out above, compulsory affiliation to particular schemes is an important instrument deployed by Member States to provide SSGI. Citizens are obliged to be affiliated to schemes related to, for example, risks of unemployment, healthcare and poverty. Compulsory affiliation is subject to the free movement rules, in so far as insurable risks are concerned. To my mind, the other side of the coin of compulsory affiliation is the concept of

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[106] See e.g. CJEU, Case C-231/03 *Consorzio Aziende Metano (Coname)* v. *Comune di Cingia de' Botti* [2005] *ECR* I-7287, paras 17 and 20.

[107] CJEU, Case C-271/08 *Commission* v. *Germany* [decided on 15 July 2010, nyr].

exclusive rights. After all, the fact that all citizens are affiliated to one single provider for particular social benefits entails that the provider concerned has the exclusive right to provide these benefits.

The case law of the CJEU on the Transparency principle and service concessions/exclusive rights is of great interest for SSGI schemes based on compulsory affiliation. The exclusive right to provide cover for particular risks may be challenged in the light of EU free movement law, in so far as these risks are insurable. Presumably, many statutory social security schemes do not cover insurable risks. However, a great number of supplementary schemes are likely to cover such risks. Regulating such schemes entails paying due consideration to the case law on the Transparency principle. Member States can make an attempt to argue in favour of having in place national regulations. Due to reasons of solidarity it makes sense that only one provider should be entrusted with the task to provide particular social benefits. Competition between various providers could lead to detrimental effects such as adverse selection and discriminatory price setting. However, insurance companies from other Member States may argue that solving these problems has nothing to do with the grant of the exclusive rights to provide cover for particular risks. Giving them the opportunity to compete for the grant of the right to provide specific social benefits will not go to the detriment of the Member States' powers to impose specific obligations and constraints on the provider that finally gets this right. It is permissible to make the grant of exclusive rights subject to all kinds of conditions based on considerations of solidarity and, yet, a national government is under the obligation to organise a contest in order to select the provider that offers the best value for money. A similar line of reasoning is contained in *Commission* v. *Germany*.[108] Here, the CJEU acknowledged that on the basis of Article 106 (2) TFEU a Member State is allowed to make the management of emergency transport services subject to specific measures in order to guarantee the provision of high quality service ambulance services. Accordingly, these services were qualified as SGEI. However, it was not clear why complying with the public procurement rules would prevent the accomplishment of the SGEI mission concerned and, therefore, Article 106 (2) TFEU could not be invoked for justifying the absence of a tender.

Taken all together, in so far as insurable social benefits are concerned, public authorities of a Member State cannot continue to grant exclusive rights to the well-known provider they are used to doing business with. They should give other operators a fair chance to become 'entrusted' with the task to provide these benefits. If they are of the opinion that the management of a particular social security scheme should remain in the hands of the well-known operator, they should come up with a sound and excellent line of reasoning for this. They should explain why solidarity can only be achieved if the incumbent is entrusted with the task to provide the SSGI concerned by basing this argument, for example, on Article 106 (2) TFEU.[109]

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[108] CJEU, Case C-160/08 *Commission* v. *Germany* [decided on 29 April 2010, nyr].

[109] See Schweitzer 2011, pp. 36–38.

In my view, however, such line of reasoning is unlikely to be convincing. Therefore, the competitive granting of exclusive rights seems also be the procedure that should be used in the SSGI sector too. To my mind, this could lead to revolutionary results in this sector, as, unlike in more commercially oriented branches, providers of SSGI are not used to competitive procedures.

However, there is one important exception to the rule of the competitive procedures. If the operators are subject to substantial State supervision, a national government is allowed to base its decision not to organise such a procedure on the (quasi) in-house argument. Therefore, the only way out seems to be subjecting SSGI providers to strong State-control.

6.5 Conclusion

Strikingly, the analysis of the CJEU's case law demonstrates that EU free movement law may force Member States to introduce elements of competition in their national schemes governing SSGI. Although it is for the Member States to regulate these services (according to the Court's mantra), the stance of EU law is not neutral in this respect; rather it is based on the view that competition should play some role in the national organisation and provision of SSGI.

In elaborating on this role, the CJEU seems to have made a distinction between two modes of competition. The first mode of competition is about the *access* to the market. In many Member States, the provision of many SSGI is reserved to a limited number of operators or even to one single provider. As a result, access to these SSGI markets is not free, as providers are under the duty to apply for a concession or an exclusive right. Thus, the main issue is how the competent public authorities of the Member States design the procedure for the grant of these concessions and exclusive rights.

The second mode of competition concerns the *rivalry on the market*. Should competition between SSGI providers be preserved at all costs or are the Member States allowed to impose on these SSGI providers several obligations and constraints? At the heart of the second mode of competition is the way, in which SSGI providers operate on the market and how they are regulated by national law.

The findings regarding the role of competition in the national SSGI schemes and the two modes of competition give rise to significant incentives for the transformation of the national organisation and provision of SSGI. These incentives are discussed below.

The first incentive concerns access to the market. In the CJEU's view, substantial State supervision is a strong argument for accepting that no competition needs to be introduced in the procedure leading to the grant of concessions and exclusive rights to provide SSGI. However, competitive procedures are required for the grant of these rights, if no provider is placed under intensive State control. In that case, every provider should have the fair chance to gain access to the SSGI market concerned. On top of that, it is apparent from the analysis of the Services Directive that the

provision of various SSGI is not covered by this Directive, as long as the provision of these services is subject to substantial control by the State. All in all, this implies that the applicable EU rules could stimulate the Member States to base the provision of some SSGI on strong control by the government, which could negatively affect independently operating private providers. So, the choice seems to be either to place SSGI providers under strong State control or to subject the grant of the concessions or the exclusive rights to a competitive procedure. The State ought not to step back and at the same time simply give exclusive rights/concessions to the providers of its preference. Privatisation without introducing a considerable room for competition is full of risks from the perspective of EU law.

The second incentive is related to competition between various SSGI providers on a given market. The CJEU has shown great willingness to accept national obligations imposed by Member States on SSGI providers, even if these obligations distort competition considerably. In contrast, a read thread running through the CJEU's case law is that national measures intervening on SSGI markets should be drafted in a consistent and systematic way. In order to guarantee the compatibility of national SSGI measures with EU internal market law, Member States must draft the measures concerned in line with these principles of good administration; by doing so they respect the EU approach to good governance in the internal market. In my view, however, this could lead to a transformation process. It should be noted that national laws governing SSGI are subject to compromises, given their (politically) sensitive nature. The room for stakeholders to clinch deals is, nevertheless, limited by the principles of good administration. If the compromises agreed upon put under pressure the consistency and coherence of the national SSGI laws concerned, EU free movement could be infringed. Therefore, the room for manoeuvre for settling matters seems to be reduced by the good governance approach developed by the CJEU.

The third incentive stimulates Member States to distinguish with great care between services that need to be regulated since they play a key role in modern society, and services that do not play such a role. In this chapter, it is argued that Member States may regulate the provision of SSGI in order to solve problems of cherry picking. However, services not clearly connected with these problems should be made subject to market forces. As a result, Member States must abolish all national obligations and constraints concerning services that do not fulfil a key function in society. In essence, the CJEU forces Member States to privatise the provision of these 'non-essential' services. It goes without saying that this could also amount to a process of transformation.

The fourth incentive is connected with the question how to frame the distinction between essential and non-essential services. In order to identify which services need to be regulated and which services must be left to market forces, the Member States must designate clear SGEI missions.[110] In this regard, it should be recalled

[110] Cf. also Commission, *Commission Staff Working Document, Second Biennal Report on Social Services of General Interest,* SEC(2010) 1284 final, 22 October 2010, p. 72.

that the status of SGEI is reinforced by the introduction of a Protocol on Services of General Interest by the Treaty of Lisbon[111] and the newly drafted Article 14 TFEU, which even stresses the importance of SGEI more than the old Article 16 EC did.[112] Member States should, therefore, set priorities and make clear which social services are regarded to fulfill essential functions in their economies. Thus, social services covered by EU internal market law should be modelled as SGEI, in so far as they are regarded by the Member States to be of special interest for their citizens. Consequently, the concept SGEI as developed in EU law encourages Member States to designate (essential) SSGI as SGEI.

To conclude, although the CJEU does not want to interfere with the national competences to regulate SSGI, the introduction of some competition in the provision of these services seems inevitable. However, the Member States can stay in charge with regard to the organisation and the provision of SSGI, if they manage to make a clear distinction between essential and non-essential services. In other words, the key question is whether the Member States will be able to designate (specific) SSGI as SGEI.

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[111] Protocol on Services of General Interest to be Annexed to the Treaty on the European Union, to the Treaty on the Functioning of the European Union and, Where Applicable, to the Treaty Establishing the European Atomic Energy Community, *OJ* 2007 C 306/158.

[112] Article 14 TFEU provides that the EU and its Member States must ensure that SGEI '… operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions.' In Article 16 EC the reference to economic and financial conditions was absent. Furthermore, Article 14 TFEU explicitly provides for a legal basis for EU action on SGEI, whereas Article 16 EC was silent on this matter.

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Chapter 7
Free Movement of Workers and Union Citizens

Alina Tryfonidou

Abstract This contribution seeks to offer some insights into the changing nature of the relationship between EU and Member State competences, with regards to the provision of SSGIs. In particular, it will consider how the provisions on the free movement of workers and the, more recently added, citizenship provisions of the Treaty, impose constraints on the Member States' autonomy with regards to the provision of such services. The essay will focus on two specific types of SSGIs that are still, mainly, provided by the State (education and the provision of a social assistance system) and will explore how the CJEU has responded to the tension between the aims of the free movement of workers and the citizenship provisions, on the one hand, and the autonomy of the Member States in these fields, on the other.

Contents

A. Tryfonidou (✉)
School of Law, Foxhill House, Whiteknights Road, Reading, RG6 7BA, UK
e-mail: A.Tryfonidou@reading.ac.uk

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7.1 Introduction

In the early days of the welfare state, certain areas of the economy were set apart from the free market philosophy, since in those sectors it was considered inappropriate for the desire to make profit to overweigh certain non-economic considerations such as, for instance, the need to ensure the universal provision of certain essential services for the benefit of all. The creation and development of the European internal market and the recent global financial crisis are, nonetheless, forces which push towards the opposite direction and are increasingly leading to a 'radical restructuring' of the relationship between the State and the market.[1] On the one hand, certain services which have traditionally been provided exclusively by the State because they have a public service mission and, for this reason, it has been considered that they should not be subject to market forces, are now in the process of being liberalised and/or privatised,[2] and this has created the need to (re-)define the extent to which the EU has the power to assess the role of the State in the provision of such services. On the other hand, the further development of the European integration and the establishment of the status of Union citizenship, have meant that even when the Member States continue to provide such services themselves, they may now be required by EU law to extend their availability to nationals of other Member States who are lawfully resident within their territory. Bringing such services within the realm of the free movement rules of the Treaty and, thus, making the actions of the Member States with regards to their organisation, provision and financing subject to EU control, results in the further diminution of the areas of Member State competence that are entirely immune from EU scrutiny.

One category of the aforementioned services are the so-called SSGIs, which are nowhere mentioned in the Treaties, but to which reference is made in numerous recent documents produced by the Commission and other bodies such as ETUC.[3] The Treaty drafters have chosen, instead, to make use of the wider terms of SGEIs and SGIs,[4] which collectively refer to public services that fulfil people's daily needs and are essential for their well being, such as, gas, water and energy supply, postal services, healthcare, education and the maintenance of a social assistance

[1] Szyszczak 2001, p. 36.

[2] See, for instance, the recent discussion in the United Kingdom concerning the cuts in the grants paid to higher education institutions and the corresponding increase in tuition fees.

[3] For a further explanation of the term 'SSGIs', see Chap. 9 by Neergaard in this collection of essays.

[4] Another term used for SGEIs and SGIs is 'public services'—see CJEU, Case C-18/88 *GB-Inno* [1991] *ECR* I-5980, para 22; CJEU, Case C-393/92 *Almelo* [1994] *ECR* I-1520, paras 47 and 49; Behrens 2001, pp. 472–473. Note, however, that the Commission has refrained from using that term as a synonym for any of the above terms —see Commission, *Green Paper on Services of General Interest*, COM(2003) 270 final, 25 May 2003, para 19. Also, commentators who have made use of this term as another label for SG(E)Is have recognised that the terms are not 'co-extensive'—see, for example, Ross 2004, p. 489.

and social security system.[5] The Commission has recognised the special role of SSGIs 'as pillars of the European society and economy, primarily as a result of their contribution to several essential values and objectives of the Community, such as achieving a high level of employment and social protection, a high level of human health protection, equality between men and women, and economic, social and territorial cohesion'.[6] As explained, '[t]he market, left to itself, does a good job of supplying many services of general interest for many people. However, sometimes markets fail to deliver socially desirable objectives and, as a result, services are underprovided by the market… In such cases public sector intervention may be necessary'.[7]

EU law, therefore, allows full account to be taken of the specificities of SSGIs and of the importance attached to the freedom of the Member States to organise the provision of such services in whichever way they consider most appropriate. The Commission has explained that as a general rule, the EU leaves it up to the Member States to decide whether they shall provide public services themselves, directly or indirectly (through other public entities), or whether they will entrust their provision to a third party.[8] However, the exercise of this choice and, most importantly, its consequences, has to be in compliance with EU law. As pointed out by Ross, 'European law does not as such say anything about the size of public budgets allocated by Member States to public services. Nor does it predetermine choices as to how such services are to be delivered. However, EU law is *not* neutral towards the way public services are organized and operated within those choices'.[9]

Therefore, the important question is how can the EU interfere with Member State choices when it comes to the provision of SSGIs? Or, perhaps more accurately, when do the actions of the Member States in this context fail to comply with EU law? This contribution will not seek to answer this broad question, but will, rather focus on two, more specific, research questions. The first research question—which will be answered in this Section—asks: in what circumstances do the citizenship provisions of the Treaty, as well as the provisions governing the free movement of workers, apply to situations involving the provision of SSGIs? The second research question, which will be explored in Sects. 7.2 and 7.3, is more specific and the answer to it will be distilled from the conduct of two case studies. This question asks how the CJEU has responded to the tension between the

[5] For an article on the 'growing Europeanisation of the public utilities legal order' see Napolitano 2005.

[6] Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union,* COM (2006) 177 final, 26 April 2006.

[7] Commission, *Report to the Laeken European Council, Services of General Interest*, COM(2001) 598, 17 October 2011, para 1(3). For a further explanation of market failure in this context see Commission, *Communication from the Commission, Services of General Interest in Europe,* COM(1996) 443 final, 11 September 1996, p. 5.

[8] COM(2001) 598, para 2(7).

[9] Ross 2004, p. 304.

aims of the free movement of workers and the citizenship provisions, on the one hand, and the autonomy of the Member States with regards to the provision of two particular SSGIs (public education and the provision and maintenance of a social assistance system), on the other.

The remaining part of this Section will seek to provide an answer to the first research question.

As noted above, when the Member States exercise their competence with regards to the provision of SSGIs, they have to act in compliance with EU law. But which provisions of the FEU Treaty are applicable in situations involving Member State action with regards to the provision of SSGIs?

It is true that in the context of EU free movement law, it is the free movement of services provisions that appear to primarily apply to SSGIs. Hence, if the provision of an (economic)[10] SSGI across borders is impeded, then this will amount to a violation of Article 56 TFEU. However, the refusal to provide a specific SSGI to certain persons may not, only, amount to an obstacle to the cross-border provision of the core service as such, but may also have the further effect of impeding the free movement of those persons who are refused its availability.

In particular, as will be seen in the two subsequent sections of this contribution, the way that a State chooses to organise the provision of a non-economic SSGI may be subjected to scrutiny under the other (economic) free movement provisions, if it is proved that this may have an impact on the exercise of an(other) economic activity across borders. For instance, the refusal to extend the availability of a SSGI to migrant workers or their families, may be capable of impeding the free movement of the former and may, thus, be caught by the free movement of workers provisions. In addition, the introduction of the citizenship provisions into (what is now) the FEU Treaty has made it possible for SSGIs to be included within the scope of EU law—and thus be subjected to EU scrutiny—in situations that do not involve any link with the economic aims of the EU.

However, it should be noted that when the free movement of persons provisions are held to apply to a situation involving the provision of SSGIs, the Court merely seeks to remove any discrimination on the grounds of nationality/free movement with regards to the provision of these services, and, thus, the EU's interference is confined to requiring the host Member State not to treat nationals of other Member States/free movers differently. Hence, under this 'discrimination model' the content of the national rules on the issue remains intact.[11] In other words, the Member States remain free to choose which SSGIs they will provide, as well as how such services will be provided. Yet, although in theory this is the case, in reality, the Member States may feel inclined to change their laws (both with respect to their own nationals and with regards to the nationals of other Member

[10] Note, however, that if a specific SSGI is found not to be an 'economic service' because it is not provided for remuneration as this was defined in CJEU, Case C-263/86 *Humbel* [1988] *ECR* 5365, para 17, then Article 56 TFEU does not apply and any impediment to its provision across borders is not prohibited by that provision.

[11] Barnard 2008, p. 4.

States) if otherwise they will be financially unable to continue offering a particular service.[12] For example, a Member State may be unable to provide a free higher education system open to all and may, thus, decide to impose limiting conditions on access to education for everyone—something which may be seen as, in effect, allowing the principle of free movement to trump over the adequate provision of an SSGI.[13]

The remaining part of this contribution will be divided into two main parts, each devoted to one type of SSGI: education and the organisation and maintenance of a social assistance system. The purpose will be to examine the second research question posed in this piece: i.e. to what extent can, and has, the EU interfered in the provision of two particular types of SSGI (education (Sect. 7.2) and the organisation and maintenance of a social assistance system (Sect. 7.3)) and what has been the corresponding diminution in the political autonomy of the Member States in these areas.

7.2 Education as an SSGI and the Free Movement of Workers and Union Citizens

The provision of education is, clearly, an SSGI. It is, also, one of the areas listed in Article 6 TFEU and for which the EU has a (solely) supplementary competence, i.e. it has the competence to merely support, coordinate or supplement the actions of the Member States in this field. However, whilst each Member State is free to choose the education system that it will build within its territory,[14] it has to act in compliance with EU law when doing so.[15] Hence, and as will be seen in more detail below, there has always been a tension between the exercise of national competence with regards to the provision of this SSGI, on the one hand, and the

[12] Neergaard and Nielsen 2010, p. 456.

[13] As explained by Szyszczak '[t]here are no criteria as to the *quality* of welfare benefits provided within a Member State, with the Citizen acting as a market or consumer citizen making a choice. There are no safeguards against "levelling down" when a Member State feels threatened by an influx of "welfare tourists" and decides to lower or withdraw a welfare benefit'. Szyszczak 2009, p. 285.

[14] CJEU, Case C-40/05 *Lyyski* [2007] *ECR* I-99, para 39.

[15] See CJEU, Case C-73/08 *Bressol* [2010] *ECR* I-2735, para 28; CJEU, Joined Cases C-11 & 12/06 *Morgan and Bucher* [2007] *ECR* I-9161, para 24; CJEU, Case C-337/97 *Meeusen* [1999] *ECR* I-3289, para 25; CJEU, Case C-308/89 *Di Leo* [1990] *ECR* I-4185, paras 14–15. This is the same approach that has been adopted in other areas which are, also, reserved for the Member States and for which the EU (if at all) has only supportive competence. See, for instance, criminal law and direct taxation and the relevant case-law: CJEU, Case C-348/96 *Calfa* [1999] *ECR* I-11 and CJEU, Case C-279/93 *Schumacker* [1995] *ECR* I-225, respectively.

requirements of EU law and, more specifically, the aim of building an internal market and liberalising inter-State movement, on the other.[16]

The Member States devote significant public resources for maintaining a high quality education system for the benefit of their *own* citizens. As explained by the Court in *Humbel*, 'the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields'.[17] For this reason, and because the Court has been of the view that with regards to courses provided under the national educational system the characteristic of remuneration is absent, the provision of education by a Member State is not a(n economic) 'service' within the meaning of Article 56 TFEU and, thus, the actions of the Member States with regards to this are not subject to an assessment as to their compatibility with that provision.[18] Nonetheless, as will be seen, this does not mean that the actions of the Member States in this field are always immune from EU interference: the Court has held that other provisions of the Treaty may be employed in order to require the Member States to provide their 'services' in the education field to nationals of the other Member States and, as a result, spend part of the public resources earmarked for the purpose of building and maintaining an education system for the benefit of nationals of the other Member States.

The Court has confirmed in a long line of case law that the conditions of *access* to vocational training fall within the scope of the Treaty[19]; and that both higher education and university education constitute vocational training.[20] More specifically, the Court has held that Member State nationals who qualify as 'workers' within the meaning of Article 45 TFEU, are entitled to be treated equally with nationals of the host State when it comes to access to education, and advantages relating to access to education have been found to amount to 'social advantages' under Article 7(2) of Regulation 1612/68, to which the worker is entitled, either for

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[16] Opinion of AG Stix-Hackl of 21 September 2006 in CJEU, Case C-76/05 *Schwarz* [2007] *ECR* I-6853, para 4, and CJEU, Case C-318/05 *Commission* v. *Germany* [2007] *ECR* I-6957, para 4.

[17] CJEU, Case C-263/86 *Humbel* [1988] *ECR* 5365, para 18. See, also, more recently CJEU, Case C-76/05 *Schwarz* [2007] *ECR* I-6879, para 40: 'Note, however, that [c]ourses given by educational establishments essentially financed by private funds, notably by students and their parents, constitute services within the meaning of Article [57 TFEU], since the aim of those establishments is to offer a service for remuneration'. See Ibid. para 40; CJEU, Case C-109/92 *Wirth* [1993] ECR I-6447, para 17; CJEU, Case C-56/09 *Zanotti*, [2010] *ECR* I-4517, paras 31–33.

[18] CJEU, Case C-263/86 *Humbel* [1988] *ECR* 5365.

[19] CJEU, Case 293/83 *Gravier* [1985] *ECR* 593, para 25; CJEU, Case C-65/03 *Commission* v. *Belgium* [2004] *ECR* I-6427, para 25; CJEU, Case C-147/03 *Commission* v. *Austria* [2005] *ECR* I-5969, para 32; CJEU, Case C-295/90 (*European*) *Parliament* v. *Council* [1992] *ECR* I-4193, para 15; CJEU, Case 24/86 *Blaizot* [1988] *ECR* 379, para 11; CJEU, Case 42/87 *Commission* v. *Belgium* [1988] *ECR* 5445, para 7; CJEU, Case C-40/05 *Lyyski* [2007] *ECR* I-99, para 28.

[20] CJEU, Case 24/86 *Blaizot* [1988] *ECR* 379, paras 15–20; CJEU, Case 42/87 *Commission* v. *Belgium* [1988] *ECR* 5445, paras 7–8; CJEU, Case C-147/03 *Commission* v. *Austria* [2005] *ECR* I-5969, para 33.

himself[21] or for the benefit of his descendants.[22] Furthermore, the children of migrant workers who wish to have access to education in the host State, can themselves rely on Article 12 of Regulation 1612/68, in order to require the host Member State not to discriminate against them on the ground of their nationality.

Most important, nonetheless, was the Court's recognition in the case of *Gravier* in the 1980s,[23] that economically inactive Member State nationals are entitled to rely on Article 18 TFEU, which prohibits discrimination on the grounds of nationality *within the scope of EU law*, and to require the Member States not to discriminate against them in relation to access to education in the territory of another Member State. The Court has, further, read this as obliging the host State to allow incoming students to reside within its territory for the duration of their course.[24]

More specifically, as regards the issue of the imposition of a limit on the number of students that can be admitted to an educational course, the CJEU has made it clear that Member States are 'free to opt for an education system based on free access—without restriction on the number of students who may register—or for a system based on controlled access in which the students are selected. However, where they opt for one of those systems or for a combination of them, the rules of the chosen system must comply with European Union law and, in particular, the principle of non-discrimination on grounds of nationality'.[25] Similarly, the conditions required to be satisfied for gaining admission to university education, must comply with the above principle.[26]

Apart from national measures involving the imposition of (non-financial) limits or conditions on access to education, the Court has had to consider whether the requirement to pay an enrolment or registration fee constitutes a violation of EU law.

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[21] Council Regulation No. 1612/68 of 15 October 1968 on Freedom of Movement for Workers within the Community, *OJ* 1968 L 257/2. For more on this see Lonbay 1989, p. 376. See, also, Article 7(3) of the same Regulation. Note that, although in the context of freedom of establishment, there is no equivalent provision, the Court interpreted the relevant provision of the Treaty (Article 49 TFEU) as covering such advantages—see CJEU, Case C-337/97 *Meeusen* [1999] *ECR* I-3289.

[22] CJEU, Case 94/84 *Deak* [1985] *ECR* 1873, para 22; CJEU, Case C-7/94 *Gaal* [1995] *ECR* I-1031.

[23] CJEU, Case 293/83 *Gravier* [1985] *ECR* 593.

[24] CJEU, Case C-357/89 *Raulin* [1992] *ECR* I-1027, para 34; CJEU, Case C-295/90 *European Parliament* v. *Council* [1992] *ECR* I-4193, para 15. This was initially enshrined in Council Directive 93/96/EEC of 29 October 1993 on the Right of Residence for Students, *OJ* 1993 L 317/59 and is now provided in Article 7(1)(c) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation No. 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ* 2004 L 158/77.

[25] CJEU, Case C-73/08 *Bressol* [2010] *ECR* I-2735, para 29.

[26] CJEU, Case C-147/03 *Commission* v. *Austria* [2005] *ECR* I-5969 and CJEU, Case C-65/03 *Commission* v. *Belgium* [2004] *ECR* I-6427.

In the landmark case of *Gravier*, the Court of Justice made it clear that discrimination on the grounds of nationality with regards to the payment of an enrolment or registration fee, constitutes a violation of Article 18 TFEU, since it impedes access to education in the territory of another Member State.[27] The case involved a French national who moved to Belgium in order to take-up a strip cartoon art course at the Academie Royale des Beaux-Arts in Liège. The problem was that the Belgian authorities demanded of all foreign students (including Gravier) to pay the 'minerval' (an enrolment fee), whilst such a fee was not imposed on Belgian nationals. We know from the facts of the case that in Belgium, primary and secondary education was free of charge in the State system and in subsidised establishments, and institutions of post secondary or higher education could only charge low registration fees intended to finance their social services. Hence, the educational services provided by these institutions were not economic activities and, accordingly, Gravier could not be considered a service recipient, within the meaning of Article 56 TFEU.[28] Also she could not enjoy the right to be treated equally with students of Belgian nationality as the child of migrant workers, since her parents were French nationals resident and working in France.[29]

The Court found that the fact that the requirement to pay an enrolment fee was only imposed on foreign students clearly amounted to (direct) discrimination on the grounds of nationality, contrary to Article 18 TFEU. The main question, however, was whether the situation fell within the scope of the Treaty since it was only if this was so that this discrimination would be prohibited. In its response, the Court noted that 'although educational organisation and policy are not as such included in the spheres which the Treaty has entrusted to the Community institutions, access to and participation in courses of instruction and apprenticeship, in particular vocational training, are not unconnected with Community law'.[30] More specifically, the Court in its judgment for the first time made it clear that 'the conditions of access to vocational training fall within the scope of the Treaty',[31] observing that '[a]ccess to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to obtain a qualification in the Member State where they intend to work and by enabling them to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired'.[32]

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[27] CJEU, Case 293/83 *Gravier* [1985] *ECR* 593. Note that this was, actually, held by the Court in its judgment in the earlier case of *Forcheri* (CJEU, Case 152/82 *Forcheri* [1983] *ECR* 2323), however, that judgment could not be considered a clear authority for this proposition since the Court's reference appeared to place reliance on the fact that Ms Forcheri was the wife of a migrant *worker*.

[28] CJEU, Case 293/83 *Gravier* [1985] *ECR* 593, para 3.

[29] Ibid. para 5.

[30] Ibid. para 19.

[31] Ibid. para 25.

[32] Ibid. para 24.

Shortly after *Gravier*, the Court was confronted with the further question of whether financial assistance given to students which is not related to *access* to education but is rather aimed at covering the maintenance expenses of students, falls within the scope of the EU law.

At first, it was considered that it is only migrant workers (and their families) that can rely on EU law in order to require the host Member State to treat them equally with its own nationals as regards the grant of financial assistance for maintenance expenses associated with education. Two provisions of Regulation 1612/68 have been relied upon for this purpose: Article 7(2) which provides that migrant workers 'shall enjoy the same social and tax advantages as national workers' in the host State[33] and Article 12, according to which the children of migrant workers shall be admitted to the host State's 'general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory'.[34]

Conversely, with regards to non-economically active persons, the Court had initially held in the cases of *Lair* and *Brown* that EU law does not include within its scope the payment of financial assistance which aims to cover the maintenance costs of a student during his education.[35] The Court, in particular, noted that: ' at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the… Treaty for the purposes of [Article 18]. It is, on the one hand, a matter of educational policy, which is not as such included in the spheres entrusted to the Community institutions (see Gravier) and on the other, a matter of social policy, which falls within the competence of the Member States in so far as it is not covered by specific provisions of the… Treaty'.[36]

Nonetheless, in recent years and, in particular, following the establishment and development of the status of Union citizenship, the Court has had a change of heart with regards to this issue.

The first signs that the *Lair/Brown* principle was about to be consigned to legal history appeared in the seminal citizenship judgment of *Grzelczyk*.[37] The eponymous applicant was a French national who moved to Belgium to study at university. During the first 3 years of his studies, he worked part-time and, as a consequence, was able to defray his maintenance expenses. However, his fourth and final year at university proved to be more demanding and, therefore, he had to

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[33] CJEU, Case 235/87 *Matteucci* [1988] *ECR* 5589, paras 11 and 16; CJEU, Case 39/86 *Lair* [1988] *ECR* 3161, paras 23–24; CJEU, Case 197/86 *Brown* [1988] *ECR* 3205, para 25; CJEU, Case C-3/90 *Bernini* [1992] *ECR* I-1071, para 20.

[34] CJEU, Case 9/74 *Casagrande* [1974] *ECR* 773, para 9; Joined Cases 389–390/87 *Echternach and Moritz* [1989] *ECR* 723; CJEU, Case C-308/89 *Di Leo* [1990] *ECR* I-4185.

[35] CJEU, Case 39/86 *Lair* [1988] *ECR* 3161; CJEU, Case 197/86 *Brown* [1988] *ECR* 3205. For a criticism of this distinction see O'Leary 1997, p. 121, para 6.23; Gori 1999.

[36] CJEU, Case 39/86 *Lair* [1988] *ECR* 3161, para 15; CJEU, Case 197/86 *Brown* [1988] *ECR* 3205, para 18.

[37] CJEU, Case C-184/99 *Grzelczyk* [2001] *ECR* I-6193.

stop working in order to be able to concentrate on his studies. In order to cover his living expenses, he applied for the 'minimex' (the Belgian minimum subsistence allowance). The Belgian authorities rejected his application on the ground that he was neither a Belgian national, nor a worker whose situation was covered by Regulation 1612/68. In its judgment, the Court found Belgium to be in violation of EU law and concluded that Mr Grzelczyk was entitled to the minimex under the same conditions as Belgian nationals: put another way, non-Belgian students (who were not workers) should be entitled to the minimex under the same conditions as this was available to Belgian students.

True, the minimex was not an education-related allowance; it was an allowance granted to *anyone* with inadequate resources. However, one could say that, when granted to a student, it served the same purpose as financial assistance for maintenace during studies. And yet, in *Grzelczyk* the Court found that it fell within the scope of EU law and, as such, its grant should not be subject to discriminatory conditions. The Court noted: '[i]t is true that, in paragraph 18 of its judgment in [*Brown*], the Court held that, at that stage in the development of Community law, assistance given to students for maintenance and training fell in principle outside the scope of the EEC Treaty for the purposes of [Article 18 TFEU]'.[38] 'However, since *Brown*, the Treaty on European Union has introduced citizenship of the European Union into the EC Treaty and added to Title VIII of Part Three a new Chapter 3 devoted to education and vocational training. There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union. Furthermore, since *Brown*, the Council has also adopted Directive 93/96, which provides that the Member States must grant right of residence to student nationals of a Member State who satisfy certain requirements'.[39] The Court then noted that the fact that a Union citizen pursues university studies in a Member State other than that of his nationality cannot, of itself, deprive him of the possibility of relying on Article 18 TFEU which, on the facts, should be read in conjunction with Article 21 TFEU, since Mr Grzelczyk had exercised his right to move and reside in another Member State.[40]

It was four years later in *Bidar*, however, that the Court made it pellucidly clear that financial assistance to cover a student's maintenance costs now falls within the scope of EU law. In that case, at issue was the compatibility with EU law of the refusal of the UK authorities to grant to a French university student a subsidised loan to cover his maintenance costs, due to the fact that he was not 'settled' in the UK. Although by the time of his application, Bidar had been resident in the UK for three years and, thus, satisfied the 'residence requirements' of UK law, he was nonetheless not 'settled' within the meaning of the relevant legislation, because his residence during that time was 'wholly or mainly for the purpose of receiving full-

[38] Ibid. para 34.

[39] Ibid. para 35.

[40] Ibid. para 36.

time education'. The Court found that the residence and settlement requirements were (indirectly) discriminatory on the grounds of nationality. The question, however, was whether the situation fell within the scope of EU law. In particular, the Court was directly confronted with the question of whether in the present state of EU law, assistance to students in higher education intended to cover their maintenance costs, fell outside the scope of the Treaty and, in particular, Article 18 TFEU. In reply to this, the Court made the following pronouncement:

> It is true that the Court held in *Lair* and *Brown* (paragraphs 15 and 18 respectively) that 'at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7 therefore […]'. In those judgments the Court considered that such assistance was, on the one hand, a matter of education policy, which was not as such included in the spheres entrusted to the Community institutions, and, on the other, a matter of social policy, which fell within the competence of the Member States in so far as it was not covered by specific provisions of the EEC Treaty'.[41]

The Court then continued:

> However, since judgment was given in *Lair* and *Brown*, the Treaty on European Union has introduced citizenship of the Union into the EC Treaty and added to Title VIII (now Title XI) of Part Three a Chap. 3 devoted inter alia to education and vocational training (*Grzelczyk*, paragraph 35).[42]

After detailing the various changes in the Treaty, the Court concluded that:

> [i]n view of those developments since the judgments in *Lair* and *Brown*, it must be considered that the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of application of the Treaty within the meaning of the first paragraph of Article [18 TFEU] for the purposes of obtaining assistance for students, whether in the form of a subsidized loan or a grant, intended to cover his maintenance costs.[43]

The Court, however, proceeded to qualify this by noting that

> 'although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States (see *Grzelczyk*, paragraph 44), it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by the State'.[44]

The Court then concluded that

> '[i]n the case of assistance covering the maintenance costs of students, it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State'.[45]

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[41] CJEU, Case C-209/03 *Bidar* [2005] *ECR* I-2119, para 38.

[42] Ibid. para 39.

[43] Ibid. para 42; CJEU, Case C-158/07 *Förster* [2008] *ECR* I-8507, para 41.

[44] CJEU, Case C-209/03 *Bidar* [2005] *ECR* I-2119, para 56.

[45] Ibid. para 57.

This idea of a 'link' with the society of the host State had not been entirely new in EU free movement law, but was in fact firstly introduced earlier in the same decade in cases involving job seekers, where the Court accepted that the host Member State can limit the availability of job seekers' allowances to persons who have demonstrated a sufficient link with the employment market of the host State.[46] On the facts in *Bidar*, the Court stressed that 'the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time'.[47] Hence, the UK requirement of three years' of residence in the UK territory was considered by the Court to be appropriate for ensuring that only students who were sufficiently integrated into its society had the right to have recourse into its social assistance system. However, the Court held that the requirement that the student is 'settled' in the UK is not justified since it precludes any possibility of a national of another Member State obtaining settled status as a student, and thus it makes impossible for such a national, whatever his actual degree of integration into the society of the host Member State, to satisfy that condition and hence to enjoy the right to assistance to cover his maintenance costs.[48] This appears to be implying that in order for a Member State to be able to rely on the need to confine the availability of certain benefits to persons who present a sufficient link to its society, it has to take into account all the factors pertaining in a situation in order to judge whether a sufficient link has been established.

The importance of the integration of the migrant student into the society of the host State is, further, reflected in Directive 2004/38, which makes it clear that the longer the migrant has resided in the territory of the host State, the more entitled he becomes to have recourse to its social assistance system. However, taking into account the concerns of the Member States for the danger of benefit tourism, the drafters of the Directive sought to provide a safety valve for the Member States, when it comes to the provision of financial assistance to cover maintenance expenses during studies. Article 24 of the Directive provides that the host Member State shall not be obliged, prior to acquisition of the right of permanent residence under Article 16, to grant maintenance aid for studies, including vocational training, consisting in student grants or students loans to persons other than workers, self-employed persons, persons who retain such status and members of their families. Hence, the host Member State is entitled to lay down a requirement that only (economically inactive) students who are resident in the territory of the host State for a minimum of 5 years

[46] CJEU, Case C-138/02 *Collins* [2004] *ECR* I-2703, para 67; CJEU, Case C-22/08 *Vatsouras* [2009] *ECR* I-4585, para 38; CJEU, Case C-224/98 *D'Hoop* [2002] *ECR* I-6191, para 38; CJEU, Case C-258/04 *Ioannidis* [2005] *ECR* I-8275, para 30. In *Bidar*, however, the Court expressly noted that requiring such a link in this instance would be inappropriate, 'since the knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical employment market' (see CJEU, Case C-209/03 *Bidar* [2005] *ECR* I-2119, para 58).

[47] CJEU, Case C-209/03 *Bidar* [2005] *ECR* I-2119, para 59.

[48] Ibid. para 61.

can have recourse to the social assistance system of that State for the purpose of being supported financially during their studies.

The Court came to endorse this approach in its judgment in *Förster*,[49] where it accepted as lawful and in compliance with EU law a Dutch requirement that a migrant student must have been lawfully resident in the Netherlands for an uninterrupted period of at least 5 years before claiming a maintenance grant. Some commentators have considered this case to be a retrograde step,[50] in that although from the Court's ruling in *Bidar* it might be deduced that the important question in each case should be the actual integration of the migrant into the society of the host State—something which can be proved in various ways—in *Förster* the Court appears to be happy to accept that a Member State is free to automatically deem a migrant student not to have established a genuine link with its society, if that person has not resided within its territory for 5 years.

Hence, this has made it clear that national authorities do not have to engage in an individual assessment of each situation to establish whether the migrant student is sufficiently integrated into the society of the host State; it suffices if they provide maintenance assistance *only* to migrant students from other Member States who are lawfully resident in their territory for at least 5 years. In this way, the Court—in line with the drafters of the 2004 Directive—sweetened the pill for the Member States who now have to foot the bill for migrant students with regards to expenses for which—until quite recently—they only needed to provide assistance to their own nationals and nationals of other Member States who contributed to their economy through their work and payment of taxes.

Finally, in recent years, there have also been cases where national legislation in the area of education was challenged, because it impeded the freedom of nationals of a Member State to move to another Member State for the purpose of receiving education there. In *Morgan and Bucher*,[51] it was held that where *the home Member State* provides for a system of education or training grants, it must ensure that the detailed rules for the award of those grants do not discriminate against persons who move to another Member State in order to receive education and, as such, create an unjustified restriction on the right to move and reside within the territory of the Member States.[52] Similarly, in *Schwarz*,[53] the Court stressed that Articles 21 and/or 56 TFEU preclude legislation which allows taxpayers to claim as special expenses conferring a right to a reduction in income tax the payment of school fees to certain private schools established in national territory, but generally excludes

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[49] CJEU, Case C-158/07 *Förster* [2008] *ECR* I-8507. Note that although the judgment was delivered after the 2004 Directive came into force (and even after its date of implementation had passed), the latter was not yet applicable to the facts of the case. Yet, the Court was clearly influenced by Article 24 of the 2004 Directive—see para 55 of the judgment.

[50] See, inter alia, O'Leary 2009. For a rather more positive view on the judgment see Golynker 2009.

[51] CJEU, Joined Cases C-11 & 12/06 *Morgan and Bucher* [2007] *ECR* I-9161.

[52] Ibid. para 28.

[53] CJEU, Case C-76/05 *Schwarz* [2007] *ECR* I-6853.

that possibility in relation to school fees paid to a private school established in another Member State. This is because this limitation imposed by the *home State* discriminates against 'free movers' and, as a result, impedes the free movement of students to another Member State.[54]

The above analysis has illustrated that although the provision of educational services (i.e. an SSGI) is still an area that the EU has, merely, supplementary competence, the freedom of action of the Member States in this sphere has been significantly curtailed. As has been seen, although they are free to make the initial choices concerning the conditions and limitations that are imposed with regards to access to education in their territory, as well as the financial assistance provided for access to education and maintenance during studies, Member States must now ensure that, with regards to the above issues, they treat Union citizens coming from other Member States in the same way as they treat their own nationals. And, following the introduction of the status of Union citizenship, this is so irrespective of whether the migrant is economically active and, thus, contributes to the economy of the host State or whether (s)he has merely entered its territory with the aim of pursuing an educational course. Nonetheless, recognising the interests of the Member States in maintaining a viable social assistance system, the CJEU also accepted that the host Member State can limit the availability of maintenance assistance during studies to nationals of other Member States who can demonstrate a sufficient link with its society.

7.3 The Organisation and Maintenance of a Social Assistance System as an SSGI and the Free Movement of Workers and Union Citizens

In the previous Section, we saw what has been the impact of EU law on the provision of education—one of the SSGIs that form part of national welfare systems. In this section, we shall take a broader approach and we shall consider what has been the impact of EU law on the organisation and maintenance of national welfare systems in general.

Until quite recently, the welfare of the population of a Member State was regarded as the concern of that State alone and, as such, it was considered to generally fall outside the realm of EU competence and supervision. Hence, the welfare policy of a State and, in particular its choices in relation to the organisation and maintenance of its social assistance and social security system, were held to be largely immune from EU interference. This is an area which is closely intertwined with State sovereignty and since it is the State itself that funds such a system, it is

[54] As very rightly explained by Dougan 2005, p. 944, EU law 'plays an important role in apportioning responsibility for covering the relevant costs [of migrant studies] between three main actors: the host State, the home State, and the student him/herself'.

all the more appropriate for it to manage it and distribute its funds in a way which accords with its own priorities and culture. The EU does not have any competence in this field and, more importantly, it does not possess a social budget.[55] Accordingly, in the absence of an EU social budget and an EU criterion of (re)distributive justice on the basis of which (EU) public funds would be allocated, it lies with the Member States to determine how to distribute national public funds mainly raised through taxation.[56]

Since the resources of States are not infinite, a criterion has to be employed for distinguishing persons who are entitled to receive social assistance benefits, from persons who are not. This has, traditionally, translated into a requirement of 'belonging' to the society of a State. The notion of solidarity is key here and it is considered that it is only persons who belong to the society of a Member State that owe solidarity obligations towards each other, which in essence means that public money collected through the joint efforts of everyone, will be used to cater for the needs of those of the 'group' who fall on hard times.

Before the process of European integration began, it was—mainly—nationality that was used as the criterion for determining 'belonging' in the society of a Member State.[57] However, as will be seen, the process of European integration has required a reconsideration and adaptation of this criterion. In particular, the establishment of the internal market has necessitated the expansion of the notion of 'belonging' to encompass migrant economic actors who contribute to the economic life of the host State and, more recently, the introduction of the status of Union citizenship has further broadened this notion to include (economically inactive) Union citizens who can demonstrate a sufficient link with the society of the host State.[58]

Accordingly, although it is still the case that the organisation of a social assistance system is an area where the Member States have exclusive responsibility, in recent years, and especially following the introduction of Union citizenship, the decisions of the Member States in this field have become increasingly subjected to EU scrutiny and, as will be seen, from this has emerged a 'constitutional-type' EU law review of Member State choices with regards to the provision of this SSGI.

In this part of the contribution, I shall consider how the extent to which the EU project has moved on from purely market integration to the creation of a quasi-constitutional polity with its own citizenship status, has affected the exercise of Member State competence in this field. The organisation and functioning of a social assistance system can be viewed as a (non-economic) SSGI and, as such, and, in particular having in mind its special characteristics, has traditionally been

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[55] Damjanovic and de Witte 2009, p. 55.

[56] Dougan 2009, pp. 152–153.

[57] Ibid. pp. 154–157.

[58] Boeger appears to be of the view that it is still, in essence, nationality that determines who belongs to the society of a Member States (its 'demos') and that the EU's interference in the 'development of social programmes' is confined to a requirement that the interests of nationals of other Member States are represented within national political processes. Boeger 2007, pp. 323–324.

considered as a largely no-touch zone for the EU. Yet, through its case law, the Court of Justice has managed to balance the need to respect the autonomy of the Member States in this field with the EU aim of ensuring that Union citizens (whether economically active or not) can move and reside freely in the territory of a Member State other than that of their nationality.

In the early stages of European integration, when the aim was still merely to build the EEC, it was only economically active Member State nationals who contributed to the market-building aims of the Treaty that could rely on EU law when they wished to be granted social assistance benefits in the host State. This was, obviously, considered necessary when seen from the point of view of the EU, since the refusal of social assistance benefits by the host State would appear to be capable of impeding the exercise of the fundamental freedoms and/or the integration of the migrant into the society of the host Member State. Moreover, nationals of other Member States who were economically active in the host State did not, merely, contribute to the economy of the host State but they, also, funded through the taxes that they paid, the social assistance system that they were claiming from and, thus, it was considered appropriate for them to be entitled to draw from this pool of resources.[59] Accordingly, and as will be seen below, through its case law, the Court ensured that the notion of solidarity at Member State level is no longer defined and limited by nationality, but is now built up between the nationals of the host Member State and migrant economic actors who possess the nationality of another Member State. It seems that migrant workers, through their permanent residence and work in the host State demonstrate a sufficient link and commitment to the society of that State and thus develop a form of solidarity with its nationals.

Yet, like with education, in this context as well, the EU has always imposed merely a non-discrimination obligation on the Member States: the EU could never—and still cannot—specify what types of social assistance benefits each Member State must provide; it can merely limit the way the Member State chooses to distribute the benefits it *already provides*. Therefore, since the Court's early case law, the principle of non-discrimination on the grounds of nationality was held to be applicable in this context, and thus the Member States could not refuse social assistance benefits to nationals of the other Member States who were lawfully resident and working in their territory, if such benefits were granted to their own nationals. The main tool used by the Court in this context was the aforementioned Article 7(2) of Regulation 1612/68, which requires the host State to grant to workers coming from other Member States the same social and tax advantages as it grants to its own nationals.

The Court in its judgment in *Even*, noted that the advantages which are extended to 'workers' by Article 7(2) of Regulation 1612/68 'are all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of

[59] Dougan 2005, p. 945.

their residence on the national territory and the extension of which to workers who are nationals of other Member States seems suitable to facilitate their mobility within the Community'.[60] It can, thus, be observed that the Court adopted a rather broad approach to the term 'social advantages' and hence a relatively wide array of social assistance benefits were made available to migrant workers.[61]

Moreover, the Court has not imposed any limiting conditions on the ability of workers to rely on EU law in order to have recourse to the social assistance system of the host State. Put differently, as long as someone is a 'worker' within the meaning of Article 45 TFEU, he is entitled to social assistance benefits in the host State under the same conditions as those imposed on the nationals of the host State. And, quite circularly, the Court held in the *Kempf* case that the fact that a migrant (part-time) worker receives less than the minimum amount necessary for subsistence and needs to supplement his income by having recourse to the social assistance system of the host State, does not mean that his activity is not 'effective and genuine work' within the meaning of Article 45 TFEU and, therefore, he is still considered a 'worker' within the meaning of that provision.[62]

Prior to the introduction of Union citizenship by the Treaty of Maastricht, it was only economically active Member States nationals or, even, passive economic actors, who could rely on EU law in order to claim equality as regards the provision of social assistance benefits in the host State.[63] Nonetheless, following the introduction of Union citizenship and, more importantly, the Court's interpretation of the citizenship provisions, it has been made clear that, even economically inactive Union citizens can now rely on the EU prohibition of nationality discrimination, in order to require the host Member State to grant them social assistance benefits under the same conditions as those that are available to its own nationals.[64]

The first step to this direction was effected in the landmark *Martínez Sala* ruling.[65] In that case a Spanish national who was lawfully resident in Germany for more than 20 years, sought to rely on EU law in order to require the German authorities to grant her a child-raising allowance under the same conditions that this was granted to German nationals. The Court held that she could rely on Article

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[60] CJEU, Case 207/78 *Even* [1979] *ECR* 2019, para 22.

[61] For an analysis see O'Keeffe 1985; Steiner 1985. See, for instance, CJEU, Case 65/81 *Reina* [1982] *ECR* 33; CJEU, Case 32/75 *Fiorini (neé Cristini)* [1975] *ECR* 1085.

[62] CJEU, Case 139/85 *Kempf* [1986] *ECR* 1741.

[63] See, for instance, CJEU, Case 186/87 *Cowan* [1989] *ECR* 195. See, also, more recently CJEU, Case C-164/07 *Wood* [2008] *ECR* I-4143. Note that in both cases the Court used the market freedoms (free movement of services in the former and freedom of establishment or free movement of workers in the latter) in order to bring the applicant within the scope of the Treaties but it considered whether there was a violation of Article 18 TFEU rather than the prohibition of discrimination under the relevant market freedom. Possibly, this is due to the fact that the contested refusal to grant the said social assistance benefit would be incapable of impeding the exercise of the relevant freedom.

[64] For an explanation see Damjanovic and de Witte 2009, pp. 71–73.

[65] CJEU, Case C-85/96 *Martínez Sala* [1998] *ECR* I-269.

18 TFEU to challenge the discrimination that was practised with regards to the grant of this allowance, since her situation fell within the scope of the Treaty: the child-raising allowance applied for had been held in previous case-law to fall within the material scope of EU law and she, as a Union citizen lawfully resident in the host State, fell within the personal scope of the Treaty. Accordingly, despite the fact that she was not a migrant worker and, also, notwithstanding the fact that there did not appear to be any link between the claimed right and her movement from Spain to Germany (i.e. her move would not be impeded as a result of the refusal of the claimed allowance), EU law applied.[66]

In *Martínez Sala* the eponymous applicant did not have to rely on EU law in order to derive a right of residence in Germany, since she was already entitled to such a right under national law. Accordingly, her recourse to the social assistance system of the host State could not question her right of residence in the host State. In particular, the Court did not have to rule on whether Ms Martínez Sala's need to have recourse to the German social assistance system meant that she was not financially self-sufficient and, thus, that she did not satisfy the self-sufficiency conditions imposed by secondary legislation to which the right of residence under Article 21 TFEU has always been subject.[67] The Court, nonetheless, had to confront this issue in the case of *Grzelczyk*, seen above, where the Court considered whether Mr Grzelczyk maintained his right to reside in Belgium which he derived from Article 21 TFEU, despite his need to have recourse to the social assistance system of the host State, and concluded that he did. The Court stressed that, although Member States may take the view that 'a student who has recourse to social assistance no longer fulfils the conditions of his right of residence' and, thus, they may take measures to withdraw his residence permit or not renew it,[68] '[n]evertheless, in no case may such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system'.[69] As the Court explained, whilst secondary legislation provides that the right of residence granted by EU law only exists as long as beneficiaries of that right fulfil the self-sufficiency conditions laid down by secondary legislation, the latter also 'envisages that beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State'.[70] According to the Court, this illustrates that the

[66] For more on this case see Closa Montero 2010.

[67] These conditions were, at the time, provided in the 1990 Residence Directives (Directive 93/96/EEC; Council Directive 90/364 of 28 June 1990 on the Right of Residence, *OJ* 1990 L180/26; Council Directive 90/365 of 28 June 1990 on the Right of Residence for Employees and Self-Employed Persons Who Have Ceased Their Occupational Activity, *OJ* 1990 L 180/28) and are now provided in Article 7 of Directive 2004/38/EC.

[68] CJEU, Case C-184/99 *Grzelczyk* [2001] *ECR* I-6193, para 42.

[69] Ibid. para 43; CJEU, Case C-456/02 *Trojani* [2004] *ECR* I-7573, para 45; CJEU, Case C-408/03 *Commission* v. *Belgium* [2006] *ECR* I-2647, paras 66–69. This is now enshrined in Article 14 of Directive 2004/38/EC.

[70] CJEU, Case C-184/99 *Grzelczyk* [2001] *ECR* I-6193, para 44.

relevant secondary legislation 'accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary'.[71]

Therefore, with its judgment in *Grzeczlyk*, the Court made it clear that economically inactive Union citizens can derive from EU law a right to reside in the territory of another Member State, and they maintain that right even when they have to have recourse to the social assistance system. This, however, can continue only for as long as they do not impose an unreasonable burden on the social assistance system of the host State. In addition, building on *Martínez Sala*, Union citizens who are lawfully resident (either under EU law or national law) within the territory of a Member State other than that of their nationality, are entitled to rely on the principle of non-discrimination on the grounds of nationality in order to require the host State to make available to them social assistance benefits, under the same conditions as these are granted to its own nationals.

This latter mode of reasoning can also be seen in the subsequent *Trojani* case,[72] which involved a(n economically inactive) French national who had moved to Belgium in 2000. Whilst being there, he found accommodation in a Salvation Army hostel, where in return for board and lodging and some pocket money he did various jobs for about 30 h a week as part of a personal socio-occupational reintegration programme. As he had no resources, he approached the Belgian authorities with a view to obtaining the minimex (i.e. the same social assistance benefit claimed in *Grzelczyk*), and this was refused on the ground that he was neither a migrant worker within the meaning of EU law, nor was he a Belgian national. The CJEU in its judgment, nonetheless, held that Mr Trojani was entitled to the minimex. Although he did not have sufficient funds to support himself and, as a result of that, he did not satisfy the conditions which would enable him to exercise his right to reside in Belgium under Article 21 TFEU, he had been granted a residence permit under Belgian law and, thus, he was lawfully resident on Belgian territory. As a result of that, he was entitled to rely on Article 18 TFEU in order to receive a social assistance benefit such as the minimex, under the same conditions as Belgian nationals.

Shortly after *Grzelczyk*, the Court in *D'Hoop* extended the principle of non-discrimination, to cover discrimination against free movers as regards the receipt of social assistance benefits in their State of nationality.[73] Accordingly, in certain instances, the EU can come to second-guess the refusal of the Member States to provide social assistance benefits to *their own* nationals, provided that the situation involves a sufficient cross-border element.

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[71] Ibid.

[72] CJEU, Case C-456/02 *Trojani* [2004] *ECR* I-7573.

[73] CJEU, Case C-224/98 *D'Hoop* [2002] *ECR* I-6191. See, also, subsequently, CJEU, Case C-192/05 *Tas-Hagen and Tas* [2006] *ECR* I-451; CJEU, Case C-221/07 *Zablocka* [2008] *ECR* I-9029; CJEU, Case C-499/06 *Nerkowska* [2008] *ECR* I-3993.

In its subsequent case law the Court further clarified the right of Union citizens to reside and receive social assistance in a Member State other than that of their nationality.

In *Baumbast*, the Court made it clear that the right of residence enshrined in Article 21 TFEU, is a directly effective right granted automatically to *all* Union citizens.[74] And although the Court acknowledged that this right is subject to limitations and conditions (namely, the economic self-sufficiency conditions laid down in secondary legislation), it also pointed out that 'those limitations and conditions must be applied in accordance with the general principles of that law, in particular the principle of proportionality'.[75] Hence, all Union citizens have the right to reside in the host State; and they have this right even when they are neither economically active nor economically self-sufficient. However, the host Member State can rely on the self-sufficiency conditions and withdraw the right of residence in its territory, if the migrant becomes an unreasonable burden on its social assistance system.[76]

In *Bidar*, the Court affirmed the previous 'broadening' of the categories of Union citizens that can receive social assistance benefits in the host State but, also, sought to provide some form of 'assurance' to the Member States, who were starting to get anxious that a large influx of (economically inactive) migrant Union citizens into their territory who, relying on EU law, might be able to receive social assistance benefits, would lead to the collapse of their social assistance system. The Court employed the notion of 'integration into the society' (or a link with the society) of the host State, as a criterion for distinguishing (economically inactive) Union citizens who can rely on social assistance benefits in the host State and such Union citizens who cannot.

Accordingly, *Bidar* made it clear that (economically inactive) Union citizens can have recourse to the social assistance system of the host State; but the extent to which they can do so depends on their degree of integration into the society of that State. This 'graded' approach[77] to the enjoyment of social assistance benefits by the host State is, also, reflected in Directive 2004/38[78] which accepts that five years of residence in the host State is sufficient proof of someone's integration into the society of that State: Article 16 of the Directive grants the right of permanent residence to Union citizens who satisfy this requirement and, as can be gathered from the provisions of the same Directive, Union citizens who acquire this right in the host State can have unlimited recourse to the social assistance system of the host State. It thereby seems that a Union citizen's integration into the society of the

[74] CJEU, Case C-413/99 *Baumbast and R* [2002] *ECR* I-7091, para 84; see, also, CJEU, Case C-456/02 *Trojani* [2004] *ECR* I-7573, para 31.

[75] CJEU, Case C-413/99 *Baumbast and R* [2002] *ECR* I-7091, para 91; CJEU, Case C-456/02 *Trojani* [2004] *ECR* I-7573, para 34.

[76] For more on this see Dougan and Spaventa 2003.

[77] For more on this see Somek 2007, pp. 790–791.

[78] White 2010, p. 1579.

host State gives rise to a certain degree of 'solidarity' which, in its turn, enables him/her to require the (nationals of the) host Member State to provide for him/her in case (s)he falls on hard times.[79] Hence, the Court appears to be considering that there is a gradual development of solidarity between Union citizens who hold the nationality of another Member State but who have established a certain degree of integration into the society of the host State, with the nationals of that State; and, the greater the integration into that society, the greater it is the entitlement of the migrant Union citizen to social assistance in the host State.

Hence, Member States are now called by the EU to extend the availability of this type of SSGI, to nationals of other Member States who are lawfully resident within their territory. In other words, Member States must now make available the social assistance benefits that bestow on their own nationals, not only to migrant *economic actors* who are lawfully present in their territory, but also to *any* Union citizen, as long as the latter does not impose an unreasonable burden on their social assistance system. This, obviously, challenges the traditional notion of solidarity, which is based on nationality, and extends this to cover all Union citizens who are capable of demonstrating a certain link with a particular Member State.[80]

7.4 Conclusion

This contribution has had as its aim to review the changing nature of the relationship between EU and Member State competences, in the context of the provision of SSGIs. In particular, the focus was placed on a consideration of how the freedom of movement for workers and the citizenship provisions of the Treaty, impose constraints upon the Member States' autonomy with regards to the provision of such services.

It was considered that the best way to introduce this topic was by conducting two case studies and looking closely at how in each of the areas studied, the Court has gradually increased the influence of EU law on Member State action in this sphere. It has been seen that although the provision of SSGIs is, still, an area of activity that is largely reserved for the Member States, the latter are nonetheless not entirely free to act as they wish in the exercise of their powers and they are now increasingly called to extend the availability of such services to nationals of other Member States who are lawfully present in their territory. In particular, it has been seen that movement by Union citizens now carries with it a legitimate expectation to have access to SSGIs in the host State under equal terms as those imposed on its own nationals. Accordingly, the choices of a Member State with regards to the provision, organisation and financing of its SSGIs appear, now, to

[79] See also, Ross 2004, p. 314.

[80] For more on this see Dougan 2009.

have been subjected to EU scrutiny which requires the Member State to explain the reasons for refusing—when it does so—such services to the nationals of other Member States. Nonetheless, the *initial* choices of the Member States with regards to the provision and organisation of SSGIs remain largely immune from EU interference and the Member States are still free to organise and finance SSGIs in whichever way they consider most appropriate, provided that they respect the principle of non-discrimination on the grounds of nationality and free movement.

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Chapter 8
Freedom to Fund?: The Effects of the Internal Market Rules, with Particular Emphasis on Free Movement of Capital

Leo Flynn

Abstract Almost two decades after the introduction of free movement of capital as an internal market freedom directly comparable to those in place since the signature of the Treaty of Rome, it is timely to explore the impact which the free movement of capital can have on the mechanisms by which SSGIs are delivered. The provisions on free movement of capital constrain the choices which Member States can make where SSGI-providers are financed through the tax system, whether by relieving them of fiscal burdens imposed on other taxpayers or by inducing taxpayers to make contributions directly to them. At the other end of the financial cycle, they restrict the extent to which Member States can direct SSGI-providers to offer a wider or narrower range of services. While this study of how national rules on financing of, and spending by, SSGI-providers interact with the EU law focuses on the free movement of capital, it also examines the consequences of the rules regarding free movement of persons and freedom to provide services (whether on a permanent or temporary basis).

Contents

All views expressed are personal to the author.

L. Flynn (✉)
Member of the Legal Service of the European Commission
Brussels, Belgium
e-mail: Leo.FLYNN@ec.europa.eu

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8.1 Introduction

Almost two decades after the completion date for the internal market, across the Union each Member State faces its own variant on a common set of challenges facing those responsible for the provision of to SSGIs. National authorities seek new means by which to organise, provide and finance those services. Consequently, a growing proportion of those services now come under the scope of Union rules on competition and the internal market.

This chapter seeks to explore the impact which the free movement of capital can have on the mechanisms by which SSGIs are delivered, in a double sense. First, it looks at how free movement of capital constrains the choices which Member States can make where SSGI-providers are financed through the tax system (Sect. 8.2), whether by relieving them of fiscal burdens imposed on other taxpayers or by inducing taxpayers to make contributions directly to them (Sect. 8.3). Second, it examines how, at the other end of the financial cycle, Member States can direct SSGI-providers to offer a wider or narrower range of services in light of the requirements of free movement of capital (Sect. 8.4). That study of how national rules on financing of, and spending by, SSGI-providers interact with the EU law focuses on the free movement of capital. However, it would be artificial to limit this study to that internal market freedom, and where appropriate reference will also be made to the consequences of the rules regarding free movement of persons and freedom to provide services (whether on a permanent or temporary basis).

8.2 Free Movement of Capital in the TFEU

Free movement of capital is the last of the fundamental freedoms underlying the internal market, based on Articles 63–66 of the TFEU.[1] Relative to the other internal market freedoms, the rules on capital movements were comparatively under-developed until the end of the 1980s. Since then, however, there has been a major shift in its role in EU law. The completion of the Single Market (now referred to as the internal market), targeted for 31 December 1992, involved a liberalisation of the rules on capital movement. Shortly afterwards, with the entry into force of the Maastricht Treaty, those liberalised rules became a core element

[1] Those provisions were formerly 56–60 of the EC Treaty. For background, see Flynn 2002.

of a new step in European integration. Free movement of capital is closely linked to the creation of the single currency and the institutions charged with managing economic and monetary union.

For ease of understanding, it is useful to summarise briefly the key features of the main Treaty rules applicable to capital. In Title IV of the TFEU (Free movement of persons, services and capital), Chap. 4 deals with the free movement of capital. Article 63 TFEU prohibits all restrictions on the movement of capital, as well as on payments, between Member States and third countries. Several limitations follow that basic principle of free movement—a "grandfather clause" relating to third country-directed restrictions (Article 64 TFEU) and a general exception clause (Article 65 TFEU). Article 64(1) TFEU provides that Article 63 TFEU shall be without prejudice to the application to third countries of any restrictions which existed on 31 December 1993[2] under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment—including in real estate, establishment, the provision of financial services or the admission of securities to capital markets. The existence of Article 64 TFEU allows retention of rules that give third-country enterprises access to the EU financial market on the basis of reciprocal access for Union enterprises to the markets of those third countries. Article 65 TFEU is similar to Articles 36, 45(3) and 52 TFEU, in that it sets out grounds for an express exception to the basic principle of free movement. Article 65(1)(a) TFEU allows the Member States to apply provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested. Article 65(1)(b) TFEU permits Member States to, *inter alia*, take measures which are justified on grounds of public policy or public security. Finally, Article 66 TFEU allows safeguard measures to be taken by the Council in order to deal with exceptional circumstances in which movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of Economic and Monetary Union.

The TFEU contains almost no elements indicating what comes within the material scope of the free movement of capital, unlike, for example, the indications offered in Article 57 TFEU about the freedom to provide services. Capital movements cover, in essence, those resources used for, or capable of, investment intended to generate revenue.[3] That notion covers cash, bonds and other debt instruments, shares and so on.

The Court of Justice (CJEU) has offered indications on the question of what is meant by "capital". In some cases, it pronounces on the point without any particular reasoning being offered. Such straightforward situations have included:

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[2] In the cases of Bulgaria, Estonia and Hungary, the relevant date is 31 December 1999.

[3] The notion of capital is, in that context, opposed to that of 'current payments', which covers the entirety of those financial dealings relating to trade in goods and services between the residents of a country and those in the rest of the world.

- direct foreign investment;[4]
- inheritance of immovable property;[5]
- transport of banknotes;[6] and
- borrowing money.[7]

However, the Court more often invokes provisions of Directive 88/361, the Third Capital Directive, together with the nomenclature annexed to that Directive, to define what constitutes a capital movement.[8] On that basis it has classified the following situations as implicating the free movement of capital:

- investments in immovable property;[9]
- the transfer of immovable property[10]—including agricultural and forestry plots;[11]
- acquisition of shares or securities in the capital markets;[12] and
- receipt of dividends.[13]

It can be difficult to identify the boundary between free movement of capital and the rules on provision of services in the context of financial services, and between free movement of capital and freedom of establishment. However, for present purposes, it suffices to state that watertight divisions cannot always be created between the freedoms' spheres of application.

Article 63(1) TFEU prohibits "restrictions" on the movement of capital, while in the related provisions discrimination is referred to only in Article 65(3) TFEU when limiting the scope of exceptions. Therefore, the long-standing debate on restrictions/discrimination which has been a feature in relation to the other Treaty fundamental freedoms does not resonate here. In *UK Golden Shares* the Court made clear that: "the prohibition laid down in Article [63 TFEU] goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial market".[14]

The principal basis on which the Court has identified restrictions has been based on the dissuasive effect or discouragement inherent in the rule. In *Verkooijen*, the Court

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[4] CJEU, Case C-54/99 *Association Église de Scientologie de Paris* [2000] *ECR* I-1335, para 14.

[5] CJEU, Case C-364/01 *Barbier* [2003] *ECR* I-15013, para 58. See also CJEU, Case C-256/06 *Jäger* [2008] *ECR* I-123, para 25; and CJEU, Case C-513/03 *van Hilten-van der Heijden* [2006] *ECR* I-1957, para 42.

[6] CJEU, Joined Cases C-163, 165 and 250/94 *Sanz de Lera* [1995] *ECR* I-4821, para 18.

[7] CJEU, Case C-439/97 *Sandoz* [1999] *ECR* I-7041, para 19.

[8] CJEU, Case C-222/97 *Trummer and Mayer* [1999] *ECR* I-1661, paras 20 and 21.

[9] CJEU, Case C-302/97 *Konle* [1999] ECR I-3099, para 22; CJEU, Joined Cases C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch* [2002] *ECR* I-2157, para 30.

[10] CJEU, Case C-222/97 *Trummer and Mayer* [1999] *ECR* I-1661, paras 20 and 21.

[11] CJEU, Case C-452/01 *Ospelt* [2003] *ECR* I-9743, para 24.

[12] CJEU, Case C-98/01 *Commission* v. *United Kingdom* [2003] *ECR* I-4641, paras 39–41.

[13] CJEU, Case C-35/98 *Verkooijen* [2000] *ECR* I-4071, paras 27–30; CJEU, Case C-319/02 *Maninen* [2004] *ECR* I-7477.

[14] CJEU, Case C-98/01 *Commission* v. *United Kingdom* [2003] *ECR* I-4641, para 43.

examined Dutch legislation which refused to extend an exemption from tax to dividends received from shares held in foreign firms, looking at its effects on capital supply and demand.[15] For the provider of the capital, the potential shareholder resident in The Netherlands, that national rule 'has the effect of dissuading nationals of a Member State residing in The Netherlands from investing their capital in companies which have their seat in another Member State';[16] for the recipient of the capital, such a provision: 'also has a restrictive effect… it constitutes an obstacle to the raising of capital in the Netherlands because the dividends… receive less favourable tax treatment… so that their shares are less attractive to investors residing in The Netherlands than shares in companies which have their seat in that Member State'.[17]

Article 63 TFEU has direct effect. Uniquely amongst the internal market freedoms, it clearly covers third-country transactions, treating capital movements into, out of and within the Union in the same way. Although the basic freedom enunciated in Article 63(1) TFEU deals with external capital movements in the same broad terms as it uses for intra-Union capital movements, Articles 64 and 66 TFEU clearly create a less liberalised framework. On the other hand, in *A*[18] the Court rejected the argument that Article 64(1) TFEU limited the direct effect of the capital movement rules in relation to third countries. It also refused to treat that the concept of restriction differently in relation to third countries than in relation to Member States. However, it noted that whether a restriction is justified may vary depending on whether it applies to intra-Union capital movements or movements involving third countries.

Finally, as with the other internal market freedoms, wholly internal situations (where all the relevant facts are confined to a single Member State) do not come with the scope of Article 63 TFEU. This chapter only considers situations in which a cross-border dimension is present.

8.3 National Choices on Funding of SSGIs Through the Tax System

Member States possess a broad discretion as to how to organise the delivery of what they consider to be SSGIs. Just as the fact that Member State A decides that a given activity is a SSGI does not dictate that Member State B must make the same evaluation, so the fact that Member State A decides that a specific SSGI will be provided by public law bodies does not have any specific implication for Member State B. The latter Member State may decide that the same SSGI will be offered by private law bodies which are obliged to provide that service or merely empower such bodies to do so without subjecting them to specific obligations.

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[15] CJEU, Case C-35/98 *Verkooijen* [2000] *ECR* I-4071.

[16] Ibid. para 34.

[17] Ibid. para 35.

[18] CJEU, Case C-101/05 *A* [2007] *ECR* I-11531.

If the Member State decides that it will provide a SSGI using public law bodies for the provision of the service, then the principal financing mode will probably be from general taxation or from purpose-specific levies (leaving aside finance raised from contributions or charges paid by users). Since the financing of SSGIs in those circumstances is drawn from State resources to the possible benefit of the service provider, issues of State aid law may arise, but there are no questions of free movement of capital specifically regarding SSGIs in that context.

Where the Member State decides that in addition to (or instead of) direct provision of a SSGI by public law bodies, private law operators will be made responsible (possibly only in part) for delivery of that service, a wider variety of financing mechanisms seems likely. A Member State may remunerate service providers as a counterpart for delivering the SSGI (with consequent issues of public procurement). It may offer grants or other subsidies to service providers (with consequent issues of State aid). In addition, the Member State may seek to facilitate or encourage private financing by means of tax breaks; they could be given to persons who make donations to service providers or be offered in relation to payments made by users of the service. The first of those fiscal mechanisms (tax advantages for donations) raises issues regarding free movement of capital. The second (tax advantages for user payments) does not, because even though a payment is involved it is not made in exchange for an item which itself constitutes capital. Tax advantages regarding payments (as opposed to donations) therefore generally give rise to issues regarding the free movement of services, if the service in question is economic, or possibly free movement of Union citizens if the service in question is not economic.

Any analysis of how such tax breaks are structured must take into account the role of tax policy as a symbol of national sovereignty and part of a country's overall economic policy, helping to finance public spending and redistribute income. In the EU, responsibility for tax policy lies mainly with the Member States, who may delegate it from the central to the regional or local level, depending on their constitutional or administrative structures. The Treaty's ban on discrimination based directly and indirectly on nationality in relation to business activities has been particularly sensitive for Member States in relation to taxation. Questions of direct taxation fall in the first instance to the Member States; in the absence of harmonisation at Union level, taxation remains in their hands though they are of course required to eliminate nationality-based discrimination. That national competence is reinforced by the fact that any harmonisation in relation to fiscal matters proceeds by way of unanimity in the Council.

8.3.1 Fiscal Treatment of Donations to SSGI-Providers

Where an individual makes a donation or leaves a legacy in favour of a SSGI-provider, national law may well provide for favourable fiscal treatment of that gift compared with gifts or bequests in favour of other persons. A standard pre-condition for such a fiscal advantage is that the SSGI-provider is classified as a charity or otherwise recognised to be pursuing an acknowledged public interest. Where

the SSGI-provider is located in a Member State other than that which provides the fiscal advantage, the question arises whether the taxpayer can obtain the tax break (with consequent implications for the SSGI-provider as to the amount of the donation).

The Court was first confronted with that issue in *Persche*,[19] in which a German tax-payer sought the favourable tax treatment that applies to gifts to charities in Germany in respect of a gift in kind to a body established in Portugal and recognised as charitable in Portugal. Mr Persche claimed as an exceptional tax-deductible expense his donation of bed-linen and towels, and also Zimmer frames and toy cars for children, to the Centro Popular de Lagoa which is a retirement home to which a children's home has been added. The German authorities rejected his request on the basis that the recipient of the donation was not established in Germany.

The Court first clarified that the taxable treatment of such gifts comes within the scope of the rules on free movement of capital, even if they are made in kind in the form of everyday consumer goods.[20] It had already analysed the tax treatment of gifts to third persons resident in another Member State in the contest of inheritances and legacies;[21] there it established that the tax treatment of transferred assets, which can include both sums of money and movable and immovable property, comes within Article 63 TFEU. As such, it rejected the claim which the Greek government had advanced with particular strength, that a gift of consumer goods should be analysed in relation to free movement of goods.

The Court then noted that since the possibility of obtaining a deduction for tax purposes can have a significant influence on the donor's attitude, the inability in Germany to deduct gifts to bodies recognised as charitable if they are established in other Member States is likely to affect the willingness of German taxpayers to make gifts for the benefit of those bodies.[22] As such, the German legislation was a restriction on the free movement of capital prohibited, as a rule, by Article 63 TFEU. In order for the Germany legislation to be compatible with the Treaty, the difference in treatment would have to concern situations which are not objectively comparable or would have to be justified by an overriding reason in the public interest (and be proportionate in the pursuit of the legislation's objective).

The key issue for the Court was whether there was indeed an objective difference between donations to German charities and Portuguese charities. The Court started by recognising that it is for each Member State to determine whether it will provide for tax advantages in favour of bodies which concern

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[19] CJEU, Case C-318/07 *Persche* [2009] *ECR* I-359.

[20] Ibid. paras 25 and 29.

[21] CJEU, Case C-364/01 *Barbier* [2003] *ECR* I-15013; CJEU, Case C-513/03 *van Hilten-van der Heijden* [2006] *ECR* I-1957; CJEU, Case C-11/07 *Eckelkamp* [2008] *ECR* I-6845; CJEU, Case C-43/07 *Arens-Sikken* [2008] *ECR* I-6887; CJEU, Case C-67/08 *Block* [2009] *ECR* I-883; CJEU, Case C-35/08 *Grundstückgemeinschaft Busley* v. *Ciprian* [2009] *ECR* I-9807; CJEU, Case C-510/08 *Mattner* [2010] *ECR* I-3553.

[22] CJEU, Case C-318/07 *Persche* [2009] *ECR* I-359, para 38.

themselves with activities that it recognises as being charitable and taxpayers who make them gifts. However, to the extent that a Member State decides to grant tax advantages to bodies pursuing certain charitable purposes, the Court held that it cannot restrict the benefit of such advantages only to bodies established in that Member State.[23]

The counter-argument of the intervening Member States was that such tax advantages allow the Member State to discharge some of its responsibilities, and that those responsibilities do not exist beyond its borders since they are an expression of the bonds of solidarity within that society. They also argued that the reduction of the expenses of the Member State concerned is the logical basis for permitting the decrease of tax revenues which flows from a right to deduct gifts.

The Court acknowledged that providing tax breaks for charitable donations can encourage charitable bodies to substitute themselves for the public authorities in assuming certain responsibilities; however, it quickly dismissed the argument that gifts to bodies recognised as being charitable which are established in another Member State can be differently treated because such gifts cannot lead to budgetary compensation for the Member State levying tax.[24] Well-established case-law holds that the need to prevent a reduction of tax revenues is neither amongst the objectives in Article 65 TFEU nor is it capable of constituting an overriding reason in the public interest. On the other hand, there is no requirement in Union law for Member State automatically to confer on foreign bodies recognised as having charitable status in their Member State of origin the same status in their own territory. Member States have discretion as to what goals or activities they wish to consider charitable. However, the discretion they possess must be exercised in accordance with Union law. Accordingly, while a Member State is free to define the interests of the general public it wishes to promote, it cannot refuse equal treatment to a body recognised as having charitable in a different Member State which satisfies the requirements imposed for that purpose by its own law and whose object is to promote the very same interests of the general public, so that it would be likely to be recognised as having charitable status in the Member State of the taxpayer.[25] In short, a body which is established in one Member State but satisfies the requirements imposed that purpose by another Member State for the grant of tax advantages is for those purposes in a situation comparable to that of bodies recognised as having charitable purposes which are established in the latter Member State.

The Court in *Persche* therefore considered as irrelevant whether there was a sufficiently close link with the national territory (in the sense that the measures promoted by the tax break would benefit nationals of or residents in the taxing Member State). If the activities of the Centro Popular benefit children and old people, that element is decisive to establish if it is comparable with an identical

[23] CJEU, Case C-318/07 *Persche* [2009] *ECR* I-359, paras 43 and 44.

[24] CJEU, Case C-318/07 *Persche* [2009] *ECR* I-359, para 46.

[25] CJEU, Case C-318/07 *Persche* [2009] *ECR* I-359, para 49.

body established in Germany, and there is no relevance to the fact that those children and elderly persons are Portuguese or that they reside in Portugal.

The Court went to dismiss arguments based on a need to safeguard the effectiveness of fiscal supervision.[26] It held that national authorities could require a taxpayer to provide such proof as they consider necessary to determine whether the conditions for deducting expenses provided for in the legislation at issue had been met; the mere fact that they might be faced with administrative disadvantages could not justify a complete refusal by the taxing authorities to grant taxpayers advantages which they can obtain in respect of gifts to national bodies of the same kind. The Court also held that a Member State cannot exclude the grant of tax advantages for gifts made to a body established and recognised as charitable in another Member State purely because, in relation to such bodies, its tax authorities are unable to check, on-the-spot, compliance with requirements imposed by their tax legislation. Even in relation to national charitable bodies, an on-the-spot inspection is not usually required and the provision of information in the framework of mutual assistance between tax administrations under Directive 77/799 will normally suffice to check that the recipient body fulfils the conditions imposes by national legislation for the grant of tax advantages.[27]

On that final point, the Court distinguished the situation of charitable bodies in third countries, because non-member countries are not under any international obligation to provide information.[28] It is therefore as a rule legitimate for the Member State of taxation to refuse to grant such a tax advantage to charitable bodies in a third country.

The Court returned to those issues in 2011 in its ruling in *Missionswerk Werner Heuchelbach*.[29] The reference from the Court of First Instance in Liège concerned succession duties on a legacy left by a Belgian national who had resided in Belgium throughout her life to Missionswerk, a religious association with its seat in Germany. Under Belgian law, a reduced rate of 7% (as opposed to a standard marginal rate of 80%) applies to legacies to non-profit-making associations, friendly societies, professional unions and public-interest foundations; however, the beneficiary must have a centre of operations in Belgium or in a Member State in which the deceased had actually worked or resided in order to qualify for that reduced rate. Missionswerk did not fulfil that condition and was refused the reduced rate.

In its preliminary ruling the Court decided that only free movement of capital rules were relevant to the situation in hand, noting that the transfer of assets left by a deceased person constitutes a movement of capital for the purposes of Article 63 TFEU, except in cases where its constituent elements are confined within a

[26] CJEU, Case C-318/07 *Persche* [2009] *ECR* I-359, paras 52–60.

[27] CJEU, Case C-318/07 *Persche* [2009] *ECR* I-359, paras 61–69.

[28] CJEU, Case C-318/07 *Persche* [2009] *ECR* I-359, para 70.

[29] CJEU, Case C-25/10 *Missionswerk Werner Heuchelbach* [decided on 10 February 2011, nyr].

single Member State.[30] Since Belgian legislation leads a legacy to be taxed more heavily where the beneficiary is a non-profit-making body which has its centre of operations in a Member State in which the deceased neither actually resided nor worked, it has the effect of restricting the movement of capital by reducing the value of that inheritance. In addition, because a higher rate of tax is applied to certain cross-border movement than that applied to movements within Belgium, those cross-border capital movements become less attractive, dissuading Belgian residents from naming as beneficiaries persons established in Member States in which those Belgian residents have not actually resided or worked. For those two reasons, the Court was faced with a restriction on the free movement of capital.

When it came to the possible justification of the restriction on the free movement of capital, the Court accepted that Member State may require, for the purposes of granting certain tax advantages, that there be a sufficiently close link between the bodies which that Member State recognises as pursuing some of its charitable purposes and the activities pursued by those bodies. However, it ruled that a Member State cannot grant such advantages only to bodies which are established in its territory and whose activities are capable of relieving that State of some of its responsibilities.[31] In particular, the possibility that a Member State may be relieved of some of its responsibilities does not mean that it is free to introduce a difference in treatment between, on the one hand, national bodies which are recognised as pursuing charitable purposes and, on the other, bodies established in another Member State which are recognised as pursuing charitable purposes, on the ground that legacies left to the latter cannot, even though the activities of those bodies reflect the same objectives as the legislation of the former Member State, have compensatory effects for budgetary purposes.

The Court therefore held in light of *Persche* that where, apart from the condition relating to the location of the centre of operations, the charitable body at issue fulfils the conditions imposed by the Belgian legislation for the grant of tax advantages in relation to succession rights, the authorities of that Member State cannot refuse that body the right to equal treatment on the ground that it does not have its centre of operations in that Member State or in the Member State where the deceased had worked or resided.[32]

Finally, there was a claim (which one must expect to surface increasingly in future challenges to national legislation privileging only those SSGI-providers which are located on the national territory) that the limited scope of the tax exemption was justified by the goal of providing tax advantages only to bodies whose activities benefit the Belgian community at large. The Court had opened the door to such arguments in *Persche*, but it found here that such a justification

[30] CJEU, Case C-25/10 *Missionswerk Werner Heuchelbach* [decided on 10 February 2011, nyr], paras 16 and 17.

[31] CJEU, Case C-25/10 *Missionswerk Werner Heuchelbach* [decided on 10 February 2011, nyr], paras 30 and 31.

[32] CJEU, Case C-25/10 *Missionswerk Werner Heuchelbach* [decided on 10 February 2011, nyr], para 33.

was not made out.[33] The Belgian government's attempt at justification failed not because the tax measure went beyond what was necessary to achieve that goal (proportionality in a narrow sense), but because the measure adopted was not suitable to achieve that goal. By taking the centre of operations of the body concerned as the criterion for establishing the existence of a close link with the Belgian community at large, the Belgian legislation treated all bodies which have their seat in Belgium differently from those which do not, even where the latter have a close link with that community. In addition, the national rule also treated all bodies which have their centre of operations in Belgium in the same way, whether or not they have established a close link with that community. For those reasons the test of suitability was not met.[34]

8.3.2 *Fiscal Treatment of Investment Income Obtained by SSGI-Providers*

Where private bodies provide SSGIs, their financing rarely depends solely on grants from the State, donations from individuals and payments made by or in respect of users of their services. They may also be financed from income arising out of their reserves or assets which they possess. In that latter situation, the Member States again may find it conducive to facilitate the delivery of SSGIs by not taxing that income or treating it more favourably than under the general regime of income taxation.

That was the choice made by Germany when it exempted income from corporation tax if that income was received in its territory by charitable foundations with unlimited liability to tax (which meant in practice that they were established in that Member State). That choice was in turn scrutinised by the Court in *Centro di Musicologia Walter Stauffer*.[35] Centro di Musicologia Walter Stauffer is a foundation established under Italian law and is recognised in that Member State as having a charitable status; it pursues cultural objects in the field of education and training. The foundation owns commercial premises in Munich which it does not manage itself but is handled by a property management agent. Because the foundation has its seat and management outside Germany, it has limited liability to tax in that Member State and as a result in 1997 it was assessed for tax on the rental income of the Munich property. After a set of appeals, the Federal Finance

[33] CJEU, Case C-25/10 *Missionswerk Werner Heuchelbach* [decided on 10 February 2011, nyr], paras 35 and 36.

[34] Equivalent issues were raised in infringement proceedings brought by the Commission against Austria in which Austria was alleged to be in breach of Article 63 TFEU because donations to training, research and educational institutions are tax deductible under its national law only in the case of institutions established within that Member State: CJEU, Case C-10/10 *Commission* v. *Austria* [decided on 16 June 2011, nyr]. In its judgment of 16 June 2011, the Court upheld the Commission's action.

[35] CJEU, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] *ECR* I-8203.

Court sent a reference to the Court of Justice asking if it was contrary to the Treaty rules on establishment, provision of services and capital to tax such rental income of a charitable foundation established in another Member State where a charitable foundation established in Germany would be exempted from tax.

After having determined that the reference did not involve issues regarding freedom of establishment (because the foundation was not actively managing the commercial premises in Munich and had no base in Germany from which to pursue its activities), the Court noted that income from real estate investments come within the scope of Article 63 TFEU and looked to see if a restriction was involved in the tax rule.[36] It made the uncontroversial observation that by applying a tax exemption for rental income only to charitable foundations which have unlimited tax liability in Germany, foundations whose seats are in another Member State are placed at a disadvantage. Therefore, the relevant rule constitutes an obstacle to free movement of capital in principle prohibited by Article 63 TFEU.

The governments of Germany and the UK argued to the Court that the foundation was not in a comparable situation to German charities. They play an active role in German society and perform duties which would otherwise have to be carried out by local or national authorities, which would be a burden on the State budget. The foundation's charitable activities concerned only Italy and Switzerland (it endows scholarships to allow young Swiss people to reside in Cremona where they receive instruction on classical methods of production of stringed instruments). Those governments also argued that the conditions under which Member States confer charitable status varies according to each State's conception of public utility. Because it is highly likely that the requirements to be given charitable status in Germany would not be the same as those in Italy, the foundation might not be in a comparable situation to a German-recognised charity.

The Court started by noting that there was no requirement in German law that the promotion of the interests of the general public (the pre-condition to be awarded charitable status) meant that a body must act to benefit German nationals or residents of that Member State.[37] The Court went to recall that it is not a requirement under Union law for Member States automatically to confer on foreign foundations recognised as having charitable status in their Member State of origin the same status in their own territory.[38] However, where a foundation recognised as having charitable status in one Member State also satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, the

[36] CJEU, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] *ECR* I-8203, para 24.

[37] CJEU, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] *ECR* I-8203, paras 37 and 38.

[38] That position had been taken in respect of an exemption laid down in the 6th VAT Directive (Council Directive 77/388/EEC of 17 May 1977 on the Harmonisation of the Laws of the Member States Relating to Turnover Taxes—Common System of Value-added Tax: Uniform Basis of Assessment, *OJ* 1977 L 145) for the supply of goods and services closely linked to the

authorities of that Member State cannot deny that foundation the right to equal treatment solely on the ground that it is not established in its territory.

The German authorities had argued, in light of the national competences and powers in the field of education and culture which find expression in Articles 107(3)(d) and 167 TFEU, that the tax rules applicable to national foundations pursuing exclusively objects related to education and training in the field of culture are compatible with Union law. The Court countered that such a difference in treatment could not be justified by the pursuit of objects connected with the promotion at national level of culture and high-level training where the national legislation in question is not based on the premise that the activities pursued by charitable foundations must benefit the national general public.[39]

The Court went on to hold that such legislation could not be justified by the need to ensure effective fiscal supervision.[40] It accepted that, before granting a foundation a tax exemption, a Member State may apply measures enabling it to ascertain in a clear and precise manner whether the foundation meets the conditions imposed by national law in order to be entitled to the exemption and to monitor its effective management. However, the fact that a foundation is located in another Member State does not justify its outright exclusion from tax advantages. The Court acknowledged that it may prove more difficult to carry out the necessary checks where foundations are established in other Member States. Even so, those are disadvantages of a purely administrative nature which the Court found are not sufficient to justify a refusal on the part of the authorities of the State concerned to grant such foundations the same tax exemptions as are granted to national foundations of the same kind.

As to the claim that the tax advantage was justified by reference to the budgetary compensation resulting from the State's liberation from costs it would otherwise have to bear itself, the Court ruled that where there is no direct link between a tax advantage consisting of exemption from tax of rental income and the offsetting of that advantage by a particular tax levy, the restriction in question cannot be justified by the need to protect the cohesion of the tax system.[41] The same applies with regard to the need to protect the basis of tax revenue, since reduction in tax revenue cannot be regarded an overriding reason in the public interest to justify a measure which is, in principle, contrary to a fundamental freedom.[42]

A final argument raised against extending the benefit of the tax exemption to foundations recognised as charitable in other Member States that would be

(Footnote 38 continued)
protection of children and young people by bodies recognised as charitable by the Member State concerned: CJEU, Case C-415/05 *Kinderopvang Enschede* [2006] *ECR* I-1385, para 23.

[39] CJEU, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] *ECR* I-8203, para 40.

[40] CJEU, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] *ECR* I-8203, paras 47–50.

[41] CJEU, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] *ECR* I-8203, paras 52–57.

[42] CJEU, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] *ECR* I-8203, para 59.

considered charitable in Germany was that criminal gangs and terrorist organisations might assume the legal status of a foundation for the purposes of money-laundering. The Court's response was robust; the fact that a foundation is established in another Member State cannot give rise to a general assumption of criminal activity.[43] Moreover, crime-fighting did not require excluding such foundations from entitlement to a tax exemption given that other, less restrictive, measures could be taken to monitor their accounts and activities.

8.3.3 *Fiscal Treatment of Payments Made by Service-Users to SSGI-Providers*

For completeness, when looking at the financing of SSGI-providers, one must consider national rules which allow service-users to offset charges or payments they make against their taxable income. Because the taxable event is a payment in respect of a service, the Treaty rules on capital are not pertinent. The relevant analytical framework depends on whether the service is considered economic or non-economic, as can be seen in the 2007 ruling in *Schwarz and Gootjes-Schwarz*.[44]

German rules enabled taxpayers to claim school fees paid to certain private schools in that country as special expenses. Those expenses could be deducted from taxable income but only where the school was in that Member State. The Court considered that the resulting exclusion concerned both the receipt of services (where educational activities came within the scope of Article 56 TFEU) and citizenship (where the educational activities were not covered by Article 56 TFEU).[45] It noted that such legislation disadvantaged children of nationals solely on the grounds that they had used their freedom of movement by going to another Member State to attend a school there. As such there was a restriction on the freedoms conferred by Article 21 TFEU which was not, the Court indicated, justified. A comparable ruling regarding university fees was handed down in 2010 in *Zanotti*,[46] where the Court also used citizenship for educational activities not covered by Article 56 TFEU. On the one hand, the Court found that EU law did not preclude national rules that imposed a ceiling on the amount of university fees which could be off-set against tax. On the other, it held that EU law prohibited a territorial limitation determining which university's fees would be tax-deductible.

[43] CJEU, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] *ECR* I-8203, para 61.

[44] CJEU, Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] *ECR* I-6849.

[45] CJEU, Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] *ECR* I-6849, paras 35 and 47.

[46] CJEU, Case C–56/09 *Zanotti* [2010] *ECR* I-4517.

The interaction between Union citizenship and national rules on taxation in the field of individual payments for SSGIs was further examined in *Rüffler*.[47] The Court ruled that Article 21(1) TFEU precludes national legislation which conditions the grant of a right to reduce income tax by the amount of health insurance contributions paid on payment pursuant to national law of those contributions in that Member State. A German national who had retired to Poland challenged that rule; he paid health insurance contributions in Germany on his income, which was taxable in Poland. He was not entitled to the tax credit generally available for such expenditure because those health insurance contributions were not paid in Poland. He had neither worked in Poland nor gone in search of work there, so the Court ruled that his situation was governed by Article 21 TFEU. It considered that he was in the same situation as a resident taxpayer paying contributions to the Polish health insurance scheme—the difference in treatment based on where the contributions were paid disadvantaged taxpayers coming from another Member State simply because they had exercised their freedom as citizens of the Union to reside in a different Member State.[48] The Court observed that, based on Union secondary legislation on co-ordination of social security, medical costs incurred in Poland by a member of the German insurance scheme would not be a burden to the Polish system because his German scheme would meet those costs.[49] There thus was no justification based on an alleged lack of contribution to financing the national health system in Poland.

8.4 Free Movement of Capital and Restrictions on the Activities of SSGI-Providers

The Treaty rules on free movement of capital come into play not only on the funding side in relation to SSGIs, but also as regards their spending activities. Insofar as SSGI-providers purchase goods and services, procurement rules might be relevant, but if they carry out capital investments, restrictions imposed on them by national law must pass muster under Articles 63 and 65 TFEU. That issue was explored in some depth in *Woningstichtung Sint Servatius*.[50]

Under the Dutch Constitution, it is the responsibility of the government to promote adequate housing. The Housing Law establishes a system of housing associations which are non-profit-making, must operate exclusively in the public housing sector and in a designated geographical area, and are answerable to the Minister. The Minister has the power to authorise housing associations to construct experimental projects which she believes to be in the interests of public housing,

[47] CJEU, Case C-544/07 *Rüffler* [2009] *ECR* I-3389.

[48] Ibid. paras 69 and 70.

[49] Ibid. para 71.

[50] CJEU, Case C-567/07 *Woningstichtung Sint Servatius* [2009] *ECR* I-9021.

even where that would depart from the general regime governing such associations. Servatius is an approved association operating in the Maastricht area; it sought to build housing as part of a mixed-use development (commercial; rented dwellings; owner-occupied; parking) in Liège, some 30 km from the Dutch border, and was prepared to use some of the funds it had obtained at favourable rates because of its status as an approved association. Servatius sought the Minister's permission to carry out that project. The Minister refused to approve it on the basis of the project's location in Belgium. As a climax to litigation in the national courts challenging that refusal, the Dutch Council of State referred a series of questions regarding *inter alia* free movement of capital to the Court of Justice.

In light of its long-standing case-law on prior authorisation systems for the purchase of real estate, the Court found that the requirement for those institutions to obtain prior authorisation from the competent Minister before investing in immovable property in other Member States constitutes a restriction on the free movement of capital.[51] It was therefore for the Dutch authorities either to bring the national legislation within the scope of one of the Treaty's exceptions or to justify the measure.

As to the claim that the promotion of social housing is covered by the notion of 'public policy' in Article 65 TFEU, the Court was brisk and to the point; even if housing associations fail to comply with their statutes and divert the funds they receive for other purposes, that behaviour cannot amount to a genuine and sufficiently serious threat to a fundamental interest of society.[52] The Court left open the question of whether the promotion of social housing is a fundamental interest of that kind; given the limited consequences it identified from breach of the national legislation, there was no need to venture further into that issue.

On the other hand, the Court was quite willing to accept that requirements related to public housing policy in a Member State and to the financing of that policy can constitute overriding reasons in the public interest and therefore justify the restriction at issue. Indeed, apart from the inherent importance of that policy for any Member State, specific features of the Dutch housing market reinforced the significance of the ground invoked, namely a structural shortage of accommodation and a particularly high population density.[53]

As a rule of thumb, prior authorisation requirements are viewed with suspicion by the Court, since the goals pursued by the national authorities can often be achieved by less restrictive means, such as a system of declarations. Here, however, the Court conceded that a prior examination carried out by the competent administration might appear better able to ensure that the resources of the approved institutions are used to meet, as a priority, the accommodation needs of certain sections of the population in the Member State concerned.[54] Checks

[51] Ibid. paras 22–24.

[52] Ibid. para 28.

[53] Ibid. para 30.

[54] Ibid. para 34.

a posteriori could well intervene at too late a stage, in particular when significant expenditure has already been made and cannot easily be recovered. Even so, in order for a scheme of prior administrative authorisation to be justified even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion. In the case in hand, the national provisions made prior authorisation by the competent Minister dependent on a single condition, namely that the project concerned be in the interests of public housing in the Netherlands. When the Minister examined whether that condition was satisfied, a check was carried out on a case-by-case basis without any legislative framework or other specific and objective criteria. As a result, housing associations could not ascertain in advance the circumstances in which their application for authorisation would be granted and on the basis of which the courts, if an action is brought before them in respect of a refusal of authorisation, might exercise their powers of review.

While the national court had argued that the restriction could be justified on the basis of Article 106(2) TFEU, that provision was not applicable here, a case which concerned neither the grant of special or exclusive rights to an institution approved in relation to housing matters nor the classification of the latter's activities as services of general economic interest.[55]

8.5 Open Questions and Tentative Conclusions Regarding Capital Movements and SSGI

The survey of case-law on free movement of capital as it relates to the financing of SSGIs and to the activities undertaken by SSGI-providers raises initially the question as to whether the Court is introducing a degree of mutual recognition in respect of public interest activities towards which Member States accord privileges. Based on the rulings to date one would have to say that, in a narrow sense, there is no mutual recognition as such: if mutual recognition means the host State defers to the home State in relation to a given regulatory question, then in respect of rules on charitable status the Court never compels Member States to defer to the assessments made by their counterparts. There is, rather, a more limited rule of equivalence: on a case-by-case basis, Member States must examine whether the home State recognition of charitable status is equivalent (that is to say, satisfies the regulatory goal) to the host State regulation. Admittedly, a Member State cannot exclude foundations, charities or other public interest entities from a fiscal

[55] Equivalent issues are raised in pending infringement proceedings brought by the Commission against Poland in which Poland is alleged to be in breach of Article 63 TFEU because pension funds established in that Member State cannot invest more than 5% of their assets outside the country: CJEU, Case C-271/09 *Commission* v. *Poland*, pending. In his Opinion on the case of 14 April 2011, AG Jääskinen recommends that the Commission's action be upheld.

privilege purely on the ground that they are either established or are active outside the national territory, but conversely the choices made by other Member States to accept those bodies as charitable or acting in the public interest cannot be forced onto the taxing Member State as the Court underlines in *Persche*.

From a practical point of view, it is possible that a more case-based, particular approach of the kind required for functional equivalence would replicate the results of a pure mutual recognition mechanism. Notwithstanding the doubts expressed by some Member States in *Centro di Musicologia Walter Stauffe*, objectives accepted as of public utility seem highly likely to be accepted as having the same status in other Member States. Even so, while there may be congruence of values between Member States (a question that is outside the scope of this paper), there is no indirect harmonisation mechanism contained in the case-law since the Court makes no sign that the choices made by Member States as to what they consider to merit fiscal treatment as a charity are subject to review by the Union institutions.

A second question which arises concerns the intensity of scrutiny which the Court brings to bear on grounds of justification invoked by Member States where the financing of SSGIs is concerned: to what degree are national authorities constrained by Union law when they seek to facilitate financing from private sources through tax breaks or to foster SSGI-providers' resources by applying tax exemptions to the latter's expenditure? It is striking that in several cases (*Missionswerk Werner Heuchelbach*; *Centro di Musicologia Walter Stauffer*; *Zanotti*), the Court finds that attempts to justify limitations to or exclusions from a privilege fails because the national measure is unsuitable to achieve its purported objective. There is an apparent reluctance to engage in a full-scale review of proportionality in such cases, which may be explicable as much by the fiscal dimension as it is by the charitable context. The net result is a sense not of judicial deference, but of a relatively generous margin where national policy preferences regarding charitable activities can be translated into concrete rules.

Finally, *Woningstichtung Sint Servatius* throws up a third question, on the possible role of Article 106(2) TFEU as regards the interaction of free movement of capital and SSGIs.

The Court of Justice is periodically faced with the issue of whether a national measure that is incompatible with Article 106(1) TFEU read together with one of the free circulation rules, or otherwise is prima facie in breach of the Treaty, is nevertheless lawful on the basis of Article 106(2) TFEU. An example of such a situation can be seen in *Merci*,[56] where the Court held that a measure conferring exclusive rights over dock operating services was contrary to Article 106(1) in conjunction with Articles 43, 102 and 34 TFEU. It did not examine any of the exceptions or the justifications for breaching the free circulation rules at that point but turned instead to Article 106(2) TFEU. The Court held that even if the

[56] CJEU, Case C-179/90 *Merci* [1991] *ECR* I-5889.

operation of the port was a service of general economic interest—a view it did not hold—the application of the rules on competition or those on free circulation would not obstruct the performance of that task. Another such example is the ruling in *RTT*[57] where the Court held that the basic voice telephony service is a service of general economic interest but its extension to the market for telecommunications equipment is an abuse of a dominant position which is not justified by Article 106(2) TFEU. The Court stated in that regard that essential requirements relating to the users and to the integrity of the network could be ensured by less restrictive means. The Court then repeated that those grounds of justification could not be used to escape the prohibition in Article 34 TFEU on restrictions on free movement of goods.

There has been relatively little interaction between Articles 63 and 106(2) TFEU but they did come under scrutiny in *Spanish Golden Shares*.[58] The infringement alleged by the Commission concerned a privatisation law applicable to State-owned public service providers and several related royal decrees. The contested royal decrees implemented the privatisation law in respect of certain petroleum, telecommunications, banking, tobacco and electricity companies (respectively Repsol, Telefonica, Argentaria, Tabacalera, and Endesa). The Spanish government defends its restrictions on the rights of shareholders in those privatised firms by reference to the need to ensure continuity in public services. Here the Court recognised that the supply of products or the provision of services in petroleum, telecommunications and electricity sectors fall within the public security exception under the Treaty. It did not, however, extend the exception to tobacco manufacturing or to the activities of a banking group which, in the view of the Court, did not provide public services since it was active in traditional banking and was neither a central bank nor a similar body. Spain, in turn, argued that Article 106(2) TFEU allowed for a broad derogation from the provisions of the Treaty. The Court did not consider that argument in depth because Spain provided no explanation why tasks of general economic interest would be jeopardised if the relevant national legislation was abrogated.

If any tentative conclusions flow from that case-law as to the third question, it is unlikely that the Court will question Member States too closely on what activities they classify as SSGIs for the purposes of Article 106(2) TFEU, although the fate of Tabacalera and Argentaria in *Spanish Golden Shares* shows that there are limits, even if they could be said to be those of plausibility. However, there is no reason to think that restrictions on free movement of capital can be accepted under Article 106(2) TFEU under less stringent conditions than are applied to other free circulation rules or to the competition rules simply

[57] CJEU, Case C-18/88 *RTT* v. *GB-Inno-Atab* [1991] *ECR* I-5973.

[58] CJEU, Case C-463/00 *Commission* v. *Spain* [2003] *ECR* I-4581.

because that freedom is in play.[59] If anything, that final observation highlights the normalcy, compared with the rest of the internal market rules, of the free movement of capital which emerges from this study.

Reference

Flynn L (2002) Coming of age: the free movement of capital case law 1993–2002, CMLRev 39 1

[59] In the pending proceedings in CJEU, Case C-271/09 *Commission* v. *Poland*, the Member State invokes Article 106(2) TFEU but AG Jääskinen recommends that the defence be rejected. First, Poland regards the pension funds as emanations of the State and not as undertakings and so they cannot avail of Article 106(2) TFEU. Second, if they are undertakings, while their provision of pensions may be a service of general interest, their investments made to fund those pensions are no different from those of any entity providing financial services under a strict prudential regime, such as life insurance firms. Nothing in that latter activity requires a policy of national preference when investing funds.

Chapter 9
The Concept of SSGI and the Asymmetries Between Free Movement and Competition Law

Ulla Neergaard

Abstract This chapter critically explains the concept of social service of general interest (SSGI), relating it to two central legal regimes: free movement and competition law. The asymmetries of relevance between these two legal regimes are carefully pointed out. The chapter considers whether it is advisable to understand and use the concept SSGI in a horizontal and universal manner across several areas of EU law, when knowing that there exist significant asymmetries between legal regimes.

Contents

U. Neergaard (✉)
Faculty of Law, University of Copenhagen, Studiestræde 6,
1455, Copenhagen K, Denmark
e-mail: ulla.neergaard@jur.ku.dk

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9.1 Introduction

The aim of this chapter is to critically explain and understand the concept of SSGI as well as relating it to two central legal regimes of the EU: free movement and competition law. The two perspectives chosen for scrutiny are of crucial and fundamental importance when dealing with SSGIs from a more theoretical perspective. They are interrelated in the sense that it has to be considered to what degree it is advisable to understand and use the concept SSGI in a horizontal and universal manner across several areas of European Union (EU) law, when knowing that there might exist significant asymmetries.

More precisely, in this chapter firstly the concept SSGI in EU law is analysed (Sect. 9.2). This is followed by a comparison—naturally rather general—of the two legal regimes with respect to the role of aims, scope, prohibitions and exemptions (Sect. 9.3).[1] Hereafter, the findings are compared and contrasted with one another and conclusions are drawn (Sect. 10.4).

9.2 Development of SSGI as a Concept in EU Law

The first time the concept SSGI was used in EU documents appears to be in 2001.[2] The document in question is the European Commission's 'Report to the Laeken European Council. Services of General Interest', in which SSGIs are mentioned in a section concerning possible measures to be taken to ensure legal certainty.[3] Without any doubt, the term has its origin in the development of the conceptual framework regarding the concept of SGEI, which is understood from the contexts it normally operates in, including the Laeken Report. Therefore, this very important concept and some of its related concepts will be briefly explained below (Sect. 9.2.1). On the basis thereof the concept SSGI will be analysed (Sect. 9.2.2).

[1] The analyses are limited to primary law, the case law of the CJEU, GC, and to some 'soft law' as this source has a special importance when considering the concept of SSGI's evolving character. Among others, public procurement, merger control and state aid law, as well as secondary law (such as the Services Directive and sector-specific legislation), is excluded from direct focus. Furthermore, in principle individuals' rights to social benefits are not included (i.e. Union citizenship and free movement of workers). Also, it is of course not possible to come up with a full account of two such great areas of law, so the purpose is to look for the general trends in differences and what impact these may have. See for a different perspective Mortelmans 2001.

[2] This observation is based on a search in the database 'EurLex' carried out on 25 February 2011 and limited to 'title and text'. Available at: http://eur-lex.europa.eu/en/index.htm. The search resulted in 79 hits.

[3] COM (2001) 598, 17 October 2991, p. 10.

9.2.1 The Relatives in the Conceptual Family

More precisely, in what follows, three essential concepts will be briefly touched upon. They may all be viewed as belonging to the same conceptual family as SSGIs. These are SGIs, SGEIs, and NESGIs. All of these concepts are inter-related and important when discussing SSGIs in order to understand the general conceptual framework to which this concept belongs.

The first of the concepts, SGI, could in principle be considered to be the 'grandmother' of SSGIs, at least when considering their relationship in a hierarchical (in opposition to a chronological) manner. For a long time it was not considered as a legal concept. It started its life in documents only having the status of soft law.[4] In fact, the concept truly came to the fore of EU law when the Commission adopted the Communication carrying the title 'Services of general interest in Europe' in 1996.[5] However, the Treaty of Lisbon 2009 has changed this as it now, in Protocol 26, is stated that the high contracting parties wish to emphasise the importance of SGIs. However, this does not necessarily mean that the concept from a legal point of view has become more important. From the early days, the Commission understands SGIs to be '… market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.'[6] It may be understood from this definition as well as the identical understandings in later communications that the concept SGI may be viewed as including both SGEIs as well as NESGIs.[7] In other words, the concept may be considered as a general concept including SGEIs and NESGIs as subgroups.

The concept of SGEI could then be considered as one of the 'daughters' of SGIs and at times it may be considered to be the 'mother' of SSGIs, at least in the sense that certain SSGIs at times may be one of its 'children'. It certainly constitutes a legal concept and always has been so, because it is included in the wording of Article 106(2) TFEU.[8] Importantly, it is also a central element within Article 14 TFEU. In Protocol 26 of the Treaty of Lisbon and Article 36 of the CFREU, it is also inherent. Finally, it is worth mentioning, that it plays a central role in the demarcation of the scope of the Services Directive.[9] The concept SGEIs is not easily

[4] See Chap. 13 in this volume, by Szyszczak.

[5] Commission, *Services of General Interest in Europe,* 96/C281/03, *OJ* 1996 C 281/03.

[6] Ibid. Sect. 4.

[7] See for e.g. Commission, *Communication from the Commission, Services of General Interest in Europe*, COM (2000) 580, 20 September 2000, Annex II; COM (2001) 598, Annex; Commission, *Green Paper on Services of General Interest*, COM (2003) 270, 21 May 2003, Sect. 16; and Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, White Paper on Services of General Interest*, COM (2004) 374, 12 May 2004, Annex 1.

[8] This provision has been altered since the entry into force of the Treaty in 1958.

[9] 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, in particular Articles 2 and 17.

defined.[10] Examples of what has been indicated to be included within this category—understood as consisting of 'market services' with certain specific characteristics—are the big network industries such as the electricity sector, gas sector, telecommunications sector, postal sector and transport sector. Other possible areas that have been mentioned are water distribution services, water supply services, waste water services, treatment of waste or public radio and television services. More recently, what may be considered as included seems expanded at least pursuant to the Commission as it now refers to the following as the most relevant sectors: transport, energy, waste water services, postal services, financial services, public service broadcasting, broadband, health care and social services and services organised by local authorities.[11] On the basis of *BUPA*, it may be assumed that at least the following descriptors—or in the wording of the General Court the *minimum criteria*, common to every SGEI mission—are important: the presence of an act of the public authority entrusting the operators in question with an SGEI mission and the universal and compulsory nature of that mission; the presence of an indication by the Member State of the reasons *why* it considers that the service in question, because of its specific nature, deserves to be characterised as an SGEI and to be distinguished from other economic activities; and the presence of a general or public interest, implying that the service is distinguished from services in the private interest.[12] In addition to this, it may be understood from *BUPA* that the recognition of an SGEI mission does not necessarily presume that the operator entrusted with that mission will be given an exclusive or special right to carry it out. More recently, the CJEU in *AG2R* touches slightly upon the concept SGEIs, but not delivering too many interpretational guidelines. In fact, the Court does not explicitly deal with the issue of whether an SGEI is involved.[13] This may, nevertheless, be understood to be the case as the CJEU applies Article 106(2) TFEU in a manner as if a SGEI is involved. One factor seems to be of significance and that is that the scheme in question (supplementary reimbursement of healthcare costs) is characterised by a high degree of solidarity.[14]

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[10] In the same direction, see GC, Case T-289/03 *BUPA* [2008] *ECR* II-81, para 165. Also see GC, Case T-289/03 (Order) *BUPA* [2005] *ECR* II-741.

[11] Commission, *Commission Staff Working Paper, The Application of EU State Aid Rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation*, SEC (2011) 397, 23 March 2011. The Commission includes in the latter category the following: long-term care, early childhood education and care services, employment services, social housing, other social services and services organised by local authorities, where the latter again may include: recreational activities (e.g. swimming pools, zoos, sport centres, youth clubs), educational and cultural activities for children and adults (e.g. child care, libraries, learning centres, museums), counselling for persons in difficult social situations, shelter for homeless persons, community centres and local town/concert halls.

[12] GC, Case T-289/03 *BUPA* [2008] *ECR* II-8.

[13] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr]. More generally about this case, see Sect. 9.3 below.

[14] Ibid. para 74. Concerning solidarity, also see paras 47–52.

Another factor which might also have an importance is that there are certain constraints of a financial nature involved.[15]

The third of these concepts, NESGI, could then be—to stay in the metaphor of a family tree—considered as yet another 'daughter' of SGIs. At the same time, the concept may be considered to be the 'mother' of certain SSGIs in the sense that these at times will be considered to constitute NESGIs. It was for long not considered as a legal concept as such as it started its life in documents only having the status of soft law. This has completely changed now as in the Treaty of Lisbon 2009, the concept is mentioned in Protocol 26, Article 2. It is here stipulated that the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise NESGIs.[16] Already in the Commission's first Communication on 'Services of general interest in Europe' (1996), it is emphasised in relation to Article 106 TFEU that the conditions of this provision do not apply:

> … to non-economic activities (such as compulsory education and social security) or to matters of vital national interest, which are the prerogative of the State (such as security, justice, diplomacy or the registry of births, deaths and marriages)… [I]t is clear that general interest services that are non-economic or the prerogative of the State are not to be treated in the same way as services of general economic interest.[17]

Later on, the Commission in its Communication on 'Services of general interest, including social services of general interest: a new European commitment' (2007) states the following concerning the concept 'non-economic services': '… these services, for instance traditional state prerogatives such as police, justice and statutory social security schemes are not subject to specific EU legislation, nor are they covered by the internal market and competition rules of the Treaty.'[18] A comparison seems to show that a certain shift has occurred. From the 1996-definition quoted above, it may be argued that SGEIs do not consist of matters which are related to prerogatives of the state, which seems to be related to other EU terms such as 'exercise of public authority' and 'non-undertakings'. However, it also seems as if the definition of NESGIs originally was wider (i.e. including more activities than today) as NESGIs were then seen as including probably what could be viewed as certain SSGIs (examples given are social security and compulsory education). Later on, a significant change therefore seems to have occurred so that the concept NESGI, in the opinion of the Commission, now primarily consists of only matters which are related to prerogatives of the state, and no longer as previously as including most kinds of SSGIs.[19]

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[15] Ibid.

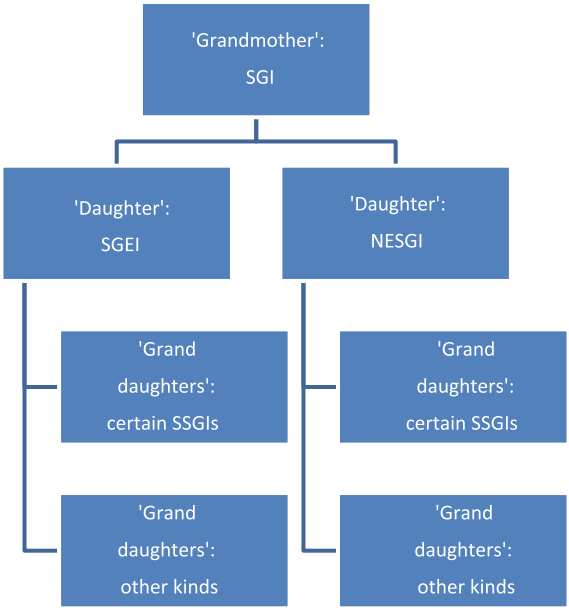
[16] It may be added that it is clearly stipulated in the Services Directive that it does not apply to this category of services. See the Services Directive, Article 2(2)(a).

[17] *OJ* 1996 C 281/03, Sect. 18.

[18] COM (2007) 725, 20 November 2007, p. 5.

[19] If NESGIs should be viewed as limited to only matters which are related to prerogatives of the state, then examples of activities belonging to the category could probably be found within fields such as the administration of taxation systems, justice, internal and external security, diplomacy and

Altogether, the three 'family members', SGEI, SGI and NESGI, have in common that they relate to services which in modern European societies are extremely essential. SGIs and NESGIs started out being non-legal concepts, but now they are just like SGEIs and constitute legal concepts. However, mainly only SGEIs and NESGIs so far truly have an importance legally speaking. None of the three concepts are easily defined and the borderlines among them are not truly clear. They are intended to have a horizontal and universal application across legal areas. On this basis, strongly simplified the family tree could be visualised in the following manner:



9.2.2 The Concept: SSGI

In many ways, the concept SSGI still is like a newborn 'baby' in comparison with the other 'family members' dealt with in the previous section. It is to be found nowhere in binding EU legal texts, but by now in many other kinds of texts. In other words, while growing up, it becomes more and more visible—or one could even say 'noisy' as a somehow 'naughty child'. As stated above, it is likely that it at times should be viewed as a 'daughter' to SGEIs and at other times to NESGIs, and thereby as a kind

(Footnote 19 continued)
defence. At a more specific level, it could also be the issue of passports, the registration of births, deaths and marriages, as well as execution of punishment of citizens. See Scott 2000, p. 313.

of 'grandchild' to SGIs.[20] It is not impossible that a development may take place having the implication that a distinction between two individual concepts could take place, namely: 'social services of no general interest' and 'social services of general interest'; or in the alternative: 'non-economic SSGIs' and 'economic SSGIs'. At present, such distinctions do not seem to exist explicitly.

Probably some additional 'grandchildren'—or 'cousins'—exist, namely so far health services of general interest (HSGIs) and educational and training services of general interest (ETSGIs).[21] To some it would be preferable rather to have one big category consisting of all these kind of services (i.e. SSGIs, HSGIs and ETSGIs) as they all have a social character, as well as often having (at least certain degrees of) a non-economic character (especially because the word 'economic' is not included in the term in opposition to the term SGEIs).[22]

Thus, a decision will have to be made from case to case whether a given SSGI-activity should be considered either as a SGEI or a NESGI,[23] which again implies

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[20] One example of the difficult distinctions may be found e.g. in Belgian Presidency of the Council, 3rd Forum on Social Services of General Interest, Social Services of General Interest: At the Heart of the European Social Model. General Background Note, 2010, p. 5, where it is stated that: 'The Commission thus recalls that only the supply and organization of services of general economic interest (SGEI) are subject to the rules of the Treaty and a case-by-case analysis is needed to be able to distinguish a SSGI from a NESGI or in other words, a non-economic service of general interest.' Further, see for e.g. Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Reform of the EU State Aid Rules on Services of General Economic Interest,* COM (2011) 146, 23 March 2011, p. 4.

[21] It is indicated by the Commission that education and training are SGIs with a clear social function, which, however, are not covered by the Communication. See Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM (2006) 177 final, 26 April 2006, p. 4, n. 7.

[22] See Hatzopoulos 2005b, p. 112 et seq, who views social policy besides health as including areas such as pensions, aid for economically disadvantaged, housing, employment, education and other. Also see Commission, *Commission Staff Working Document, Annexes to the Communication from the Commission on Social Services of General interest in the European Union—Socio-Economic and Legal Overview*, COM (2006) 177, 26 April 2006, Sect. 1.1.1., where it is stated that: 'It is in this context very important to note that 'social' does not necessarily mean 'non-economic'. The fact that the functioning is based on solidarity, that certain social objectives are pursued or the non-profit nature of the provider do not rule out that the activity in question is qualified as an *economic* activity. Some operators may agree to take aspects of solidarity into account in the light other benefits they may obtain from intervening in the sector under consideration. Conversely, non-profit-making entities may compete with profit-making undertakings and may, therefore, constitute undertakings within the meaning of Article 87 of the EC Treaty [now Article 107 TFEU]. As a general rule, EU case law classifies as an undertaking any entity engaged in an economic activity, regardless of its legal status in which it is financed [Footnote omitted]. It should also be noted that an entity carrying out primarily non-economic activities might be engaged in secondary activities of an economic nature. In such cases, classification as an undertaking within the meaning of the competition rules will be confined to the economic activities involved.'

[23] This point of view could seem supported in the following: 'SSGI are not included as such in the two categories mentioned above of SGEI and NESGI, but they oscillate between the two,

that the need for clarity regarding those concepts is intensified further.[24] It would probably also imply that most SSGIs would be considered as SGEIs, as the concept NESGI as explained above seems to have been reduced—at least in the eyes of the Commission—in what it includes, namely to include primarily activities related to the prerogatives of the state.

Since 2006, the Commission distinguishes between two categories of SSGIs.[25] The first category consists of statutory and complementary social security schemes defined as: '… organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability.'[26] The second category concerns other essential services provided directly to the person:

> These services that play a preventive and social cohesion role consist of customised assistance to facilitate social inclusion and safeguard fundamental rights. They comprise, first of all, assistance for persons faced by personal challenges or crises (such as debt, unemployment, drug addiction or family breakdown). Secondly, they include activities to ensure that the persons concerned are able to completely reintegrate into society (rehabilitation, language training for immigrants) and, in particular, the labour market (occupational training and reintegration). These services complement and support the role of families in caring for the youngest and oldest members of society in particular. Thirdly, these services include activities to integrate persons with long-term health or disability problems. Fourthly, they also include social housing, providing housing for disadvantaged citizens or socially less advantaged groups. Certain services can obviously include all of these four dimensions…[27]

(Footnote 23 continued)
depending on whether or not the criterion of economic activity is identified within the social service in question.' See the Belgian Presidency of the Council, 3rd Forum on Social Services of General Interest, p. 11.

[24] The difficulties in this regard seem recently acknowledged by the Council as it has stated in an invitation to the Commission: 1. Without prejudice to the Commission's right of initiative, to further clarify, particularly through the Commission's Guide, the Interactive Information Service and, if need be, other appropriate non- legislative instruments, its views on: (a) the way of identification of a social service as an economic or non-economic service of general interest… See the Council, *Council Conclusions 'Social Services of General Interest: at the Heart of the European Social Model'*, 3053rd Employment, Social Policy Health and Consumer Affairs Council Meeting, Brussels, 6 December 2010, p. 5.

[25] Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM (2006) 177.

[26] Ibid. p. 4.

[27] Ibid. p. 4. These definitions are repeated by the Commission in 2007 in its package of initiatives to turn its Citizens' Agenda into a consistent set of actions; see Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, A Single Market for* twenty-first *century Europe*, COM (2007) 724, 20 November 2011, p. 3. Social services are particularly mentioned by the Commission in the accompanying Communication; see COM (2007) 725, pp. 5–6. Also see Commission, *Commission Staff Working Document*, *Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in Particular to Social Services of General Interest*, SEC (2010) 1545, 7 December 2010.

The first element in the concept, 'social service', is widely used both at the EU-level and at the national level. For instance, Marcou and Wollmann express the following quite common conception, which is much wider than the Commission's understanding of SSGIs:

> Social services are services for people and families. They include child care, long-term care for the elderly and frail, and health services; and they can include basic education, basic cultural amenities (e.g. public libraries) and sports facilities (e.g. swimming pools). Such services are usually financed by budgetary appropriations or social security contributions, and only to a limited extent by user contributions. This is also the case when service delivery is contracted out![28]

The inclusion in the concept SSGIs of the words 'general' and 'interest' is likely to be understood in light of the development of the words in the context of SGIs and SGEIs. However, it might be that often these are not decisive because 'social services' (without the extra words 'general' and 'interest') often by nature are in the general interest, of course depending on how to understand 'general interest'. Yet, it may be—which is something different—that the service in question is provided by different actors, such as the public sector, the market sector or the private, non-profit section (consisting of a highly variable solidarity organisations: charitable or religious associations, mutual societies, cooperatives, foundations etc.).[29] Regarding the expression 'general interest' it is also worth noting that the General Court in *BUPA* regarding SGEIs held that the provision of the service in question must, by definition, assume a general or public interest, implying that SGEIs are distinguished from services in the private interest, even though that interest may be more or less collective or be recognised by the State as legitimate or beneficial.[30] Furthermore, it is explained that the general or public interest on which the Member State relies must not be reduced to the need to subject the market concerned to certain rules or the commercial activity of the operators concerned to authorisation by the State.[31] In other words, the General Court states that the mere fact that the national legislature, acting in the general interest in the broad sense, imposes certain rules of authorisation, functioning or control on all the operators in a particular sector does not, in principle, mean that there is a SGEI.[32]

The Commission has stated that in the performance of their general interest role social services, in practice, often present one or more of the organisational characteristics below:

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[28] Marcou and Wollmann 2010, p. 1. Along the same path, see for e.g. the historians Petersen and Petersen 2010, p. 28, who in principle view as central welfare state services education, health, housing, and culture, but end up in as many as six volumes 'only' analysing what probably could be considered as more core social security services.

[29] Belgian Presidency of the Council, 3rd Forum on Social Services of General Interest, p. 6.

[30] GC, Case T-289/03 *BUPA* [2008] *ECR* II-81, para 178.

[31] GC, Case T-289/03 *BUPA* [2008] *ECR* II-81.

[32] Ibid.

> - they operate on the basis of the solidarity principle, which is required, in particular by the non-selection of risks or the absence, on an individual basis, of equivalence between contributions and benefits,—they are comprehensive and personalised integrating the response to differing needs in order to guarantee fundamental human rights and protect the most vulnerable,—they are not for profit [Footnote omitted] and in particular to address the most difficult situations and are often part of a historical legacy,—they include the participation of voluntary workers, expression of citizenship capacity,—they are strongly rooted in (local) cultural traditions. This often finds its expression in the proximity between the provider of the service and the beneficiary, enabling the taking into account of the specific needs of the latter,—an asymmetric relationship between providers and beneficiaries that cannot be assimilated with a 'normal' supplier/consumer relationship and requires the participation of a financing third party.[33]

9.2.3 Summing Up

The development of the related concepts shows that it is not necessarily unlikely that a 'soft law' status of a given concept may end up getting a 'hard law' status. Thus, the same may eventually occur to the concept SSGI, which in itself justifies a further scrutiny thereof.

It also demonstrates that the content of concepts may vary over time, especially implying that the concept NESGI, which, in principle, implies a total 'immunity' from EU interference, may include fewer and fewer services as these may instead be considered as included in the concept SGEI, which only to a smaller degree implies such 'immunity'. Or to stay in the terminology suggested by Szyszczak: belonging to the category consisting of NESGIs may be viewed as a very safe haven, whereas belonging to the category consisting of SGEIs is not as safe.[34] With the Treaty of Lisbon, Article 14 TFEU has brought a new legislative competence into force, which, therefore, implies that a wide understanding of SGEIs has the potential of having dramatic consequences in that regard. Regarding NESGIs, a narrow understanding may imply that if an importance was meant to be attached to Article 2 in Protocol 26, this then diminishes. Therefore, most SSGIs

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[33] Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM (2006) 177, p. 4. SSGIs may in the alternative be classified pursuant to the objectives they intend to pursue. For instance, these have been described in the following manner: 'These are services to persons, designed to meet people's vital needs, particularly for users in vulnerable situations; they are key instruments for protecting the fundamental rights and human dignity; They play a preventive and social cohesion role, with regard to the entire population, independently of wealth and income; They contribute to fighting discrimination, to promoting gender equality, to protecting human health, to improving the level of health and quality of life and ensuring equal opportunities for all, thus reinforcing the individuals' capacity to fully take part in society.' See Belgian Presidency of the Council, 3rd Forum on Social Services of General Interest, p. 7.

[34] See Chap. 13 in this volume, by Szyszczak.

might end up most often being categorised as SGEIs with the mentioned implications to follow.

In addition, it demonstrates that time does not necessarily imply that conceptual clarity in this area arrives, at least not so far.

Furthermore, it is evident that the concepts, including SSGIs, today are all meant to apply horizontally and in a universal manner across various legal fields.

Also, as it is the case regarding SGEIs, it may be assumed that Member States, in principle, have a wide discretion in classifying services as SSGIs, however, subject to EU control of whether a manifest error has occurred.[35] Importantly, it is unlikely that the Member States have the final competence to decide whether a SSGI constitutes an economic or non-economic SSGI.

Finally to be mentioned, social services are provided in different ways in each of the Member States. It has become common to distinguish between different models. For example, Munday distinguishes among the following four different European models: (1) The Scandinavian model of public services; (2) The family care model; (3) The means-tested—sometimes known as the 'Beveridge'—model; and (4) The Northern European subsidiarity model.[36] However, these differences are seemingly not given any weight in the EU approach to the concept, which implies that it is then not clear whether one model in the long run is preferred to another.

9.3 Comparison of the Two Legal Regimes

As understood from the previous section, SSGIs are as the rest of its 'conceptual family' not always easily defined, and in what follows rather different kinds of services such as e.g. education, training, pensions, health, housing, childcare, social security, care of elderly people, will be viewed as having some relevance, as there often seems to be an overlap in the use of the concept SSGI and social services. Under all circumstances, if the concept SSGI is understood in the abovementioned very limited understanding, the treatment especially in the case law of the CJEU of HSGIs and ETSGIs, nevertheless, is of relevance due to the evident parallels among these kinds of services. More precisely, in the following free movement and competition law will—in rather general terms—be compared with regard to aims (Sect. 9.3.1), scope (Sect. 9.3.2), prohibitions (Sect. 9.3.3) and exemptions (Sect. 9.3.4), however, limited to what seems of importance within the context of SSGIs.

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[35] See on this element for e.g. Karayigit 2009, or Neergaard 2009a.

[36] Council of Europe, Report Prepared by Brian Munday, University of Kent, European Social Services: A Map of Characteristics and Trends, pp. 6–7. In the literature, many other distinctions prevail. See in this regard, for e.g. Chap. 22 in this volume, by Koldinská. Of course, many other distinctions exist.

9.3.1 Aims

9.3.1.1 Generally

When the EEC was founded in 1958, Article 2 EEC enumerated a number of aims, which should be achieved by establishing a common market and gradually approximating the Member States′ economic policies.[37] Since the Treaty of Maastricht, which came into force 1 November 1993, and even more since the Amsterdam Treaty, which entered into force 1 May 1997, the economic aims of the EU indicated in the Treaty texts have been complemented by more political aims including a number of welfare-related policies. The Treaty of Amsterdam introduced new social norms, in particular: A broad competence for the EU to create non-discrimination law (Article 13 EC, now Article 19 TFEU) also on other grounds than nationality and gender such as ethnicity, religion, age, disability and sexual orientation and a fundamental acknowledgement of SGEIs (then Article 16 EC, now Article 14 TFEU). In relation to this development, it may be mentioned that already in the Statement from the Paris Summit in 1972, it is stated that the Heads of State or Heads of Government attaches as much importance to vigorous action in the social fields as to the achievement of the Economic and Monetary Union.[38] Also, with the Treaty of Lisbon 2009, it is now stressed in Article 9 TFEU that: 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.'

It is of central interest that in *Defrenne II* (1976) the Court rules that the equal pay provision in what is now Article 157 TFEU forms part of the social objectives of the EU, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples.[39] The CJEU states in para. 12 (emphasis added): '…this *double aim, which is at once economic and social*, shows that the principle of equal pay forms part of the foundations of the community…'

Today, it has become common to speak about an evolving European Social Model which is several years old by now, as it was applied for the first time by the Commission in 1994.[40] The most important step in this regard may be viewed as having been taken with the formulation of the Lisbon strategy in 2000, which may be viewed as the result of a compromise between the neo-liberal and the more

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[37] The present paragraph and the following constitute a development from Neergaard and Nielsen 2010.

[38] Available at: http://www.ena.lu/statement_paris_summit_19_21_october_1972-020002284.html.

[39] CJEU, Case 43/75 *Defrenne II* [1976] *ECR* 455.

[40] See Commission, *European Social Policy—A Way Forward for the Union—A White Paper*, COM (94) 333, 27 July 1994, Preface.

socially oriented governments of Member States.[41] There is no consensus among legal scholars on how the concept of the European Social Model should be defined.

Closely related to the concept of European Social Model is the concept of Social Market Economy. After the Treaty of Lisbon 2009 entered into force, Article 3(3) TEU expressly indicates that 'social market economy' is what the Union should work for. However, there is also a condition inserted which could have some importance, namely 'highly competitive'. As observed by Semmelmann, the concept relates to a market economy including social policy measures that are confined to market-based measures, however, the details remain widely controversial.[42] Under all circumstances, it seems noteworthy that 'social market economy' in the future has a potential to play an explicit and significant role.

Thus, the EU has developed from a domination of a market economic ideology to something different as well as to include a social dimension to a larger and larger degree. Nevertheless, so far the EU still is not generally viewed as vested with important legislative competences in the social area, but among others because of the free movement and competition law, EU law may have a large impact after all.

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[41] Hatzopoulos 2005a, p. 1634.

[42] Semmelmann 2010, p. 521, where it is added that: '…the impact of the introduction of the concept of the 'social market economy' amounts to a rather cosmetic and rhetorical step and merely points to a stronger emphasis on the social element than has been the case thus far, without making any pronouncement on the specific implementing measures and its weight vis-à-vis other goals; it reflects a desire to address the social concerns whereas at the same time it recalls the need of not undermining the central objective of strengthening the single market. Even though it may be intended to create a social counterbalance to market considerations, its impact can be equated to and does not go beyond the recognition of the equal status of both a social and an economic objective of the European Union [Footnotes omitted].' See also the explanation by Azoulai 2008, p. 1337: 'This concept—in its German ordo-liberal inspiration not without strong liberal elements—in the new treaty clearly corresponds to the desire to create a social counterbalance to market considerations. It contains the idea that European integration should not be pursued to the detriment of the integrity of the social systems of the Member States. Economic benefits should not be obtained by sacrificing social benefits. The inclusion of the concept of a social market economy in the new Treaty confirms the desire to find a new equilibrium, and to combat the '*social deficit*' of the Union… It is quite clear that this conception is based on a contradiction. The means for developing a social Europe are in fact limited. The 'new' Union—just like the Community—has not been granted a competence in matters of social harmonization. It only has instruments of coordination in relation to the social policies and social law of the Member States, which in their turn are based on very divergent economic and social models [Footnotes omitted].' Further, see Joerges 2009, and Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a Single Market Act, For a Highly Competitive Social Market Economy, 50 Proposals for Improving Our Work, Business and Exchanges With One Another*, COM (2010) 608, 27 October 2010.

9.3.1.2 Free Movement Law

In *Cassis de Dijon,* a leading case on free movement, which is from the same historical period as *Defrenne II*, the CJEU expands the issues of overriding public interests on which the Member States can rely when justifying restrictions to the fundamental freedoms so as to allow Member States to uphold a number of rules on their welfare states even when they restrict the free movement in the EU. Much more recently, the CJEU rules in, for e.g. *Laval*, that the EU has not only an economic, but also a social purpose.[43]

A relevant expression in this regard is found in the draft report on 'Delivering a single market to consumers and citizens', where it is suggested that the Parliament:

> Takes the view that the old perception of the single market as being primarily tied to economic considerations needs revisiting; stresses that all those involved in shaping and implementing the single market need to adopt a more holistic approach, fully integrating citizens' concerns, particularly in relation to economic, social, health and environmental issues and consumer protection;
> Stresses that the single market should be central in achieving the goal of a sustainable and highly competitive social market economy in the context of the EU 2020 Strategy's longterm vision…[44]

In a recent Communication from the Commission concerning the Single Market, the following understanding regarding the significance of social market economy is put forward:

> In a social market economy, a more unified European market in services means being able to ensure, with no race to the bottom, that businesses are able to provide their services more easily throughout the European Union…, whilst at the same time providing more high quality jobs and a high level of protection for workers and their social rights… More broadly, social and territorial cohesion is a prime importance for European integration, which acknowledges that market forces alone cannot provide an adequate response to all collective needs. Services of general economic interest (SGEIs) are essential building blocks of the European social model that is both highly competitive and socially inclusive.[45]

Following from these quotations, social market economy in this context seems acknowledged as important by these central institutions. Generally speaking, the free movement rules seem—at least on the surface—to be guided by an acknowledgement of more social aims also to rule.

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[43] CJEU, Case C-341/05 *Laval* [2007] *ECR* I-11767, para 105. Also see CJEU, Case C-438/05 *Viking* [2007] *ECR* I-10779, para 79.

[44] *EP Report of 28 March 2011 on Delivering a Single Market to Consumers and Citizens*, Committee on the Internal Market and Consumer Protection, Rapporteur: Louis Grech, 2010/2011(INI) paras 11–12. Also see EP, Amendments 1–285.

[45] Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Single Market Act, Twelve Levers to Boost Growth and Strengthen Confidence, 'Working Together to Create New Growth'*, COM (2011) 206/4, 13 April 2011, pp. 16–17.

9.3.1.3 Competition Law

In the area of competition law, the situation seems different. Here, economic aims appear on the surface to continue to dominate over the years.[46] The former Article 3(1), litra g) EC, states that the activities of the Community shall include: '… a system ensuring that competition in the internal market is not distorted…' The widespread perception has for long been that the real aims of the competition provisions are aims originating from economic theory such as 'consumer welfare' or 'efficiency'.[47] More thoughtfully, but also very representative, Sánchez Graells has argued:

> Inasmuch as the pursuit of alternative or secondary goals (of a social or industrial nature) conflicts with the main economic goals—which will be the case in most circumstances—competition law should disregard such 'secondary' considerations and be guided exclusively by economic criteria. In the EC, market integration considerations have been historically important, but have lost *momentum* as the evolution of the internal market reached maturity. Therefore, in our view, as a part of EU economic law, *competition law should be guided by economic efficiency considerations and have as its goal the protection of competition as a process, in order to maximise social welfare*—even if the specific contours of this criterion (i.e, total or consumer welfare) remain relatively undefined. In our opinion, and in the light of the position of most economists, the proper goal should be specified *as the maximisation of total social welfare*.[48]

The widespread perception of a close link to economic theory has, for years, seemed to have had an enormous impact on competition policy and law, also at the national level. In general, especially since the 1990s the role of economic analysis has grown and it has been common to perceive the area as having been 'economized'.[49] Although the CJEU in, for e.g., *Albany* has acknowledged the impor-

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[46] CJEU, Case 120/78 *Cassis de Dijon* [1979] *ECR* 646.

[47] See for instance the Norwegian Ph.D.thesis by Gjendemsjø 2011. Also see CJEU, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited* [2009] *ECR* I-9291, paras 62–63: 'With respect to the Court of First Instance's statement that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective competition in terms of supply or price, the Court notes that neither the wording of Article 81(1) EC [now Article 101(1) TFEU] nor the case-law lend support to such a position. First of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC [now Article 101 TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price…'.

[48] Sánchez Graells 2011, p. 97.

[49] See in this regard Pera 2008, and Lavrijssen 2010, p. 636.

tance of social objectives also in the context of competition law, it has not seemed in actual fact to have had too much significance.[50]

In the Treaty of Lisbon 2009 the former Article 3(1), litra (g), can be said to have been 'moved' to Protocol 27 with the following content: 'The High Contracting Parties, considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted…' Yet, the present Article 3(1), litra (b) TFEU may be viewed as taking over the function of the former Article 3(1), litra g).[51] By the abovementioned insertion of especially the objective of a social market economy, in combination with the insertion of Article 7 TFEU, it could, nevertheless, be expected that a more horizontal acceptance across legal regimes would come into force, *e.g.* also having consequences to an area such as competition law, thereby changing in the direction of a higher emphasis on also non-competition considerations.[52] This expectation could, for instance, be seen as supported by the following recent statement by Vice President of the Commission, Almunia and responsible for Competition Policy, on his vision of the EU's competition policy:

> Our competition policy is the expression of the model born in Europe after World War II and known as 'social market economy'. Competition policy, contrary to what some think, is not about neo-liberalism or the jungle. Its purpose is completely different and positive. Competition policy in Europe is about encouraging entrepreneurship and innovation, the creation of jobs and the placing in the market of innovative products and services that bring choice and competitive prices for the consumer. The role of competition enforcers is to make sure companies play fair, do not gain excessive power and when they acquire power through organic growth, not to abuse it. Competition policy, therefore, has a regulatory role and this role is essential to preserve a social economy and social fairness… To apply a phrase coined by Karl Schiller, a German minister during the late 60s, early 70s, competition policy is about '*the market when possible, the state where necessary*'.[53]

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[50] See CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751, para 54: 'Next, it is important to bear in mind that, under Article 3(g) and (i) of the EC Treaty, the activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted' but also 'a policy in the social sphere'. Article 2 of the EC Treaty provides that a particular task of the Community is 'to promote throughout the Community a harmonious and balanced development of economic activities' and 'a high level of employment and of social protection'.

[51] See in this regard Lavrijssen 2010, p. 637.

[52] Article 7 TFEU determines: 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.'

[53] Joaquín Almunia, How Competition Policy Contributes to Competitiveness and Social Cohesion Europe 2011, Regulação e Competitividade Lisbon, 14 January 2011. Also see e.g. Weitbrecht 2008, p. 88, who states: 'Operating a system ensuring that competition in the internal market is not distorted has been one of the fundamental activities of the European Union (Art. 3(g) Rome Treaty). Under the Lisbon Treaty, signed on December 13, 2007, Art. 2(3) dealing with the internal market does no longer refer to such a system. Undistorted competition is now only mentioned in a tersely-worded Protocol on the Internal Market and Competition. While the current Competition Commissioner has sought to downplay the significance of this change as one of mere semantics, this revision may well turn out to be the starting point for a different role of competition in the European Union over the next 50 years.' Also see Semmelmann 2010, p. 521,

This statement could be perceived as an indication of a change of approach in this area of law. However, this does not seem to be traceable in the case law so far. In two interesting cases of recent date, the CJEU seems unwilling to change the underlying ideology of the competition law regime. This is the impression gained from *TeliaSonera*, rendered in the context of Article 102 TFEU (margin squeeze on competitors), where the CJEU states:

> In order to answer those questions, it must be observed at the outset that Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 309), is to include a system ensuring that competition is not distorted.
> Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market.
> The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union (see, to that effect, Case C–94/00 *Roquette Frères* [2002] ECR I–9011, paragraph 42).[54]

The other recent case which is important to mention in this context is *AG2R*, which, inter alia, involves the state action doctrine, which before the entry into force of the Treaty of Lisbon 2009 was based on a combined reading of Articles 3(1) litra (g), 10, and 81 (and at times also Article 82) EC, thereby imposing an obligation on Member States not to adopt measures that might deprive Article 81 EC of its effectiveness or prejudice its full and uniform application.[55] Article 3(1) litra (g) is not really in existence any longer (whereas Article 10 in substance is now Article 4 TEU and Article 81 EC is now Article 101 TFEU). Therefore, it is of great interest to see how the CJEU deals with the aim now. The impression from *AG2R* is that the CJEU now simply ignores the element concerning the distortion

(Footnote 53 continued)
who points out: 'Article 3(3) TEU as amended compared to ex art. 3(1) EC no longer includes a system of undistorted competition. The current art. 3(3) TEU is yet to be read in conjunction with Protocol 27 on the Internal Market and Competition attached to the Lisbon Treaty which states that 'the internal market as set out in Article 3 TEU includes a system ensuring that competition is not distorted'. What does the elimination of competition as a goal from the EU Treaty mean in legal terms (notwithstanding the chapter on competition which remains largely unaltered): the Protocol enjoys the rank of primary law so that there is no impact on the legal status of competition as a goal of the European Union. The fact that it will be made a part of the internal market as derived from the wording of the Protocol reflects the approach that considered competition rules and the free-movement rules as two sets of rules with the same overarching goal, namely to abolish obstacles to cross-border trade. Nonetheless, the step could be understood as a political weakening of competition as a value in itself. This would amount to a weakening of the economic element in the economic constitution as opposed to the interventionist pattern [Footnotes omitted].'

[54] CJEU, Case C-52/09 *TeliaSonera* [decided on 17 February 2011, nyr], paras 20–22.

[55] See further for e.g. Neergaard and Nielsen 2011 and Gerard 2010, pp. 202–210.

of competition.[56] No other provision regarding aims has been referred to instead of the old Article 3(1) litra (g). Thus, Article 3(3) TEU is not included instead. Neither is there a reference to the abovementioned Protocol 27. However, the content of the doctrine seems to be completely in conformity with what it has always been. It is, therefore, likely that no changes in this regard will arrive.

9.3.1.4 Comparison

On this basis, a comparison of the two legal regimes brings the impression that although the overall aims of the Treaties in principle supposedly are identical in both, in practice the CJEU views them differently in each of the two regimes. Thus, the competition law regime appears as much more limited in the perception of aims of importance than the free movement law regime which to a much larger degree seems to acknowledge also the social dimension of the EU. This might have an importance to the actual interpretations as to, for e.g. scope, prohibitions and exemptions, but as it will be demonstrated, this conclusion does not necessarily follow.[57]

9.3.2 Scope

9.3.2.1 Generally

The scope of legal provisions may refer to various elements, including for e.g., subject matter, territory or persons bound. In what follows, a rather selective approach has been chosen in order to focus on what in particular may be of interest for reasons of comparison.

9.3.2.2 Free Movement Law

In the area of free movement law, one of the important criteria regarding the scope of application—of particular interest here—is whether services are provided for economic consideration, which requirement is found in Article 57 TFEU concerning the free movement of services.[58] This section is, therefore, primarily devoted to this topic, but in addition also to the criterion concerning the exercise of official authority contained in Article 51 TFEU (and applicable to the right of establishment and the free movement of services through Article 62 TFEU). The

[56] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], paras 28–39.

[57] See further e.g. Neergaard and Nielsen 2011.

[58] Other freedoms can also be of interest. See for instance CJEU, Case C-567/07 *Sint Servatius* [2009] *ECR* I-9021, regarding free movement of capital in the context of social housing.

former brings services inside the scope of Article 57 TFEU, whereas the latter brings it outside.

The point of departure in many cases, more recently expressed in, for e.g. *Laboratory Analyses* Case, is that it is established that EU law does not detract from the power of the Member States to organise their social security systems and that, in the absence of harmonisation at European Union level, it is for the legislation of each Member State to determine the conditions for the grant of social security benefits.[59] Nevertheless, it is also settled case law that, when exercising that power, Member States must comply with EU law and, in particular, with the provisions on the freedom to provide services.[60]

One of the significant categories of social services consists of health/medical services.[61] In for e.g. *Laboratory Analyses*, the CJEU sums up its practice in this regard in the following manner:

> According to settled case-law, medical services supplied for consideration fall within the scope of the provisions on the freedom to provide services…, there being no need to distinguish between care provided in a hospital environment and care provided outside such an environment…
>
> The Court has also held that the freedom to provide services includes the freedom for the recipients of services, including persons in need of medical treatment, to go to another Member State in order to receive those services there…
>
> Moreover, the fact that the applicable national rules are social security rules and, more specifically, provide, as regards sickness insurance, for benefits in kind rather than reimbursement does not mean that medical treatment falls outside the scope of that basic freedom…[62]

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[59] CJEU, Case C-490/09 *Laboratory Analyses* [decided on 17 January 2011, nyr], para 32.

[60] Ibid.

[61] See more generally on this subject (van de Gronden et al. 2011).

[62] CJEU, Case C-490/09 *Laboratory Analyses* [decided on 17 January 2011, nyr], paras 34–36. Reference could also be made to the older CJEU, Case C-157/99 *Smits and Peerbooms* [2001] *ECR* I-5473, which also concerns health services. Here, a number of the governments argues that hospital services cannot constitute an economic activity within the meaning of Article 57 TFEU, particularly when they are provided in kind and free of charge under the relevant sickness insurance scheme. Also, it is claimed that there is no remuneration within the meaning of Article 57 TFEU where the patient receives care in a hospital infrastructure without having to pay for it himself or where all or part of the amount he pays is reimbursed to him. Furthermore, the view is put forward that a further condition to be satisfied before a service can constitute an economic activity within the meaning of Article 57 TFEU is that the person providing the service must do so with a view to making a profit. Finally, the German Government claims that the structural principles governing the provision of medical care are inherent in the organisation of the social security systems and do not come within the sphere of the fundamental economic freedoms guaranteed by the EC Treaty, since the persons concerned are unable to decide for themselves the content, type and extent of a service and the price they will pay. All these arguments cannot be upheld and the CJEU hereby lays the foundation regarding health services followed in its subsequent case law and as expressed above in CJEU, Case C-490/09 *Laboratory Analyses* [decided on 17 January 2011, nyr].

It may be understood that the view is that there is a close link between health services and more broadly social security. Another recent case is *Kattner Stahlbau* concerning whether Articles 56 and 57 TFEU must be interpreted to the effect that they preclude national legislation, pursuant to which undertakings in a particular branch of industry and a particular territory must be affiliated to an employers' liability insurance association in the mechanical and metal sector.[63] In this case, the CJEU holds that the measure is within the scope of these provisions. In this regard, it states:

> While it is true that, according to the consistent case-law cited in paragraph 71 of this judgment, in the absence of Community harmonisation, it is for the legislation of each Member State to determine, in particular, the conditions concerning the requirement to be insured with a social security scheme and, consequently, the method of financing that scheme, the Member States must nevertheless comply with Community law when exercising those powers…. It follows that that power of the Member States is not unlimited…
>
> Consequently, the fact that national legislation such as that at issue in the main proceedings concerns only the financing of a branch of social security, that is to say, insurance against accidents at work and occupational diseases, by providing for compulsory affiliation of undertakings covered by the scheme at issue to the employers' liability insurance associations entrusted by the law with providing such insurance, does not exclude the application of the EC Treaty rules, in particular those relating to freedom to provide services…
>
> Accordingly, the system of compulsory affiliation laid down in the national legislation at issue in the main proceedings must be compatible with the provisions of Articles 49 EC and 50 EC [now Articles 56 and 57 TFEU].[64]

Other social areas may also be included. For instance, in *Sint Servatius* social housing was involved.[65] Furthermore, certain kinds of education may also be included.[66] In this sector, however, certain important particularities rule. For instance, in *Jundt* the CJEU states that:

> In that regard, it has already been held that, for the purposes of that latter provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question…
>
> Second, the Court has excluded from the concept of 'services' within the meaning of Article 50 EC [now Article 57 TFEU] courses provided by certain establishments forming part of a system of public education and financed, entirely or mainly, by public funds… The Court has thus stated that, by establishing and maintaining such a system of public education, normally financed from the public purse and not by pupils or their parents, the

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[63] CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513.

[64] Ibid. paras 74–76.

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

[66] See for instance CJEU, Case 293/83 *Gravier* [1985] *ECR* 593; CJEU, Case 263/86 *Humbel* [1988] *ECR* 5365; CJEU, Case 109/92 *Wirth* [1993] *ECR* I-6447; CJEU, Case C-281/06 *Jundt* [2007] *ECR* I-12231.

> State does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational fields…[67]

Finally, it may be mentioned that more classic social security schemes may be included in the scope. In this regard reference may be made, for e.g. to *Freskot*, where the CJEU determines that if benefits fall within the field of social security, that is not sufficient to preclude application of Articles 56 and 57 TFEU.[68]

Besides the criterion of economic consideration, the exercise of official authority may have an importance, as such may be considered to be outside the scope.[69] As the CJEU states in, for e.g., *Jundt*:

> While, under the first paragraph of Article 45 EC [now Article 51 TFEU], in conjunction with Article 50 EC [now Article 57 TEUF], the freedom to provide services does not extend to activities connected in a Member State, even occasionally, with the exercise of official authority, that derogation must, however, be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority…[70]

In, for e.g., *Peñarroja Fa* it states in the same direction:

> In that regard, it should be borne in mind that the Court has consistently held that the first paragraph of Article 45 EC [now Article 51 TFEU] applies only to activities which in themselves involve a direct and specific connection with the exercise of official authority…[71]

Thus, it is clear that the criterion of exercise of official authority is interpreted rather narrowly. Advocate General Cruz Villalón in the *Notary Profession* Case examines the criterion very thoughtfully and thoroughly and besides the observation of a narrow interpretation, it may be understood from this examination, among others, that in his opinion the criterion constitutes a reference to a foreign body in the phenomenology of modern official authority.[72] Further, in his opinion a

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[67] CJEU, Case C-281/06 *Jundt* [2007] *ECR* I-12231, paras 29–30.

[68] CJEU, Case C-355/00 *Freskot* [2003] *ECR* I-5263, para 53. In this case, the CJEU in paras 56-59 holds that: 'In the present case, it is clear that the payment of the contribution by the Greek farmers does not constitute economic consideration for the benefits provided by ELGA under the compulsory insurance scheme. The contribution is essentially in the nature of a charge imposed by the legislature and it is levied by the tax authority. The characteristics of that charge, including its rate, are also determined by the legislature. It is for the competent ministers to decide any variation of the rate. Similarly, the rate and detailed rules governing the benefits provided by ELGA under the compulsory insurance scheme are framed by the national legislature in such a way as to apply equally to all operators. Consequently, benefits such as those provided by ELGA under the compulsory insurance scheme cannot be classified as services within the meaning of Articles 59 and 60 [now Articles 56 and 57 TFEU] of the Treaty.'

[69] In the alternative, this criterion may be viewed as an exemption; see Sect. 9.3.4 below.

[70] CJEU, Case C-281/06 *Jundt* [2007] *ECR* I-12231, para 37.

[71] CJEU, Joined Cases C-372/09 and C-373/09 *Peñarroja Fa* [decided on 17 March 2011 nyr], para 42.

[72] Opinion of AG P Cruz Villalón of 14 September 2010 in CJEU, Case C-247/08 *Notary Profession,* [2009] *ECR* I-9225, para 80.

privatised (or non-nationalised) economic activity which is, nevertheless, characterised by the exercise of official authority is, therefore, something relatively unexpected in the scheme of the Treaty.[73]

9.3.2.3 Competition Law

In the area of competition law, when deciding that the provisions are applicable, the criterion of particular interest in this context is the prevailing requirement of an undertaking. This is seen as following explicitly from the wording of, for e.g. Articles 101, 102, and 106 TFEU. However, the concept is not defined in any of these provisions and its understanding, therefore, has had to be developed by the CJEU. In general, in order to fall outside the scope of the competition rules the activity must either be performed by a non-entity or the entity must be engaged in an activity that is non-economic.[74]

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[73] Opinion of AG P Cruz Villalón of 14 September 2010 in CJEU, Case C-247/08 *Notary Profession,* [2009] *ECR* I-9225, paras 93–96. Also, he explains that: 'In this sense, 'official authority' is, above all, 'authority', that is to say the capacity to impose a form of conduct consistent with an irresistible will. On the basis of a readily accepted understanding of the term, and in its fullest sense, that capacity is held exclusively by the State, that is to say by the institution that is the embodiment of the legal system as the instrument for the administration and organisation of legitimate force. Official authority is, therefore, sovereign power, *qui superiorem non recognoscens in regno suo*. This means that official authority is the supreme source of legitimate force in the State, which it administers either for the benefit of the existence of the State and the achievement of its aims (general interest) or in the service of legitimate expectations of conduct held by certain individuals in relation to others (private interest), in the latter case always in accordance with the conditions established previously. Of course, the purpose of the force monopolised and administered by the State is one of the first criteria to be taken into account when it comes to drawing the dividing line between official authority and individuals. Official authority must achieve those general objectives that underpin the legitimacy of the specific form of State adopted by the executive (in Europe, typically, a social and democratic State based on the rule of law). Individuals, on the other hand, in the exercise of their freedom as such, can dedicate themselves to the satisfaction of their private interests. What is more, they may do so, where appropriate and under the conditions laid down by the system, by recourse to the force administered by official authority, which, for those purposes, is, in principle, an instrument for the pursuit of non-general interests. However, the criterion most traditionally used to identify official authority is the capacity of the body exercising official authority to impose its will unilaterally, that is to say without requiring the consent of the person subject to the relevant obligation. An individual, on the other hand, may secure the acceptance of his will by another individual only with the latter's consent. [Footnotes omitted]. Also see CJEU, Case C-247/08 *Notary Profession* [24 May 2011, nyr], para 124, where the CJEU decides that the nationality condition required by Belgian legislation for access to the profession of notary constitutes discrimination on grounds of nationality prohibited by Article 53 TFEU [then Article 43 EC].

[74] Odudu 2011, pp. 240–241.

To illustrate the role of the criterion, a point of departure may be taken in the ruling in *AG2R*.[75] Although only rendered by five judges, there is reason to believe that it, at least to some degree, is representative as to the state of law at present.[76]

The central background of *AG2R* is proceedings between AG2R Prévoyance (hereafter 'AG2R'), which is a provident society governed by the French Social Security Code, and Beaudout Père et Fils SARL (hereafter 'Beaudout') concerning the latter's refusal to join the scheme for supplementary reimbursement of healthcare costs managed by AG2R for the French traditional bakery sector. The reason for this refusal is that, by virtue of a supplementary healthcare costs insurance scheme Beaudout preferred to be affiliated to an insurance company other than AG2R, since 10 October 2006. This leads to the decision by AG2R to bring proceedings against Beaudout before the national court, thereby seeking an order that Beaudout regularises its affiliation to the scheme as well as paying outstanding contributions.

The national court in question decides to stay proceedings and to refer a question to the CJEU for a preliminary ruling. This court reinterprets the question into the following:

> [I]t is clear from the decision to refer that the national court wishes to determine, in essence, whether a decision by the public authorities to make compulsory, at the request of the organisations representing employers and employees within a given sector of activities, an agreement resulting from collective bargaining which provides for compulsory affiliation to a scheme for supplementary reimbursement of healthcare costs managed by a designated body, without possibility of exemption, is compatible with European Union law.[77]

Among others, the CJEU decides that it shall be considered whether the following requirement has been fulfiled or not, namely that under Article 106(1) TFEU, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States may neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 TFEU and in Articles 101 TFEU to 109 TFEU, subject to Article 106(2) TFEU.[78] In this context, attention is given to the interpretation of Articles 102 read together with 106 TFEU.[79]

The first step—and the only one dealt with in the present analysis—is then to establish with regard to the interpretation of Article 102 TFEU, whether an institution such as AG2R is an undertaking for the purposes of this provision. In this examination, the CJEU firstly—with reference to precedent—rehearses the familiar dicta that the concept of an undertaking covers any entity engaged in an

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[75] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr].

[76] Regarding the concept of undertaking, see also for instance: Belhaj and van de Gronden 2004; González-Orús 1999; Hervey 2011, pp. 189–195; Lasok 2004; Louri 2002; Sauter and Schepel 2009, pp. 75–90; Schweitzer 2011, pp. 20–26; Townley 2007; and Winterstein 1999.

[77] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], para 23.

[78] Ibid. para 25.

[79] Ibid. para 26.

economic activity, irrespective of its legal status and the way in which it is financed.[80] Also with reference to precedence, it adds that any activity consisting in offering goods and services on a given market is an economic activity.[81] This definition, no matter how reasonable it may seem at first sight, has in actual fact often caused the CJEU trouble in applying.

In the decision, the Court, inter alia, emphasises that AG2R is a non-profit-making legal entity, which is governed by private law and has as its object the provision of cover for physical injury caused by accident or sickness.[82] Also, it is understood that inasmuch as it provides compulsory supplementary social protection for all employees within a particular economic sector, a scheme for supplementary reimbursement of healthcare costs such as that in question in the main proceedings pursues a social objective.[83] Nevertheless, the CJEU by reference to precedent rules that the social aim of an insurance scheme is not in itself sufficient to preclude the activity in question from being classified as an economic activity.[84]

The CJEU also examines whether the scheme can be regarded as applying the principle of solidarity and to what extent it is subject to supervision by the State which instituted it, given that these are factors that are liable to preclude a given activity from being regarded as economic. The former question may be viewed as answered in the positive and the latter question as answered in the negative.[85] Therefore, the conclusion reached is, in principle, that AG2R, although being non-profit-making and acting on the basis of the principle of solidarity, is an undertaking engaged in an economic activity which was chosen by the social partners, on the basis of financial and economic considerations, from among other undertakings with which it is in competition on the market in the provident services which it offers.[86] Thus, the decisive element in the scheme leading to considering AG2R as an undertaking is the supervision/competition criterion.[87] The final outcome of the case regarding Articles 102 and 106 TFEU is that:

> Inasmuch as the activity consisting in the management of a scheme for supplementary reimbursement of healthcare costs such as that at issue in the main proceedings is to be classified as economic—this being a matter for the national court to determine—Articles 102 TFEU and 106 TFEU must be interpreted as not precluding, in circumstances such as those of the case in the main proceedings, public authorities from granting a provident society an exclusive right to manage that scheme, without any possibility for undertakings

[80] Ibid. para 41.

[81] Ibid. para 42.

[82] Ibid. para 43.

[83] Ibid. para 44.

[84] Ibid. para 45.

[85] Ibid. paras 46–65.

[86] Ibid. para 65.

[87] The CJEU hereby seems to be in line with the Opinion of AG Mengozzi of 11 November 2010 in CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], para 78. For another, however older, case of relevance regarding the importance of 'competition', see CJEU, Joined Cases C-264/01, C-354/01, C-354/01 and C-355/01 *AOK* [2004] *ECR* I-2493.

within the occupational sector concerned to be exempted from affiliation to that scheme.[88]

AG2R demonstrates how difficult it at times may be to decide whether an entity should be considered to be an undertaking or not. For instance, in *Kattner Stahlbau*—concerning although not identical, then at least similar issues—the CJEU in contrast finds that an undertaking is not involved as both the solidarity and the supervision/competition criteria are fulfilled.[89] As an other example reference may be made to *FENIN*, where the CJEU holds that there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that 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.[90] It should be emphasised that activities which fall within the exercise of public powers are not of an economic nature justifying the application of the Treaty rules of competition.[91] The case law in this area has not surprisingly been subject to criticism in the legal literature. Critical elements which could be mentioned are that the test used is difficult to apply and may lead to legal uncertainty. Also, the case law here is not necessarily consistent and the underlying logic is not always truly apparent.

As public distortions of competition law with regard to SSGIs often seem to be more relevant than private distortions thereof, the so-called state action doctrine should also for the sake of completeness be mentioned as having some relevance. Again *AG2R* is an illustrative case to include. It demonstrates that for Articles 101 TFEU, read with Article 4(3) TEU, to be applicable, it is necessary to examine whether the nature and purpose of an agreement such as that at issue in the main proceedings warrant its exclusion from the scope of Article 101(1) TFEU.[92] The CJEU states firstly, that the agreement at issue in the main proceedings was concluded in the form of an addendum to a collective agreement and therefore is the result of collective bargaining between the organisation representing employers and those representing employees within the French traditional bakery and pastry-making sector.[93] Secondly, it states that as to its purpose that agreement establishes, within a particular sector, a scheme for supplementary reimbursement of healthcare costs which contributes to improving the working conditions of employees, not only by ensuring that they have the necessary means to meet

[88] Also see Sect. 9.3.4 below about the argumentation in *AG2R* concerning especially Article 106(2) TFEU.

[89] CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513, para 68. The finding in question is to be verified by the referring court.

[90] CJEU, Case C-205/03 P *FENIN* [2006] *ECR* I-6295, para 26. For a recent and seemingly much less controversial case, see GC, Cases T-443/08 and T-455/08 *Flughafen Leipzig-Halle* [decided on 24 March 2011, nyr].

[91] See, to that effect, e.g. CJEU, Case C-113/07 P *SELEX* [2009] *ECR* I-2207, para 70.

[92] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], para 30.

[93] Ibid. para 31.

expenses incurred in connection with sickness, work-related accidents, occupational illnesses or maternity, but also by reducing the costs which, in the absence of a collective agreement, would have had to be borne by the employees. Especially by reference to *van der Woude*, in which it is decided that a collective agreement concerning a healthcare insurance scheme which designates a single insurer in the event of subscription to that scheme, thereby excluding any possibility of affiliation to competing insurers, is excluded from the scope of Article 101(1) TFEU, the CJEU reaches the conclusion that the agreement in question does not, by reason of its nature and purpose, come within the scope of Article 101(1) TFEU.[94] The compulsory element and that there is no provision for exemption from affiliation does not change this.[95]

9.3.2.4 Comparison

The point of departure in a comparison regarding scope should be taken from the observation that free movement law as the dominating rule will be applicable to measures regarding social services. In contrast, in the area of competition law there seems to be a larger reluctance in viewing them as being performed by an undertaking and thus in consequence to consider them as often being outside the scope. Once elements of competition are introduced—perhaps in a mix with elements of solidarity—the situation may change.[96] Also, in the latter regime there seems to be a larger reluctance in including collective agreements and the like. The difference between the two regimes has very clearly come to expression in e.g. *Kattner Stahlbau*, where the same national measure is viewed as outside the scope of the competition provisions, but within the scope of the free movement rules.[97] However, a similarity seems to be that in both legal regimes exercise of official/public authority is considered outside the scope. It is difficult to conclude whether this concept is understood identically in each of the two legal regimes.

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[94] Ibid. paras 32–36.

[95] Regarding the state action doctrine, the CJEU's final conclusion is: 'Accordingly, the answer to the first part of the question, as reformulated, is that Article 101 TFEU, read in conjunction with Article 4(3) EU, must be interpreted as not precluding the decision by the public authorities to make compulsory, at the request of the organisations representing employers and employees within a given occupational sector, an agreement which is the result of collective bargaining and which provides for compulsory affiliation to a scheme for supplementary reimbursement of healthcare costs for all undertakings within the sector concerned, without any possibility of exemption.' See CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], para 39.

[96] See in this regard e.g. van de Gronden 2011, p. 139.

[97] CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513.

9.3.3 Prohibitions

9.3.3.1 Generally

Both sets of legal regimes contain several prohibitions. The analysis here naturally has to be fairly brief. Regarding free movement law, the prohibition contained in Article 56 TFEU will be touched upon. Regarding competition law, some mention of the combined reading of Articles 102 and 106(1) TFEU and the state action doctrine will be made.

9.3.3.2 Free Movement Law

Free movement rules have developed into prohibiting direct and indirect discrimination as well as what may be referred to as non-discriminatory restrictions. Especially, this latter element may be viewed as having recently been expressed by the CJEU in *Laboratory Analyses*—but also in a multitude of other cases—as Article 56 TFEU here is seen as precluding the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State.[98] Also, the notion of market access appears to gain increasing importance.[99] The more flexible understanding of the prohibition, which has emerged, implies that what is prohibited is extremely wide (however, subject to possible exemptions, see further below).

Laboratory Analyses concerns the Luxembourg Social Security Code, which precludes reimbursement of the costs of medical analyses carried out in another Member State. The CJEU holds that in so far as the application of the Luxembourg rules at issue effectively precludes, in practice, the possibility of acceptance of liability for laboratory analyses and tests carried out by almost all, or even all, medical service providers established in Member States other than Luxembourg, it deters or even prevents persons insured by the Luxembourg social security scheme from using such providers and constitutes, both for such persons and for providers, an obstacle to the freedom to provide services.[100]

Another example to point to is *Freskot*.[101] As explained in the chapter by van de Gronden this case seems to point in the direction that compulsory affiliation to a social security scheme concerning insurable risks is likely to result in restrictions

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[98] CJEU, Case C-490/09 *Laboratory Analyses* [decided on 17 January 2011, nyr], para 33. Other freedoms can also be of interest. See for instance CJEU, Case C-567/07 *Sint Servatius* [2009] *ECR* I-9021, regarding free movement of capital in the context of social housing.

[99] See further e.g. Snell 2010.

[100] CJEU, Case C-490/09 *Laboratory Analyses* [decided on 17 January 2011, nyr], para 41. In the same direction, see CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513.

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

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.[102]

9.3.3.3 Competition Law

To SSGIs, the combined reading of Articles 106(1) and 102 TFEU may have some relevance. Pursuant to this, the granting of exclusive rights and related issues may be contrary to these provisions, unless justified primarily under reference to Article 106(2) TFEU. The guiding principle is the so-called *Höfner* criterion, which implies that national measures which create a situation in which an undertaking cannot avoid infringing Article 102 TFEU are incompatible with the Treaty.[103] Buendia Sierra argues that:

> Therefore, all exclusive rights are in principle contrary to Article 86(1) and 82 [now Articles 106(1) and 102 TFEU] unless they can be justified for the general interest reasons and they respect the principle of proportionality.[104]

Others are more sceptical as to the scope of the combined reading. For instance, Maillo states that: '…there is no automatic abuse, nor can the grant of an exclusive right be considered to be prima facie illegal'.[105] Under all circumstances, since the 1990s, the EU has increasingly put pressure on national measures, especially exclusive and special rights. The underlying rationale behind this development seems to be driven by a market economic ideology.[106] Therefore, the possibility of justification pursuant to Article 106(2) TFEU has grown in importance (see Sect. 9.3.4 below).

As a recent example as to the concrete application of the criterion, reference may again be made to *AG2R*. The CJEU establishes that AG2R has been granted an exclusive right to receive and manage the contributions paid by the employers and employees in the sector in question.[107] Accordingly, such a body could be regarded as an undertaking holding exclusive rights within the meaning of Article

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[102] van de Gronden 2011, p. 126.

[103] CJEU, Case C-41/90 *Höfner* [1991] *ECR* I-1979, para 27.

[104] Buendia Sierra 1999, p. 189.

[105] Maillo 2007, p. 624. See also for the same perception e.g. de Vries, p. 158. Also see a possible support for this point of view, e.g. CJEU, Case C-209/98 *Sydhavnens Sten & Grus* [2000] *ECR* I-3743, paras 67–9.

[106] See further Neergaard 2007, p. 387. Regarding the related provisions, it is noteworthy that the CJEU has stated that: '… Article 86(1) EC [now Article 106 TFEU] precludes Member States, in the case of public undertakings and undertakings to which they grant special or exclusive rights, from maintaining in force national legislation contrary to Articles 43 EC and 49 EC [now Articles 49 and 56 TFEU]', which pursuant to the judgement includes concessions granted without prior public procedure. See CJEU, Case C-347/06 *Brescia* [2008] *ECR* I-5641, para 61.

[107] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], para 66.

106(1) TFEU.[108] Also, AG2R is considered to have a statutory monopoly in a substantial part of the common market and may be regarded as occupying a dominant position within the meaning of Article 102 TFEU.[109] With regard to the abovementioned *Höfner* criterion, the CJEU among others states:

> Such an abusive practice contrary to Article 106(1) TFEU exists where, in particular, a Member State grants to an undertaking an exclusive right to carry on certain activities and creates a situation in which that undertaking is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind…
>
> However, it must be pointed out, firstly, that the fact that undertakings in the French traditional bakery sector are unable to have recourse to other bodies in order to obtain cover for supplementary reimbursement of healthcare costs for the benefit of their employees and the resulting restriction of competition derive directly from the exclusive right conferred on AG2R… .
>
> Secondly, as the Advocate General noted in point 98 of his Opinion, there is no information in the documents supplied by the national court or in the observations submitted to the Court to show that the services supplied by AG2R do not meet the requirements of the undertakings concerned.[110]

On this basis, the CJEU apparently thinks that the measure in question is in conformity with Articles 102 and 106(1) TFEU, although it is not completely certain as the CJEU does not spell this out in explicit terms. Nevertheless, the CJEU continues to examine Article 106(2) TFEU despite the fact that often this element will only be held necessary to examine if a breach of Articles 102 and 106(1) TFEU is found.[111]

9.3.3.4 Comparison

A comparison shows that when competition law as above is limited to only include the combined reading of Articles 102 and 106(1) TFEU, it does not appear as very all-compassing. The same observation could be made regarding the state action doctrine. Thus, the free movement rules seem to constitute a much harder regime, at least when taking the more limited approach underlying the present analysis.[112]

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[108] Ibid. para 66.

[109] Ibid. para 67.

[110] Ibid. paras 69, 71 and 72.

[111] That this is not more explicitly stated might have to do with the circumstance that the CJEU, in principle, intends to leave the final decision to the referring court.

[112] See for an alternative point of view Davies 2009, p. 574.

9.3.4 Exemptions

9.3.4.1 Generally

Exemptions may have much in common with scope because both constitute ways of avoiding being caught by prohibitions. At times, other terms are used: exceptions, exclusions, immunities or justifications, flourish. However, here a loose understanding is taken in direction of finding out which instances may lead to an otherwise prohibited measure, nevertheless, being allowed upheld.

9.3.4.2 Free Movement Law

The internal market law rules have for a long time been read as involving a balance between free movement and alternative national aims, for e.g. as expressed in Article 36 TFEU or the *Cassis de Dijon* justifications, where especially the latter often may be viewed as allowing for interests which, in a broad sense, are social in character. The principle of proportionality has to be fulfiled in the context of both kinds of justifications.

In general, at present it still seems as if *directly discriminatory* measures most often may only be justified pursuant to interests stipulated in Treaty provisions. Within the area of services, through Article 62 TFEU, Articles 51 and 52 TFEU in this regard are of primary importance. Hereby, only the situation of exercise of official authority, and the interests of public policy, public security or public health justifications are worth invoking.[113] These are narrowly interpreted and only seldom of relevance to most national social measures. For instance, in *Laboratory Analyses* the CJEU acknowledges the following as being the state of law:

> … first, that the objective of maintaining a balanced medical and hospital service open to all may fall within the derogations on grounds of public health provided for in Article 46 EC [now Article 52 TEUF], in so far as such an objective contributes to the attainment of a high level of health protection…, and, secondly, that it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying an obstacle to the principle of freedom to provide services…[114]

Here, in principle, two kinds of justifications seem to be at stake, namely the objective of maintaining a balanced medical and hospital service open to all and the prevention of the risk of seriously undermining the financial balance of the social security system. However, it might also be that the latter is part of the former. If not, then the latter may be considered as a not Treaty-based justification (whereas the former is part of the 'public health' justification in Article 52 TFEU).

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[113] Exercise of official authority has been dealt with above in Sect. 9.3.2.

[114] CJEU, Case C-490/09 *Laboratory Analyses* [decided on 17 January 2011, nyr], para 43.

The case, in line with most others, demonstrates that although the CJEU, in principle, acknowledges the mentioned justifications as legitimate, in practice it is very difficult for Member States to convincingly prove the risks in question. Also, the latter justification itself, namely the risk of seriously undermining the financial balance of the social security system, which has the potential of a general application to many kinds of social measures, is formulated and understood very narrowly. Furthermore, even if a measure is viewed as justified, the principle of proportionality might often end up after all implying that the measure in question is, nevertheless, not acceptable.

Besides the Treaty-based exemptions, as mentioned also the so-called court-established justifications may be invoked. These are, in principle, endless in kind. For instance, in *Sint Servatius* which concerns free movement of capital the CJEU holds that requirements related to public housing policy in a Member State and to the financing of that policy can also constitute overriding reasons in the public interest and therefore justify restrictions.[115] This can, for example, be specific concerns such as a structural shortage of accommodation and a particularly high population density.[116]

A crucial issue is whether Article 106(2) TFEU is applicable as an exemption in the area of free movement law. It has for long been in force as an exemption within the area of competition law, but uncertainty surrounds its applicability within free movement rules as such.[117] That the term 'in particular' is included in the wording of the provision could indicate that the reference to the competition provisions is not exhaustive. Therefore, it has also seemed to be an outspread assumption in the literature that the provision besides the competition provisions is also applicable as a kind of exemption to the free movement rules, state aid rules, Article 37 TFEU and the public procurement law rules.[118]

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[115] CJEU, Case C-567/07 *Sint Servatius* [2009] *ECR* I-9021, para 35.

[116] Ibid. para 35.

[117] See further the Sect. below concerning competition law.

[118] See among others Buendia Sierra 1999, pp. 297–298; van de Gronden 2004, pp. 87–94; Sauter 2008, p. 185; CJEU, Case 72/83 *Campus Oil* [1984] *ECR* 2727, para 19; Case C-179/90 *Merci* [1991] *ECR* I-5889; Opinion of AG Rozè of 26 April 1983 in CJEU, Case 78/82 *Commission* v. *Italian Republic* [1983] *ECR* I-1599; CJEU, Case C-157/94 *Commission* v. *Kingdom of the Netherlands* [1997] *ECR* I-5699; CJEU, Case C-159/94 *Commission* v. *French Republic* [1997] *ECR* I-5815; CJEU, Case C-158/94 *Commission* v. *Italian Republic* [1997] *ECR* I-5789; CJEU, Case C-438/02 *Hanner* [2005] *ECR* I-4551, para 48; Opinion of AG Tizzano of 8 May 2001 in CJEU, Case C-53/00 *Ferring* [2001] *ECR* I-9067, paras 33 and 56-59; CJEU, Case C-280/00 *Altmark* [2003] *ECR* I-7747; CJEU, Joined Cases C-34/01-C-38/01 *Enirisorse* [2003] *ECR* I-14243; CJEU, Case C-451/03 *SADC* [2006] *ECR* I-2941; CJEU, Case C-393/92 *Almelo* [1994] *ECR* I-1477. However, also see the Commission, *Commission Staff Working Document, Annexes to the Communication from the Commission on Social Services of General Interest in the European Union—Socio-Economic and Legal Overview*—COM (2006) 177 final, SEC (2006) 516, Sect. 1.1.1. Especially Bekkedal, who has been the defender of another point of view; see Bekkedal 2011.

The preliminary ruling, *Sint Servatius*, was before it was decided expected to cast better light on the issue as the referring court had asked several questions in this regard.[119] However, the CJEU ends up stating that there is no need to answer any of the questions concerning the interpretation of Article 106(2) TFEU.[120] However, this conclusion might have been reached on a basis of a misreading of the provision, as the CJEU seems to limit the interpretation thereof to only what is relevant when it is read together with Article 106(1) TFEU which is understood from the following ground:

> Article 86(2) EC [now Article 106(2) TFEU], in conjunction with Article 86(1) EC [now Article 106(1) TFEU], may be relied on to justify the grant by a Member State to an undertaking entrusted with the operation of services of general economic interest of special or exclusive rights which are contrary to the provisions of the Treaty, to the extent that performance of the particular task assigned to that undertaking can be assured only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community….[121]

Based, among others, on the following observation that the national proceedings do not concern the grant of special or exclusive rights the CJEU reaches the conclusion that there is no need to answer the questions. However, from the wording of Article 106(2) TFEU it is not a requirement that special or exclusive rights are involved.[122] Of course, it might be that the CJEU has wanted a change of scope, moving in the direction of narrowing it down.[123] Another possibility is that the CJEU simply established some kind of pseudo-explanation for not dealing with the issue.

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[119] CJEU, Case C-567/07 *Sint Servatius* [2009] *ECR* I-9021. Among others, the national court asks: '4a. Besides, or in conjunction with, the overriding reasons in the public interest referred to in Article 58 EC [now Article 65 TFEU] and recognised in the case-law of the Court of Justice, can a Member State rely on Article 86(2) EC [now Article 106(2) TFEU] to justify a restriction on the free movement of capital, if special rights have been granted to the undertakings concerned and those undertakings are entrusted with the operation of services of general economic interest? 4b. Do the public interests referred to in Article 58 EC and the overriding reasons in the public interest recognised in the case-law of the Court of Justice have the same content as the general economic interest referred to in Article 86(2) EC? 4c. Does reliance by the Member State concerned on Article 86(2) EC, its contention being that the undertakings to which special rights have been granted perform tasks of general economic interest, have additional weight over and above reliance on public interests as referred to in Article 58 EC and the overriding reasons in the public interest recognised in the case-law of the Court of Justice?' .

[120] CJEU, Case C-567/07 *Sint Servatius* [2009] *ECR* I-9021, para 47.

[121] Ibid. para 44.

[122] In support of this, see e.g. GC, Case T-289/03 *BUPA* [2008] *ECR* II-81.

[123] See in this regard also e.g. van de Gronden 2011.

9.3.4.3 Competition Law

If SSGIs are considered to be NESGIs, they are, in principle, completely out of reach of the competition rules. If SSGIs are considered to be SGEIs, it is of interest to consider how SGEIs have been dealt with by the CJEU in the context of Article 106(2) TFEU as this may be viewed as constituting a kind of exemption.[124]

In the case law, Article 106(2) TFEU has primarily had a role to play as a kind of exemption to the combined reading of Articles 106(1) and 102 TFEU.[125] In a decision as to whether Article 106(2) TFEU can imply 'immunity' to an otherwise unlawful anti-competitive state measure or activity legitimised by such a measure, the CJEU will often apply a two-step-test, possibly supplemented by a third and/or fourth step.[126] Thus, the CJEU might follow the subsequent pattern of argumentation of whether:

(1) a SGEI is entrusted;
(2) the application of the rules on competition obstructs the performance, in law or in fact, of the particular tasks assigned to the undertaking(s);
(3) the principle of proportionality in the strict sense—pursuant to which it shall be examined whether a less anti-competitive measure could reach the same result—is fulfiled; and
(4) the development of trade is not affected to such an extent as would be contrary to the interests of the EU.

It should be emphasised that this is only meant to constitute a simplified picture of the scheme of thinking which the CJEU is likely—but not necessarily—to use. Also, this is not always applied. In other words, derogations may occur, especially because this field of law is still under development and therefore characterised by a relatively high degree of uncertainty and unpredictability.

The steps are applied cumulatively, so that they all, in principle, should be answered in the positive as a condition for 'immunity'. The individual step should, therefore, only be applied if the examination of the previous step leads to a positive result. What has been stated above in Sect. 9.2.1 about SGEIs is of significance to the first step. In many cases, the examination ends after the first two steps. In case the answer to the examination under the second step is positive, the rules of competition will not be applicable in order to condemn the measure in question, etc., unless the CJEU finds it necessary to examine the third or the fourth step, which may lead to another result. However, neither the third nor the fourth

[124] Hereby, an important exemption in competition law, namely Article 101(3) TFEU has been left out of the analysis. See in this regard, for e.g. Mortelmans 2001.

[125] See above in Sect. 9.3.3.

[126] As a condition for applying the test, it is inter alia assumed that an undertaking in the sense of Art. 106(2) TFEU is involved, see further above.

step are applied that often, but if applied and the answers to the relevant questions are in the negative, the measure etc., will be condemned.[127]

For the sake of illustration, reference may be made to *AG2R* again. Here, the application of Article 106(2) TFEU is not very systematic. As explained above in Sect. 9.2.1, regarding the first step the CJEU seems to consider a SGEI as being entrusted. This is not explicitly expressed.[128] Regarding the second step, the CJEU states the following guiding principle:

> [I]t follows from the case-law that it is not necessary, in order for the conditions for the application of Article 106(2) TFEU to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the exclusive rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject, or that maintenance of those rights is necessary to enable the holder thereof to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions…[129]

Furthermore, the CJEU finds that:

> It must, however, be held that, if the transfer clause and, as a result, the exclusive right of AG2R to manage the scheme for supplementary reimbursement of healthcare costs for all undertakings in the French traditional bakery sector were to be set aside, that body, although required under Addendum No 83 to offer cover to the employees of those undertakings on the conditions laid down in that addendum, would run the risk of suffering the defection of low-risk insured parties, who would have recourse to undertakings offering them comparable or better cover in return for lower contributions. In those circumstances, the increasing share of 'bad risks' which AG2R would have to cover would bring about a rise in the cost of cover, with the result that that body would no longer be able to offer cover of the same quality at an acceptable price.
>
> That would *a fortiori* be the position in the case of a scheme which, like that at issue in the main proceedings, is characterised by a high degree of solidarity by reason of, inter alia, the fixed nature of the contributions and the obligation to accept all risks.
>
> Such constraints, which render the service provided by the body concerned less competitive than a comparable service provided by insurance companies not subject to those constraints, argue in justification of the exclusive right of that body to manage such a scheme, without there being any possibility of exemption from affiliation.[130]

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[127] See further e.g. Neergaard 2011b.

[128] In the Opinion of AG Mengozzi of 11 November 2010 in CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], para 104, the understanding is: 'In like manner to the approach adopted by the Court with regard to the supplementary pension scheme at issue in *Albany*, I find that there is sufficient support for the view that the supplementary healthcare scheme managed by AG2R performs an essential social function and, as such, can come under the category of services of general economic interest within the meaning of Article 86(2) EC [now Article 106(2) TFEU].'

[129] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], para 76.

[130] Ibid. paras 77–79.

On this basis, the result becomes that Article 106(2) TFEU implies that the involved measure, in principle, is considered as lawful. In light of *AG2R* being representative of the case law of relevance, it is seen how Article 106(2) TFEU is given a fairly strong impact as an exemption, and in fact taking into account economic considerations.

9.3.4.4 Comparison

It appears as if Article 106(2) TFEU which is of great relevance under the competition rules is a stronger kind of exemption than the traditional possibilities under the free movement rules, and therefore seems to give more leeway for Member States to regulate SGEIs—and therefore also often SSGIs—than the traditional free movement exemptions allow.[131] Also, in opposition to the free movement rules, the chances of economic grounds being accepted are generally considered larger in competition law. In contrast, non-economic interests are generally in competition law considered less likely to be taken into account.[132] It has also been explained that it is not clearly settled whether this provision is applicable under the free movement rules although for e.g. the wording of the provision and certain older case law seems to support such a point of view. The principle of proportionality may have an importance in both areas, but is very well developed in free movement law, and very rudimentary in competition law. Also, in free movement law, the principle of proportionality is very strong in direction of leading to not accepting national measures as lawful.

9.3.5 Summing Up

The above comparison of the two legal regimes—although the analysis has been limited to aspects primarily of interest to SSGIs—seems to confirm the prevailing view that although similarities exist, also asymmetries between free movement and competition law may be pointed out.[133] For example, there seems to exist differences in which and how aims are given weight in each of the two legal regimes. Also, regarding scopes, prohibitions and exemptions, differences have been spotted. As Member States in many cases have to consider EU law in the design of

[131] van de Gronden 2011, p. 150. See however Davies 2009, p. 572, who argues that: 'The overlap between Article 86(2) [now Article 106(2) TFEU] and the existing derogations from free movement is complete. An undertaking that is honestly trying to achieve social goals within the framework of a state-imposed SGEI mission, rather than profiting from protectionism, has little to fear from free movement law in the first place.'

[132] See e.g. Mortelmans 2001, pp. 637 et seq.

[133] All results reached are of course to some extent limited due to the generalisations and estimations which have had to be made.

national social law, they should, therefore, be aware that the ways of thinking are rather different in free movement and competition law.

The more reluctant approach in competition law, especially regarding scope and exemptions, may to a certain degree be explained by the circumstance that the competition law regime, if coming into force, by tradition might be considered to be more dominated by market economics, and the implications thus likely to be invasive in the vulnerable area of social services. Also, it is an area which is not really constructed to a scrutiny of national legislation, but originally largely was developed with a primary eye on the activities of private undertakings. In addition, the competition law regime works in closer relationship to economic theory than the other regimes which may be a reason to explain the development: the understanding of the issues at stake may simply have been better perceived in this area. In contrast, the free movement law regime constitutes an area in which the individuals and their rights are one of the driving forces. Although possible explanations may be suggested, this is not the same as implying that the difference in treatment between the regimes is desirable.[134]

9.4 Conclusions

Generally, the findings demonstrate that there are many difficulties connected with the invention of SSGI as a concept. It may be viewed as having its origin in a conceptual framework originating from the competition law regime.[135] In contrast, it is conceptually more common to speak of social services within the free movement law regime rather than SSGIs, which in this regime still appears as a foreign object.

Due to a kind of 'exportation' to other areas, it is now unavoidable that also the concept SSGI has to operate horizontally and in a universal manner. This is so despite the many very important asymmetries between the two legal regimes which have been pointed out above. The competition law regime and the free movement regime each have a life story, which do not make it all that easy to use the concept horizontally, which then becomes one of the greatest challenges to the area of SSGIs.

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[134] See in the same direction, however regarding health care, for e.g. Szyszczak 2009, p. 192.

[135] See in the same direction e.g. Fiedziuk 2011, p. 235: 'The existing qualification problem is compounded by the fact that an attempt to design a horizontal definition of non-economic services of general interest relying on the Court's existing case law could be rather risky given the fact that the economic/non-economic distinction is understood differently by the Court in EU competition law and in EU internal market law. For instance, in the public health care services sector, Member States are afforded greater flexibility by the Court when it comes to the application of EU competition rules, whereas in the free movement disputes the Court endorses individual economic rights, even though they have many times been claimed to undermine the delivery of a universal service.'

If the concept SSGI is to be used, it is likely to make more sense if one distinguishes between *economic* SSGIs and *non-economic* SSGIs and thereby designating whether it is a social service belonging to the offspring of SGEI or of NESGI in the conceptual family. It may also be of importance to specify whether this characteristics concerns free movement or competition law, taking into consideration the long line of case law having defined these areas of law.[136] It is legally needed eventually to have defined exactly what qualifies a social service to be a SSGI.[137]

Also, because the concept SSGI is meant to apply horizontally, it may have the consequence that either the more reluctant treatment in competition law or the more expansive approach in free movement law will 'win'. On the surface, competition law is a harder regime, but in fact more kinds of activities/measures—at least in this area—are held out of its scope and the exemption in Article 106(2) TFEU seems very strong once the formal criteria have been fulfilled (e.g. the requirement of an enactment of a SGEI). In contrast, in free movement law, the regime is on the surface softer especially due to the many possibilities of exemptions; yet more services are included in the scope, more end up being prohibited, more cannot be justified and the principle of proportionality is not applied that gently in favour of Member States' measures. Also, the protection through the principle of solidarity may be viewed to be stronger in the competition law regime, than what may be observed in the free movement regime.[138]

Economic SSGIs are likely to find protection in Article 106(2) TFEU in competition law, but 'social services' will not necessarily be protected in free movement law. For instance, it is not certain at all that Article 106(2) TFEU can be used as an exemption in free movement law. The prevailing asymmetries could be diminished to some degree, if Article 106(2) TFEU explicitly could be invoked in the free movement universe. Support for such an approach may, for example, be held to be found in the greater constitutional role given to SGEIs now (Article 14 TFEU, Article 36 of the Charter of Fundamental Rights, and the Protocol 26 of the Treaty of Lisbon). This would require further development of the second step in the pattern of argumentation outlined above in Sect. 9.3.4, so that the term: 'the rules on competition', should be substituted by those of relevance in a given situation.

Altogether, it should be acknowledged that almost all services can be provided by the market, so the issue much rather becomes what kind of services do we want—which do not we want—to immunise from the influence of the EU market

[136] In the same direction, see van de Gronden 2011, p. 125.

[137] Also see e.g. SEC (2011) 397, p. 34, where it is stated that: 'A number of Member States and many other stakeholders thus ask the Commission for further guidance on the general criteria for distinguishing between economic and non-economic activities for the purposes of applying the state aid rules and for concrete examples illustrating the application of these criteria'.

[138] See further Neergaard 2010. Concerning solidarity in EU law, also see e.g. Barnard 2005, Dougan and Spaventa 2005, Ross and Borgmann-Prebil 2010.

economic ideology.[139] Care has to be taken that the current rules become better targeted to take the specificities of social services into account.[140]

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[139] See in this regard for e.g. Fiedziuk 2011, p. 234, who states: '[F]rom an economist's understanding, any service always and indistinguishably appears to be per se economic'.

[140] In the same direction, it has been expressed: 'The real issue at stake that we feel will condition all the others, will be the place and the commitment of each player within… the 'mixed economy of social services' and the appropriate responses to be applied so that the values and principles at the heart of social services are fully respected.' See Belgian Presidency of the Council of the European Union, 3rd Forum on Social Services of General Interest, p. 9.

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Chapter 10
Public Distortions of Competition: The Importance of Article 106 TFEU and the State Action Doctrine

Piet Jan Slot

Abstract This chapter examines the potential distortions of competition that may arise when governments seek to promote SSGIs. This is becoming an important issue as many social services are being transferred to competitive market structures. A central research question is the extent to which governments can contribute to the optimal functioning of SSGIs. The chapter focuses upon Article 106 TFEU and the State Action Doctrine (SAD), but also discusses the application of the free movement rules.

Contents

P. J. Slot (✉)
Faculteit Rechtsgeleerdheid, Europees Recht, Leiden University, Leiden, The Netherlands, Beulingstraat 2,1017BA, Amsterdam, The Netherlands
e-mail: pieterjanslot@gmail.com

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10.1 Introduction

The theme of this book is: The role of Social Services of General Interest (SSGIs) in EU law: New Challenges and Tensions. The theme of my contribution is: 'Public Distortions of Competition—The Importance of Article 106 TFEU and the State Action Doctrine.' For the purposes of this contribution it is perhaps useful to be clear about the terminology. The European Union (EU) Commission in its Communication of 23 March 2011 makes a distinction between Services of General Interest (SGIs) as a general concept and those that are economic in nature, the Services of General Economic Interest (SGEIs). In addition, it distinguishes between Social Services of General Interest (SSGIs) which can be both economic (SGEIs) and non-economic in nature.[1] The Commission does not explain the difference between SGIs and SSGIs. I will, in this contribution only, refer to SSGIs and SGEIs, whereby SSGIs refers to all services and SGEIs only to economic services.

Governments of EU Member States aim to promote SSGIs, this aim being reflected in national policies. And since the Treaty of Lisbon's entry into force, the role of SSGIs is spelt out more prominently than before in several provisions of primary EU law. But the eminent role of SSGIs was not always self-evident in the EU. The precursor of the present Article 14 TFEU addressing SGEIs, was inserted in the EC Treaty by the Amsterdam Treaty.[2] As for Member States, one can recall the anti-social services policies of the Thatcher government in the UK in the 1980s. In this contribution, I look at distortions of competition that may arise when governments seek to promote SSGIs. And as the case law of the CJEU shows, SSGIs or SGEIs may also be established by labour unions or professional organisations and subsequently be made compulsory by governments. Such actions may also lead to an infringement of competition by governments.

This leads to the following research question: to what extent can governments contribute to the optimal functioning of SSGIs? However, since, as it will be discussed below, the rules of Article 106 TFEU or the EU doctrine of State Action only apply when the relevant activities are carried out by undertakings, this question will necessarily only be addressed to SGEIs. Therefore, the research question is to what extent the rules of Article 106 TFEU or the EU doctrine of State Action promote SGEIs or hinder their functioning. In order to answer this

[1] See speech by Commission Vice-President J. Almunia, 'Only government funding of this latter category of public services (services that are economic in nature) is subject to EU competition law and, more specifically, to the control of State aid,' Press Release, 'SGEI reform and the application of competition rules to the financial sector: themes for dialogue with the European Parliament,' SPEECH/11/197. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/197&format=HTML&aged=0&language=EN&guiLanguage=en (last accessed on 11 October 2011). See also Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Reform of the EU State Aid Rules on Services of General Economic Interest*, COM(2011) 146 final, 23 March 2011, p. 3.

[2] Article 16 EC. See Ross 2000, p. 22.

question I first (briefly) identify the general perspectives of SSGIs. That perspective in turn has, of course, an influence on the position of SGEIs as well. Since these perspectives are the subject of other chapters of this book, for the purpose of this contribution I have assumed what these general perspectives are and gleaned these from Article 14 TFEU, Articles 35, 34 and 36 of the Charter of Fundamental Rights of the EU, the case law of the EU Courts, the Services Directive 2006/123[3] and Commission documents.[4]

This book takes SSGIs as its point of departure and notes that recently many social services have been transferred to competitive market structures. In this context, it is important to note that the focus of the book is to analyse and indicate the implications of this changing role of SSGIs, i.e. their transformation into SGEIs.

Section 10.2 of this chapter discusses significant changes in provisions of primary EU law resulting from Member States wishing to promote the interests of SGEIs in national policy. This section is devoted to the rules on SGEIs after the Treaty of Lisbon. It is important to note that EU law leaves Member States free to decide which activities of general interest they will provide themselves or through entities they control (SSGIs not provided by undertakings) and those that will be provided in one way or another through the market (SGEIs). In the latter case, the entities providing such services will be considered undertakings. This distinction is fundamental for the question which EU rules apply, and is like a continental divide. The Sect. 10.3 asks how SSGIs and SGEIs are established. Since SGEIs are provided by undertakings, the Sect. 10.4 of this chapter discusses the concept of undertaking. This section is brief, as this concept is the subject of another chapter of this book. The Sect. 10.5 looks at the question whether the rules on free movement apply to SGEIs. The Sect. 10.6 discusses how Member States can affect the functioning of undertakings providing SGEIs. The Sect. 10.7 is devoted to the role of Article 106 TFEU in relation to the provision of SGEIs. The Sect. 10.8 discusses the State Action Doctrine and analyses whether this rule of EU law restricts Member States in their efforts to provide SGEIs. I draw some conclusions in Sect. 10.9.

10.2 SGEIs in EU Law After the Treaty of Lisbon

With the entry into force of the Treaty of Lisbon, the role of SGEIs in EU law has been considerably strengthened. As a result, the powers of the Member States are strengthened accordingly. This has happened in two ways. First, the text of Article

[3] 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 376/36-68.

[4] See e.g. COM(2011) 146 final; Commission, *Commission Staff Working Paper, The Application of EU State Aid Rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation*, SEC(2011) 397, 23 March 2011.

14 TFEU has been amended to include legislative powers for the EU to establish principles and set conditions, particularly economic and financial conditions, which are intended to enable SGEIs to fulfil their missions.

The full text of Article 14 TFEU now reads as follows:

> Without prejudice to Article 4 of the Treaty on the European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

The insertion of a reference to Article 4 TEU in this provision is new. I assume that Article 4(1) TEU is the guiding provision for the interpretation of Article 14 TFEU. It states that:

> In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

According to Article 5 TEU:

> The limits of Union competence are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

The reference to these principles seems to be designed to accompany and to some extent counterbalance the attribution of competence to the EU. The latter is also expressed by the words in the last sentence of the Article 14 TFEU: '… without prejudice to the competence of Member States.' Notwithstanding these qualifications, it is important to note that Article 14 TFEU does allow the Union to set principles and conditions for SGEIs. Previously, such competence was often based on Article 114 TFEU (formerly Art. 95 EC), as can, for example, be seen in the Electricity and Natural Gas Directives. These powers are subject to the case law of the CJEU—the *Tobacco* judgments—therefore, they could only be used if and when there was a genuine obstacle to free movement.[5] It is likely that the

[5] The CJEU in CJEU, Case C-376/98 *Germany* v. *European Parliament and Council (The Tobacco Advertising Directive)* [2000] *ECR* I-8419, held in paras 106, 107 that:

'In examining the lawfulness of a directive adopted on the basis of Article 100a of the Treaty, the Court is required to verify whether the distortion of competition which the measure purports to eliminate is appreciable (Titanium Dioxide, cited above, para 23) [CJEU, Case C-300/89 *Commission* v. *Council* [1991] *ECR* I-2867].

In the absence of such a requirement, the powers of the Community legislature would be practically unlimited. National laws often differ regarding the conditions under which the activities they regulate may be carried on, and this impacts directly or indirectly on the conditions of competition for the undertakings concerned. It follows that to interpret Articles 100a, 57(2) and 66 of the Treaty as meaning that the Community legislature may rely on those articles with a view

legislative powers of the Union under Article 14 TFEU are similarly circumscribed.

The new text of Article 14 TFEU, nevertheless, makes is very clear that the Member States remain in the driving seat. They remain competent to establish and define SGEIs.

The other change brought about by the Treaty of Lisbon 2009 is the incorporation of the Charter of Fundamental Rights in the primary law of the EU. The Articles 34, 35 and 36 of the Charter are directly relevant for our topic. Article 34 underlines the importance of social security and social assistance. Article 35 states that everyone has the right of access to preventive health care. These two articles spell out the importance of SSGIs, however, they do not refer to SGEIs. This is different for Article 36 of the Charter, which reads:

> The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

When read together, these Articles of the Charter, of course, underscore the importance of SSGIs and implicitly also of SGEIs. Nevertheless, it is important to take the new provisions on competences in Articles 4, 5 and 6 TFEU into account. Social policy is mentioned in Article 4(2)(b), thus it is subject to shared competence. Health care is mentioned in Article 4(2)(k), as well as Article 6. Obviously, the competences listed in Article 4 allow for greater EU involvement than the competences listed under Article 6. Nevertheless, the free movement rules of the Treaty apply to all policy areas.

It is difficult to see what the contribution of Article 36 of the Charter is in view of the general Treaty exemptions to the free movement rules, the mandatory requirements and Article 106(2) TFEU.

As noted in the Introduction, the Treaty of Lisbon 2009 has emphasised the role of SGEIs. This has happened through the introduction of new provisions, but also because the competences of the Union and the Member States have been more clearly delineated than under the old EC Treaty rules. This confirms a trend that started in the judgments of the CJEU in the electricity cases.[6]

(Footnote 5 continued)
to eliminating the smallest distortions of competition would be incompatible with the principle, already referred to in para 83 of this judgment, that the powers of the Community are those specifically conferred on it'.

In the sequel to this judgment, CJEU, Case C-380/03 *Germany* v. *Parliament and Council* [2006] *ECR* I-11573 the CJEU accepted a subsequent version of the directive that left out the criticised elements.

[6] CJEU, Case C-157/94 *Commission* v. *Netherlands* [1997] *ECR* I-5699; CJEU, Case C-158/94 *Commission* v. *Italy* [1997] *ECR* I-5789; CJEU, Case C-159/94 *Commission* v. *France* [1997] *ECR* I-5815; CJEU, Case C-160/94 *Commission* v. *Spain* [1997] *ECR* I-5865.

10.3 How Are SSGIs and SGEIs Established?

Normally, SSGIs and SGEIs are created by government when it considers the provision of specific services to be of special public interest. The government will do this by laying down rules establishing such services or by other forms of governmental action. Governments may want to provide social services themselves or through organisations that are controlled by them or by regional or local government. For example, healthcare services referred to in Article 35 of the Charter are in several Member States provided by public institutions. Governments may also have recourse to mixed private and public institutions. Governments do not always draw a clear line between provision of services through a public or private institution. A good example is the *AOK* case discussed in the next section. Another example is the French *AG2R* health insurance scheme (discussed below). As was indicated in Sect. 10.1 above, SGEIs are SSGIs that are performed by the private sector, i.e. undertakings. Since the distinction between undertakings and other governmental institutions is very important in EU law, I discuss the concept of undertaking in the next section.

Normally, SGEIs are created by government, by adopting rules establishing SGEIs, or by other forms of governmental action. Private undertakings cannot, themselves, assume public functions or more precisely, claim the benefit of Article 106(2) TFEU. It is possible that collective agreements create an SGEI. This was the situation in the *AG2R* case where the CJEU discussed the status of a collective agreement concerning a healthcare insurance scheme.[7] The CJEU found that the agreement did not fall within the scope of Article 101 TFEU because according to its case law collective agreements fall outside the scope of the competition rules.[8] Nevertheless, the Court subsequently found that AG2R may be considered an undertaking. It left the final decision on this issue to the referring national court. An important conclusion from the case law of the CJEU is that collective agreements may create SGEIs.

As observed above, normally some form of governmental action is required to establish an SGEI. Such an action does not always have to be explicit nor does it have to take the form of legislation. In *Ijsselcentrale* the Commission accepted that the electricity company was entrusted with a service of general economic interest even though there was no official governmental act to prove this.[9] Some Directives

[7] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr].

[8] Ibid. para 35.

[9] Commission, Commission of 16 January 1991, 91/50/EEC, Relating to a Proceeding under Article 85 of the EEC Treaty (now Article 101 TFEU) (*Ijsselcentrale and others*), *OJ* 1991 L 28/32.

require Member States to designate particular services as SGEIs and to notify these to the Commission. Examples are found in Article 3(2) of the Electricity Directive[10] and in Article 3(2) of the Gas Directive.[11]

10.4 The Case Law of the CJEU on the Concept of Undertaking

This section examines the case law of the CJEU on the concept of undertaking. This examination demonstrates that it is for the Member States to decide whether or not to provide certain goods or services through undertakings, i.e. the market, or through governmental institutions. It is for the purposes of this contribution not necessary to examine the full case law of the CJEU; a few highlights will suffice.[12]

The concept of undertaking has for a long time not been raised in competition law cases. It was only in the late 1980 and early 1990s that this issue came to the fore, when the liberalisation efforts started in earnest. The first case where this concept was put to the test of the Court was *Höfner*.[13] In this judgment, the CJEU held that the Bundesanstalt für Arbeitsvermittlung was an undertaking. This agency had been given the monopoly of providing employment services. This position was strengthened by sanctions: contracts concluded by undertakings other than the agency were null and void. Nevertheless, the agency did not provide employment services for executives searches, because such services were considered to be of a special nature. Therefore, the German Government did not enforce the monopoly for these special services and allowed a market to develop. The *Poucet and Pistre* judgment[14] provides further clarification of the relevant criteria.

In particular, the *AOK* judgment[15] is a good case to demonstrate how and on the basis of which criteria, the government can decide whether or not to reserve certain activities for itself or to provide those services through the market. The Opinion of AG Jacobs in this case provides in paras 25–43 a very useful discussion of the relevant criteria on the basis of which the CJEU decides whether or not the activity is carried out by an undertaking. In summary, these are, according to AG Jacobs, the following:

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[10] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009, Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 2003/54/EC, *OJ* 2009 L 211/55.

[11] Directive 2009/73/EC of the European Parliament and of the Council 13 July 2009 Concerning Common Rules for the Internal Market in Natural Gas and Repealing Directive 2003/55/EC, *OJ* 2009 L 211/94.

[12] See also Chap. 11 in this volume, by Heide-Jørgensen.

[13] CJEU, Case C-41/90 *Höfner and Elser* [1991] *ECR* I-1979.

[14] CJEU, Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] *ECR* I-637.

[15] CJEU, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] *ECR* I-2493.

> – The Court's general approach… can be described as functional… it focuses on the type of activity performed rather than on the characteristics of the actors which perform it, the social objectives associated with it, or the regulatory or funding arrangements to which it is subject in a particular Member State.
> – The status of actors in national law is not therefore relevant when assessing whether they amount to undertakings in Community law. Hence, no weight can be attached to the fact that in German law sickness funds are classified as bodies subject to public law or as part of the administration of the State. Likewise, the regulatory or funding arrangements applied by a Member State to a given field of activity will not determine the applicability of the Community competition rules. Such choices may themselves fall to be assessed under those rules. Nor will the existence of social or general interest objectives associated with a given field of activity deprive it of its economic character. Such objectives may, however, supply a justification under Article 86(2) EC for arrangements which would otherwise infringe Community competition.[16]

Some schemes of this type have been held by the Court as not involving economic activities and therefore fall outside the scope of the EU competition rules.

It is important to note that the distinctive criteria that have been raised in the judgments before the CJEU are the result of deliberate governmental decisions on how to provide certain services and how to organise them. Therefore, what evinces from this brief survey of the relevant case law is an important point for our topic; it is not whether the balance has been drawn correctly by the CJEU since there will always be differences of opinion. The point is that Member States can exercise their (sovereign) powers on how to supply goods or provide services that they deem to be of general interest. Governments can supply or provide such services themselves, through organisations under their control or on the market through undertakings.

10.5 Free Movement

A similar point can be made about the role of governments as owners of undertakings. The Treaty is indifferent to public or private ownership. But once a Member State has decided to go down the route of privatisation, it must play by the free movement rules. In the 'golden shares' cases the CJEU clearly ruled that Article 345 TFEU has no role to play as a justification once the Member State has decided to produce goods and provide services through the market. The Court clearly rejected the major/minor argument forwarded by Advocate-General Ruiz-Jarobo Colomer. The Advocate General suggested that if it is allowed for a state to retain full ownership of certain activities, the state should also be allowed to partly control such activities through such devices as golden shares. The Court

[16] Opinion of AG Jacobs of 22 May 2003 in CJEU, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] *ECR* I-2493, paras 25–28.

clearly rejected this argument. Article 345 TFEU does not justify restriction of free movement. However, it was observed that as a result of the golden share case law, Member States might be more reluctant to privatise. The CJEU seemed to have been aware of such a risk. Of course, Member States can have recourse to the usual exceptions contained in the Treaty and the rule of reason.

The judgment *Commission* v. *Belgium*[17] provides a good illustration of what constitutes a justification. It has been discussed whether Article 106(2) TFEU provides an additional justification. In the *Servatius* judgment,[18] the CJEU declined to answer the question whether Article 106(2) TFEU has an additional function over and above the justifications of the free movement rules. In this context, it is worth recalling that the Court has always been willing to accept fresh justifications under the free movement rules.[19] In any event it would seem that the function of Article 106(2) TFEU for providing additional justifications is limited.

Furthermore, in the harmonised sectors such as transport, energy and telecommunications, room for independent action by Member States to regulate SGEIs may be more limited. Nevertheless, secondary legislation usually provides for guarantees to secure specific public interests. Harmonising how Member States can pursue public interest objectives in these sensitive policy areas has avoided the pursuit of the diverging public interest by each Member State, through Article 106(2) TFEU. Where there is no harmonisation (the pharmaceutical sector) or harmonisation efforts failed (e.g. in the sector of port services), this problem remains.

10.6 How Can Member States Affect the Functioning of Undertakings Providing SGEIs?

The basic rule is, of course, that Member States must respect the free movement rules and the competition rules. This section concentrates on the effect of the competition rules. Two norms are relevant: first, Article 106 TFEU and second, the norm of Protocol No. 27 on the internal market and competition,[20] Article 4(3) TEU and Articles 101 and 102 TFEU [formerly Articles 3(1)(g), 10, 81 and 82

[17] CJEU, Case C-503/99 *Commission* v. *Belgium* [2002] *ECR* I-4809.

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

[19] The *Servatius* judgment provides yet another example. In para 29 of this judgment, the CJEU accepted that 'national rules may restrict the free movement of capital in the interest of objectives directed at resisting pressure on land or at maintaining, as a town and country planning measure, a permanent population in rural areas.' Ibid.

[20] At first sight it may seem that Article 3(1)(g) is now replaced by Article 3(1) TFEU. However, this article assigns exclusive powers to the Union. Thus, it only allocates competences and no longer establishes a general principle. The latter is contained in Protocol 27 to the Lisbon Treaty, which has the same status in the Union law as the two Treaties. On this Protocol see Barents 2009, p. 123; Lane 2009, p. 167.

EC]—the 'State Action Doctrine,' or 'SAD.' It should be noted that the CJEU in its recent judgment in *AG2R* only referred to Article 4(3) TEU in conjunction with Article 101 TFEU.[21] Both norms concern government conduct in relation to competition but their focus is somewhat different. The SAD is, on the one hand, broader than the norm of Article 106, and at the same time more limited. The SAD is broader because it addresses the conduct of Member States vis-a-vis all undertakings. It is more limited because it only concerns governmental actions that are contrary to the competition rules. Article 106 TFEU is more limited than the SAD, because it deals with only undertakings to which Member States have granted special or exclusive rights or undertakings entrusted with the operation of services of general economic interest but extends to all Treaty rules.[22] On the other hand, it is broader than the SAD because it addresses actions that are contrary to all rules of the Treaty. In the context of this contribution, dealing with distortions of competition, the latter difference is not relevant. As *AG2R* shows, both norms can be relevant for the purposes of our topic. In this judgment, the Court assessed the agreements setting up the healthcare organisations under Article 4(3) TEU and the fund; that is, the institution running the healthcare services under Article 106 TFEU in combination with Article 102 TFEU.[23]

I argue in this contribution that both Article 106 TFEU and the SAD give Member States considerable discretion in establishing and shaping SGEIs. Since the recent judgment of the Court in *AG2R* provides a good example and summary of the relevant rules, I will illustrate the issues with the help of this judgment.

10.7 Article 106 TFEU

Once it is established that certain SSGIs are entrepreneurial activities and therefore are to be considered SGEIs, Article 106 TFEU comes into the picture.[24] This is a complex Article. Article 106(1) TFEU is addressed to Member States, prohibiting them from enacting or maintaining in force measures contrary to the rules of the Treaty, in particular Article 18 TFEU (the non-discrimination prohibition) and Articles 101–109 TFEU (the competition rules). Article 106(2) TFEU may exonerate certain governmental actions that would otherwise be incompatible with Article 106(1) TFEU. It may also exonerate the conduct of undertakings entrusted with the operation of SGEIs that would otherwise infringe Article 101 TFEU or Article 102 TFEU.

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[21] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], para 37.

[22] For the purpose of this contribution I use the term 'Article 106 undertakings' as a shorthand.

[23] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], paras 24, 25.

[24] Ibid. para 66.

10.7.1 Article 106(1) TFEU

As the CJEU reiterated in *AG2R*, Article 106(1) does not prohibit the mere creation of dominant position:

> 68 … the mere creation of a dominant position through the grant of special or exclusive rights within the meaning of Article 106(1) TFEU is not in itself incompatible with Article 102 TFEU. A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses (see Höfner and Elser, paragraph 29; Albany, paragraph 93; Brentjens,' paragraph 93; and Drijvende Bokken, paragraph 83).
> 69 Such an abusive practice contrary to Article 106(1) TFEU exists where, in particular, a Member State grants to an undertaking an exclusive right to carry on certain activities and creates a situation in which that undertaking is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind (see, to that effect, Höfner and Elser, paragraph 31, and Pavlov and Others, paragraph 127).

The Court subsequently applied these two criteria in the *AG2R* case. It found first that the restriction of competition derived directly from the exclusive right conferred upon AG2R, thus, the first criterion was met. As to the second criterion, it found that there was no information in the documents supplied to it that the services supplied by AG2R did not meet the requirements of the undertakings concerned, the *Höfner and Elser* criterion. Since it was uncertain whether the second condition would exonerate the government from the norm of Article 106(1) according to case law and in view of the fact that the exclusive right might restrict competition, the Court went on to assess whether Article 106(2) TFEU applied in the remainder of the judgement.

10.7.2 Article 106(2) TFEU

Article 106(2) allows Member States to designate what services they want to single out as SGEIs. This characterisation may subsequently give rise to special treatment. Such special treatment consists of a relaxing of the rules of Articles 101 and 102 TFEU insofar as their application would obstruct the performance, in law or in fact, of the particular tasks assigned to them.

The case law of the CJEU shows that governments enjoy a wide margin, first, in laying down and defining public service obligations. A good example of this discretion is again provided in paras 76–78 of *AG2R*.[25] According to the CJEU:

[25] Although in *AG2R* the undertaking was the product of a collective agreement and not a governmental action, there is no doubt that the discretion applies to SGEIs that are created by governments.

> … it follows from the case law that it is not necessary… that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the exclusive rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject, or that maintenance of those rights is necessary to enable the holder thereof to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions…

The Court observed that without the exclusive right and the transfer clause the undertaking:

> … would run the risk of suffering the defection of low-risk insured parties, who would have recourse to undertakings offering them comparable or better cover in return for lower contributions. In those circumstances, the increasing share of 'bad risks' which AG2R would have to cover would bring about a rise in the cost of cover, with the result that that body would no longer be able to offer cover of the same quality at an acceptable price. That would a fortiori be the position in the case of a scheme which… is characterised by a high degree of solidarity by reason of, inter alia, the fixed nature of the contributions and the obligation to accept all risks.

The CJEU concluded in para 80 that:

> … the annulment of a transfer clause… could have the result of making it impossible for the body concerned to accomplish the tasks of general economic interest which have been assigned to it under economically acceptable conditions.

Furthermore, it should be noted that Article 106(2) TFEU allows governments a considerable margin to set the relevant parameters, as was demonstrated in the 'electricity cases.'[26] In these judgments the Court upheld the import restriction laid down by the government, even though the Member State subsequently abolished it. In the *Chronopost* judgment the Court held that in order to determine whether or not the level of compensation was acceptable under Article 106(2) TFEU, the relevant cost parameters of the public sector should be taken as a yardstick, and not those of the private sector.[27] In the *Altmark* ruling the Court ruled that under strict

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[26] CJEU, Case C-157/94 *Commission* v. *Netherlands* [1997] *ECR* 1-5699; CJEU, Case C-158/94 *Commission* v. *Italy* [1997] *ECR* I-5789; CJEU, Case C-159/94 *Commission* v. *France* [1997] *ECR* I-5815; CJEU, Case C-160/94 *Commission* v. *Spain* [1997] *ECR* I-5851; CJEU, Case 189/95 *Franzén* [1997] *ECR* I-5909.

[27] CJEU, Joined Cases C-88, 93 and 94/01 P *Chronopost SA and others* v. *Commission* [2003] *ECR* I-6993. In para 34 the Court held: 'La Poste is entrusted with a service of general economic interest within the meaning of Article 90(2) of the EC Treaty (now Article 86(2) EC) (see Case C-320/91 Corbeau [1993] *ECR* I-2533, para 15). Such a service essentially consists in the obligation to collect, carry and deliver mail for the benefit of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar conditions as to quality.' In para 41 the CJEU, held that: 'In the light of all the foregoing considerations, the Court of First Instance erred in law in interpreting Article 92(1) of the Treaty as meaning that the Commission was not entitled to determine whether there was aid to SFMI-Chronopost by reference to the costs borne by La Poste but that it should have checked whether the payment received by La Poste 'was comparable to that demanded by a private holding company or a private group of undertakings not operating

conditions compensation for the fulfilment of public service obligations does not constitute state aid.[28] Subsequently, the Commission adopted a Decision based on Article 106(3) TFEU on the application of Article 106(2) TFEU to state aid in the form of public services compensation granted to certain undertakings entrusted with the operation of services of general economic interest.[29] The Decision deals with cases where the *Altmark* criteria have not been met. The Commission gave further rules in a framework that addresses situations that do not fall within the scope of the Decision. Contrary to the rules of the Decisions, compensation is not exempt from notification.[30]

Summarising the above, it can be observed that on top of the possibility to reserve certain activities totally for the government, Article 106 TFEU provides considerable additional discretion for governmental control of privately run SGEIs.

As far as the undertakings that come within the scope of Article 106(2) TFEU are concerned, the provision allows them a considerable margin of operation that follows from the cases discussed above, the 'electricity cases' and *Chronopost*. Nevertheless, the margin of discretion for undertakings may be smaller than the one for governments.[31]

The very fact that governments have an ample discretion also means that there may considerable differences in the way Member States define, establish and protect their public interests. If such differences lead to distortions of competition, harmonisation is called for. This has happened in some areas where safeguarding the public interests is high on everybody's agenda, e.g. energy, telecoms and transport. These are also areas where the markets are clearly broader than that of a single Member State. Such harmonisation will be more difficult to achieve in areas where that is not the case.[32] In these areas, Member States will be less willing to agree to harmonisation.

(Footnote 27 continued)
in a reserved sector, pursuing a structural policy—whether general or sectorial—and guided by long-term prospects.'

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

[29] Commission, *Commission Decision of 28 November 2005*, C(2005) 2673 *on the Application of Article 86(2) of the EC Treaty to State Aid in the From of Public Service Compensation Granted to Certain Undertakings entrusted with the Operation of Services of General Economic Interest*, *OJ* 2005 L 312/67.

[30] *Community Framework for State Aid in the Form of Public Service Compensation*, *OJ* 2005 C 297/4. [Eds: The Framework and Decision were revised after this chapter was completed and are discussed in Chap. 13 by Szyszczak].

[31] See Slot 1998, pp. 1183–1203.

[32] An example could be the public water supply.

10.8 The State Action Doctrine (SAD)

Governmental action relating to SGEIs will normally be assessed by the rules of Article 106 TFEU. However, governmental action may favour private action incompatible with the competition rules. That may be the case when such rules establish quasi SGEIs or when they concern other measures relating to SGEIs. Such measures may, in exceptional cases,[33] fall foul of the SAD. This doctrine was first propounded by the CJEU in its *Inno-ATAB* judgment.[34] The Court did so in response to preliminary questions. It held that:

> … the Treaty imposes a duty on member states not to adopt or maintain in force any measure which deprive that provision [Art. 86 EC] of its effectiveness. […] Likewise, Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles 85–94 of the Treaty.[35]

In the *Van Eyke v. Aspa* judgment, the Court added a second test with the words:

> … or to deprive its own legislation of its official character by delegating to the private traders responsibility for taking decisions affecting the economic sphere.[36]

In the aftermath of this judgment a discussion was held in the literature whether or not the *Van Eyke v. Aspa* formula should be extended to include situations in which government conduct had the effect of distorting competition without there being a prior conduct by private parties or without legislative competence being transferred to the private sector. Or put differently, whether legislation could also be considered contrary to Articles 3(1)(g), 10, 81 and 82 EC when it made anti-competitive behaviour by undertakings superfluous.[37] Certain types of price regulation by governments were given as an example. These arguments were discussed before the Court in *Meng*,[38] *Ohra*[39] and *Reiff*.[40]

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[33] This could be the case when there is no clear governmental action bestowing such a task on the undertaking. Another situation could be where the services provided by the undertaking cannot be considered exclusive or special rights. See e.g. CJEU, Case C-35/96 *Commission* v. *Italy (CNSD)* [1998] *ECR* I-3831.

[34] CJEU, Case 13/77 *GB-Inno-BM* v. *ATAB* [1977] *ECR* 2115.

[35] Ibid. paras 31 and 33.

[36] CJEU, Case 267/86 *Van Eyke* v. *Aspa NV* [1988] *ECR* 4769, para 16.

[37] Wainwright and Bouquet 2003, p. 544.

[38] CJEU, Case C-2/91 *Meng* [1993] *ECR* I-5791.

[39] CJEU, Case C-245/91 *Ohra* [1993] *ECR* I-5851.

[40] CJEU, Case C-185/91 *Reiff* [1993] *ECR* I-5801 Reich 1994, pp. 459–492. There was an extensive discussion in the CJEU on the desirability of a broad norm (outlawing all state legislation with an anti-competitive effect) versus a more limited norm (action prescribing, encouraging or reinforcing anti-competitive agreements) as is evidenced in the rapport d'audience of the *Meng* case (CJEU, Case C-2/91 *Meng* [1993] *ECR* I-5791). The discussion was reopened after a first round with the Opinion of AG Tesauro of 14 July 1993 in CJEU, Case

In the procedure, before these three cases, six questions were asked to the parties and the 10 intervening Member States. The questions and the answers by the parties and governments can be found in the report for the hearing of judge rapporteur Jolliet in *Meng* and *Ohra*. As the reports for the hearing cannot be found on the website of the case law of the CJEU but only in the original ECR version of the judgments, it may be useful to cite the questions in full. The questions summarise the discussion about the extension of the SAD doctrine at that time very well.

The Court asked:

First question

> Since 1985 (see the Fifteenth Report on Competition Policy, Brussels §985, pp. 100 to 102) the Commission has maintained the view that in order to comply with the spirit of Article 85 Member States must refrain solely from the following:
>
> – requiring, encouraging or facilitating the conclusion of prohibited agreements;
> – reinforcing the effects of such agreements by extending them to undertakings which are not party to them;
> – adopting public measures restricting competition for the specific purpose of enabling undertakings to escape the effects of Articles 85 and 86, when there is no public interest to be shown for it.
>
> What measures fall within the third category referred to above? Do they include the measures at issue?

Second question

> What are the reasons justifying the distinction drawn by the Commission between cases where national rules reinforce an existing agreement and those where rules with the same content are adopted without having been preceded by an agreement.

The third question

> If a national measure having the same effects as an agreement which may have been concluded between undertakings on the same subject matter must be regarded as unlawful, what kinds of existing rules may be regarded as incompatible with Article 3(f), the second paragraph of Article 5 and Article 85 of the Treaty?

The fourth question

> In that context, how are rules which fall under Article 3(f), 5 and 85 to be distinguished from those which fall under Articles 30 and 59?

The fifth question

> a. The parties to the main proceedings, the Member States and the Commission are asked to state their views on whether rules contrary to Articles 3(f), 5 and 85 of the Treaty may be justified, and on the criteria which may be applicable for that purpose. Could the Court refer in that connection to the grounds set out in Article 85(3), or take into account that overriding requirements of the general interest the significance of which it has recognized in relation of Article 30 and 59?

(Footnote 40 continued)
C-2/91 *Meng* [1993] *ECR* I-5751, followed by a second round with seven questions to the governments and a second opinion.

b. Where applicable, what would be the considerations pertaining to the general interest which could be relied upon in order to justify the national measures in question?

The sixth question

> In its judgment of 13 December 1991 in RTT (Case C-18/88 [1991] ECR I-5941, paragraph 20) the Court stated that Article 90(1) 'prohibits Member States from placing, by means of legislation, rules or administrative provisions, public undertakings and undertakings to which they accord special exclusive rights in a situation in which those undertakings could not place themselves on their own initiative without breaching the provisions of Article 86.
>
> Does that judgment have any consequences as regards the assessment of Member States' legislation concerning private undertakings which do not enjoy special or exclusive rights [Article 3(f), second paragraph of Article 5 and Article 85 of the Treaty]?

The answers supplied by the parties, the Commission and the Member States' governments made it very clear that all of them except, of course, the claimants before the national courts were opposed to any extension of the norm. Thus, the SAD doctrine was not further developed into a full effects test. Henceforth, it is clear that governments will only in exceptional cases be found to have introduced or maintained in force measures, whether legislative or regulatory, which may render ineffective the competition rules.[41]

It is important to point out that for the SAD to apply it is not sufficient that some activities are carried out by entities that are considered undertakings. It should be remembered that it is also necessary that such actions are actually infringing Article 101(1) TFEU. This demonstrated by the *Pavlov* judgment[42] where the actions by private parties that qualified as undertakings did not fall under the prohibition of Article 101(1). The CJEU ruled that:

> … a request by the members of a profession for membership to be made compulsory cannot constitute an infringement of Article 85(1) of the Treaty.[43]

Consequently, the Court held that a decision by the Member State in question to make membership of such a fund compulsory for all members of the profession is not contrary to Articles 4(3) TEU and 101 TFEU.

In addition, it should be remembered that according to the case law of the CJEU in *Ladbroke*[44] and the *Italian Customs agents*[45] the private sector is shielded from having to comply with the competition rules if the restraint of competition results from national legislation. However, private sector conduct is only exonerated if there is no residual area left for possible competition as the Court held in the

[41] Wainwright and Bouquet 2003.

[42] CJEU, Case C-180/98 *Pavlov* v. *Stichting Pensioenfonds* [2000] *ECR* I-6451.

[43] Ibid. para 98.

[44] CJEU, Joined Cases C-359/95P and 379/95P *Commission and France* v. *Ladbroke* [1997] *ECR* I-6265.

[45] CJEU, Case C-35/96 *Commission* v. *Italy (CNSD)* [1998] *ECR* I-3851.

'Sugar' judgments.[46] If governmental interference with the competitive process is such as to leave no scope for competition, undertakings cannot be held liable under the competition rules. Private sector conduct will only be subject to the competition rules once the governmental shield has been removed by national courts or the Commission. Such a governmental shield is protecting the undertakings as long the claim that the conduct of the government is exonerated by Article 106(2) TFEU is not defeated.

10.9 Conclusion

The conclusion can be that governments are and remain in the driving seat to establish and maintain SGEIs. First, as follows from the discussion of the concept of undertaking, governments decide which SGEI activities they will control themselves and which they will leave to the market. Second, they also are, under the free movement rules of the Treaty, free to assume full ownership or control of undertakings. The main constraint is that they cannot have their cake and eat it too; Article 345 TFEU does not shield them from the application of the free movement rules nor does it provide a justification ground in addition to the well-known category of rule of reason exceptions.

Third, even when SGEI activities are established as market operations, Article 106 TFEU as interpreted by the CJEU allows Member States a considerable margin to establish SGEIs and to grant them exclusive or special rights for operating such services.[47] The case law under Article 106(2) TFEU also allows governments a considerable margin for laying down the relevant parameters. Similarly, Article 106(2) TFEU grants the undertakings entrusted with SGEIs ample room to fulfil their special tasks. Fourth, the SAD has not evolved into a general rule limiting governmental actions whenever they have an effect on competition. The law as it stands on this norm only prohibits egregious cases of governmental interference by means of actions of undertakings.

Overviewing the case law on Article 106 TFEU and the SAD one could say that the evolution of this part of Community law has greatly increased the possibilities for governments to run SSGIs in the form of SGEIs. This is also the result of a clearer delineation of competences in the Lisbon Treaty.

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[46] CJEU, Joined Cases 11, 40–48, 50, 54–56, 111, 113 and 114/73 *Suiker Unie and others* v. *Commission* [1975] *ECR* 1663.

[47] This clearly demonstrated in the Opinion of AG Jacobs of 22 May 2003 in CJEU, Joined Cases C-264, 306, 354 and 355/01, *AOK Bundesverband* [2004] *ECR* I-2493. Unlike the CJEU in its judgment, the AG found that the healthcare funds are undertakings thus finding that they are subject to the competition rules. However, subsequently he considered that the undertakings can be exempted under Article 106(2).

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Chapter 11
Private Distortions of Competition and SSGIs

Caroline Heide-Jørgensen

Abstract This chapter offers an examination of the importance of the application of the primary competition rules in the Treaty of the Functioning of the European Union (TFEU) to SSGIs. The focus of the enquiry is on the relationship between Article 101 TEFU and SSGIs. In particular, it will focus on the case law of the application of the primary competition rules to SSGIs and the question of how to interpret Article 101(1) and 101(3) TFEU in relation to SSGIs.

Contents

C. Heide-Jørgensen (✉)
Faculty of Law, Copenhagen University, Copenhagen, Denmark
e-mail: caroline.heide-jorgensen@jur.ku.dk

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11.1 Introduction: From State to Market

SSGIs are truly one of the hot topics within EU Law. There is a changing legal and political climate in relation to the SSGIs in the EU as many of the SSGI's are being transferred from being delivered by the State to being delivered in competitive markets, with all the implications and problems to which this gives rise. Many of the SSGIs pursue 'public interest' objectives. This does not necessarily go hand-in-hand with the competition rules that are aimed at private undertakings, not State/public activity, and concerned with competition and the competitive structure on the market. The competition rules and free market rules are the cornerstones of the EU. In connection with the transformation of many SSGIs into competitive market structures in recent years one of the emerging questions is that of the application of the competition rules, both at EU level and national level: when an SSGI is provided by a non-State body or when a public body operates in a competitive market why should the competition rules not apply? An SSGI provider, such as a healthcare authority, may be so big as to be dominant in a market, the use of the form of a Public Private Partnership may give rise to questions of infringement of Article 101 TFEU, and competition issues may arise, when mergers take place and when an SSGI provider is threatened by competition.[1] Application of the competition rules could have a great impact on SSGIs since it would mean a wider application of the market economy ideology, though it was probably not the original intention, that SSGIs should be subject to principles of the market economy. The question of how to strike the right balance between the competition rules and the public interest pursued by the SSGIs is (still) a very delicate and difficult one.

The purpose of what follows is then to examine the importance for SSGIs of the primary competition rules in the TFEU and how the case law from the European Courts has tried to find the right balance between the competition rules and the public interest behind the SSGIs. The focus in this chapter is on Article 101 TFEU on anti-competitive agreements,[2] thus Article 106 TFEU is not part of the analysis, nor are the State aid rules. The Court of Justice of the European Union (CJEU) has rendered some very important judgments in the area of the application of the primary competition rules to SSGIs. It is characteristic that the relevant cases have only concerned the areas of health care and/or social security, while there is still no case law on the relationship between the primary competition rules and other kinds of SSGIs. Although there is relevant case law many uncertainties remain as how to balance the public policy interest behind the SSGIs with the competition rules.

This chapter will continue in Sect. 11.2 by examining the present case law from the CJEU on the concept of an undertaking, which is crucial for the primary

[1] Szyszczak 2009, p. 209.

[2] Article 102 TFEU on the abuse of a dominant position and the Merger Regulation and the accompanying rules are part of the rules of private distortions of competition and could also be relevant for SSGIs, but the analysis in the following is limited to Article 101 TFEU, since this is where the case law is to be found.

competition rules concerning private distortions of competition and the application to SSGIs. Section 11.3 follows a discussion of how to tackle the problems left by the case law by balancing conflicting values under Article 101(1) and/or under Article 101(3) TFEU. Section 11.4 offers some concluding remarks.

11.2 Competition Law and SSGIs: When an Undertaking is Not an Undertaking

11.2.1 The Concept of an Undertaking

The gateway to competition law is the concept of an 'undertaking'. The competition rules, as well as the rules of free movement, are applied to the economical activities of undertakings. 'Undertaking' is referred to in Articles 101 and 102 TFEU and the concept of an undertaking is also of fundamental importance under the Merger Regulation.[3] An undertaking engaged in economical activity is normally contrasted with the exercise of public authority and the activities of non-undertakings. This is a very old and very basic truth of competition law,[4] but in the SSGI context this has given rise to difficult questions.[5]

As is well known, the concept of an undertaking is not defined in the TFEU, but has instead been developed in the case law, starting with the judgment in *Höfner and Elsner,*[6] where the CJEU held, that 'every entity engaged in an economical activity regardless of the legal status of the entity and the way in which it is financed' is to be considered an undertaking. This definition has been accepted in all subsequent case law on the matter. '*Economic activity'* has been at the core of many cases in this field, defined—inter alia—in *Pavlov*[7] as 'any activity consisting in offering goods and services on a given market is an economic activity.' This definition of 'economic activity' has also been accepted in subsequent case law. Economical activity is normally contrasted with the exercise of public power and/or non-economical activity. Entities which carry on economical activities are to be considered undertakings, making the concept of an economical activity crucial. It has consistently been held, that any activity consisting of offering goods and

[3] Council Regulation No. 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings (the Merger Regulation), *OJ* 2004 L 24/1.

[4] For the competition law view, see e.g. Bellamy and Child et al. 2008; Whish 2009, p. 82 et seq. But this observation is also very common in the growing literature of SSGIs, see e.g. Neergaard 2009, Fig. 1, p. 20; Szyszczak 2009, p. 208.

[5] For the general competition law literature, see e.g. Faull and Nikpay 2007; Rose et al. 2008; Whish 2009. For the literature on SSGIs see e.g. Belhaj and van de Gronden 2004; Lasok 2004; van de Gronden 2004; Neergaard 2009; Szyszcak 2009; van de Gronden 2009.

[6] CJEU, Case C-41/90 *Höfner* [1991] *ECR* I-1979, para 21.

[7] CJEU, Joined Cases C-180/98 and C-184/98 *Pavel Pavlov and others,* [2000] *ECR* I-6451, para 75.

services on a market is an economical activity.[8] This market criterion,[9] stressing the participation in a market, or the exercise of an activity in a market context is referred to in all the hard cases as one of the core problems (see below in Sect. 11.2.2). Additionally, in order to characterise an activity as economical, it is not necessary that it strives for profit or is carried out for economical purposes. It is settled case law,[10] that the fact, that an organisation does not have a profit motive or does not have an economical purpose does not in itself mean, that its activities are not to be considered economical. Finally, generally speaking, the CJEU has taken the view that *a functional approach*[11] should be adopted. An undertaking may be an undertaking in some respects but not in others.[12] The distinction is also behind the decisions in *AOK*[13] and *FENIN*[14] (see below in Sect. 11.2.2).

These basic definitions found in the case law emanating from *Höfner and Elsner* are still the points of departure when examining the concept of an undertaking in an SSGI context. But they by no means solve the problems of locating SSGIs in a competition law context. On the contrary, over the past 5–10 years the judgments of the CJEU have illustrated just some of the difficulties that are to be expected in the relationship between competition law and SSGIs and non-economical activity when the concept of an undertaking is used as a tool to draw the line.

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[8] See, inter alia, CJEU, Case 118/85 *Commission* v. *Italy* [1987] *ECR* 2599, para 7; CJEU, Case C-35/96 *Commission* v. *Italy* [1998] *ECR* I-3851, para 36; CJEU, Joined Cases C-180/98 and C-184/98 *Pavel Pavlov and others* [2000] *ECR* I-6451, para 75; CJEU, Case C-475/99 *Ambulanz Glöckner* [2001] *ECR* I-8089, para 19; CJEU, Case C-309/99 *Wouters* [2002] *ECR* I-1577, para 47; CJEU, Case C-82/01 P *Aéroports de Paris* [2002] *ECR* I-9297, para 79; CJEU, Case C-205/03 P *FENIN* [2006] *ECR* I-6295, para 25; CJEU, Case C-49/07, *MOTOE* [2008] *ECR I*-4863, para 22; CJEU Case C-113/07 P *SELEX* [2009] *ECR* I-2207, para 69; and now the latest decision: CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr].

[9] Se also the Opinion of AG Maduro of 10 November 2005 in CJEU, Case C-205/03 P *FENIN* [2006] *ECR* I-6295, where it is explained, that two criteria dominate in the determination of whether or not an entity is to be considered as an undertaking within competition law: first, a comparative criterion focusing on the nature of the activity (economical) and second, a market criterion focusing on whether the activity in question is being carried out under market conditions or not.

[10] Whish 2009, p. 84.

[11] The expression comes from Whish 2009, p. 83.

[12] Latest in CJEU, Case C-49/07 *MOTOE* [2008] *ECR* I-4863, concerning a non-profit making association governed by private law whose object was to organize motorcycling competitions in Greece, where the CJEU held, that 'The classification as an activity falling within the exercise of public powers or as an economical entity must be carried out separately for each activity exercised by a given entity', para 25. See also GC, Case T-155/04 *SELEX Sitemi Integrati SpA* [2006] *ECR* II-4797, para 54.

[13] CJEU, Joined Cases C-264/01, C-306-/01, C-354/01 and C-355/01, *AOK Bundesverband* [2004] *ECR* I-2493.

[14] CJEU, Case C-205/03 P *FENIN* [2006] *ECR* I-6295.

11.2.2 The Hard Cases: Social Security and Healthcare

Social security and healthcare have given rise to some hard cases. Supply and demand by public entities will fall within the scope of competition law whenever it concerns an economical activity. In these cases, the general competition law test for an entity to qualify as an undertaking has not been regarded sufficient in the case law and has been complemented with a more concrete test focusing on *solidarity principles*. This has developed over the years, but it was already clear in the earliest practice of the CJEU.

11.2.2.1 Social Security/Insurance Schemes

The starting point is the judgments from the 1990s in *Poucet & Pistre*[15](1993) and *Fèdération Francaises des Sociétès d'Assurances*[16](1995). Both cases are about social security, but the situations were different, as were the outcomes.

In *Poucet & Pistre,* the question was about compulsory social protection, including that provided by autonomous statutory schemes, in particular a sickness and maternity insurance scheme, which was applicable to all self-employed persons in non-agricultural occupations, and the old-age insurance scheme for the craft occupations concerned in the concrete case. Poucet and Pistre wanted to be free to approach any other private company offering the same services, and the national courts dealing with this question referred the case to the CJEU asking 'Whether an organisation charged with managing a special social security scheme is to be regarded as an undertaking for the purposes of Articles 85 and 86.' (now Articles 101 and 102 TFEU). The CJEU pointed out, that 'those schemes pursue a social objective and embody the principle of solidarity.'[17]

The Court dealt with this concept in paras 8–13 of the judgment, explaining that:

> Those schemes pursue a social objective and embody the principle of solidarity. They are intended to provide cover for all the persons to whom they apply, against the risks of sickness, old age, death and invalidity, regardless of their financial status and their state of health at the time of affiliation. The principle of solidarity is, in the sickness and maternity scheme, embodied in the fact that the scheme is financed by contributions proportional to the income from the occupation and to the retirement pensions of the persons malting them; only recipients of an invalidity pension and retired insured members with very modest resources are exempted from the payment of contributions, whereas the benefits are identical for all those who receive them. Furthermore, persons no longer covered by the scheme retain their entitlement to benefits for a year, free of charge. Solidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover. In the old-age insurance scheme, solidarity is embodied in the fact that the contributions paid by

[15] CJEU, Case C-159/91 *Poucet et Pistre* [1993] *ECR* I-637.

[16] CJEU, Case C-244/94 *Fédération Francaises des Sociètés d'Assurance* [1995] *ECR* I-4013.

[17] Ibid. para 8.

> active workers serve to finance the pensions of retired workers. It is also reflected by the grant of pension rights where no contributions have been made and of pension rights that are not proportional to the contributions paid. Finally, there is solidarity between the various social security schemes, in that those in surplus contribute to the financing of those with structural financial difficulties. It follows that the social security schemes, as described, are based on a system of compulsory contribution, which is indispensable for application of the principle of solidarity and the financial equilibrium of those schemes.

When examining whether or not they could constitute an undertaking for the purposes of competition law, the CJEU took the view of social security schemes, such as those in this case, that sickness funds and the organisations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of solidarity and is entirely non-profit making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions.[18]

The CJEU concluded that the activity in question was to be regarded as a non-economical one, and therefore the organisations in questions were not undertakings for the purposes of competition law. A different result was reached in *Fédération Francaise des Sociétés d'Assurances,*[19] concerning a supplementary old-age insurance scheme for self-employed farmers which was intended to supplement a basic compulsory scheme. However, this organisation operated in accordance with capitalizations principles and the benefits depended solely on the amount of contributions paid by the recipients and the financial results of the investments made by the managing organisation. Therefore, the CJEU considered this activity to be an economical one and the organisation in question to be an undertaking for the purposes of competition law,[20] despite some elements of solidarity.[21] Similar principles and arguments about capitalisation principles have been used in later cases on various kinds of social security/insurance schemes for pensions and insurance against accidents at work and occupational diseases.[22]

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[18] Ibid. para 18.

[19] Ibid.

[20] Ibid. paras 14–17 and 22.

[21] Ibid. paras 18–22.

[22] In CJEU, Joined Cases C-180/98 and C-184/98 *Pavel Pavlov and others* [2000] *ECR* I-6451, the CJEU held, that a Dutch supplementary pension fund for doctors was an association of undertakings. The argument of the CJEU was, that the individual doctors were to be considered undertakings, that their contributions to a pension fund were closely linked to their professions, and that the elements of solidarity imposed on the pension scheme could not affect the fact, that it was an undertaking. See also CJEU, Joined Cases C-115-117/97 *Brentjens* [1999] *ECR* I-6025, where a sectoral pension fund was classified as a an undertaking; CJEU, Case C-67/96 *Albany* [1999] *ECR* I-3775, also concerning the classification of a sectoral pension fund as an undertaking; CJEU, Case C-219/97 *Maatschappij* [1999] ECR I-6121, concerning the classification of a sectoral pension scheme. *CJEU,* Case C-218/00 *Cisal* [2002] *ECR* I-691, the CJEU had to determine whether compulsory membership of a national insurance scheme against accidents at work and occupational diseases was to be considered an undertaking, and in doing so it found, that the body concerned (INAIL) operated on the basis of solidarity since the benefits paid to insured persons were not strictly proportionate to the contributions paid by them, and

The same approach was adopted in *Kattner Stahlbau*[23] where the CJEU had to consider whether or not a body administrating compulsory affiliation to an insurance scheme against accidents at work and occupational diseases was an undertaking or not. Under German law, in respect of insurance against accidents at work and occupational diseases, all undertakings must be affiliated to the Berufsgenossenschaft (employers' liability insurance association) that covers their sector and geographical area. The various employers' liability insurance associations have the status of non-profit bodies governed by public law. Kattner was a German private limited company active in steel construction and the manufacture of staircases and balconies. Kattner wanted to opt out of the relevant Berufsgenossenschaft (Maschinenbau und Metall-Berufsgenossenschaft—MMB) and take out private insurance in stead, but since the affiliation with the MMB was compulsory for Kattner, its request was refused. The German Court referred a question to the CJEU on the concept of an 'undertaking'. The CJEU started out by pointing to the important fact, that:

> According to settled case law, Community law does not detract from the powers of the Member States to organize their social security systems (see, in particular Case C-158/96 Kohll [1998] ECR I-1931, para 17; Case C-157/99 Smits and Peerbooms [2001] ECR I-5473, para 44, and Case C-372/04 Watts [2006] ECR I-4325, para 92).[24]

These cases all concern the law on free movement, but the CJEU went on to stress, that a statutory insurance scheme like the one in question 'pursues a social objective'.[25] However, such a social aim of an insurance scheme is not in itself sufficient to preclude an activity from being classified as an economical activity.[26] To decide whether the scheme should be regarded as an undertaking the CJEU examined firstly, the application of the principle of solidarity and secondly State supervision. As regards *the principle of solidarity*[27] the CJEU firstly pointed out, that the scheme at issue, like the one in *Cisal,* was financed by contributions the rate of which was not systematically proportionate to the risk insured. The German system at issue differed in some respects from the one in *Cisal*, but like the one in *Cisal,* there was no direct link between the contributions paid and the benefits granted, and therefore the scheme entailed solidarity between better paid workers and those who, given their low earnings, would be deprived of proper social cover

(Footnote 22 continued)
since the INAIL was subject to supervision by the state and the fact that the INAIL fulfilled 'an exclusively social function' (para 45), for which reasons the activities of INAIL could not be considered to be economical activities for the purpose of competition law. Accordingly, the INAIL was not considered an undertaking.

[23] CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513.

[24] Ibid. para 37.

[25] Ibid. para 38.

[26] Ibid. para 39.

[27] Ibid. paras 44–59.

if such a link existed.[28] As regards *the supervision by the State* the CJEU pointed out, that the degree of latitude was established and strictly delimited by law, with the relevant provisions laying down first, the factors that had to be taken into account when calculating the contribution payable under the statutory scheme in question, and second, an exhaustive list of benefits provided under that scheme, together with the arrangements for the grants of benefits.[29] The CJEU concludes, that since the scheme appeared to apply the principle of solidarity and was subject to State control, and the body fulfilled an exclusively social function, its activities was not economical activity for the purposes of competition law, and accordingly not to be considered an undertaking.[30]

The same principles of solidarity and State supervision has most recently been followed in the judgment of *AG2R Prévoyance* (2011),[31] where the CJEU held that a French healthcare insurance scheme operating on the basis of the principle of solidarity should be considered an undertaking for the purposes of competition law. At stake was a French compulsory affiliation to a supplementary healthcare scheme in the bakery business. The supplementary scheme was governed by a number of rules in the French social security rules which was made compulsory to Mr. Beaudout by an addendum to a collective agreement covering the bakery business. When Mr. Beaudout refused to join the scheme, proceedings were brought against him, and the French tribunal dealing with the case referred preliminary questions to the CJEU. As a meaningful answer to the national courts questions the CJEU had, inter alia, to consider whether or not the body responsible for the supplementary healthcare scheme was an undertaking for the purposes of the EU competition rules, here Article 102 TFEU. In answer to this question the CJEU initially states that the case law repeatedly has held, that the concept of undertaking encompasses every entity engaged in economical activity, regardless of the legal status of the entity and the way in which it is financed, going on to the area of social security and pointing out, that in the context of social security the Court has established two main criteria for determining whether or not the activity in which the body or bodies responsible for the various schemes concerned is/are engaged is economical in nature: (1) whether or not the scheme applies the principle of solidarity, and (2) the extent to which the scheme is under State control. As regards the principle of solidarity the CJEU first notes, that the scheme in question was financed by fixed-rate contributions and that, accordingly, the rate is not proportionate to the risk insured: the scheme does not take into consideration factors such as age, state of health or any particular risks inherent in the position occupied by the insured employee. Second, the services were, in certain cases,

[28] Ibid. para 59, with reference to CJEU, Case C-218/00 *Cisal* [2002] *ECR* I-691, para 42, where the exact same wording is used.

[29] CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513, para 62.

[30] Ibid. paras 65–66.

[31] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr]. AG Mengozzi delivered his Opinion on 10 November 2010.

supplied irrespective of whether the contributions due had been paid. Together, the CJEU concluded, that the scheme in question was characterised by a high degree of solidarity. As regards the matter of state control the CJEU points out, that one the one hand there was some State control in so much as ministerial decree was needed to make the agreements compulsory for all employees and employers to whom they were applicable, and that it was within this regulatory framework, that the representatives of the employers and the employee had set up a joint committee to examine, once in a year, the results of the scheme. However, others characteristics lead to the view that the body enjoyed a degree of autonomy: there were no statutory obligation either on the social partners to appoint AG2R to manage a scheme for supplementary reimbursement of healthcare costs such as that at issue in the main proceedings or on AG2R to assume in fact the management of such a scheme. In that context Mr. Beaudot argued that other insurance companies offered services which were substantially identical to those provided by AG2R. All in sum, the CJEU concluded, that even though AG2R was non-profit making and operating on the basis of solidarity, is was an undertaking engaged in economical activity which was chosen by social partners on the basis of financial and economical considerations from among other undertakings with which it is in competition on the market in the provident services which it offers.

To sum up, it must be regarded as settled case law that if in its activities an entity applies the principle of solidarity and is subject to State supervision it is not to be considered an undertaking for the purposes of competition law. What is perhaps a little less clear is what is to understood by the principle of solidarity, and to what extent there has to be a supervision by the State. In its judgments the CJEU refers to 'the principle of solidarity'. The CJEU points to some characteristic elements, especially that the insurance scheme should be financed by contributions whose rate is not systematically proportionate to the risk ensured, and that the benefits paid should not necessarily be proportionate to the insured persons' earnings.[32] However, no general definition of the principle is to be found either in the judgments of the CJEU or the Opinions of the Advocates General[33], in these cases.[34] The condition of State supervision is also touched upon in the cases.[35] As Advocate General Jacobs explained, very clearly, in his Opinion in *Cisal:* 'the underlying question is whether that entity is in a position to generate the effects which the competition rules seek to prevent.[36] However, the degree of State

[32] CJEU, Case C-218/00 *Cisal* [2002] *ECR* I-691, paras 39–40, similarly in CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513, paras 44–59.

[33] Opinion of AG Jacobs of 13 September 2001 in CJEU, Case C-218/00 *Cisal* [2002] *ECR* I-691 reflects on the elements of solidarity in paras 67–70, as so does AG Mazák in his Opinion of 18 November 2008 in CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513 paras 48–52.

[34] See also Neergaard 2010; Ross 2009.

[35] And is being mentioned also in the earlier cases, see CJEU, Joined Cases C-159/91 and C-160/91 *Poucet et Pistre* [1993] *ECR* I-637, para 14.

[36] Opinion of AG Jacobs of 13 September 2001 in CJEU, Case C-218/00 Cisal [2002] *ECR* I-691, para 71.

supervision appears to have varied slightly between the cases, with the strongest element of State supervision in *Cisal*[37] and the weakest in *AG2R Prévoyance.*[38]

11.2.2.2 The Healthcare Cases: Managing Bodies Acting in a 'Market Context' as 'Buyer'

The cases in the different areas of healthcare have elaborated on the principle of solidarity and in applying it in the healthcare sector the cases have created an area of immunity from competition law. Healthcare is of great economical importance, and the competition rules could be relevant, when healthcare authorities act as undertakings in providing healthcare services and when entering into contracts necessary for the delivery of healthcare services, i.e. when they buy something for the purpose of delivering their services to those who are entitled to them.[39] The CJEU has shown it is willing to interpret the competition rules in such a manner as to allow broad exceptions with regard to healthcare.

The case law in this area started with *AOK,*[40] where the CJEU found, that the German sickness funds were not to be considered undertakings for the purposes of competition law. The claim was that the sickness funds were infringing Articles 101, 102 and 106 TFEU by fixing a maximum amount payable for medicinal products. The case arose as a result of the increasing costs of the German statutory health insurance scheme. To minimise costs the German legislator introduced a series of measures, one of which was to fix a maximum amount payable by the sickness funds in respect of the cost of medicinal products. The sickness fund would pay for a given product up to a fixed maximum amount but if the price exceeds that amount, the insured person would have to pay the difference. Under the German system the sickness funds provide health insurance for the vast majority of the population. It is in principle obligatory for employees to be insured under the statutory scheme, exceptions being made for (1) employees whose income exceed a statutorily prescribed level and (2) civil servants. People who are self-employed may insure themselves on a voluntary basis. The benefits provided by the sickness funds are financed through contributions levied in most cases in equal shares on insured persons and their employers. The amount of the contributions is determined principally by the insured person's income and the contribution rate set by each sickness fund. It is laid down by statute, that insured

[37] See CJEU, *C*ase C-218/00 *Cisal* [2002] *ECR* I-691, para 43; Opinion of AG Jacobs of 13 September 2001 in CJEU, Case C-218/00 *Cisal* [2002] *ECR* I-691, paras 71–76; CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513, paras 60–67; and Opinion of AG Mazák of 18 November 2008 in CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513, paras 53–61.

[38] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr].

[39] The literature on the healthcare cases is vast, for recent literature see: van de Gronden 2009; Szyszczak 2009.

[40] CJEU, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] *ECR* I-2493.

persons may freely choose their sickness fund as well as the doctor or the hospital from which they receive treatment. To this extent the sickness funds are in competition. The German Courts dealing with the national proceedings brought against the sickness funds by some pharmaceutical companies referred a number of preliminary questions to the CJEU for preliminary ruling. One of the questions concerned the fundamental concepts of an undertaking and association of undertakings. In its ruling[41] the CJEU referred to its earlier case law, and concluded that:

> Sickness funds in the German statutory health insurance scheme, like the bodies at issue in *Poucet and Pistre*, cited above, are involved in the management of the social security system. In this regard they fulfil an exclusively social function, which is founded on the principle of national solidarity and is entirely non-profit making.[42]

The CJEU went on to characterise the funds as having no influence on the benefits, which did not depend on the amount of the contributions. Thereafter, the CJEU had two remaining problems. The first was the fact that the sickness funds could control their contributions and had freedom to compete with each other. The CJEU just very briefly noted, that this fact 'does not call this analysis in question',[43] which is remarkable as the analysis showed the possibility of competition, as is normal between undertakings. The second was that, apart from their functions of an exclusively social nature, there was the possibility that the sickness funds and their representative engaged in operations which had a purpose that was not social but economical in nature. The CJEU solved this problem by examining whether the determination by the sickness fund associations of the fixed maximum amounts was linked to the sickness funds' function of an exclusively social nature or whether it fell outside that framework and constituted an activity of an economical nature.[44] The CJEU concluded that the fixing of the amount did not pursue a specific interest separable from the exclusively social objective of the sickness funds. Since the CJEU did not found that the sickness funds were acting as undertakings or associations of undertakings, the fixing of the maximum amounts were not contrary to the competition rules. The judgment in AOK has been heavily debated,[45] and it is perhaps not quite clear which lessons can be drawn from it.[46] Interestingly, for various reasons in his opinion Advocate General Jacobs had

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[41] Ibid. paras 45–66.

[42] Ibid. para 51.

[43] Ibid. para 56.

[44] Ibid. paras 59–64.

[45] Se e.g. Belhaj and van de Gronden 2004; Lasok 2004; van de Gronden 2004; Boeger 2007; van de Gronden 2009; Neergaard 2010; Szyszczak 2009.

[46] Both Boeger 2007 and Lasok 2004 criticises the *AOK* judgment, CJEU, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] *ECR* I-2493. See Lasok 2004: 'Where the dividing line now lies between entities that are undertakings and entities that are not is virtually impossible to identify with any degree of precision' and further on 'it is highly questionable that the solution found by the ECJ [now CJEU] in AOK provides a workable answer to the question when is an undertaking not an undertaking'.

suggested that the AOK should be considered undertakings for the purposes of competition law.[47]

The judgment in *AOK* was given between the judgment of the GC[48] and the judgment of the CJEU[49] in *FENIN* concerning the Spanish healthcare systems, where the CJEU found that the Spanish National Health System's managing bodies (SNS) did not operate as undertakings by purchasing medical goods and equipment, because their subsequent use did not constitute an economical activity. The CJEU upheld the judgment of the GC, which had first cited the earlier case law on the concept of an undertaking[50] and then went on to point out, that the offering of goods and services is the characteristic feature of an economical activity, not the business of purchasing as such.[51] Then the GC found, that it would be incorrect, when determining the nature of that subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economical activity. The GC then went on to conclude, that:

> Consequently, an organisation which purchases goods—even in great quantity—not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC.[52]

The CJEU upheld the conclusion of the GC, though it made no direct reference to this quite remarkable quotation from the GC judgments about the dissociation of the purchasing activity and the subsequent use. In his Opinion, Advocate General Maduro took up this argument of dissociation of the purchasing activity and the subsequent use, arguing in the same manner as the GC,[53] and concluding that organisations that carry out mixed activities are only subject to competition law in respect of that part of their activities that is economical in nature. This has certainly been settled case law for long time, but perhaps it is a little less easy to

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[47] Opinion of AG Jacobs of 22 May 2003 in CJEU, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] *ECR* I-2493.

[48] GC, Case T-319/99 *FENIN* [2003] *ECR* II-357.

[49] CJEU, Case C-205/03 P, *FENIN* [2006] *ECR* I-6295, AG Maduro delivered his Opinion 10 November 2005.

[50] Ibid. para 35.

[51] Ibid. para 36.

[52] Ibid. para 37.

[53] CJEU, Case C-205/03 P, *FENIN* [2006] *ECR* I-6295, AG Maduro delivered his Opinion 10 November 2005.

understand when it comes to dividing an activity into separate parts, which is what is actually being done with that kind of argument.[54]

The CJEU dismissed the appeal as partly unfounded, and therefore had no need to consider the GC findings on solidarity.[55] The GC referred to the case law in *Poucet and Pistre* and *Fédération Francaise* and concluded, that the SNS also

> … operates according to the principle of solidarity that it is funded from social security contributions and other State funding and in that it provides services free of charge to its members on the basis of universal cover. In managing the SNS, these organisations do not, therefore, act as undertakings.[56]

In sum, the Spanish National Health Service was not considered to be an undertaking.

The *FENIN* cases are the latest in this area and therefore still leading authorities. But it is not clear in every respect what lessons are to be drawn from them and the other case law on the application of the competition rules to SSGIs.

11.2.3 The Critique of the Case Law

Many comments have been put forward, one general one being that a health care system, that is mostly based on the principle of solidarity does completely escape from the competition rules,[57] and that the CJEU uses the concept of an undertaking as a flexible jurisdictional tool to exclude solidarity-based healthcare systems from the ambit of European competition law, when it comes to the managing bodies.[58]

It has also been pointed out that these decisions introduce a considerable degree of uncertainty because they fail to give clear guidance about the conditions under which public health management could be considered an economical activity, and when certain functions are 'dissociated' from social ones.[59] There has also been discussion and criticism of the dissociation between a purchasing activity and subsequent use, since neither the GC nor the CJEU have given any reason for the dissociation in *FENIN*, which is a novelty in competition law and which has been formulated in general terms, and therefore (perhaps) not limited to the cases involving SSGIs.[60] This distinction has great potential for the application of the competition rules to SSGIs and especially to healthcare services since these players are usually quite big, and perhaps also so big as to be considered dominant

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[54] And *FENIN* had also argued before the CJEU (para 17) that this distinction was impossible to make.

[55] GC, Case T-319/99 *FENIN* [2003] *ECR* II-357, paras 38–44.

[56] Ibid. para 39.

[57] Van de Gronden 2009, p. 13.

[58] Van de Gronden 2009, p. 10.

[59] Boeger 2007, p. 331.

[60] Farley and Krajewski 2007, p. 121.

as purchasers from the competition law point of view. Surely, the sellers of goods or services purchased by these bodies would have difficulty in understanding why they should not be able to invoke the competition rules when selling to such a buyer. Furthermore, logical inconsistency has also been mentioned; it is almost impossible to ascertain in advance, when a given activity will be classified as 'economic' and when not, and as more and more competition and liberalisation is being introduced in this area in the Member States, it is becoming increasingly difficult to predict what will be caught by the competition rules and what will be excluded.[61]

Another very important question left open by the CJEU in the *AOK* judgment is just how much competition can be tolerated while allowing the system to continue to be exempt from competition law. This problem was not settled by *FENIN* and it is only likely to become more and more important as the trend seems to be to introduce more and more competition in national systems. The recent judgment in *AG2R Prévoyance* suggests that there are limits but precisely how narrow or broad is unclear. In any case, it will become more and more difficult to justify wide exemptions from competition law on the grounds on the concept of an undertaking as the health care sector becomes more commercialised.[62]

These problems also arise in national law, where a number of cases have highlighted some of the differences, primarily within healthcare. Although the healthcare systems in the EU differ from one Member State to another it has been argued that it is possible to divide them into two main categories: National Health Services and Social Insurance Systems with different challenges.[63] In the UK the *FENIN* judgment has created some challenges. Before the *FENIN* judgment it was held in the often cited *Better Care* decision[64] that a health authority was acting as an undertaking when purchasing residential and nursing care from independent providers for the residential homes run by the authority. After the *FENIN* judgment, the OFT reacted by issuing a Note on how to understand the different approaches between the GC and the British regulator, and explaining that it would not use competition law against the buyers of social services. Others examples were also seen in other Member States,[65] and there are probably more to come in the future.

A fair overall conclusion seems to be that the present case law on the concept of undertaking do not solve the problems of the proper relationship between competition law and SSGIs. There are far too many uncertainties left open, and in this writers view this case law is not truly convincing for all the reasons mentioned above. The reluctance of the courts to apply the competition rules can be explained in many

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[61] Boeger 2007, p. 331; Lasok 2004, p. 385.

[62] Farley and Krajewski 2007, p. 123; Szyszczak 2009, p. 211.

[63] Van de Gronden 2009, p. 6.

[64] The BetterCare decision is mentioned in the Opinion of AG Maduro of 10 November 2005 in CJEU, Case C-205/03 P, *FENIN* [2006] *ECR* I-6295, and is also touched upon by Farley and Krajewski 2007, p. 122, and Szyszczak 2009, p. 210f, who explains how the OFT reacted to the *FENIN* judgment.

[65] Farley and Krajewski 2007, p. 121.

ways, but one major problem of applying the competition rules to SSGIs is the scope for a defence or a justifications for actions (by SSGIs/the State) under Article 101(1) and/or 101(3) TFEU.[66] But perhaps something is happening here as well, and one way could be to look on the emerging case law and debate about rethinking the interpretation of TEFU Article 101 as regards the question of including exemptions for public interests or social reasons under Article 101(1) TFEU.

11.3 Balancing Non-Competition Objectives Against Restrictions of Competition

11.3.1 Regulatory Ancillarity or the Inherent Restrictions Approach—Balancing Under Article 101(1)—Wouters and Meca-Medina

Sometimes, objectives conflict as is seen in the cases of competition law and SSGIs. There could be different approaches to solve such a conflict of values. One way of dealing with the problem could be to follow the line of argument put forward in the *Wouters*[67] case and the *Meca-Medina*[68] case, where the CJEU balanced different values under Article 101(1) TFEU.[69]

In *Wouters*[70] the CJEU balanced different values, and found that the Dutch Bar Council's Regulation, prohibiting lawyers from forming partnerships with non-lawyers, did not infringe Article 101(1) TFEU. *Wouters* has lead to the suggestion in the ordinary competition law theory, that it might be possible to justify agreements under Article 101(1) TFEU that would usually be considered to restrict competition, if they are limited to what is necessary to serve a legitimate objective (regulatory rules). This has been described as 'regulatory ancillarity'[71] or the 'inherent restrictions' approach.[72]

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[66] Szyszczak 2009, p. 82.

[67] CJEU, Case C-309/99 *Wouters* [2002] *ECR* I-1577.

[68] CJEU, Case C-519/04 P *Meca-Medina and Majcen* [2006] *ECR* I-6991. See Townley 2009, p. 62ff, and further on p. 65ff on the possibility of reading Article 101(3) TFEU expansively, and p. 139 concluding, that it would be helpful, if the European Courts explained, when to balance under Article 101(1) and when under 10(3) TFEU.

[69] It is an old and continuing discussion in competition law as to whether the weighing of the pro- and anti-competitive effects of agreement should be considered as part of the Article 101(1) analysis or whether this is only a matter for Article 101(3) TFEU, the discussion of rule of reason in EU Competition Law. One could argue, that this balancing-method/the inherent restrictions approach is not part of the rule of reason, see van de Gronden 2011, p. 277.

[70] CJEU, Case C-309/99 *Wouters* [2002] *ECR* I-1577.

[71] Whish 2009, p. 126ff, talks about 'regulatory ancillarity'. See also Faull and Nikpay 2007, p. 237ff, arguing p. 239, that this has a narrow scope.

[72] Van de Gronden 2011, p. 277. Townley 2009, p. 62ff, refers to the problem under the heading 'Compromise'.

Mr. Wouters, who was a Dutch lawyer, challenged the rule adopted by the Bar of the Netherlands which prohibited lawyers from entering into partnership with non-lawyers, as he wished to practise in a firm of accountants. A number of questions were referred to the CJEU. In replying the question arose as to the compatibility with Article 101. On this matter the CJEU held:

> However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, para 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.[73]

The same approach of balancing conflicting values under Article 101(1) TFEU was followed in the *Meca-Medina-case,*[74] where the CJEU held, that anti-doping rules adopted by the international swimming association (FINA) which implemented the Anti-Doping Code of the International Olympic Committee (IOC), were not a restriction of competition within the meaning of Article 101 TFEU.

Mr. Meca-Medina and Mr. Majcen were tested positive for the drug Nandrolone during the World Cup in swimming in 1999. Since this violated the IOC and FINA anti-doping rules, they were both suspended for 4 years. They complained to the Commission arguing, that the IOC's rules were a restriction of competition. The Commission rejected the complaint and the case went on to the European Courts. On the matter of restriction of competition the CJEU ruled

> Next, the compatibility of rules with the Community rules on competition cannot be assessed in the abstract (see, to this effect, Case C-250/92 *DLG* [1994] ECR I–5641, para 31). "… not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) of the Treaty For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives" (Wouters and Others, para 97) and are proportionate to them.[75]

The CJEU went on to state, that the anti-doping rules did not constitute a restriction of competition within the meaning of Article 10 TFEU, since they were

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[73] CJEU, Case C-309/99 *Wouters* [2002] *ECR* I-1577, para 97.

[74] CJEU, Case C-519/04 P *Meca-Medina and Majcen* [2006] *ECR* I-6991.

[75] CJEU, Case C-309/99 *Wouters* [2002] *ECR* I-1577, para 42.

justified by a legitimate objective,[76] and since they were also not disproportionate, no infringement of Article 101 TFEU was found.[77]

In *Wouters* (and *Meca-Medina)* the CJEU held, that not every agreement, that restricts the freedom of an undertaking is to be considered to infringe the prohibition laid down in Article 101(1) TFEU. To decide whether or not Article 101 TFEU is infringed, it should be considered whether public interests are at stake. It is in other words possible to balance non-competition objectives against restrictions of competition under the Article 101(1) TFEU analysis. If the effect on competition is a result of the pursuit of such public objectives, then Article 101 TFEU is not applied even though some restriction of freedom can be observed.[78] With this approach not only purely economical/market considerations but also non-competition objectives are included in the analysis after Article 101(1) TFEU, and therefore—with the wording of the CJEU in *Wouters*—it must be examined:

> …whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.[79]

This has also been described as a balancing test, where the non-competition objectives out-weigh the restrictions of competition in what might be considered a proportionality-test,[80] meaning that agreements between undertakings that do restrict competition are nevertheless not considered within Article 101 TFEU if they are limited to what is necessary to serve a legitimate public purpose. Where this may take the general application of Article 101 TFEU, and whether this is the start of a new general rule or just a few cases, is not certain. The CJEU has not been explicit about which objectives it would consider legitimate in this context, which is of course quite relevant for SSGIs.[81] But for the SSGIs this could mean an approach allowing the public interests in the SSGIs to be balanced with the competition rules within Article 101 instead of using the concept of an undertaking as a tool to draw a(n) (artificial) line between competition rules and the public policies behind the SSGIs.[82]

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[76] Ibid. para 45.

[77] Ibid. para 55.

[78] Van de Gronden 2011, p. 276; Whish 2009, p. 127; Forrester 2006; Van de Gronden talks about 'the inherent restrictions approach'.

[79] CJEU, Case C-309/99 *Wouters* [2002] *ECR* I-1577, para 97.

[80] According to Whish 2009, p. 127; and Forrester 2006, p. 291, the CJEU is conducting a balancing test. See also on this matter Faull and Nikpay 2007, p. 187, with reference to sports, and setting up three conditions, also at p. 237ff in general; Szyszczak 2007, p. 83; the thorough analysis in Townley 2009, p. 64; and van de Gronden 2011, p. 277, taking the method into the area of SSGIs.

[81] Davis 2009, p. 60.

[82] Davis 2009, p. 59 et seq., in general; and van de Gronden 2011 specifically for healthcare.

11.3.2 Balancing Under Article 101(3)

Balancing under Article 101(3) TFEU could be another possible way to solve the problems of conflicting values. It is an old and continuing discussion in competition law how to strike the right balance between Articles 101(1) and 101(3) TFEU. Over the years, various approaches have been put forward.

One way is to approach Article 101(3) TFEU broadly and read the four conditions, and especially the first condition on improvement in the production or distribution of goods or in technical or economical progress expansively, allowing other policies than just purely economical to be taken into account when deciding whether or not to allow agreements that can be considered to be restrictive of competition.[83] There are many important policies in the EU, e.g. industrial policy, environment, employment, culture, public safety, consumer protection, fair trading, etc. The broad view would allow these broader considerations in the interpretation of Article 101(3) TFEU, and it can be traced in decisions from the period, where the Commission enjoyed a monopoly over decision making under Article 101(3) TFEU.[84]

But this more wide approach does not go hand in hand with the *more economical approach,* launched by the Commission as a 'modernisation' of the competition rules, emphasising the economical effects of anti-competitive behaviour, efficiency and underlining the benefits of the consumers as the sole purpose of the competition rules.[85] The Guidelines on Article 101(3) TFEU[86] are an example of this more economical approach. The Guidelines explain Article 101(3) TFEU in a purely economical way and are therefore an example of a more narrow view of Article 101(3) TFEU, where only agreements that would bring about economical benefits are permissible under Article 101(3) TFEU.[87] This view can be seen many places in the guidelines, but are perhaps most clearly expressed in para 42 of the Guidelines, where it is stated, that:

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[83] Townley 2009, p. 65; Whish 2009, p. 151 et seq.

[84] Townley 2009, p. 65-69, explains this development in general until the judgment of the GC, Case T-168/01 *GlaxoSmithKline* [2006] *ECR* II-2969*,* see below at n. 94. See also Whish 2009, p. 153; Monti 2007, Chap. 4.

[85] As is well known this started out with the major modernisation of the block exemption rules around 2000 and culminated with the decentralisation of the competition rules with Council Regulation No. 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 EC (now Articles 101 and 102 TFEU), *OJ* 2003 L 1/1 and the connected guidelines, and taken even further in the so-called modernisation of Article 102 TFEU, ending up with the Guidance of the Commissions enforcement priorities on Article 102 TFEU from 2009.

[86] Commission, *Communication from the Commission, Notice, Guidelines on the Application of Article 81(3) of the Treaty* [now Article 101(3) TFEU], *OJ* 2004 C 101/97.

[87] Faull and Nikpay 2007, p. 294 explains the rationale behind Article 101(3) TFEU exactly in this way. See also Whish 2009, p. 152; Monti 2007 for an explanation of the development in this field.

> Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3).[88]

Thus, in the Commissions opinion should be no room for pursuing non-competition goals under Article 101(3) TFEU stressing again that enhancing consumer welfare should be the sole purpose of the competition law rules.[89]

In recent years, the debate about the economical constitution of Europe has intensified and it is now a common theme to talk about a European Social Model.[90] There is no consensus among scholars as to how this concept should be defined, but the CJEU has ruled that the EU has not only an economical but also a social purpose.[91] Behind this assumption lies a good deal of research.[92] This is not the place to go into detail. Here it will be sufficient to point out, that this is a result of a long development from the very beginning of the European Economic Community with more and more social norms/areas being included in the EU. However, it still holds true, that different levels of social protection prevail throughout the Member States.[93] Closely related to the concept of a European Social Model is the concept of a 'social market economy', which was introduced in the Treaty of Lisbon 2009. This comes at the same time as—and is perhaps also partly reason for—what can be seen as one of the most characteristic recent trends in EU competition law, namely that of discussing the aims of competition rules, which can be found behind the discussion of whether to include public policy goals into Article 101 TFEU, or not, and questioning whether or not this more economical approach and the focus on consumer welfare as the only objective for competition rules really is the right approach within competition law.[94] The debate has only been intensified by the entry into force of the Treaty of Lisbon 2009 and one of the big questions for the time being in competition law is, if the introduction of the 'social market economy' in combination with the removal from the main text of the TFEU of the principle of undistorted competition in Article 3 (1) (g) EC Treaty and its transfer to a less prominent place, namely only in a Protocol will mean anything for the understanding and interpretation of the competition rules. In addition, the previous Article 4 EC has become Article 119 in TFEU, which refers to the 'principle of an open market economy with free competition'. What this debate and the possible developments will mean for SSGIs is unclear at the moment, but the possibility

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[88] *OJ* 2004 C 101/97, para 42.

[89] *OJ* 2004 C 101/97, para 13, but as well known seen many other places as well.

[90] See inter alia Nielsen and Neergaard 2010, p. 441, drawing on the research results from the Blurring Boundaries Project; Micklitz 2010; Semmelmann 2010.

[91] In the cases CJEU, Case C341/05 *Laval* [2007] *ECR* I-11767 and CJEU, Case C-438/05 *Viking* [2007] *ECR* I-10779. As to the conceptual matters see Nielsen and Neergaard 2010, p. 443; Semmelmann 2010.

[92] See inter alia Nielsen and Neergaard 2010, p. 441 with references, drawing on the research results from the Blurring Boundaries Project, Semmelmann 2010.

[93] Semmelmann 2010, p. 519.

[94] Gerber 1998, was one of the earliest publications at the start of the modernisation programme. Other examples can be seen in Gormsen 2010; Akman 2009; Townley 2009; Semmelmann 2008.

that some kind of new-orientation of the primary competition rules could have an impact on how the SSGIs are affected by the primary competition rules, can not be ruled out.

The European Courts have not rendered many judgments on these aspects of Article 101 TFEU after the Commission adopted a 'more economical approach', but the judgment in *GlaxoSmithKline* touches upon this important question on the aims of competition policy as well on as other aspects of the interpretation of Article 101 TFEU. The *Glaxo* case concerned restrictions in parallel trade in pharmaceuticals and raised the question whether or not sales conditions introduced by GlaxoSmithKline in order to prevent parallel trade from Spain to high priced countries were contrary to Article 101 TFEU and whether or not the sales conditions could benefit from exemption under Article 101(3) TFEU. The sales conditions were notified to the Commission back in 1999 in order to obtain a negative clearance, which the Commission refused.

The GC[95] rendered its judgment in 2006, finding that the agreement had as it effect rather than its object to restrict competition.[96] In analysing the question of object, the CG stated, that the objective of Article 101 TFEU:

> … is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question…[97]

An agreement construed to prevent parallel trading did not necessarily had the object of restricting competition where the agreement could not be presumed to result in a reduction of welfare for the final consumer, partly because in many member states the patient (i.e. the consumer) bears only a limited part of the total expenses for the medicine, while the national sickness reimbursement schemes bears most of the costs.[98] Instead the GC found that the agreement had the effect of restricting competition and therefore fell within the scope of Article 101(1) TFEU. But the GC found, that the Commission had not examined adequately the parties' arguments for justification under Article 101(3) TFEU. The GC paid most attention to the first condition of Article 101(3) TFEU, concluding[99] that the Commission could not lawfully conclude, that GlaxoSmithKline had not demonstrated, that the first condition of Article 101(3) TFEU was fulfilled. In essence, GlaxoSmithKline had argued, that the agreement would result in gains in R&D. Lastly the GC briefly touched upon the three other exemption conditions in Article 101(3) TFEU, and concluded, that the Commissions decision did not contain sufficient reasoning to refuse an exemption. The ruling from the CJEU[100] followed the result

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[95] GC, Case T-168/01 *GlaxoSmithKline* [2006] *ECR* II-2969.

[96] Ibid. paras 114ff, and 148 et seq.

[97] Ibid. para 118, repeated in para 171 when touching upon the CJEU, Case C-309/99 *Wouters* [2002] *ECR* I-1577.

[98] GC, Case T-168/01 *GlaxoSmithKline* [2006] *ECR* II-2969, para 131.

[99] Ibid. para 308.

[100] CJEU, Joined Cases 501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline* [2009] *ECR* I-9291.

from GC, but with a different reasoning, which makes it interesting in this context. Firstly, the CJEU found, that the sales conditions should have been considered as a restriction by object rather than by effect.[101] In particular, the CJEU rejected the argument of the GC, that the finding of a restriction by object should be limited to agreements that deprived the final consumer the advantages of effective competition in terms of supply or price. The CJEU held that, first of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Second, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 101 TFEU aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price. Thus, it follows that, by requiring proof that the agreement entails disadvantages for final consumers as a prerequisite for a finding of anti-competitive object and by not finding that that agreement had such an object, the GC committed an error of law.[102]

As the rest of the judgment was well founded on other legal grounds, the CJEU upheld the ruling from GC, as the CJEU supported the arguments from the GC as to Article 101(3) TFEU. In *GlaxoSmithKline* the CJEU rejected the thinking of consumer welfare as the sole or predominant goal of European competition law and instead pointing to various goals, mentioning also the structure of the market and competition as such. The *GlaxoSmithKline* case illuminates the dilemmas of how to strike the right balance between Articles 101(1) and 101(3) TFEU, and it can be read as a contribution to the ongoing debate in competition law of the aims and values, but what the implications are for the SSGIs are by no means certain.

11.4 Concluding Remarks

The foregoing discussion has shown some of the problems with the primary competition rules and the SSGIs. The case law of the CJEU still has many uncertainties. The basic concept of an undertaking and the distinction between economical and non-economical activity—which is really the gateway to the competition law regime—are still quite unclear. Very important and still uncertain questions are how exactly to treat the principle of solidarity in this context, how much competition can be introduced in a certain area, and how much State supervision is to be required before the system in question escapes from the competition law regime. These questions have been at the forefront in this area from the very beginning and

[101] Citing CJEU, Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* [2008] *ECR* I-7139, para 65, on parallel trade in pharmaceuticals.

[102] GC, Case T-168/01 *GlaxoSmithKline* [2006] *ECR* II-2969, paras 63–64.

although some more concrete conclusions can be reached from the existing case law, as described above, many uncertainties still remain.

The question of SSGIs and competition law is of course highly delicate and political since it refers to basic choices in the EU as such as well in the Member States as to how to provide these important services within social security, healthcare, education, etc., and it is quite understandable that perhaps some reluctance to interfere in the basic choices of the Member States maybe identifiable in the case law from the European Courts. But this does not change the fact that the present case law does not sufficiently resolve the big challenges presented by the SSGI in the area of competition law which will only get bigger as the SSGIs get more and more commercialised. Perhaps, the emerging case law on balancing conflicting goals under Article 101 TFEU can be shown to be a more reliable way forward, since it allows a proper balancing within the competition rules.

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Chapter 12
Social Services of General Interest and the State Aid Rules

Julio Baquero Cruz

Abstract The present chapter examines the impact of the State aid rules on the organisation and provision of SSGIs. The topic is approached as a test to the thesis according to which the Union, its institutions and its law tend to favour economic objectives over social policy aims, thus producing a social deficit. The chapter addresses two main questions: do the State aid rules endanger the provision of SSGIs? Should issues concerning social services be dealt with at Union level or at national level, and which institutions are better equipped to deal with them? To explore these questions, the chapter examines the following issues: the applicable texts and the institutions in charge of interpreting and applying them; the notion of economic activity; the *per se* exception concerning aid of a social nature granted to individual consumers and the social dimensions of other exceptions; and the *Altmark* case law, the *Altmark* package and its reform.

Contents

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J. Baquero Cruz (✉)
Legal Service of the European Commission,
B-1049 Brussels, Belgium
e-mail: Julio.BAQUERO-CRUZ@ec.europa.eu

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12.1 Introduction

The interpretation and application of the State aid provisions of the TFEU with regard to SSGIs is a rich field for the assessment of the general thesis according to which Union law and institutions are affected by a structural market bias that leads them to favour market values, interests and policies over social policy objectives.

The foremost advocate of that thesis is Fritz Scharpf. He has presented it in various essays on the EU, now compiled in a book.[1] According to Scharpf, the liberal bias and the corresponding social deficit produced by the EU, its institutions and its law are due to the interaction of three elements: a strong emphasis on *negative integration*, which results in a *reduction of national policy capacities*, especially in the social field, and which is coupled with *weak positive integration* at the Union level. Let us consider these three elements in turn.

Negative integration refers to 'the removal of national obstacles to trade', while positive integration would amount to the creation of 'a common European regulatory regime'.[2] For Scharpf, the problem with negative integration is that it reduces national political capacities. '[A]t the national level, economic policy and social-protection policy had and still have the same constitutional status—with the consequence that any conflict between these two types of interests could only be resolved politically'.[3] This corresponds, in legal terms, to the idea of the economic neutrality of the constitution, according to which a constitution cannot embody a particular economic theory or ideology but must leave a large choice of policy measures open to policy makers. In contrast to what happens at the national level, Scharpf argues that 'once the European Court of Justice… has established the doctrines of 'direct effect' and 'supremacy', any rules of primary and secondary European law, as interpreted by the Commission and the Court, would take precedence over all rules and practices based on national law, whether earlier or later, statutory or constitutional. When that was ensured, all employment and welfare-state policies at the national level had to be designed in the shadow of 'constitutionalized' European law'.[4] For Scharpf, this produces a liberal bias and a social deficit, mostly in free movement cases, like *Laval* or *Viking* or the cases on the free

[1] Scharpf 2010.
[2] Ibid. p. 14.
[3] Ibid. p. 222.
[4] Ibid.

movement of patients.[5] But together with the internal market rules he also mentions, as factors of negative integration, the stability and growth pact, European liberalisation and deregulation policies, and European competition policy, including the application of the State aid rules.[6] All of these would create severe constraints on national political and problem-solving capacities, particularly in relation to employment, industrial, tax and social policies. Curiously, however, Scharpf does not mention the special rule of the Treaty concerning SGEIs (Article 106(2) TFEU), the case law on this provision or the *Altmark* judgment,[7] topics which should be at the heart of his concerns.

The constraints due to negative integration are aggravated by the fact that they cannot be sufficiently remedied by European positive integration. According to Scharpf, positive integration in the Union is a weak instrument and sometimes it is unavailable, as a result of procedural difficulties, such as the need to achieve unanimity in some areas, the widespread practice of consensus decision-making, the strength of veto positions and blocking minorities, the decision-making trap, which means that once a decision has been adopted and is in place it is very difficult to modify it when new circumstances require a policy change, the rather limited competences of the Union in the social field, and the limited budgetary resources available for Union redistributive policies.

As a result of the interplay between negative integration, reduced national capacities and weak positive integration, the Union political system is said to be highly individualistic, appearing as 'the extreme case of a polity conforming to liberal principles which, at the same time, lacks practically all republican credentials'.[8] The constraints of the decision-making process of the Union are thus said to be 'responsible for an extreme conservative bias of EU policy'.[9]

To overcome this situation, Scharpf has proposed a number of remedies. To begin with, he would favour an approach according to which 'conflicts between social-protection purposes and market-liberalising purposes would finally have to be resolved through a balancing test, rather than through lexicographic ordering'.[10] Secondly, with regard to positive integration, he would like to see policy solutions aimed at increasing the outcome legitimacy of the Union, that is, the legitimacy obtained from the results of policy measures. In his view, the current deficit in input legitimacy (that is, in participatory and representative democracy) is very difficult to overcome, in view of the weakness and lack of cohesion of the European public sphere.[11] The most the European Union could do would be to

[5] Ibid. pp. 336–341. CJEU, Case C-341/05 *Laval* [2007] *ECR* I-11767; CJEU, Case C-438/05 *Viking* [2007] *ECR* I-10779.

[6] Ibid. pp. 224 and 242.

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

[8] Scharpf 2010, p. 320.

[9] Ibid. p. 322.

[10] Ibid. p. 242.

[11] Ibid. p. 322.

devise rules that do not threaten the policy capacities and input legitimacy of the Member States. To this end, he has proposed various forms of flexibility and differentiation within what he calls 'framework directives', and discussed the potentialities, advantages and limitations of the OMC and other forms of soft law in dealing with the social deficit of the Union.[12] Finally, he has proposed to empower the European Council, at the request of a Member State and deciding by simple majority, to allow the requesting Member State to disregard a judgment of the CJEU.[13]

Echoes of Scharpf's attitude, from a similar ideological position, can be found in some legal and political writings on SSGIs and Union law. It has thus been argued that Union law trivialises social services, without taking into account their specific nature, and that a specific legal framework, different from the one that applies to other SGIs and from general internal market rules, is needed to safeguard those services.[14]

I have already assessed Scharpf's argument elsewhere, in general[15] and also with regard to the particular field of SGEIs, criticising his position in part.[16] Concerning SGIs, I reached the conclusion that the case law of the Court has found a reasonable balance between economic and social concerns, but that Union legislation, at least in the field on which I focused (the liberalisation of the postal sector), may show certain signs of regulatory capture and of a market bias.

The limited objective of this chapter is to check Scharpf's thesis against the specific topic of the interaction between the State aid rules and social services. This topic leads itself very well to this kind of analysis. It is indeed about a set of legal norms and a policy inscribed in the Treaty (legislation is limited in this field, as the rules are mostly contained in the Treaty; there is limited secondary law and some soft law), and therefore very difficult to amend. Their application is in the hands of the Commission, subject to review by the Court, the institutions which, according to Scharpf, structurally tend to favour economic interest over social values. The question I ask here, therefore, is whether the State aid rules, as they are interpreted and applied by the Commission and the Court, give precedence to economic over social values, reflecting a liberal bias, and whether they may endanger the provision of SSGIs.

A closely related and equally important theme of this chapter is the issue of institutional choice, also relevant to Scharpf's argument. In that regard a number of questions can be asked. First, where should issues concerning social services be

[12] Ibid. p. 666.

[13] Ibid. p. 200.

[14] Driguez and Rodrigues 2008, pp. 192, 194 and 196–197. For a similar opinion, see the Rapport d'Information of the French Assemblée Nationale of 1 April 2009 on Social Services of General Interest, Report No. 1574, pp. 9–10.

[15] Baquero Cruz 2007.

[16] Baquero Cruz 2005.

dealt with? At Union level or at that of the Member States? Second, what margin of manoeuvre must be left to the Member States? Finally, at Union level, which institution should decide on those issues that properly belong to that level? What shall be the respective roles of the Commission, the Court and the Union legislator?

To carry out this analysis, I go through the following steps. First of all, I look at the applicable texts and at the institutions in charge of interpreting and applying them (Sect. 12.2). Second, I analyse the notion of economic activity as it is applied in our field, since it is the first hurdle in the application of the State aid rules, which do not apply to non-economic activities (Sect. 12.3). Thirdly, I consider the *per se* exception included in the Treaty for aid of a social nature granted to individual consumers, and the social dimensions of the facultative exceptions concerning other categories of aid (Sect. 12.4). Finally, I consider the *Altmark* case law, on the notion of State aid with regard to public service compensations, and also the secondary and soft law measures adopted by the Commission following that judgment (the so-called *Altmark* package) and their imminent reform (Sect. 12.5). A conclusion closes the chapter (Sect. 12.6).

12.2 The Text of Article 107 TFEU and the Institutional Setting

The main provision on State aid in the Union treaties is Article 107 TFEU, which reads as follows:

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
2. The following *shall be compatible* with the internal market:

   (a) *aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned*;

   …

3. The following *may be considered to be compatible* with the internal market:

   (a) aid to *promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation*;

   …

   (e) such *other categories of aid* as may be specified by *decision of the Council* on a proposal from the Commission. (Emphasis added)

The procedure to enforce this norm is laid down in Article 108 TFEU, supplemented by the 'Procedural Regulation'.[17] Basically, Article 108 TFEU establishes a centralised *ex ante* system of review by the Commission after obligatory prior notification from Member State authorities. Measures which constitute aid cannot be implemented before being authorised by the Commission. In this system of review, there is a limited and mainly negative role for national courts,[18] and no role for national administrations. It is also important to emphasise that most Member States do not have their own systems of State aid law. There is, therefore, an asymmetry with regard to the competition rules applicable to undertakings, where the Member States do have their own competition laws and enforcement authorities, which also apply Articles 101 and 102 TFEU. At present, a network of State authorities, similar to that existing for the application of Articles 101 and 102 TFEU, is not conceivable in the Union for the application of the State aid rules. The consequence of this asymmetry is that the Commission has too much aid to review, with only limited resources to do so. Hence, the need to set priorities, which, as I shall argue, has special consequences for aid concerning local and regional SGIs—the levels where most social services are organised and provided. In summary, we can say that the State aid rules constitute a powerful policy instrument in the hands of the Commission, subject to exceptional political control by the Council, and to review by the Union Courts. However, the limited resources the Commission has to perform this task mean that it will often be confronted with hard policy choices concerning enforcement priorities.[19]

In itself, the text of Article 107 TFEU seems to be balanced between the need to prevent distortions of competition due to public subsidies to commercial companies and the legitimate policy objectives that Member States may want to pursue through those subsidies. State aid is disciplined, not impaired. The aim of such constraints is another equally important and legitimate policy objective: competition, economic efficiency, and the internal market. The exceptions enshrined in that provision seem to be sufficient to protect and take account of other public policy objectives, including social policy aims. That will depend, of course, on how these exceptions are interpreted and applied in practice, an issue to which the rest of the chapter will be devoted.

As to the institutional choices taken by the drafters of the Treaty, they seem natural and neutral. It is difficult to conceive a system that could work better with the available institutional resources. In an ideal world, one might want to have

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[17] Council Regulation No. 659/1999 of 22 March 1999, Laying Down Detailed Rules for the Application of Article 107 TFEU, *OJ* 1999 L 83/1.

[18] See the Commission, *Commission Notice on the Enforcement of State Aid Law by National Courts of 9 April 2009*, *OJ* 2009 C 85/1.

[19] In law there are limits to the setting of enforcement priorities, as the Commission is bound by Article 10 of the Procedural Regulation (Regulation No. 659/1999) to examine without delay 'information from whatever source [usually complaints from competitors] regarding alleged unlawful aid'. The setting of priorities is a policy issue that may be reflected in block exemptions, individual and general Decisions (like the *Altmark* Decision, cited in n. 7) and soft law instruments.

parallel State aid rules in all national legal orders, and national authorities enforcing the State aid rules at their level, complementing the action of the Commission, cooperating with it as parts of a State aid network, focusing, for example, on regional and local aid schemes, and allowing the Commission to focus on the aid that has a greater impact on the internal market. Such a more developed enforcement mechanism would require an ambitious legal and institutional reform.

12.3 The Notion of Economic Activity

Like the other economic rules of the Treaty, the State aid rules only apply to economic activities. This limited scope of application is implicit in Article 107 TFEU. Aid caught by this provision must distort or threaten to distort competition; it must favour 'certain *undertakings* or the *production* of certain goods' (emphasis added). If the subsidy does not concern a productive activity or favour an undertaking, which is defined by the case law as '… any entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed',[20] competition cannot be distorted by definition. Aid granted for the purpose of non-economic activities is thus not caught by Article 107 TFEU.

However, the notion of economic activity (offering goods or services in the market) is very wide and flexible. In the case law of the Court, there is a presumption in favour of finding an economic activity, both with regard to the competition rules and to the free movement rules. As a result, the notion of non-economic activity is a residual notion. I think this is a correct approach in legal and also in economic terms. In legal terms, the balance between economic objectives and other policy objectives can only be carried out once there is an economic activity. A finding that an activity is not economic means that no balance will be required and that economic considerations will have no weight. In economic terms, activities in which economic aspects are totally absent are rare. The residual nature of the legal category of non-economic activities simply reflects that reality.

According to the Commission Staff Working Paper of 2011, '[t]he most relevant criterion used in this context is whether there is a market for the services concerned'.[21] The existence of a market is linked to the presence of real competitors, which will depend on the nature of the activity, its aim, and, most importantly, on the rules to which it is subject.[22] With this more sophisticated

[20] CJEU, Case C-41/90 *Höfner* [1991] *ECR* I-1979.; CJEU, Case C-218/00 *Cisal* [2002] *ECR* I-691, para 22.

[21] Commission, *Commission Staff Working Paper, The Application of EU State Aid Rules, on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation*, SEC(2011) 397, 23 March 2011, p. 34.

[22] This is the test developed in CJEU, Case C-36/92 *Eurocontrol* [1994] *ECR* I-43, para 30. See, also, CJEU, Case C-343/95 *Diego Calì & Figli* [1997] *ECR* I-1547, para 23. For a more detailed discussion, see Baquero Cruz 2005, pp. 179–185.

analysis, the Court has developed the old *Höfner* case law, according to which the decisive question was whether the activity in question could be carried out by private entities.[23] This is a good development, for almost any activity is potentially economic, and that would mean that the notion of non-economic activities would be non-existent. The bottom line of the current case law of the Court is that the economic or non-economic character of an activity will depend on the regulatory decisions taken by the Member States when they establish the legal framework of that activity, and whether that regulatory framework leaves some room for actual competition among independent economic entities. Much depends, therefore, on the actual decisions taken by the Member States.

SSGIs can be economic and non-economic. As the Court has constantly held, the social aim of an insurance scheme [or of any other activity] is not in itself sufficient to preclude the activity in question from being classified as an economic activity.[24] Two other elements have to be examined: whether the principle of solidarity is predominant and whether the scheme is subject to supervision by the State.[25]

Much of the recent policy discussion on the notion of economic activity revolves around the issue of whether it is possible, for the sake of legal certainty, to establish a list of activities that can be considered *per se* as non-economic and therefore not subject to the economic rules of the Treaty, including the State aid rules. For some, the distinction is not sufficiently clear and it would be possible to render its application more predictable.[26] In two communications of 2007 and 2011 the Commission mentions as non-economic services 'traditional state prerogatives such as police, justice and statutory social security schemes'; 'air navigation safety or anti-pollution surveillance'.[27] However, even those activities cannot be said to be excluded as such, in absolute terms, from the notion of economic activity. As already suggested, the key to this legal notion is to be found in the way in which a Member State regulates a public service activity.[28]

There are, I think, four main situations. First, if a Member State excludes the market and competition completely, the activity will clearly be non-economic. Second, if a State excludes the market almost completely and non-economic

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

[24] CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751, para 86.

[25] CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513, para 43.

[26] For example, Dony 2004, p. 307.

[27] See Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committe and the Committe of the Regions, Accompanying the Communication on 'A Single Market for* 21*st Century Europe', Services of General Interest, Including Social Services of General Interest: A New European Commitment*, COM(2007) 725 final, 20 November 2007, p. 4; Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Commitee and the Council of the Regions on the Reform of the EU State Aid Rules on Service of General Economic Interest*, COM(2011) 146 final, 23 March 2011, p. 3.

[28] See van Raepenbusch 2006, p. 101.

considerations and regulatory techniques are predominant, then the relevant activity may also be a non-economic activity as a whole, even if there are certain elements of competition built into the regulatory regime, insofar as the latter are not dissociable from the non-market elements or if they are an integral part of a system in which there is no actual competition among the different entities at play in it.[29] Third, if the regulation is hybrid and the economic activities can be dissociated from non-economic activities, some aspects may be subject to the competition rules and other aspects may escape them.[30] Finally, there will be no exemption from the State aid rules if the economic aspects clearly prevail and the social aims are limited.

This means that a Member State can exclude the economic character of basically any activity, if it chooses to do so clearly and completely. Admittedly, the difference between the second and the third situations might be hard to draw. It all depends, I think, on whether the scope left to the market and competition is substantial enough and whether it makes sense to apply the State aid rules in that area.

It is therefore very difficult to draw up a list of activities which are not economic. Such a list would have a purely descriptive and indicative character.[31] The economic or non-economic character of an activity does not depend on its intrinsic characteristics but on the way in which public authorities regulate it. In most cases it is clear whether there is a market or not, but in hard cases a concrete detailed analysis is essential.

It is clear that a narrower notion of economic activity would leave more leeway to social services. But that would also mean that the important economic aims behind the State aid rules, which are also aims of general interest, would be sacrificed in some cases. Such a course of action would not be balanced in normative terms: it would give an excessive priority to social policy over economic policy objectives. As I shall later argue, that could be bad for social services. All in all, I consider that the wide notion of economic activity is correct in legal terms and also in policy

[29] As was the case in CJEU, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] *ECR* I-2493, para 53. Despite the fact that there was some measure of competition among German sickness funds when they set their contribution rates, the Court concluded that their activities were not economic, because that element of competition was just a limited incentive for the funds to be more efficient, but at the end of the day they are 'joined together in a type of community founded on the basis of solidarity ('Solidargemeinschaft') which enables an equalisation of costs and risks between them'.

[30] CJEU, Joined Cases 40–48, 50, 54–56, 111, 113 and 114/73 *Suiker Unie* [1975] *ECR* 1663, para 24: 'whatever criticisms may be made of a system, which is designed to consolidate a partitioning of national markets by means of national quotas, the effects of which will be examined later, *the fact remains that if it leaves in practice a residual field of competition, that field comes within the provisions of the rules of competition.*' [emphasis added].

[31] See, for example, the Commission, *Commission Staff Working Document, Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in Particular to Social Services of General Interest*, SEC(2010) 1545, 7 December 2010, pp. 22–23; the Guide gives examples based on Court judgments and on Commission decisions.

terms. I do not think it damages the provision of social services or puts economic interests over social policy objectives. What it does is to ensure that both are taken into account. It is within the substantive provisions (Articles 106 and 107 TFEU), when they are interpreted and applied, that the tension between economic and social values and interests must be spelled out and possibly resolved (or dissolved).

12.4 Social Aid to Individuals and Other Forms of Social Aid

Although the social aim of a particular measure cannot automatically shield it from the application of Article 107 TFEU,[32] the social character of aid can be taken into account at the stage of justification. In addition, subsidies which are used to compensate the special charges of undertakings entrusted with SGEIs, which may be of a social nature, may not constitute aid if they respect a number of criteria, as will be seen in Sect. 12.5.

In Article 107(2)(a) TFEU, among the measures that '*shall be compatible* with the internal market', we find the provision concerning 'aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned'. The Commission has a very limited discretion with regard to the *per se* exemptions enshrined in Article 107(2) TFEU. If the measure in hand falls under one of the categories defined in Article 107(2) TFEU, the Commission *must* approve it. In contrast with the categories of aid of Article 107(3) TFEU, which '*may* be considered to be compatible with the internal market (emphasis added)' by the Commission, and for which conditions and criteria may be imposed, in the context of Article 107(2) TFEU the Commission discretion is tightly bound and as a result the Member States have more leeway.

I think this legal distinction shows the preference the Treaty drafters intended to give, among the other categories of aid included in Article 107(2) TFEU, to social aid granted to individual consumers. This preference is understandable, since in principle it is a measure that will have a very limited effect on competition, since individual consumers may choose among different goods or services provided by different companies. A system of vouchers is a method of aid that achieves social aims selectively, without distorting the competitive structure of markets. The drawback is that it can hardly be applied alone where markets do not function because of market failures. In most cases, it will be used to correct the undesired social effects of markets that are already in place.

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[32] See CJEU, Case C-342/96 *Spain* v. *Commission* [1999] *ECR* I-2459, para 23: '… the social character of State aid is not sufficient to exclude it outright from being categorised as aid for the purposes of Article [107 TFEU]…' See, also, CJEU, Case 173/73 *Italy* v. *Commission* [1974] *ECR* 709, paras 27 and 28; CJEU, Case C-241/94 *France* v. *Commission* [1996] *ECR* I-4551, para 21.

Indeed, one could wonder why the drafters of the Treaty decided to include aid schemes granted to individual consumers among the *per se* exceptions to Article 107(1) TFEU. It could be argued that such aid, which is not granted to companies, does not affect competition in the first place. There could be a ground for this inclusion in view of the fact that individual aid which is subject to discriminatory conditions or favours some goods or services over substitutable goods of services could have an indirect adverse effect on competition. The drafters of the Treaty might have taken the correct decision while taking into account the lesser effects on competition of this kind of aid by including it in Article 107(2) TFEU, that is, by making it an automatic or *per se* exception. And in any event this provision is part of the Treaty and must be interpreted from the assumption that it has some useful effect (*effet utile*).

This exemption is mentioned in the 1994 Guidelines concerning the application of the State aid rules in the aviation sector. The Guidelines argue that that provision, 'which up to now has only rarely been used, may be of certain relevance in the case of direct operational subsidisation of air routes provided the aid is effectively for the benefit of final consumers'. 'The aid must have a social character, i.e. it must, in principle, only cover specific categories of passengers travelling on a route (e.g. children, handicapped people, low income people). However, in case the route concerned links an underprivileged region, mainly islands, the aid could cover the entire population of this region.' Finally, 'the aid has to be granted without discrimination as to the origin of the services, that is to say whatever EEA air carriers operating the services. This also implies the absence of any barrier to entry on the route concerned for all Community air carriers'.[33]

From this we learn a number of things. Firstly, that there is a measure of flexibility in the condition that the aid is 'granted to individual consumers'. According to the Guidelines, the aid has to be 'effectively for the benefit of final consumers'. That formulation allows for two possibilities: direct aid to the consumers; and also aid to the transport company, as long as the aid is passed on to final consumers. Secondly, in principle it is aid that should be granted to specific categories of people, but when it covers underprivileged regions it may benefit the entire population. Finally, although the provision only refers to 'products' (reflecting the focus on goods and the secondary importance of services when the Treaty was drafted), the Commission interprets it dynamically to cover services as well, which seems to be a correct interpretation.

The Commission routinely authorises social aid to be granted to individuals pursuant to Article 107(2)(a) TFEU.[34] Negative decisions are very rare in State aid

[33] Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State Aids in the Aviation Sector of 10 December 1994, *OJ* 1994 C 350/5,11.

[34] See, for example, Commission, *Decision of 11 December 2007,* C(2007) 5979 final, N 471/2007, *Portugal, Social Aid to individual Air Passengers Resident in Madeira*; Commission, *Commission Decision of 23 April 2007,* C(2007) 1872, N13/2007, *France, Social Aid to Individual Passengers for Corsica*; Commission, *Commission Decision of 10 April 2009*, C(2009) 3047, N 179/2009, *United Kingdom, UK Homeowners Morgage Support Scheme*; Commission,

cases concerning this provision.[35] In one case that we will take as representative of the line usually taken in these cases, the Commission received a notification of a discount scheme for eligible air services available to all people whose main residence is in one of the geographical areas in the most peripheral parts of the Highlands and Islands of Scotland.[36] The Decision described the scheme as follows: 'The aid to be granted will be granted by way of discount, the discount to be offered is a set percentage of the airline fare excluding taxes, airport charges and fuel/insurance/security surcharges etc. The discount will be the same for each eligible route and will be set at up to 50% of the normal tariff'.[37] The Decision also explained that:

> [t]here are currently a number of air routes operated under compensated public service obligations (PSOs) which are excluded from the scheme. *PSOs are applied to those routes which have no prospect of being commercially viable. Aid of a social character which is the subject of the present decision is considered by the UK authorities to be more appropriate for air services which can be provided commercially but at a cost which is a barrier to social inclusion*. It allows support to be targeted at those communities which are disadvantaged by high air fares.[38]

This shows the limits of vouchers and of Article 107(2)(a) TFEU. As already suggested, although vouchers could also be used to help in creating a market, usually together with public service obligations, in general Member States will tend to use vouchers and the exemption enshrined in Article 107(2)(a) TFEU where markets are already in place but they do not deliver the particular social services policy makers want to achieve or in the way they want them. The individual aid scheme will then be used to correct the market and achieve those public goods. However, where the market does not deliver the services at all, public authorities may need to create the market by providing financial incentives in the

(Footnote 34 continued)
Commission Decisions of 13 July and 24 November 2009, C(2009) 5658 final and C(2009) 9243 final, N 358/2009 and N 603/2009, *Hungary, Support Scheme for Housing Loans*. The Commission Decisions on State aid which are not published in the *OJ* can be found at: http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=3.

[35] See, for example, Commission, *Commission Decision of 26 January 2011, on State Aid*, C(2011) 267, C 50/2007, *France, Sickness Insurance Policies (contrats solidaires et responsables) and Supplementary Group Insurance Policies Providing Cover for Death, Incapacity and Invalidity*, *OJ* 2011 L 143/16 (the scheme was not approved under Article 107(2)(a) TFEU because it was not certain that the tax exemption and deduction scheme would be passed on to final individual consumers and because the tax deduction could involve discrimination); Commission, *Commission Decision of 24 January 2007, on State Aid*, C(2007) 170, C 52/2005, *Implemented by the Italian Republic for the Subsidised Purchase of Digital Decoders*, *OJ* 2007 L 147/1, paras 125–128; the aid did not have a social character because it benefited the whole of the Italian population.

[36] Commission, *Commission Decision of 14 February 2008, on State Aid*, C(2008) 685, N 27/2008, *United Kingdom, Aid of a Social Character Air Services in the Highlands and Islands of Scotland* (prolongation of N 169/2006), *OJ* 2008 C 80/5.

[37] Ibid. para 11.

[38] Ibid. para 17 [emphasis added].

form of compensation for public service obligations, which might include regulated tariffs.

In the case in hand the Commission recognised that the aim of the scheme was social: '… residence in a remote region may be regarded as a social handicap which justifies the grant of such individual aid'.[39] In its conclusion on the application of Article 107(2)(a) TFEU, the Commission 'decided not to raise any objections to the measure in question on the grounds that the aid is compatible with the Common Market'.[40] It examined the scheme in the light of the Communication of 1994 on the application of the State aid rules in the aviation sector. First of all, the Commission found 'that the financial compensation [was] for the benefit of final consumers. The air carriers that operate the routes in questions will act as intermediaries and will be reimbursed by the competent authority… on production of proof of sale…'[41] This shows, as already pointed out, an extensive reading of the condition of Article 107(2)(a) TFEU according to which aid must be granted to individual consumers. The Commission accepts aid that is granted directly to companies and only indirectly to consumers. Finally, the Commission notes that there is no discrimination against other Community air carriers.[42]

In this context, the Commission does not need to examine whether there might be an overcompensation of the air carriers or whether they are efficient. The measure is not designed as compensation granted to the company. By definition, therefore, there can be no overcompensation. Concerning efficiency, the existence of a functioning market should tend to ensure that the air carriers operating those routes are efficient. An interesting question behind this Decision is whether there were substitutable means of transportation which could have been discriminated against by the aid scheme. There the question is whether transportation by a combination of ferry and bus or ferry and train, with a very long journey to Glasgow or Edinburgh, is really a substitute for air transportation, which is much faster. The Commission Decision seems to imply that those other means of transportation are not really substitutable, when it says, at the beginning of the Decision, in the description of the aid, that there are 'few alternative transport choices…', like '… long rail or road journeys with poor options for daily return journeys', and that 'the choices faced by these communities when travelling to the main economic, administrative and population centres of Scotland are typically journeys of extremely long duration or expensive air services'.[43]

Other aid schemes of a social nature not involving individual aid to consumers or service recipients may be approved by the Commission under other paragraphs of Article 107 TFEU. A very important category is employment and training aid, which is considered, if it complies with certain conditions, to be compatible with

[39] Ibid. para 35.

[40] Ibid. conclusion.

[41] Ibid. para 33.

[42] Ibid. para 36.

[43] Ibid. paras 5, 6 and 8.

the internal market by the general block exemption regulation,[44] or can be authorised by the Commission if it is notified to it. The same is true of many regional and rescue and restructuring aid schemes, which may be justified on social policy grounds, even if they may be inefficient in economic terms. These kinds of aid, however, fall outside of the scope of this chapter, as they do not generally concern SSGIs but aid to the functioning of specific undertakings in order to protect or to create employment.

In some cases, nonetheless, other provisions of Article 107 TFEU may be useful when analysing aid linked to social services. A good example is a Decision about a Swedish aid scheme aimed at encouraging the construction of special housing for elderly people.[45] The market failed in providing such housing and Sweden wanted to encourage it with a financial incentive. Aid amounted to about 10 % of the construction costs. According to the Decision, 'The constructed apartments will be rented from the owners by the municipality, who in turn will allocate them to elderly people in accordance with social security legislation The municipality may charge a subsidised rent from the actual inhabitant. The final users of the apartments are therefore not in a direct contractual relationship with the owners'.[46] This meant that Article 107(2)(a) was not applicable, as the aid was not given or passed on to the final consumers, directly or indirectly, although final consumers clearly benefited from it in the end, as otherwise housing would not be available.

In its Decision, the Commission started recalling that 'the measure has not been designed by Sweden as a compensation for a [SGEI]' and that it was going to examine it 'as aid to certain economic sectors' under Article 107(3)(c).[47] This shows that the decisions of the Member States concerning the 'design' of their social policy measures determine the legal framework applicable to them. The Commission basically accepts that there is a market failure ('… the market is not able to respond to the demand for special housing'),[48] that there is no discrimination ('The scheme is open to all property owners without discrimination between public and private actors, nor against foreign investors.'),[49] and finally that 'the aid granted under the scheme is needed to reach *an objective of social equity* that is otherwise not being sufficiently met by the market. The aid would be proportional to the aims pursued and the effects on competition are restricted to the minimum necessary (emphasis added)'.[50]

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[44] Commission Regulation No. 800/2008 of 6 August 2008, Declaring Certain Categories of Aid Compatible with the Common Market in Application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation), *OJ* 2008 L 214/3-47. On this topic, see Bacon 2009, pp. 197–208; Heidenhain 2010, pp. 439–444.

[45] Commission, *Commission Decision of 7 March 2007, on State Aid*, C (2007) 652 final, N 798/06, *Sweden, Measures to Promote Certain House Building*.

[46] Ibid. para 6.

[47] Ibid. para 18.

[48] Ibid. para 19.

[49] Ibid. para 20.

[50] Ibid. para 21.

Two things are worth highlighting in this Decision. First, social policy justifications in the State aid field may come out not just in the framework of aid to individual consumers or concerning the compensation of public service obligations. Secondly, the Decision does not go into the issue of the justification of the level of the aid, even though one might wonder on what basis was a 10 % of the construction costs accepted as a proportionate aid to promote the building of such housing. Finally, there was no requirement concerning the efficiency of the construction companies to which the aid was granted. This means that the proportionality test applied by the Commission in this case was fairly loose, probably in view of the social aim of the aid scheme.

12.5 *Altmark*, *BUPA*, the *Altmark* Package and its Reform

The leading *Altmark* judgment, of 2003,[51] interpreted the notion of State aid and, more precisely, the concept of 'advantage' which is part of that notion, for cases of compensation of public service obligations. Here, I shall not offer a complete presentation of this judgment and of the institutional and academic debate that led to it, which has been the object of much attention and discussion.[52] Since it is, in many ways, a 'legislative' judgment of the Court, I think it is enough to focus on the criteria it establishes for compensation of public service obligations not to constitute aid and therefore be exempt from the obligation of notification to the Commission. The Court laid down the following four requirements:

First of all, the undertaking receiving financial compensation for its activities needs to have been entrusted with public service obligations which have been clearly defined by public authorities. Secondly, there is a requirement of *transparency*: the parameters on the basis of which the compensation is calculated must be established beforehand in an objective and transparent manner. Thirdly, there must be *no overcompensation*: the compensation granted should not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit. And fourthly and finally, there is an *efficiency* requirement: the undertaking must be chosen in a public procurement procedure, or else the level of compensation must be determined on the basis of an analysis of the costs of an efficient company.

[51] CJEU, Case C-280/00 *Altmark* [2003] *ECR* I-7747. The *Altmark* approach was built on the *Ferring* judgment (CJEU, Case C-53/00 *Ferring* [2001] *ECR* I-9067), refining it, and was confirmed in CJEU, Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] *ECR* I-14243. In CJEU, Case C-126/01 *GEMO* [2003] *ECR* I-13769, the Court took a different approach, but it was a chamber judgment and it seems to have remained an isolated and doubtful precedent.

[52] See Sinnaeve 2003; Acierno and Baquero Cruz 2004; Szyszczak 2004; Heidenhain 2010, pp. 511–533 (chapter by Max Klasse); Szyszczak 2011, pp. 293–326.

The importance of *Altmark* was not so much substantive as institutional. When the four *Altmark* criteria are met by a compensation scheme, there is no need to notify it to the Commission before it is carried out, since we are not dealing with a State aid at all.[53] That also means that in such cases national courts may decide, on the basis of the four criteria, whether there is aid or not. By putting the emphasis on the very notion of aid and not on the compatibility of those schemes with the internal market, the *Altmark* judgment was probably meant to relieve the Commission of the administrative burden of checking many compensation schemes which, if tailored to the *Altmark* ruling, would not need to be notified and analysed by the Commission. One may wonder, however, whether this intention has been achieved in practice. Since the four *Altmark* cumulative conditions are very stringent and only rarely met in practice (the fourth condition, in particular, is often not met), many measures end up falling under Article 107(1) TFEU which could have escaped it under the somewhat more flexible approach that the Court had previously followed in *Ferring*.[54]

An additional important aspect of *Altmark* is that it left open the question of the role of Article 106(2) TFEU in this field. In *Ferring*, which was the point of departure for *Altmark*, the Court declared that Article 106(2) TFEU 'is to be interpreted as meaning that it does not cover a tax advantage enjoyed by undertakings entrusted with the operation of a public service such as those concerned in the main proceedings in so far as that advantage exceeds the additional costs of performing the public service.'[55] It seemed, therefore, that the analysis under Article 106(2) TFEU would have no autonomous effect: the same kind of analysis would be done, in the same way, within the framework of the notion of State aid enshrined in Article 107 TFEU. Thus, the normative content of Article 106(2) TFEU would already have been present in Article 107 TFEU. If the compensation did not exceed what was needed by the company to perform the SGEI entrusted to it, there would be no aid under Article 107 TFEU and no need to justify the measure under Article 106(2) TFEU. On the other hand, if the compensation granted to the undertaking was excessive and constituted State aid, it could not possibly be justified under Article 106(2) TFEU, as it would go beyond what was needed to perform the SGI.[56] That would mean that Article 106(2) TFEU would be redundant for these cases. *Altmark*, in contrast, left the issue open, potentially allowing Article 106(2) TFEU to play a distinct role in this field.[57]

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[53] This position departed from the previous position of the GC, according to which any public service compensation granted to an undertaking constituted State aid which should be notified to the Commission and could be justified within the framework of Article 106(2) TFEU. See GC, Case T-106/95 *FFSA* v. *Commission* [1997] *ECR* II-229; GC, Case T-46/97 *SIC* [2000] *ECR* II-2125.

[54] CJEU, Case C-53/00 *Ferring* [2001] *ECR* I-9067.

[55] Ibid. para 33.

[56] Sinnaeve 2003, pp. 355–359.

[57] This view has been emphasised in GC, Case T-354/05 *TF1* v. *Commission* [2009] *ECR* II-471, para 135.

From the point of view of the debate on the socioeconomic model of the EU, I see *Altmark* as a neutral decision, for two main reasons. First, it achieves a reasonable balance between the economic interest in avoiding aid that distorts competition and the legitimate policy aims pursued through SGEIs. A more flexible solution, like holding, for example, that public service compensation *never* constitutes aid as long as the company receiving it has been entrusted with the operation of SGEIs, would certainly have left more leeway to national policy makers, but that would have sacrificed completely the important public interest of competition. Secondly, *Altmark* does not mean that those measures that do not comply with its four strict requirements will be unlawful aid that cannot be implemented. It simply means that such schemes will be treated as aid that must be notified. They could then be saved by the Commission by virtue of the exceptions enshrined in Articles 106 and 107 TFEU.

After *Altmark* there has been a clear tendency towards more flexibility in this area.

The first elements of flexibility came with the *Altmark* package, adopted by the Commission in 2005. This package included two main instruments: a Decision based on Article 106(3) TFEU[58] and a Framework.[59] The Transparency Directive was also amended to oblige undertakings that receive public funds as compensation for public service obligations to keep separate accounts.[60] To this was added a set of 'Frequently Asked Questions', recently updated into a comprehensive guide, which devotes much space to SSGIs.[61] The package is a mix of hard law and soft law instruments that builds up on the *Altmark* judgment with a view to guiding the Commission in its practice and to providing increased legal certainty to public authorities, recipients of public services and economic operators.

The main novelty of the package, both in the Decision and in the Framework (which are very similar in their approach and wording) is that the fourth *Altmark* requirement (efficiency), which was the most problematic and hard to apply of the four, is simply omitted. That is, for the Commission, the basic role that Article 106(2) TFEU can play in this field from the point of view of State aid policy. The possibility of such an approach has been confirmed by the GC, for whom the economic efficiency or inefficiency of the undertaking receiving public funds as compensation for its public service mission has no bearing on the application of

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[58] Commission, *Commission Decision of 28 November 2005,* C(2005) 2673, *on the Application of Article 86(2) of the EC Treaty to State Aid in the Form of Public Service Compensation Granted to Certain Undertakings Entrusted with the Operation of Services of General Economic Interest*, *OJ* 2005 L 312/67.

[59] *Community Framework for State Aid in the Form of Public Service Compensation*, *OJ* 2005 C 297/4.

[60] Commission Directive 2005/81/EC of 28 November 2005, Amending Directive 80/723/EEC on the Transparency of Financial Relations Between Member States and Public Undertakings As Well As on Financial Transparency within Certain Undertakings, *OJ* 2005 L 312/47.

[61] SEC(2010) 1545, cited in n. 31.

Article 106(2) TFEU.[62] However, this position has not yet been confirmed or even addressed by the CJEU.[63] Thus, compensation which constitutes aid because it does not comply with the fourth *Altmark* requirement will be considered by the Commission to be compatible with the Treaty under Article 106(2) TFEU, as long as it meets the first three *Altmark* requirements. According to the Decision, if it complies with the three of them and does not go not beyond certain thresholds (the company must not have more than 100 million euro of turnover per year and compensation must not exceed 30 million euro per year), such aid is exempted from the requirement of notification. Even though it formally constitutes aid, the practical consequences would be the same as if the four *Altmark* criteria had been fulfilled: there will be no need to notify the aid in order to implement it.

If the aid scheme goes beyond the thresholds set out in the Decision, then it will have to be notified to the Commission, but it will also be declared compatible by the Commission, according to the Framework, if it complies with the first three *Altmark* requirements. Also under the Framework, therefore, there is no need to set up an efficient aid scheme.

As I have already said, when *Altmark* was decided it was not clear what the future role of Article 106(2) TFEU would be. It was clear, as a matter of principle, that overcompensation of the actual costs of the company entrusted with a service of public economic interest would not only qualify the measure as State aid: it would also be disproportionate under Article 106(2) TFEU, distorting competition for no legitimate reason. It was not clear, however, what would be the appropriate analysis, under Article 106(2) TFEU, of a situation in which the company entrusted with a service of public economic interest received compensation that did not go beyond its actual costs associated with the performance of the service, in the cases in which that company was inefficient—i.e. the service could have been performed for less cost to the community by another company. Inefficiency meant that the measure would qualify as State aid under the fourth *Altmark* requirement, but could it be saved under Article 106(2) TFEU?

Everything would depend on the type of proportionality analysis applied in the framework of Article 106(2) TFEU. If a strict proportionality applied, the compensation of an inefficient company could be seen as disproportionate, since there would be alternatives less restrictive of competition, i.e. the compensation of the costs of an efficient company. But in the *Altmark* package the Commission decided to apply a softer necessity test that tries to reconcile social policy aims and

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[62] See judgment of the General Court, GC, Joined Cases T-568/08 and T-573/08 *M6 and TF1* v. *Commission* [decided on 1 July 2010, nyr], paras 140–141.

[63] In CJEU, Case C-451/10 P *TF1* v. *Commission*, *OJ* C 2010 328/15, an appeal against the judgment of the General Court mentioned in the previous footnote, TF1 claims that the GC erred in law 'by stating that the application of Article 106(2) [TFEU] did not require an assessment of the efficient functioning of public service'. The court rejected the appeal by reasoned order of 9 June 2011, without addressing this tissue.

competition,[64] a test that only rules out the overcompensation of the concrete company entrusted with the service, not the compensation of inefficient providers. Thus, the applicable test focuses on the actual needs of the particular company that receives the aid, not on whether a more efficient company could do the same for less cost to the community. The compensation allowed by the package, therefore, can be inefficient and go beyond what would be needed, in the abstract, to provide the service. It is, however, indispensable for that particular company, since without it that particular public service could not really be provided, or at least not in the same conditions. This element of the package gives precedence to social policy aims over economic considerations. It accepts suboptimal schemes for the provision of economic services of general interest, including social services, thereby enhancing the discretion of the Member States in this area.

It is worth noting in this regard that in the only provision of the Decision where quality and efficiency do play a role, that role is left to the discretion of the Member States. It is Article 5(4), according to which '[i]n determining what constitutes a reasonable profit, the Member States may introduce incentive criteria relating, in particular, to the quality of service and gains in productive efficiency'.

Besides this main and very important element of flexibility, the Decision includes other provisions which show a marked deference towards the social policies of the Member States. The first is the wide margin granted to the Member States in the definition of SGEIs, which underlines the fact that with regard to that definition the Commission will limit itself to a control of manifest error. Secondly, overcompensation can be carried over to the next year if it does not exceed 10 % of total compensation. For social housing there is a special rule allowing to carry over up to 20 %. Finally, as already said, the thresholds of the Decision are set at 100 million euro of turnover per year and at 30 million euro compensation per year. However, these thresholds do not apply to hospitals and social housing, in view of their 'specific characteristics' (probably a reference to the very high amounts involved in these two sectors, which is the rationale for not applying the thresholds, which were considered to be too low for them)—yet another rule that gives a relative precedence to social policy over economic considerations.

In addition to the flexibility found in the provisions of the package, the Commission's practice based on it has also been fairly flexible, in particular with regard to social services. To give just one example among others,[65] I shall refer to the Decision it took on a Dutch aid scheme for housing corporations.[66] In this case, the

[64] This is the test that the Court generally applies in the framework of Article 106(2) TFEU. See Baquero Cruz 2005, pp. 195–197. See also CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751, para 103.

[65] See also, for example, Commission, *Commission Decision of 7 December 2005, on State Aid,* C(2005) 4668 final, N 395/2005, *Ireland, Loan Guarantee for Social Infrastructure Schemes Funded by the Housing Agency*.

[66] Commission, *Commission Decision of 15 December 2009, on State Aid*, C(2009) 9963 final, N 642/2009, *The Netherlands, Existing and Special Project Aid for Housing Corporations*. The Decision has been attacked in three pending cases before the General Court: GC, Cases T-201/10

fourth *Altmark* requirement (efficiency) failed, since there was no tender and no proof that the housing corporations receiving the aid were efficient companies.[67] As a result there was aid, but the scheme was approved as modified by the Dutch authorities. The most important commitment concerned the definition of the social group that could benefit from the aid scheme. In its modified version, that scheme only applied to persons who earn less than 33,000 euro per year. That social group represents almost half (about 43 %) of the Dutch population, the average income in the Netherlands being around 38,000 euro per year. The Commission considered that 'this definition is acceptable, since it clearly delimits the scope of the activities to socially less advantaged households that are disadvantaged compared with those that are outside the target group'.[68]

One might wonder, however, whether this is a genuine social measure or one that goes beyond its purported social objective. The Commission adopted a very flexible definition of what constitutes a 'social policy' measure and what are 'socially less advantaged households'. The Decision thus leaves a large policy margin to national authorities. Once again, one is left with the impression that social policy objectives are given more weight than economic considerations. The Decision allows the Dutch authorities to pursue social policy, avoid 'ghettoes' of social housing and promote a social mix, with certain limits. Indeed, it seems that a measure extending to the whole Dutch population could have been disproportionate, having an excessive negative effect on competition.

That there is flexibility does not mean that there are no limits to it. In the State aid case concerning the French scheme to promote sickness insurance policies for people representing 'bad risks' for insurers through a tax deduction and a tax exemption, the Commission ruled that the aid scheme in its entirety was incompatible with the internal market.[69] In spite of its social character, in its analysis under Article 106(2) TFEU the Commission basically found that the tax measures did not contain any mechanism to avoid overcompensation and that the tax exemption was 'in no way linked to the additional costs born by the insurers'.[70] The scheme could therefore not be saved under Article 106(2) TFEU.

The Framework which is part of the *Altmark* package was due to expire on 29 November 2011 and a revised package was adopted on 20 December 2011.[71] The

(Footnote 66 continued)
IVBN v. *Commission*; T-202/10 *Stichting Woonlinie and Others* v. *Commission*; T-206/10 *Vesteda Groep* v. *Commission*, *OJ* 2010 C 179/59-50, 53.

[67] Ibid. paras 14 and 89.

[68] Ibid. para 57.

[69] Decision of 26 January 2011, cited in n. 35.

[70] Ibid. para 144. See, also, paras 189–192.

[71] The revised package includes the following legal texts: Communication from the Commission on the application of the EU State aid rules to compensation granted for the provision of SGEIs, *OJ* 2012 C 8/4-14; Commission Decision of 20 December on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEIs, *OJ* 2012 L 7/3-10; Communication from the Commission,

2011 Communication from the Commission[72] and a Commission Staff Working Paper[73] already gave some hints on the possible avenues for reform. The envisaged changes could involve, in particular, a clarification of the notion of non-economic services of general interest and of the application of the four *Altmark* requirements. Secondly, the reform would aim at simplifying the application of the package. The Commission is looking for a 'diversified and proportionate approach'. That would mean that the degree of scrutiny would depend on the nature and dimension of the public service concerned. Thus, the approach could be simpler 'for certain types of small-scale public services of a local nature with a limited impact on trade between Member States and for certain types of social services'. For such social services, the *de minimis* thresholds might be modified or lifted altogether, as is the case now for hospitals and social housing, in order to reduce the administrative burden of the competent authorities. In contrast, the Commission proposes to take 'greater account of efficiency and competition considerations in the treatment of large scale commercial services with a clear EU-wide dimension'.[74] The aim, therefore, seems to be to focus enforcement on large commercial services, while being less intrusive on certain types of local and social services. The revised package adopted on 20 December 2011 confirms this approach. If certain conditions are respected, health and long term care, childcare, access to and reintegration in the labour market, social housing and the care and social inclusion of vulnerable groups are automatically deemed to be compatible with the internal market and exempt from the obligation of notification to the Commission, regardless of the amount of the aid received as compensation. In contrast, for other SGEIs a threshold of 15 million euros per year continues to apply. The revised package thus establishes a more favourable and flexible regime for social services.

One should also mention, as a further possible element of flexibility, the *BUPA* judgment of the GC.[75] In *BUPA*, the Court decided that an Irish equalisation scheme concerning the health insurance market met the four *Altmark* conditions. The judgment was characterised by a very flexible approach to the *Altmark* criteria. A large margin of discretion was granted to State authorities not only regarding the definition of public service obligations, but also concerning the setting of the parameters of compensation and the other elements of the *Altmark* test, including the

(Footnote 71 continued)
EU framework for State aid in the form of public service compensation (2011), *OJ* 2012 C 8/15-22; Commission Regulation on the application of Articles 107 and 108 TFEU to *de minimis* aid granted to undertakings providing SGEIs, *OJ* 2012 L 114/8.

[72] Commission Communication of 23 March 2011, cited in footnote 28. The Communication is based on the recommendations concerning social services included in the report of M. Monti to President Barroso of 9 May 2010 on *A New Strategy for the Single Market: At the Service of Europe's Economy and Society*, pp. 73-75.

[73] Commission Staff Working Paper cited in n. 21.

[74] Communication cited in n. 27, pp. 6-7.

[75] GC, Case T-289/03 *BUPA* v. *Commission* [2008] *ECR* II-81. For a description and critique of this judgment, see the annotation by Sauter 2009.

efficiency requirement. The judgment limited itself to a mere review of manifest error. One may wonder whether and to what extent *BUPA* is compatible with *Altmark*. *BUPA* was not appealed and the Court has not had a chance to rule on it, so we do not really know. In case of doubt, it is clear that *Altmark* remains good law. But I think *BUPA* may be reconciled with *Altmark* if it is understood in its context. One possible explanation is that the Commission Decision that was attacked had been adopted before *Altmark*. It would have been odd for the GC to apply the *Altmark* criteria very strictly and rigidly to a Decision taken before the judgment. This may explain part of the flexibility of *BUPA*. More importantly, perhaps, the *Altmark* judgment was designed for a pure case of compensation of concrete costs born by a company entrusted with a public service activity, whereas *BUPA* was about a risk equalisation scheme concerning health insurance and services. That meant that some of the criteria laid down in *Altmark* for cases of direct compensation were not really designed for that kind of case. There was a need to adapt the criteria, while keeping their general spirit, so that they could apply in a different context.

All in all, it seems that the issue of the compensation of the special costs attached to the performance of social services has been dealt with in a balanced way in Union law. One may even add that social policy has sometimes been given more weight than important economic considerations.

12.6 Conclusion

I should like to conclude with some ideas on three issues: the notion of SSGIs and its added value, if any, as a legal tool; the reform of the *Altmark* package and the problems it may raise; and the general issues of the socioeconomic model of the Union, the appropriate level at which it should be tackled and the question of institutional choice.

On the first point, I tend to think that the notion of SSGIs has little, if anything, to offer in legal terms, at least with regard to State aid law. To begin with, the notion is inherently ambiguous. All social services are, by definition, of general interest. SGIs are also, by definition, in some way or another, social. They are social at least in a general sense, even though some SGIs may seem at first sight to be more social than others. But all SGIs are part of the shared values of the Union, contributing to the 'European model of society', to the social models of the Member States, and to social cohesion, through universal access and fair tariffs. All SGIs, economic and non-economic, social and commercial, involve some form or another of direct or indirect redistribution of economic resources, correcting what a free market would do and would not do if left alone. Even large commercial services like energy supply or public transport, where the economic aspects seem to prevail over the social dimensions, involve considerations of social policy and a measure of solidarity.

Secondly, the notion of SSGIs cannot do, in legal terms, more or anything else than what can already be done with the special provision that applies to SGIs. The

category of social services, therefore, is a purely descriptive notion with no normative added value. The notion may be very relevant in terms of policy or soft law, to set priorities and to guide the practice of the Commission with regard to social services.[76] But I see no need for specific rules concerning SSGIs: the rules we have allow decision makers to take their specificity sufficiently into account.[77]

Concerning the reform of the *Altmark* package, it seems to me, first of all, that it will be difficult to clarify the notion of economic activity. As I have explained, in hard and hybrid cases the application of this key notion can only rely on a case by case analysis and will remain a relative 'source of uncertainty'.[78] Since the concept of economic activity does not solely depend on the nature of the activity but mainly on the regulatory framework that applies to it, which can change from Member State to Member State and also in time, drafting a list of 'non-economic activities' seems to be an impossible task.

Secondly, the focus on large scale commercial services and the adoption of a looser legal framework with regard to small-scale public services of a local nature and to some kinds of social services is clearly understandable, in view of the fact that the Commission has limited resources and must focus its State aid policy on the most important distortions of competition in the internal market. However, this approach may have a number of drawbacks. First of all, since most Member States do not have their own State aid rules and enforcement mechanisms, there is almost nothing at the national level that can take care of distortions of competition with regard to those seemingly minor services. Second, the cumulative anticompetitive impact on trade of many small-scale local, regional or social services may be significant. As a matter of fact, social services now represent a non-negligible and so far growing part of the economies of many Member States. Those small inefficiencies, added together, may actually be bad for the economy at large, in view of the significant and growing dimension of employment and expenditure connected to the social services sector.[79] In addition, they may also be bad for the provision

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[76] That has been the main role of the notion of SSGIs so far. See, for an example, the Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM(2006) 177 final, 26 April 2006, which makes clear at the outset that, '… under Community law, social services do not constitute a legally distinct category of service within services of general interest, although they have a special role as pillars of the European society and economy…' p. 4.

[77] But see the EP, *Resolution of 14 March 2007 on Social Services of General Interest in the European Union*, *OJ* 2007 C 301/140-143 E, emphasising the need for a clearer legal framework that takes into account the specificity of social services, and the opinions mentioned in n. 14.

[78] As described in COM(2006) 177 final, p. 7. See also COM(2007) 725 final, p. 5: 'The question of how to distinguish between economic and non-economic services has often been raised. The answer cannot be given a priori and requires a case-by-case analysis'.

[79] See Commission, *Commission Staff Working Document, Second Biennial Report on Social Services of General Interest,* SEC(2010) 1284 final, 22 October 2010, pp. 15–27. According to the report, the share in employment of the activities linked to the provision of health and social services has grown, in average across the Union, from 8.7 % in 2000 to 9.6 % in 2007 (p. 16), and this sector is 'one of the main contributions to employment creation from 2000' (p. 18).

of the services and for their underlying policy aims. In the present times of economic crisis, cost-efficiency is crucial for the sustainability of social services.[80] The change of focus to which the reform of the package might lead may not help ensuring the sustainability of social services. The baseline seems to be that those are matters for the Member States, not for the European Union, its law and its institutions. The cost-efficiency of social services will in all likelihood be left to the discretion of the Member States, and we know that in the field of public expenditure self-discipline is seldom achieved.

On the other hand, a more vigorous application of the State aid rules with regard to social services and services of a local and regional nature may come up against intractable enforcement problems. Enforcement and enforcement capabilities are one of the key issues in this field, if not the main one. The 2011 Communication points to problems of enforcement of the package concerning certain sectors, including social services and services provided at the local and regional levels. According to the Commission, '… in certain areas, e.g. in the social services sector, the Package has not always been implemented as foreseen. This might be due to a lack of awareness on the side of the authorities concerned as well as to the complexity of the existing Package'.[81] It is therefore likely that many measures that constitute State aid and should have been notified to the Commission have been implemented by Member State authorities without notification, in breach of the Treaty rules.[82] Taking into account these problems, sacrificing the efficiency, sustainability and quality gains that a more vigorous enforcement of the State aid rules could bring to social services might therefore be the inescapable consequence of limited capabilities, and not an actual policy choice.

A possible partial solution to this shortcoming might be offered by the public procurement rules, procedures and principles, which tend to ensure a degree of efficiency in the company that is awarded a public contract, but their full application in the field of public services cannot be taken for granted.[83] In particular, the public procurement Directives are applicable to public service contracts but they do not apply to in-house services or to public service concessions, an instrument which is often used to entrust the operation of public services to undertakings.[84] In addition, public service contracts concerning social and health

(Footnote 79 continued)
In terms of expenditure, 'the resources devoted to health and social services, amounted in 2005 to around 9 % of the GDP of the EU-25' (p. 22).

[80] Ibid. p. 37: the crisis 'has caused both the need and the demand for services to rise and, at the same time, significantly constrained the financing basis in public budgets'. Hence the increasing need to fulfil 'the growing demand for services in a cost-effective way'.

[81] Communication 2011, cited in n. 27, p. 6. [See Chap. 13 by Szyszczak for an update on the Almunia revision of the Monti-Kroes package of measures; Eds].

[82] See Sinnaeve 2011, pp. 213 and 217.

[83] On this issue see Drijber and Stergiou 2009 and SEC(2010) 1545, pp. 59–73.

[84] Article 18 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004, Coordinating the Procurement Procedures of Entities Operating in the Water,

services are only subject to a limited number of the rules included in the applicable Directive.[85] Although it is clear that, in law, public authorities awarding public service concessions are bound to respect the principle of non-discrimination on the ground of nationality, which imposes an obligation of transparency,[86] it is not clear whether such rather vague obligations are strictly respected in practice, in the absence of detailed secondary law rules. It seems to me that it is the Union legislator and not the Commission or the Union courts that could remedy the gaps in this field in a reform of public procurement rules or in sector-specific instruments,[87] laying down clear requirements for the concession of those services.

My final point will return to the questions raised at the beginning of this chapter: do the State aid rules, as they are interpreted and applied by the Commission and the Union courts, give precedence to economic over social values, reflecting a liberal bias, and do they endanger the provision of SGIs? What level should deal with these issues: the Union or the Member States? Within the Union, what is the appropriate role of the Union court, the Commission and the Union legislator?

In my view, the rules reach a reasonable balance between the various public interests at stake, and so does their interpretation and application by the Commission and the Union courts.[88] Beyond the search for that balance, and perhaps more importantly, I think that the case law and the Decisions of the Commission have mainly sought to define the contours and limits of a policy space that must be available to policy makers, be they national or supranational. Indeed, what one finds sometimes, in a number of cases and Decisions, is that a relative precedence is given to social policy aims over economic and efficiency considerations. That precedence can be based on the general consideration that social policy has somewhat more weight than economic efficiency when both values need to be balanced in concrete cases. It may also find a positive normative basis in Article 9 TFEU, according to which, '[i]n defining and implementing its policies and activities, *the Union* shall take into account requirements linked to… the guarantee of adequate social protection, [and] the fight against social exclusion…'. The Commission and the courts are certainly part of the Union, and their State aid

(Footnote 84 continued)
Energy, Transport and Postal Services Sectors, *OJ* 2004 L 134/1; Article 17 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts *OJ* 2004 L 134/114.

[85] See Articles 20 and 21 of Directive 2004/18/EC. See, also, SEC(2010) 1545, p. 14.

[86] CJEU, Case C-324/98 *Telaustria* [2000] *ECR* I-10745, paras 58–62.

[87] The legislator has already done so in the field of public passenger transport services by rail and by road, imposing public procurement rules on public service concessions in that field. See Regulation No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on Public Passenger Transport Services by Rail and by Road and Repealing Council Regulations No. 1191/69 and 1107/70, *OJ* 2007 L 315/1-13. On the first experiences with this Regulation, see Rusche and Schmidt 2011.

[88] In this sense, van Raepenbusch 2006, pp. 143 and 161.

decision-making practice and case law are an important part of the definition and implementation of Union policies and activities.

The importance of the relative precedence given to social objectives over economic objectives is also, and perhaps mainly, institutional. Indeed, that relative precedence may well be needed, not only for SGIs but for all SGEIs, to preserve a space available to policy makers (both at Union and national level) which is not completely predetermined by the application of legal norms and in which they can deploy their political choices, deciding, if they so wish, to pursue social policies in inefficient ways. The soft application of the principle of proportionality would be the legal translation of that policy space, the technique that legal adjudicators use to look for a balance between law and politics, and for boundaries between their own function and that of policy makers. The deep discourse is, then, about legitimacy and democracy. That also explains why, in institutional terms, the main issues (the quality and efficiency of social services) are no longer in the hands of the judges or of the Commission as direct administrator of the State aid rules, but in those of the Union legislator or national legislators. The Union legislator, in particular, could act through a reform of the public procurement rules and/or through legislative developments concerning the State aid rules, based on Article 114 TFEU (harmonisation measures for the establishment and functioning of the internal market) or, finally, pursuant to the new legal basis enshrined in Article 14 TFEU.[89] Indeed, this provision allows the Union legislator to enact regulations that establish the principles and set the conditions for SGEIs to operate in accordance with economic and financial conditions that enable them to fulfil their missions. Through one or more of these avenues, the EU legislator could decide to give more weight to efficiency and quality in the implementation of SSGIs. An alternative possibility would be to pursue some of these ends through the open method of coordination, with its attendant advantages and disadvantages.[90]

Finally, I think that the radical views of Scharpf, that oppose economic and social values and interests as if they were inherently incompatible, are misleading. I consider that the interaction between economic and social policies does not always need to lead to an irreconcilable tension in which something has to be sacrificed to something else. It could be that our social policies would be better and more effective if they were implemented taking account of basic economic and efficiency concerns. The first policy issue, then, is how to create regulatory mechanisms that can do both things at the same time: to provide high quality social services in an efficient and effective way. The second issue is at what level this can be achieved if we do want to achieve it. I doubt that at the level of the Member States these balanced and optimal regulatory mechanisms will be found or even sought, for in the national, regional and local contexts social policy measures are often captured by the entrenched positions of the various groups concerned and

[89] On the possible added value of this legal basis, see Fiedziuk 2011.

[90] This is what purports to do the 'Voluntary European Quality Framework for Social Services' drafted by the SPC, SPC/2010/10/8 final.

very difficult to change. The EU, with its law and institutions, could play the role of a catalyst in this field, as in other policy areas, unblocking national policy discourses. Paradoxically, to a large extent that can only happen if there is a will on the part of the Member States. It is clear that these are not questions that the law and judges may resolve.

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Part III
Secondary and Soft Law

Chapter 13
Soft Law and Safe Havens

Erika Szyszczak

Abstract This chapter argues that SSGIs are not a legal concept in EU law. They have been constructed as a separate concept, emerging through *political* processes, as a special category of SG*E*Is. This has occurred because the crude legal tools deployed by EU law to separate (or demarcate) the application of the EU law to 'economic' activity only, and to allow Member States to continue to organise 'non-economic' activity, cannot capture the confused and dynamic changes to SSGI over the last few years. These changes have brought many SSGIs within the scope of the application of EU law. This chapter argues that SSGIs have been *Europeanised* through two methods. Firstly, by the Commission capturing a central role in moulding an EU agenda for the modernisation of SSGIs, using soft law and new governance techniques and providing legitimacy to such processes by creating a stakeholder constituency. It is argued that other EU Institutions have been drawn into this constituency and have not been able to exercise a decisive or independent role in the Europeanisation process. Secondly, through the Member States in the Council seeking justifications and exemptions for SSGIs in secondary legislation. These are referred to as 'safe havens'. The result is a casuistic approach deploying inconsistent terminology and inconsistent approaches towards SSGIs in EU law and policy. However, it is unlikely that any harder legal processes could be successfully negotiated to manage the interests at stake for SSGIs exposed to EU law and policy. Thus, SSGIs are subject to a variable geometry in EU law and policy.

E. Szyszczak (✉)
School of Law, University of Leicester, Leicester, LE1 7RH, UK
e-mail: ems11@le.ac.uk

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Contents

13.1 Introduction

SSGIs are not a legal concept in EU law. SSGIs are mentioned for the first time on a political agenda in 2001 in the Commission Report to the Laeken European Council. Services of General Interest.[1] Even in soft law, SSGIs did not emerge as a distinct category until the Commission Communication of 2006,[2] although social and health services were mentioned in earlier communications.[3] What we now recognise as SSGIs were seen as either 'social' activities or 'non-economic activities' or part of the 'public' activities of the State serving public interest goals.[4] This was a convenient nomenclature, masking the reality that SSGIs generated significant amounts of economic activity, especially in the procurement of goods and services, which could favour local products and services, generate significant local employment and ignore inefficiency and lack of choice for consumers.

The Commission White Paper of 2004 had recognised that SSGIs fell within the competence of the Member States but also recognised that EU law could have an impact upon the delivery and financing of such services.[5] SSGIs now create significant problems for the competence debate between the Member States and the

[1] COM(2001) 598. My thanks to Ulla Neergaard for this point.

[2] Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union,* COM(2006) 177 final, 26 April 2006.

[3] See Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, White Paper on Services of General Interest*, COM(2004) 374, 12 May 2004. See Chap. 2 in this volume, by Bauby.

[4] González-Orús 1999; Buendia Sierra 1999.

[5] COM(2004) 374.

EU because the Member States (and local authorities) are resorting to the commercialisation and marketisation of SSGIs leading to an increased cross-border interest in providing SSGIs beyond the nation state. Competition issues arise where the State devolves the provision of SSGIs to non-State bodies but the State retains a status of a monopsony.[6] Local laws and regulations, knowledge, familiarity with the cultural context of SSGI provision may favour local providers of such services making market access difficult for cross-border entrants and this may not open up markets to effective competition, or result in efficiency or provide the right balance and mix of services to give the consumer choice.

Sporadic litigation has questioned whether there is an EU definition of SSGI and how far Member States can shield SSGIs from the full force of EU market rules. In theory Article 106(2) TFEU, the generic shield for SGEIs, should be able to offer some protection for the *economic* activity of an undertaking operating as an SSGI. Much of the litigation centres on the application of the free movement rules where it is contentious as to whether Article 106(2) TFEU can be stretched across the TFEU to provide a justification for not applying the free movement provisions to a SSGI.[7] Article 106(2) TFEU operates *ex post* and *ad hoc* litigation has resulted in a number of rulings where it is difficult to ascertain a clear normative approach to its application with claims that its casuistic nature is not sufficient to protect SSGIs.[8]

SSGIs have emerged as a special form of SG*E*Is, but to date neither the European Courts, nor the other EU Institutions, have defined SSGIs sufficiently for them to emerge as a special *legal* category in EU law. Thus the Member States, and the Council, have resorted to creating a number of safe havens for SSGIs to be either accorded special treatment under EU law or excluded from its application. This has resulted in fragmentation of the concept as a plethora of terms, definitions and concepts have appeared in different layers of policy documents, soft and hard law. The most prominent safe haven for SSGIs is now found in the primary Treaty where reference to the concept of NESGIs are to be found in the Protocol No 26 to the Treaty of Lisbon 2009. This does not capture the range of *economic* social services that are potentially subject to EU law. Thus, in secondary law safe havens are to be found in the field of State aid in the '*Altmark* Monti-Kroes' package of

[6] See, for e.g., in the UK where the Office of Fair Trading (OFT) has estimated that public sector spending is around some £220 billion per annum on the purchase of goods and services from the private/third sectors (OFT, Commissioning and competition in the public sector, March 2011, OFT1314). Available at: http://www.oft.gov.uk/shared_oft/reports/comp_policy/OFT1314.pdf (last accessed on 9 June 2011). The UK Government advisor, Sir Philip Green, a well-known high street retailer, was engaged to conduct an Efficiency Review of public procurement where he reported back: 'Government must leverage its name, its credit rating and its buying power'. *Efficiency Review by Philip Green—Key Findings and Recommendations.* Available at: http://download.cabinetoffice.gov.uk/efficiency/sirphilipgreenreview.pdf (last accessed on 9 June 2011). For academic work on monopsony practices in buying social care in the UK see: Hancock and Hviid 2010.

[7] See Bekkedal 2011.

[8] Van de Gronden 2011.

measures in 2005–2007 (and the revision of that package in 2011–2012), in the Services Directive[9] and in the special treatment of certain SSGIs in the public procurement rules. All these secondary measures are subject to the residual (or constitutional) rules contained in the TEU and TFEU and the general principles of EU law.

The argument of this chapter is that the Commission has assumed a central role in driving an EU agenda for the modernisation of SSGIs and ensuring their compatibility with EU law and policy using techniques of new governance and soft law. Not only have these processes *Europeanised* SSGIs but also, so far, they have avoided open conflicts among the Member States, interest groups and stakeholders concerning the role of SSGIs in the EU. This is a remarkable achievement when EU competence for creating a policy on SSGIs is limited and at a time when SSGIs are under internal pressures as Member States strive to reduce public expenditure in a climate of economic crisis, changing demography (and workforce composition) and changing consumer expectations of services provision. Section 13.2 of this chapter analyses the evolution of the role of soft law used by the Commission and the ways in which a range of stakeholders, including the Member States, have been drawn into a discourse on SSGIs. Section 13.3 analyses EU law where the Commission and the Member States have either excluded SSGIs from the scope of EU law or provided special rules to apply to SSGIs in the State aid rules, particularly in relation to funding. Section 13.4 analyses the special, but inconsistent, treatment given to SGEIs (which include many services that would be identified as SSGIs) in the Services Directive. Section 13.5 concludes the chapter arguing that the use of soft law and safe havens has been of value to the Member States in stemming the potential erosion of their competence in the field of SSGIs as a result of the *ad hoc* litigation which challenges the 'non-economic' nature of many SSGIs. But, on the other hand, the processes have facilitated the Europeanisation of SSGIs and created an EU agenda for their modernisation. It is argued that the nature of the Europeanisation processes has resulted in inconsistencies in EU law and policy which are unlikely to be rationalised or re-casted in hard legislation but instead will be mediated through reliance on authoritative Guides and Communications adopted by the Commission. The outcome is the creation of a variable geometry for SSGIs.

13.2 Soft Law

The first argument of this chapter is that the Commission's actions created a debate around SSGIs that has allowed for Europeanisation processes to permeate into an area of competence traditionally, and jealously, protected by the Member States.

[9] 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.

Europeanisation is used as a term to explain the emergence of new networks of established, and new actors, creating an EU concept of SSGIs and the emergence of the Commission with a new governance competence and capacity in the form of soft law and soft governance processes. The Commission assumed the task of the Europeanisation of SSGIs as a process played out in a succession of soft law documents and the creation of a circle of stakeholders in the European debates. There is a strong correlation between CJEU/General Court judgments and the failure of the Member States to agree to hard legislative measures to regulate SG*E*Is. Initially, the Commission used soft law in the form of Communications as an attempt to consolidate and clarify the emerging CJEU case law against the Member States' reluctance to legislate in the field. This has now become a more complex process and is a good example of the Commission attempting to retain the role and power of 'the Communitarian Institution' against the superior power of the Member States, as well as seize the initiative where differences and divisions between Member States are obvious.[10] The use, and range, of soft law and soft governance processes, alongside the breadth of themes, has intensified over the last 2 years, with the Commission harnessing a wider group of actors to contribute to the discourse of how the special category of SSGIs, as a sub-category of SGEIs fits with EU policies.[11] This has allowed for the creation of a set of Europeanised themes: a European *concept* of SSGI; a European *discourse* on SSGI; a European *understanding* of the problems of SSGIs.

Soft law can easily become a shorthand description for any measures which are not hard law and there are excellent analyses of different types, and significance of soft law.[12] The analysis, in this chapter, uses soft law as a generic definition to embrace all measures that are not in the legally binding form of primary law and secondary law and focuses upon the *form* of soft law, the *content* of the soft law, its *role* and *purpose* in the regulation and Europeanisation of SSGIs. What will unfold, in this chapter, is a process of layering different forms of soft law on SSGIs through different soft governance processes. In relation to SGIS, soft law ranges from Commission activity in the form of White and Green Papers, Communications, Staff Working Papers/Documents, Frequently Asked Questions, Reports and Guides. Other EU Institutions and stakeholders through representation and the involvement of 'civil society', have contributed to the range of *soft* measures addressing SSGIs mainly in the form of Reports and responses to consultations which are attributed significance by the Commission using examples and quotations from such documents in its own communications and documents.

[10] Szyszczak 2006.

[11] See Chap. 9 in this volume by Neergaard for a classification of the SGI 'family.' See Chap. 12 in this volume by Baquero Cruz, for a discussion of whether there is the necessity for a special category of SSGI in EU law.

[12] Senden 2004; Neergaard 2011.

13.2.1 New Governance

A trend in EU integration studies from the mid1990s has been to analyse the processes of EU policy making, particularly to capture the multi-level and multi-actor dimension(s) to EU policy.[13] The use of new governance is identified by de Búrca[14] and Dawson[15] as a vehicle for responding to policy choices where there is strategic uncertainty for the EU in confronting complex problems *and* the need to manage countervailing tendencies through a response of 'unity' in an EU approach and, at the same time, manage respect for national diversity. SSGIs pose such a problem for the EU where the interdependence of several EU *and* national regulatory regimes is at issue. This chapter argues that a new constellation of stakeholders has been created, largely at the instigation of the Commission, to provide legitimacy to the Europeanisation of SSGIs by channelling new avenues for what are portrayed as democratic, participatory processes. Thus, it is argued that the participation and responses of the stakeholders to Commission initiatives are part of the emerging new governance processes. This, in turn, opens up further research questions on the constitutional evolution of new governances processes.

The concept of 'governance' has taken hold in the EU stemming from the Commission's White Paper in 2001.[16] The idea of 'governance' is used to describe the more progressive, transparent, non-hierarchical and pluralistic process of multi-level policy making in the EU, in contrast, to the traditional law and policy-making processes embedded in the original EEC Treaty. Initially, the White Paper of 2001 was intended to be a response to the failure of the Commission to stem the power of the Member States in the Council and as a response to the general indifference in Europe to integration. Subsequently, a new concept of multi-level policy-making processes has emerged involving consultation and involvement of different actors in different *fora* (or sites). One element of such processes is the Commission identifying 'common' issues and facilitating common responses. An important element of these processes involves the Commission explaining policy, decision making and the case law of the European Courts in order to enhance 'stakeholder' and 'citizen' accessibility to EU laws.

The Commission has harnessed a range of stakeholders who have contributed to the growing discourse on the modernisation and Europeanisation of SSGIs through a range of publications which enjoy a definitive status in Commission documents.[17] For example, the European Platform for Rehabilitation created Nine Principles of Excellence in 2002; the European Social Network (ESN) formulated

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[13] Wallace et al. 2005.

[14] De Búrca 2010.

[15] Dawson 2011.

[16] Commission, *Communication form the Commission*, *European Governance—A White Paper*, COM(2001) 428 final, 25 July 2011.

[17] Commission, *Commission Staff Working Document, Second Biennial Report on Social Services of General Interest*, SEC(2010) 1284 final, 22 October 2010.

a set of recommendations in 2006; the European Association of Service Providers for persons with disabilities (EASPD) issued a memorandum on a European Quality Principles Framework in 2006; SOLIDAR, a European network of non-governmental organisations working in development and humanitarian aid, social policy and social service provision, formulated Recommendations calling for the involvement of social NGOs in the elaboration of a European framework for the quality of social and health services; EUROCITIES, a network for local government of the major European cities, published a position paper on the development of a European Quality Framework in 2007; the Social Platform published a paper entitled 'Nine Principles to achieve quality social and health services' in 2008; FEANTSA, the European federation of national non-governmental organisations working with homeless people, published a document, 'Quality in social services: The perspective of social services working with homeless people'; Erdiaconia, a federation of organisations, institutions, churches providing social and health services, education based on Christian values, issued 'Principles for Quality Diaconal Social Services'; in 2010, the PROMETHEUS project developed the Common Quality Framework for Social Services of General Interest.[18]

13.2.2 The Form and Content of Soft Law on SSGIs

Significantly, the Commission chose the neutral term 'Services of General Interest' to capture the wide-ranging debate of the role of the diverse public services in the EU. This allowed the Commission to take ownership of a concept firmly rooted in national cultural, conceptual, constitutional and political backgrounds. Until the mention of SSGIs in the Commission Communication of 2006[19] SSGIs were classified as either non-economic activities falling outside of EU law or SGEIs which could be subject to the special treatment accorded under either the justifications found in the free movement rules or under Article 106(2) TFEU. The 2006 Communication was published on 26 April 2006 as part of the follow-up to the White Paper on Services of General Interest of 12 May 2004 and the survey that followed the White Paper.[20] This 2006 Communication is important for the *European* definition it ascribes to SSGIs. Firstly, SSGIs are defined as having a set of characteristics:

[18] A project financed through the Commission's PROGRESS project on social services quality. PROGRESS is the EU programme for employment and social solidarity managed by the DG for Employment, Social affairs and Equal Opportunities of the European Commission. This programme was established to financially support the objectives of the EU in the employment and social affairs area, set out in the Social Agenda.

[19] COM(2001) 598.

[20] COM(2006) 177 final.

'Social services often contain one or more of the following organisational characteristics:

- they operate on the basis of the solidarity principle;
- they are comprehensive and personalised, integrating the response to differing needs in order to guarantee fundamental human rights and protect the most vulnerable;
- they are not for profit;
- they include the participation of voluntary workers;
- they are strongly rooted in local cultural traditions. This finds its expression in particular in the proximity between the provider of the service and the beneficiary;
- there is an asymmetric relationship between the provider and the beneficiaries of the service that cannot be assimilated to a 'normal' supplier/consumer relationship'.

From 2006 the consolidation of the Europeanisation process of SSGIs moved rapidly. A consultation process[21] followed with the Commission issuing a second Communication in 2007.[22] The Communication lists several specific aims for social services, explains how these aims are reflected in the ways the services are organised, delivered and financed and proposes a strategy to clarify the applicable legal framework. It is accompanied by a Commission Staff Working Document, *Progress since the 2004 White Paper on Services of General Interest.*[23] This document reveals the difficulties bearing upon the Commission from the negotiation of the Services Directive (discussed in Sect. 13.3). It also discusses the application of the State aid rules in the wake of the *Altmark* ruling[24] using the Commission Decision, Framework and Frequently Asked Questions (FAQs) (discussed below in Part 2), alongside the use of Public Procurement rules and the special rules in the liberalised sectors. It also has a section devoted to development co-operation. The Commission emphasises that while progress on a legal framework for SG*E*Is had stalled, SG*E*Is are a pervasive feature of a wide range of EU policy areas.

The question of *funding* SGEIs after the ruling in *Altmark*[25] and the impact of the public procurement rules dominate these soft law documents. The Commission commissioned a study of SSGIs in 2008 and in November 2008, the Social

[21] This involved: (i) responses to a questionnaire prepared by the Social Protection Committee (SPC) in September 2006; (ii) a study on health and social services of general interest commissioned in 2006 (but finalised in 2008) organised within the framework of the open method of coordination by the Belgian authorities; (iii) the results of a peer review on long-term care; (iv) the opinion of the EP (FINAL A6-0057/2007); (v) the opinion of the ESC (CESE 426/2007); and (vi) the opinion of the Committee of the Regions (CoR ECOS-IV-006).

[22] Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Services of General Interest, Including Social Services of General Interest: A New European Commitment*, COM(2007) 725, 20 November 2007. The Communication accompanies the *Communication* from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Single Market for 21st Century Europe*, COM(2007) 724 final, 20 November 2007.

[23] Available at: http://ec.europa.eu/services_general_interest/docs/sec_2007_1515_en.pdf (last accessed on 15 September 2011).

[24] CJEU, Case C-280/00 *Altmark Trans* [2003] *ECR* I-7747.

[25] Ibid.

Protection Committee adopted a report on the application of Community/EU rules to social services of general interest, which assessed the strategy put in place by the Commission and made a number of recommendations.[26] This included new questions that had emerged since the FAQs of 2007. Examples include where the burden of proof lies, funding arrangements,[27] mixed public procurement contracts, how to assess over-compensation for the provision of a pso where there are different providers. The thrust of the Report is at SGEIs but there is brief mention of SSGIs under '6. Operational Conclusions' where the SPC acknowledges:

> There is, however, also some remaining reluctance to a systematic application of Community rules to all aspects of the organisation, financing and provision of SSGI.

Also in 2008, the Commission published its first Biennial Report on social services of general interest in 2008.[28] This report is in the form of a Commission Staff Working Document. Normally, Commission Staff Working Papers (SWP) and Documents are much lengthier than a Communication and are targeted at officials and stakeholder representatives at EU and national level. While the Communications are usually translated into 23 or 22 languages, in order to enable the national administrations and parliaments to deal with them, the Staff Working Papers and Documents are usually published in only one to three languages, and often only in English. For example, the first Biennial Report is only available in English.

The First Biennial Report is a scoping exercise, describing the socioeconomic role of such services and the major economic and societal changes to which they have to adapt. It looks at the way they adjust to evolving needs and constraints, considers how these changes affect the organisation, financing and provision of social services of general interest in terms of relevant Community/EU rules. Of significance is the emphasis upon modernisation of social protection and SSGIs. The emphasis upon modernisation is not new but part of an ongoing EU agenda which has been developed from the late 1990s through the 'social open method of co-ordination'.[29]

The Second Biennial Report is also a Commission Staff Working Document but does not have a COM number and is only published in English.[30] This Report begins by examining health and social services in the Member States and the EU from an employment and economic perspective and then focuses upon quality issues with an examination of the application of the legal rules to SSGIs and a

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[26] SPC, Report of the Social Protection Committee on the Application of Community Rules to SSGI, SPC 2008/17 final.

[27] In the light of CJEU, Case C-532/03 *Commission* v. *Ireland* [2007] *ECR* I-11353.

[28] Commission, *Commission Staff Working Document, Biennial Report on Social Services of General Interest*, COM(2008) 418 final, 2 July 2008. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC2179:EN:NOT (last on accessed 9 June 2011).

[29] Szyszczak 2002; Szyszczak 2003; Armstrong 2010.

[30] Commission, *Commission Staff Working Document, Second Biennial Report on Social Services of General Interest*, SEC(2010) 1284 final, 22 October 2010.

discussion of the follow up to the Monti Report 2010.[31] The Commission includes summaries of reports of the various stakeholders it has included in its constellation and also engages in soft governance practices of providing 'good examples' of Member State practices.

Alongside these developments the former Commissioner for Competition, Mario Monti, delivered his Report on *A New Strategy for the Single Market*.[32] Public services, generally, are described as an 'irritant' of the Single Market[33] and sections of the Report are devoted to how public services can be better assimilated into the Commission's new agenda for the revitalisation of the Single Market. SSGIs are also mentioned. The Report identifies the issue of improving the quality of SSGIs as the major concern. However, it rejects the idea of even framework regulation for SSGIs as offering little added value and recognising the slim chance of adoption of such a measure. Instead, the Report recommends using the existing levers of the state aid rules and public procurement rules to introduce greater flexibility in the regulation of SSGIs and to reduce the tensions between the integration of markets at European level and social protection at national level to reach the EU goal of a 'highly competitive social market economy'. Thus in speeches of the Vice President of the Commission, responsible for EU competition policy Joaquín Almunia, we see positive language being used, bringing public services in from the cold:

> public services are one of the pillars of Europe's social and economic model.[34]

On 7 December 2010 the Commission issued another Staff Working Document, a 'Guide' to EU rules and SGEIs and *in particular* to SSGIs.[35] This provides the most comprehensive statement of the case law and the Commission's soft law, as well as an explanation of the public procurement rules. In the 'Introduction', the Commission traces its own institutional history pointing to the first 2006 Communication where the Commission identified several areas where greater clarity was needed in the application of EU law as a result of the questions raised during the consultative exercise.

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[31] Mario Monti, A New Strategy for the Single Market, At the Service of Europe's Economy and Society, Report to the President of the European Commission Jose Manuel Barroso, May 9 2010, p. 73. Referred to as the 'Monti Report' in this chapter.

[32] Ibid.

[33] Cf. Prosser 2005, p. 172 writing on public services in the EU 'Initially they were seen as something of an irritant, limiting the creation of a full internal market'.

[34] At the time of writing, most recently in the Speech to the College of Europe, Bruges, 30 September 2011 'SGEI reform: Presenting the draft legislation.' Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/618&format=HTML&aged=0&language=EN&guiLanguage=en (last accessed 13 October 2011).

[35] Commission, *Commission Staff Working Document, Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in Particular to Social Services of General Interest*, SEC(2010) 1545 final, 7 Dec 2010. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=977&furtherNews=yes (last accessed on 14 June 2011).

The Commission is constantly under pressure to keep ahead of the case law of the European Courts in the application of the procurement, competition and State aid rules to SGEIs. To provide legal certainty and to ensure the Member States especially, but also the providers, consumers and other stakeholders, are aware of the impact of EU law the Commission has also introduced 'Frequently Asked Questions (FAQs)' documents. These supplement the Commission's Staff Working Documents as a kind of 'quiz' by setting out a series of questions, with the Commission also knowing the answers. These have developed from simple 'Questions and Answers' to the Commission giving detailed legal answers to the questions it has posed.

Thus, a range of soft law measures is used by the Commission to create an agenda of common concerns, inter alia, Member State and EU interests, the creation of a community of stakeholders, the creation of principles/indicators/best practice/iterative processes as well as underlying themes which run through the different soft law processes: modernisation, quality and citizenship. The Monti Report, in rejecting hard law measures, gave the green light for a more coherent and comprehensive set of soft law measures to be adopted which are normative in flavour, create an agenda for modernisation and create a political link between stakeholder responses and the rulings of the European Courts providing legitimacy for the Europeanisation processes taking shape.

13.2.3 The Role of Other Actors

The Commission has used other EU Institutions and institutionalised committees in a constructive manner, to build the narrative around the Europeanisation processes of SSGIs. It has also engaged with new sites of input into the discourse, particularly the new phenomena of 'Forums' on SSGIs. The modernisation of social protection processes from 2000 onwards (as part of the original Lisbon Agenda 2000) used high-level civil servants to facilitate co-operation between the Commission and the Member States at the national level to modernise and improve social protection systems. We now see a shift towards EU-level *fora* to institutionalise the modernisation processes. The Social Protection Committee was harnessed into the Council agenda by creating a working group in December 2009 to develop a voluntary quality framework for SSGIs with the aim to Europeanise a common understanding of the quality of social services within the EU.

The European Parliament has been actively involved in SGEI/SSGI activity following the Commission's 2006 Communication. Asked to respond to the 2006 Communication, the European Parliament tabled a Report (the 'Fereira Report')[36]

[36] *Report of 6 March 2007 on Social Services of General Interest in the European Union*, Rapporteur Joel Hasse Ferreira, 2006/2134(INI), PE 378.584v04-00 A6-0057/2007.

and adopted a Resolution in 2007.[37] The Fereira Report remains an important document which clearly identifies many of the legal problems surrounding the relationship of SSGIs with EU law and the need to protect SSGIs from the full force of marketisation values in their evolution under EU regulation. Currently, the European Parliament is working in tandem with the Commission initiatives on clarifying the application of EU law to SSGIs alongside the themes of certainty, simplification and quality. For example: the European Parliament's Own Initiative Report on the future of SSGIs,[38] the new public service intergroup (Castex) instituted on 20 January 2010,[39] a Report on the evolution of public procurement procedures,[40] and the evaluation of the Services Directive.[41]

The European Parliament has been instrumental in bringing the Committee of the Regions into the SSGI discourse. In the Resolution presented by Proinsias De Rossa on SSGI on 5 July 2011, the European Parliament is seen to take up the position of the Committee of the Regions, as expressed in its opinions, in particular on the need to respect the principle of local and regional authorities' autonomy in the provision of services. The European Parliament also asked that a high-level multi-lateral working group on SSGIs be created, co-chaired by the Parliament and the Commission, providing for the active participation of the Committee of the Regions.

Of significance for the widening of the inclusiveness of the Europeanisation discourse is the use of three 'Forums' on Social Services of General Interest. The first Forum on SSGIs took place on 17 October 2007, in Lisbon, under the auspices of the European Parliament, with the support of the Portuguese EU Presidency and the European Commission. Its aim was to promote the ongoing debate on structural changes in the field of SSGI and the appropriate legal and political framework for their organisation, regulation, provision and financing at European level.

The second Forum took place under the French Presidency on 28 and 29 October 2008 in Paris. The theme of this Forum was 'Guarantee access to all social services of general interest: what is the influence of Community law?' Here, the focus was upon the contribution of SSGIs to inclusion policies and social protection as well as examining how EU law takes account of the specificity of SSGIs,

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[37] Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-0070.

[38] Rapporteur: Proinsias De Rossa: Report on the Future of Social Services of General Interest, PE 438.251v03-00 A7-0239/2011. See also de Rossa 2011.

[39] Available at: http://www.publicservices-europa.eu/ (last accessed on 30 August 2011).

[40] In response to the *Commission Green Paper on the Modernisation of EU Public Procurement Policy Towards a More Efficient European Procurement Market*, COM(2011) 15 final, 27 January 2011. Rapporteur: Heide Rühle, Draft Report on Modernisation of Public Procurement, 2011/2048(INI). Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-467.024+03+DOC+PDF+V0//EN&language=EN (last accessed on 30 August 2011).

[41] Rapporteur: Evelyne Gebhardt, *Draft Report on Implementation of the Services Directive 2006/123/EC*, 2010/2053(INI). Available at: (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-452.694+01+DOC+PDF+V0//EN&language=EN (last accessed on 30 August 2011).

identifying conflicts and tensions. In addition to highlighting the role of SSGis in the financial crisis the Forum stressed the importance of promoting the quality of SSGIs.

The third, and most recent, Forum held by the Belgian Presidency of the Council of the European Union concluded with 15 Recommendations addressed to the European Parliament, the Council and the Commission. Additionally, the Belgian Presidency organised a technical seminar within the Social Security Federal Public Service on 13 July 2010 and engaged an SSGI team to provide a General Background note. The emerging theme from events in 2010 is the multi-actor and multi-legal resources that engage with the operation of SSGIs under EU law.

The use of 'Forums' engages a wider group of stakeholders and involves civil society in the debate at the EU level over policy and values inherent in the evolution of the EU, and as a *process*, should be added to the emerging forms and processes of new governance in the EU.[42] In addition to discussing the technical State aid and procurement rules, issues of SSGI and fundamental rights appear on this agenda, alongside issue of representation in the civil society dialogue in ensuring a balance between economic and social interests of the EU. The Report also raises the role of Article 9 TFEU[43] as a new horizontal mainstreaming clause:

> This clause offers a dual control, a posteriori by control of compliance with social principles, as well as a priori by the requirement of an impact assessment. In any case, it offers a new viewpoint for interpretation by the Court of Justice.

Adding that to ensure the social clause is effective a 'social progress pact' could be developed, an idea preferred by the European Economic and Social Committee. As a suggestion, inspiration could be taken from the 'European Consensus' in the context of the EU development policy, particularly in relation to the use of 'powerful implementation mechanisms'.

A critique of this process is that the actors lack self-determination. There are few opportunities for the contestation of issues and agendas are set by the Commission. Dawson has argued that:

> New governance cannot be seen solely as an abstract set of procedures *within which* political choices are made; instead, the set of procedures *themselves* have a bearing on the political choices that can be articulated through them.[44]

Thus, a research question for the future will be how far new governance techniques satisfy, and can accommodate, the classic calls for transparency and accountability and participatory democratic 'law' and policy making in the EU.[45]

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[42] The third Forum involved some 300 participants from the Member States, the EU Institutions and stakeholders.

[43] Article 9 TFEU states: 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.

[44] Dawson 2010, 409.

[45] Cohen and Sabel 1997.

13.3 Safe Havens

The EU has very limited competence to legislate for SSGIs. The increased marketisation of these services and consequent challenges to national schemes using EU law has led the Commission and the Council to create a number of exclusions or special regimes that can now be identified as an emerging concept of SSGIs as a special category of SGEIs in EU legislation. It should be noted that the legal concept of SSGI is not used in the secondary legislation, or in the harder forms of soft law used by the Commission in the field of State aid. This section of the chapter examines the rules created in relation to State aid, the freedom to provide services and the public procurement rules to demonstrate how certain 'social' activities are given special, but inconsistent treatment in EU law.

13.3.1 State Aid

Following the *Altmark* ruling[46] the Commission gave notice that it would adopt a 'more economic approach' to the application of the State aid rules in its State Aid Action Plan. In the assessment of SGEIs Point (i) states:

> … compensations granted should make the performing of public service missions feasible without leading to overcompensation and undue distortions of competition.[47]

This led to the Monti-Kroes Package of 2005/2007 consisting of a Commission Decision and Framework, a revision of the Transparency Directive and a Commission Press Release of Frequently Asked Questions. The aim of this package was to create greater transparency in the funding of public services, to create a set of *de minimis* rules (even though the CJEU has repeatedly stated that *de minimis* does not apply to the State aid rules[48]) and finally to create a set of safe havens through the exclusion of certain activities from the State aid rules and the *Altmark* ruling.

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[46] CJEU, Case C-280/00 *Altmark Trans* [2003] *ECR* I-7747.

[47] Commission, *State Aid Action Plan, Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005–2009,* COM(2005) 107 final, 7 June 2005, p. 10.

[48] CJEU, Case C-280/00 *Altmark Trans* [2003] *ECR* I-7747, para 81. See also CJEU, Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] *ECR* I-14243, para 28: 'It must be recalled that there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected….'

13.3.1.1 The Commission Framework and Decision

The legal status and legal basis of the Commission Framework[49] and the Decision[50] are not transparent. Both appear to operate as Block Exemptions to the State aid rules, but do not use Article 109 TFEU as the legal base. However, both are published in the Official Journal. Under the Commission Decision public service compensation that amounts to State aid is permitted [that is, it falls within Article 106(2) TFEU and does not need to be notified to the Commission] if:

1. It is less than €30 million per annum paid to undertakings with an annual turnover of less than €100 million, or is paid to hospitals or social housing undertakings[51] or certain small air or maritime undertakings, airports and ports carrying out a SGEI;
2. There is an official act (for example, a statutory rule) specifying the undertaking's precise public service obligation, the parameters for calculating, controlling and reviewing the public service compensation and the arrangements for avoiding overcompensation;
3. The amount of public service compensation does not exceed the costs involved in performing the pso, taking into account relevant receipts and a reasonable profit; the compensation is only used for the SGEI concerned.

Thus, the conditions reinforce the transparency and efficiency objectives for public service obligations inherent within *Altmark* but carve out exemptions for 'social' public services as well as introducing a *de minimis* rule.

In the Framework, public service compensation which does not satisfy the *Altmark* criteria or the Decision must be notified to the Commission as a State aid in the usual way. The Framework addresses when Article 106(2) TFEU will apply. The Framework is identical to the Decision, except for the fact that where State aid falls within the Decision it does not have to be notified to the Commission; thus, the Commission is obviously concerned with the scrutiny of larger amounts of State aid the opportunity to impose conditions on the grant of such aid.

Where the public service compensation does not fall under the conditions of *Altmark*, the Decision or the Framework the State aid rules may still apply, including the application of Article 106 (2) TFEU. It is difficult to envisage a situation where the proportionality principle of Article 106(2) TFEU is satisfied if a situation is not covered by the *Altmark* ruling, the Framework and the Decision.

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[49] *Community Framework for State Aid in the Form of Public Service Compensation*, *OJ* 2005 C 297/4.

[50] Commission, *Commission Decision of 28 November 2005,* C(2005) 2673 *on the Application of Article 86(2) of the EC Treaty to State Aid in the Form of* Public Service Compensation *Granted to Certain Undertakings Entrusted With the Operation of Services of General Economic Interest*, *OJ* 2005 L 312/67.

[51] Note, however, that Commission has intervened in social housing projects in the Member States, most notably in the Netherlands, see Szyszczak 2011; van de Gronden 2011; and Chap. 6 in this volume, by van de Gronden.

The post-*Altmark* era may be regarded as a transitional and experimental period where the Member States and the EU (particularly through Commission practice) have brokered a new relationship towards the regulation of public services using the State aid rules leaving many elements of uncertainty in both Commission practice and Court jurisprudence.[52] There is both a Member State and EU benefit in the fluidity of application of the legal rules since where there is no sector-specific legislation; there is greater flexibility to negotiate the evolution and recalibration of the provision of public services, including SSGIs.

The Commission took stock of this new relationship through a stakeholder consultation, eliciting feedback on three broad issues related to stakeholders' interests:

(i) from public bodies: is the package sufficiently user friendly and does it allow provision of SGEI to citizens?
(ii) from SGEI users: does the package allow for provision of good quality and cost-effective services?
(iii) from providers: does the package ensure a level playing field with competitors without creating unnecessary obstacles?

The Member States were asked to report on the implementation of the Monti-Kroes package during 2009. The review reveals the weaknesses of self-reporting in that many national reports are not very detailed; Member States are unlikely to open up their internal organisation of SGEIs to too much scrutiny. Some Member States express concerns over issues of legal certainty connected to the *Altmark* ruling and Monti-Kroes package, especially around the notions of economic activity, effect on trade, the relationship between State aid/public procurement and how to control overcompensation. The lack of legal certainty raises concerns within the Member States and the Commission as to whether rules are always applied correctly. From the post-*Altmark* case law, and the apparently rigid application of the *Altmark* conditions by the Commission, greater clarification of the four *Altmark* criteria are also necessary, particularly on concepts of defining what is a 'well-run undertaking' and a 'reasonable profit' and the linkage between costs and efficiency. Many Member States would like to see the *de minimis* threshold raised and the creation of more safe havens and safe harbours, especially for SSGIs.

The consultation was short: it started on 10 June 2010 and closed on 10 September 2010. Yet the consultation received a number of contributions, the most emanating from France, Germany, Italy and Belgium.[53] The Commission produced a comprehensive report on the application of the Kroes-Monti package based upon the Member State responses and the consultation exercise[54] and on 23

[52] See Klasse 2010; Hancher and Larouche 2011; Szyszczak 2011.

[53] The responses are available at:http://ec.europa.eu/competition/consultations/2010_sgei/reports.html (last accessed on 4 May 2011).

[54] Commission, *Commission Staff Working Paper, The Application of EU State Aid Rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation,*

March 2011 issued a Communication.[55] The Commission emphasised that only if was deemed appropriate would a new legislative proposal follow, coordinated with other initiatives, for example, a quality framework, the use of the new Article 14 TFEU legal base, the reform of the public procurement rules and the follow-up to the 2010 Monti Report. The consultation process was completed by July 2011 and in September 2011 four proposals were published, again for consultation in a short time frame of 1 month.[56] On 20 December 2011, the Commission adopted a revised package of measures to regulate the financing of services of general economic interest (SGEI) in the EU. The new measures comprise a Communication, a revised Decision and a Communication on a Framework applicable from 31 January 2012[57] and the promise of a new *de minimis* Regulation for SGEI by the Spring of 2012.[58] The measures reflect the changing economic and constitutional climate of the EU as well as a modernisation and 'more economic' approach towards regulating the financing and operation of SGEI in Europe.

For the purposes of this chapter the significant aspect of the reform package is a new slogan from the Commission: '… on the market side; our rules become tougher; on the social side, they are relaxed'.[59] Thus, in the proposed de minimis Regulation 'small and local' amounts of compensation for SGEIs from local authorities fall outside of the Commission's review. The range of sectors falling outside of the Commission's review has increased, for example, the provision of an SGEI by hospitals providing medical care, including emergency services and

(Footnote 54 continued)
SEC(2011) 397. Available at: http://ec.europa.eu/competition/state_aid/legislation/sgei_report_en.pdf (last accessed 4 May 2011).

[55] Commission, *Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, Reform of the EU State Aid Rules on Services of General Economic Interest*, Com(2011) 146, 23 March 2011. The Opinion of the Economic and Social Committee can be found at: *OJ* 2011 C 248/149 and the Opinion of the Committee of the Regions at: *OJ* 2011 C 259/40. For more detailed discussion see Sinnaeve 2011.

[56] Available at: http://ec.europa.eu/competition/state_aid/legislation/sgei.html (last accessed on 10 October 2011).

[57] *Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest*, *OJ* 2012 C 8/4; Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union 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* 2012 L 7/3; *Communication from the Commission, European Union framework for State aid in the form of public service compensation, OJ* 2012 C 8/15. See *State aid: Commission adopts new rules on services of general economic interest (SGEI)* IP/11/1571, 20/12/2011; Geradin 2012; Szyszczak 2012.

[58] *Draft Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest*, 2012l C 8/23. Adopted on 25 April 2012: *OJ* 2012 L 114/8

[59] VP Almunia, Speech to the College of Europe, Bruges, 30 September 2011 'SGEI reform: Presenting the draft legislation,' supra n. 34.

the pursuit of ancillary activities directly related to the main activities, compensation for the provision of SGEI meeting essential social needs for health care, childcare, access to the labour market, social housing are exempted.

13.3.1.2 Revision of the Transparency Directive

The Transparency Directive[60] was revised to impose an obligation to keep separate accounts for undertakings benefiting from public service compensation that also engage in activities outside of the SGEI, irrespective of whether they were receiving State aid.[61]

13.3.1.3 Frequently Asked Questions

The first set of 'Frequently Asked Questions' (known in the EU jargon as 'FAQs') was issued in the form of a Press Release referenced as a Memo.[62] This document outlines why the 2005 Framework and Decision have become necessary for public services and outlines the new package. For our purposes, it is interesting to note the explanation of *why* safe havens have been created in the package of measures:

> **Why exempt small-scale funding from prior notification?**
> With respect to small-scale public services, (such as home care services, local radio stations, local public childcare facilities), that receive no more than €30 million in annual subsidies and with respect to hospitals and social housing—independent of the amount of compensation received—the Commission does not think that prior notification of compensation is necessary, because there is little risk of serious distortions of competition within the Single Market. The exemption also covers compensation payments for air and maritime transport to islands where the annual traffic does not exceed 300,000 passengers, as well as compensations for ports and airports where annual traffic does not exceed 1,000,000 passengers as regards airports, and 3,00,000 passengers as regards ports. The relatively small scale of this funding does not require prior notification, provided all conditions of the Decision are fulfiled. Therefore, the Decision on small-scale funding seeks to exempt public authorities that wish to compensate such mostly locally active undertakings from the obligation of prior notification.

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[60] Commission Directive 80/723/EEC of 25 June 1980 on the Transparency of Financial Relations Between Member States and Public Undertakings As Well As on Financial Transparency within Certain Undertakings, *OJ* 1980 L 195/35. The Directive had been amended several times before the 2006 revision. For a discussion of the case see Chap. 6 in this volume, by van de Gronden.

[61] Commission Directive 2006/111/EC of 16 November 2006 on the Transparency of Financial Relations between Member States and Public Undertakings As Well As on Financial Transparency within Certain Undertakings, *OJ* 2006 L 318/17.

[62] State Aid: Commission Provides Greater Legal Certainty for Financing Services of General Economic Interest, Press Release IP/05/937, Reference: MEMO/05/258 Date: 15/07/2005. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/937&format=HTML&aged=0%3Cuage=EN&guiLanguage=en (last accessed on 9 June 2011).

The FAQs then address issues of SSGIs in greater detail, in particular as to why they are not excluded altogether from the State aid rules, emphasising that the mere function of social activities is not enough to shield them from the EU rules. It is the small, local nature of most SSGIs that warrants the safe haven, *not* the function of the activity:

> **Why not exempt other social services than hospitals and social housing?**
> Most social services are likely, in practice, fall below the thresholds for notification in the Decision. This means that the notification obligation is not nearly as heavy for social services as would be the case for hospitals and social housing, which are well-established and stable sectors where it is known that investment and operating costs would exceed the general thresholds.
>
> The draft framework sets forth the criteria for the Commission's assessment of the compatibility of compensation which, according to the amount of compensation and the turnover of the beneficiary, remains subject to the principle of prior notification.

This document is a memorandum or *aide-memoire*, outlining the necessity for the new EU rules, reassuring the Member States (and other stakeholders) of the limited EU competence in the area, but also giving notice that further soft law measures in the form of an explanatory communication would be forthcoming:

> **Why does the framework not address social services in more detail?**
> In its May 2004 White Paper on Services of General Interest (see IP/04/638), the Commission announced that it will submit a Communication on social and health services of general interest in the course of 2005. This Communication will set out a systematic approach in order to identify and recognise the specific characteristics of social and health services of general interest and to clarify the framework in which they operate and can be modernised. It will, amongst others, take stock of the Community policies related to the provision of social and health services of general interest, and describe the ways these services are organised and function in the Member States.

The later FAQs are more detailed, prescriptive and substantive documents and have been transformed into Manuals.

13.3.2 Procurement Rules

13.3.2.1 Soft Law

Public procurement is one of the areas where expenditure on SGEIs is significant, despite a climate of public budget cuts.

Public procurement falls within the general free movement provisions of the TFEU and is implemented by specific secondary law.[63] Since 1992, there has been

[63] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004, Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors, *OJ* 2004 L 17/1; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on Coordination of Procedures for the Award of Public

particular emphasis upon modernising public procurement at the national level to introduce greater transparency and market opening as well as efficiency. Policy is developed through Commission soft law, especially in areas which are controversial or where new objectives have appeared such as 'green' procurement. These examples provide useful case studies of how social objectives can be written into traditional EU processes that in the past have focused upon economic considerations. The pursuit of environmentally friendly procurement has been permitted by case law and is now explicitly incorporated in the Directives, but some aspects of green procurement are difficult to reconcile with the existing procedural rules and the Commission has developed soft law Guidelines.[64]

The expansion of EU values after the Treaty of Lisbon 2009 has allowed for other factors to play a role in procurement. A new *Guide* explains the possibilities of using the existing EU rules to address social aspects at all stages of the procurement process, for example promoting equal opportunities, improving labour conditions, social inclusion, compliance with ILO Conventions.[65] A second guide is aimed at guidance on providing high quality and efficient services in line with EU rules.[66]

The interaction of public procurement with the State aid rules, especially after the *Altmark* ruling, has highlighted the issue of ensuring non-discrimination and transparency in the procurement of SSGIs and the Commission included procurement issues in its FAQs as part of the Monti-Kroes package and as part of the Staff Working Document of 2010.[67]

(Footnote 63 continued)
Works Contracts, Public Supply Contracts and Public Service Contracts, *OJ* 2004 L 134/114; Council Directive 89/665/EEC of 21 December 1989 on the Coordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts, *OJ* 1989 L395/33; Council Directive 92/13/EEC of 25 February 1992, Coordinating the Laws, Regulations and Administrative Provisions Relating to the Application of Community Rules on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunication Sectors, *OJ* 1992 L 76/14; Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, Amending Council Directives 89/665/EEC and 92/13/EEC With Regard to Improving the Effectiveness of review Procedures Concerning the Award of Public Contracts, *OJ* 2007 L335/31; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the Coordination of Procedures for the Award of Certain Works Contracts by Contracting Authorities or Entities in the Fields of Defence and Security, and Amending Directives 2004/17/EC and 2004/18/EC, *OJ* 2009 L 216/76.

Available at: http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm.

[64] SEC(2010) 1545 final. Available at: http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm#green.

[65] See: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/106&format=HTML&aged=0&language=en&guiLanguage=fr.

[66] Buying Social: A Guide on Taking Account of Social Considerations in Public Procurement. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/106&format=HTML&aged=0&language=en&guiLanguage=fr.

[67] SEC(2010) 1545 final.

13.3.2.2 The Procurement Directives

The secondary EU public procurement rules[68] only apply where the relevant thresholds are reached[69] and when a public authority externalises the SSGI by entrusting it to a third party for remuneration. Difficulties arise where a public authority decides to provide a service 'in-house' through a legally distinct entity. The CJEU has narrowed down this exception in that if a private undertaking holds a share in the capital of the legally distinct entity this will deny the possibility of the procurement being 'in-house', because it excludes the public authority from exercising control over the entity in the same manner as it exercises control over its own internal departments.[70] This is a cause for concern for the Member States with much lobbying to reverse this judgment of the Court in any revision of the legislation.[71]

The public procurement rules recognise the special nature of SSGI procurement where a public service contract is awarded (that is, where the public authority pays the service provider a fixed remuneration).[72] Article 21 of Directive 2004/18/EC provides that health and social services contracts are not subject to all of the detailed rules of the Directive. Health and social services are among the services listed in Annex II B to Directive 2004/18/EC and public service contracts are subject to only a limited number of provisions of the Directive. In particular, health and social services contracts must set out the technical specifications at the start of the procurement process[73] and the results of the award procedure must be published.[74] Problems occur where there are mixed SSGI and other commercial

[68] Where there is a cross-border element to the procurement the basic rules of the TFEU apply, in particular adherence to the principles of transparency, equal treatment and non-discrimination, as well as the case law of the CJEU.

[69] Article 7 of Directive 2004/18/EC. See Chap. 6 in this volume, by van de Gronden on the difficulties of applying the Transparency Directive in procurement issues.

[70] CJEU, Case C-26/03 *Stadt Halle* [2005] *ECR* I-1, paras 49, 50. Cf. CJEU, Case C-107/98 *Teckal* [1999] *ECR* I-8121; CJEU, Case C-324/07 *Coditel Brabant* [2008] *ECR* I-8457; CJEU, Case C-573/07 *Sea* [2009] *ECR* I-8127; CJEU, Case C-340/04 *Carbotermo* [2006] *ECR* I-4137; CJEU, Case C-295/05 *Asemfo* [2007] *ECR* I-2999. Public–Private Partnerships (PPPs) which have been pioneered by the UK and adopted not only in Europe, but also in the developing world (Schwartz 2011), are covered by the public procurement rules.

[71] See Article 11 of the proposal for a Directive on public procurement, COM (2011) 896 final; Article 15 in the Proposal for a Directive on the award of concession contracts COM (2011) 897 final.

[72] Where a service concession is granted the basic TFEU rules and principles of EU law apply where there is a cross-border interest. Because many SSGIs are subsidised by the central or local state authorities there is a thin line between whether the subsidy allows a service concession to truly operate since the definition of a service concession is that there must be an essential element of risk undertaken by the operator: CJEU, Cases C-300/07 *Oymanns* (2009) *ECR* I-4779 and C-206/08 *Eurawasser* (2009) *ECR* I-8377.

[73] Article 21, read in conjunction with Article 23 of Directive 2004/18/EC.

[74] Article 21, read in conjunction with Article 23 of Directive 2004/18/EC.

services. If the value of the commercial services is higher than the value of the SSGI the safe havens will not apply.[75]

Of concern for the provision of national SSGIs, and now a concern of the EU, is whether creating requirements for the 'quality' of an SSGI fit with the EU rules. In the Commission's Staff Document the Commission acknowledges that specifications can give rise to discrimination because local providers will be familiar with local requirements for SSGIs. The Commission recognises that requirements for a local context may be acceptable if they can be justified by the particularities of the service provided and are strictly related to the performance of the contract and do not go beyond what is strictly necessary.[76]

The Commission states that public authorities may specify all the characteristics of the service to ensure high quality provision, for example, continuity of service, user accessibility, local infrastructure. Similarly, the experience and standard of the service provider's staff may be an important aspect of SSGI provision and therefore selection criteria may be included involving professional experience, qualifications, technical infrastructure to ensure the selected contractor has sufficient capacity to perform the service. Thus, quality requirements can be legitimately used in the award criteria as well as the conditions for performing the contract. When awarding a public contract or a concession for a SSGI the public authorities may adopt an integrated approach for the performance of complex services and are also able to choose a suitable length of time for the contract to ensure continuity and stability of the services. Significantly, public authorities may use the negotiated procedures to purchase health and social services.

SGIs raise a number of specific issues. One issue is that Directive 2004/18/EC does not allow contracts to be reserved for certain kinds of undertakings. This creates issues for public authorities which would prefer 'not-for-profit' bodies to supply SSGIs, with a belief that quality can be better preserved by such bodies.[77] In *Sodemare* the Court accepted that national provisions may, in exceptional circumstances, limit the kind of providers tendering for SSGI contracts if the national rules were compatible with EU law.[78] Thus, a public interest justification could be raised (provided it was necessary and proportionate). In *Sodemare* the justification was that the restriction of the provision of care homes to non-profit bodies was necessary to attain a social objective pursued by the national social security system.

A second issue is whether social corporate governance (i.e, control of the body, the kind of Directors on the governing board) rules could be applied to undertakings supplying an SSGI. Such requirements do not relate to the subject matter of the contract (technical features/value for money) or the performance of the

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[75] CJEU, Case C-76/97 *Tögel* [1998] *ECR* I-5357, paras 29–40.

[76] Examples are given at p. 66 of the Commission Working Document. Cf. CJEU, Case C-234/03 *Contse* [2005] *ECR* I-9315, para 79.

[77] Cf. with the use of Public Finance Initiative (PFI) since 1992 in the UK.

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

contract. The public authority may require a specific service to be performed and assessed in certain kind of way involving the participation of users provided that this does not lead to discrimination or pre-judge the award of the contract. At page 71 (Para 4.2.14) of the Staff Working Document the Commission gives examples of the various ways in which users of SSSGI may be involved in the way a SSGI is delivered.

A third issue is whether a public authority can outsource a SSGI other than through the public contract or concession route prescribed by EU law. The Commission gives an example of one variation where a public authority establishes in advance the conditions for provision of a social service and after sufficient advertising and compliance with the principles of transparency and non-discrimination grants licences (or authorisations) to all providers meeting the conditions. Such a system would not have limits or quotas and thus all service providers meeting the conditions could participate.

The procurement rules came under scrutiny in the Monti Report 2010 and in the Single Market Act 2011 procurement is to be modernised under the proposals set out in para 2.1.2.[79]

> **Key action**
> **Revised and modernised public procurement legislative framework,** with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs 62.

Service concessions are singled out for attention in a specific legislative framework to provide greater legal certainty for this type of partnership.

The Commission issued a Green Paper on the modernisation of EU public procurement policy[80] and in October 2011 the Commission published a Staff Working Paper on the application of EU public procurement law on relations among contracting authorities. This is a manual explaining the Court's case law and the application of the procurement rules. At the time of writing it is only available in English.[81] On 20 December 2011 the Commission adopted a proposal to reform the 2004 Directives on procurement.[82] Special attention is drawn to services to the person, for example, social, health and education services. The

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[79] Commission, *Communication from the Commission to the European Parliament, the Council, The Economic and Social Committee and the Committee of the Regions, Single Market Act Twelve Levers to Boost Growth and Strengthen Confidence 'Working Together to Create New Growth,'* {SEC(2011) 467 final}, COM(2011) 206, 13 April 2011.

[80] COM/2011/0015 final. Available at: http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=INI/2011/2048.

[81] Commission, *Commission Staff Working Paper, Concerning the Application of EU Procurement Law to Relations Between Contracting Authorities*, SEC(2011) 1169, 4 October 2011.

[82] European Commission, *Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal service*, COM (2011) 895 final; Proposal for a Directive on

proposal identifies the wide diversity of such services across the Member States but also concludes that such services are most likely to be provided locally and not affect cross-border trade. Thus, a de minimis threshold of €500,00 is proposed before such services would attract the attention of EU procurement rules. However, the principles of transparency, equal treatment will apply alongside ensuring that contracting authorities are able to apply specific quality criteria in the choice of service providers. The proposals also seek to address the contentious problems of 'in-house' and public–public cooperation by consolidating the CJEU case law.[83]

13.4 The Services Directive 2006/123

SSGIs are subject to the free market rules, especially the internal market rules of Articles 49 and 56 TFEU, where they constitute an 'economic' activity which is defined as a service provided for remuneration. This concept has been refined by the case law of the CJEU.[84] In relation to SSGIs, the free movement of services rules may be affected by national desires to restrict the type of body offering a SSGI, requiring prior authorisation of bodies for reasons of judging suitability or ensuring solvency to provide quality and continuity of care.

The residual rules of the TFEU continue to apply and because Member States continue to have some leeway in developing national social policy they may raise justifications to any restrictions they may wish to impose on the free movement of an economic SSGI.[85]

The troubled negotiation of the Services Directive[86] resulted in a number of safe havens and exclusions for SGEIs and especially SSGIs.[87] In line with the TFEU and the CJEU case law the Directive does not cover 'non-economic services of general interest' or public administration, public education provided by the State or public entities in fulfilment of their duties towards their population and without any economic consideration.[88] The Directive does not manage the

(Footnote 82 continued)
public procurement COM(2011) 896 final; Proposal for a directive on the award of concession contracts COM (2011) 897 final.

[83] Rodrigues 2010.

[84] Inter alia: CJEU, Case C-109/92 *Wirth* [1993] *ECR* I-6447; CJEU, Case C-172/98 *Commission* v. *Belgium* [1999] *ECR* 3999; CJEU, Case C-157/99 *Smits and Peerbooms* [2001] *ECR* I-5473; CJEU Case C-196/87 *Steymann* [2001] *ECR* I-5473; CJEU, Joined Cases 51/96 and C-191/97 *Deliège* [2000] *ECR* I-2549. See Chaps. 6, 7, 8, 9 in this volume, by van de Gronden, Tryfonidou, Flynn, and Neergaard, respectively.

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

[86] Directive 2006/123/EC.

[87] Barnard 2008; Davies 2007; Neergaard 2008.

[88] See Recital 8, and 17 of the Services Directive.

liberalisation of SGEIs [Article 1(2)].[89] The Directive does not affect freedom of the Member States to define a SGEI, how it is organised and financed [Article 1(3)], although any measures must be in conformity with EU law. The Directive does not affect the Member States' ability to apply the free movement of services chapter to SGEIs provided in another Member State.

As Neergaard notes, it is only in Recital 17 to the Directive that the concept of SGEI is mentioned, and with some confusion and inaccuracy.[90] There is no definition of SGEIs in the list of definitions provided in Article 4 of the Directive. Rather confusingly, Article 17 of the Directive includes within the concept of SGEIs the concept of universal service obligations contained in the liberalisation legislation of postal, electricity, gas, water distribution services, water supply and waste treatment. Even more confusingly, Article 2(2)(a) of the Directive refers to a new concept in EU law of 'non-economic services of general interest' to which the Directive is not applicable, but to which the Treaty rules and general principles of EU law *could* be applicable. Tracing the legislative history of the Directive Neergaard shows how the European Parliament in its first reading of the Commission's draft of the Directive proposed the partial exclusion of certain SGEIs a move readily endorsed by the Member States.[91] This is not surprising given the body of soft law that had grown up since 1996, alongside the inclusion of Article 16 EC (now Article 14 TFEU) by the Member States. However, little attention is paid to whether the definition and application of the EU rules relating to services should have a different scope and meaning from the definition and principles developed largely under the competition rules of the EC (now TFEU) Treaty.

Of special significance for this chapter is the singling out for exclusion of certain health care services [Article 2(2)(f)]; certain social services [Article 2(2)(j)]; social housing, childcare, support of families, persons temporarily or permanently in need where support provided by the State or by charities recognised as such by the State.[92] These exclusions are a derogation from the general rules of the TFEU and are subject to strict interpretation.

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[89] For example, CJEU, Case C-355/00 *Freskot* [2003] *ECR* 5263; CJEU, Case C-263/86 *Humbel* [1988] *ECR* I-5365; CJEU, Case C-109/92 *Wirth* [1993] *ECR* I-6447.

[90] Neergaard 2008, p. 70.

[91] Neergaard 2008, p. 96.

[92] The concept of a 'charity' was referred to in the Commission's Handbook on implementation of the Services Directive. See also the Question and Answer 7.10 in the Commission Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in Particular to Social Services of General Interest. The Commission states that the concept of 'charities' is specific to the Services Directive and its interpretation does not depend upon national law or other EU instruments but is intended to only identify certain operators whose services can be excluded from the scope of the Directive by virtue of Article 2(2)(j). The Commission moves on to provide an EU definition of such charities: '… not only that the providers of the service in question must be non-profit making but also that they must perform activities of a charitable nature (specifically recognised as such by the authorities) for third parties (in other words, not their members) in need. It follows from this inter alia that mere recognition as a non-profit-making organisation (for instance for tax purposes) or

This is one area where the lack of thought and differences between the rules applicable to SGEIs under the competition rules and under the free movement of services rules is exposed. In the 2010 FAQs, which have been transformed into a Guide,[93] the Commission addresses the question of whether the 'mandated provider' concept, as set out in Article 2(2)(j) of the Services Directive, is the same concept as the concept of 'act of entrustment' within the meaning of Article 106(2) TFEU and the Monti-Kroes package. The answer provided in para 3.4.4 shows a nuanced approach taken by the Commission. The Commission argues that the two concepts are a consistent concept in that '… they presuppose an obligation for the SGEI provider to provide the service'. But the Commission then moves on to state that the two concepts have different functions. Under State aid rules the concept of 'act of entrustment' is a precondition to be met before public service compensation can be regarded as compliant with the *Altmark* conditions and/or Article 106(2) TFEU. In contrast, the concept of 'mandated provider' is aimed at delimiting the scope of the exclusion of certain *social* services from the ambit of the Services Directive. However, a 'mandated provider' can be an undertaking that has received 'an act of entrustment' for the Services Directive but the relationship is not symmetrical because in order to satisfy the *Altmark*/Article 106(2) TFEU/Monti-Kroes criteria in addition to being entrusted with the provision of a public service obligation (pso) additional conditions must also be met, namely the mechanisms to ensure that overcompensation of the pso does not take place.

For SGEIs which have not been excluded from the Directive the Services Directive also creates 'safeguards' which allow the Member States to take full account of the features of SGEIs when implementing the Services Directive into national law. These safeguards are found in the review and assessment of requirements found in national law. The Member States are allowed to maintain in force authorisation schemes governing the access to, or the exercise of a service activity, which would include a SGEI, in all cases where such authorisation schemes are not discriminatory, justified by an overriding reason relating to the public interest and are proportionate.[94] Furthermore and requirements imposed upon SGEIs should not obstruct the performance and particular task assigned to a

(Footnote 92 continued)
the general interest nature of the activities performed are not enough in themselves for an organisation to be recognised as coming under the heading of "charities recognised as such by the State"'.

[93] SEC(2010) 1545 final.

[94] Articles 9–13 of the Services Directive 2006/123/EC. Note, however, that Article 9 of the Services Directive imposes an obligation upon the Member States to review national legislation and evaluate access schemes governing the exercise of a service activity. Member States were required to abolish authorisation schemes that were incompatible with Article 9, or replace such schemes with less restrictive measures that were compatible with the Directive. Such self-evaluation is unlikely to recognise obstacles which have not been challenged before using the free movement rules and it may take several years for a scheme to be challenged through litigation before the CJEU, which may involve application of the TFEU rules.

SGEI.[95] The free movement to provide services clause of Article 16 of the Directive does not apply to SGEIs, subject to the explicit derogation in Article 17 of the Directive.

13.5 Conclusions

SSGIs have been protected from the full application of EU law by the Commission and the Council (acting on behalf of Member State interests) through a combination of exemptions, justifications and safe havens in EU legislation. The Member States have been successful in stemming the erosion of national competence in the field of SSGIs by the use of special pleadings in any new secondary legislation. This approach is less successful where litigation is based upon primary legislation which has been immune from successive Treaty revisions. Here, resort must continue to be made to the older tools of public interest justifications and the application of the principle of proportionality. This has created a casuistic, approach without any clear statement of principle.

The creation of safe havens may be as crude a legal tool as the 'non-economic' tool to shield certain social activities from the thrust of market rules even where clear economic resources are evident in market-based relationships. For example, this is seen in the blanket exclusions of State aid for hospitals and social housing in the Commission Decision of 2005 and extended in the 2011 Almunia reforms to other 'social services,' where, in some Member States, the activities are evidently marketised and may not be compatible with the basic Treaty provisions. Inconsistencies arise in the terminology used in the legislation, as well as the different functions of various EU concepts which are developing in the legislation. The 2010/2011 appraisal of the Single Market and the Monti-Kroes package, alongside the modernisation of the procurement rules, would be an opportunity for the Commission to recast the bundle of safe havens and introduce greater consistency of terminology. However, given the enlargement of the EU and the divisions between the Member States it is unlikely that any major overhaul of secondary legislation will take place and the Commission is most likely to resort to further Guides to provide interpretation of the inconsistent terminology that has developed.

In the absence of competence to legislate in the area of SSGIs the Commission has complemented the use of safe havens with a soft law discourse which has moved the modernisation of SSGIs way from autonomous Member State policy making to a Europeanisation process. The purpose of this is two-fold. Firstly, the p*ost*-Treaty of Lisbon 2009 re-balance of 'market—social values' and the constitutionalisation of SGIs has allowed for the creation of a discourse of common concerns: of efficiency, of modernisation and quality and the use of good

[95] Article 15(4) Directive 2006/123/EC.

governance in the provision of SSGIs in Europe. In particular, the creation of a generic concept of SGIs has formed a useful vehicle to crystallise the controversial concept of the European Social Model.[96] At the same time there is acceptance that any future EU regulation of SGIs will be fragmented, allowing for diversity within the EU. SGIs are part of the new EU 2020 strategy and social services are recognised as having a role to play in economic, social and territorial cohesion. The Commission has been particularly successful in harnessing soft governance processes and engage a wide range of stakeholders to further an agenda on modernisation of SSGIs re-using older omc processes.

A second purpose is borrowed from Neergaard's description of soft law as an 'in between' layer of regulation where hard law is difficult (and sometimes impossible) to achieve.[97] As such it can be argued that soft law now plays a crucial role in the creation of an EU architecture. The various forms of soft law that have been described and discussed in this chapter create new, complex and elaborate *layers* of EU regulation for SSGIs already embedded in national political, legal and political regulatory orders. The *processes* of soft law generation attempt a semblance of democratic participation through stakeholder consultation and engagement.

The uneasy relationship of SSGIs with EU regulation suggests that the layers of soft law fulfil a need for the *lagging* of SSGIs in the Europeanisation processes. The vagaries of the English language allow a double play of meaning here. 'Lagging' can mean 'being left behind and/or failing to catch up with developments'. This is true for the EU response to SSGIs where the commercialisation of many activities has not been sufficiently accommodated in the framework of EU law. 'Lagging' can also mean 'insulation, to prevent loss of heat/heat diffusion'. The use of soft law has allowed for the conceptual problems associated with SSGIs to be insulated: to be part of an EU agenda where legislative competence is limited with the aim of protecting traditional *national* roles as well as ensuring that SSGIs can be modernised. Both meanings work well to describe the role of the use of soft law in EU political processes.

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[96] See, for example, Council Conclusions, Social Services of General Interest at the heart of the European social model, 305rd Employment, Social Policy Health and Consumer Affairs Council Meeting Brussels, 6 December 2010. See also the essays in Neergaard et al. 2008.

[97] Neergaard 2011.

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Chapter 14
Social Services of General Interest and the EU Public Procurement Rules

Elisabetta Manunza and Wouter Jan Berends

Abstract Social services of general interest are typically services which are not simply 'purchased' by public authorities from third parties against remuneration. Public authorities always retain the prerogative to decide whether they wish to provide a service themselves, either by using their own resources, through an in-house construction or in cooperation with other public authorities. It is also possible to distribute licenses or (limited) authorisations to private parties, award a service concession or grant an exclusive right for the performance of social services. This means that public authorities have extensive possibilities to provide social services in such a way that the Public Procurement Directive 2004/18/EC is not applicable, although they might have to take into account certain competitive obligations formulated by the European Court of Justice. The result is a fragmented legal framework, which is not conducive to compliance. This chapter discusses this legal framework in the context of the renewed interest in the public procurement market caused by a number of changes contained in the Lisbon Treaty as well as by the economic and sovereign debt crisis. In addition, the latest Commission proposals for the revision of the current public procurement directives, which form part of the Commission's initiative to relaunch the single market, will be discussed briefly. The proposals emphasise that Member States can specify that the choice of providers of social services may not be based on price considerations alone but should also include specific quality criteria. This is a good step in the direction of a public procurement regime which is not so much based on *price competition* but focuses more on *competition based on quality*. Finally, the

E. Manunza (✉) · W. J. Berends
Department of Law, Europa Institute, Utrecht University,
Achter Sint Pieter 200, 3512 HT Utrecht, The Netherlands
e-mail: e.r.manunza@uu.nl

W. J. Berends
e-mail: w.j.berends@uu.nl

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authors argue that an objective test should be introduced to assess the decision of a public authority to perform an activity itself or to externalise it to a third party. Such a test would force public authorities to take this decision on objective, transparent, proportionate grounds resulting in enhanced predictability, which is in the interest of public authorities themselves, as well as in the interest of citizens and service providers.

Contents

14.1 Introduction

Social services of general interest are typically services which are not simply 'purchased' by public authorities in the Member States pursuant to the rules laid down in the EU Public Procurement Directive 2004/18/EC.[1] Their provision is often organised in other ways. Firstly, it is important to realise that no rule of

[1] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ* 2004 L 134/114.

European law requires (national) public authorities to externalise the performance of social services of general interest to the free and competitive market. A public authority always retains the prerogative to decide whether it wishes to provide the service itself or in cooperation with other public authorities. In those two cases the EU Public Procurement Directive is not applicable. Secondly, in many cases rights to provide social services of general interest are distributed between private parties in the form of (limited) authorisations or awarded to them as a service concession. For different reasons, both (limited) authorisations and service concessions fall outside the scope of Directive 2004/18/EC, so there is no obligation to follow one of the public procurement procedures laid down therein. In the past, the choice to explicitly exclude the award of service concessions from the scope of the Directive was based on political reasons.[2] The distribution of (limited) authorisations is outside the scope of the Directive, perhaps for a different reason. The *distribution* of rights within a market by a public authority, as is the case with limited authorisations, cannot be considered as a purchasing activity from a legal perspective. Indeed, the authority in question does not purchase anything nor does it spend tax money. Instead, it 'encumbers' its own rights and receives remuneration in exchange, at least in some cases. However, as will be explained below, it follows from the case law of the CJEU that the award of such public contracts[3] by public authorities to third parties is also subject to some form of *competitive procedures*.

In this contribution, a distinction is made between *public procurement procedures* and other *competitive procedures/competitive tendering*. The term *public procurement procedures* is used to refer to the procedures laid down in the EU Public Procurement Directive 2004/18/EC. The term *competitive procedures* or *competitive tendering* is used to refer to other forms of competitive obligations in situations which are outside the scope of the EU Public Procurement Directives and that have been developed in the case law of the CJEU, such as for service concessions and for the award/distribution of (limited) authorisations (for example, for games of chance or the exploitation of casinos or lotteries). We will, further, focus on the rules for 'purchasing' public contracts. This means that it is beyond the scope of this contribution to discuss the circumstances in which licenses such as limited authorisations should be 'distributed' within a market by using competitive procedures/tendering.

To carry out this investigation, we go through the following steps. First of all, we discuss the renewed interest in the public procurement market caused by a number of changes brought about by the Lisbon Treaty and the deep economic and sovereign debt crisis in the last 3 years (Sect. 14.2). A question which will be dealt with in this section is whether a new tension has emerged due to the recognition of the principle of regional and local self-government—resulting in increased

[2] Manunza 2001, Sect. 4.3.

[3] Note that the term 'public contract' in this context is used in a broader sense than in the Directive to cover all kinds of purchasing transactions between public authorities and third parties used to entrust the provision of general interest tasks to such a third party.

discretionary power to decide whether regional and local governments wish to provide the service themselves or in cooperation with other public authorities—on the one hand and the intention of the EU to further liberalises the internal public procurement market on the other (Sect. 14.2.1).

In the context of the deep economic and sovereign debt crisis, the question is raised whether the choice the EU made several decades ago to subject the procurement of social services of general interest to a 'lighter' public procurement regime than other 'economic' services, is a choice which still does justice to the wish of the Member States to guarantee the provision of those services in the future, under the altered financial circumstances resulting from the deep economic crisis. Indeed, the decision to award public contracts in competition, was originally taken *inter alia* with the aim to spend community money more efficiently—by acquiring the best quality for the lowest price—and give all citizens equal opportunities to perform public contracts (Sect. 14.2.2).

Secondly, we will focus on the question whether public authorities are *obliged* to purchase such services in competition on the market or whether they can (still) perform social services of general interest themselves or in cooperation with other public authorities (Sect. 14.3). Thirdly, we will consider the opportunities for in-house provision (Sect. 14.4). After that, we describe the current public procurement rules applicable to purchasing social services of general interest as well as other competitive procedures which might have to be followed, depending on the circumstances (Sect. 14.5). In addition, the latest Commission proposals will be discussed briefly (Sect. 14.5.1).

Finally, we consider the problem that the choice between both options, externalisation or in-house provision, often appears not to be made on rational grounds. Therefore, before making this choice a *preliminary question* should be answered, namely whether a modern economy would not benefit from the introduction of rules subjecting the choice of public authorities between performing certain tasks themselves and awarding their performance to third parties, to objective, transparent and non-discriminatory criteria. How should public authorities decide whether they themselves or third parties are better able to collect and treat household waste, perform forensic investigations or provide home care services and other social and healthcare services, such as population screening? This fundamental question is investigated in Sect. 14.6, where it will be argued that an objective test should be introduced to assess the decision of a public authority to perform an activity itself or to externalise it to a third party.[4]

Without having the intention to speak the last word on this matter, we consider that it is of fundamental importance to draw attention to new questions such as this

[4] It is beyond the scope of this contribution to explain the various possibilities public authorities have under the European Public Procurement Directives and the case law of the Court of Justice of the European Union to take social criteria into account in their decisions to award a specific public contract. See in this context the Commission document *Buying social, A Guide to Taking Account of Social Considerations in Public Procurement* (2010) and Arrowsmith and Kunzlik 2009.

in order to ensure that the provision of social services of the highest quality can also be guaranteed in the Member States in the future under altered economic circumstances.

14.2 A Renewed Interest in the Public Procurement Market

In Europe, a renewed interest in the public procurement market emerged in 2010. On the one hand, this was caused by the entry into force of the Lisbon Treaty. This has led to several fundamental changes in the approach of the public procurement market, which are particularly important for the organisation of services of general interest, and thus for 'social' services of general interest. On the other hand, the renewed interest is the result of the deep economic crisis which hit the world and therefore also Europe from 2008 onwards.

14.2.1 The First Cause: Changes in the Lisbon Treaty

It took the European Union a long time to establish a new legal framework, which is now laid down in the Treaty of Lisbon 2009.[5] The entry into force of this Treaty raises the question whether any of the amendments which have been introduced might have consequences for the public procurement market. At first sight, the Lisbon Treaty has not caused substantial changes in the internal market provisions and therefore nobody would expect fundamental changes for the public procurement market as a consequence of its entry into force. After all, the provisions on free movement and state aid have remained unchanged.

In our opinion, however, there are some changes which could have important consequences for the public procurement market and therefore for the organisation of social services of general interest; consequences which we think are already visible. The first important change concerns the 'internal market' concept. Under the old EC Treaty the internal market had to be accomplished through the guiding principle of an open market economy with free competition (Art. 4 EC). The Lisbon Treaty has changed this by introducing the concept 'social market economy', aiming at full employment and social progress (Art. 3(3) TEU).

A change of this concept inevitably has consequences for the public procurement market, because the liberalisation of the public procurement market plays a key role in the functioning and completion of the internal market. In recent European studies, the volume of the public procurement market in 2008 was

[5] The consolidated versions of the Treaty on European Union (*OJ* 2008 C 115/13) and the Treaty on the Functioning of the European Union (*OJ* 2008 C 115/47) constitute the current legal basis of the European Union.

estimated at around 2,155 billion euro, 18 % of the GDP of the EU.[6] In short, it is the largest economic segment within the European internal market. In the second place, the liberalisation of this market sector is based on the internal market provisions: a change of the internal market concept can, therefore, have consequences for establishing its size as well as for its functioning.

In addition to the change in the internal market concept which, enriched with the adjective 'social', is now aimed at full employment and social progress, another important change might be the recognition—for the first time in European Union primary law—of the principle of regional and local self-government. According to Article 4(2) the Union 'shall respect… [the Member States'] national identities… inherent in their fundamental structures, political and constitutional, *inclusive of regional and local self-government'*.

The last change, which is of similar importance, concerns the strengthening of the principle of subsidiarity. The provision dealing with the subsidiarity principle, Article 5 TEU, clarifies that the principle of regional and local self-government also plays a role in the application of the subsidiarity principle, in the sense that 'in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather… be better achieved at Union level'. National parliaments ensure compliance with the principle of subsidiarity.

Those changes, which are *inter alia* intended to clarify that the Union is not only focussing on the free market but it is also aware of the social dimension, have consequences for the possibility of public authorities to either perform services themselves or externalise them. This is apparent from the development in the case law of the CJEU on public-public partnerships.[7] In a number of judgments in the last 2 years the Court already hinted at the principle of regional and local self-government and, by doing so, gave—perhaps indirectly—more discretionary power to regional and local authorities as regards the question whether performance by the market or by public authorities themselves is the best mechanism for the fulfilment of general interest tasks.[8] This question will be discussed in more detail in Sect. 14.3.

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[6] Monti 2010, p. 76.

[7] See also Commission, *Commission Staff Working Paper, Concerning the application of EU public procurement law to relations between contracting authorities (public–public cooperation)*, SEC (2011) 1169 final, 4 October 2011.

[8] See the Belgian *Coditel* judgment of 13 November 2008 (CJEU, Case C-324/07 *Coditel Brabant SA* v. *Communne d'Uccle and Region de Bruxelles- Capitale* [2008] *ECR* I-8475, and the *Hamburg* Judgment of 9 June 2009 (CJEU, Case C-480/06 *Commission* v. *Germany* [2009] *ECR* I-4747). (see further Sect. 14.3) as well as the following cases: CJEU, Case C-573/07 *Sea Srl* v. *Comune di Ponte Nossa* [2009] *ECR* I-8127 and CJEU, Case C-196/08 *Acoset SpA* v. *Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others* [2009] *ECR* I-9913; cf., the facts and decision in CJEU, Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki AE* v. *Ethnico Symvoulio Radiotileorasis and Ypourgos Epikrateias* and *Aktor Anonymi Techniki Etaireia (Aktor ATE)* v. *Ethnico Symvoulio Radiotileorasis* [2010] *ECR* I-4165.

In principle, there is no objection to this increase in discretionary power for local and regional authorities. However, a possible undesirable effect must be pointed out: public contracts might increasingly be performed by public authorities themselves, thereby excluding third parties from certain markets. What we think is lacking here, is clarity with regard to how public authorities take the decision to perform a contract themselves instead of externalising it. As long as that decision is not taken on the basis of *verifiable* and objective criteria, the application of the European public procurement rules will only become more complex (this problem will be dealt with in Sect. 14.5). As a consequence, there will be many competing aims in the public procurement market, which, in turn, can lead to different approaches, opinions, interpretations and an increasing number of court cases.

14.2.2 The Second Cause: Through the Economic Crisis Towards a Social Market Economy

The second cause of the renewed interest in the public procurement market, the deep economic crisis which started in the autumn of 2008, as well as the sovereign debt crisis, is perhaps of even greater importance.[9] After the bankruptcy of investment bank Lehman Brothers on 15 September 2008 the stock exchanges were hit by the sharpest fall in 1 day since the terrorist attacks of 11 September 2001. This global economic crisis, the first major economic crisis to which the European economic project was exposed, raised new questions with regard to the existence and future of the European internal market and as a consequence with regard to financing and organising social services of general interest.

On the one hand, a major question was to what extent the internal market structures designed would be able to withstand the socioeconomic pressure which built up in all Member States, given the pressure to keep jobs, protect vital industries, support banks and so on. With hindsight—although it is too early to tell—we can state that, in general, the basic principles of the internal market are still firmly established. In the report on the future of the internal market after the crisis,[10] (the Monti report) commissioned by Commission President Barroso, Mario Monti emphasises the importance of the public procurement market as a means to help the European economy out of the crisis. The Public Procurement Directives have made public procurement procedures in the Member States *more transparent*. They have had a very positive influence on *competition in* the

[9] See on the public procurement market and the economic crisis: Manunza 2009 and Manunza 2010c.

[10] See the Mission letter from the President of the European Commission José Manuel Barroso to Mario Monti dated 20 October 2009, Pres (2009) D/2250.

Member States and have resulted in better *value for money*.[11] It is estimated that public authorities have realised savings of up to 5–8 % of the price paid.[12] At the same time, Monti acknowledges the complaints by regional and local authorities with regard to the complexity of the rules and the importance of so-called in-house provision for them. He concludes that it is necessary to make public procurement policy simpler, more effective and less onerous and to clarify the possibilities which public authorities have with regard to in-house provision.[13]

The Commission has taken the measures proposed by Monti on board and emphasises in its *Europe 2020* communication[14] that European cooperation is needed more than ever to take the necessary measures to combat this crisis. In this context, the internal market and the public procurement market are deemed especially important. In its own words: 'none of our Member States is large enough to keep pace with the emerging economies or to undertake this transformation alone'.[15]

On 27 October 2010, the Commission published a communication called *Towards a Single Market Act. For a highly competitive social market economy* in which it lists 50 measures to relaunch the internal market in 2012, exactly 20 years after its establishment.[16] As usual, the Commission starts out by summing up the success stories, including the 2.75 million additional jobs and an economic growth of 1.85 % in the period 1992–2009. However, it goes on to emphasise that the focus within the 'relaunched' internal market has shifted dramatically in comparison to 20 years ago: back in 1992, free movement of goods and services was the central topic of the major economic operation, currently the focus is on citizens and solidarity while all proposals are aimed at improving the lives of the citizens of the Union.[17]

In addition, the Commission mentions that the potential of the single market is by no means fully used and that considerably larger gains are possible. Indeed, it estimates an economic growth of 4 % of GDP in the next 10 years if the

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[11] However, only 2 % of public contracts concerns direct cross-border procurement, Monti 2010, p. 76.

[12] Ibid. p. 76; the *Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation*, SEC (2011) 853 final part (1) and part (2) mentions cost savings of around 4–5 %. Available at: www.ec.europa.eu/internal_market/publicprocurement/modernising_rules/evaluation/index_en.htm.

[13] Monti 2010, p. 78.

[14] Commission, *Communication from the Commission, Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth* COM (2010) 2020 final, 3 March 2010.

[15] Commission, *Commission Working Document, Consultation on the Future "EU 2020" Strategy* COM (2009) 647 final, 24 November 2009.

[16] Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a Single Market Act. For a highly, competitive social market economy. 50 proposals for improving our work, business, exchanges with one another*, COM (2010) 608 final, 27 October 2010.

[17] Commission, *EU Citizenship Report 2010, Dismantling the Obstacles to EU Citizens' Rights*, COM (2010) 603 final, 27 October 2010.

measures it proposes will be introduced. However, this growth will have to be achieved on the basis of sustainable and social criteria. All measures proposed will, therefore, be subjected to an in-depth analysis to assess their social impact. This analysis will focus on the impact of single market legislation on the social rights enshrined in the EU Charter of Fundamental Rights. The analysis examines specifically how these rights relate to one of the main objectives of the 'new' internal market, i.e. solidarity. At the same time, the Commission responds to the wish of the European Parliament, as formulated in its resolution of May 2011,[18] to put more emphasis on the social aspects of public procurement rather than on the more economically oriented 'old' concept of the internal market. In its communication *Single Market Act. Twelve levers to boost growth and strengthen confidence 'Working together to create new growth'* the Commission identified public procurement as one of the priority areas in relaunching the single market.[19]

The Commission also heeded some of the other measures proposed by Monti and argued *inter alia* for the simplification of the existing legal framework for public procurement in 2012. To that end, it started a consultation in January 2011 which was concluded on 18 April 2011.[20] In the Green Paper, the European Commission asks whether the specific features of social services should be taken more fully into account in EU public procurement legislation and if so, how this should be done.

On 20 December 2011, the European Commission published three new proposals for the revision of the European legal public procurement framework. Two of them are intended to replace the current Directives 2004/17/EC and 2004/18/EC,[21] while the third specifically concerns the regulation of the award of concession contracts.[22] In the proposal for the revision of Directive 2004/18/EC the European Commission has codified and clarified the conditions developed in the Court's case law in relation to in-house provision and public–public cooperation (see Sects. 14.4.2 and 14.4.3).[23]

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[18] EP Resolution of 12 May 2011 on Equal Access to Public Sector Markets in the EU and in Third Countries and on the Revision of the Legal Framework of Public Procurement Including Concessions, P7_TA (2011) 0233.

[19] Commission, *Communication from the Commission to the European Parliament, the Council, The Economic and Social Committee and the Committee of the Regions, Single Market Act, Twelve Levers to Boost Growth and Strengthen Confidence "Working Together to Create New Growth"* COM (2011) 206 final, 13 April 2011.

[20] Commission, *Green Paper on the Modernisation of EU Public Procurement Policy, Towards a More Efficient European Procurement Market,* COM (2011) 15 final, 27 January 2011.

[21] Commission, *Proposal for a Directive of the European Parliament and of the Council on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors,* COM (2011) 895 final, 20 December 2011 and *Proposal for a Directive of the European Parliament and of the Council on Public Procurement,* COM (2011) 896 final, 20 December 2011.

[22] Commission, *Proposal for a Directive of the European Parliament and of the Council on the Award of Concession Contracts,* COM (2011) 897 final, 20 December 2011.

[23] COM (2011) 896, Article 11.

But what are, and will in the future be, the consequences of the developments described above for social services of general interest? Does the strengthening of the internal market mean that in the future public authorities will (always) have to leave the performance of social services to the market, meaning they will have to select the providers of such services by way of a public procurement procedure? As we will see below the answer is 'no' and the proposals of the European Commission of December 2011 will, when accepted, not change anything in this regard. Public authorities will keep the discretionary power to decide whether they will perform social services themselves or in cooperation with other authorities (public-public partnerships) or whether they want to externalise the provision of such services to third parties. Also in the last case, the application of the public procurement rules is and will remain minimal, even if the proposal of the European Commission will be accepted.

On the other hand, growing public budget deficits have caused a revival of the debate, which played a central role in the 1990s, on the necessity and scale of the welfare state.[24] Indeed, budget deficits increase the need for Member States to manage their public finances in a cost-conscious and effective way, since they are required to do so by the Stability and Growth Pact.[25]

In times of crisis the convergence criteria, specifically the strict limitation of the government[26] budget deficit to 3 % of GDP and the equally strict limitation of government debt to 60 % of GDP,[27] have more drastic effects than ever before. As a consequence, public authorities are forced to look for private sector entities who are willing to fund investments, to continue their privatisation operations, to stop the performance of general interest tasks, including those of a social nature, to hand over the performance of such tasks—where possible—to the market or to externalise their provision to third parties. Obviously, public authorities have only

[24] Manunza 2011a, b.

[25] Resolution of the European Council on the Stability and Growth Pact Amsterdam, 17 June 1997, *OJ* 1997 C 236/1; Council Regulation 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, *OJ* 1997 L 209/1 and Council Regulation 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, *OJ* 1997 L 209/6. Under the 1997 Regulations the Member States are obliged to submit annually updated macro-economic and budgetary prognoses to the European Commission and the Council. In the case of excessive deficits the Pact provides for sanctions and corrective procedures. The Stability and Growth Pact is translated into stability and convergence programmes. The stability programmes are prepared by euro zone Member States, convergence programmes by the other EU Member States.

[26] Article 2 of 'Protocol (No. 12) on the excessive deficit procedure' attached to the Treaty on the Functioning of the European Union defines the term 'government' in Article 126 TFEU as the: 'general government, that is central government, regional or local government and social security funds, to the exclusion of commercial operations, as defined in the European System of Integrated Economic Accounts'. 'Deficit' is defined as the 'net borrowing as defined in the European System of Integrated Economic Accounts'.

[27] Article 2 of Protocol No. 12 defines the term 'debt' used in Article 126 TFEU as the: 'total gross debt at nominal value outstanding at the end of the year and consolidated between and within the sectors of general government as defined in the first indent'.

a limited amount of resources at their disposal for ensuring the provision of (social) services of general interest. Due to the way in which those services are currently purchased and organised they often escape the logic of economic competition, as will be discussed below. As a result, they are potentially or *de facto* provided at a loss.[28] Therefore, public authorities will, in the future, be confronted with the problem of how to organise and finance social services of general interest in such a way that the continuity of their provision will be guaranteed even in circumstances altered as a result of the crisis. In addition to the drastic solutions mentioned above, public authorities will investigate less far-reaching measures to enable them to reduce budget deficits and at the same time guarantee the continuity and the best possible conditions for the provision of (social) services. In this new context, it will be interesting to investigate to what extent public procurement procedures can be used to select the social service provider offering the highest quality services against the lowest costs. Over the years, the positive effects of public procurement have been confirmed in several studies.[29] In addition, public procurement is a purchasing instrument that enables public authorities to pursue the aims of affordability and quality of social services of general interest at the same time. In times of crisis, the professional use of procurement procedures offers public authorities the opportunity to ensure the provision of affordable social services of general interest, without necessarily compromising their quality.

14.3 EU Liberalisation of SSGIs?

14.3.1 Do Member States Have 'Room for Manoeuvre' with Regard to the Organisation of SSGIs?

The concept of social services of general interest is neither defined in the TFEU nor in secondary legislation. In the communication *Implementing the Community Lisbon programme: Social services of general interest in the European Union*[30] several (groups) of SSGIs are identified.[31] The communication *Services of general interest,*

[28] Boullart and Depré 2005.

[29] Evaluation of Public Procurement Directives, Markt/2004/10/D Final Report, 15 September 2006; Commission, *Working Document Prepared by the Commission Services, Public Procurement Indicators 2008*, 27 April 2010; Monti 2010 and Commission, *Commission Staff Working Paper, Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation, 27 June 2011 SEC (2011) 853 final part 1 and part 2.*

[30] Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union,* COM (2006) 177 final, 26 April 2006.

[31] See the document for the complete list.

including social services of general interest: a new European commitment[32] and the *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*[33] clarify the aims and organisational principles characteristic of social services of general interest and point out that social services may be of an economic or non-economic nature, depending on the activity under consideration.

The fact that an activity is identified as a 'social' activity is not automatically enough to avoid being regarded as an 'economic activity', as interpreted by the CJEU[34] or to avoid the application of public procurement law. Public authorities in the Member States, whether they are national, regional or local authorities, have a broad margin of discretion when deciding which services they regard as services of general (economic) interest. However, EU law does pose some limits to this discretion.[35]

The scope and organisation of services of general (economic) interest varies considerably between Member States, depending on their different traditions and cultures with regard to state intervention. As a consequence, there is a broad range of services of general (economic) interest. The differences in needs and preferences of users can vary according to differences in the geographical, social and cultural situation. Indeed, it is to a large degree the responsibility of (national, regional or local) public authorities to determine the nature and scope of a particular service of general interest.

In accordance with the principles of conferral, subsidiarity and proportionality the role of the EU is limited to those competences which have been conferred on it by the Treaties, and as far as this is necessary. In its actions, the Union shall respect the diverging situations of the various Member States and the role which national, regional and local public authorities have been given to ensure the well-being of their citizens and to promote social cohesion, accompanied by the necessary guarantees for democratic choices as regards *inter alia* the quality level of service provision.[36]

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[32] Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Accompanying the Communcation 'A Single Market for twenty-first Century Europe', Services of General Interest, Including Social Services of General Interest: A New European Commitment*, COM (2007) 725 final, 20 November 2007.

[33] Commission, *Commission Staff Working Paper, Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in Particular to Social Services of General Interest* SEC (2010) 1545 final, 7 December 2010.

[34] CJEU, Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others* v. *Stichting Pensioenfonds Medische Specialisten* [2000] *ECR* I-6451, para 118; CJEU, Case C-218/00 *Cisal di Battistello Venanzio & C. Sas* v. *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [2002] *ECR* I-691, para. 37; CJEU, Case C-355/00 *Freskot AE* v. *Elliniko Dimosio* [2003] *ECR* I-5263.

[35] SEC (2010) 1545 final, pp. 16–17.

[36] SEC (2010) 1545, p. 17.

In short, it is up to the public authorities in the Member States to classify a service as a service of general interest. Note, however, that it is the way in which the service provision is organised and not so much the nature of the service which is decisive.[37] The broad discretionary power of the Member States is limited when the EU harmonises certain sectors by adopting secondary legislation. However, that is not (yet) the case with regard to many social and healthcare services of general interest. Their discretionary power can also be limited by the case law of the CJEU.

This raises the question whether the EU public procurement rules are applicable to social services of general interest. It is important to realise that the EU rules on public contracts do not require (national) public authorities to externalise the performance of social services of general interest to the free and competitive market.[38] A public authority always retains the prerogative to decide whether it wishes to provide the service itself (either by using its own resources or by way of an in-house construction) (1) or in cooperation with other public authorities (2). In those two cases, which will be discussed in more detail below (see Sect. 14.3), the EU public procurement rules are not applicable. However, depending on the circumstances it might be the case that the state aid or competition rules apply.[39]

The public procurement procedures (3) and the competitive procedures for public service concessions (4) only apply if a public authority decides to externalise the service provision by entrusting it to a third party against remuneration. If a public authority decides to externalise a service against remuneration it is bound by the provisions of Directive 2004/18/EC or by the provisions of EU law on the award of public service concessions, as formulated in the case law of the European Court of Justice.

It is important to emphasise that the scope of the EU Public Procurement Directives is limited to the 'purchasing activities' of public authorities. When public authorities wish to grant a concession for the performance of a social or health service of general interest or to *distribute* (limited) authorisations or licences between private parties, then those public contracts fall outside the scope of Directive 2004/18/EC. However, in the last decade the Court of Justice has developed settled case law to the effect that the basic principles of the internal market and of EU law are applicable even to those types of contract.[40]

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[37] As we can deduce for example from the reasoning of the Court in the *BFI* case: see paras 44–46 in CJEU, Case C-360/96 *Gemeente Arnhem and Gemeente Rheden* v. *BFI Holding BV* [1998] *ECR* I-6821.

[38] The Court stated in the (Dutch) *BFI* case that an activity in the general interest, not having an industrial or commercial character involves activities *which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence* [emphasis added]. Paras 50 and 51.

[39] See Chap. 12 in this volume, by Baquero Cruz.

[40] As specified in the introduction, it is beyond the scope of this contribution to discuss the circumstances in which licenses such as limited authorisations should be distributed within a market by using competitive procedures. It is important to realise that the distribution of such

In the Netherlands, for instance, the ministry of Health, Welfare and Sport has organised the performance of antenatal screening for Downs syndrome through the National Institute for Public Health and the Environment (RIVM) in such a way that the rules of Directive 2004/18/EC do not apply. The RIVM has entrusted the selection of the laboratories which are to perform the actual screening to eight regional centres by way of a ministerial order. The laboratories are not remunerated directly by the regional centres but by health insurance companies and/or patients. Since it is unclear whether the laboratories received the right to exploit the services by virtue of their selection and whether they bear the risk for the performance of the service, it is also unclear whether this construction should be seen as a service concession or as the grant of a limited authorisation or license. What is certain is that this construction does not meet the criteria for the application of Directive 2004/18/EC. As a result, only minimal rules apply, as will be explained below, which could have negative effects on the rights of individuals (i.e. potential service providers: the competitors of the selected laboratories in our example).

All in all, the liberalisation of social services of general interest is minimal, and opportunities for public authorities to provide such services themselves or to cooperate with other public authorities are quite extensive.

14.3.2 How to Identify the EU Rules Applicable to the Organisation of SSGIs?

In order to answer the questions which procurement procedures or other forms of competitive tendering are applicable to the selection of the providers of social services of general interest and to what extent it is possible to pose requirements for their performance, it is necessary to analyse a number of aspects.

The initial question to ask is whether the entity selecting the service provider can be classified as a 'contracting authority' within the meaning of Directive 2004/18/EC.[41] In our example concerning the antenatal screening for Downs syndrome in the Netherlands it should first be established whether the regional centres

(Footnote 40 continued)
authorisations does not always involve payment. In 2011, the CJEU confirmed its previous case law in the (Dutch) *Betfair* case (CJEU, Case C–203/08 *Sporting Exchange Ltd, trading as 'Betfair'* v. *Minister van Justitie,* [2010] *ECR* I-4695) with regard to the requirement that competitive tendering should be used to award limited authorisations. See for licenses and limited authorisations: Wolswinkel 2009a, b and Van Ommeren et al. 2011a, b. See for the *Betfair* case: Stergiou 2011, and Manunza 2010b in which she *inter alia* touched upon the problem that it is incomprehensible for private parties that certain contracts concluded by public authorities with private parties are subject to competitive tendering while others are not. As a consequence, compliance with the current rules is insufficient and the positive effects of a good organisation of the public procurement market are not fully realised.

[41] In accordance to Art 1 of the Dir: see 14.3.3.

appointed by the Ministry can be qualified as contracting authorities. This question will be briefly dealt with in 14.3.3.

It is also important to establish the status of the service provider. Can it also be classified as a public authority or is this provider active on the market as a purely commercial undertaking? The answer to this question is relevant to be able to decide whether there might be possibilities for in-house provision rather than externalisation to a third party. Note that although public authorities, as mentioned earlier, have the prerogative to choose for either performance by third parties or performing services themselves, once they have made this choice it has certain consequences. The legal construction of in-house provision can be used to avoid public procurement obligations but state aid rules may still play a role when subsidies granted to the selected provider are not based on market prices. In (Sect. 14.3) the possibility for public authorities to provide social services of general interest by their own resources or through an in-house construction will be explored in more detail.

A further aspect which needs to be taken into account is the payment of the providers. Are they being paid directly by the contracting authority or by the recipients of the service, citizens or agents, for instance? In the case of healthcare services parties such as health insurance companies could act as agents. When it has been determined that an in-house construction is impossible, *inter alia* because it is not the contracting authority that pays for the services but third parties (citizens, agents), then we might be dealing with a service concession.

Under European law the so-called 'lighter' public procurement regime applies to a services concession. The regime is light in the sense that the award of this type of contract is only subject to the respect of the basic Treaty provisions (TEU and TFEU), in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency,[42] as developed in the case law of the Court of Justice. The detailed European public procurement procedures laid down in the Public Procurement Directives can be disregarded. It is possible in this case to opt for a simple form of contracting involving a competitive procedure (see further Sect. 14.4).

[42] See for example for the principle of equality the following cases: CJEU, Case C-275/98 *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab* v. *Ministeriet for Fødevarer, Landbrug og Fiskeri* [1999] *ECR* I-8291; CJEU, Case C-324/98 *Telaustria* [2000] *ECR* I-10745; CJEU, Case C-231/03 *Coname* v. *Comune di Cingia de' Botti* [2005] *ECR* I-7287, CJEU, Case C-458/03 *Parking Brixen GmbH* v. *Gemeinde Brixen and Stadtwerke Brixen AG* [2005] *ECR* I-8585. Manunza and Senden 2005; Pijnacker Hordijk 2005; Drijber 2005; see also for the principle of transparency Stergiou 2011.

14.3.3 How to Determine Whether the Entity Selecting the Provider or the Service Provider Itself are Contracting Authorities?[43]

Article 1 of Directive 2004/18/EC defines the entities which are contracting authorities for the purpose of the directive: the State, regional or local authorities and so-called bodies governed by public law, as well as associations formed by those entities. Often, however, SSGI are not purchased/organised by 'traditional' public authorities but by other (semi) public entities, such as the regional centres mentioned in the example of the organisation of antenatal screening for Downs syndrome in the Netherlands. This raises the question whether such entities are covered by the concept 'bodies governed by public law'. Article 1(9) of Directive 2004/18/EC defines a body governed by public law as any body (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) having legal personality; and (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

These three cumulative criteria need to be investigated one by one. Over the years, the concept has raised many questions from practitioners and led to additional case law. Especially in (public) cooperation structures nuances in the agreements concluded can be decisive for answering questions such as whether it is the cooperation structure itself which grants a public contract or whether a body governed by public law has been created.

In *Truley,*[44] the CJEU ruled that the phrase 'established for the specific purpose of meeting needs in the general interest' (Art. 1(9)(a)) is an autonomous concept of Community law. Unfortunately, however, the concept 'needs in the general interest, not having an industrial or commercial character' has not been properly clarified in EU legislation or in the case law of the Court.

The case law of the CJEU is casuistic on this topic. The Court has repeatedly refrained from giving a general explanation,[45] although it did provide a number of

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[43] See also Manunza 2003a; Manunza and Bleeker 2008 and Manunza and Kühler 2011.

[44] CJEU, Case C-373/00 *Adolf Truley GmbH* v. *Bestattung Wien GmbH* [2003] *ECR* I-1931, para 40.

[45] See cases *Mannesmann, BFI, Ente Fiera* and *Truley* as well as *Korhonen* and *Aigner.* CJEU, Case C-44/96 *Mannesmann Anlagenbau Austria AG and Others* v. *Strohal Rotationsdruck GmbH*, [1998] *ECR* I-73; CJEU, Case C-360/96 *Gemeente Arnhem and Gemeente Rheden* v. *BFI Holding BV* [1998] *ECR* I-6821; CJEU, Joined Cases C-223/99 and C-260/99 *Agorà Srl and Excelsior Snc di Pedrotti Bruna & C.* v. *Ente Autonomo Fiera Internazionale di Milano en Ciftat Soc. coop. arl.* [2001] *ECR* I-3605; CJEU, Case C-373/00 *Adolf Truley GmbH* v. *Bestattung Wien GmbH* [2003] *ECR* I-1931; CJEU, Case C-18/01 *Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy and Rakennuttajatoimisto Vilho Tervomaa* v. *Varkauden*

'indications' when answering questions by national courts in order to enable them to establish what 'needs in the general interest not having an industrial or commercial character' are.[46] The judgments of the CJEU are very reactive, in the sense that the Court strictly limits itself to determining whether the case at hand involved a task in the general interest not having an industrial or commercial character.

For example, in the *BFI* judgment the Court dismissed the argument that an entity cannot be classified as a body governed by public law when the same activities can also be performed by private undertakings because this proves the existence of competition in the market.[47] The Court argued that this was not a good criterion:

> [S]ince it is hard to imagine any activities that could not in any circumstances be carried on by private undertakings, the requirement that there should be no private undertakings capable of meeting the needs for which the body in question was set up would be liable to render meaningless the term 'body governed by public law' used in Article 1(b) of Directive 92/50.[48]

According to the Court of Justice the question whether an entity meets needs in the general interest not having an industrial or commercial character, must be answered without investigating whether private undertakings can meet the same needs. In the *BFI* judgment, the CJEU decided that the 'absence of competition is not a condition necessarily to be taken into account in defining a body governed by public law'[49] but 'the existence of significant competition… may be *indicative* of the absence of a need in the general interest, not having an industrial or commercial character'.[50] In the *Truley* judgment the Court neutralises that assumption to a large extent by considering that 'although not entirely irrelevant, the existence of significant competition does not, of itself, permit the conclusion that there is no need in the general interest not having an industrial or commercial character'.[51] The decisive factor, according to the CJEU in the *BFI* case, is that there are activities 'which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence'.[52]

(Footnote 45 continued)
Taitotalo Oy [2003] *ECR* I-5321 and CJEU, Case C-393/06 *Ing. Aigner, Wasser-Wärme-Umwelt, GmbH* v. *Fernwärme Wien GmbH* [2008] *ECR* I-2339.

[46] Note that this does not automatically mean that those indications can be read *a contrario* to determine when there is a need in the general which *does have* an industrial or commercial character since the first condition concerns three categories of needs: two of them relate to the general interest while the third relates to needs which are not in the general interest.

[47] According to the appellant in the *BFI* case.

[48] Para 44.

[49] Para 47: 'It follows that Article 1(b) of Directive 92/50 may apply to a particular body even if private undertakings meet, or may meet, the same needs as it and that the absence of competition is not a condition necessarily to be taken into account in defining a body governed by public law'.

[50] Para 49.

[51] Para 61.

[52] Para 51.

The decision to qualify the tasks entrusted to the public authority as needs in the general interest not having an industrial or commercial character, is thus the prerogative of the national authorities.

The third criterion of the concept body governed by public law (c) is already met if only one of the three sub-criteria is satisfied since the three sub-criteria are not cumulative in nature. The question to be answered in this case is whether a public authority is financing, supervising or controlling the body in question. An answer to this question can be found in relevant regulations or in the articles of association of the entities. The regulations or articles must specify accurately how the direction is appointed and by whom, how the entity is financed and who supervises it.

In practice, the second criterion, regarding legal personality will easily be met, but there are exceptions. This raises the question whether an entity without legal personality can still be qualified as a body governed by public law despite the fact that the second criterion is not met.

14.3.3.1 Functional Interpretation of the Term State

As early as in the 1980s, the CJEU decided in the Dutch *Beentjes* case that the term State must be interpreted in functional terms.[53] The Court considered that the aim of the directive 'would be jeopardized if the provisions of the directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration'. In practical terms, this functional interpretation means that the characteristics and function must be taken into consideration when determining whether an entity can be considered to be a contracting authority for the purpose of the directive. Special attention should be paid to the composition and functions of the entity in question, for instance, to assess whether they are governed by legislation and whether the entity is dependent on the authorities,[54] which may be the case if a public authority is the single shareholder.

The question which arises is how the term 'body governed by public law' relates to the concept 'contracting authority' in this context. There are valid legal arguments to test entities that are not covered by the term body governed by public law against the functionally interpreted concept of *State*.[55]

Indeed, we have to keep in mind that the second generation Public Procurement Directives introduced the term body governed by public law to tighten up the scope of the Public Procurement Directives adopted in the 1970s. This tightening up was deemed necessary after it had become clear that the desired liberalisation

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[53] CJEU, Case 31/87 *Gebroeders Beentjes BV* v. *State of the Netherlands* [1988] *ECR* 4635.

[54] *Beentjes* case, paras 11 and 12.

[55] Manunza 2003a; Manunza and Kühler 2011.

was hindered by a number of factors, in particular by the fact that the definition of contracting authority was formulated so restrictively that numerous public entities were not covered by the directive, resulting in their contracts not being subject to a European procurement procedure. The concept covered only the 'State, its territorial bodies, and legal persons governed by public law or, in the Member States that did not have this concept, similar entities, listed in Annex I of the relevant directive'. In order to counter the problem posed by wilful evasion of the public procurement rules the CJEU interpreted the concept State in functional terms. There are entities which have been identified as contracting authorities in the past by using this method which nowadays would not be qualified as a contracting authority, because they do not meet the three cumulative conditions for bodies governed by public law laid down in Directive 2004/18/EC.[56]

It is evident that the introduction of the concept body governed by public law was never meant to exempt (semi) public entities not covered by the concept because one of the cumulative criteria is not met, resulting in their contracts not being subjected to a European public procurement procedure.[57]

14.4 The Current Rules on SSGIs and Public Procurement: Provision by Public Authorities Themselves or in Cooperation with Other Public Entities

Public authorities have a choice with regard to the provision of SSGI between performing the services in question themselves or externalising them to a third party against remuneration. When public authorities choose to provide services themselves a distinction can be made between (1) *performance by a public authority's own resources* (e.g. a local authority decides to provide a social service of general interest itself by entrusting the performance of certain welfare services to its own municipal department) and (2) *in-house provision* (the service provision is kept public; the local authority entrusts the performance of the activity in question to a separate public entity which is closely connected to it and over which it exercises a certain control). Performance by own resources can be described as the situation in which a contracting authority entrusts a task to an entity *that forms part of its own authority structure*. An authority structure in this context is understood as the sum of all organs which cannot formally be distinguished from the structure of the contracting authority in question. If such a formal distinction is

[56] In *Beentjes* because the entity concerned lacked legal personality (second condition) and in *Connemara* (CJEU, Case C-306/97 *Connemara Machine Turf Co.Ltd* v. *Coillte Teoranta* [1998] *ECR* I-8761 because the FB was performing tasks which were *not* in the general interest, not having an industrial or commercial character. Nevertheless, the FB was classified as a contracting authority.

[57] Drijber and Stergiou refer to an 'anti-circumvention provision' in Drijber and Stergiou 2009, p. 832.

possible, but an organ is, nevertheless, dependent on the direction of the contracting authority, both financially and as regards supervision, then we are dealing with in-house provision.[58]

Over the last few years, public authorities in several Member States, such as the Netherlands, Italy and Germany, have been exploring ways of keeping the performance of general interest tasks in public hands. This picture also emerges from an analysis of the case law of the CJEU. In the last decade, the Court received many questions related to so-called 'in-house' constructions and to service concessions, used for the performance of general interest tasks.[59] The following sections will briefly deal with the different possibilities that exist for cooperation between public authorities for the provision of social services of general interest. The first of these possibilities, the in-house construction developed in the case law of the CJEU, will be discussed in Sect. 14.4.1. The second possibility, as developed in the case *Commission* v *Germany*[60] will be dealt with in Sect. 14.4.2. Section 14.4.3 will focus on the last possibility for cooperation between public authorities, laid down in Article 18 of Directive 2004/18/EC. This article contains an exception to the public procurement rules which applies when a contracting authority grants an exclusive right to another contracting authority.

14.4.1 In-House Provision as a Case Law Exception

The first possibility for a public authority to provide a service itself was developed in the case law of the CJEU. In 1999, the CJEU in *Teckal* created an exception to the public procurement rules for cases in which a service is provided to a public authority by a separate legal entity.[61] Normally, such a relationship would fall within the scope of the public procurement rules. Nevertheless, the public authority and the service provider may effectively be regarded as one, according to the Court, when two conditions are met. If this is the case, the relationship is neither covered by the principles of transparency, equal treatment and non-discrimination flowing from the Treaty, nor is Directive 2004/18/EC applicable.

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[58] In accordance with *Teckal* : CJEU, Case C-107/9 *Teckal Srl* v. *Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [1999] *ECR* I-8121. See also Manunza 2001.

[59] Note that in the vast majority of cases dealt with by the CJEU concerning public service concessions (including the question whether an in-house construction was allowed) the Court answered questions referred to it by Italian courts pursuant to the preliminary ruling procedure (starting with the *RI.SAN* case in 1999, CJEU, Case C-108/98 *Ri.San. Srl* v. *Comune di Ischia and Other* [1999] *ECR* I-5219). In Italy, the way in which local and regional authorities shall manage local services of general interest is governed by legislation.

[60] CJEU, Case C-480/06 *Commission* v. *Germany* [2009] *ECR* I-4747.

[61] For a discussion of the *Teckal* doctrine and an overview of national rules on in-house constructions in Germany, Italy, Spain, Poland, Denmark and the United Kingdom see Comba and Treumer 2010. See also Weltzien 2005; Avarkioti 2007; Kaarresalo 2008; Cavallo Perin and Casalini 2009; Frenz and Schleissing 2009.

The first condition is that the control which a public authority, either alone or jointly with other public authorities, exercises over the separate legal entity, must be similar to the control it exercises over its own departments.

The question whether a public authority exercises a control over a separate legal entity which is similar to that which it exercises over its own departments, can only be answered on a case-by-case basis, taking into account all the relevant legislative provisions and concrete circumstances (legislation, position of the entity in question). The public authority must at least exercise a control over the relevant provider which gives it power of decisive influence over both the strategic objectives and significant decisions of that entity. The CJEU has acknowledged that the similar control does not have to be exercised individually, but can also be exercised jointly by several public authorities.[62] The second condition is that the separate legal entity must carry out the essential part of its activities for the public authority. The CJEU has confirmed that the second criterion can also be met when several public authorities exercise control over a separate legal entity, by taking into account the activities which the separate legal entity carries out for those public authorities.[63]

Note, however, that any subsidies granted to the service provider will have to comply with the so-called *Altmark* conditions to avoid application of the state aid rules.[64] To put it simply: when a public procurement procedure has not been followed, any subsidy must be in conformity with market prices and must be established in advance in an objective and transparent manner, since otherwise the subsidy might be classified as state aid (provided all other relevant conditions are fulfiled).[65]

14.4.2 Cooperation Between Public Authorities in Order to Provide a Service of General Interest

The public procurement rules apply to the provision of services of general interest when a public authority plans to conclude a contract for pecuniary interest in writing with a third party ('an economic operator'). Whether that third party is a private undertaking or a public entity is irrelevant. What matters is whether the economic operator is an entity engaged in an economic activity on a market.

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[62] CJEU, Case C-324/07 *Coditel Brabant SA* v. *Communne d'Uccle and Region de Bruxelles-Capitale* [2008] *ECR* I-8475.

[63] CJEU, Case C-340/04 *Carbotermo SpA and Consorzio Alisei* v. *Comune di Busto Arsizio and AGESP SpA* [2006] *ECR* I-4137 and CJEU, Case C-295/05 *Asociacion Nacional de Empresas Forestales (Asemfo)* v. *Transformacion Agraria SA (Tragsa) and Administracion del Estado* [2007] *ECR* I-2999.

[64] CJEU, C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v. *Nahverkehrsgesellschaft Altmark GmbH* [2003] *ECR* I-7747 paras 89–93.

[65] See on Altmark Chap. 12 in this volume, by Baquero Cruz and Chap. 13 by Szyszczak.

In June 2009, the CJEU decided a case against Germany concerning the cooperation among four local authorities *(Landkreise)* and the City of Hamburg Cleansing Department with regard to the disposal of waste in a nearby incinerator.[66] In this case the Court introduced a new type of exemption, which is different from the in-house exception described above.[67] It ruled that public authorities can engage in activities for the performance of the public interest tasks conferred on them, using their own resources, in cooperation with other public authorities, without being obliged to use a specific legal form under EU law.[68] In other words, the CJEU determined that public–public cooperation does not necessarily require the establishment of new entities which are under joint control. According to the Court, this cooperation can also be based on a simple form of cooperation between public entities with the single aim of performing the general interest tasks conferred on them together. This does not necessarily mean that all public entities involved in the cooperation participate in the performance of those general tasks to the same extent, since cooperation can be based on a distribution of tasks according to specialisation.

However, there must be genuine cooperation—as opposed to a public contract stipulating that a third party performs a task against remuneration—and only financial transfers corresponding to the reimbursement of the operating costs are allowed between the public authorities. The realisation of that cooperation may only be governed by considerations and requirements related to the pursuit of goals in the general interest, which excludes all forms of market orientation and the use of private capital.[69]

14.4.3 Granting an Exclusive Right on the Basis of Article 18 Directive 2004/18/EC[70]

The last possibility is laid down in Article 18 of Directive 2004/18/EC:

> This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

Article 18 concerns an important exception to the basic point of departure underlying the Directive that the award of public contracts ('contracts for pecuniary interest concluded in writing between one or more economic operators and

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[66] CJEU, Case C-480/06 *Commission* v. *Germany* [2009] *ECR* I-4747.

[67] Karayigit calls this exemption 'in thy neighbour's house' provision in Karayigit 2010, pp. 183–197; see also Pedersen and Olsson 2010.

[68] Case C-480/06 *Commission* v. *Germany* [2009] *ECR* I-4747, paras 45 and 47.

[69] Ibid. para 47.

[70] See extensively on this subject: Manunza 2001, Sect. 5. See also Manunza and Kühler 2011.

one or more contracting authorities') should,—in principle,—be opened up to competition. The article lays down four criteria. The first criterion requires the existence of a 'public service contract'. The second criterion requires that both the entity awarding the contract (in this case the public authority externalising the service, (authority A) and the entity acquiring the contract (authority B), are contracting authorities or associations of contracting authorities within the meaning of Article 1(9) of the Directive. The third criterion is that contracting authority B acquires the contract on the basis of an *exclusive right*. In this regard, it is relevant what (*quid*) an exclusive right is and how (*quo modo*) it is granted. Indeed, Article 18 requires that the exclusive right must be enjoyed pursuant to a published law, regulation or administrative provision. In addition, a question which can be raised is whether the point in time (*quando)* at which the exclusive right was granted is relevant for the interpretation of the term exclusive right. The last criterion is that the law, regulation or administrative provision on which the exclusive right is based, shall be compatible with the TFEU.

14.4.3.1 The First Criterion: 'Public Service Contract'

The first criterion contains two requirements. The first requirement is that we are dealing with a *service* which falls within the scope of Directive 2004/18/EC. The Directive distinguishes between two categories of services which are listed in Annex II A and II B attached to the directive.[71] Contracts for social services which the contracting authority wishes to award to a provider can concern the performance of a service of general (economic) interest. A large number of social services belong to the services listed in Annex II B of Directive 2004/18/EC. The II B categories, in turn, refer to the CPV classification system.[72] When the service is listed in Annex II B of Directive 2004/18/EC, a lighter regime applies. The few provisions of the Directive applying to those services[73] will not have to be taken into account when one of the specific exemptions applies, as is the case when an exclusive right has been granted on the basis of Article 18.

The second requirement of the first criterion is that we must be dealing with a public contract.[74] Article 1(2)(a) of the Directive defines public contracts as 'contracts for pecuniary interest concluded in writing'. The phrase 'for pecuniary interest' means that in return for performance of the contract the contracting authority will have to provide a consideration which can be valued in money.

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[71] Art 20 and 21 of Dir 2004/18/EC.

[72] The codes mentioned in the Annex, as well as the CPV codes, can be found on the de website of DG Internal market, under www.simap.europa.eu; see also n. 86 infra.

[73] Article 23 on technical specifications and Article 35 on the obligation to send a notice of the results of the award procedure.

[74] See for a recent discussion of the concept of contract and public–public cooperation Wiggen 2011, pp. 157–172.

When the contracting authority provides a consideration which can be valued in money in return for the service performed by the provider, this condition is fulfiled.[75]

14.4.3.2 The Second Criterion: 'Contracting Authority'

The second criterion of Article 18 of the Directive involves an analysis of whether the entity which might be awarded the contract is itself a contracting authority within the meaning of Article 1(9) of the Directive or an association of contracting authorities.

The question, therefore, is whether a service provider with whom a contracting authority wishes to conclude a contract can be classified as a contracting authority for the purpose of Directive 2004/18/EC. The test to be performed in order to establish whether a provider classifies as a contracting authority/body governed by public law, has already been dealt with in Sect. 14.3.3. In order to conform to the definition of a body governed by public law the relevant body must meet needs in the general interest.

14.4.3.3 The Third Criterion: The 'Exclusive Right'

The interpretation of the concept exclusive right in Article 18 of Directive 2004/18/EC should be a narrow one since Article 18 contains an exception to the applicability of European law. In the area of public procurement law, the European Court of Justice has only had a few opportunities to rule on a situation in which the award of an exclusive right based on Article 18 was at issue. Particularly important is the *BFI* case mentioned earlier.[76]

The award of exclusive rights creates situations which resemble a monopoly; in other words, such situations involve a right granted by a public authority to an undertaking or a public entity on the basis of which the recipient is the only one allowed to provide a service in a specific geographic area.[77] The exclusive right should be granted *pursuant to a published law, regulation or administrative*

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[75] See for the latest developments with regard to the interpretation of the term 'pecuniary interest' the following cases: CJEU, Case C-399/98 *Scala* [2001], *ECR* I-5409, paras 76–86, CJEU, Case C-220/05 *Auroux* [2007] *ECR* I–385, para 45; CJEU, Case C-451/08 *Helmut Müller* [2010] *ECR* I-2673 and CJEU, Case C-306/08 C*ommission* v. *Spain* [decided on 26 May 2011, nyr].

[76] The *BFI* case concerned Article 6 of Directive 92/50/EEC, the predecessor of Article 18 Directive 2004/18/EC; see also CJEU, Case C-323/07 *Termoraggi SpA* v. *Comune di Monza* [2008] *ECR* I-57. Cf., CJEU, Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* v. *Administración General del Estado* [2007] *ECR* I-12175.

[77] CJEU, Case C-202/88 *French Republic* v. *Commission of the European Communities* [1991] *ECR* I-1223 on telecommunications terminals equipment concerns the difference between exclusive and special rights.

provision by the contracting authority to the provider. In addition to *how* an exclusive right is granted, another relevant question is whether the *time* of granting is relevant. The wording of Article 18 Directive 2004/18/EC dispels all doubt. The requirement that the law, regulation or administrative provision should be published, does not imply that it should exist before granting the exclusive right but that the award can take place first while the law, regulation or administrative provision can be adopted and published afterwards.[78]

14.4.3.4 The Fourth Criterion: 'Compatible with the Treaty'

Article 18 Directive 2004/18/EC requires the law, regulation or administrative provision on which the exclusive right is based to be compatible with the TFEU. Note, however, that the *provisions* should be compatible with the Treaty, not the exclusive right. Whether this is the same should be assessed on a case-by-case basis. Incompatibilities with the Treaty could specifically involve the provisions on the free movement of services and competition as well as the principles of transparency, non-discrimination and objectivity. This can also be deduced from paragraph 45 of the *BFI* case: 'It is of no avail to object that, by recourse to Article 6 of Directive 92/50, the contracting authorities could evade competition from private undertakings which considered themselves capable of meeting the same needs in the general interest as the entity concerned. The protection of competitors of bodies governed by public law is already assured by Article 85 et seq. of the EC Treaty since the application of Article 6 of Directive 92/50[79] is subject to the condition that the laws, regulations or administrative provisions on which the body's exclusive right is based must be compatible with the Treaty'.

The phrase 'compatible with the Treaty' is aimed at monopolies for the provision of services created by governments and which cover an entire Member State or a substantial part of it. However, in our opinion there are reasons to assume that granting an exclusive right might be incompatible with the free movement of services, because such a right can cover a substantial part of a Member State. We would like to go even further and state together with Gilliams, that 'if more than one undertaking is prepared and able to provide a service, it will be hard to maintain that assignment by the government of the relevant activity to a specific body [governed by public law] is necessary.'[80]

Unfortunately, in the opinion of the Court is it not necessary to require that there should be no private undertakings capable of meeting needs in the general interest or to consider whether private undertakings might meet the same needs of the public authority which is concerned.[81] Depending on the circumstances,

[78] Letter of the European Commission dated 7 December 1995, para 2.3, p. 3 (unpub).

[79] The current Art 18 of Directive 2004/18/EC.

[80] Gilliams 1998, p. 41.

[81] CJEU, C-360/96 *BFI*, paras 44 and 46.

however, the exceptions laid down in the Treaty (e.g. for health services: the protection of public health exception contained in Article 62 read in conjunction with Article 52(1) TFEU) and/or the *rule of reason* could be invoked to justify limitations of the free movement of services. However, in the context of the award of an exclusive right, the justifications should be subjected to a very strict proportionality test.

In practice, exclusive rights are unfortunately often granted for services which are delivered on markets where there is a great deal of competition from private sector entities. For example, the Supreme Court of the Netherlands (Hoge Raad) dismissed the appeal by AVR-Afvalverwerking BV against the award by the municipality Westland to HVC of an exclusive right for the treatment of household waste without following a public procurement procedure on all grounds, including the alleged breach of the Treaty provisions.[82] HVC had been awarded the same exclusive right by more than 50 other municipalities.

14.5 The Current Rules on SSGIs and Public Procurement: Externalisation to a Third Party against Remuneration

When a public authority intends to externalise the provision of a service against remuneration, it can decide to award a contract in the form of a *public service contract* or in the form of a *service concession*. In the first case, once it has been established that the public authorities must be classified as contracting authorities, Directive 2004/18/EC applies, provided the threshold amounts laid down in Article 7 of the Directive are exceeded.[83] Still, not all of the Directive's provisions apply to contracts for the provision of social services.[84] Social services and health services are among the services listed in Annex II B to Directive 2004/18/EC.[85] Those services are also mentioned explicitly in category 25 of this annex.[86] This category

[82] HR 18 November 2011, LJN: BU4900.

[83] The thresholds are established by regulation for a period of 2 years. The last Reg on the thresholds is Commission Reg 1251/2011 of 30 November 2011 amending Dir 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts, *OJ* 2011 L 319/43.

[84] The technical specifications (Art 21 read in conjunction with Art 23 of Dir 2004/18/EC) shall be laid down before the start of the public procurement procedure and a notice of the results of the award procedure shall be sent (Art 21 read in conjunction with Art 35(4) of Dir 2004/18/EC).

[85] This follows from Article 21 of the Directive. An extensive description of the procurement regime for health care services under Directive 2004/18 EC can be found in Hatzopoulos and Stergiou 2011, pp. 413–452.

[86] See for the services listed in Annex II A and those listed in II B, articles 20 and 21 of Directive 2004/18/EC. The codes mentioned in the Annex can also be found on the de website of DG Internal market, available at: www.simap.europa.eu.

refers to the CPV classification system.[87] Division 85 of this classification concerns health and social work services.

In practice, and with hardly any guidance provided by the CJEU, it is a complex and time-consuming exercise to decide which specific services fall within a particular classification and which do not. Still, this decision is of crucial importance since being listed in Annex II B of the directives means that only a very small number of the articles of the Public Procurement Directive apply. These require, in particular, that the technical specifications shall be laid down at the start of the procurement process (Art. 23 Directive 2004/18/EC) and the results of the award procedure shall be published (Art. 35(4) Directive 2004/18/EC).

In the case of mixed service contracts which consist of both a social service (II B service) and another service falling entirely within the scope of the Directive (II A services, such as transport or scientific research),[88] the limited number of provisions of Directive 2004/18/EC apply only when the value of the social service exceeds that of the other service.

Service contracts—regardless of the nature of the service—not exceeding the threshold amounts for application of the Public Procurement Directive and service concessions (regardless of the amount of money involved) remain outside the scope of the Public Procurement Directives. Since 1999, we know that there can also be obligations for contracts below the threshold amounts and for service concessions.[89] The Court of Justice has recognised those obligations on the basis of the free movement provisions and the general principles emanating from them, such as the principles of non-discrimination, equal treatment and transparency.[90] Specifically, with regard to II B services it was debated until quite recently whether the public authority concerned should take into account the basic rules and principles of EU law, where the contract is of cross-border interest even if the value of the II B service contract to be awarded does not exceed the threshold for application of the Directive. However, on 10 March 2011 the CJEU ruled in its judgment in the case *Strong Seguranca SA* v *Municipio de Sintra* that the general principles of transparency and equal treatment are indeed applicable to II B services when there is certain cross-border interest. *A contrario* this leads to the

[87] The Common Procurement Vocabulary (CPV) establishes a single classification system for public procurement aimed at standardising the references used by contracting authorities and entities to describe the subject of procurement contracts. consists of a main vocabulary for defining the subject of a contract, and a supplementary vocabulary for adding further qualitative information. The main vocabulary is based on a tree structure comprising codes of up to 9 digits (an 8 digit code plus a check digit) associated with a wording that describes the type of supplies, works or services forming the subject of the contract.

[88] CJEU, Case C-160/08, *Commission* v. *Germany* [2010] *ECR* I-3713.

[89] As well as for the award of limited authorisation schemes; however, as we clarified, this topic is beyond the scope of this contribution.

[90] See n. 42 supra.

conclusion that those principles do not apply where II B service contracts do not display certain cross-border interest.[91]

In the Italian *SECAP* cases, the CJEU formulated a number of criteria which can be applied in order to determine whether there is certain cross-border interest. In its judgment, the Court first reiterated that the basic rules and principles of EU law also apply to contracts below the European thresholds and to service concessions when the contracts in question are of certain cross-border interest, and went on to formulate the criteria.[92] The Court ruled that it is permissible for national legislation to lay down (connected) objective criteria to be used to determine whether there is 'certain cross-border interest' in a concrete case, such as the estimated contract value, the place where the work is to be carried out, the economic interest of the contract and the question whether the borders straddle conurbations which are situated in the territory of different Member States.[93]

Even when there is national legislation in place, it is for the contracting authority to assess whether the 'certain cross-border interest' criterion is met and this assessment may be subject to judicial review.[94]

In the case of social services, we recommend publishing a notice on the website of the contracting authority after the contract has been awarded and, when it has been determined that the contract has certain cross-border interest, advance publication in order to inform the market of the upcoming award of a contract.

As mentioned above, a public authority can also decide to award the contract in the form of a *service concession*. In that case, the consideration for the provision of the service consists mainly in the right to exploit the service. The concessionaire bears the operational risk for the exploitation of the service in question.[95] The consideration for the provision of the service is mainly paid by third parties.

When public authorities award a service concession they will always have to take into account the basic rules and principles of EU law, more specifically the principles of transparency, equal treatment and non-discrimination, provided the contract is of certain cross-border interest. This means that there is a minimal publication obligation (transparency principle); that discrimination on the ground of nationality is prohibited (non-discrimination principle) and that any interested party should be given equal opportunities to acquire the contract and should be selected on the basis of the same criteria (equal opportunities and equal treatment principle). The intention of a public authority to grant a concession could, for instance, be published on its website.

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[91] CJEU, Case C-95/10 *Strong Seguranca SA* v. *Municipio de Sintra and Securitas- Servicos e Tecnologia de Seguranca* [lodged on 22 February 2010, nyr].

[92] CJEU, Joined Cases C-147/06 and C-148/06 *SECAP SpA and Santorso Soc. Coop. Arl* v. *Comune di Torino* [2008] *ECR* I-3565, para 21.

[93] Para 31.

[94] Para 30.

[95] Since CJEU, Case C-206/08 *WAZV Gotha* v. *Eurawasser* [2009] *ECR* I-8377 we know that the risk involved can be very limited from the start depending on the construction used.

14.5.1 Proposals for a Revised EU Legal Framework on Public Procurement

On 20 December 2011, the European Commission published three proposals for new Public Procurement Directives. Two of them are intended to replace the current Directives 2004/17/EC and 2004/18/EC,[96] while the third specifically concerns the regulation of the award of concession contracts.[97] For the purpose of this contribution a number of changes should be noted briefly. A significant change is that the proposed Directive on concessions ensures that the rules applicable to all concession contracts will be laid down in a single legal instrument, ending the current situation in which the rules applicable to the award of works concessions are contained in Directive 2004/18/EC while the award of service concessions is governed only by the general principles of the TFEU. Another important change is that the conditions developed in the Court's case law in relation to in-house provision and public–public cooperation are codified and clarified.[98]

A last important change is that the proposal abolishes the difference between services listed in Annex II A and Annex II B. According to the explanatory memorandum such a distinction is no longer justified.[99] Instead, the proposal introduces a new title III which lays down a 'particular procurement regime' for public contracts for 'social and other specific services' listed in a new annex XVI, which is applicable when the value of such a contract exceeds the new threshold amount of EUR 500,000.[100] The services listed exhaustively in Annex XVI are health and social services, administrative educational, healthcare and cultural services, compulsory social security services, benefit services, other community, social and personal services, services furnished by trade unions and religious services. According to recital 11 these so-called 'services to the person' are provided in a context that varies widely amongst Member States, which warrants a specific regime for such services when the value of a public contract for such a service exceeds the threshold amount. The specific regime proposed[101] requires the publication of a contract notice on the EU level but gives Member States a wide discretion to organise the choice of the service providers in the way they consider most appropriate.

Advance publication of a contract notice will undoubtedly create competition. Member States will have to carefully consider the conditions in which they want this competition to occur in order to avoid legal challenges by potential candidates who could argue that they were not invited to tender without good reason or that

[96] COM (2011) 895 final and COM (2011) 896 final.

[97] COM (2011) 897 final.

[98] COM (2011) 869, Article 11.

[99] Ibid. p. 8.

[100] Ibid. Article 4 (d).

[101] Ibid. Articles 74–76.

there were other discriminating circumstances. On the other hand, the higher threshold amount will, of course, exclude a considerable amount of contracts from the scope of the Directive. Recital 11 states that below the threshold amount the contract will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary. However, even when such indications are absent and the situation appears to be one which is wholly internal, it must not be forgotten that a contracting authority which refrains from competitive tendering might be challenged by interested undertakings. Or phrased the other way around: a contracting authority which normally uses competitive tendering for its purchasing activities protects itself against (legal) challenges from third parties. Candidates in the Member States will under certain circumstances be able to demand participation in a public procurement procedure outside the application of the EU public procurement rules, on the basis of the general equality principle, specifically the principle of equal treatment as laid down in their national law, in regulation or in national case law. In the Netherlands, this practice has already become visible over the last years before the civil courts.[102] All in all, the EU ensures that the responsibility for the legal and efficient purchasing of social services rests with the Member States and they will have to carefully consider how they will guarantee the legality of their purchasing activities.[103]

In recital 11, it is emphasised that Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example, by granting licences or authorisations to all economic operators meeting certain conditions established beforehand by the contracting authority, without any limits or quotas. The proposal only requires contracting authorities to respect the basic principles of transparency and equal treatment. In addition, the rules are intended to ensure that contracting authorities are able to apply specific quality criteria for the choice of service providers. The proposal emphasises that Member States can specify that such a choice may not be based on price considerations alone. This is a good step in the direction of a public procurement regime which is not so much based on price competition, but focuses more on competition based on quality.

14.6 A New Approach: Public Authorities Need to Choose *Rationally* Between Providing SSGIs Themselves or Externalising Them to Third Parties

As explained above, the liberalisation of SSGIs is minimal and the possibilities for public authorities to provide such services themselves or to cooperate with other public authorities are quite extensive. The question is, however, whether this will

[102] Manunza 2010d, Sect. 14.2.

[103] On legality and efficiency see Manunza 2010c, pp. 49–86. See also Radbruch 1932, vol. 2.

change as a consequence of the relaunching of the internal market in 2012 for the benefit of the European economy: what will be the consequences of the developments described above for social services of general interest? Does the strengthening of the internal market mean that in the future public authorities will (always) have to leave the performance of social services of general interest to the market? Does this means that they will have to select the providers of such services in competition, especially since the European Commission in relation to these services has now proposed that they will have to be awarded in competition above the threshold amount of EUR 500000?[104] We do not expect so. Public authorities will keep the discretionary power to decide whether they will perform social services of general interest themselves or in cooperation with other authorities (public-public partnerships) or whether they want to externalise the provision of such services to third parties, as the new proposals of the European Commission confirm. Is this a comforting thought, however? No, not necessarily. In the current debate on social services it is often claimed that the use of public procurement procedures to purchase such services would hinder their proper performance. Unfortunately, however, this is a thought which characterises the discussion of the use of public procurement procedures in general. It seems as if in the current debate the advantages of public procurement—cost savings, good governance,[105] more jobs, better position of competitors in the market leading to services of a higher quality—are being overshadowed by the disadvantages—alleged complexity of the rules and administrative burdens. More often than not,

[104] COM (2011) 896 final, Art. 74.

[105] See Manunza 2010d, Sect. 14.2. The historical research contained in this publication reveals that already in the age of the Romans public procurement was a common method to prevent corruption: see the reports of Pliny the Younger when he was proconsul of Bithynia (now northern Turkey) to emperor Trajan on corruption related to the execution of public works in the Imperial period: *Epistulae*, X, 37. See also X, 38, 1–2 en 39, 1–2. It is unknown to what extent and in which circumstances this method was obligatory. What we do know is that the oldest known *attempt* to establish a *legal obligation* for the tendering of works (and tax collection) dates back to this period; in 169 B.C., Livy describes how tribune Rutilius proposed an act to annul recent awards made by the censors Tiberius Sempronius Gracchus (the father of the famous brothers) and Gaius Claudius Pulcher and '… to award them again, and to give everybody without any distinction the right to collect taxes and execute works'. See Titus Livius, *Ab urbe condita libri*, XLIII, 16, 6–7: '([6] Hinc contentione orta cum veteres publicani se ad tribunum contulissent, rogatio sub unius tribuni nomine promugaltur, [7] quae publica vectigalia aut ultro tributa C. Claudius et ti. Sempronius locassent, ea rata locatio ne esset:) ab integro locarentur, et ut omnibus redimendi et conducendi promiscue ius esset. See also Cicero, *In Verrem*, II, I, 130–131, on corruption in public procurement. See on public procurement in Roman times also Perelli 1994, pp. 195–244; Taylor 2003, p. 16 *et seq* and Robinson 1992, p. 48 et seq.

In Dutch history public procurement is recorded from the late Middle Ages. When tendering becomes obligatory, in 1815, the method is related to the aim of fighting corruption. In later times, other aims were added: see Hartenlust 1980, pp. 490–497. See also Chao-Duivis 2009, p. 9 *et seq*; White 2000 and Manunza 2003b, pp. 747–757.

however, those ideas are not based on scientific data but on irrational and non-professional arguments.[106]

It is good first to investigate what the possible advantages of the 'professional' public procurement of social services might be. 'Professional public procurement' in this context is understood as the use of public procurement procedures by a contracting authority which has a clear picture of what it wants to purchase, uses proportionate, objective and non-discriminatory criteria for the selection of tenderers and is prepared to draw up good award criteria, which are not solely based on price but also on other considerations related to the quality of the service provision.[107] Public procurement law clearly gives public authorities sufficient leeway to purchase against conditions established by themselves. The a priori assumption that public procurement would hinder a proper organisation of social services is a major misconception.

The fact that the European Commission in its new proposal has chosen to identify a category of social services, to include them in an exhaustive list and to subject them to a lighter purchasing regime—clarifying at the same time that other types of social services shall be opened to competition—seems to confirm our proposition.

In our opinion, the problem is situated on another level and the solution needs to be found in another direction. Services of general (economic) interest have been the subject of debate for decades.[108] This debate focuses mainly on the questions *how* those concepts should be defined and *who* should ensure their performance under which conditions. This debate is also raging in the Netherlands. Newspapers and academic journals regularly report on problematic procurement procedures in areas such as home care services, the collection and disposal of household waste, public transport, the purchase of school books, the social services sector and so on. A recurring question in such reports is whether it had not been better to let public

[106] See for example, the arguments used in the Netherlands by organisations representing municipalities, educational institutions and government purchasers and which eventually led to the rejection of a Public Procurement Act in 2008. See Manunza 2010a.

[107] See the Opinion of the European Economic and Social Committee on the 'Green Paper on the modernisation of EU public procurement policy—Towards a more efficient European Procurement Market' (2011/C 318/19) in which the committee calls professionalism a 'basic condition for any public purchasing'. See also Van de Meent 2010.

[108] A discussion of the concept 'general interest', services of general interest' and 'services of general economic interest' is beyond the scope of this contribution. See for this long-lasting discussion: Commission, *Communication from the Commission, Services of General Interest in Europe*, *OJ* 1996 C 281/3; Commission, *Communication from the Commission, Services of General Interest in Europe*, *OJ* 2001 C 17/4; Commission, *Report to the Laeken European Council—Services of General Interest,* COM (2001) 598 final, 17 October 2001; Commission, *Green Paper on Services of General Interest*, COM (2003) 270 final, 21 May 2003; Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Council of the Regions, White Paper on Services of General Interest,* COM (2004) 374 final, 12 May 2004; COM (2007) 725 final. See also Slot et al. 2007, pp. 102–105; Arnon and Sluijs 2008, p. 108 et seq; Krajewksi 2008, pp. 377–397.

authorities perform those tasks themselves instead of subjecting them to the forces of the free market by way of public procurement.[109]

We have to appreciate that competitive tendering of social services of general interest can also be used if the public authority does not require competition on price but competition based on other criteria instead, particularly those relating to the quality of the services provided. The European Commission supports this opinion in its new proposal for a Directive on public procurement.[110]

If competition on price is not required, the rules on competitive tendering or public procurement procedures only apply if the public authority has to choose between different potential providers. If, however, all providers meeting the conditions set by the competent public authority will be authorised to operate and are obliged to provide a service to a beneficiary on request, these rules do not apply.[111]

The question at stake here, goes beyond the old dilemma of deciding what is the best mechanism for the performance of tasks in the general interest: performance by public authorities themselves or by third parties; the question here is whether a modern economy would not benefit from the introduction of rules subjecting the choice of public authorities between performing certain tasks themselves and awarding their performance to third parties to objective, transparent and non-discriminatory criteria. At the moment, such a decision is only subject to control through political channels. For economic operators, however, that is not a predictable mechanism. What is lacking is an objective test to be applied to the decision to opt for either the public or the private approach.[112]

In this context, it is interesting to note that in the United States such a criterion has actually been developed in the Federal Activities Inventory Reform Act 1998 (FAIR Act).[113] This Act imposes the annual obligation on all federal departments to make a list of all activities identified as 'inherently governmental'. In the Act, the concept of an inherently governmental activity is defined as 'an activity that is so intimately related to the public interest as to mandate performance by government personnel' (Section 5(2)(A)). In *Circular A-76 of the Office of Management and Budget*, an order implementing the Act, a number of criteria are elaborated to further specify the concept.[114] It is beyond the scope of this contribution to list them here. However, it is important to note that the Act offers private parties concerned the possibility to challenge the decision to include an activity in the list. The decision on the challenge is subject to (administrative)

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[109] Manunza 2010e.

[110] COM (2011) 896 final, Article 76(2).

[111] Ibid. recital 11 in which the Commission emphasises and clarifies this point.

[112] This is true on both the European and the national level (in the Netherlands but also in other Member States).

[113] Public Law 105-270; 31 USC 501. Available at: http://www.whitehouse.gov/omb/procurement_fairact.

[114] Available at: http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction.

appeal. Moreover, the Act in question contains the *obligation* to base the decision of public authorities to opt for the provision of tasks themselves on a prior comparison of the costs of that scenario to the costs of performance by third parties.

This rule is evidence of a clear vision on the economic organisation of this part of the market, and gives that market a clear structure. It also offers businesses a better basis to decide on—long term—investments and provides them with the possibility to appeal decisions which affect them. On the European level such a vision is a long way away. A criterion to decide whether performance by public authorities or by third parties is the best mechanism, could be social welfare, for example.[115] Such a vision would entail that the public interest is only at issue when a loss of welfare occurs because the market is not functioning as it should. This is a vision which is strongly supported by economists.[116] For centuries, economists consider the free market as a neutral and timeless notion, a means to increase welfare; not something you can either support or oppose, but which allows discussion on the possibilities and impossibilities in specific cases. According to Baarsma the free market mechanism is unnecessarily politicised and moralised nowadays, but contrary to mankind the market is neither moral nor immoral.[117] When measuring the loss of social welfare, it might be considered to take into account both economic and social aspects. It goes without saying that this criterion has to be developed further.

Such an approach presupposes, at least, a thorough investigation of the question whether the market is really failing, and confirms that the provision of services by public authorities themselves is a subsidiary option. All this requires a rationalisation of the choices to be made.[118] At the moment, however, decisions are often based on irrational grounds, with the result that in reaction to incidents and

[115] In order to measure welfare or well-being social aspects are taken into account in addition to economic data. On the basis of that idea in 1974 The Netherlands Institute for Social Research (SCP) developed the life situation index: a single figure expressing the development of welfare and wellbeing. The figure is composed of eight indicators: health, sport, social participation, cultural/leisure activities, housing, mobility, holidays and possession of assets. According to Boelhouwer (Boelhouwer 2010) the index is a good instrument to capture both welfare and wellbeing and follow their development over time. See also Baarsma 2010a.

[116] Baarsma 2010a, p. 8. Baarsma is a member of the *Academisch Genootschap Aanbesteden* (an academic interdisciplinary board on public procurement consisting of economists and lawyers founded by Elisabetta Manunza in cooperation with Jan Telgen, economist. Available at: http://tst.acgea.nl/). See also Dijkgraaf and Gradus 2003.

[117] Baarsma 2010a and 2010b.

[118] Baarsma et al. 2006. In this report, the authors explain how they as economists think this test should be performed. As we said before, the criteria for the rationalisation of the choice of public authorities between performing tasks themselves or externalising their provision to third parties need to be developed. That is why Wouter Jan Berends recently (1 August 2011) started a PhD research project with this specific aim at Utrecht University under the supervision of Elisabetta Manunza. Hopefully, we can present the results in the next few years.

sentiments contracts are either awarded directly, or are performed by public authorities themselves instead of being externalised.

Considering provision by public authorities themselves as a subsidiary option seems the right starting point to us, given the fact that the past century has provided abundant evidence that, *in principle,* any service can be performed better by the market than by the state.[119] That is: unless there is *verifiable* evidence which proves otherwise.

A good economic organisation, therefore, requires an obligatory justification of decisions regarding the organisation of social services of general interest: provision by public authorities themselves or externalisation to third parties. In the debate on services of general interest and social services all too often the interests of the various *authorities* occupy a remarkably prominent position: complaints about the efforts, costs and time that tendering will take may be irrelevant; however, when the consequences for citizens and undertakings are not being taken into account.[120]

Public authorities nowadays demand an increasing amount of discretionary power.[121] When making choices surrounding the organisation of social services of general interest; however, public authorities should not manifest themselves as administrators but rather as good lawmakers. Lawmakers which should strive for an adequate performance of social services of general interest on the one hand and for equal opportunities for both citizens and undertakings on the other, as well as for an efficient management of public funds. The Monti report supports this view. After noting that social services of general interest fall primarily within the competence of the Member States, it states that many stakeholders' key concern is that the rules applying to the selection of social service providers must be *predictable* and proportionate.[122] We have to realise that the need for predictable and proportionate rules for selecting social service providers is not only very important for public authorities and consumers, but also for undertakings wishing to have the opportunity to provide a service. Just the preparation of such a *predictable* and proportionate regime will already cause public authorities to reconsider the question how general interest tasks might be best performed. And the best performance, in the sense of the most beneficial performance for the welfare and well-being of citizens, should be the goal public authorities strive for.

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[119] Interesting in this context are the theories of Nasar on the positive effects of competition: Nasar 2011.

[120] Baarsma and Manunza 2010a, b. See also European Parliament, Resolution of 18 May 2010 on new developments in public procurement (P7_TA (2010)0173). European Parliament, Report on new developments in public procurement (A7-0151/2010).

[121] P7_TA (2010)0173, in which a number of the complaints of public authorities are visible. In the proposals for the new directives the European Commission seems to have responded to the complaints by giving public authorities a wider margin of discretion.

[122] Monti 2010, p.73.

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Chapter 15
Preserving General Interest in Healthcare Through Secondary and Soft EU Law: The Case of the Patients' Rights Directive

Rita Baeten and Willy Palm

Abstract This chapter analyses the extent to which the Directive on the application of Patients' Rights in Cross-border Healthcare succeeds in addressing the imbalance between the general interest objectives of healthcare systems and EU internal market objectives. It assesses the Directive's potential impact on health systems' financial sustainability, as well as its possible effects on accessibility to and quality of healthcare services. The Directive aims to clarify the rights and entitlements of patients to reimbursement for healthcare they receive in another EU country and thus provides legal clarity on the interpretation of the CJEU rulings regarding patient mobility. However, it does not address the deregulatory effects that could result from the application of the free movement principles to providers wishing to temporarily or permanently provide health services in another Member State. In addition, whereas the grounds to justify public measures that hinder free movement, in light of general interest, will likely continue to evolve within the jurisprudence, they are presented within the Directive as an exhaustive list of reasons. Furthermore, the Directive fails to address some of the major concerns that have driven the policy debate since the initial rulings. This concerns in particular the obligation to reimburse care from providers not integrated in the statutory system in the Member State of treatment. While the Directive does not aim to create new social rights, it can be seen to have a significant impact on access to care. Specifically patients getting access to cross-border care will have more choice of providers. This could also affect access to care domestically through policies to address long waiting times and the reimbursement of care from

R. Baeten (✉)
European Social Observatory, 13, Rue P. E. Janson 1050 Bruxelles, Belgium
e-mail: baeten@ose.be

W. Palm
European Observatory of Health Systems and Policies,
Rue de l'Autonomie 4 1070 Bruxelles, Belgium
e-mail: wpa@obs.euro.who.int

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non-contracted providers. Finally, while Member States seemed unwilling to establish common EU level guarantees for high-quality care, they refused to automatically rely upon quality standards for healthcare providers established by the Member State of treatment.

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15.1 Introduction

In March 2011, the Directive on the application of Patients' Rights in Cross-border Healthcare (hereafter the Directive) was signed into EU law.[1] This Directive is the result of a lengthy and laborious policy process aimed at finding adequate responses to the rulings of the Court of Justice of the European Union (CJEU) with regard to access to health services outside the state of affiliation. In a series of judgments over more than a decade the CJEU made clear that healthcare is an economic activity in the meaning of the EU Treaty and therefore the internal market provisions on the freedom to provide services are applicable.[2]

Health policy makers have been considering since how to cope with the implications of this case law, which created a great deal of legal uncertainty. The Member States' main fear was that this internal market approach would jeopardise national sovereignty over healthcare and undermine national regulation with respect to public health services, as certain of these rules could be targeted as

[1] Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare, *OJ* 2011 88/45-65.

[2] CJEU, Case C-120/95 *Decker* v. *Caisse de Maladie des Employés Privés* [1998] *ECR* I-1831; CJEU, Case C-158/96 *Kohll* v. *Union des Caisses de Maladie* [1998] *ECR* I-1931; CJEU, Case C-157/99 *Geraets-Smits and Peerbooms* [2001] *ECR* I-5473; CJEU, Case C-385/99 *Müller-Fauré and Van Riet* [2003] *ECR* I-4509; CJEU, Case C-372/04 *Watts* [2006] *ECR* I-4325; CJEU, Case C-444/05 *Stamatelaki* [2007] *ECR* I-3185.

unjustified obstacles to the free movement of goods and services. This may lead to the Member States losing control over areas such as healthcare priority setting and capacity planning.[3]

From the start the concept of general interest took a central position in the discussion on how to strike a balance between the economic principles of free movement on the one hand and the social characteristics of national health systems on the other hand. Already in the Court rulings reference was made to 'overriding reasons of general interest' to justify for impediments to free movement. Since this exception was limited to the particular cases brought before the CJEU, and, therefore, did not provide any legal certainty for health systems as a whole, the debate gradually shifted towards considering healthcare more broadly as services of general interest (SGI)—more particularly social services of general interest (SSGI)—to which the free movement provisions would not apply or only partially.[4]

On various occasions the EU Health Council expressed concerns over the impact of developments such as those relating to the single market on health systems and argued that these should be made consistent with the Member States' health policy objectives as well as brought in line with the common values of solidarity, equity and universality that all European health systems share.[5] When the European Commission in 2004 proposed to include healthcare services without distinction into the scope of the horizontal Directive on services in the internal market,[6] it soon became clear that there was no sufficient public and political support for this indistinctive treatment. As a result, the Commission committed to develop a specific, more adapted Community framework for health services.

In this chapter, we assess to what extent the Directive addresses the concerns on the interaction between the internal market rules and healthcare systems that were voiced in the policy process following the CJEU rulings applying the free movement rules to healthcare and eventually led to the exclusion of healthcare services from the services directive.

We will investigate whether the Directive aims to preserve the general interest objectives of healthcare and how the Directive might impact on these objectives. First, we analyse what is the specific nature of healthcare and why a specific approach in the application of the free movement rules to this sector was deemed necessary. Next we analyse the potential impact of the Directive on the long-term financial sustainability of health systems, as this is a precondition to realize the general interest objectives, requiring them to be organised as efficient as possible. Then we investigate its implications for accessibility of care for all. Here, we look

[3] Gekiere et al. 2010.

[4] See also Cygan 2008.

[5] Council of the European Union, Conclusions on patient mobility and healthcare in the Internal Market, 26 June 2002; Council Conclusions on Common values and principles in EU Health Systems, Luxembourg, 1–2 June 2006.

[6] Proposal for a directive of the European Parliament and of the Council on services in the internal market, COM (2004) 2 final of 5 Mar 2004.

into the different access hurdles to care and whether the Directive helps to overcome some of these hurdles. Finally, we examine whether the Directive has an impact on the objective to provide high-quality care.

15.2 The Specificity of Healthcare

Health and access to healthcare are acknowledged as fundamental human rights by several international treaties. Also enshrined in the EU Charter of Fundamental Rights, in Article 35, is the commitment:

> Everyone has the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices.[7]

Generally, to achieve this, public intervention and financing are considered necessary. Therefore, it is generally assumed that European health systems share a common set of values, which are also reflected in several EU policy documents. In 2006, after health services were excluded from the scope of the Services Directive, the EU Health Council stressed the need to safeguarding these overarching values of universality, access to good quality care, equity and solidarity and making them financial sustainable.[8] Similarly, in 2004, when the open method of coordination was applied to the field of health and long-term care, in order to define a common EU framework for knowledge sharing and support the modernisation of social protection, the same common objectives were defined:

- Accessibility of care for all, based on fairness and solidarity, taking into account the needs and difficulties of the most disadvantaged groups and individuals, as well as those requiring costly, long-term care;
- High-quality care for the population, which keeps up with medical advances and the emerging needs associated with ageing and is based on an assessment of their health benefits and
- Measures to ensure the long-term financial sustainability of this care and aiming to make the system as efficient as possible.[9]

Furthermore, from an economic perspective the healthcare sector is characterised by significant market failures which make it impossible to achieve an

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[7] Council of the EU, Charter of Fundamental Rights of the European Union, *OJ* 2000, C 364/1, Article 35.

[8] Council Conclusions on Common values and principles in EU Health Systems, Luxembourg, 1–2 June 2006.

[9] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Modernising social protection for the development of high-quality, accessible and sustainable healthcare and long-term care: support for the national strategies using the "open method of coordination"*, COM (2004) 304 final of 20 April 2004.

efficient market for healthcare.[10] Even if competing economic actors are involved in the organisation, financing and provision of healthcare, it is therefore widely accepted that their activities require regulation to bring them fully in line with the goals of public health and social policy. Unbridled liberalisation and deregulation in healthcare could make health systems less effective, more costly and less equitable.[11]

On these grounds, health services, in particular those that are publicly funded, are considered 'different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so'.[12] As such, they fall within the wider framework of services of general interest, as defined by the European Commission. In 2006, the European Commission issued a Communication on social services of general interest to identify and recognise their specific nature and to clarify the framework in which they operate and can be modernised.[13] Although health services were formally excluded from this communication—the Commission had just announced a specific initiative on healthcare services after their exclusion from the Services Directive—the characterisation of these social services of general interest closely connect to healthcare as well: solidarity-based, comprehensive and personalised, not for profit, proximity and asymmetric relationship between provider and beneficiary.[14]

Regulation in healthcare is generally meant to ensure the general interest missions that are closely connected to the values underpinning health systems. They can be divided into the social objectives on the one hand, aiming to provide accessibility of care for all, based on fairness and solidarity, and the protection of the patients on the other hand, guaranteeing the quality and safety of care. Universal access implies social protection mechanisms and requires both financial commitment from the public purse and strong regulatory powers, not only to ensure financial protection and the systems' longterm financial sustainability, but also to guarantee physical access through timely and geographical coverage. The protection of the individual patient falls within the remit of both the safeguarding of more classic patient rights as well as a more recent approach to consumer protection in healthcare. These guarantees are also universal in the sense that authorities are supposed to also ensure these rights for care services that are not publicly funded or do not serve any public interest objective (e.g. aesthetic surgery). They rather relate to what EU health ministers in 2006 formulated as common operating principles that all EU citizens would expect to find—and

[10] Donaldson and Gerard 2004, 29–52; see also Thomson et al. 2009a, 11–12.

[11] See, for example, Maynard 2005, 256.

[12] *Communication from the Commission - Services of general interest in Europe*, COM (2000) 0580 final.

[13] *Communication from the Commission, Implementing the Community Lisbon Programme: social services of general interest*, COM (2006)177 final.

[14] With regard to the exclusion of Services of General Economic Interest (SGEIs) from the Services Directive see Chap. 13 by Szyszczak.

structures to support them—anywhere in the EU: quality and safety; privacy, transparency on tariffs, choice of provider, availability of redress mechanisms, etc. Ensuring continuity of care would also fall under this category. The duties for public authorities to ensure these operating principles for all types of care, stem from two characteristics of healthcare: first, the information asymmetry between the healthcare provider and the patient and second, the fact that the 'consumption' of healthcare of poor quality entails serious health risks.

It was feared that regulation of the healthcare sector could become jeopardised by the application of internal market principles. Various approaches were used to try to respond to the European case law defining healthcare as an economic activity, not only with respect to reimbursement rules for healthcare provided elsewhere in the Union, but also for regulatory intervention more broadly.

Initially soft law mechanisms were considered as the only feasible option, given the fact that there was no political consensus to address the issues through secondary law. In particular, the High Level Group on Health Services and Medical Care (HLG), consisting of senior officials of EU Member States and the European Commission, looked for pragmatic solutions to a range of specific issues. After the exclusion of healthcare from the Services Directive, it was generally accepted that the soft law mechanism should be complemented by a sectoral legal framework to clarify the uncertainties, to address practical issues and to organise cooperation between Member States.[15] Noteworthy, the soft law mechanisms incorporated in the Directive draw extensively on the work carried out in the preceding HLG.

Even if the Directive recognizes that the health systems in the Union are a central component of the Union's high levels of social protection, contribute to social cohesion, social justice and sustainable development and that they are part of the wider framework of services of general interest (Recital 3), it does not aim to define or reinforce the general interest missions of healthcare systems. The general interest objectives of healthcare only come into play to justify possible obstacles to the principle of free movement. Nevertheless, as we will analyse in this chapter, the Directive can sometimes have an impact on the general interest objectives of health systems.

The Directive aims to clarify the rights and entitlements of patients to receive reimbursement for healthcare they seek in another EU country, thus, implementing and codifying the rulings by the CJEU. It furthermore provides measures to protect the individual patient (as a consumer of services), in order to ensure the proper conditions for receiving care abroad and to build trust and confidence to allow patients to seek treatment across the EU. The latter includes besides measures to guarantee quality and safety of care received, also transparent complaint procedures and redress mechanisms, systems of professional liability insurance or similar arrangements, privacy protection with respect to the processing of personal data, as well as the right to have and to access a personal medical record (Article 4.2).

[15] See also Gekiere et al. 2010.

Although these provisions in principle only relate to cross-border care, they should apply to all patients alike.[16]

In the remaining part of this chapter, we assess how the Directive might impact on the basic general interest objectives of healthcare systems; ensuring accessibility of care for all and providing high-quality care. Since the long-term financial sustainability of health systems is a precondition to enable policies that strive for the realization of the general interest objectives, we will start by analysing how the Directive could impact on the financial viability of healthcare systems, in particular by focusing on its impact on Member States' steering capacity.[17]

15.3 The Financial Sustainability of Healthcare Systems and the Directive

From the onset the political debate on the implications of the jurisprudence did not focus primarily on the potential impact in terms of the number of patients travelling for healthcare abroad, but rather on the implications for the organisation of the national healthcare systems and the financial impact.

As pointed out above, healthcare systems are characterised by extensive regulation, aiming to address the important market failures in this sector and to ensure the most cost-effective use of the limited public financial means. These regulatory frameworks risk being placed under pressure through the application of the EU internal market principles. The threshold for applying the free movement rules is low. If rules regarding the reimbursement of cross-border healthcare potentially form an obstacle to free movement, also other regulations limiting access to healthcare services or restricting the exercise of these activities can be regarded as possible barriers to the single market.[18]

Nevertheless, the CJEU accepted general interest objectives as a justification ground for hindrance to the free movement. In this respect, three conditions apply: it must be proven that the measure is necessary to protect the public interest objective; that it does not exceed what is necessary to attain this objective and that the result cannot be achieved by a less restrictive measure. In this way, health authorities face a relatively high burden of proof. It may not only be a challenge to demonstrate the wider effect of an individual measure to the sustainability of the entire system or to any other general interest objective it is pursuing; the proportionality test makes the assessment of compatibility even more uncertain as it compels Member States to position the targeted measure within the broader

[16] Palm and Baeten 2011.

[17] As argued by Thomson et al. 2010b, 1, financial sustainability should be understood as a 'policy constraint' rather than a 'policy goal'.

[18] See Gekiere et al. 2010. CJEU, Case C-120/95 *Decker* v. *Caisse de Maladie des Employés Privés* [1998] *ECR* I-1831.

context of related policies and alternative options. In that sense, the CJEU ruled out a prior authorisation scheme for outpatient dental clinics based on the assumption that the measure was not pursuing the general interest objective in a consistent and systematic manner, as it did not also subject group practices to such a system, and that it did not adequately circumscribe the exercise of national discretion, as decentralised authorities could apply different criteria for assessing the need for additional dental clinics.[19]

The potential deregulatory effect stemming from the removal of unjustified restrictions to the free movement principles could cripple the steering instruments used by health authorities. The fear that legal uncertainty might lead to creeping deregulation and the concern to lose the steering capacity over the healthcare systems was one of the main drivers behind the Directive. Yet, the adopted text only deals with patient mobility and carefully avoids addressing the potential deregulatory effect of the application of the free movement principles on providers wishing to temporarily or permanently provide services in another Member State.

We will assess whether, and to what extent, the Directive provides greater clarity on the regulatory powers of health authorities in case of patient mobility, which is necessary to ensure the longterm financial viability of health systems. We argue that while the Directive reproduces the grounds to justify obstacles to the freedom to provide services as invoked by the jurisprudence, these grounds of justification in the jurisprudence can be expected to continue to evolve, but they are presented within the Directive as an exhaustive list of reasons to justify certain measures.

15.3.1 Prior Authorisation

The CJEU ruled that the condition of making reimbursement of costs for care incurred in another Member State subject to the requirement that the patient must first receive authorisation from his domestic social protection system is an obstacle to the freedom of movement. The CJEU accepted that Member States could restrict the freedom to provide medical and hospital services insofar as this was deemed necessary for the objectives of maintaining a balanced medical and hospital service open to all and a treatment facility or medical competence within a national territory that is essential for the public health and even the survival of the population.[20] Apart from the Treaty-based exception of the protection of public health, the CJEU accepted a list of public interest objectives that need to be safeguarded in healthcare, such as the risk of seriously undermining the financial balance of the social security system or to prevent overcapacity in the supply of

[19] CJEU, Case C-169/07, *Hartlauer Handelsgesellschaft mbH/Wiener Landesregierung and Oberösterreichische Landesregierung* [2009] *ECR* I-1721.

[20] *Kohll*, cited in n. 2 *supra*, paras. 50–1.

medical care.[21] The CJEU recognized that hospital planning seeks "to ensure that there is sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned. For another thing, it assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources".[22] The need to plan for healthcare capacity and resources, introducing quantitative and territorial restrictions limiting the number of healthcare providers, is thus accepted by the CJEU as an important measure for health systems to ensure access, quality and sustainability, justifying restrictions to the principle of free provision of services and free establishment of providers.[23]

The Directive maintains the possibility to require prior authorisation as a condition for reimbursement of specific types of cross-border care. In the first place, this is the case for healthcare, made subject to planning requirements and involving overnight hospital accommodation of at least one night or requiring the use of highly specialized and cost-intensive medical infrastructure or equipment (Article 8.2(a)). The element of planning has thus become the decisive factor for determining the remaining scope of prior authorisation rather than the setting where the care is delivered (outpatient vs. inpatient). This reflects the technological progress, the development of new methods of treatment and the different national policies regarding the role of hospitals (recital 41). While the Commission in its initial proposal wanted to establish a common list under its control, the Directive leaves it to the Member States to define the services that fall under these categories of healthcare subject to planning. Yet, they need to notify the Commission about it (Article 8.2 in fine), just as for any decision limiting reimbursement on the basis of the general exception (Article 7.11).

The provision to leave it to the Member States to decide for which healthcare a prior authorisation is still required and to set the criteria for refusing it is motivated by the fact that Member States remain responsible for the organisation and delivery of healthcare that planning necessities differ from one Member State to the other (Recital 42) and that the impact on health systems caused by patient mobility might vary between Member States or even between regions (Recital 44).[24] Measures (including prior authorisation systems and administrative procedures regarding cross-border healthcare) need to be proven necessary and proportionate to the objective to be achieved and may not constitute a means of arbitrary discrimination (Article 7.11; 8.1 in fine and Article 9.1). They also need to be applied in a consistent and coherent manner and the discretion of authorities needs to be adequately described.[25] Whereas in the initial Commission proposal

[21] Ibid., para. 41.

[22] *Watts,* cited in n. 2 *supra*, para. 109; *Müller-Fauré*, cited in n. 2 *supra*, paras. 79–80; *Geraets-Smits and Peerbooms*, cited in n. 2 *supra*, paras. 78–9.

[23] See also Baeten and Palm 2011.

[24] The latter would even justify different criteria for different regions (or other relevant administrative levels) or different treatments.

[25] *Hartlauer*, cited in n. 19 *supra.*

Member States were required to provide evidence that the outflow of patients due to cross-border hospital care undermines, or is likely to undermine, the financial sustainability of health and social security systems overall or the organisation, planning and delivery of health services,[26] such a condition has not been maintained in the final, adopted text.

Interestingly, with regard to the extension of the possibilities to require prior authorisation to care requiring the use of highly specialized and cost-intensive medical infrastructure or equipment, there has been some interaction between the CJEU and the decision-making process on the Directive. In the *Hartlauer* case the Advocate General explicitly referred to the concept of 'hospital care', as defined in the draft Directive, extending the possibility for using prior authorisation to healthcare that requires the use of highly specialised and cost-intensive medical infrastructure or medical equipment to conclude that the Court's reasoning on the need to restrict cross-border provision of hospital care could also be extended to dental care.[27] In *Commission* v. *France* where the Commission challenged French legislation requesting the prior authorisation for treatment involving major medical equipment, the French authorities initially indicated that they intended to amend the applicable legislation so as to address the complaints. However, in the light of the adoption of the initial proposal of the Directive in July 2008 by the European Commission, the French authorities reviewed their position and decided to contest the infringement proceedings.[28] In its judgment, the Court accepted that the considerations expressed in respect of medical services provided in a hospital setting, can be reproduced with regard to medical services involving the use of major medical equipment, even if those services are supplied outside such a setting.[29] The development in the Courts' approach on this issue suggests that the Court is open to developments in the policy making process and searching for political guidance on the application of the fundamental Treaty provisions on the free movement in a specific sector.

The protection of public health, including the need to ensure quality and safety, is used as a supplementary ground to require prior authorisation and further limit access to cross-border care. Prior authorisation for treatments that could expose the patient or the population to a substantial safety risk may be refused (Article 8 (b) and Article 8.6 (a) and (b)). Furthermore, as we will discuss in Sect. 15.5, care provided by a healthcare provider who would raise serious and specific concerns about the quality or safety of care can be subject to the requirement of prior authorisation (Article 8.6 (c)).

Although it remains unclear what exactly should be understood by these exceptions and how they will be implemented, it is expected that Member States

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[26] Proposal for a Directive on the application of patients' rights in cross-border healthcare, COM (2008) 414 of 2 July 2008, recital 7.3.

[27] *Hartlauer*, cited in n. 19 *supra*, Opinion of the AG, fn 44.

[28] CJEU, Case C-512/08 *Commission* v. *France* [2010] ECR I-08833.

[29] Ibid., para. 34.

will clarify this as they are required to make publicly available which healthcare is subject to prior authorisation (Article 8.7). In particular, the exclusion of specific providers may potentially give rise to controversy and litigation.

Next to the specific rules defining the conditions under which healthcare may be subject to prior authorisation, a general exception allows Member States to limit reimbursement of cross-border care on the basis of overriding reasons of general interest, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources (Article 7.9). It is unclear how this 'one size fits all' provision should be applied in practice and applied.

15.3.2 Conditions for Reimbursement and Qualifying Providers

Since the first Court rulings, Member States feared in particular that they could not impose on and monitor whether cost containment measures were being respected by providers abroad, in the same way as they could in the case of domestic providers.[30] In countries where healthcare under the social protection system is provided by a limited group of (contracted or public) providers or providers who adhered to a collective agreement, it was feared that it would no longer be possible to exclude (private) providers from their social protection system. If they would have to fund care from non-contracted providers abroad, they feared the possibility of coming under pressure to reimburse care from domestic non-contracted providers, who do not have to comply with all the conditions defined in these contracts or agreements (in particular, the set tariffs).

Under the Directive, the Member State of affiliation may impose for the reimbursement of cross-border healthcare the same conditions, criteria of eligibility and regulatory and administrative formalities as it would in cases where healthcare were provided in its territory, as long as they are not discriminatory or constitute an obstacle to the free movement of patients, services and products, unless they are objectively justified by planning requirements (Article 7.7). This possibility to justify conditions, which could form an obstacle to the free movement of patients, was not included in the initial Commission proposal of 2008.[31] The general interest exception as formulated in the adopted text is thus limited to planning requirements. However, many thresholds for funding treatment do not directly relate to planning requirements, but do nevertheless form key elements of the system of controlling access to care and are instruments to control costs and avoid wastage of financial resources. As an example, conditions may be imposed regarding the reimbursement of expensive pharmaceutical products (such as that

[30] Palm et al. 2000, 99–100.

[31] Proposal for a Directive, cited in n. 26 *supra.*

an alternative, cheaper product proved ineffective). If such domestic reimbursement conditions cannot be imposed for pharmaceuticals dispensed in another Member State, this can have an important impact on healthcare budgets.

Since reimbursement of cross-border care under the Directive in principle follows the rules of the Member State of affiliation, it could be argued that private (non-contracted) providers could be excluded from coverage, since this would fall under the application of the provision that the same conditions, criteria for eligibility and regulatory and administrative formalities can be imposed by the Member State of affiliation as the ones applied if healthcare is provided in its territory. The CJEU, nevertheless, specified that denying reimbursement of foreign private or non-contracted providers is to be considered a disproportionate measure.[32]

When Member States started to implement the Court rulings, they nearly all searched for creative ways to channel patients away from these non-statutory providers abroad. Most of them made treatment abroad by providers integrated in the statutory system of the Member State of care provision more attractive, or they made it more attractive for patients to be treated by contracted providers abroad.[33] Until the very last moment in the debate in the Council on the proposal for a Directive, the choice of the providers to be covered by the Directive was the major outstanding issue. Many Member States preferred to exclude non-contractual healthcare providers from the scope of the Directive, since, in their view, this would give rise to 'reverse discrimination' because treatment of such providers is not reimbursed at national level, while they would have to reimburse it in cross-border situations.[34] This issue was the main reason behind the failure of the Swedish proposal for a compromise at the end of 2009,[35] even if the Swedish compromise text proposed that the Member State of affiliation was allowed to limit the application of the rules on reimbursement for cross-border healthcare:

> …to healthcare providers that meet at least the same or equivalent standards and guidelines on quality and safety, including provisions on supervision, as defined for providers that are part of the statutory social security system or national health system in the Member State of treatment.[36]

Under the Spanish Presidency in the first half of 2010, a compromise was reached on a provision allowing the refusal to grant prior authorisation for care that:

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[32] *Geraets-Smits and Peerbooms*, cited in n. 2 *supra*; CJEU, Case C-496/01 *Commission v France* [2004] *ECR* I-2351 and *Stamatelaki,* cited in n. 2 *supra*.

[33] Baeten et al. 2010.

[34] Slegers 2009.

[35] Press release of the Council meeting Employment, Social Policy, Health and Consumer Affairs, Brussels, 30 November—1 December 2009, p. 13.

[36] *Note from the Committee of Permanent Representatives (Part I) to the Council on the Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare* (LA)(*) (Legal basis proposed by the Commission: Article 95 TEC)—Political agreement, 16005/09, 25 November 2009, Article 8, 7.

> …is to be provided by a healthcare provider that raises serious and specific concerns relating to the respect of standards and guidelines on quality of care and patient safety, including provisions on supervision, whether these standards and guidelines are laid down by laws and regulations or through accreditation systems established by the Member State of treatment (Article 8 6c)

This is discussed in greater detail in Sect. 15.5. The 'accreditation systems' in this formulation thus seem to be the relic of the contracting and agreement systems.

It is to be doubted whether through this quality and safety exception, cross-border healthcare delivered by private or non-contracted providers in the Member State of treatment could be systematically submitted to prior authorization.

In conclusion, the Directive does provide more legal certainty on the interpretation of the Court rulings, since rules that have been set on a case by case basis now are anchored in legislation. However, the Directive interprets the grounds to justify restrictions on the free movement as defined by the CJEU in a rather limited way. When compared to the initial Commission proposal,[37] the final, approved version clearly better preserves the steering capacity of the Member States. Some of the major concerns with regard to the steering capacity that drove the debate since the initial Court rulings are not solved by the Directive, and some may not be solved given the lines drawn by the Court.

15.4 Accessibility of Care for All and the Directive

In this section, we investigate to what extent the fundamental health system goal of achieving access to healthcare for all is materialised in the Directive.

Accessibility of care for all implies that the entire population of a country has access to appropriate healthcare services when needed, and at an affordable cost, irrespective of sex, ethnic, social or any other background nor financial or health status. Besides elements of physical and timely access, it primarily involves financial coverage. Universal access is generally achieved through statutorily fixed and publicly funded schemes in which participation is mandatory and access to healthcare is based on need. Universality is rather an ideal than reality and the fundamental right to healthcare can be made subject to certain limitations. The idea of universality includes two strands of principles: on the one hand the idea that everyone should be guaranteed a minimum level of subsistence and care; on the other hand the idea of equality implying that everyone should be guaranteed an equal level and quality of care, regardless of financial or other status.[38] Health systems can be situated in the continuum between these two principles. They often

[37] Proposal for a Directive, cited in n. 26 *supra.*

[38] Wörz et al. 2006.

combine both principles by putting the minimum at a sufficiently high level so that there is relatively few remaining room for preference, choice and private market.

The concept of access to care has different dimensions, which can also be seen as hurdles to be surmounted before realising universal access.[39] The most important ones are the financial hurdles as determined by the personal scope, the material scope and the scope of financial coverage of healthcare. They represent the breadth (eligibility), the depth (benefit package) and the height of statutory coverage (level of cost sharing). The other hurdles relate more to factual elements, such as the geographical scope and availability of care; the level of provider choice; other organisational barriers and conditions to which coverage is made subject and, finally, personal preferences and individual characteristics of patients that determine their usage of healthcare services.

Two important dimensions of access should not be forgotten and are implied by this hurdle model: timeliness and quality. In order to be effective, universal access needs to ensure that healthcare can be provided within medically justifiable time limits and that the healthcare received meets the best possible quality and safety standards.

We will now explore whether and how these different dimensions of universality are preserved and promoted through the Directive on the application of patients' rights in cross-border healthcare and its soft law mechanism, as compared to previously existing EU secondary and soft law mechanism. A distinction should be made between how the Directive is likely to affect access hurdles to cross border care on the one hand and on access hurdles to care at home on the other hand. Access to domestic healthcare is to an important extent determined by the financial sustainability of the system, as discussed in Sect. 15.3.

The traditional secondary EU law relevant for ensuring access to healthcare abroad is the coordination mechanism for social security rights,[40] which grants under certain conditions (care becoming necessary during a stay in another Member State or pre-authorised treatment) access to healthcare within the whole EU on the basis of statutory entitlements to care in the Member State of affiliation. Next to this framework established by the social security coordination Regulation 883/04 (hereafter referred at as the Regulation), now the Directive establishes an alternative route for access to care abroad, by codifying the CJEU jurisprudence in this area. Both build on access rights established at a national, regional or local level. As such, the Directive, just as the Regulation, has no initial intention to create any new social access rights. As also expressed through their legal basis (Articles 48 and 114 TFEU), the prime objective of both secondary laws is the fulfilment of the free movement, respectively, of healthcare services and persons. However, to some extent the Directive is likely to influence the access hurdles.

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[39] See www.ehma.org/projects as well as Busse et al. 2006 and Wörz et al. 2006.

[40] Regulation EC 883/2004 of 29 April 2004 on the coordination of social security systems, *OJ* 2004 L 314/1; Regulation EC 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, *OJ* 2009 L 284/1.

15.4.1 Financial Access to Care

Now we will assess to what extent the Directive has an impact on the three different dimensions determining financial access to care: the eligibility criteria defining the personal scope of the healthcare cover; the benefit package defining the material scope and the level of cost sharing defining the funding level of care.

In terms of the *personal scope* of application, the Directive, in the same vein as the Regulation, is aligned with the national definitions of eligibility. In order to benefit from the reimbursement of healthcare provided outside the state of affiliation, a person needs to be covered by a national statutory scheme. No discrimination can be applied on the basis of nationality: all nationals of an EU Member State as well as stateless persons and refugees who reside in a Member State and are or have been subject to the social security legislation of one or more Member States can benefit from the entitlements provided by the Directive. This also extends to nationals of a third country who are legally residing in one of the EU Member States.[41]

As to the *material scope*, i.e, the package of healthcare services that are covered under the national statutory benefit scheme, the Directive limits reimbursement of cross-border healthcare to those services that are covered in the Member State of affiliation (Article 7.1 in fine). Unlike this, under the Regulation the patient will be treated as if he was insured in the country of treatment (Article 19.1 and 20.2 of the Regulation). This means that the benefit package of the state of treatment applies and that patients through the Regulation could get coverage for care that is not covered in their state of affiliation. This potential extension of nationally defined access rights is contained by the conditions to which coverage under the Regulation is made subject. For planned treatment abroad a prior authorisation is required (Article 20.1 of the Regulation). This prior authorisation condition under the Regulation is justified by the fact that reimbursement is operated according to the legislation of the state of treatment and would therefore grant more beneficial rights to patients, which they would otherwise not enjoy.[42] The potentially more beneficial rights, including a wider benefit package and the fact that the patient does not have to pay for the treatment in advance, is also why the Directive grants priority to the Regulation when the conditions of the Regulation are met (Article 8.3 of the Directive).

Although Member States could in principle decide to reimburse cross-border treatments that are not available or covered under the national statutory scheme or may on a voluntary base decide to reimburse any other related costs, such as accommodation and travel costs, or extra costs which persons with disabilities might incur due to one or more disabilities (Article 7.4 of the Directive), they

[41] As for the Regulation, Regulation EC 1231/2010 of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

[42] CJEU, Case C-56/01 *Inizan* [2003] *ECR* I-12403.

remain fully competent and free to take decisions about the basket of healthcare to which citizens are entitled and make fundamental ethical choices in this regard (see respectively Recital 5 and 7 of the Directive).

Nevertheless, it cannot be denied that there is a converging influence on benefit packages being exercised by EU rules. The EU obliges Member States to apply objective, non-discriminatory criteria, without reference to the origin of the products or services, when defining the benefit basket.[43] This also implies that when a Member State defines its benefits basket in general terms, i.e., covering all treatments that are considered 'normal in the national professional circles concerned', this can only lawfully be interpreted as comprising treatments that are 'sufficiently tried and tested by international medical science'.[44] Similarly, the CJEU stated that where the list of medical benefits reimbursed does not expressly and precisely specify the treatment method applied but only defines types of treatment, prior authorization cannot simply be refused on the ground that such a treatment method is not available in the Member State of residence of the insured person. The competent institution needs to assess on the basis of objective and non-discriminatory criteria and taking into consideration all the relevant medical factors and the available scientific data, whether that treatment method corresponds to benefits provided for by the legislation of that Member State.[45] These principles will not only apply when implementing the Regulation (as in the Court Case), but they will also have to be taken into account when applying the Directive. The growing international exposure of health systems may contribute to an increasing alignment of benefit packages.

The Directive also provides for enhanced cooperation between Member States through soft law mechanism in several areas, which could influence national decisions on the kind healthcare to be covered by the public systems. One of these areas is health technology assessment (HTA).[46] Article 15 establishes the basis for connecting national HTA bodies into a voluntary network to facilitate the exchange of information and avoid duplication of assessments. Health technology assessment aims to inform policies that seek to achieve best value for money, by summarising in a systematic manner information related to the safety, effectiveness and cost-effectiveness of health technologies, based on the best available scientific evidence.

The establishment of such a network was on the political agenda for a long time. Already in 2003 health ministers recommended cooperation on health technology assessment at EU level.[47] In a response, the issue was the topic of one of the five working groups of the High Level Group on Health Services and

[43] CJEU, Case 238/82 *Duphar* [1984] *ECR* 523.

[44] *Geraets-Smits and Peerbooms*, cited in n. 2 *supra*.

[45] CJEU, Case C-173/09 *Elchinov* [2010] ECR I-08889.

[46] Garrido et al. 2008.

[47] High Level Process on Patient Mobility and Healthcare Developments in the European Union, Outcome of the reflection process, HLPR/2003/16, 9 December 2003.

Medical Care, established by the European Commission in 2004 and was the first topic on which this High Level Group reached an agreement.

Even if the Directive states that measures adopted through this network shall not in any way harmonise national benefit baskets nor interfere with Member States' freedom to decide how the implement any HTA conclusions (Article 15.7), it is probable that the establishment under this network of common methodological and process standards and common review processes will also lead to converging outcomes of national HTA assessments, and could lead to more correspondence in national decisions with regard to benefit packages.

The Directive also establishes European reference networks between healthcare providers and centres of expertise (Article 12). They are aimed to improve the access to diagnosis and the provision of high-quality healthcare to all patients who have conditions requiring a particular concentration of resources or expertise, and could also be focal points for medical training and research, information dissemination and evaluation, especially for rare diseases (recital 54).

As was the case for the HTA network, the establishment of these networks of centres of reference was on the political agenda for a long period of time and debated through soft governance mechanism since 2003. 'The High Level Group on Health Services and Medical Care' set up a specific working party on centres of reference. Pilot projects were supported under the EU Public Health Program in 2006 and 2007, to test the feasibility of the approach.

According to the Directive, the Commission will develop criteria and conditions that the networks should be required to fulfill in order to receive financial support. Even though the Directive specifies that the creation of these European reference networks shall not harmonize any national laws or regulations and respects the Member States' responsibilities for the organization and delivery of healthcare, the creation of these networks could increase pressure on the respective statutory systems to reimburse the care they provide and to open them to all EU citizens alike. It could lead to the development of a whole new level of highly specialized healthcare in Europe based on the latest state of medical knowledge and applying the most advanced health technologies. Given the probably high cost of these treatments, it may as well strengthen the call for a new way of funding and even perhaps a basis for European solidarity.

Finally, the possibilities to reimburse treatment of rare diseases were strongly debated in the run-up to the final version of the Directive. Although the European Parliament proposed to award to patients affected by rare diseases unconditional access to cross-border treatment, irrespective of prior authorization or the benefit package in the state of affiliation, the Directive only refers to the possibilities offered by the Regulation to allow them to seek diagnosis and treatment elsewhere in the EU (Article 13(b)) and suggests the Member States to get scientific advice to clinically evaluate any related request for prior authorization (Article 8.4). It is not clear how this provision should be applied in practice.

The third financial access hurdle to care is the funding level or *financial scope*. According to the Directive, cross-border healthcare shall be reimbursed or paid directly by the Member State of affiliation up to the level of costs that would have

been assumed, had this healthcare been provided in its territory, without exceeding the actual costs of healthcare received (Article 7.4). As a consequence, the patient charge can be lower for treatments in Member States where the applicable prices are lower than in the Member State of affiliation. By contrast, the patient charge could be prohibitive for treatments in Member States where the applicable prices are higher than in the Member State of affiliation. However, nothing forbids Member States to reimburse the full cost of cross-border care, even if it exceeds the reimbursement level in the state of affiliation, nor reimburse other related costs, such as accommodation and travel costs or extra costs incurred by patients due to any disability they suffer from (Article 7.4 §§2 and 3).

According to the non-discrimination principle, the Directive forbids healthcare providers to apply a different scale of fees for patients from other Member States (Article 4.4). This means that they could in principle charge the tariffs that apply to domestic "private" patients.

By contrast, according to the Regulation care is funded according to the level applicable in the Member State of treatment, and patients are, based on the principle of non-discrimination, equally treated with the patient who is insured in the state of treatment. Hence, the applicable user charges will apply to cross-border patients. If, however, for a patient who has received (or should have received) a prior authorisation under the Regulation, payment turns out to be lower than what would have been paid if treatment would have been given in the state of affiliation, the patient is, according to the *Vanbraekel* case law, entitled to an additional reimbursement. This additional funding should cover any user charge he would have been exposed to in the state of treatment, up to the level of the difference between both tariffs.[48] The Regulation, combined with this case law, thus guarantees the patient always the most beneficial reimbursement tariff (either of the country of treatment or of the country of affiliation).

Furthermore, the patient who seeks treatment abroad under the Directive (as opposed to under the Regulation), has, in principle, to first pay for his treatment and only receives reimbursement upon his return home. Since this represents an important access hurdle to cross-border care, the European Parliament proposed that the Member State of affiliation would pay for the care abroad directly or deliver vouchers to the patients with which he could pay his treatment abroad. The adopted version of the Directive turned this proposal into a voluntary mechanism, stipulating that Member States can set up a voluntary system of prior notification whereby, in return for such notification, the patient receives a written confirmation of the amount to be reimbursed on the basis of an estimate. This estimate shall take into account the patient's clinical case, specifying the medical procedures likely to

[48] CJEU, Case C-368/98 *Vanbraekel* [2001] *ECR* I-5363 and *Watts*, cited in n. 2 *supra*; However, the Court denied the application of this additional reimbursement bonus for unscheduled care during a temporary stay in another Member State, basically since in those cases a patient—given the urgency of treatment—could not actually choose between treatment at home or in the country of stay and therefore no hindrance to the principle of free provision of services can be found (CJEU, Case C-211/08 *Commission* v. *Spain* [2010] *ECR* I-5267).

apply (Article 9, 5). Yet, given the complications related to such a procedure, it is unlikely that Member States will apply this provision.

In conclusion, our analysis shows that the Regulation provides more guarantees for financial access to care abroad then the procedure based on the Directive. This is also why the Directive gives priority to the reimbursement based on the Regulation when the patient has the right to treatment abroad according to the latter (Recital 29, 31, 41 and Article 8.3).

15.4.2 Non-Financial Aspects of Access to Care

The first and most obvious non-financial access hurdle to care which can be overcome in the context of cross-border care is *geographical limitation*. Traditionally, Member States apply a territoriality principle limiting access to care to healthcare providers established on its territory. Besides exceptions made through bilateral agreements, the Regulation has been the first instrument to more systematically create an opening to providers in other Member States, however, subject to the before-mentioned conditions of necessity or prior authorisation. With the Directive the territorial restriction of access and coverage is further watered down. The mere fact that healthcare is provided outside the Member State of affiliation (definition of cross-border healthcare in Article 3(e)) is not any longer a sufficient reason to deny reimbursement according to the same conditions and level as applicable in the Member State of affiliation (Article 7.1; 7.4 and 7.7) nor to require a prior authorisation for it (Article 7.8).

As a consequence, the Directive allows patients access to care that is closer to home, even in another Member State, than alternative care in the Member State of affiliation. Since evidence shows that patient flows are numerically the most important in border regions and between neighbouring countries,[49] this geographical access hurdle is an important barrier which can be addressed through the Directive. However, the Directive has preserved considerable scope for limiting EU-wide reimbursement of healthcare, in particular through systems of prior authorisation, as discussed above.

Second, the extent to which patients are free to *choose a healthcare provider* can also be considered as a dimension determining access to care. Patients obtain through the Directive access to providers abroad to which they would other ways not have access. While under the Regulation patients are only guaranteed access to providers who are contracted by the statutory system of the Member State of treatment, since the legislation of the latter applies, the Directive does not make any distinction between providers integrated in the statutory system of the Members State of care provision or not.

[49] Rosenmoller et al. 2006.

Even if the Directive does not oblige Member States to reimburse costs of healthcare provided by healthcare providers established on its own territory if those providers are not part of the social security system or public health system of that Member State (Article 1.4), it is well possible that the implementation of the Directive would also lead to more provider choice domestically. As an illustration, when Germany and the Netherlands implemented the Court rulings, by providing access to non-contracted providers abroad, they extended this possibility to domestic non-contracted providers.[50]

Thirdly, the most important *organizational access hurdles* which can be addressed through the Directive are waiting times. According to the Directive, the Member State of affiliation may not refuse prior authorization if it cannot provide the treatment to which the patient is entitled, on its territory, within a time limit which is medically justifiable based on an objective assessment of the patient's medical condition; the history and probable course of the patient's illness; the degree of the patient's pain and/or the nature of the patient's disability at the time when the request for authorization was made or renewed (Article 8.5). Nevertheless, in this respect the Directive does not provide for rights which were not already guaranteed through the Regulation. Also under the Regulation Member States are obliged to accord authorisation for care abroad when the treatment in question is part of the benefit package in the state where the patient resides and cannot be provided there within a time limit which is medically justifiable, taking into account his/her current state of health and the probable course of his/her illness (Article 20.2 in fine of the Regulation).[51] After the Court rulings, Member States confronted with long waiting times tried to reduce the demand for exit, for example through contracting the domestic commercial sector.[52] The Directive is expected to lead to more transparency in waiting list policies and in policies to reduce waiting times that are not medically justifiable.

Finally, the access hurdle determined by the *cultural and socio-economic characteristics of patients* is in the context of cross-border care particularly sensitive. Several studies have demonstrated that the willingness to travel abroad for healthcare and the actual usage of cross-border care is highly variable and that within the EU especially the more mobile, educated and wealthier parts of the population are more likely to seek treatment across borders.[53] The lack of information, not only in terms of the possibilities to reimbursement of cross-border care but also in terms of the availability and quality of care, has been identified as an important obstacle discouraging people to receive cross-border treatment. This is

[50] Baeten et al. 2010.

[51] This was introduced after the *Pierik* rulings (CJEU, Case 117/77 *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland* v. *Pierik* [1978] *ECR* 825; CJEU, Case 182/78 *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland* v. *G. Pierik* [1979] *ECR* 1977) and was further strengthened after the *Müller-Fauré* Case (*Müller-Fauré*, cited in n. 2 *supra*).

[52] Baeten et al. 2010.

[53] European Commission (2007). Cross-border health services in the EU. Analytical report. Flash Eurobarometer, 210 (May):1–42.

why in the Directive a lot of attention is spent on improving information about cross-border care, by imposing information requirements upon healthcare providers in order to help individual patients to make an informed choice (Article 4.2(b)) as well as by establishing national contact points in order to facilitate the exchange of information (Article 6). The information duty covers a whole spectrum of issues, including rights and entitlements, applicable procedures and mechanisms, as well as availability, provider status, prices, etc. Irrespective of the challenge to provide all this information in a clear, transparent and timely manner, the language barrier may still be a problem as a result of the division of information responsibilities between the Member State of treatment (Article 4—healthcare delivery) and the Member State of affiliation (Article 5—reimbursement). There is no obligation for Member States to deliver information in languages other than the official languages of the Member States concerned (Article 4.5). Also, the level of information provided and the way in which the contact points will work in the different Member States is likely to reflect cultural and organizational differences, depending much on the consumer consciousness and even the freedom of choice existing within health systems in the various Member States.

15.5 Quality and Safety of Healthcare in the Directive

When patients seek care in another Member State, they should have confidence in the quality and safety of their treatment. When nationally set norms and requirements on quality of care cannot be upheld in a cross-border situation, Member States can rely on mutual trust, assuming that the norms and requirements in the Member State of care provision ensure the same level of protection as the domestic ones. In this sense, the Court held that Member States should rely upon quality controls for healthcare providers and institutions supervised by the Member State of treatment and, thus, cannot refuse reimbursement of care provided abroad on the grounds that they are unable to verify the quality of this care.[54]

Alternatively, minimum level norms can be set at EU level. The harmonisation of laws is in particular appropriate for protecting public health. In the healthcare sector, qualifications of health professionals and norms on quality and safety of pharmaceutical products have been harmonised in the EU. However, with regard to healthcare services, no such norms exist.

Thus, there is a need to establish an EU level framework to ensure quality and safety of cross-border healthcare. However, the organisation and delivery of healthcare is a national competency, and Member States do not accept EU interference with regard to the quality and safety of the care they provide and organise at home. This is the paradox in which the Directive is caught and which already

[54] *Stamatelaki*, cited in n. 2 *supra*.

becomes clear in the preamble. The Directive aims to provide rules for facilitating access to safe and high-quality cross-border healthcare, in full respect of national competencies in organising and delivering healthcare (Recital 10). It is assumed that these objectives cannot be sufficiently achieved by the Member States (Recital 64).

According to the Directive, cross-border healthcare shall be provided in accordance with standards and guidelines on quality and safety laid down by the Member State of treatment and Union legislation on safety standards (Article 4). The preamble of the Directive adds that systematic and continuous efforts should be made to ensure that quality and safety standards are improved, taking into account advances in international medical science and generally recognised good medical practices, as well as taking into account new health technologies (recital 22). Member States shall furthermore render mutual assistance as is necessary, including cooperation on standards and guidelines on quality and safety (Article 10).

The Directive thus suggests that all Member States should have standards and guidelines on quality and safety of care. Considering the wide diversity of policies in the Member States on quality and safety, with some Member States not having any legislation or national policies on quality of care,[55] this provision could, in principle, imply the establishment of minimum level standards and guidelines on quality and safety in all Member States. Nevertheless, it is not clear what level of quality and safety measures would be required and how this would be supervised or exacted. The obligation for Member States to cooperate on standards and guidelines on quality and safety points to some form of soft governance but the Directive does not provide a legal basis for a platform to this end. Whether the Directive will in practice lead to Member States taking initiatives to establish standards and guidelines on quality and safety of care is thus questionable.

The issue of a guiding role for the EU in policies on quality of care is indeed highly sensitive for Member States. Therefore, the provisions of the initial proposal for a Directive, granting the Commission, in cooperation with the Member States, the power to develop guidelines to facilitate the implementation of the provisions on quality and safety, was not acceptable for them. Furthermore, when the Commission launched its initial proposal for a Directive, it announced that it would bring forward in 2008 a Communication and a Council Recommendation on Patient Safety and Quality of Health Services.[56] This was finally reduced to a Council Recommendation on Patient Safety.[57] Member States strongly opposed

[55] Legido-Quigley et al. 2008, 17, 35.

[56] *Communication from the Commission—A Community framework on the application of patients' rights in cross-border healthcare*, SEC (2008) 2183, COM (2008) 415 final, 2 July 2008.

[57] *Council Recommendation of 9 June 2009 on patient safety, including the prevention and control of healthcare associated infections, OJ* 2009 C 151/1.

the Commission's idea to present a proposal for a Council Recommendation aimed at putting in place effective quality improvement strategies in the EU or to present common voluntary quality standards for Member States.[58]

Anticipating the adoption of the Directive, Member States nevertheless agreed that the Commission would set up an enhanced collaboration mechanism between Member States and the EU on quality of healthcare in the form of a joint action. Such a mechanism implies cooperation at technical rather than political level. However, they made it clear that discussion on this topic could not lead to drawing comparisons between Member States' healthcare systems and that the main focus should be on exchange of information and sharing of best practices.[59] Participation in the joint action would not be obligatory and the Commission should stimulate and facilitate these exchanges.[60] Some light soft law mechanism is thus emerging in this field.

With regard to information on quality of care, the Directive states that the Member State of treatment shall ensure that patients receive relevant information on the applicable standards and guidelines, including provisions on supervision and assessment of healthcare providers and information on which healthcare providers are subject to these standards and guidelines. The Member State of treatment has furthermore to ensure that healthcare providers provide relevant information to help individual patients to make an informed choice, including on treatment options and on the availability, quality and safety of the healthcare they provide in the Member State of treatment. To the extent that healthcare providers already provide resident patients in the Member State of treatment with relevant information on these subjects, the Directive does not oblige healthcare providers to provide more extensive information to patients from other Member States (Article 4).

It remains unclear what kind of information individual healthcare providers can, and should, provide on quality and safety. There are no examples in national legislation on patients' rights that include the right to information from individual providers on the quality and safety of the healthcare they provide.[61] There are no precedents providing for the right to receive information on outcomes of care from individual care providers and, the question remains, whether individual providers are the most appropriate and objective source to provide such information. At most, we could expect care providers to provide information about the national norms and legislation with which they comply, specific accreditations or acquired

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[58] European Commission, *Minutes of the Patient Safety and Quality of Care Working Group meeting of 2 February 2010 approved by the Group*, HLG/PSQCWG/2010/01, 26 January 2011.

[59] Council of the European Union, *Outcome of proceedings*, Working Party on Public Health at Senior Level on 28 May 2010, Brussels, 3 June 2010.

[60] Council of the European Union, *Quality of Healthcare—Presentation by the Commission, from: General Secretariat of the Council to: Working Party on Public Health at Senior Level*, Brussels, 9366/1/10 21 May 2010.

[61] Nys and Goffin 2011.

training and experience. This consequently overlaps with the information the public authorities should provide.

In sum, there seems to be little appetite from Member States to establish minimum EU level guarantees for high level quality care 'that all EU citizens would expect to find, and structures to support them, anywhere in the EU' as stated in the 2006 Council conclusion on values and principles of healthcare systems. This does however not mean that Member States are willing to rely on quality standards and controls for healthcare providers and institutions established by the Member State of treatment.

This becomes apparent in the section on prior authorisation of the Directive discussed in Sect. 15.3.1. Healthcare may be subject to prior authorisation in a limited number of cases. This includes healthcare which is provided by a healthcare provider that, on a case-by-case basis, could give rise to serious and specific concerns relating to the quality or safety of the care, with the exception of healthcare which is subject to Union legislation ensuring a minimum level of safety and quality throughout the Union (Article 8 2c). The Member State of affiliation may refuse to grant prior authorisation if this healthcare is to be provided by a healthcare provider that raises serious and specific concerns relating to the respect of standards and guidelines on quality of care and patient safety, including provisions on supervision established by the Member State of treatment (Article 8 6c).

These stipulations raise questions with regard to their application. How is a patient supposed to know that the healthcare provider he wants to consult with gives rise to serious and specific concerns relating to the quality and safety of care? If the patient had any doubt about a provider's quality of care, he would not consider treatment from this provider. Apart from this stipulation, if he has the right to the treatment in question from this provider without prior authorization, the patient may never think to consider requesting prior authorisation. However, the Member State of affiliation may decide thereafter not to refund the care if the relevant authority considered the treatment as giving rise to serious and specific concerns relating to the respect of standards and guidelines on quality of care and patient safety. Thus, the patient may be duped twice; the care he received did not meet the quality standards and he is unable to receive reimbursement. Therefore, it is difficult to imagine how these provisions could ensure the quality of cross-border healthcare.

Furthermore, the possibility to refuse granting prior authorisation is limited to cases where there are serious and specific concerns relating to the respect of standards and guidelines on quality of care and patient safety, including provisions on supervision. This suggests that the prior authorisation can only be refused when the provider in question does not comply with the norms applicable in the Member State of care provision and, thus, is escaping the supervision mechanism in this Member State. It is hard to imagine how a Member State of affiliation would be able to assess whether a provider is complying with these norms, if the Member State of care provision is unable to supervise this care. The lack of clarity about the implementation of this provision allowing refusal of prior authorisation suggests

that this formulation is the result of a political compromise and that the real motives for this exception lay elsewhere, as discussed above (see Sect. 15.3.2).

It is also illustrative that the Council's adoption of the Directive is accompanied by a statement by three Member States who did not approve the final text; they regretted that the Directive 'does not provide a sufficient guarantee of a high level of quality and safety to patients wishing to receive cross-border healthcare and does not entirely respect the responsibilities and competences of the Member States in relation to the organisation and planning of national health systems'.[62] Yet again, this demonstrates Member States' incapacity to overcome the paradox in which they are caught: addressing quality issues at EU level or not guaranteeing quality of cross-border care.

We can conclude that the proposal bears the potential to set in motion a process of cooperation between Member States on standards and guidelines on quality and safety. The impact thereof could go beyond the provision of cross-border care. It depends on the political will of the public authorities whether such a process could have an effect, and there is nothing to suggest at the moment that this willingness exists. As a consequence, the aim to ensure quality and safety of cross border care is not met by the Directive. Being aware of this flaw, Member States availed themselves the possibility to refuse prior authorisation when they have concerns about the quality of care abroad. This stipulation raises serious questions with regard to its application.

15.6 Conclusions

In this chapter we assessed to what extent the Directive succeeds in addressing the imbalance between the internal market objectives and the general interest objectives of healthcare systems, as was the subject of the policy debates following the CJEU rulings on patient mobility and the inclusion of health services in the services Directive.

We analysed its potential impact on the long-term financial sustainability and on the basic objectives of healthcare systems: ensuring accessibility of care for all, based on fairness and solidarity and ensuring the provision of high quality care.

Since the Directive does not aim to create new social rights or to safeguard the general interest missions of healthcare systems but aims to clarify the rights of patients to seek healthcare in another EU Member State and to ensure the proper conditions for receiving that care, the general interest objectives only come into play to justify existing regulations. Nevertheless, the Directive can have important impacts on some of the general interest objectives of healthcare systems.

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[62] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare (second reading)—Approval of the European Parliament's amendments—Statements, 6590/11 ADD 1 REV 2, Brussels, 23 February 2011.

With regard to the long-term financial sustainability of healthcare systems, our analysis focused on the potential deregulatory effect of the application of the free movement rules and the consequent loss of steering capacity of health authorities. In this respect, the Directive carefully avoids addressing the application of the free movement principles beyond the issue of patient mobility, to deal with providers wishing to temporarily provide services or permanently establish in another Member State. It provides however legal certainty on the interpretation of the Court rulings on patient mobility; rules that have been set on a case by case basis are now anchored in legislation. The planning argument as accepted by the Court to justify obstacles to the freedom to provide services, is reproduced in the Directive. Nevertheless, whereas the grounds of justification in the jurisprudence can be expected to continue to evolve, they are presented within the Directive as an exhaustive list of reasons to justify certain measures. Furthermore, given the lines drawn by the Court, a secondary legislation instrument proves to be unable to address some of the major concerns that drove the policy debate since the initial Court rulings. In particular, this concerns the reimbursement of care provided by non-contracted providers abroad, and possibly also at home. Nevertheless, when compared to the initial Commission proposal, the final, approved version of the Directive clearly better preserves the steering capacity of the Member States.

Next, we analysed whether the Directive helps to overcome some of the access hurdles to care. We found that the Directive provides less guarantees than Regulation 883/04 with regard to the financial aspects of access to care. This is also why the Directive gives priority to the reimbursement based on the Regulation when the patient has the right to treatment abroad according to the latter. Furthermore, through the erosion of geographical boundaries as well as the increasing international exposure of health systems, the definition of access rights to care may be getting more aligned in the future, especially in terms of the benefit package covered and provider choice. In specific areas, like rare diseases and reference networks this could eventually lead to a European layer of solidarity and funding to guarantee access to all EU citizens alike. The most important access hurdles to care that can be overcome by the Directive are however non-financial. Patients can have access to care that is closer to home, but in another Member State and patients confronted with long waiting lists at home, can receive care abroad. Also provider choice increases. These newly created possibilities are likely to also impact domestic access to care. Member states might be more inclined to develop policies to address long waiting times and to also reimburse care from non-contracted providers domestically.

We furthermore examined whether the Directive has an impact on the objective to provide high-quality care. We found that the proposal bears the potential to set in motion a process of cooperation between Member States on standards and guidelines on quality and safety. The impact thereof could go beyond the provision of cross-border care and also have an impact on domestic care. However, it depends on the political will of the public authorities whether such a process could have an effect, and nothing suggests at this moment that this willingness exists. There seems to be little appetite from Member States to establish minimum EU

level guarantees for high level quality care. Nevertheless, some light soft law mechanism on quality of care will most probably see the light. This does however not mean that Member States are willing to rely upon quality standards and controls for healthcare providers and institutions established by the Member State of treatment. As a consequence, the aim to ensure quality and safety of cross-border care is not sufficiently met by the Directive.

Finally, we showed that the stipulations in the Directive on cooperation between Member States draw extensively on the output of the High Level group on health services and medical care, preceding the adoption of the Directive. They will now be further implemented by the Commission, assisted by a Committee consisting of representatives of Member States (Article 15). This thus illustrates how a soft law mechanism (the High Level group) can lead to a hard law instrument (the Directive), which in turn reverts to soft governance for its actual implementation.

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Chapter 16
The Scope of the EU 'Pensions'-Directive: Some Background and Solutions for Policymakers

Hans van Meerten

Abstract Pensions are currently at the top of the agenda of companies, employees, pension providers, governments and, last but not least, the European Union. The European Commission is about to revise the most important EU-pension legislation, the Directive concerning the Institutions for Occupational Retirement Provisions (the IORP-Directive).The EU aims to further regulate the internal market for pension provision and review the scope of the Directive. But pensions were a matter for national competence and Member States carefully watch the steps of the EU for various reasons. The question on the scope of the IORP-Directive touches upon the essence of 'pension.' What are 'pensions'? What kind of pension funds should be subject to the Directive? Should pensions be subject to internal market rules, or should it be a competence of national social partners, where the EU should have a little as possible influence? In this chapter solutions are offered for the dilemmas that are faced when regulating 'pensions' at the supra national level. On the basis of an analysis of the case law on EU Internal Market law and EU competition law lessons can be learned for redefining the scope of the Directive. Furthermore, this chapter will provide for some (legal) clarification and background on the highly complex world of 'EU Pensions.' The suggestions in this chapter might be useful for policymakers.

Contents

H. van Meerten (✉)
Clifford Chance LLP, Amsterdam, The Netherlands
e-mail: hans.vanmeerten@cliffordchance.com

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16.1 Introduction

The way in which modern democracies have structured their pension systems is under severe pressure. This is obviously due to an omnipresent problem: ageing. The number of pension beneficiaries is increasing at a higher rate than the economically active population needed to fund the pension benefits.[1] But there are many more specific factors to consider.

With regard to the situation in the EU Member States, one thing is clear: the challenges that confront Member States warrants a revision of the pension system—some cases requiring a fundamental revision.[2] Such a revision cannot be implemented on a national level only. After all, the EU now has influence over many aspects of pension policy, which is a natural progression from the 'four freedoms' and their incremental scope. What follows are a few examples. The CJEU has qualified (Dutch) pension funds as undertakings for the purposes of (what is now) the TFEU Treaty,[3] although they are entrusted with the operation of services of general economic interest (SGEI) for the purposes of Article 106(2) of the TFEU. More recently, the CJEU has ruled that certain German local authorities are required to observe tendering guidelines in awarding service contracts for occupational pensions.[4] Where tax aspects are concerned, the CJEU has ruled repeatedly that the place of the registered office of a pension institution shall not affect the tax deductibility of pension contributions.[5] The last example of EU influence that is mentioned is—not unimportantly—the introduction of the Pension Directive in 2003 (IORP Directive, hereinafter: the Directive).[6] The IORP Directive creates a framework for prudential regulation of occupational pension schemes that operate on a funded basis and are outside the scope of social security

[1] See for an elaboration: Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Dealing with the Impact of an Ageing Population in the EU*, COM(2009) 180 final, 29 April 2009.

[2] In the Netherlands, the Labour Foundation presented the concept Pension Accord Spring 2010 on 4 June 2010. This Accord proposes fundamental changes in occupational pensions in the second pillar. A year later the social partners presented the final Accord.

[3] CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751.

[4] CJEU, Case C-271/08 *Commission* v. *Germany* [decided on 15 July 2010, nyr].

[5] See, for instance, CJEU, Case C-150/04 *Commission* v. *Denmark* [2007] *ECR* I-1163.

[6] Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, *OJ* L 235/10-21.

schemes. With this Directive a first step towards an internal European pension market has been taken. Central to the Directive is the idea that it becomes possible for pension institutions to operate on a cross-border basis on an equal playing field. It puts in place minimum standards to facilitate cross-border activity. If the institution meets the criteria in the Directive, it qualifies for a European passport. Subsequently, pension institutions with a European passport must be able to perform services freely and to invest.

The European Commission considers the pension issue as a priority. In 2010, it published a Green Paper entitled 'towards adequate, sustainable and safe European pension systems' ('the Green Paper').[7] The Commission had already pronounced the future of pensions as a key priority in the legislative programme for 2010.[8] The Green Paper identifies a number of challenges that lie ahead of the EU Member States over the next few years. In addition to the ageing issue (and the problems directly related to it),[9] these include changes to pension systems,[10] the impact of the financial and economic crisis[11] and removing obstacles to mobility in the EU. The Commission has initiated a public debate to enable consultation with all stakeholders about the identified challenges.[12] In April 2011, the European Commission asked the new supervisory authority for insurance companies and occupational pension funds (EIOPA) for advice on the EU-wide legislative framework for IORPs. Advice is sought on the scope of the IORP Directive, on certain cross-border aspects and on three other areas.[13]

In this chapter, the focus will be on a fundamental issue: what should be the new scope of the IORP Directive? Which pension funds and schemes should be subject to it? As Sect. 16.2 makes clear, the Directive needs thorough revision.

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[7] Commission, *Green Paper, Towards Adequate, Sustainable and Safe European Pension Systems*, COM(2010) 365 final, 7 July 2010.

[8] Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Council of the Regions, Commission Work Programme 2010, Time to Act*, COM(2010) 135 final, 31 March 2010.

[9] For instance: women outlive men therefore should they still be treated equally?

[10] This includes rising the retirement age, potentially rewarding late retirement and discouraging early retirement.

[11] To quote the European Commission: 'By demonstrating the interdependence of the various schemes and revealing weaknesses in some scheme designs the crisis has acted as a wake-up call for all pensions, whether PAYG or funded: higher unemployment, lower growth, higher national debt levels and financial market volatility have made it harder for all systems to deliver on pension promises' Green Paper, op cit footnote 7, *supra*.

[12] A website was launched especially for this purpose: ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=839&furtherNews=yes.

[13] First, what quantitative requirements should apply to IORPs and how should these be measured. Second, what should be the qualitative requirements, particularly in respect of the governance of IORPs. Third, what information should be provided in respect of IORPs to members and beneficiaries, and to supervisory authorities. See: European Insurance and Occupational Pensions Authority (EIOPA)'Draft response to Call for Advice on the review of Directive 2003/41/EC Scope, cross-border activity, prudential regulation and governance,' EIOPA-CP-11/001, 8 July 2011.

The discussion about the scope of the IORP Directive is of a highly political nature. Political, in the sense that Member States, financial institutions and social partners all have different stakes and objectives. Some Member States are not that keen on the EU regulation of 'their pensions' and question the competence of the EU in this field.[14] That is why the Commission takes a cautious approach in the Green Paper. It states explicitly that Member States are responsible for pension provision and that the Green Paper does not question Member States' prerogatives in pensions or the role of social partners.[15] However, it is unclear where the said prerogatives exactly begin and end. The question on the scope of the IORP-Directive touches upon the essence of 'pension.' What are 'pensions'? Do the activities of pension funds qualify as services of general interest (SGI), or rather as services of general economic interest (SGEI)? Does that even matter? Are pension fund social institutions which should not be subject to internal market rules? What should be the role of the EU? The answers to these questions depend on endless factors and variables. It is not the aim of this chapter to provide for a clear answer, if even possible. However, an effort is made to give some legal clarification on these issues that might be useful to policymakers. The structure of this chapter is as follows: Sect. 16.2 provides a background to the current scope and contents of the Directive. In Sect. 16.3, the EU case law and regulatory framework regarding 'pensions' will be addressed. This Part provides a framework to judge the validity of some national arguments used to justify the national competences in the field of pensions and to escape the EU-legislation. Finally (Sect. 16.4), a clarification on the highly differentiated and complex regulatory EU framework regarding pensions is proposed. Section 16.5 concludes.

16.2 (Legal) Background

First, it is important to note that there are three main categories of pension schemes in the EU Member States: social security schemes (first pillar), occupational schemes (second pillar) and individual schemes (third pillar). Occupational schemes generally involve employer and employees paying into a savings scheme, out of which retirement benefits will be paid to these same employees. IORPs can only operate on occupational schemes.

Second, there is a distinction between funded schemes and pay-as-you-go schemes (PAYG). In a PAYG system, benefits are financed by current contributions. No capital is kept in reserve. In funded pension schemes a capital reserve is created during the accrual period. This reserve is used to fund future benefits.

[14] The Dutch government writes in response to the Green Paper: 'The Dutch parliament has expressly referred to the national competence regarding the establishment of the national pension system. The Dutch parliament has thereby indicated that the role of Europe in the field of pensions will remain under a critical review,' *supra*, n. 12..

[15] COM (2010) 365 final, op cit footnote 7 *supra*.

Third, roughly speaking, *funded* pension schemes can either take the form of a Defined Benefit (DB) scheme or a Defined Contribution (DC) scheme.[16] The Netherlands and the United Kingdom are the frontrunners in the EU where DB schemes are concerned. New EU Member States mostly operate DC schemes. The main difference between the two pension schemes lies in who bears the risks. In a DB scheme, the sponsor (usually the employer) bears the risk; in a DC scheme, the individual member (usually the employee) bears the risk. In other words, a member of a DB scheme is 'guaranteed' a certain pension benefit whereas, for a member of a DC scheme, the level of contributions, rather than the final benefit, is predefined. The difference between DB and DC scheme has implications for the supervision structure. Financial supervision of DC schemes can be less complex in structure as there is no real need for buffers and/or solidarity mechanisms. After all, in pure DC schemes, no pension promises are made to members; the risk lies with the members/employees.

Fourth, in 2003, the European legislature issued a Directive on the activities and supervision of institutions for occupational retirement provision (IORPs).[17] Some key Articles of the Directive should be addressed.

The current scope of the Directive (Article 2) covers IORPs with legal personality and where the IORPs do not have legal personality, those authorised entities responsible for managing them and acting on their behalf. Article 6 of the Directive defines an IORP as:

> an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed individually or collectively between the employer(s) and the employee(s) or their respective representatives or with self-employed persons, in compliance with the legislation of the home and host Member States, and which carries out activities directly arising therefrom.

According to the Directive retirement benefits are benefits paid by reference to reaching, or the expectation of reaching, retirement or, where they are supplementary to those benefits and provided on an ancillary basis, in the form of payments on death, disability, or cessation of employment or in the form of support payments or services in case of sickness, indigence or death. In order to facilitate financial security in retirement, these benefits usually take the form of payments for life. They may also be payments made for a temporary period or as a lump sum.

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[16] All manner of hybrid schemes are possible as well.

[17] Op cit footnote 6 supra and accompanying text.

The current Directive explicitly excludes:

(a) institutions managing social security schemes which are covered by Regulation (EEC) No. 1408/71[18] (partly replaced by 883/2004)[19] and Regulation (EEC) No. 574/72;[20]
(b) institutions which are covered by Directive 85/611/EEC[21] and Directive 73/239/EEC,[22] Directive 93/22/EEC,[23] Directive 2000/12/EC[24] and Directive 2002/83/EC;[25]
(c) institutions which operate on a PAYG basis;
(d) institutions where employees of the sponsoring undertakings have no legal rights to benefits and where the sponsoring undertaking can redeem the assets at any time and not necessarily meet its obligations for payment of retirement benefits;
(e) companies using book-reserve schemes with a view to paying out retirement benefits to their employees.

Article 3 of the Directive foresees the application of the Directive to the non-compulsory occupational retirement provision business of IORPs managing social security schemes covered by Regulations (EEC) No. 1408/71[26] and (EEC) No. 574/72.[27]

Article 4 allows Member States to choose to apply the provisions of Articles 9–16 and 18–20 of the IORP Directive to the occupational retirement provision

[18] Council Regulation 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, Consolidated version *OJ* 1997 L 28/1.

[19] Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, *OJ* 2004 L 166/1-123.

[20] Council Regulation 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, *OJ* 1996 L 323/38.

[21] Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), *OJ* 1985 L 375/3–18.

[22] Council Directive 73/239/EEC of 24 July 1973 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 L 228/3-19.

[23] Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, *OJ* 1993 L 141/27-46.

[24] Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, *OJ* 2000 L 126/1-59.

[25] The Insurance Directives have all been replaced by the Solvency II Directive: Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking up and pursuit of the business of insurance and reinsurance (Solvency II), *OJ* L335/1, 1-155.

[26] Op cit., footnote 19 *supra*.

[27] Op cit., footnote 20 *supra*

business of insurance undertakings.[28] In that case, all assets and liabilities corresponding to this business will be ring-fenced, managed and organised separately from the other activities of the insurance undertakings, without any possibility of transfer.

The second paragraph of Article 5 provides the option for Member States not to apply Articles 9–17 to institutions where occupational retirement provision is made under statute, pursuant to legislation, and is guaranteed by a public authority.

According to the OPC Report on pension institutions outside the statutorily managed first pillar,[29] pension schemes/institutions in the following Member States are explicitly excluded from the scope of the IORP Directive:

(a) Social security schemes falling under Regulation 1408/71;[30] and Regulation 574/72[31]: BG, HU, IT, LI, LT, LV, NO, PL, RO, SK
(b) covered by other EU Directives: AT, BE, CY, DE, DK, EE, ES, FR, HU, IE, IT, LT, LU, NL, NO, PT, PL, SE, UK;
(c) PAYG schemes: CY, FR, NO;
(d) institutions where employees of the sponsoring undertakings have no legal rights to benefits: DE, NO;
(e) book-reserve schemes: AT, BE, CY, DE, IT, LU, NO, PT, SE.

Analysis of the current existing pension schemes/institutions and the applicable EU legislation[32] has shown that there are pension schemes/institutions which fall outside the scope of any EU prudential legislation and the IORP Directive, although some Member States apply the IORP Directive to these schemes/institutions on a voluntary basis. These schemes/institutions can be categorised as follows:

(a) voluntary personal pension plans in which the employer can make contributions: BG, CZ, HU;
(b) voluntary personal pension plans in which the employer cannot make contributions: MT, PT, SI, ES;
(c) mandatory personal pension plans in which the employer can make contributions: HU, IS;
(d) mandatory personal pension plans in which the employer cannot make contributions: HU.

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[28] Some Member States (e.g. France) have availed themselves of this option; others (including the Netherlands) have not (Dutch Parliamentary Documents II, 2004/05, 30 104, no. 3, p. 7). See also: Van Meerten and Starink 2011.

[29] See Table 1 of the Commission working document accompanying the Green Paper, originally prepared by the OPC as part of its Report on pension institutions outside the statutorily managed first pillar, CEIOPS-OP-32-09 (fin), 30 October 2009.

[30] Op cit footnote 18, *supra*.

[31] Op cit footnote 20, *supra*.

[32] *Supra*, n. 29.

16.2.1 Observations Regarding the Current Scope[33]

Pursuant to the Directive, activities of an IORP must be limited to activities in connection with retirement benefits and related activities. The definition of retirement benefits in the Directive for this purpose is a broad one. It includes labour-related retirement benefits in the 043 form of payments during the entire remaining life, and also temporary benefits or lump sum benefits. Thus, the definition of retirement benefits captures certain benefits that would not qualify as retirement benefits within the context of the Pension Act in the Netherlands.[34] Furthermore, this definition makes clear that an IORP cannot be an institution that operates on a 'pay-as-you-go' (hereinafter: PAYG) basis. This is explicitly confirmed by Article 2 para 2(c) IORP. Furthermore, Member States are free to choose the legal form of an IORP.

All this leads to a situation where IORPs comprise almost all institutions that provide occupational retirement benefits, including pension funds, insurance companies and investment funds. Below it will be shown that the current regime is unclear and might introduce some perverse incentives.

First of all, the Member State option to apply the IORP Directive or the Solvency I and/or II Directive to the pensions business of insurers gives rise to competitive distortions.[35] Insurers in some Member States can be subject to less strict capital requirements than insurers in other Member States. This has been an important source of tensions between the insurance and pension funds sector. The insurance sector is arguing for an extension of Solvency II-type rules to the IORP Directive, while the pension funds sector finds such rules inappropriate.

Second, the IORP Directive currently exempts PAYG schemes and book reserves from its scope. This results in an unequal application of the IORP Directive to what appears to be similar schemes. For example, both in Germany and the UK pension promises have to be backed by the plan sponsor and a protection fund is in place in case a company becomes insolvent. The IORP Directive allows German schemes to be largely unfunded by exempting book reserves, while the UK schemes have to be fully funded as assets are set aside into a trust. Furthermore, most social pension schemes fall under the EU coordination system of social security. For example, this is the case of the French schemes AGIRC/ARRCO, which are entirely managed by the social partners and work on a PAYG basis; as well as the case for the Finnish statutory schemes 'TEL' which work on a mixed basis (partly PAYG and partly funded) and managed by private paritarian social protection entities. This is also the case for the Swiss mandatory funded second pillar schemes, also managed by social partners and falling under

[33] We owe Barthold Kuipers (EIOPA) gratitude for his comments on this point.

[34] Explanatory Memorandum' of the Dutch PPI Act, Dutch Acts of Parliament, No. 31891, 3, 2008–2009.

[35] See also Chap. 17 in this volume, by Schelkle and Van Meerten and Starink 2011.

the EU coordination rules.[36] PAYG schemes are similar to many DB plans as pension commitments are supported by contributions paid by employers and employees. The IORP Directive allows the industry-wide schemes in France (AGIRC/ARRCO) to operate on a PAYG basis, while industry-wide pension schemes in the Netherlands or the United Kingdom have to be fully funded. Third, the IORP Directive does not only allow insurance-type vehicles within its scope, but also some investment funds. Investment funds are generally 'empty' vehicles/contracts without, for instance, a governing board, established by financial institutions in which all risks are borne by the individual investor. Since schemes without legal personality can also qualify as IORPs (like in Malta, for example),[37] the IORP vehicle is increasingly used for pension products that are directly marketed to retail investors. An important policy question is whether it is desirable that Member States have a choice to apply the IORP Directive or the UCITS Directive for such individual pension products. The IORP Directive may be misused to circumvent the restrictions on illiquid investments (private equity, infrastructure, real estate) included in the UCITS Directive to protect retail investors.

16.3 The EU (Case) Law Regime

Three aspects of the relevant EU law setting of the matter are relevant: the legal basis, the principle of subsidiarity and case law.

First of all, if the EU wants to act, a legal basis must be prescribed. This must be found in the TFEU. Several legal bases serve as a possibility for the EU measures regarding 'pensions.' Some allow for true legislation (i.e. 114 TFEU), others for 'soft law, such as the open method of Coordination (OMC) which has now been 'constitutionalized' in Articles 168, 173 and 179 TFEU. Article 148 TFEU, part of Title IX, employment, allows the Council, on a proposal from the Commission and after consulting the European Parliament, to adopt guidelines which Member States are obliged to take into account in their employment policies. Article 148(3) and (4) TFEU allow the Council to examine 'the implementation of the employment policies of the Member States in the light of the guidelines for employment' and to make recommendations to Member States. It does not constitute a legal base for the adoption of legislation *stricto* sensu.[38]

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[36] Brussels, 15th of November 2010, AEIP's reaction to the Green Paper, Towards adequate, sustainable and safe European pension systems, COM(2010) 365/3.

[37] In Malta, the retirement Scheme of a contractual nature consists of a separate pool of assets with no legal personality with the purpose of providing retirement benefits. See: Legal form of the IORP, CEIOPS-DOC-08-06 Rev1, 30 October 2009.

[38] *Opinion on the legal basis of the proposal for a regulation of the European Parliament and of the Council on enforcement measures to correct excessive macroeconomic imbalances in the euro area*, COM (2010) 525—C7-0299/2010– 2010/0279(COD), 12 April 2011.

Article 136 TFEU allows the Council to adopt in accordance with procedures set out in Articles 121 and/or 126 TFEU, measures to strengthen the surveillance of Member States' budgetary discipline, perhaps including, according to the pact of the Euro, aligning the pension system to the national demographic situation, for example by aligning the effective retirement age with life expectancy or by increasing participation rates and limiting early retirement schemes and using targeted incentives to employ older workers (notably in the age tranche above 55).[39] It should be pointed out that the IORP-Directive was adopted on the basis of (old) Articles 47(2) EC, 55 EC and 95 EC. This makes the Directive an internal market Directive and not a social policy measure. This has been confirmed by the CJEU.[40] Second, the so-called principle of subsidiarity is often invoked by Member States to justify their national competences regarding 'pensions.' This principle is a fundamental principle of EU law. Article 5 TEU provides that the EU:

> … shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Recital 9 of the IORP Directive reads as follows:

> In accordance with the principle of subsidiarity, Member States should retain full responsibility for the organisation of their pension systems as well as for the decision on the role of each of the three "pillars" of the retirement system in individual Member States.

The Directive, and also most politicians and stakeholders seem to confuse the subsidiarity principle with the legal basis principle. After all, if the Member States should have 'full responsibility' for the organisation of their pension systems, the EU would be powerless in this area. It must be recalled that national measures must always be in conformity with the Treaty and that Member States may not misuse EU law. There is no nucleus of sovereignty that Member States can invoke as such against the Community.[41] More importantly, among EU lawyers there is common opinion that the subsidiarity test is irrelevant to determine whether the EU has a certain competence or not.[42] Therefore, it is of paramount importance to address the issue properly.

Third and finally the case law of the CJEU should be addressed. In the case of *AG2R Prévoyance*, an interesting matter was put before the CJEU. The case shows great similarities with the *Albany* case although unlike the pension fund at issue in *Albany*, affiliation to which was compulsory subject to exemptions, the scheme for supplementary insurance to cover healthcare costs in the *AG2R* proceedings made

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[39] Conclusions of the Heads of State or Government of the Euro area, Brussels, 11 March 2011. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119809.pdf.

[40] CJEU, Case C-343/08 *Commission* v. *Czech Republic* [2010] *ECR* I-275.

[41] Lenaerts 1990.

[42] Van Meerten 2004.

no provision for exemption from affiliation. The CJEU attached no special weight to the existence of that exemption from affiliation in its interpretation of Article 101(1) TFEU,[43] which makes the case very important for occupational pension provision systems with compulsory membership.

Let it however be noted that whether the activities of the fund and/or the scheme can be classified as of SSGI or SGI is not so much relevant.[44] What matters is whether *the activity* in question qualifies as 'economic.' If the answer is affirmative, the competition and/or internal market rules apply. Therefore, SSGIs may be of an economic or non-economic nature, depending on the activity under consideration.[45] The fact that the activity in question is termed 'social' is not by itself enough[46] for it to avoid being regarded as an 'economic activity' within the meaning of the CJEU's case law. SSGIs that are economic in nature are SGEIs.

The question of how to distinguish between economic and non-economic services has often been raised, and the answer cannot be given a priori. It requires a case-by-case analysis.[47] A single institution may well be engaged in both economic and non-economic activities and therefore be subject to competition rules for *parts* of its activities but not for others. The Commission points at the following examples.[48] The CJEU has ruled that a given entity may be engaged on the one hand in administrative activities which are not economic, such as police tasks, and on the other hand in purely commercial activities.[49] An entity can also be engaged in non-economic activities where it behaves like a charity fund and at the same time competes with other operators for another part of its activity by performing financial or real estate operations, even on a not-for-profit basis.[50] According to this functional approach, each activity therefore has to be analysed separately.[51] It is of course, as AG Jacobs argued, 'difficult to arrive at any precise statement of the point at which the redistributive component of a pension or insurance scheme will be so pronounced as to eclipse the economic activities which private pension and insurance providers compete to supply. Schemes come

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[43] Opinion of AG P Mengozzi of 11 November 2010 in CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr], p. 41.

[44] There is no general EU legislative framework applicable to SSGIs; hence, they are subject to the legal regime of SGIs. However, some EU-law imposes a different legal regime so SSGIs, such as exclusion from the area of application of Services Directive. Van Meerten et al. (2008).

[45] Confirmed by the Commission: Commission, *Commission Staff Working Document*, *Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in Particular to Social Services of General Interest*, SEC(2010) 1545, 7 December 2010.

[46] CJEU, Joined Cases C-180-184/98 Pavlov [2000] *ECR* I-6451.

[47] European Commission (EC) 'Services of general interest, including social services of general interest: a new European commitment,' COM(2007) 725 final.

[48] Ibid.

[49] CJEU, Case C-82/01 *Aéroports de Paris* [2002] *ECR* I-9297.

[50] CJEU, Case C-222/04 *Cassa di Risparmio di Firenze* [2006] *EC*R I-289.

[51] CJEU, Case 118/85 *Commission* v. *Italy* [1987] *ECR* 2599.

in a wide variety of forms, ranging from State social security schemes at one end of the spectrum to private individual schemes operated by commercial insurers at the other.'[52] Classification is thus necessarily a question of degree.

In the context of social security, the CJEU has established two main criteria for determining whether or not the activity in which the body or bodies responsible for the various schemes concerned is/are engaged is economic in nature.[53] The CJEU examines, first, whether the scheme at issue applies the principle of solidarity and, second, the extent to which that scheme is subject to control by the State: if the scheme applies the principle of solidarity and is under State control, the body in charge of managing the scheme will be considered not to be engaged in an economic activity and will therefore fall outside the scope of the competition rules.[54] In *Albany* the CJEU held that a pension fund charged with the management of a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector, to which affiliation has been made compulsory by the public authorities for all workers in that sector, is an undertaking within the meaning of the Treaty. The pension fund in *Albany* was entrusted with one scheme only and this scheme met the solidarity criteria. The CJEU remained however vague about the necessary level of solidarity of the scheme in order to justify the breach of competition law.[55] The CJEU:

> Third, operation of the sectoral pension fund is based on the principle of solidarity. Such solidarity is reflected by the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from contributions in the event of incapacity for work, the discharge by the fund of arrears of contributions due from an employer in the event of the latter's insolvency and by the indexing of the amount of the pensions in order to maintain their value. The principle of solidarity is also apparent from the absence of any equivalence, for individuals, between the contribution paid, which is an average contribution not linked to risks, and pension rights, which are determined by reference to an average salary. Such solidarity makes compulsory affiliation to the supplementary pension scheme essential. Otherwise, if 'good' risks left the scheme, the ensuing downward spiral would jeopardise its financial equilibrium.[56]

In following case law the CJEU did not develop universal solidarity criteria. Also here, determining the level of solidarity requires a case-by-case analysis. The CJEU did stress that it considered compulsory affiliation to a scheme to be

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[52] CJEU, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] *ECR* I-2493.

[53] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr].

[54] See, inter alia, CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513.

[55] As Drijber rightly argued, this reasoning of the CJEU in *Albany* is rather odd. First the CJEU held that granting an exclusive right is not as such contrary to Article 86 EC [now Article 106 TFEU] in conjunction with Article 82 EC [now Article 102 TFEU] but then held that the exclusive right to its very nature restricts competition, which requires justification. See (in Dutch): Drijber 2007.

[56] CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751.

both an inherent feature and a logical consequence of the solidarity principle.[57] In *Kattner Stahlbau*[58] the CJEU furthermore held:

> … the principle of solidarity, which is characterised, in particular, by funding through contributions the amount of which is not strictly proportionate to the risks insured and by the granting of benefits the amount of which is not strictly proportionate to contributions.

In *AG2R*[59] the CJEU added that:

> That scheme does not, therefore, take into consideration factors such as age, state of health or any particular risks inherent in the position occupied by the insured employee.

Somewhat as an aside, it remains to be seen whether the Dutch Pension Accord[60] will pass the—be it vague—solidarity test of the CJEU. The level of solidarity between generations is a controversial issue in the Accord.[61] Also, the pension benefits are no longer secured (if they were ever). Fact is that optional insurance schemes operating according to the capitalisation principle, even where they are managed by non-profit organisations are considered as economic activities.[62] The capitalization principle means that the insurance benefits depend solely on the amount of contributions paid by the recipients and the financial returns on the investments made.[63] On the other hand, the management of compulsory insurance schemes pursuing an exclusively social objective, functioning according to the principle of solidarity, offering insurance benefits independently of contributions, have been classified as non-economic activities of a purely social nature.[64]

Van de Gronden and Sauter argue that in the *AG2R* case the CJEU extended the above described two-tiered test (exploring the role of solidarity and mapping the impact of the state supervisory mechanisms), towards bodies managing social security schemes.[65] Apart from being governed by the principle of solidarity, these bodies must be subject to a substantial degree of control by the state in order to escape from competition law. This implies that bodies operating in a public environment are more likely to be exempted from the competition rules than privatised bodies providing similar services.

Above it was demonstrated that it depends on the national design of the pension schemes whether managing bodies fall within the ambit of EU competition law.[66]

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[57] European Association of Paritarian Institutions (AEIP), 'Reflection Paper on Solidarity in Social Protection,' June 2005. Available at: www.aiep.net.

[58] CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513.

[59] CJEU, Case C-437/09 *AG2R* [decided on 3 March 2011, nyr].

[60] *Supra*, n. 2.

[61] See Article of Kocken and Van Wijnbergen in the Dutch Financial Times, 29 July 2011, 'Fatal Error in Pension Accord.'

[62] CJEU, Case C-244/94 *Fédération française des sociétés d'assurance and Others* [1995] *ECR* I-4013.

[63] SEC(2010) 1545 final, op cit footnote 45, *supra*.

[64] CJEU, Case C-159/94 *Commission* v. *France* [1997] *ECR* I-5815.

[65] Van de Gronden and Sauter 2011.

[66] See for the healthcare situation: Van de Gronden 2009.

The main argument is related to the principle of solidarity and state control.[67] However, a caveat must be added: the nonapplicability of the competition law rules does not mean that the activities of the pension scheme/fund must not be in conformity with the four freedoms (goods, services, capital and persons). Van de Gronden points out that in this regard it is remarkable that in the cases *Freskot*[68] and *Kattner Stahlbau,*[69] where the CJEU progressively extended the scope 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.[70] According to this author it is striking that the CJEU 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. Consequently, these judgments show that scope of free movement is broader than the scope of competition law.[71] In the cited cases, the focus was on statutory social security schemes. So far, there is no case law regarding the question whether compulsory affiliation to *complementary* schemes might be in violation of Article 56 TFEU (free movement of services). With regard to pension schemes in the 2nd pillar, the IOPR-Directive, Article 20(1) leaves little room for misunderstanding:

> Without prejudice to national social and labour legislation on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, Member States shall allow undertakings located within their territories to sponsor institutions for occupational retirement provision authorised in other Member States.

Furthermore, it should be borne in mind that the necessity, for a Member State to preserve the financial equilibrium of its retirement system constitutes a legitimate ground for restricting freedom of movement, as is made expressly clear in (old) Article 137(4) EC and the case law.[72] Moreover, the CJEU has accepted that the Member States have a wide discretion in the organisation of their retirement systems where that organisation involves complex evaluations of financial data.[73]

In general, however, the free movement rules are capable of breaking open social security schemes, whereas the role of competition law is limited in this respect.[74]

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[67] Note that in healthcare case the universal coverage is of interest as well since providing access to all may be regarded as an expression of solidarity, as the CJEU did in the FENIN case, CJEU, Case C-205/03 *P FENIN* v. *Commission* [2006] *ECR* I-6295.

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

[69] CJEU, Case C-350/07 *Kattner Stahlbau* [2009] *ECR* I-1513.

[70] See Chap. 6 in this volume, by van de Gronden.

[71] See also Szyszczak 2009.

[72] Opinion of AG Bot of 6 October 2009 in CJEU, Case C-343/08 *Commission* v. *Czech Republic* [2010] *ECR* I-275, p. 56. See, in particular, CJEU, Case C-303/02 *Haackert* [2004] *ECR* I-2195.

[73] CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751.

[74] *Supra*, n. 65.

To conclude this paragraph, a point of criticism on the case law of the CJEU. It has been argued that the CJEU in *Albany* failed to take the above described functional approach and logic far enough.[75] The CJEU seems to have assumed that pension funds are simply the representatives of beneficiaries' interests, ignoring the important financial institutions owned and operated by those funds. Moreover, the CJEU failed to appreciate the hidden costs of sector fund economic organisations—that is, the potential costs associated with the vertical integration of funds' financial services borne by pension fund beneficiaries, plan sponsors and/or participating employees.[76]

16.4 A New Regulatory Framework

The main question of this chapter is: which pension funds/schemes should be subject to the secondary EU-legislation framework, i.e. the IORP-Directive? Many Member States want to escape regulation by this Directive. Some because of the possible future solvency (II-alike) requirements. The United Kingdom, for example,

> … supports the objectives of Solvency II for insurers. However, the application of a similar solvency regime for pension funds would raise funding requirements beyond those needed for financial stability and member security purposes. This would significantly raise the costs of Defined Benefit schemes to sponsoring employers, potentially reducing benefits for members of such schemes.[77]

Other Member States argue more generally that their 'pensions' are 'social' products and therefore should not be subject to the Directive. For example, the German response to the Green Paper reads:

> Der von der Kommission verfolgte Ansatz, mit einer Erweiterung des Anwendungsbereichs der IORP-Richtlinie den Binnenmarkt für Altersvorsorgeprodukte zu stärken, könnte damit nicht erreicht werden. Denn bei 'book reserve schemes' handelt es sich nicht um Finanzprodukte, sondern um unternehmensinterne Sozialleistungen, die in Deutschland über den Pensions-Sicherungs- Verein (PSV) gegen Verlust geschützt sind. Würde man an diese Leistungen aufsichtsrechtliche Vorgaben entsprechend der IORP-Richtlinie knüpfen, zum Beispiel im Hinblick auf eine Bedeckung mit Vermögenswerten, wäre das gleichbedeutend mit deren Abschaffung.[78]

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[75] Clark and Bennett 2001.

[76] Ibid.

[77] *Supra*, n. 12.

[78] Antworten der Bundesregierung auf die im Grünbuch enthaltenen Fragen der EU-Kommission—finale Fassung, Supra, n. 12. Author's translation: 'The Commission's approach to widen the scope of the IORP Directive, in order to strengthen the internal market for pension products could thus not be achieved. 'Book reserve schemes' are not financial products, but are about company intern social services, which are protected against loss in Germany by the Pension Protection Association. If one were to bring these services in accordance with regulatory requirements of the IORP Directive, for example in relation to the coverage of assets, that would be tantamount to the abolition.'

When redefining the scope, another important 'defect' in the Directive needs to be fixed.

In 2011, the foundation Holland Financial Centre performed a feasibility study of a tax-qualifying pension scheme for the Netherlands and the United Kingdom.[79] One of the findings is that that so-called 'pension pooling'—i.e. operating pension schemes on a cross-border basis—is feasible, yet far from optimal. In practice, the requirement of respecting the national 'social and labour' encounters many obstacles.[80] Any IORP interested in carrying out cross-border activity is required to observe the social and labour laws of the Member State that qualifies as the home country of the pension scheme. As each Member State is free to interpret the provisions, this legislation ranges widely from country to country. At times, prudential supervision rules even form part of social and labour laws. This diffuses the distinction between 'social and labour law' on the one hand, and 'prudential (financial) law' on the other side. The Directive stipulates that 'social and labour law' applies to the scheme, and the prudential, financial law applies to the IORP.

A possible solution for the above addressed problems would be to replace the IORP Directive by two new regimes: a soft law code and a legislative approach (Article 288 TFEU). The soft law approach would 'regulate' certain non-economic pension services of general interest; i.e. collective pension *schemes* established by employers or social partners *and* those *institutions* operating these schemes. These institutions/schemes would not be subject to the Directive as long as they meet a certain level of solidarity (e.g. the degree of absence of risk selection, average premiums height, degree of solidarity between generations, etc.). A European Communication or a code, explaining the main features of the pension schemes based on solidarity and the conditions they have to comply with in order to be exempted from the Directive and/or competition rules, could remove legal uncertainty.[81] To avoid free movement rules—if wanted—it could furthermore be prescribed that these institutions/schemes only operate domestically, meaning that they shall only operate schemes for beneficiaries with the nationality of the country where the fund has its seat.[82] As is well known, in case there is no cross-border element, EU law does—in principle—not apply.[83] An example can be

[79] www.hollandfinancialcentre.nl

[80] Article 20 IORP Directive.

[81] European Association of Paritarian Institutions (AEIP), 'AEIP's reaction to the Green Paper,' November 2010, *Supra*, n.12.

[82] It remains uncertain under the IORP Directive when a fund is cross borderly active. Under the Dutch approach the difference between the location of establishment of the sponsoring undertaking and the location of the IORP is not decisive to determine the possible cross-border activity. What should decisive is the difference between the 'nationality' of the pension scheme and the location of the IORP. See: Van Meerten 2009.

[83] In principle, because in practice a cross border element can easily be found.

found in the Solvency II Directive.[84] For these kind of schemes/funds—and strictly under the above described conditions—further harmonisation and a Solvency II-alike framework is not *per se* needed.

On the other hand, with regard to funds and schemes that do qualify as economic, the 'whole nine yards' must apply. These funds and schemes are active on the internal market and should be subject to competition law and the four freedoms. Here, more harmonisation is needed to reach a level playing field between IORPs and other financial institutions. The 'hard law' approach could follow the *Lamfalussy* technique[85] and could arrange for the same level of detail as the Solvency II regime,[86] be it for IORPs with their own specifics. The legislation could regulate matters such as a qualitative (governance, financial reporting) and disclosure and information requirements.[87] The quantitative measures could be the (fixed) interest rate,[88] the security level (e.g. 97.5% or 99.5%, depending on the contract), the capital requirements (MCR/SCR),[89] technical provisions and—if necessary[90]—the buffers.

This construction, which clearly needs to be thought through and developed further, seems to have several advantages. The most important one is that the competences of the Member States in the field of pension social services are clearer defined and respected. Furthermore, a 'race to the bottom' between economic IORPs can be prevented: they all operate under the same conditions. Last but not least: the requirement of respecting national social and labour law can be *deleted*. In case of non-economic activity, the requirement is meaningless because there is no cross-border activity. Funds only operate domestically and beneficiaries are always subject to national law. In case of economic activity, the protection of the participants is warranted through the EU harmonised 'hard law' regulation.[91]

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[84] Article 304 of the Solvency II Directive, stipulates: 'the activities of the undertaking related to points (a) and (b), in relation to which the approach referred to in this paragraph is applied, are pursued only in the Member State where the undertaking has been authorized.'

[85] With four levels of legislation. This method was introduced on the basis of the recommendations of the 'Lamfalussy Report' and accepted by the European Council: Resolution of 23 March 2001 on more effective securities market regulation in the European Union, *OJ* 2001 C 138/1/2. See for more detail: Ottow and Van Meerten 2010.

[86] Lechkar et al. 2009.

[87] For DC-type plans the same information should be provided as for DB plans, except information on the funding level for those DC-type plans where the members take the risk. See in this respect also: De Ryck 1999, p. 50.

[88] See for an interesting approach: Pikaart and Bos 2011.

[89] Minimum Capital Requirement and Solvency Capital Requirement.

[90] In case the fund operates DB schemes.

[91] See Article 30 of the Solvency II Directive. Article 30(1 and 2) reads: 'the financial supervision of insurance and reinsurance undertakings, including that of the business they pursue either through branches or under the freedom to provide services, shall be the sole responsibility of the home Member State. Financial supervision pursuant to para 1 shall include verification, with respect to the entire business of the insurance and reinsurance undertaking, of its state of solvency, of the establishment of technical provisions, of its assets and of the eligible own funds, in accordance with the rules laid down or practices followed in the home Member State under provisions adopted at Community level.'

As was stated in the Solvency II Directive, the main objective of insurance and reinsurance regulation and supervision is the adequate protection of policy holders and beneficiaries.[92] This applies *mutatis mutandis* to pension regulation.

16.5 Concluding Remarks

This chapter has described the main features of EU regulation and case law in relation to occupational pensions. It has explored the political sensitivities involved in regulating pensions. This chapter has shown that the EU regime is complex and inconsistent. As a result, the main piece of legislation, the IORP Directive, leads to distortions of the EU-level playing field. This chapter has proposed a possible solution for the dilemma when regulating pensions: should it be a national or an EU competence? It is suggested that the regulation of pensions could be divided into a soft law approach and a hard law approach. Since social services, including pensions, can be of an economic or non-economic nature, depending on the activity under consideration, it is proposed to regulate the *economic* activities at the EU-level, whereas the *non-economic* activities of pension funds can be regulated nationally. In this respect, the EU can only can non-binding guidance.

To conclude, one cannot simply state that 'pensions' are a national or a EU competence. Each decision must be made on an ad hoc basis.

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[92] See recital 16 of the Solvency II Directive.

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Chapter 17
The Political Economy of Regulating Longevity Insurance in the EU

Waltraud Schelkle

Abstract Old-age security is a pressing reform area in all EU member states. For political reasons, Single Market legislation and regulation distinguishes between economic and noneconomic activities, because the Treaty gives the Community regulatory authority only for the former. Hence, occupational and personal pensions are regulated in categorically different ways from (noneconomic) public pensions. The economic rationale for this distinction was always problematic and national welfare reforms have made the boundaries between economic and non-economic services even more blurry. The consultation and Communication on SSGI, undertaken to clarify the distinctions between different types of services, intended to take account of these new realities, but these measures have not settled the regulatory issue at stake: to find complementarities between social solidarity and market integration. In the case of insurance, this requires that competition is contained to allow for differentiated economic regulation. In practice, EU regulation allows for this to happen while the regulatory conceptualisation lags behind this practice.

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W. Schelkle (✉)
European Institute, London School of Economics and Political Science (LSE),
Houghton Street, London, WCA2AE, UK
e-mail: w.schelkle@lse.ac.uk

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Contents

17.1 Introduction: The Challenge of Old-Age Security in the EU

There is hardly a more pressing policy issue in advanced democracies than old-age security. Security here refers to preventing a situation in which individuals live longer than their available means can sustain them. Insurance for (the unanticipated part of) longevity is provided by financial mechanisms or products that are paid until the end of life. Three provisions are particularly relevant. There are, first, public pay-as-you-go (PAYG) pensions that are paid out of taxes or contributions of the current economically active population. Second, there are funded (private or public) pensions for which the individual saves, i.e pays contributions that should equal the present value of payments to be received by the representative individual. A third provision is life insurance products that are paid out after a specified period of time, for instance 30 years, after which this lump-sum is turned into an annuity, i.e a regular payment until death. Note that simply taking the lump-sum without turning it into an annuity is not longevity insurance but simply saving for retirement.

European governments and their electorates are particularly concerned about old-age security. Pension entitlements are comparatively generous in most countries, populations are ageing fast and retirement ages are strictly set while a high employment rate of the working-age population is the norm only in a very few, typically Nordic, states. Over the last two decades, governments have engaged in continuous reforms of their pension systems, the effects of which become slowly apparent.[1] The EU urges member states through various channels, from fiscal surveillance to coordinated reform processes, to 'modernize' their pension systems which includes both public pensions but also the regulation of private provisions. My interest here is in the channel of the Single Market.

[1] See the contributions in Immergut et al. 2007 and in Palier 2010 for pension reforms in the wider context of welfare state restructuring in Continental Europe.

Under EU law, occupational and personal pensions are regulated in categorically different ways from public pensions: providing occupational and personal pensions is an economic activity while public pension schemes are regarded as noneconomic SSGI.[2] In this chapter, I will argue that one can easily see why the EU chooses this legal distinction as it has competences with respect to (longevity and all other) insurance as a financial service but not regarding genuine ('non-economic') social services. Yet, I will also provide evidence that this is at odds with the evolution of pension systems on the ground that the EU's very own modernization agenda fosters. The point then is not to blame EU politics and law for this misleading distinction since it is common in mainstream comparative welfare state research. But I argue that it is politically damaging and economically inconsistent for the EU to base its regulation on this distinction.

Politically, the dichotomy of economic and noneconomic, financial and social services, is a problem for the public perception of what social policy is and how the EU affects social policy. The verdict that the various notions of SGEIs and SSGIs provide in legal terms a 'safe haven' or a 'safeguard' against EU norms of free trade, as Szyszczak argues in her chapter, indicates a problem for the political economy of European integration. The notion of a 'safe haven' suggests that the economic significance of such services threatens their social character because EU Single Market Directives may then apply and dismantle the social. In order to get 'safe haven' treatment, the social must claim exception. My case study of longevity insurance regulation in the EU is a study of exactly this political economy problem. It takes legal concepts and analyzes their economic and political consequences. Political economy here means to examine the economics and the politics of the boundaries drawn by the EU between financial and social services in order to understand the practically relevant tension between the economic and the political rationale for this distinction.

If we acknowledge that social policy in general, and SSGI in particular, generate economically valuable activity, then it makes no sense to privilege the commercial (alias economic) over the *potentially* commercial (alias social). On the contrary, in the case of insurance it would be equally plausible to put the burden of proof on commercial provision, given that competitive insurance markets are beset by market failure that follow from asymmetric information and, in the case of longevity, this particular uncertainty. A more constructive way forward has been shown by the *Albany* ruling (or rather the Opinion of Advocate General Jacobs in this case).[3] It established the idea of differentiated regulation that acknowledges that social policy (or public interest) considerations can trump commercial freedoms *within* the realm of economic regulation. Economic regulation does not have to be procompetitive even if it tries to achieve integration, for instance, by establishing common regulatory principles.

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[2] See Chap. 9 in this volume by Neergard.

[3] Opinion of AG Jacobs of 28 January 1999 in CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751.

Moreover, it is contradictory for the EU—Commission and Council alike—to push for welfare reforms and the 'modernization of the public sector' in member states that then get caught by competition or freedom of movement law, pushing them into a direction that was not intended by legislators. The hybridization of public and private schemes forces the legal profession to develop more sophisticated tests, so as to determine on which side of the distinction a scheme falls. Thus, EU law had to allow for an ever more qualified and conditional application of competition and free movement rules. The consultation over services of general interest culminating in Protocol 26 to the Treaty of Lisbon 2009 tried to put an end to the uncertainty. Yet, it simply reintroduced the distinction of economic and noneconomic within social services. But the real tension is arguably not among economic/financial and non-economic/social services, EU or member state competences. The practically important question is to what extent competition has to be contained, or qualified, in order to achieve integration. The latter is to be understood in the sense of creating bigger insurance pools that transgress established borders of risk communities.

The chapter proceeds as follows: The next section outlines (briefly) the significance of insurance for European political economy and the particular case study of pensions regulation. Then Sect. 17.3 explains the EU regulation of longevity insurance and how it established a clear three-pillar structure. The following Sect. 17.4 shows how EU insurance regulation based on a distinction between economic and noneconomic services is challenged by major trends in national pension reforms in OECD countries. The final section discusses this distinction in light of the previous findings.

17.2 Insurance in European Political Economy

Insurance has an interestingly ambiguous relationship to both market integration and competition.[4] Economic integration tends to make individuals and firms more mobile. This inadvertently changes the established risk pools in member states, creating opportunities for more insurance of some risks while undermining opportunities for others. Labour migration is the most obvious mechanism by which individuals switch the communities with which they share risks of unemployment, ill health or longevity.[5] In the case of longevity insurance, countries of destination can typically rejuvenate their insurance pool although this is only of long-term advantage if national pension systems take adequate care of longevity risks, i.e do not underestimate how long people live. Less obvious is how cross-border

[4] Integration and competition are not the same, as Greer and Rauscher 2011 rightly stress, a point to which we return.

[5] I concentrate here on insurance areas for (private and public) social insurance but these considerations could be extended to exclusively private insurance. In fact, the mobility that comes with tourism has made motor insurance a densely regulated area in the EU, mainly to allocate damages in case of accidents.

investment by financial firms affects insurance of national income and employment. Regulatory competition can lower standards everywhere but also make firms offer insurance products in areas that were underserved before. Holding claims in different jurisdictions can reduce risk if business cycles in different member states are not fully synchronised but it can also add risk if the exposure to volatility in one member state is contagious and cumulative. This is particularly critical for banks and insurers, hence the need for prudential supervision across borders.

Insurance economics does not support the proposition that unfettered competition delivers the desirable amount of insurance across Europe. There are the well-known consequences of asymmetric information such as adverse selection, discrimination and moral hazard which would make competitive markets deliver less insurance than is desirable, and feasible. There is also, well, uncertainty.[6] Because of uncertainty, the system of commercial insurance markets is incomplete. This is particularly severe for high damage-low probability events such as nuclear reactor accidents, but also for slowly accumulating risks such as climate change and the evolution of longevity. In all these cases, it is hard to translate uncertainty into calculable risk. This is why insurance against it has come to draw on the political authority of the welfare state, namely the political authority to tax and to include future generations into the risk pool, as in Pay as You Go (PAYG) pensions. This does not necessarily lead to a complete takeover by the state, as our case study of longevity insurance illustrates and a study of health insurance could show as well; the main uncertainty here being the pace of medical progress.

The failings of insurance markets can explain why insurance was often made mandatory and became politically such a powerful force in creating 'imagined communities'.[7] Mutual insurance gave the working class a basis for identity formation well before social democratic parties in power were in a position to give them state backing—and this is important for the political legitimacy of occupational pensions until this very day. Liberal and even Conservative parties came to see social insurance as an opportunity to appease the 'deserving' workers and assemble constituencies among the worried middle-classes. Parties of all ideologies discovered social insurance schemes as a way of overcoming the divisions between rural and urban areas in nation building.[8] As the great sociologist and historian of insurance, François Ewald, put it: 'what makes for its political success' is that:

> [i]nsurance provides for a form of association which combines a maximum of socialization with a maximum of individualization. It allows people to enjoy the advantages of association while still leaving them the freedom to exist as individuals.[9]

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[6] A whole strand of modern economics, that explicitly takes uncertainty into account, has reinterpreted economic activities and contracts in terms of insurance (Stiglitz 1969; Varian 1980; Sinn 1995). This new welfare economics can be seen as an update of Adam Smith's doctrine that more division of labour creates economic value. The add-on is that this division is not only limited by economies of scale but also by the risk-bearing capacity of an economy.

[7] Anderson 1983.

[8] Baldwin 1990.

[9] Ewald 1991, p. 204.

Without risk pooling, i.e association on a sufficiently grand scale, it is difficult to leave the safety net of one's birthplace and become an individual that entertains intimate relationships for nonutilitarian reasons while relying on strangers for mutual support, that is modern insurance. European market integration has increased the pool of strangers with whom EU citizens can share their risks. But it also challenges established institutions of risk sharing and may make them provide less insurance, for instance, in order to attract investors but not poor migrants.

To European political economy, it is therefore of keen interest to explore how EU regulation manages or tries to disentangle insurance as a financial and a social service. The EU's delineation exercise will be studied with respect to insurance for longevity, i.e the risk of living longer than planned savings last. Those who pay into these schemes acquire an entitlement that is not purely based on residency and need as a pure social insurance tends to be.

The case study covers a standard theme of EU studies: that the Commission must disentangle social from financial services, so that it can exercise its authority in internal market creation while it has to tread carefully with respect to social services because of the prerogative of member states in social policy (Articles 151 and 153 TFEU). There is also the more general theme of European integration as a modernizing force and reform lever. One interest I have here is how the delineation exercise of the EU interacts with trends in national pension reforms. It suggests that the conceptualization of SSGI was a way for member states to draw a line in the sand, fending off the Commission's relentless effort at integrating markets and promoting competition[10] while they privatized some public welfare provisions.

The distinction of social and financial services in terms of noneconomic and economic reproduces a conventional idea of the welfare state that is regularly at odds with its reality. The idea is that the welfare state is 'the other' of capitalist markets, embedding and taming them. In the influential work of Gøsta Esping-Andersen,[11] the generosity and maturity of welfare regimes can be measured in terms of how much social policies 'decommodify' labor, i.e the extent to which they make the living standard of workers and their families independent of earnings through free services and cash transfers. Not only does this ignore the relevance of social policies for markets other than the labor market, notably financial markets. It also ignores that social policy is often intensely commodifying.[12] To take the case of longevity insurance: One of the universal trends of welfare state development over the last century was taking old-age security to a considerable degree out of the care of families. State pensions allowed the elderly to retire and live on their own and to buy most of the services and commodities they need from markets. Moreover, public schemes become the basis on which private pensions can piggyback and typically cater to the better-off. In that sense,

[10] Krajewski 2010, p. 86.

[11] Esping-Andersen 1990.

[12] This is analysed more systematically in Schelkle 2012.

social policy makes markets for private provisions. It is this market-making role of social policy that the categorical classification as noneconomic overlooks while domestic welfare reforms rely on this role in practice. Once we recognize this role, the regulation of longevity insurance in the EU is invariably social policy. Yet it is also to a large extent economic regulation.

17.3 The Regulation of Longevity Insurance in the EU

In 2007, about 10.5 million Europeans lived in another Member State which represents a bit more than 2 % of the population.[13] Over one million people are frontier workers, i.e they cross an internal EU border for work on a daily basis. Migrant workers acquire entitlements to cash and in kind benefits for themselves and their families for which at least two states share responsibility. Every year about 250,000 new retirees take all or part of their pensions across borders because they worked in more than one other member state. In a classical immigration country (like Germany), 1.1 million or 5.6 % of all pensioners were foreigners in 1992, 3.8 % or two-thirds of which received their pension while living abroad; in 2008, 2.2 million or 9.0 % of all pensioners were foreigners out of which 5.4 or 60 % lived abroad.[14]

The variety and overlap of pension schemes pose real challenges for EU regulation. Within old-age security, public PAYG pensions are the pure case of social services declared off limits for competition and free movement law. Private personal pensions or life assurances are financial services subject to internal market law, which, nevertheless, rely heavily on regulation of risk-bearing capacity that may require some exemption from competition law. Private, but collectively administered, occupational pensions constitute an intermediate case since such pensions are both an economic (sic) social service for workers, covering various risks for which the employer sponsors a third party insurer, but also part of the current remuneration package for the individual employer and employee. The remuneration package may be ruled by national labor law which would tip the regulation towards a social service. So should these schemes be subject to Single Market law or exempt? All of them or differentiated according to whether they are voluntary or mandatory schemes? We start with the legal answers.

Three sets of rules carve up the regulatory space of insurance for longevity; a limited number of additional Directives are also relevant, but will be introduced to the discussion later.

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[13] Press Release, Updated Social Security: Supporting Mobility in the EU, MEMO/09/353.

[14] Deutsche Rentenversicherung, Rentenversicherung in Zeitreihen 2009 (*Pension provision in times series*) 2009, p. 176. Available at: http://www.deutsche-rentenversicherung.de (last accessed on 8 July 2011).

1. There is first the *Coordination Regulation* 883/2004, namely 'on the coordination of social security systems' which replaced the famous Regulation 1408/71 from May 2010; it applies to statutory public pensions and also to some mandatory private schemes. They are noneconomic social services of general interest.
2. The so-called *IORP Directive* 2003/41/EC, namely 'on the activities and supervision of Institutions for Occupational Retirement Provision' covers occupational pension funds that are the most important source of private pensions in most OECD countries.[15] They are regulated as services of general *economic* interest.
3. The *Solvency II Directive* 2009/138/EC covers all life assurance, not only schemes for longevity risks, and replaces 13 insurance Directives, including the Third Life Assurance Directive 2002/83/EC. They are regulated as financial services.

The first impression is that EU regulation has established a fairly clear three-pillar structure on old-age security provision in which occupational and personal pensions are economic services. The main differences are summarized in Table 17.1. The dimensions in the first column try to capture key characteristics of social versus financial services, for instance, the universal service obligation seems to characterize social services by definition but not financial services. Yet, we will see that these characteristics are cross-cutting, that is a financial service can be socially regulated and social security can be, to some extent, economically regulated. Social regulation means that a (noneconomic or economic) service is subject to rules that give weaker or disadvantaged market participants equitable access to resources or shift risks to those market participants with presumably higher risk bearing capacity. Economic regulation, by contrast, means that (noneconomic or economic) services are required to allow competition between providers and choice of providers, and possibly also entail the obligation to provide the service efficiently, e.g not to engage in price dumping or cross-subsidies for gaining market share.

17.3.1 Universal Service Obligation

Universal service obligation in the present context refers to the stipulation that all clients (i.e users of an insurance service) must be given access to an insurance scheme. By definition, this obligation is an element of statutory social security systems and hence the universal service obligation is not specifically mentioned as a condition for recognizing these systems as such by the regulator.

Whether occupational pension funds or IORPs[16] should have such an obligation, was one of the many contested political issues surrounding the negotiation of

[15] OECD, Pensions at a Glance, 2009, p. 141.

[16] An IORP in the sense of Directive 2003/41/EC (of the European Parliament and of the Council of 3 June 2003 on the Activities and Supervisoin of Institutions for Occupation

Table 17.1 Overview of EU regulation in longevity insurance (as used in this chapter)

	Old-age social security	Occupational retirement provision	Life assurance
Major rules	*Coordination Regulation* 883/2004	*IORP Directive* 2003/41/EC	*Solvency II Directive* 2009/138/EC
Scope	Public pensions and some mandatory occupational schemes	Occupational pension funds with own legal personality	Assurance contracts on survival to a stipulated age and annuities
Universal service obligation	n.a. [by definition, national prerogative]	Recommended, contracting social partners encouraged to insure against biometric risks and destitution of survivors (Recital 14, Articles 15(2) and 17(1))	No, insurance obligations to be segmented into 'homogeneous risk groups' and technical provisions calculated for each separately (Article 80)
Risk classification and equality norms	*Equal Treatment in social security Directive* 79/7/EEC applies, stipulating 'progressive implementation' of gender equality in matters of social protection (Article 1)	*Recast Directive* 2006/54/EC, amending Directive 86/378 and 96/97/EC, on *Equal Treatment of Men and Women in Matters of Employment and Occupation*	*Gender Equality Directive* 2004/113/EC (Article 5(1)) applies. Solvency requirements provide some incentives for unisex tariffs (Article 105(3e)). C–236/09 *Test-Achats* requires phasing-out of using gender as a discriminating factor
Portability, calculation of benefits	Exportability or 'waiving of residence rules' (Art.7); 'aggregation of periods' (Art.6) and 'pro-rata calculation' (Art.52).	*Safeguard Directive 98/49/EC* ensures merely nondiscrimination and freedom of capital for the payment of benefits from occupational pensions	*Safeguard Directive 98/49/EC* ensures merely nondiscrimination and freedom of capital for the payment of benefits from personal pensions/life assurances
Prudential principles	n.a. [national institutions of auditing, including parliaments; fiscal surveillance under the Stability and Growth Pact, not covered here]	'Prudent person rule' (Art.18) but quantitative restrictions on investments can be imposed by host state if justifiable (Art.18(5-6) and Recital 27). Technical provisions to be calculated using actuarial methods and following prudent principles (Article 15)	'Prudent person rule' (Article 132) with guarantee of 'freedom of investment' (Article 133, Recital 72), i.e quantitative restrictions on investments must not be imposed by host state. Technical provisions to be calculated in a meticulously prescribed way (Articles 77–85); solvency requirements (Articles 94–96) analogous to Basel II rules for banks

Source Own classification; if not otherwise mentioned, Articles refer to rules mentioned at the top of a column

the IORP Directive, resulting in 10 years before the Directive was finally agreed. This issue, concretely the coverage of biometric risks (longevity, occupational disability, destitution of survivors), was the subject of extensive negotiations on the IORP Directive, among Commission and Council and within the European Parliament.[17] The insurance of biometric risks on top of providing retirement income was perceived by the Council as an unwarranted social policy element while some in the industry feared stricter financial regulation if it had to provide such insurance coverage. In the end, it was included as a recommendation, i.e the contracting social partners are *encouraged* to ensure that pension schemes prevent poverty in old age and hence insure against the biometric risks of longevity by granting life-long payments rather than a one-off lump sum that can run out, of occupational disability and of destitution of survivors.[18]

The exact opposite is prescribed for life assurances, namely segmentation and actuarial pricing rather than solidaristic pooling of risks. The Solvency II Directive requires personal pension providers to segment risk pools, 'as a minimum by lines of business, when calculating technical provisions', i.e the assets they have to hold in order to match their current obligations. Biometric risks, thus, would need to be dissected into health hazards of the representative individual, dangers of certain types of jobs, and income risks for survivors. This segmentation has a financial supervisory rationale, making it easier to see what risks a firm has underwritten and whether it has taken precautions against foreseeable losses. But it does not necessarily make sense in terms of efficient insurance coverage as this separation of risks may result in underinsurance, depending on who is identified as the community of risk that needs to be insured.

17.3.2 Risk Classification

The universal service obligation touches closely on the more general issue of risk classification. Risk classification is a crucial activity by which insurers compete and on which the 'politics of social solidarity'[19] thrives. For old-age security, the most commonly used criterion of segmenting the risk pool is gender. It is a,

(Footnote 16 continued)
Retirement Provision (IORP Directive), *OJ* 2003 L 235) is defined as 'an institution, irrespective of legal form, operating on a funded basis, established separately from any sponsoring undertaking, or trade for the purpose of providing retirement benefits in the context of an occupational activity' (Article 6(a)). This excludes all pay-as-you-go schemes, firms' in-house pension plans including book-reserve schemes and general financial savings products, the latter being covered by the, Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the Taking-Up and Pursuit of the Business of Insurance and reinsurance (Solvency II Directive), *OJ* 2009 L 335/1.

[17] Haverland 2007, pp. 897–900; n. 6.

[18] IORP Directive Recital 30; Article 15.

[19] Baldwin 1990.

statistically, robust and easy to construct predictor of life expectancy, even if gender is not the cause of this risk. Such statistical discrimination makes it easy for a prudential supervisor to assess the commercial viability of firms, for instance, by looking at the gender profile of their annuity portfolios. But as a consequence, women get considerably lower annuities for their savings than men because insurers expect to have to pay them for longer. This may aggravate other disadvantages, in this case lower life-time earnings of women. Critics can also point to the conventional character of risk classification and its regressive consequences: if gender is a good proxy for life style, such as drinking and eating habits, or the incidence of work-related stress, then this may change as women have careers and adopt less healthy life styles. Life expectancy may then be better predicted by education and disposable income, revealing that poorer women (assuming they are likely to have less healthy life styles and more stressful lives) have to pay the price for longer life expectancy of relatively well-off women—while men do not share this risk. One conclusion that social regulators have drawn from this is to outlaw risk classification on grounds of sex as gender discrimination. Or put in terms of a regulatory choice: gender discrimination is not compatible with insurance being regulated as a social service, while if regulated as a financial service, statistical discrimination on grounds of sex is likely to be allowed as a robust, hard to manipulate predictor of risks.

Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security requires governments to implement 'progressively' gender equality.[20] This meant that the retirement age for women and men did not have to be equalized immediately. However, even by 2008, some governments still did not prescribe unisex life tables for the calculation of annuities in funded statutory pension schemes.[21] In other words, EU legislation urged governments to provide more social policy in the sense of being more redistributive towards traditionally disadvantaged female earners. But some member states dragged their feet, presumably for fiscal reasons. Yet, in a climate of austerity, governments can also achieve equality by bringing down the entitlements of men to female levels.

Occupational pension schemes were covered originally by Directive 86/378/EEC which required applying the principle of equal pay to men and women. But it excluded many items from the definition of 'pay', notably occupational pensions, and hence was compatible with charging different contributions or applying different pensionable age limits. But the Court's case law, in particular C-262/88 *Barber*,[22] invalidated certain provisions of the Directive, because the Court decided that the Treaty Article on the wider definition of 'pay' trumped the Directive. The *Barber* ruling said that an occupational scheme must not impose

[20] Barnard 2006, Chap. 10.

[21] SPC, Privately managed funded pension provision and their contribution to adequate and sustainable pensions, 2008, p. 41.

[22] CJEU, Case C-262/88 *Barber* v. *Guardian Royal Exchange Association* [1990] *ECR* I-1889.

'age conditions which differed according to sex [..] even if the difference [..] was based on the age laid down by the national statutory scheme'.[23] The Court limited the retrospective effects of this ruling because the financial consequences (of compensating men) would have been enormous. The Maastricht Intergovernmental Conference in 1991 decided then to apply the principle of equal treatment only to earnings-related benefits acquired after May 1990. Hence, Directive 86/378/EEC was replaced and the case law taken into account in subsequent Directives, the latest of which is the Recast Directive 2006/54EC.[24] Occupational pension funds were still allowed to pay out different capital benefits in the case of defined contribution schemes and charge different contributions from employers in defined benefit schemes if this was justified on actuarial grounds when the scheme was implemented.[25]

Insurance companies covered by the Solvency II Directive were given some moderate incentives to use unisex tariffs and conversion rates for annuities. The incentive comes from Article 105(3e) which implies that they can save on capital requirements to cover the 'revision risk' that stems from 'changes in the legal environment'. The Article is not explicit about what these changes are but the political discussion surrounding the 'Gender Equality Directive'[26] suggests that they concern norms of equality and nondiscrimination on grounds of sex, possibly age, and race. The Gender Equality Directive prohibits, in principle, to use sex as a factor for calculating insurance premia (Article 5(1)). The draft for this Gender Directive, originally proposed to apply both to occupational and personal pensions, met with great resistance from the insurance industry and member states.[27]

Subsequently, its scope was narrowed down to personal pensions and an escape clause was introduced in Article 5(2): member states may allow their commercial insurance companies to charge different premia for women and men as long as they can prove this to be 'proportionate' to the difference in risk. Premia must

[23] Barnard 2006, p. 522.

[24] Barnard 2006, pp. 515–517. Since the early 1990s, the Court's case law allowed levelling downwards, i.e granting men the less favourable terms of women, even though in the famous *Defrenne (No.2),* CJEU, Case C-43/75 *Defrenne II* [1976] *ECR* 455, the Court decided that compliance with 'the Treaty's aspirations' of improving working conditions could only be achieved by raising lowest salaries (Barnard 2006, p. 527). It was employers who triggered this change, using equal treatment to reduce occupational pension benefits for women.

[25] Barnard 2006, pp. 530–531, refers to Council Directive 96/97/EC of 20 December 1996 Amending Directive 86/378/EEC on the Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes, *OJ* 1996 L 151, Article 6(1)(h-i), now replaced by the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and occupation (Framework Equal Treatment), *OJ* 2006 L 204/23, Article 9(h, j).

[26] Council Directive 2004/113/EC of 13 December 2004, Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services.

[27] Mabbett 2011.

reflect sex as 'a determining factor in the assessment of risk'[28] and be 'based on relevant and accurate actuarial and statistical data' which has to be published and regularly updated. This regulatory settlement has now been successfully challenged by a Belgian consumer protection organization, *Test-Achats*. In its ruling,[29] the CJEU stated that using gender as a discriminating factor in insurance must be phased out by December 2012. So we have here a case of commercial financial services being subjected to social policy obligations by the judiciary when legislation failed in this attempt. Mabbett argues that the Court has overridden an industry-friendly escape clause because it concerned a fundamental right of equal treatment.[30]

17.3.3 Portability Norms

This norm safeguards entitlements from insurance contracts and thus allows for mobility. Personal pension schemes invariably grant portability while the 'politics of solidarity' that underpinned the creation of communities of risk has not always been favorable to individual mobility and therefore does not normally grant portability of accrued entitlements. For instance, Advocate General Jacobs acknowledged in his Opinion on *Albany* that, ceteris paribus, more recently established occupational pension funds can always offer lower premia and thus outcompete an existing one simply because their pool of the insured is younger. Allowing everybody to leave who would be accepted by the new competitor would make the previously existing unviable and jeopardize the old-age security of those not accepted or already retired.

Accordingly, the Coordination Regulation 883/2004 for statutory social security schemes is preoccupied with portability, namely how to ensure equality of treatment between permanent resident nationals, temporary residents, and frontier workers. Case law has continuously expanded the personal scope of the Regulation even though the Treaty Article still refers only to 'workers'. The notion of 'insured persons' now covers the employed and the self-employed, the retired, students, stateless persons and refugees residing in a member state, as well as the family members or survivors of each.[31] The normally valid *lex loci laboris*, i.e the country of employment is, in principle, also the 'competent' member state, had therefore to be complemented in parts by a residence principle (*lex loci domicilii*) for all those

[28] This wording allows both for a causal and a probabilistic reading, thus getting around the fierce debate of whether discrimination on either is more justified.

[29] CJEU, Case C–236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others* v. *Conseil des ministres* [decided on 1 March 2011, nyr]. See Mabbett 2011 for a full discussion.

[30] Mabbett 2011, p. 5.

[31] Regulation No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems (Coordination Regulation), *OJ* 2004 L 166, Article 2.

who are 'not to be professionally active'.[32] In other words, the insurance pool has been vastly expanded to provide social safety to more mobile European citizens. For the present context, a case in point is in-kind benefits such as free public transport or low-cost access to museums for senior citizens. These benefits must be provided at the expense of the place of residence,[33] an instance of intergenerational solidarity in the EU becoming de-territorialized.[34]

The principles on which the coordination of social security regimes is based generally[35] have been developed not least in order to deal with pension entitlements of so-called guest workers. Exportability in this context means that pension benefits must be paid regardless of where the pensioner resides. An exception is 'special non-contributory cash benefits' which member states sought to make nonexportable.[36] Another principle, aggregation of periods, asks authorities to take the periods of insurance in other member states into account when assessing whether a claimant of old age benefits satisfies the minimum qualifying periods of contribution, employment, or residence for the domestic scheme. In case law,[37] the Court clarified that the aggregation principle must be applied independently of residence but if the beneficiary resides outside the Union, in this instance the United States, it is for the competent member state to decide whether it will pay the benefit thus calculated. A last principle, prorata calculation, asks member states to share the costs of pensions in proportion to the time that a person has spent in each. 'Overlap', i.e more than one state paying for the same period of compulsory insurance, should be avoided. However, the pension benefits acquired in the competent state for a period may be lower than if that period would have been spent in the more generous state; case law has decided that the difference must be paid by the more generous state. In turn, when calculating the earnings-related contributions to social security in the member state of residence, the authorities are allowed to take into account any income earned in another member state.[38] These principles prescribing aggregation of periods and proraterization thus try to prevent that mobility is driven or deterred by social security considerations. If in doubt, however, the benefits awarded to the migrant must be the 'most favourable'.[39] We can, thus, see that social security coordination is used to combine the integration of labor markets in Europe with safeguards against 'welfare shopping'.

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[32] Schoukens 2010, p. 36.

[33] Article 23 Coordination Regulation.

[34] See Martinsen 2005 for health care.

[35] Barnard 2006, pp. 212–217.

[36] The listing of all these benefits in the Annex of the new Coordination Regulation is the main reason why it could not be implemented before May 2010; Pennings 2005, pp. 251-253.

[37] In Case C-331/06 *Chuck* [2008] *ECR* I-1957, para 28, the Court states that the objective of the Regulation is to promote 'the greatest possible freedom of movement for migrant workers within the Community', not merely the coordination of social security systems as the Dutch and some other governments maintained.

[38] Paskalia 2009, pp. 1207–1209.

[39] Schoukens 2010, pp. 58–59; Paskalia 2009, pp. 1213–1215.

This kind of highly regulated integration allows, at the margin, for redistribution from richer or more generous countries to poorer or less generous ones.

By contrast, the Safeguard Directive 98/49/EC[40] applying to private pensions, does not guarantee portability. In particular, this can lead to nontrivial disadvantages for leavers of an occupational scheme. The Directive merely stipulates, first, that there must be freedom of capital for the payment of benefits from pensions and, second, there must be no discrimination between those who leave a scheme for another member state and leavers who remain in the country. This does not prevent supplementary occupational schemes from disadvantaging leavers. Such schemes tend to stipulate long vesting periods (minimum time for acquiring an entitlement), low transfer values (if the employee wants to take out the entitlement and invest in another scheme), and no full protection of reserved rights (the entitlement if the leaver does not want to take it out and waits for payment until retirement) so as to keep employees attached to the firm.[41]

These means of privileging loyalty over mobility, that the Safeguard Directive respects, have obviously been a target of the Internal Market and Competition Directorates in the Commission. However, a Commission initiative in 2005 to make occupational pensions fully portable failed. A broad coalition of national social partners, the European employers and pension fund associations as well as influential member state governments, in particular from the Netherlands, rejected the draft of a Portability Directive for occupational pensions.[42] These opponents resented the Commission's attempt to treat all pensions as financial savings and insurance vehicles for individuals. They defended the view that occupational pensions are an employment-related benefit, i.e an element of corporate welfare at the discretion of employers or social partners. Thus, national employment laws trumped the EU imperatives of competition and free movement.

17.3.4 Prudential Principles

Prudential supervision tries to ensure that providers of longevity insurance stay solvent and honour long-term contracts on which the livelihood of their clients in old age depends. In publically provided old-age security, this is ultimately a question of fiscal capacity: present and future pension obligations must be met by social security contributions and taxes over the same time horizon. Public pensions are typically defined-benefit, i.e the risk of longevity is borne by the insurer, ultimately the community of present and future taxpayers, that guarantees a certain replacement of previous income. Yet, state authorities also have the possibility,

[40] Council Directive 98/49/EC of 29 June 1998 on Safeguarding the Supplementary Pension Rights of Employed and Self-Employed Persons Moving Within the Community, *OJ* 1999 L 209.

[41] Mabbett 2009, p. 780.

[42] Mabbett 2009.

typically subject to approval of parliament, to change certain parameters of the insurance compact, such as the contribution rate, indexation rules, and the taxation of pension benefits. This is politically one of the most important reasons for why the SSGI for old-age security is still a prerogative of member states.

In commercial insurance, the terms of a contract can normally not be changed ex post. Benefits are typically defined contribution, possibly with certain guarantee elements.[43] Solvency II requires insurance companies to hold capital ('own funds') which is the difference between their (uncertain) liabilities under the insurance contracts they sell and the assets they acquire with the premiums they collect. The capital base must absorb, with a certain probability, the unexpected losses from the various risks that insurers incur.[44] The security is ultimately dependent on market valuations, which the crisis of 2007–2009 has shown to breakdown if asset markets freeze or collapse.

No such risk-based solvency requirements and technical provisions are imposed on IORPs, even though they may provide defined benefits and thus run high risks. They have to hold mandated funds that match their (uncertain) contractual commitments in line with stipulations originally laid down in the Solvency I Directive. IORPs engaging in cross-border activities must hold fully funded assets to meet their obligations 'at all times'[45]; a stipulation which does not strictly apply to domestically operating institutions. In a public consultation on higher solvency standards for IORPs, to be harmonized with the requirements for insurers under the Solvency II Directive, the pension funds, and especially the Dutch authorities, put forward a whole list of arguments for why and how they should be treated differently.[46] Occupational pension providers can ask for additional contributions from members, and benefits are often flexible or conditional. Similarly, the covenants of sponsoring employers and the existence of an employer's insolvency protection fund can be treated like reinsurance, more generally, there is an additional buffer due to the fact that it is part of an employment relationship. Additionally, uniform risk capital requirements ignore that there is often an implicit, or explicit, government guarantee for occupational pension funds.

The funds and supporting governments insisted that IORPs are part of national welfare arrangements, based on mutuality rather than exchange, and not simply

[43] For instance, in Germany, it is not allowed to offer pure defined contribution pensions, at least the nominal value of contributions must be guaranteed (i.e a minimum defined benefit), notably in all schemes qualifying for subsidies as a Riester Rente.

[44] More precisely, Solvency II asks insurers to have capital or own funds that avoid ruin with a probability of 99.5 % over the next year; financial economists speak of the 'Value-at-Risk' of a firm 'subject to a confidence level of 99.5 % over a one-year period'.

[45] Recital 28; Article 16(3) IORP Directive.

[46] Commission, *Feedback Statement, Consultation on the Harmonisation of Solvency Rules Applicable to Institutions for Occupational Retirement Provision (IORPs) Covered by Article 17 of the IORP Directive and IORPs Operating on a Cross-Border Basis, European Commission, Internal Market and Services DG, 16 March* 2009, p. 10. Available at: http://ec.europa.eu/internal_market/consultations/2008/occupational_retirement_provision_en.htm (last accessed on 8 July 2011).

participants in specialized financial markets that the EU would like to integrate. The two ways of providing safety of insurance—capital requirements or mutuality—cannot be distinguished in terms of economic and noneconomic; both are ultimately economic services. But the market valuations on which capital requirements depend result from competition among commercial providers while mutuality results from containing competition that allows forming distinct communities of risk.

17.3.5 Section Summary

The EU has developed differentiated instruments for the regulation of public, collective and private insurance of longevity. They are the outcome of political contestations, over market integration, the role of competition and national specificities, but also responses to economic pressures, such as the fiscal and commercial viability of pension schemes. These instruments divide up the regulatory space into the provision of old-age security through PAYG schemes, occupational pension funds, and annuities. Social security comes on the side of (noneconomic) social services and life assurances on that of financial services. The case of occupational pension funds falls somewhere in between or even outside the dualism. Norms like the universal service obligation, portability and prudential safeguards through market valuation apply less stringently to occupational pensions than to personal pension providers, and to statutory social security, respectively.

But not only has the odd case of occupational pensions indicated that the dichotomous understanding of economic and noneconomic services, as construed by the distinction of economic and noneconomic SSGI, is dubious. We have seen also that mobility-enhancing norms like portability apply very strictly to public schemes while gender equality was first imposed on private providers. Public pensions are thus regulated to facilitate the integration of labor markets, which serves to redistribute from better-off to less well-off members of the EU. Private pensions are thus regulated to undo part of the income inequality that women experience during their working lifetime, which also serves to diversify the risk pools that each provider creates.

Why then, are some of the regulations still so contentious, perpetuating the impression that all is due to a power struggle about competences for European market integration and national welfare states? The EU's regulatory thrust stresses individual entitlements and mobility, no longer just for workers and firms but for citizens. This reveals a prointegration bias although not necessarily a procompetition bias. Still, this bias can come into conflict with governments' attempts at protecting national institutions, such as mutuality in social partnership. The economic and noneconomic distinction on the basis of which the EU applies competition and free movement law, suggests that all integration is market integration. But this is too narrow. Integration can still take place, even if the preservation of

national institutions requires exempting them from the imperative of market competition, for instance, by agreeing on principles of mutuality and minimum standards for organizational guarantees.

17.4 Trends in National Pension Reforms

This section shows that national reform trends lead to a further erosion of a clear three-pillar structure for noneconomic and economic pension provision, with occupational pensions as the hard-to-classify case in between. The consultation and communication on SSGI noticed this and was motivated officially by the need for clarification that the modernization of social security systems had created.[47] In the area of old-age security three trends in pension reforms are of interest.[48] First, there was a trend towards privatization, i.e the dominant public system was supplemented by private sources. Second, there was an increase in the prefunded elements overall, both in public and occupational schemes. And, finally, closer links between contributions and entitlements have been established in public PAYG systems which, together with the trend towards defined contributions schemes in occupational pensions, have reduced the insurance of longevity provided to individuals. These trends were realized in rather technical reforms, for example, by changing parameters in indexation rules, introducing rules that trigger adjustments of benefits conditional on demographic projections, and granting or abolishing credits for care time or education.

The trend towards privatization has contributed to the impression that European market integration is bad for social welfare. Supplementing and partly replacing public pensions by private sources can have regressive effects that match closely the purchasing power of the insured.[49] Replacement is by voluntary and/or personal pensions, coverage tends to be patchy. To mitigate these effects of privatization, the new member states in Central and Eastern Europe have made personal pensions mandatory while Germany subsidises them heavily.[50] 'Pioneering member states' in the Netherlands, Sweden, Denmark and the UK have, by contrast, made occupational schemes quasi mandatory so as to reduce the

[47] See for instance European Commission COM(2007) 725 final, 8.

[48] Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Services of General Interest, Including Social Services of General Interest: A New European Commitment,* COM(2007) 725 final, 20 November 2007, pp. 107, 111–115; OECD 2009, p. 28.

[49] SPC 2008, p. 23.

[50] Commission, *Commission Staff Working Document, Joint Report on Social Protection and Social Inclusion, Accompanying Document to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Proporsal for the Joint Report on Social Protection and Social Inclusion 2010*, SEC(2010) 98 final, 5 February 2010, p. 111.

fragmentation and unfair distribution of coverage.[51] Making schemes mandatory is the standard way of dealing with adverse selection and also addresses the adverse redistributive effects of voluntary schemes. Declaring supplementary private schemes mandatory introduces an element of social insurance to private commercial schemes. But it can get governments into conflict with Single Market and competition rules, as the *Albany* case and its many predecessors showed.

The second and third trends, introducing funded elements into public PAYG systems and reducing the redistributive ('solidaristic') elements, blurs the distinction of pillars as well. The most sophisticated way of doing both is to make them 'notional defined contributions' schemes. The Swedish pension reform is the prime example for this kind of reform. It ended the promise of defined benefits in a universal PAYG system, replacing it by a system of notional accounts that is still pay-as-you-go but emulates a funded pension scheme with fixed ('defined') contributions. The pension benefit out of every individual's notional account depends on the growth rate of the average pensionable income of all insured. Adjustments will be automatic, based on a formula that ensures that imbalances between contributions and projected benefits do not occur.[52] So the cohort of the insured will bear the risk of unanticipated real growth and life expectancy, not future generations.

Another noticeable trend is that a number of implicit redistributive elements have been separated out or made more transparent, for instance disability and widows pensions, and a point system shows clearly how care work or time spent in higher education is valued. Every person with pension rights receives an annual statement on the funds accrued. Italy and Poland have also introduced notional defined contribution schemes. Others (e.g DE, ES, FR, PT) have tightened the correspondence between contributions and entitlements in a more conventional way but it amounts to the same thing: 'a number of statutory, public PAYG systems [..] now emulate the individual accounts and actuarial connections hitherto only found with private, fully funded schemes'.[53]

Automatic adjustment mechanisms, built into notional accounts, have been introduced in other forms by a number of member states. 'These [adjustment mechanisms] are designed to stabilise pension systems through automatic adjustments (e.g. SE, FI, PL, DE) or periodically required reviews and adjustments (e.g. AT, IT, FR). They intend to reflect changes in one or more factors such as longevity (e.g. in SE, FI, IT, PT), the support ratio (e.g. in DE), reserve fund performance (e.g. SE) or general economic performance (e.g. in FI, SE). The effects vary from increases in contribution rates (e.g. DE), lower (or even negative) indexation of benefits (e.g. FI, SE) and lower accrual rates (e.g. PT), to increases in pensionable ages (e.g. in DK)'.[54] Automatic adjustment makes insurance rely

[51] Ibid.; see also SPC 2008, pp. 21–22.

[52] Anderson and Immergut 2007, pp. 384–385; Palme 2005, p. 45.

[53] SEC(2010) 98 final, p. 111.

[54] Ibid. p. 114.

more on the current risk pool and less on the intergenerational spreading of risks, which pay-as-you-go as part of public debt management does on a grand scale. The political beauty of automaticity is not difficult to see: The bargaining modus of politics is replaced by rules that safeguard individual entitlements, including the terms of any (downward) revision that no longer require parliamentary approval. This depoliticized mode of governance by public authorities can easily be seen as addressing the problem of credible commitment despite having to keep promises flexible when dealing with the vagaries of demographic and economic developments.

These trends amount, in practice to a significant deviation from the 'pillar' model of pension systems of which every major supranational organization (World Bank, ILO, OECD) promoted its own version. The Commission took it up in a slightly modified form in the late 1990s which we have seen in the last section left its traces in the regulation of longevity insurance.[55] The World Bank version makes clear why this was politically not attractive to governments. Each pillar was supposed to fulfill one of the three functions of a pension system: redistribution was the state pillar's task, insurance (including basic savings) was for the occupational pillar, and (higher) savings was the personal pillar's role. Concentrating the redistributive function in the much reduced state pillar would have heightened the political salience of public pensions, mobilizing opposition to change without making them more popular with broad sections of the working middle classes that do not benefit from redistribution.

The international policy community subsequently turned against the very terminology and normative thrust behind the pillarization concept.[56] Instead, the terminology switched to the notion of a multi-tier system. The goal is apparently still to provide 'security through diversity'.[57] But rather than 'diversity', the reform trends can be seen as leading to convergence, each tier providing for (more) insurance, (more) savings and (some) redistribution.[58] Beforehand, the political-economic rationale of this overall thrust looks surprisingly functional, in that reforms arguably aim both at hardening the inherently soft budget constraints of public schemes and at reducing the endemic failures of competitive insurance markets for private schemes. Yet, in this very endeavor, the pillars became hybrid. That triggered the delineation exercise of EU regulation in noneconomic and economic (social) services.

What was gained by maintaining this dichotomy within social services, given that it does not reflect the degree to which the EU regulation of longevity insurance reaches all schemes but differentiates among at least three types of schemes? This chapter has mentioned repeatedly the many conflicts over the regulation of

[55] Mabbett 2009, pp. 777–778.

[56] OECD, OECD Employment Outlook: Boosting Jobs and Incomes, 2006, pp. 28–30; SPC 2008, p. 7.

[57] OECD 2009, pp. 49–50.

[58] Unisex tariffs are a way of forcing private providers to redistribute (Lefèbvre 2007, pp. 8–9).

pensions. These conflicts are conveniently framed as conflicts between the market-maker EU and welfare-state preserving governments, even though the latter are busy reformers. The distinction is part of this framing exercise by pretending that there are issues that are subject to competition law and internal market regulation and issues that are matters for sovereign national welfare reform. Yet, in practice the distinction collapsed. Financial services are subject to social regulation, especially gender equality norms, and statutory social services are subject to supposedly economic norms, such as mobility through portability. The last section argues that legal concepts could take account of this hybridization by differentiating between competition and integration other than market integration as two different goals of the Single Market Program. We have seen that, in practice, differentiated EU regulation already does this.

17.5 The Misleading Distinction Between Economic and Noneconomic Services

This chapter has placed the regulation of SSGI in the wider context of the regulation and reform of social and financial services. Based on a case study of longevity insurance it was argued, first, that the differentiated regulation of public, occupational, and personal pensions did not pitch economic integration against welfare states. The issue can be better understood as trying to foster (labor) market integration through social security but also private welfare provision through market integration. Competition as a norm of the EU's insurance regulation came to be heavily qualified, for instance, by restricting the use of risk classification as a means of competing for clients through gender equality norms. As regards the latter, further evidence is a Block Exemption Regulation for the insurance industry since 1992, renewed in 2010. It allows insurers to cooperate, in particular by sharing data on mortality tables, and come to agreements concerning the calculation of risk premia. The Commission justifies this measure as being procompetition but since it allows the collusion of firms, the block exemption is de facto an integration measure.[59]

This pro-integration, contained-competition thrust of EU insurance regulation finds support in the new economics of welfare that has become a well-established part of mainstream economic theory.[60] It makes sense for the EU to push for integration, yet competition between commercial providers is rarely an appropriate maxim for social services regulation as it may give rise to market failure. This body of the literature would confirm that there are unexploited opportunities for

[59] Commission Regulation No. 267/2010 of 24 March 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector, *OJ* 2010 L 83/1. These agreements must be passed on as non-binding recommendations. Data must be made available to insurance companies in other member states that have not yet entered a national market.

[60] Barr 1992.

risk pooling in the Single Market with its concentration of demographic risks, obstacles to mobility, and home biases for asset holdings. Portability stipulations for social security or equality norms for private insurers can be justified on the grounds that they lead to more diversified risk pools, thus potentially more efficient or more comprehensive insurance.

Why then, is this apparent win–win situation not fully exploited? My conclusion is that the win–win situation is actually exploited. This insight is buried by a distinction between economic and noneconomic services which projects a misleading image of this process. This is not just a cognitive phenomenon but has damaging legal and political consequences. The distinction puts the noneconomic on the defensive and requires finding an exemption from the supposedly relentless drive for the integration of competitive markets. To dispel this misleading image, one has to recognize firstly that all social services are economic services but often not provided in commercial exchange. The privatization trend in national welfare reforms shows, however, that there is no fixed boundary between commercially and not-for-profit provided services. Secondly, one has to recognize that integration can have different dimensions—economic, political, social—and is fostered by a multitude of instruments, of which competition is only one. Thirdly, EU law, regulation and jurisprudence are quite ready to compromise on competition while it has an institutional bias towards more integration.[61] The latter is not necessarily at odds with increasing social solidarity, although it leads to a reconstruction of communities of risk with redistributive consequences.

Promotion of insurance or, more generally, of social solidarity through integration is of course still a politically contested process. Integration can be achieved through common standards of regulation (possibly in segmented markets). The EU has developed differentiated instruments to take account of that and several regulatory norms, such as universal service obligation, portability and equality, are qualified with respect to occupational pension schemes. This takes account of the different way in which risk bearing capacity of these SGEI is achieved. Organizational guarantees of prudence may be a viable alternative to the market-based guarantees provided by capital requirements. This is for the very reason that organizational guarantees are more akin to statutory social security where the fiscal organization of the state provides this guarantee on a much enlarged scale. The political conflict that emerges regularly is whether welfare provisions by the state and by undertakings should safeguard primarily individual entitlements, or whether the institutional viability of these provisions can trump individual choices. If competition is the norm, individual choice should prevail. If integration is the maxim, then the constituent parts that are to be integrated need safeguards as they ensure the diversity of choices, here: among pension instruments, in the long term. Yet even so, there can be a valid argument about the question to what extent existing communities of risk should be extended and reconstructed.

[61] Sauter and Schepel 2009 show this generally and systematically for the evolution of Single Market jurisprudence.

National pension reforms in the EU do exactly that, autonomously but also with the support of various EU policy processes. We saw that public schemes assume elements of private schemes by reducing the amount of redistribution while elements of social insurance are introduced in private schemes, notably by making them mandatory. The two-way process undermined the pillar model of pension provision. The EU Commission and the various regulatory committees concerned with 'age-related spending' did not resist this hybridization of pillars too much. After all, these reforms are compatible with several EU agendas, such as improving the financing of old-age security, steady adjustment of benefits to demographic developments and preventing poverty in old age.

The economic versus noneconomic distinction within social services suggests that European integration wants to chip at the core of national welfare states. When unresolved regulatory issues pop up in court cases, the 'non-economic' services are put to trial, not commercial providers whose activity may undermine a social service. In practice, regulation already acknowledges that welfare states make and shape these markets, as Baquero Cruz's chapter shows for state aid. The implicit criterion for differentiated economic regulation and integration is whether it can be shown that a reform or a service can provide more insurance for existing beneficiaries or additional insurance for those so far excluded *if* markets become more integrated. An example for more insurance is the rejuvenation of insurance pools for longevity through migration. This can justify the strong portability requirements for social security. A next step in this direction would be to consider whether facilitating migration in this way means less insurance for the country of origin. Another example for additional insurance is to extend benefits for the elderly to all residents, irrespective of contributions, which gives reality to the universal service obligation. European integration has achieved exactly that to an astonishing extent, quietly, and without much political fanfare.

Such differentiated regulation of economic services (or services of general economic interest) follows in the footsteps of the *Albany* ruling. The main argument there was that financial viability is a valid reason for containing competition, because adverse selection in competitive markets would jeopardize solidaristic insurance to workers.[62] A number of characteristics qualify a scheme as solidaristic, for instance, the same flat contribution and benefit rates for all members, or the absence of close correspondence between contribution and entitlement. EU jurisprudence and legislation could take existing arrangements with these features and, instead of questioning whether they comply with internal market or competition norms, start from the presumption that existing arrangements have a valid and established insurance rationale. This would put the burden of proof on those who challenge existing insurance arrangements, i.e private providers that seek access to a service market and want to compete with existing schemes. The underlying regulatory idea is to acknowledge a trade-off between solidarity and competition as well as the insight that there are good reasons for containing

[62] Sauter and Schepel 2009, pp. 84–90.

competition in insurance. Solidarity and integration, by contrast, need not be alternatives. Like efficiency and equity in the new economics of welfare, they can be complements, at least along a range of policy options. Acknowledging this requires little more than making legal distinctions catching up with practice.

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Part IV
Examples of Regulation of SSGIs in National Law

Chapter 18
SSGIs in Sweden: With a Special Emphasis on Education

Caroline Wehlander and Tom Madell

Abstract Sweden has a long tradition of being a welfare state with local authorities both having the responsibility for the provision of public services and being the ones delivering the services. This has changed the last decades and today public services performed by private entrepreneurs. These entrepreneurs are usually chosen within the public procurement regime, but they can also—especially when it comes to different kinds of social services—be the deliverers of public services within the free choice system. This article focuses on the unique Swedish free choice system and public funding of independent schools in relation the EU competition rules.

Contents

C. Wehlander (✉) · T. Madell
Department of Law, Umeå University, SE-901 87, Umeå, Sweden
e-mail: caroline.wehlander@jus.umu.se

T. Madell
e-mail: tom.madell@jus.umu.se

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18.1 Introduction

The Swedish welfare system started in the eighteenth century with the poor relief organised by the church. This became obligatory in 1734 when each parish [*socken*] was required to provide an alms-house. During the nineteenth century private sick benefit societies were started, and in 1891 these became regulated and subsidised. In 1913, the government passed the National Pension Act to provide security for the aged and in 1934 the private unemployment societies were regulated and subsidised in a way similar to the sick benefit societies.

From the 1930 to the 1980s, Swedish politics were based on the assumption that social change could be accomplished through a specific political and administrative process. The central government decided the aims of policy, government commissions of inquiry engaged experts who compiled available knowledge, Parliament turned the resulting proposal into law, a civil service agency implemented the policy and local authorities put it into effect. The post-war Sweden was characterised by distinctive institutions and policy programmes with strong public expansion, social engineering and centrally planned standard solutions. This rationalistic model of social engineering can be called 'the Strong State'. 'It was taken for granted, in this period, that if there was a social problem, the state could and should solve it'.[1] As a matter of fact 'Scandinavian legal realists questioned legal science; they looked upon themselves as social engineers and regarded their professional work as a value neutral technique. Increasingly, they regarded the political drafts of legislation as important legal sources.'[2] 'It suited the reform policy of the social-democratic party, which wanted to introduce a well-regulated welfare state. Law and politics interacted in this upcoming, strong welfare-state'.[3] Even if there have been radical changes in the welfare system the last three decades—some authors are even talking about 'the fall of the Strong State'—the Swedish welfare state is still built on social insurance and social service provision.[4]

[1] Lindvall and Rothstein 2006, p. 54.
[2] Modéer 2008, p. 289.
[3] Ibid. p. 292.
[4] See Lindvall and Rothstein 2006, pp. 47–63.

18.2 The Swedish Model and the Historical Development of SSGIs

The traditional Swedish (rationalistic) welfare model is built on a cooperation between the (from a legal point of view) two tiers of the society—the central government decides different policies and within the principle of local self-government the local and regional government—the municipalities [*kommuner*] and the county councils [*landsting*]—are responsible for providing the public services. Law usually regulates these services, but the Swedish municipalities are also—on a voluntary basis and within the frame of the Local Government Act [kommunallagen (1990:900)]—allowed (and often also more or less expected) to provide other kinds of services.

Local government has a long tradition in Sweden. The municipalities, the county councils (created in 1862) and the regions are responsible for providing a significant proportion of all public services.[5] There is a highly decentralised public system in most areas.[6] The Swedish municipalities are by law responsible for the provision of, e.g. social services; childcare and preschools; elderly care; support for the physically and intellectually disabled; primary and secondary education; planning and building issues; health and environmental protection; refuse collection and waste management; emergency services and emergency preparedness; water and sewerage; and libraries. Legislation is usually general in character and details are discussed and interpreted by authorities at regional and/or local level in order to implement rules according to regional/local circumstances. Street-level bureaucrats tend to play a very important role in the implementation of different policies. On a voluntary basis the Swedish municipalities are also allowed to provide services within e.g. leisure activities; cultural activities; housing; energy; and industrial and commercial services.

Sweden has, by tradition, had a very strong public sector. However, since the 1980s when New Public Management was introduced, the scene has changed dramatically when it comes to service providers. In almost all areas of SGI there are today both public and private actors.

There is no general (horizontal) law framing the SGIs but the Constitution [*Regeringsformen*] mentions in very general terms that the State is responsible for the well-being of its citizens. The procedures within public administration at all levels of government are regulated in the Administrative Procedure Act [*förvaltningslagen (1986:223)*]. The rules in the Act are also valid for private providers when they act on behalf of an authority towards individual citizens. There are special obligations of services to the public. Authorities should act according to

[5] Overall, municipalities and county councils employ more than one million people, corresponding roughly to 25 % of the total employment in Sweden. Information avaialbe at: www.skl.se

[6] See the Local Government Act. Available at: http://www.regeringen.se/content/1/c6/03/91/65/16f96742.pdf

rules and regulations but also handle matters in a simple and rapid way, and use easily comprehensible language. The Act includes the procedure for handling matters, which consists of a number of predetermined stages. The rules are particularly important when someone wants to appeal against a decision made by an authority.

However, the EU concepts in the fields of public services are not commonly used in Sweden. In the legal and common language it is the national concepts of common interest, public services and social services that are used, not the concepts of SGI, SGEI, NESGI and SSGI (SSGEI or NESSGI) etc.[7] However, there is no doubt that all the services that can be labelled as SSGI,[8] e.g. statutory and complementary social security schemes, social assistance, reintegration into society and labour market, health and disability services, social housing, child care, teaching, education and training etc., in different ways are provided within the Swedish welfare system.[9] As stated above, the obligations to provide the services usually follow explicitly from legislation, but due to local or regional differences the local self-government concept of common interest can differ. Even if a service in an urban area is not considered to be of common interest and therefore falls outside the municipality's competence to provide, it might well be a service that a rural area municipality can provide—since it, in that case, falls within the common interest in the municipality due to the principle of local-self government. Or to put it in another way, what in one municipality might be organised in a way that makes it an SGEI might in another be classified as a NESGI.

18.3 Organisation of the Delivery of SSGI

Social welfare in Sweden is made up of several organisations and systems dealing with welfare. It is mostly funded by taxes, and executed by the public sector on all levels of government as well as private organisations. It can be separated into three parts falling under three different ministries; social welfare, falling under the responsibility of Ministry of Health and Social Affairs[10]; education, under the

[7] However, it is not only in Sweden that the concept of SGI etc., is confusing, see e.g. Neergaard 2008; Neergaard 2009; Damjanovic and de Witte 2010, pp. 53–94; and Nielsen 2010, pp. 229–264.

[8] See Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM(2006)177 final, 26 April 2006, and Commission, *Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions, Accompanying the Communication on 'A Single Market for 21st Century Europe', Services of General Interest, Including Social Services of General Interest: A New European Commitment*, COM(2007) 725, 20 November 2007.

[9] See Kolam 2010, pp. 391–399.

[10] Available at: http://www.sweden.gov.se/sb/d/1474.

responsibility of the Ministry of Education and Research[11] and labour market, under the responsibility of Ministry of Employment.[12]

Sweden is a unitary State with two levels of local self-governments—18 county councils and 290 municipalities. The county councils of Västra Götaland and Skåne have the status of regions. The decentralised administration of the State is composed of 21 counties [*län*].

For many years, the main responsibility for providing various types of public services in Sweden has rested on local government. The importance of local government has also grown apace with the construction of the welfare state. The municipalities (charged with local government functions) have, during the last decades, taken over responsibility in several areas where central government or the county councils used to have responsibility, e.g. the responsibility for providing basic care and treatment for the elderly, the chronically ill, the care for the physical or mentally disabled and other residents and child care.

The changes in Swedish welfare policies since the 1980s, with decentralisation and privatisation, have been aimed at decreasing the size of the public sector while maintaining the levels and goals of the welfare state. Legislation on social services and other local government issues has increasingly been structured as 'frame work' law lacking details.[13] This gives the municipalities responsibility for organising and providing several types of public services—in-house or ex-house—while central government has retained the means to exert influence and control. In general terms, one could say that during the last decade, the public sector in Sweden has been characterised by less central government control. The legislation has been constructed as 'defined-rights legislation', imposing duties on public authorities but not conferring enforceable rights on individuals.

Today municipalities, county councils and regions to a large extent procure SSGI from private companies. The activities carried out by private companies on behalf of municipalities, county councils or regions are financed using public funds. In some areas—such as refuse collection, public transport and dental care—it has been for a long time common for the public authorities to procure services externally. In the last 10 years an increased number of private companies have begun to run preschools, schools, hospitals and care facilities. Competition with private enterprise, and privatisation, has been a hallmark of the municipal area since the beginning of the 1990s and in this respect the influence of EU cannot be underestimated.[14]

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[11] Available at: http://www.sweden.gov.se/sb/d/1454.

[12] Available at: http://www.sweden.gov.se/sb/d/8270.

[13] See *inter alia* the Social Services Act [*Socialtjänstlagen (2001:453)*].

[14] About the use of public and administrative contracts in Sweden, see Madell 1998.

18.4 Recent Developments

One of the biggest challenges today is to define the ability of local authorities to determine their own internal structures without getting in conflict with the EU rules.[15] In Nordic societies, the provision of welfare services through the welfare state has been a key element for a number of years and there has been considerable political consensus on the desirability of preserving the welfare state.[16] However, liberalisation and privatisation, which is generally promoted at the economic and social level through the development of the Internal Market in the EU, may put pressure on welfare states and create tensions between the EU and Member States in matters of welfare. One problem with the development is the so-called *Kommunalblindheit*—blindness regarding local authorities—of EU-law when it comes to the municipal responsibility for planning and developing infrastructure and social services etc.—a responsibility that has a long tradition in the Scandinavian welfare states.[17] The municipalities and county councils are free to decide the forms in which municipal and county council services may be organised, in-house (sometimes including municipal companies) or ex-house by providers that have been procured under the Public Procurement Act [*lagen (2007:1091) om offentlig upphandling*, *LOU*].

The Swedish Public Procurement Act and the Act on procurement procedures of entities operating in the water, energy, transport and postal services sectors [*lagen (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster*, *LUF*] not only follow the directives, they also cover procurements under the thresholds and so-called 'B-services', *i.e*. contracts which have as their object services listed in Annex II B and solely shall be subject to Article 23 and 35(4) in the Directive 2004/18/EC. The only general exception from using the procurement regime is if the value of the contract is low, *i.e.* contract values less then 15 % of the thresholds (287 000 SEK). This strict regime leads to that SSGI—if not provided in-house—usually are procured under the public procurement regime or, when possible, under the Act on Free Choice Systems [*lagen (2008:962) om valfrihetssystem, LOV*].

However, it is not only the EU legislation that has lead to a change in the Swedish welfare model—it is more like a change into a new era and an ideology change. The Swedish model can be said to be 'eroding both from the inside… and from the outside'.[18]

The Swedish public and social housing—the municipal housing companies can be mentioned as one example, education as another.[19] The area of housing expanded during the 1960s when the government promised to build one million

[15] See Madell 2009, pp. 423–450.

[16] See e.g. Hollander and Madell 2003, pp. 15–46 and Christiansen et al. 2006.

[17] The terminus goes back to Faber 1991, p. 1132 and Schefold 2005, p. 288.

[18] Modéer 2008, p. 298.

[19] See Madell 2009, pp. 423–450.

apartments with in the next 10 years so that everyone would be able to rent his or her own flat.[20] The municipal housing companies in Sweden have by law been given a social obligation to provide good housing for all households. These companies also provide public utilities on the Swedish housing market. Rent control has also been a feature of the Swedish housing system. The Swedish Parliament ruled that the municipal owned housing companies together with tenant representatives where to negotiate rent level and the agreed rents set the ceiling for private and all other landlords' rents for similar dwellings.

Since January 1st 2011 municipal housing companies are to be run according to sound business principles. This means not only that the municipalities may not give direct subsidies to their municipal housing companies, but also that the companies must eventually generate the highest possible profit, taking into account the operational risks the municipality elects to accept.

18.5 Design of Important Legislation Regarding SSGI

18.5.1 Social Welfare

Social services, by their development and their form constitute an important and specific part of the Swedish Welfare State. According to the Constitution, the State is responsible for the well-being of its citizens and the conception and the importance of the social services are distinctive element of the Swedish model. They are largely universal (according to the needs, independently of resources) and are strongly subsidised, in order to guarantee the same access and the same quality of services to the entire population.[21] This is defined as financial security in the case of illness, old age and for the family; social services; health care; promotion of health and children's rights; individual help for persons with disabilities and coordination of the national disability policies. As stated above, the municipalities are responsible for the performance of these services.

Social services are primarily the responsibility of the municipalities as financial allowance or material support for people who need special assistance, for vulnerable groups and care services for elderly (social and health care) and disabled. The mandatory tasks of municipalities in the social fields include in particular child-care, schools, elderly care and long-term health. The county councils are responsible for providing health care (hospitals), dental services and mental care. There is no hierarchical power between the county councils and the municipalities, each one being responsible for different specific activities.[22]

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[20] See Lindvall and Rothstein 2006, pp. 47–63.

[21] See http://www.sweden.gov.se/sb/d/2061

[22] The role of the voluntary organisations (charitable, church organisations etc.) is very small in Sweden.

18.5.1.1 Social Insurance

The Swedish social insurance is mainly handled by the Swedish Social Insurance Agency and encompasses many separate benefits according to the Social Insurance Code (*Socialförsäkringsbalken (2010:110)*). The social insurance is individually based and provides financial security in the event of illness, disability and old age as well as for families with children. The purpose is to compensate loss of income when a person is unable to support him/herself by working as a result, for example, of an illness or caring for a child. Social insurance is administered by the Swedish Social Insurance Agency and the Swedish Pensions Agency.

Social insurance includes both universal benefits and means-tested benefits. Universal benefits are paid to everyone at the same rate and include child allowance and adoption allowance. Mean-tested allowances include housing allowance, housing supplement for pensioners and supplementary maintenance support. The major benefits are monetary support for children up to 16 years of age [*barnbidrag*] and benefits allowing parents to be on parental leave up to 480 days per child. It also includes special benefits to care about sick and disabled children [*föräldrapenning*]. Another areas of support are housing allowances for young people and people with children who otherwise cannot afford housing [*bostadsbidrag*], benefits if you are ill or disabled and cannot work [*sjukpenning* and *handikappersättning*] and benefits for those who have retired [*pension*].[23]

18.5.1.2 Social Services

The Social Services Act [*socialtjänstlagen (2001:453)*] is a framework law that emphasises the right of the individual to receive municipal services. People who need help to support themselves in their day-to-day existence have the right to claim assistance if their need 'cannot be met in any other way'. The services provided by the social services are based on assessment of the individual's needs of services and care. This is given out purely on need-bases and handled by each municipality's social service.

Elderly care means both retirement homes as well as home care. The main concept guiding the care of the elderly in Sweden today is that the elderly are to be enabled to continue living in their own homes for as long as possible.[24] The services that are most important in making it possible for older persons to stay on in their own home are home care services. The municipal social services are responsible for the home care services that provide assistance with shopping,

[23] See http://www.sweden.gov.se/sb/d/11224/a/137563

[24] A new provision of the Social Services Act, in force since 1 January 2011, stipulates the 'dignity of life within elderly care' to be provided by social services, to guarantee an appropriate response according to the needs and requirements of every individual and by taking into consideration the various cultural, ethical and other particular conditions associated with the person's identity.

cleaning, cooking, washing and personal care to elderly persons living in ordinary housing who cannot cope on their own. To enable elderly persons to continue living in ordinary housing, other forms of services are often provided in combination with home care services. Most municipalities offer meals services, safety alarms and adult day care. Even persons with extensive needs of health care can remain in their own homes, because home care services can be offered round the clock. Charges for the care of the elderly are levied under the Social Services Act. The national rules are designed to protect the individual against high costs.

The legislation indicates what expenses, over and above housing costs, are to be met out of the individual's reserved amount under the Act. Within the frame of these rules, each municipality decides its own system of charges and the specific charge payable by the individual. The individual has right to appeal the decision concerning the charge payable to an administrative court if he or she is not satisfied with the decision.

18.5.1.3 Support and Service for Disabled Persons

The Law on Support and Service for disabled persons [*Lagen (1993:387) om stöd och service till vissa funktionshindrade*] is based on claimable rights for the disabled and comprehensive duties for the municipal authority in question. The rights regulated in the law are assistance in various forms, aid resources, rehabilitation, services and special living facilities. The disabled person oneself can arrange the service according to his or her special needs. It is possible to penalise the local authorities with a fine if they do not execute the rights in accordance with the law.

18.5.1.4 Health and Medical Services

Under the Health and Medical Services Act [*hälso- och sjukvårdslagen (1982:763)*], health care has to be available to all members of society, thus ensuring a high standard of general health and care for everyone on equal terms. The central government, the county councils and the municipalities share the responsibility for health care. Central government has the overall responsibility for health care policy. The county councils and the municipalities are responsible for meeting the health care needs of the population and of the patients. They have to ensure that their inhabitants receive health care in hospitals, care facilities, special forms of housing and their own homes, etc. The main task of the county councils and the municipalities is to commission and fund the activities to be carried out. With the exception of compulsory mental care and forensic mental care, heath care does not have to be provided by public bodies. In addition, with certain exceptions, private providers of health care, even when financed with public money may not carry out other tasks that involve the exercise of public authority. The 20 county councils and regions are responsible for providing health and medical care to those

living in their areas, forensic mental care, following court decisions, compulsory mental care and dental services, etc.[25]

The health care system in Sweden is financed primarily through taxes levied by county councils and municipalities. The health care providers of the public system are generally owned by the county councils, although the managing of the hospitals is often done by private companies after a public tender.

Health and social services are usually provided in-house or by an entrepreneur. Since 2003, people everywhere in the country have been entitled to freedom of choice in health care. Free choice means that patients can seek out patient care anywhere in the country on the same terms as in their own county council area. When a county council decides on a course of treatment, such as hospital care, the patient is free to choose a hospital anywhere in the country. With the exception of compulsory mental care and forensic mental care, health care does not have to be provided by public bodies. Even if an entrepreneur provides health care itself, the regional municipality is responsible for health care and therefore is also responsible for that entrepreneur fulfiling the service in a proper way.

Dental care is not quite as subsidised as other health care, and the dentists decide on their own treatment prices.[26]

18.5.1.5 The Labour Market

Since the beginning of the twentieth century Sweden has been characterised by a strong and well-organised trade union movement and powerful employer organisations. One central feature is that the organisations themselves regulate the labour market through collective agreements on sectorial and local level concerning payment and employment conditions. Even if there are a lot of legislation concerning labour law the idea of self-regulation through collective bargaining by the social partners is strong.

The labour market policies fall under the responsibilities of the Ministry of Employment. The responsibilities considered to be a part of the welfare system include unemployment benefits, activation benefits etc.

18.5.2 Free Choice Within the Area of Health Care and Social Services

The Act on Free Choice Systems [*lagen (2008:962) om valfrihetssystem, LOV*] entered into force in 2009. The Act on free choice systems consecrates the system of free choice and competition of health and social services and can be used as an

[25] See Madell 2009, pp. 423–450.

[26] The Swedish system for providing health care is described in Madell 2009, p. 423–450.

alternative to the Public Procurement Act for giving older people and persons with disabilities more opportunity to choose their service provider. The act is intended to function as a voluntary tool for municipalities that want to 'competition test' services provided in-house so as to be able to transfer the choice of provider to the user.

The system was introduced to help develop e.g. elderly and disability care that is more clearly based on the needs and desires of the individual. It applies when a contracting authority (obligatory for primary care conducted by county councils and voluntary for municipalities; it also concerns the National Public Employment Service) opens some activities to competition. Within this procurement, the municipality sets a fixed level of quality and price and thus operators should compete based on the highest quality instead of the lowest price. The funding system continues to be tax-based but the financing will follow the provider chosen by the user. As concerns some labour-market activities (e.g. for immigrants), the system of choice is mandatory since 1 May 2010.

A procuring authority wishing to apply the law must advertise continuously in a national database. Private businesses and non-profit organisations can apply to be approved as providers. Local authorities and county councils can regulate the conditions of the consumer choice system via agreements. All suppliers who have applied to participate in a consumer choice system, who meet the set demands and are approved, sign contracts with the local authority or county council. The basic concept of the law is no price competition between providers. Individuals are free to choose the provider they perceive as having the best quality. According to the bill the local authority or county council is responsible for ensuring that the user or patient receives complete information from all providers. For people who wish not to choose, there should also be a non-choice alternative. Providers considering themselves to be wrongly treated can appeal to an administrative court. The free choice system it is also mandatory for the county councils within the field of health care.[27] The Swedish Competition Authority supervises the free choice system. Another area where a different free choice system is used is education.

18.6 Education: Can the '*Humbel* Axiom' Protect the Swedish Education System from the Competition Rules?

Sweden might be seen as a laboratory to study far-reaching market-oriented reforms in the field of education, introduced by governments of different parts of the political spectrum during the last 40 years.[28] The obligation to take a final examination at the end of upper secondary school was replaced in 1968 by the award of a leaving certificate. In 1986, the central State powers regarding school

[27] See Madell 2009, pp. 423–450.

[28] Björklund et al. 2005, p. 9.

education were reduced to establishing rules on goals and general frames for education and exercising administrative supervision, while responsibility for planning and provision was largely decentralised to local authorities. In 1992, children and their families were given extended possibilities to choose compulsory and upper secondary education and so-called 'independent schools' were given extended access to public funding. These developments can be characterised by deregulation, a decentralisation of responsibilities, a striking increase of the number privately operated independent schools, a gradual extension of freedom of choice for the users and the development of publicly funded education business. The new Education Act [*skollagen (2010:800)*] is consistent with some of those trends but goes in several aspects back to more central regulation. Outside Sweden this rather unique model raises political and research interest.[29]

In this part of our article we will draw attention to some legal consequences, notably in the field of competition and state aid, which might follow from the education reforms in Sweden on the background of the developments of the case law of the CJEU under the last 30 years. First some elements of the present Swedish school system will be summarised, with a particular focus on the shift towards user's choice and the growing competition between municipal and independent schools and between independent schools themselves. Second a case law review will show how the CJEU, in spite of some initial self-restraint, has gradually brought education within the realm of Union law through the application of Union powers in the field of education, rights conferred by EU citizenship and Internal Market rules. One will possibly wonder what a case law dealing with free movement issues has to do with competition and state aid. Patient readers will hopefully be rewarded in the last part, where it will be exposed and discussed some Union law issues brought about by the sale by Swedish local authorities of municipal schools to private bodies ('spin-offs'). It will be argued that these spin-offs have a potential to break the unconvincing legal 'shield' constituted by the Humbel criteria against the application of state aid and competition rules to a highly marketised school system such as the Swedish school system.

[29] Pater and Waslander 2009, p. 4. The authors underline that in the wake of marketsation of education in the 1990s, many countries have crafted new policy arrangements combining public and private control over compulsory education. What makes the Swedish educational system 'rather unique' is according to them the combination of public funding with the possibility of for–profit firms governing schools, present only in very few countries. Politicians in the United Kingdom have expressed interest for the system..

18.6.1 An Overview of the Swedish School System in a Market Perspective

18.6.1.1 General Features

The Swedish school system consists basically of compulsory and non-compulsory (voluntary) education. Children enroled in compulsory education (also called Ground School) normally attend the 9-year regular compulsory school programmes open to children aged 7–16, with the alternatives of Sami school, special school or programmes for pupils with learning disabilities. On the request of their parents—thus on a voluntary basis—children aged 6 may attend the 1-year pre-school class. After completing compulsory school, young people are entitled to enrol in non-compulsory upper secondary school. Upper secondary education is divided into 17 national 3-years programmes, offering a broad general education and basic eligibility for students to continue studies at the post-secondary level. Alongside the so-called 'national programmes' there are a number of specially designed and individual study programmes. Almost all compulsory school students enrol directly in upper secondary school. For some, the alternative can be 4-years national programmes in upper secondary education for the learning disabled, offering vocational training in the form of national, especially designed or individual programmes, similar to those found in regular upper secondary schooling.

In addition, the national school system includes kindergartens, municipal adult education, education for adults with learning disabilities, Swedish courses for migrants and after-school centres completing education in pre-school and compulsory classes.[30] The education system is based on overall goals set out by the Swedish Parliament and the government in the Education Act, curricula and course syllabi for compulsory school as well as programme goals for upper secondary school. Within this framework, municipal and private operators have long enjoyed an appreciable margin of discretion in determining how their schools are to be run. However, this margin has been restricted in the new Education Act, as the legislator felt a need to equalise methods used and results achieved by the various types of schools through more detailed central rules and supervision. The National Agency for Education [*Skolverket*, hereafter called NAE] is responsible for following up and evaluating the school system. The Schools Inspectorate [*Statens Skolinspektion*], founded in October 2008, has taken over some of NAE's previous tasks and is the central Swedish agency responsible for supervising the Swedish school system. Its mission is, in particular, to ensure that local authorities and independent schools follow existing laws and regulations.

An independent school is defined in the Education Act as a school unit where private operators[31] provide education within the school system in the form of pre-

[30] See Chap. 1 Sect. 1 of the Education Act [*Skollagen (2010:800)*], the last of which came into force 1 July 2011. Some parts will apply on education starting from the school year 2012–2013.

[31] This private operator may be a natural or legal person.

school, compulsory school, compulsory school for children with learning disabilities, upper secondary school, upper secondary school for children with learning disabilities or day-care by a school unit providing pre-school, compulsory school or compulsory school for children with learning disabilities.[32] Schools that are not independent schools are addressed in the Education Act under the category 'schools with public operators' and called 'municipal schools' in this chapter. Within the national school system, independent schools can be found together with municipal schools at both pre-school, compulsory school and upper secondary school level (both regular and for students with learning disabilities). Apart from independent schools, there are also a number of international schools intended primarily for the children of foreign nationals and receiving partial government funding. The right to establish an independent school within the education system is subject to authorisation by the Schools Inspectorate and must be granted if the applicant is considered able to fulfil all relevant legal requirements and if the school's establishment has no long-term negative effect for the students or for the education provided by public bodies in the municipality of establishment. Municipalities may own stocks or shares or otherwise exercise control over independent schools.[33] Authorisation of independent schools should not be confused with the possibility to contract out parts of the education provided, open under special conditions to both municipal and independent schools.[34]

18.6.1.2 Users' Rights and Public Service Obligations

The obligation for public institutions to secure the right to education is enshrined in the Swedish Constitution.[35] The Constitution also guarantees the right for all children covered by compulsory schooling to a free basic education in the national school system.[36] Everyone, regardless of residence as well as social and economic situation, has a right to equal access to education in the public school system, this right being only restricted if provided by specific provisions under the Education Act. According to the Education Act the right to education free of charge is applicable throughout the national school system, at pre-school, compulsory and upper secondary levels. This includes the cases where pupils/students attend a school in the municipality of residence, in another municipality or an independent

[32] See Chap. 1 Sect. 3 combined with Chap. 2 Sect. 7 2nd para of the Education Act. Most of them are operated by municipalities and are therefore named 'municipal schools' in this article.

[33] This possibility was introduced in the new Education Act; see Chap. 2 Sect. 6.

[34] See Chap. 23 of the Education Act, which also includes provisions on municipal cooperation in this field.

[35] See Chap. 1 Sect. 2 of the Swedish Instrument of Government [*Regeringsformen*].

[36] See Chap. 2 Sect. 18 of the Swedish Instrument of Government.

school.[37] It also comprises teaching material, school meals, health services and under certain conditions school transport.[38]

Municipalities are under a specific obligation to guarantee pupils residing in their geographic area access capacity to pre-school, compulsory and upper secondary education in the national programmes.[39] The main responsibility for securing individual rights to schooling rests, thus, by the municipalities, while operators can be both public (mostly municipal) and private (independent schools). Interestingly, the earlier requirement for local authorities to establish a plan for the education they are responsible for has been removed in the new Education Act. It has been replaced by planning obligations for operators and school units. The municipality of residence is responsible for guaranteeing young people upper secondary education in the national programmes.[40] To that end, a municipality may enter cooperation contracts with other municipalities and under certain conditions shall cover the student's board and lodging costs for attending school outside the boundaries of the municipality.[41]

When the free choice reforms were introduced in 1992, independent schools were present in Sweden to a very limited extent, such schools being only considered beneficial if they could complement the public ones, typically in terms of alternative pedagogical methods. The new political majority elected in 1991 put forward independent schools rather as vectors of competition, cost efficiency and free choice in the field of education. As a consequence, the multiplication of independent schools—regardless of their pedagogical specificity and of the governments in place—has ever since been promoted through legislative and administrative measures, leading the percentage of children enroled in free schools to increase steadily.

As a principle, a pupil/student must, to the largest possible extent, be placed in the school of his/her (or the family's) choice, municipal or independent, at pre-school, compulsory and upper secondary levels. As an illustration, the choice made of a pre-school or compulsory school operated by the municipality may be disregarded in two cases, namely if it deprives other children from their right to attend this school as their 'neighbourhood school' or if it causes organisational or economic problems to the municipality.[42] By contrast, independent pre-schools and compulsory schools are not under an obligation to open their places to the municipal 'queue' system.

These developments have given rise to variations in the conditions for providing and receiving education. One fundamental goal in the new Education Act has, therefore, been that 'municipal and independent schools to the largest possible

[37] See Chap. 7 Sect. 3 of the Education Act.

[38] See Chap. 9 Sect. 8, Chap. 10 Sect. 10 and Chap. 15 Sect. 17 of the Education Act..

[39] See Chap. 16 Sect. 42 of the Education Act.

[40] See Chap. 16 Sect. 42 of the Education Act.

[41] See Chap. 15 Sect.s 30 and 32 of the Education Act.

[42] See Chap. 9 Sect. 15, Chap. 10 Sect. 30 and Chap. 11 Sect. 29 of the Education Act.

extent have a common regulation'.[43] In the new Act independent schools have, thus, been made a part of the national school system. All school operators—public and private—are, however, individually responsible for their education activities being compatible with Swedish law.[44] Both municipal and independent schools must be open without distinction to all pupils entitled to education in pre-school, compulsory school and upper secondary school.[45] However, an independent school does not have to enrol a child with special educational needs if this would cause serious economic or organisational difficulties for the school. Conversely, the municipality is not obliged to compensate an independent school that enrols such children. Whereas instruction may not be confessional, independent schools may include confessional *education*, on a non-compulsory basis for the children enroled. A fundamental principle is otherwise that education within the national school system must be equivalent whatever school form or day care and wherever in the country,[46] which is generally meant to entail that pupils and students must have access to well-educated teachers, learning support and objective and comprehensive instruction regardless of which operator is managing the school unit.[47] As a general rule, curricula are decided at central level and must according to the new Education Act be followed by all local operators—public or private—of compulsory schools.[48] National programmes in upper secondary schools are likewise established at central level and as a general rule must be followed by all operators.

Some specific obligations rest upon the municipal operator, as an extended arm of the municipality in its role of public body warranting citizen rights in matter of education. The municipality, as an operator, must secure that all pupils entitled to compulsory education have access to education in ground school (operated by public or private bodies) and that all students entitled to upper secondary education have access to the national upper secondary education programmes.[49] By contrast, private operators are not entrusted with continuity obligations. They may offer a limited number of upper secondary education programmes and may close down a school unit, which in practice happens in case of bankruptcy. Furthermore, a number of exception rules offer more flexibility to independent schools under certain conditions. For instance, they enjoy a certain freedom to schedule time for the various courses to be provided. Another example is the possibility for Waldorf

[43] See the preparatory works to the Education Act [*Skollagen (2010:800)*], Government Bill 2009/10:165, p. 203, the author's own translation.

[44] See Chap. 2 Sect. 8 of the Education Act.

[45] See notably Chap. 9 Sect. 17, Chap. 10 Sect. 25 and 35, Chap. 11 Sect. 25 and 34, Chap. 16 Sect. 42–48, Chap. 18 Sect. 8–9 of the Education Act.

[46] See Chap. 1 Sect. 9 of the Education Act.

[47] See the preparatory works to the Education Act, Government Bill 2009/10:165, p. 206.

[48] See Chap. 10 Sect. 8 of the Education Act..

[49] See Chap. 10 Sect. 24 and Chap. 16 Sect. 42 of the Education Act.

schools to be exempted from certain qualifications rules provided for teachers.[50] Through successive reforms the asymmetry between the obligations laid on municipal and independent school operators appears to have been gradually reduced. Under the same period—as will be developed in the next section—access to public funding has been enhanced for independent schools.

18.6.1.3 System Financing

Corollaries of freedom of choice are increased pedagogical homogeneity throughout the system and public funding of independent schools. In the new Education Act, the legislator declares an ambition to achieve a balance between the pedagogical freedom and creativity which made independent schools attractive to their users and legitimate to support with public funding in the first place, and a level of convergence between municipal and independent schools which secures quality, equal chances and legal security.[51]

According to the new Education Act, authorised independent schools must, thus, be funded by state resources to a level that puts them on equal footing with publicly operated schools. They receive a 'per-pupil voucher' from the municipality of residence of each pupil/student attending them and are accordingly not allowed to charge fees from their users. The municipality in which the pupil resides is obliged to provide the voucher amount irrespective of the municipality in which the school of the student's choice is located. The 'per-pupil' voucher includes a basic voucher plus an additional voucher for each pupil/student in need of extensive support or entitled to native language lessons. The principles for determining the funding granted to independent schools are set by governmental decree.[52] The basic voucher is determined each calendar year on the basis of the municipality's budget and includes compensation for a determined set of operating costs such as wages, administrative costs, VAT and facilities costs (including costs in the form of interest rates for capital). There is no minimum amount specified. Instead, the basic voucher normally corresponds to the average costs per child/student for an equivalent municipal school unit, but can under special circumstances amount to the operator's real costs if these are 'reasonable' and as a maximum.

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[50] See Chap. 2 Sect. 4 of the Education Decree [*Skolförordningen (2011:185)*].

[51] See the preparatory works to the new Education Act, Government Bill 2009/10:165, p. 206. An earlier Government Official Report (SOU 2002:121) expressed already the view that municipal and independent schools to the largest possible should be submitted to the same regulation. A proposal to replace the name 'independent school' by the name 'private school' was therefore put forward, as it was deemed that schools covered by the same regulation as municipal schools could not be considered as 'independent', see p. 197 et seq. The name proposed was, however, not introduced in Swedish law. A major objection was that the name 'private school' rather indicated a private funding, which is not at all the case with independent schools.

[52] See in particular Chap. 14 of the Education Decree.

An independent school is not obliged to enrol or keep a pupil in need of extensive support or native language lessons, if the municipality has not granted the additional voucher for this pupil. The municipality is not either obliged to grant the additional voucher in case this causes particular organisational or financial problems.

The funding of municipal schools and independent schools entitled to vouchers are covered by local tax revenues[53] and for some municipalities by the general state subvention to local authorities.[54] As mentioned above, compulsory education is free of charge for the pupils and their family. However, it is provided that some expenses may be charged, corresponding to insignificant costs for the pupils, notably in restricted cases expenses for school trips the family consents to.[55]

18.6.1.4 Independent Schools: Some Market Aspects and Legal Issues

Independent school may be seen as mixed economy bodies, a private operator—enjoying freedom to organise the school's activity within certain limits—being funded, but not commissioned, by municipalities. Public funding and political support have considerably improved their potential to compete with municipal schools, as some recent data show. Independent ground schools are present in about 210 of the 290 municipalities, mostly the urbanised areas of south and middle Sweden and, in particular in the Greater Stockholm. In 2010, slightly more than 15 % of ground schools and 48 % of upper secondary schools were independent. At compulsory level 11 % of the pupils were enroled in independent schools, and almost 20 % of the students at upper secondary level were enroled in independent gymnasiums.[56]

Notwithstanding the legislator's intention to achieve 'competition neutrality' between municipal and independent schools, it appears that a number of asymmetries, following provisions not only in the Education Act but also in the Education Decree (*Skolförordningen 2011:185)*), remain regarding regulation and financing. Without a closer study of specific aspects—for which this article is not the place—it is not possible to assess the degree of homogeneity between public and private operators in terms of public service obligations and compensation amounts. The asymmetries might shrink given the move towards convergence in the new Education Act but the financial burden on municipalities must be expected to be heavier owing to their obligations to provide 'reserve capacity' in case of

[53] The local authorities may levy tax for the management of their affairs; see Chap. 14 Sect. 4 of the Swedish Instrument of Government [*Regeringsformen*]..

[54] The general State subvention is part of a financial redistribution system designed to equalise the financial base of local authorities, whichever their surface, population and geographic situation.

[55] Chap. 9 Sect. 9 and Chap. 10 Sect. 11 of the Education Act.

[56] NAE, Facts and Figs. 2010, Facts and Figures About Pre-School Activities, School-Age Childcare, Schools and Adult Education in Sweden, NAE Report No. 349, 2010, pp. 20, 36.

service disruption in the system and to finance school transport. Wage costs can be another differentiating factor, depending on the various employment conditions. The relative freedom enjoyed by independent schools under the former Education Act can be illustrated by the proportion of teachers with a university degree in pedagogic in 2010, which at ground school level was of 70 % in independent schools as compared to 88 % in municipal schools and at upper secondary level 56.4 % in independent schools, respectively 79.5 % in municipal schools.

Often the product of spin-offs of municipal schools, independent schools are mostly run for profit and still in majority small sized. Limited companies dominate largely (64 %) and their proportion increases, in particular at upper secondary level. The trend is also to consolidation with some corporate groups dominating the sector. Business experts consider that profit opportunities in the field of education are good in Sweden, but the expansion of an education business affects municipal schools and is not uncontroversial.[57] The debate focuses mainly on the possible relationship between the many and profound reforms that have characterised school politics and the constant drop Swedish schools have seen in PISA results since 2000.[58] Other issues are some cases of independent schools' bankruptcies affecting users or unreasonable dividends decided by independent schools owners. Time and analysis will hopefully inform us on the consequences the commercialisation of education has for users, operators, performance levels and social cohesion.[59] Regardless of the merits of independent schools, their development has benefited from the enthusiasm many municipalities have shown in selling schools to municipal staff. It has also given rise to a number of legal disputes as to whether assets, in particular the goodwill value of municipal schools—had been transferred under market value. For the national courts requested to settle those disputes, the applicability of the national rules limiting the competence of local governments to grant individual aid to specific undertakings[60] does not seem to have caused particular uncertainty. By contrast, the question whether these municipal measures could fall within Union law's state aid rules, and on which grounds, was highly problematic, and was left mostly unproven by the following Swedish administrative court decisions.

In a case decided in April 2009, concerning the sale by the municipality of Täby of an upper secondary school to the principal of the municipal school to be laid down, the contract at issue included sale of furniture and other equipment for the

[57] Planning becomes a problematic exercise in a dynamic market with free choice for users. Demographic aspects, like the decrease of the number of pupils, can necessitate consolidation but also cooperation between municipal schools to secure quality and continuity. This is not easy to reconcile with a market logic of undistorted competition.

[58] PISA, Report for 2009, 7 December 2010. In 2009, the gap between the best and worst Swedish students was larger than the OECD average, and while there was still less difference between good and bad schools than in many OECD countries, the gap in Sweden was in 2009 twice as wide as in 2000.

[59] Some statistics can be found on the website of NAE, available at: www.skolverket.se

[60] See Chap. 2 Sect. 8 of the Local Government Act [*Kommunallagen (1990:900)*].

sum of 9.2 million Swedish kronor, while the new independent school would be operated in the same premises (on the basis of a rental contract between the municipality and the independent school) and normally with the same personal as the municipal school. The Administrative Court of Appeal of Stockholm found that individual aid had been granted to an undertaking contrary to Swedish municipal competence rule, as the municipality had not evaluated the immaterial value developed by the municipality in the municipal school and not charged the buyer for this goodwill.[61] Though requested by the plaintiffs to examine whether the municipal sale measure contravened Union law's State aid rules, the Administrative Court of Appeal did not mention the latter in its ruling. The absence of any reasoning on the possible application of the Treaties State aid rules may find an explanation in the Swedish rules regarding municipal decisions' legality review procedure. A few weeks later, the Administrative Court of Stockholm (first instance court) rescinded a very similar decision made by the municipality of Upplands Väsby to sell three schools to a private company founded by personal who had been leading the municipal schools, for an amount of approx. 2.1 million Swedish kronor.[62] The Court, pointing at evidence of the municipality being aware that there was more value to the schools than just the value of furniture, found that the possible goodwill value of the schools had not been evaluated and that their total market value had not in any way, for instance through a competition procedure, been investigated by the municipality. As they never made their way to the Supreme Administrative Court, the decisions summarised here are not of any value as legal precedents. The national courts did not see any need to formulate questions for a preliminary ruling by the Court of Justice, which could have helped clarify the connection between the facts in the case and State aid law.[63] This lack of interest for the possible application of state aid law to the situations examined is surprising, as the issue had been raised by a State report published in Sweden

[61] See the judgment of the Administrative Court of Appeal of Stockholm [*Kammarrätten i Stockholm*] No. 584-08, decided after appeal from a decision of the Administrative Court in Stockholm County No. 10633-07.

[62] See the judgment of the Administrative Court of Stockholm County [*Länsrätten*] No. 13429-08.

[63] In yet, another spin-off case regarding the sale of two schools to companies created by staff of these schools, goodwill was found correctly evaluated (see the judgment of the Administrative Court of Appeal of Stockholm, No. 3801-09 and 3802-09). However, payment conditions were considered as more generous than market conditions, thus constituting aid contrary to the Swedish municipal competence rules. In its conclusions, the Administrative Court of Appeal underlines that the very fact that individual aid to particular undertakings contrary to Chap. 2 Sect. 8 of the Swedish Local Government Act had been established, suggested that the municipality also had contravened Union law's State aid rules. Regarding, however, the question as to whether the municipality should have notified its sale plans to the Commission, the Administrative Court of Appeal considered that 'in the absence of more detailed analysis or argumentation in the case it could not be considered as proved that all the criteria required were fulfiled for the existence of a state aid having to be notified.', p. 4. In the frame of such legal actions—so-called legality review—it is normally for the member of the municipality contesting a municipality's decision to prove its illegality.

before the cases were decided.[64] It also contrasts with the fact that all the more national measures in the field of education are subject to Treaty rules, as an effect of the case law of the Court of Justice in Luxemburg. There seems to be some reluctance to accept the idea that Swedish school business can be Union business.

18.6.2 Education a National Prerogative All the More Covered by Union Law

Who would have said—some 40 years ago—that national tax, healthcare or pension rules and measures would systematically have to respect Union law? What seemed then politically difficult to imagine has become a reality, which invites us to accept that all the more State measures regarding education fall under the Treaty rules as but one of the expectable 'domino effects' produced by a combination of national politics, dynamic distribution of powers between the Union and the Member States and negative integration by the Court of Justice. Before discussing how State aid rules might apply to spin-offs of schools in Sweden and with a view to evaluate the probability that the Commission bases its decision on economical facts rather than on 'realpolitik', an overview of the prudent case law of the Court of Justice in matters of education might help. In this part, we shall therefore see how the Court, when confronted with national rules on *access* to education, has in a series of cases not hesitated and affirmed that education can be 'Union business' by applying other Treaty instruments than provisions requiring the presence of an economic service activity. This approach, early present in *Gravier*, was largely reinforced in *Grzelczyk* and *Bidar*, when the Court started to rely on the rights conferred by EU citizenship introduced by the Maastricht Treaty. It will then be exposed how the Humbel doctrine first seemed to seal the impossibility of another approach and seemed able to keep education largely away from Union law's market rules. It was, however, not applied in *Schwarz* and *Jundt*, where the Court could not infer free movement rights without connection to an economic education activity, and therefore had to look at the concept of remuneration from a different angle. The Court of Justice has, thus, begun to turn its back to the 'education exception' sustained in Humbel, convinced by its AGs that it was time, when examining whether an activity is economic for the purpose of free movement rules, to apply the same criteria to education as regarding healthcare activities, applying functional criteria in individual cases and looking away from formal 'national

[64] Swedish Agency for Public Management [*Statskontoret*], Pricing in the Transfer of Public-Sector Activities to Municipal Staff ('hiving-off'): Municipal and EC/EU Legal Aspects, Report 2008:10, Commissioned by the Swedish Ministry of Finance to Examine the Controversial Conditions of Municipal Spin-Offs. In the Swedish full text, the question of the applicability of EU state aid rules is raised p. 46 and 47, but the sale of schools at issue is examined exclusively from the angle of a *building* being possibly sold by a municipality under market price to municipal employees.

system aspects'. The Court seems nevertheless unwilling to let school education provided by private actors and indirectly subsidized by public funds come within the scope of state aid law.

That education is not *per se* outside the scope of the Treaties was established early by the *Gravier* ruling. Referring to the Community's competence on the basis of Article 128 of the Treaty (now Article 166 TFEU) and the role of vocational training for the enlarged labour *market*, the Court concluded that *conditions of access* to vocational training fell within the scope of Article 7 of the EEC Treaty (now Article 18 TFEU) prohibiting discrimination on the grounds of nationality[65]. This conclusion was reached regardless of whether the activity was economic for the purpose of free movement rules, a question the Court decided not to examine[66]. In *Humbel* the Court underlined: 'the judgment in the Gravier case / …/ means that the prohibition of discrimination on grounds of nationality /…/ always applies to vocational training, *whatever the circumstances*' (emphasis added)[67].

Much later in *Bidar*, the Court found that a Member State's rules on access to subsidised loans or grants to cover the maintenance costs of students lawfully resident in that State and wishing to attend university courses there, can be prohibited as discriminatory. As the Union had gained powers in the field of education and EU-citizens a right to free movement, access to such assistance was subject to the principle of equal treatment in Article 12 EC (now Article 18 TFEU), *regardless of their possible economic character*.[68] EU-citizenship was also decisive in *Grzelczyk*, as the Court ruled that a person lawfully residing in another Member State than the State of which he is a national, could as a EU-citizen rely on the principle of equal treatment to claim access to that Member State's social assistance benefits to continue studying there, as he was 'not an unreasonable' burden on the public finances of that State.[69]

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[65] Case C-293/83, *Gravier v. City of Liège*, [1985] ECR p. 593, paras. 19–25 and 30–31. The rule examined provided for differential fees for courses in strip cartoon art, considered by the Court as vocational training.

[66] Ibidem, paras. 7 and 16.

[67] Case C-263/86, *Belgian State v. René Humbel and Marie-Thérèse Edel*, [1988] ECR p. 5365, para. 23, concerning enrolment fees for courses deemed to constitute vocational training but not a service for the purpose of free movement rules.

[68] Case C-209/03, *The Queen (on the application of Dany Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills*, [2005] ECR I-2119, para. 48.

[69] Case C-184/99, *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193. Mr. Grzelczyk had covered the costs of his first three years of study in the host Member State by taking on various minor jobs and had applied for benefits only for the particularly demanding fourth year. The Court interpreted the words "not unreasonable" as meaning that a certain degree of solidarity must exist between nationals of a Member State and nationals of other Member States, particularly if the economic difficulties encountered by a beneficiary of the right of residence are temporary. Interestingly the Court took support of the sixth recital of Directive 93/96 that is more nuanced than to the wording of its Article 4, see para. 44.

Whether education can be an economic activity was—although unclearly—discreetly tackled in Commission v. Hellenic Republic. The Court made clear first that the mere establishment of a vocational training school by private individuals had no connection with the exercise of official authority within the meaning of the exemption rule of Article 55 EC (now Article 51 TFEU), and second that the protection of the general interests entrusted to such schools was sufficiently guaranteed by the supervision of the national authorities.[70] Restricting cross-border establishment was, therefore, needless and contrary to the freedom of establishment, a conclusion implicitly building on the view that vocational training at issue in the case (and likewise private lessons) constituted services in the meaning of Article 60 EC (now Article 57 TFEU).[71] Whether this training was privately or publicly funded was not clear in the case.

Parallel with this labour market/citizenship case law, the Court took another approach in *Humbel* and ruled that courses *in national education systems* do not constitute a service, defined in Article 57 TFEU as 'services *normally* provided against remuneration'. The Court stated that remuneration in Article 57 basically means consideration for the service in question, *normally* agreed upon between the provider and the recipient of the service. Courses in national education systems lacked this essential characteristic, on the basis of two criteria (called below 'the *Humbel* criteria'). First, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Second, the system in question is funded from the public purse and not by the pupils or their parents. Remarkably the *Humbel* criteria exclude from the Treaty rules the *totality of an activity in 'a system' organized by the State* instead of examining the activity of a given operator. The very notion of system is vague and seems carved by the Court to avoid stepping into a particularly sensitive field in terms of national sovereignty and subsidiarity. Not so problematic in the education sector as long as school education still was mostly provided by the State or under close State control, the *Humbel* criteria could however have been in the way of a European integration of social market activities subsidized by State resources. A few years ago, Hatzopoulos could, thus, observe that the definition of remuneration laid down in the *Humbel* ruling 'has been considerably watered down' in the healthcare area.[72] Thus in *Smits and Peerbooms*, the Court upheld the basic definition in *Humbel*, but never tested the *first Humbel* criterion to identify remuneration, namely the *intention of the state in establishing and maintaining the system*. Later in the *Watts* case AG Geelhoed, 'disregarding whether Humbel may still be regarded as being good law', based his opinion on the *Smits and Peerbooms* reasoning line.[73] In

[70] Ibidem, para. 9.

[71] Case C-147/86, *Commission v. Hellenic Republic*, [1988] ECR p. 1637, para. 10.

[72] Hatzopoulos 2006, p. 2.

[73] Opinion of AG Geelhoed in case C-372/04, *Yvonne Watt v. Bedford Primary Care Trust and Secretary of State for Health*, para. 60.

healthcare case law, the state's intentions regarding the system have simply not been considered as *constitutive* of the definition of remuneration. Instead, they have been relevant to examine possible justifications—overriding reasons related to a public interest —of national provisions limiting free movement.[74]

In *Wirth* the Court decided that the *Humbel* criteria were equally applicable to institutes for higher education[75]. Since it found that courses provided by such institutes and essentially financed by public funds did not constitute an economic activity, free movement provisions could not be invoked against discriminatory national rules on access to grants for such courses. The Court actually didnot devote much attention to the first *Humbel* criterion, i.e. the aim of the State[76] and decided on the case in spite of the scarce information concerning the proportion of private, respectively, public financing of the courses at issue, i.e., the second *Humbel* criterion[77]. Importantly, the Court clarified *obiter dictum* that courses given in establishments of higher education financed essentially out of private funds, in particular by students or their parents *and which seek to make an economic profit*, become services in the meaning of Article 60 EEC (now Article 57 TFEU)[78]. It did, however, not consider a third possibility, namely private establishments seeking to make profits (and many times making profits) but part of a national education system and financed mainly by public funding, which is typically the case of 'mixed economy bodies' such as independent schools in Sweden. The Court could in *Wirth* not reason in terms of EU-citizenship, as the concept was not yet part of the Treaty[79].

Several reasons make it worth mentioning the two *Schwarz* cases decided by the Grand Chamber on German rules denying tax deduction for school fees paid by German nationals having their children in schools outside Germany. First, the Court clarified that the 'non-discrimination approach' is only necessary when the 'free movement approach' is not applicable to the same facts, as Article 18 finds a specific expression in Article 56 TFEU.[80] Second, the Court, though initially naming the *Humbel* criteria, applied instead extensively its line of reasoning in healthcare cases, bringing private schools largely financed by public funds into the

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[74] See Case C-157/99, *Smits and Peerbooms*, paras. 56–58 compared to paras.70–71.

[75] Case C-109/92, *Wirth v. Landeshaupstadt Hannover*, [1993] ECR I-06447, para. 16.

[76] Ibidem, para. 12. See also C-109/92, *Wirth v. Landeshauptstadt Hannover*, para. 16.

[77] AG Darmon had underlined this lack of information, and meant that it was for the national court to decide the case on the basis of the *Humbel* criteria, see opinion of AG Darmon in case C109/92, *Wirth v. Landeshaupstadt Hannover*, para. 16.

[78] Ibidem, para. 17.

[79] This explains the assertion that '*at the present stage of the Treaty* assistance to students for maintenance and for training in principle fall outside the scope of the Treaty', see para. 25, an assertion later modified by the *Grzelczyk* ruling.

[80] Case C-76/05, *Herbert Schwarz and Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach*, [2007] ECR I-6849, para. 35. The Court of Justice ruled that the question of whether the private school in Scotland was providing a service in the meaning of Article 49 EC (now Article 56 TFEU) was for the national court to answer on the basis of more detailed facts. It was only if the answer to that question was negative that an examination in the light of Article 18 EC (now Article 18 TFEU) proved necessary, see paras. 47 and 83–99.

realm of free movement law. By reference to *Wirth*, it is found that the education provided by the private school in Scotland was a service in the meaning of Article 50 EC. By reference to *Smits and Peerbooms*, it is considered to be the case even if the service was subsidised and thus not mostly paid by the user[81]. The Court held further, by analogy with *Watts*, that Article 49 EC applied to nationals of a Member State purchasing education services in other Member States, regardless of whether the provision of similar education in the context of the national system was itself a service for the purpose of free movement.[82]

To justify differentiation the German State raised two arguments. First, it gave its view that the tax deduction constituted indirect state aid in favour of certain private schools compensating them for the high qualitative and financial requirements, which they are imposed in order to be 'approved substitute schools'.[83] This argument was hastily dismissed by the Court, who chose instead to qualify the tax deduction as an advantage to parents (allowing freedom of choice, precision added), and not as a *direct* subsidy to the schools concerned.[84] It is submitted that by refusing to see the tax deduction rule as state aid, the Court made a maladroit attempt to keep school education outside the demanding state aid rules and their corollaries in terms of procurement as an instrument for compensation control. This becomes all the more obvious as the Court dismissed the second argument of the German State, namely that the German schools eligible for tax deduction and private schools established in other Member States were not in an objectively comparable situation. The Court, having qualified the tax deduction as exclusively an *advantage to parents*, contradicts itself immediately after by underlining that the German provision implies that '*any private school* established in a Member State other than the Federal Republic of Germany, merely by reason of the fact that it is not established in Germany, *is automatically excluded from the tax advantage at issue* in the main proceedings, whether or not it meets the criteria' laid down in the provision for German schools to be eligible for the tax deduction rule! The very same tax rule qualified as an *advantage for a private school* in Scotland and relevant for its freedom to provide a service, becomes suddenly *only an advantage for a German national and not for a German private school* in Germany. Who said law is not magic? Compared to the preliminary ruling, the Court expressed in *Commission v. Germany* — the "second" *Schwarz* case— similar conclusions as to a breach of Articles 18 and 56 TFEU.[85]

Shortly after ruling in the *Schwarz* cases, the Court had in *Jundt* to assess the compatibility with Article 49 EC (now Article 56 TFEU) of German legislation

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[81] See C-76/05, above footnote 53, paras. 38–41.

[82] Ibidem, paras. 45–46.

[83] Ibidem, paras. 54–55.

[84] Ibidem, para. 71.

[85] Case C-318/05, *Commission v. Germany*, [2007] ECR I-6957, para. 121. In *Commission v. Germany* the Court also found the tax rule incompatible with Articles 39 and 43 EC (now Articles 45 and 49 TFEU).

precluding a German lawyer, living and working in Germany, from deducting from his taxable income expense allowances received for a punctual teaching work at a French university, a benefit he would have enjoyed if he had been teaching on that basis in Germany. Examining first the existence of a service for the purpose of Article 49, the Court underlined that the teaching activity was not provided by the universities themselves, but instead *by natural persons called upon by universities to help them fulfil their mission*.[86] The *Humbel* criteria were, therefore, found irrelevant to establish the presence of remuneration. Instead, the payment made by the French university, itself financed by public funds, to the German lawyer, even if only covering his expenses, constituted remuneration, *as the activity was not provided for nothing*.[87] This minimalistic characteristic for remuneration was seen as supported by the ruling in *Smits and Peerbooms*, where the Court had stated that 'an activity does not cease to be economic simply because there is no aim to make a profit'. In *Jundt*, the Court did not have to overrule *Humbel* (where the recipient of the school fee payable to a specific school was seen as the State 'in charge of the system)', only to focus instead on the relationship between a public body and a private part it paid for part-time assistance in its mission. If the university's activity as a whole fulfilled the *Humbel* criteria and could be regarded as non-economic, we find in *Jundt* that non-economic education (provided by the university to the users) can *include* economic education activities (external teachers providing *not for nothing* courses on a secondary basis).

On the face of the case law summarised here, it is submitted that determining whether education provided by natural persons or private bodies constitutes an economic activity for the purpose of free movement rules goes through answering the simple question 'who gets paid for providing what to whom' (expressed very bluntly). When the 'who' contributes to the education activity as a private body or person, it is irrelevant whether the provision is for profit as it is sufficient that it is 'not for nothing'. It is also irrelevant whether the system to which the 'who' contributes is considered as a whole as non-economic. Is such a proposition relevant to foresee a possible resolution to the Swedish State aid complaints? This is an element of discussion in the next section.

18.6.3 Complaints at the Commission: Uneasy Questions Set by These Spin-Off Cases

Parallel with the proceedings at the Swedish Administrative Courts reported under section 6.1, a group of 20 spin-off operations—including the spin-offs in Täby and Upplands Väsby but also kindergartens and medical centres in other municipalities

[86] Case C-281/06, *Hans-Dieter Jundt and Hedwig Jundt v. Finanzamt Offenburg*, [2007] ECR I-12231, para. 31.

[87] Ibidem, para. 32.

in the area of Stockholm—have been brought to the Commission's attention through complaints lodged 2008.[88] The sale of schools was claimed to have included State aid incompatible with the Treaties, as they had been carried out in the absence of any competitive procedure and for an amount under market value.[89] This part of our chapter looks into two questions that the Commission must answer when examining these complaints. It must establish that independent schools are undertakings, even as a part of the Swedish education system. Examining then competition distortion or risk of distortion, the Commission must also put in plain words *which market could be affected*.

Let us start with some facts that are hard to deny. It seems crystal clear—not the least to business experts—that corporate companies as for instance Academedia (the largest with 100 schools in Sweden 2011), ThEducation[90] or Baggium,[91] running both schools at compulsory, upper secondary level and adult education 'are engaged in gainful activity'.[92] Their for-profit corporate activity is explicitly based on the assumption that business opportunities can only get better.[93] The same goes for smaller companies running schools for profit, even if their business is purely local. As many schools once sold to municipal staff have soon been acquired by larger education companies it seems likewise obvious that there is, at least in the urban areas of Sweden, a market for schools in Sweden.

If private operators taking over municipal school units under market value should be regarded as undertakings in the meaning of Article 107(1) TFEU, the

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[88] These spin-offs lead to a partial privatsation. The local authority closes down its own school and sells the schools assets and building to a private part on the condition that the latter gets from the State administration an authorisation to run an independent school in this location. The new established free school is run in a mixed economic model by a private body and with public funds.

[89] European Commission CP248/08.

[90] The majority owner of the corporate company ThEducation is per June 2011 the corporate company Bure. Bure's business concept is 'to acquire, develop and divest operational companies so that the shareholders in Bure shall receive a good return on invested capital through access to a portfolio of professionally managed companies', see http://www.bure.se/extra/pod/?lang=en.

[91] The Swedish group Baggium is part of the Nordic company FSN, which acquired Baggium AB in January 2010. FSN presents itself as 'a leading Nordic private equity investment company focused on the middle-market segment'. Originally established in 2000, FSN Capital seeks to make control investments in Nordic companies with significant potential to become international leaders. Baggium has more than 40 schools in Sweden.

[92] Affärsvärlden 2007-11-14: it is this education activity that makes them attractive as investment objects. Available at: http://80.76.151.54/aktier/analyser/analys/index.xml?stock_analysis_id=10834&skiprows=0

[93] See Academia's business vision, '*We will be the leading education company on the deregulated education market. Through well-defined brands we will drive the pedagogic development and create a company with the highest quality on the market. We will take active part in the transformation and development of the education industry… AcadeMedia is an education company that develops people. We use methods that result in measurably higher quality and more satisfied customers than our competitors*'. Available at: http://www.academedia.se/Start/OmAcadeMedia/InEnglish.aspx.

really thorny issue is the nature of the economic activity they are engaged in: are they selling education and is there a market for compulsory and upper secondary education in Sweden? According to the divergence doctrine, which Piernas Lopez dates back to the *Meca-Medina* appeal ruling of the Court of Justice in 2006, the notion of economic activity for the purposes of the internal market rules differs from the notion of economic activity in the field of competition.[94] As to the concept of economic activity used to define the scope of the competition rules, Odudu distinguishes two elements. The first element, formulated by the Court of Justice in *Commission* v. *Italy* and clarified in *FENIN* and *Bodson*, is that there must first be an offer of goods or services on the market.[95] The second element is that there must be a potential to make profit from the offer of goods or services *without State intervention*. This second element is submitted with reference to a formulation of AG Jacobs in *AOK* and to *Höfner*.[96] In the light of this second element, independent schools in Sweden, which make profit with school education *based on the very fact that there is State intervention*, would thus not constitute undertakings unless they conduct some economic activity on the side of the school activity. In Sweden this is the case of only a limited number of providers, conducting, for instance, both adult education and school education. Applying the second element submitted by Odudu leads here to the existence of a market which does not include companies only dealing with school education within the national system. Such a finding is totally at odds with economic expertise. Once again the existence of an education market in a number of countries including Sweden does not seem much of a question, for instance, in a report published by the OECD which instead questions the nature and the functioning conditions of this market in different practical and legal situations.[97] It is, therefore, submitted that in a competitive situation as school education in Sweden today, the drastic *Höfner* definition of an undertaking seems to offer a more functional point of departure for reasoning than Odudu's second element: according to the *Höfner* definition the source of financing is not relevant, only the presence of market, where at least some suppliers enjoy legal conditions to act for profit.

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[94] See Piernas Lopez 2010, p. 177, referring to the *Meca-Medina* case, in which the Court held that, whereas the rules concerning questions of purely sporting interest fall outside the scope of the Treaty provisions on free movement, this did not imply that the addressees of such rules or people engaged in the activity governed by such rules were excluded from competition rules, see CJEU Case C-519/04 *Meca-Medina and Majcen* [2006] *ECR* I-6991, paras 26–27.

[95] CJEU, Case C-118/85 *Commission* v. *Italy* [1987] *ECR* 2599, paras 3 and 7; GC, Case T-319/99 *FENIN* [2003] *ECR* II-357, para 37; CJEU, Case C-30/87 *Bodson* v. *Pompes Funèbres des Régions Libérées SA* [1988] *ECR* 2470, para 18.

[96] Odudu 2009, pp. 230–232.

[97] Waslander et al. 2010, see point 261. Referring to other studies and to their own observations the authors conclude inter alia 'there is strong evidence that education markets are essentially *local in nature*. That is, parents do not choose just any school but a school within travelling distance, and schools do not compete with any school but with schools nearby. This implies that characteristics of the local situation are important'.

This is, however, not the way the Commission appears to look at it and the patient reader will now recognise him/herself. In the version per December 2010 of its FAQ document on Services of General Interest updated 2010 (hereafter called the SGI guide), the Commission treats the question as to whether an activity is economic for the purpose of State aid rules, under the heading 'When does an activity qualify as non-economic for the purposes of the competition rules?'[98] As non-economic, the Commission names notably '[t]he provision of public education financed as a general rule by the public purse and carrying out a public service task in the social, cultural and educational fields towards the population', by reference to a case law listed in footnote nr 48. This case law includes the criteria laid down in *Humbel* and the principle expressed in *Commission* v. *Germany* (by reference to *Watts*) that free movement of services must be enjoyed by nationals of a Member State even if a comparable activity in their home country is not a service within the meaning of the free movement of service provisions. The Commission, thus, seems to hold the view that the criteria—in particular the 'tailor-made for education' *Humbel* criteria—for an activity to be non-economic for the purposes of the free movement rules are determining for the purpose of the State aid rules. This view was in different ways applied in State aid decisions referred to in the SGI guide.

The first case regards subsidies—approx. EUR 229 000—notified by the Czech Republic and granted for the purchase of educative equipment to a college providing tertiary education. In this very short decision the Commission chooses to apply a combination of the definition of an undertaking laid down in *Höfner and Elser*—somewhat completed in Cisal—and of the *Humbel* criteria. To qualify as an undertaking an entity must thus engage in an economic activity—i.e. offer goods or services on the market—regardless of its legal status and the way in which it is financed. The Commission then takes the view that there is no State aid because the college pursued an educational role of general interest and did not conduct any economic activity as:

1. The State, in maintaining a national education system, is, *according to the Humbel ruling*, not seeking to engage in gainful activities, and the college was acting under the national education system.
2. The college could not perform any other activity than 'education and scientific research, development and other creative activities in the approved study programmes and operation of the university on the basis of the state approval and a permit of the Ministry of Education.[99]

[98] See Commission, *Commission Staff Working Document, Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in Particular to Social Services of General Interest*, SEC(2010) 1545 final, 7 December 2010, p. 23.

[99] Commission *Decision of 30 November 2006*, C(2006) 5528, NN 54/2006, *Czech Republic, Prerov Logistics College*, *OJ* 2006 C 291, paras 15–18. Available at: http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/.

Interestingly, the Czech Republic never claimed that the college conducted a non-economic activity. The Commission was, thus, led to discuss the situation in case the college had been regarded as an economic operator. Given the local dimension of the college, its teaching language, location, size and the relatively small amount of public support involved, the conclusion was that the subsidy at issue had no effect on trade.

If we summarise *Prerov* it seems that the Commission followed the logic:

> Article 107(1) TFEU => undertaking => offer goods or *services* on a market (*Höfner* definition) => service according to the *Humbel* criteria => remuneration *normally* agreed upon between the provider and the recipient of the service => this characteristic is absent regarding any unit formally part of the national education system, *if this unit cannot perform any other activity* than the central education programmes approved by the State, on the basis of a State approval and permit to operate.

The risk of subsidising an economic activity with State resources granted to provide a service held in this decision to be non-economic is explicitly formulated by the Commission in the *Prerov* decision. Its relevance for the complaints against sales of schools in Sweden will be commented at the end of this section.

A second decision referred to in the Commission's guide was taken by the EFTA Surveillance Authority (hereafter called 'the Authority') on a complaint lodged by the Norwegian Association of Private Kindergartens (hereafter called 'Barnehagers') against the Norwegian provisions regulating the financing of public, respectively private kindergarten. If we summarise the decision in Barnehagers it seems that—compared with the Commission's decision in *Prerov*—the Authority started from the *Höfner* definition and accumulated then two lines of argumentation to conclude that the activity conducted by *municipal* kindergarten in Norway was not economic,[100] (1) based on *Höfner/Humbel* and (2) on *Poucet and Pistre*:

> Article 107(1) TFEU => undertaking => offers goods or *services* on a market (*Höfner* definition) =>
>
> 1. Service according to the *Humbel* criteria[101] => no remuneration by application of the *Prerov* reasoning to kindergartens, seen as 'preschool education' and thus a part of the national education system (the Authority does not envisage the possibility of the kindergartens conducting another activity than day-care for small children)
> 2. Not an offer on a market, but instead an exclusively social function by application of the criteria in the *Poucet and Pistre* case law => entirely non-profit and financing based on the principle of solidarity
>
> – The municipality (as operator of municipal kindergartens) has no intention to make profit and only fulfils social, cultural and educational duties (p. 10–11)
> – Users pay fees but the fact that those fees are fixed, not proportional to the cost of the individual service and reduced for parents with more than one child and families with low income demonstrates the principle of solidarity (p. 11)

[100] EFTA Surveillance Authority Decision No. 39/07/COL of 27 February 2007 on Public Financing of Municipal Day-Care Institutions in Norway, p. 11.

[101] Ibid. page 9.

This double argumentation in *Barnehagers,* mixing the *Höfner* definition and the solidarity principle in *Poucet and Pistre*, seems to fulfil a need to come to the same conclusion as in *Prerov*, regardless of differences concerning facts. Compared to *Prerov* the argument that kindergartens are a part of the national education system is weaker and the argument that subsidy is limited in amount and time also weaker (the *Barnehagers* case concerned a scheme subsidising operating costs and fee control was at issue). Common to both cases is, however, the fact that the recipients of state resources are public bodies, which arguably made it easier for the Commission and the Authority to regard those bodies as functional parts of the State systems and therefore to invoke the *Humbel* criteria to consider their activity as non-economic.

This was not the case in yet another decision, not mentioned in the SGI guide, which concerned *private* kindergartens having been granted a selective advantage in the form of subsidised real estate leasehold fees in Oslo.[102] In its decision, the Authority does not conduct any reasoning on these kindergartens being a part of the national education system or on the educational and social aspects of these activities; it simply acknowledges that support in the form of reduced annual leasehold was given to undertakings (the private day-care facility providers), giving them an advantage they would not have enjoyed in the normal course of *business*. In the absence of information on the sources of funding of private kindergartens and on their degree of integration in the national system of education according to the Norwegian legislation in force 2003, it seems only possible to conclude that the Authority considered kindergartens run by municipal bodies under the Norwegian legislation in force 2007 as non-economic while it considered kindergartens run by private bodies under the Norwegian legislation in force 2003 as economic. This limited case law leaves us with the following questions:

- Would *private* kindergartens in Oslo still be considered as undertakings after the changes introduced 2003 in the Norwegian Kindergarten Act as regards public subsidies, giving a more equal treatment of municipal and non-municipal kindergartens?
- Should, instead, these *private* kindergartens be considered as undertakings, even when they provide (pre-school) education within the frame of a national education system and according to programmes approved by the State and operating with a permit from the State, and with public funding? Would this affect the view held in the Barnehagers case that *municipal* kindergartens in the same system do not constitute undertakings?

What is, however, clear in both decisions in *Prerov* and *Barnehagers* is the use of *two* successive tests to determine whether Article 107(1) TFEU is applicable. The first looks at the presence of an offer of goods or services on the market and

[102] EFTA Surveillance Authority Decision 291/03/COL of 18 December 2003, Regarding the Establishment of Private Day-Care Facilities on Public Sites with Subsidized Real Estate Household Fees in Oslo (Norway)..

the second at the presence of a service in the meaning of Article 56 TFEU, by reference to the *Humbel* criteria.

A similar two-steps reasoning is also present in the opinion of AG Jääskinen in *Poland* v. *Commission*, a case concerning rules on pension funds in Poland restricting investments in non-Polish funds/shares.[103] The AG, evaluating a possible justification of this restriction on the basis of the exception rule in Article 106(2) TFEU, questions whether the companies administrating the funds can be seen as undertakings, i.e. if they offer services on a market. To answer this first question he examines whether they provide a 'service for the purpose of competition law'. To this second question his answer is 'no', based on the observation that each company may only administrate *one* fund and has no *open circle of customers*. In trying to establish the provision of a 'service for the purpose of competition law' the AG seems to take account of the divergence doctrine, by contrast with the decisions in *Prerov* and *Barnehagers*, in which the existence of a service provision is based on a plain application of the *Humbel* doctrine, that is, by using in competition issues criteria used to define a 'service for the purpose of *internal market* law'.

To reconcile law and facts, it is submitted here that the following two-steps reasoning might be appropriate for the Commission to use in the case of the spin-offs brought to its attention. The first question to be answered (the first test) is proposed here to be whether independent schools provide a 'service for the purpose of the competition and State aid rules'. In the new Education Act, they have, indeed, been integrated *formally* to the Swedish education system and from a functional and financial point their treatment has been made more equivalent to municipal schools. Is it enough to motivate the view that their activity seeks what the State establishing and maintaining such a system seeks? It seems that the answer to this question is inevitably 'no'. By contrast, with what appeared to be reasonable regarding the college at issue in *Prerov*, independent schools may be part of the system maintained by the State but they can hardly be considered as not seeking to make an economic profit. As explained above, their activity is in the vast majority of cases seeking profit, even if this goal implies that they have to fulfil a number of obligations in the general interest. By analogy with the economic activity of the German teacher in *Jundt*, independent schools in Sweden may rather be seen as contributing to the national education system on their own business terms—including closing down if figures tell they should—than embodying the State's will in all aspects. If these arguments are admitted the conclusion is that it is not enough to be part of a national education system on formal criteria and that the activity provided by independent schools does not fulfil the *Humbel* criteria.

The second question to be answered (the second test) in that case is which economic activity they conduct (answering the question "who gets paid by whom for what" formulated in our conclusion of Sect. 6.2). Independent schools are,

[103] Opinion of AG Jääskinen of 14 April 2011 in CJEU, Case C-271/09 *Poland* v. *Commission* [decided on 21 December 2011, nyr], paras 68, 70 and 71.

according to present Swedish legislation, not commissioned by the State, which leaves us with the only possible alternative that their customers are (as some providers write it on their websites) pupils, students and their families (and in some cases adults in need of academic education). From the point of view of each private operator, the voucher per pupil/student is certainly perceived as a consideration—be it subsidised or totally publicly funded—for the service they provide, qualifying their activity as a 'service for the purpose of State aid—and competition—rules'. As none of the schools at issue appears to have run—apart from school education—another activity unmistakably held as economic—as, for instance, courses for professional adults—the Commission would probably unfortunately not clarify how the principles laid down transparency directive should be applied to avoid cross-subsidisation risks.

18.7 Conclusions

After being a strong welfare state with municipal provision of public services Sweden in the last two decades has turned into a market state with in some cases far-reaching market-oriented reforms. The promotion of market solutions in the Swedish public sector has given rise to political and legal developments, which raise some difficult questions on the interpretation of Union legal concepts. We have drawn some attention to the Swedish public procurement rules regarding SSGI. The general rules[104] are less flexible than the EU procurement rules, but an alternative set of procurement rules—based on the controversial Swedish legislator's view that the contracts concluded constitute concessions—has been adopted to support free-choice systems, where holders of social rights act as quasiconsumers in a contract actually binding public authorities and providers. Compared to contracts not allowing users' free choice of provider, the specific risk constituted by unpredictable individual choices causes uncertainty as to whether contracts constitute concessions or service contracts. This uncertainty constitutes a serious problem as either the procurement directives or the Directive on concessions proposed by the Commission[105] might be applicable to this way of organising SSGI.

We have further seen that, as rental housing has been radically liberalised in Sweden, it seems today difficult to legally motivate low or no-return investments made by municipalities in this sector without invoking the existence of a social service of general interest. The Dutch case has indeed made clear that social cohesion and integration can be invoked to justify a very broad public financing of such missions. It seems, however, that the Commission's narrow definition of

[104] By 'general rules' we mean here procurement rules which are not particularly designed for free-choice systems

[105] When this is written,

SGEI as only housing for the socially disadvantaged is challenged by the stake of the Swedish government, claiming that unless municipal housing undertakings—in a "universal" model—maximise their investments just as their private counterparts do, the only alternative to achieve cohesion and integration through housing policies would be to adopt the residual model of social housing.

We have also evoked the Commission's discreet treatment of the Swedish cases concerning schools' spinoffs, contrasting with its resolute action against Germany in the Schwarz case. However, if the education market continues to grow in Sweden and in other Member States, it might become impossible for the Commission to use the *Humbel* axiom as an opportune subsidiarity instrument. In the debate on the liberalization of SSGI, the Swedish independent schools' state aid cases must be examined by the Commission and by Sweden *with transparent references to all relevant elements of the case law* of the Commission, the Authority and most importantly the Court of Justice. Otherwise, the Commission and/or Sweden would seem to deliberately bypass politically sensitive legal issues, an attitude contrasting with the progress made by the Court of Justice towards more convergence between education and healthcare case law. If education provided by independent schools in Sweden constitutes an economic activity, central issues must be on the basis of which mission of general interest they are subsidised, and how under- or overcompensation is avoided.

More importantly the Commission must defend the interests of the Union, which includes the value of equality and fundamental rights—notably to education. While the Swedish government has so far been sceptical to the concept of SGEI,[106] its politics might demand that subsidisation of cohesion or education is classified as SGEI. In the European context of a *social* market economy, crucial elements become the definition of the general interests citizens want to preserve and an open dialogue between EU-institutions and Member States on how to legally combine these interests with market and budget logics. Is 'good legislation' not about democratic procedures preventing conflicts and problems when they otherwise almost certainly can be expected?

18.8 Addendum (per June 2012)

Before this chapter went to press, the Swedish government received in March 2012 a letter from DG Competition at the European Commission, meant to respond a "wave of enquiries" in the Swedish Parliament about the Swedish authorities' privatization practices including the complaints sent to the Commission[107]. The

[106] Wehlander 2011, 65–71.

[107] Letter to the Head of Section for Market and Competition Division at the Swedish Ministry of Enterprise, Energy and Communications, registered under reference COMP/H-2/BC – (2012)33624, dated 29.03.2012.

Commission informs about its decision to close the spin-off cases administratively, without a formal decision being taken, as "absence of effect on internal market and trade between Member States would *a priori* indicate that the measures described in the complaints would not constitute aid in the meaning of Article 107(1) TFEU". The Commission reserves itself the discretion to review the matters if new evidence arises. It seems that the Commission—implicitly and very discreetly—shares our view that independent schools in Sweden constitute undertakings for the purpose of state aid rules.

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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

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

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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 systems[2] 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 Swedish[6] 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 *Bismarck*ian 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]

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[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

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[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.

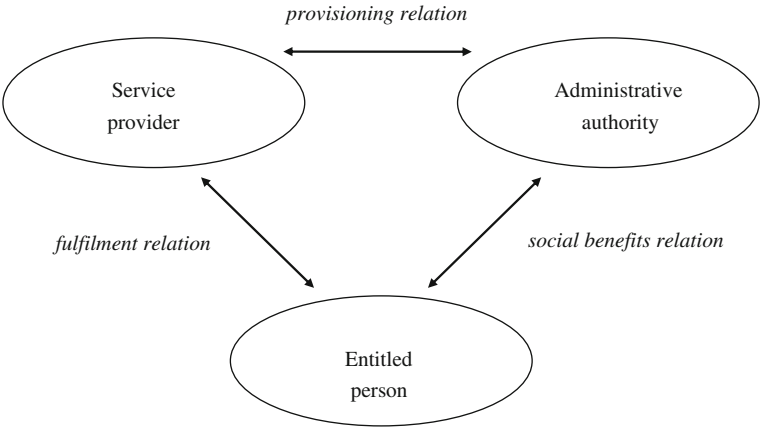

Fig. 19.1 The social benefits delivery triangle

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 provider[27] 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 [*verwaltungsrechtliche 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 *Oymann*s 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]

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[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]

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[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 phenomenon[46]—does not automatically induce competition between service providers (as can be seen from a judgment of the CJEU[47]).

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 before[48];
- 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 Market[49];

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[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 play[51];
– second, the prohibition of state aids which are incompatible with the internal market[52]; 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.

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Chapter 20
Changes and Challenges in UK Social Services: *Social* Services of General Interest or 'Welfare' Services of General *Economic* Interest?

Jim Davies

Abstract This chapter provides a synopsis of social service provision in the United Kingdom. It discusses the individualisation of service provision and the rhetoric of consumer choice that is a developing characteristic of many of the main sectors of the welfare model. At the sectoral level, attention is drawn to the different models for social service provision that are, in general, shaped by neo-liberal economic theory. The development of this UK welfare model is framed against its Poor Law antecedents dating from the sixteenth century and the welfare reforms of the mid-twentieth century. Where virtually continuous reform of service provision and procurement is a characteristic of social welfare organisation, devolution has added to its complexity: with degrees of national autonomy, Scotland, Wales and Northern Ireland now bring a quasi-federal diversity to the welfare model. An overview of universal health service provision, local authority obligations and social housing provides a range of examples from the UK social services. Private law, and private remedy, now exists in what were once public spaces: public law obligations remain, but for social services, as SSGIs or social welfare SGEIs, both public law and private law find challenges in human rights norms. Ongoing modernisation and private sector involvement in social services provision has been accompanied by the appearance of structural and organisational characteristics that, for a growing number of UK social service sectors, would be likely to see them categorised as SGEIs at the EU level.

J. Davies (✉)
Department of Law, School of Social Sciences, The University of Northampton, Park Campus, Boughton Green Road, Northampton, NN2 7AL, UK
e-mail: jim.davies@northampton.ac.uk

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Contents

20.1 Introduction

Aspects of consumerisation and marketisation can be identified with a developing model of social services delivery in the United Kingdom that has been ongoing since the 1970s. It is a model associated with a preoccupation for public service reform that can be traced to the economic concerns that persisted for much of the decade following the oil 'crisis' price rise of 1973–1974.[1] The successive Conservative governments, between 1979 and 1997 introduced economic reform based on a neo-liberal programme that, significantly, was maintained by the New Labour governments from 1997 through to 2010 and that continues with the present Conservative/Liberal Democrat coalition government. Consequently, the administration and provision of services has become established on neo-liberal principles and constant change. It is a reform process that has been described as an attempt 'to depoliticize the public realm' by promoting the idea of 'consumer choice' 'with the intention of conveying symbolic reassurance to the wider public concerning the efficacy of government'.[2]

Descriptively, this chapter provides an overview of the long history of social services development and a characterisation of the mid-twentieth century reforms that saw the establishment of a welfare state model in the United Kingdom. The contemporary model of social services provision is then assessed within the context of its reforming initiatives and the organisational structures of the service delivery model in selected sectors. This is a model marked by a complexity of overlapping legislation and amending instruments. It is a model in which spheres

[1] Pawson and Jacobs 2010, p. 77, citing Clarke and Newman 1997.

[2] Ibid. p. 77, citing Clarke 2004.

of operation of many of the various social services also overlap with a resultant 'blurring' of responsibilities and new challenges to traditionally enforceable norms. Areas of social service delivery that were once clearly established within public spaces have now been placed into the private sector and confined by private law relationships that are in tension with the public law responsibilities placed on local government. Tension between legal norms do not end there: the introduction of the Human Rights Act 1998 brought, *inter alia*, the provision of UK Social Services under the umbrella of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and in doing so introduced the potential for new challenges in the mixed public/private law framework of social services provision.

What becomes apparent is the dominance of a model that can be characterised by a developing individualisation of service provision and increased opportunities for the service-user to participate in the decisions relevant to their needs. Initiatives to broaden the *public* participation in the decision-making process,[3] particularly through patient and public involvement (PPI) in the health and social care sectors have raised tensions where 'issues that matter most to *patients* may not be of paramount importance for *citizens* conceived as tax payers or representatives of local communities.'[4] Such aspirations for collective voice *and* citizen participation appear to be giving way to a model in which the dominant focus is on consumer choice and economic regulation. Recent supply side reforms, particularly in relation to the National Health Service (NHS), have had the objective of increasing the diversity of care providers such that independent, private, not for-profit and for-profit organisations have become actors in a 'market-like system in which [it is envisaged] competition will improve both efficiency and quality of care, including responsiveness to patients.'[5]

With consumer centric models becoming the established delivery model in many sectors, the organisational characteristics of UK social services reflect the 'intensive quest for quality and effectiveness' of the modernisation trend identified as part of the EU Lisbon programme.[6] New radical reform is now heralded as an urgent requirement for UK social services in order to bring accountability and transparency; diversity of service providers and consumer choice and decentralised control with increased regulatory functions.[7] As regulatory functions develop and

[3] Initiatives promoted by the Committee of Ministers of the Council of Europe, Recommendation No. R (2000) 5, The Development of Structures for Citizen and Patient Participation in the Decision–making Process Affecting Health Care, Appendix, Guideline 1: 'The right of citizens and patients to participate in the decision-making process affecting health care… must be viewed as a fundamental and integral part of any democratic society.'

[4] Vincent-Jones et al. 2009, p. 248 [emphasis added].

[5] Allen 2009, pp. 378–379.

[6] Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM(2006) 177 final, 26 April 2006, p. 5.

[7] HM Government, Open Public Services: White Paper, 2011. Available at: http://www.cabinetoffice.gov.uk/sites/default/files/resources/open-public-services-white-paper.pdf. (last accessed on 25 August 2011).

service provision becomes ever more marketised it will become increasingly more difficult to find a UK social service that could escape an 'economic activity' assessment by the CJEU.[8] As a consequence, such a service would, under the EU Commission's guidance, become a Service of General Economic Interest (SGEI) featuring specific public service obligations arranged through an act of entrustment on the basis of a general-interest criterion.[9]

Overlapping spheres of social service delivery, the developing interface of normative sources of law and the potential consequences of 'economic' definition at the EU level are not the only complex dimensions of the UK model. This chapter also draws attention to the UK model of social services that is further complicated by the various legislative acts of political devolution which have given rise to a quasi-federalist structure in which elements of social service provision fall under the autonomous regimes of the Scottish Parliament, the Welsh Assembly or the Northern Ireland Assembly. Throughout, the chapter introduces short case studies to illustrate some of the background to individual sectoral reforms and the challenges developing in the legal framework that surrounds the provision of social services.

20.2 Historical Development of Social Services in the United Kingdom

England developed an approach to the relief of *want* (poverty) that can be traced back to the second half of the sixteenth century.[10] In a succession of Poor Law Acts,[11] provision was made for the official recording and categorisation of the poor in order to determine their entitlement to relief. The resultant norm of means tested poverty relief was established on a common law legal framework with a significant degree of local autonomy exercised at the level of individual parishes and towns

[8] See, for example, CJEU, Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] *ECR* I-6451, para 118; CJEU, Case C-218/00 *INAIL* [2002] *ECR* I-691, para 37; and CJEU Case C-355/00 *Freskot* [2003] *ECR* I-5263.

[9] See, Commission, *Commission Staff Working Document, Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in Particular to Social Services of General Interest*, SEC(2010) 1545 final, 7 December 2010, pp. 16–17.

[10] A century and a half before the Acts of Union 1707 established the United Kingdom.

[11] 1552 Poor Law Act, requiring the official recording of the number of poor in each Parish Register; 1563 Poor Law Act, requiring the categorisation of the poor in order to determine the treatment that they were to receive; 1572 Poor Law Act introducing the first compulsory poor law tax imposed at a local level and making the alleviation of poverty a local responsibility; 1576 Poor Law Act obliging each town to provide work for the unemployed; 1597 Poor Law Act providing for Justices of the Peace to be given authority to raise additional compulsory funds to provide for the poor and introducing the new position of 'Overseer of the Poor'; and, the 1601 Poor Law Act which formalised the earlier provisions and made new provision for a national system of poor relief to be funded through the levying of property taxes.

with the roots of poverty perceived to be the *fault* of the individual and subject to social stigma. The development of a modern system of public administrative law, with which we can begin to associate modern concepts of welfare began to emerge during the mid-nineteenth century, but it was to be another 100 years before the abolition of the Poor Law system.

From the beginning of the twentieth century, the United Kingdom had a functioning bureaucratic apparatus with efficient tax collection and, following in the wake of the Poor Law, a developing client selection competency.[12] With a few earlier interventions, the roots of modern social services in the United Kingdom are to be found in the objectives of the 'Social Insurance and Allied Services' Parliamentary Report prepared by Beveridge in 1942. This mid-Second World War report recognised social insurance as a mechanism for the provision of income security and an attack upon want, but went significantly further in identifying *want* as but one of 'five giants on the road of reconstruction' that also included disease, ignorance, squalor and idleness.[13] A further guiding principle of the recommendations of the Report was that 'social security must be achieved by co-operation between the State and the individual. The State should offer security for service and contribution', that in organising security, the State 'should not stifle incentive, opportunity, responsibility…it should leave room and encouragement for voluntary action by each individual to provide more than that minimum for himself and his family'.[14]

The fundamental approach of the Beveridge model was one of universal coverage with insurance based on citizenship and/or physical presence on national territory, state funded through taxation and other direct or indirect contributions.[15] That the cornerstones of the model were to be built on universalism and citizenship is identified by Ferrera as a consequence of the social and state actors' orientation away from the earlier Poor Law traditions. Early inroads towards universal provision began with old age pension coverage for the *needy elderly* in 1908, extended to *all employees* below a certain wage in 1925 and, with the removal of means testing, to all active citizens in the Beveridge revisions of 1946.[16] The implementation of the Beveridge Report was co-ordinated within a broader social welfare framework of change that was to bring security 'from the cradle to the grave' as a post-war objective for returning troops. Consequently, as the war began to draw to its close, and shortly thereafter, the modern UK framework of social services of general interest was founded on the legislative base of the 1944 Education Act; the 1945 Family Allowance Act; the 1946 National Insurance Act, which implemented the Beveridge scheme for social security; the 1946 National Health Service Act; the 1946 Slum Clearance and Housing Act; the 1948 National

[12] Ferrera 2005, p. 67.

[13] Beveridge 1942, p. 6.

[14] Ibid. pp. 6–7.

[15] De Búrca 2005, pp. 116–117.

[16] Ferrera 2005, pp. 63–64.

Assistance Act, which abolished the Poor Law and made provision for welfare services and The 1948 Children Act. A second Housing Act in 1949 provided for local authorities to build houses for the population generally, rather than only for the needy.

The Beveridge Report had embraced the contemporary argument that these services were inter-related and the concept of the *welfare state* enjoyed, to a large degree, the support of a political consensus until the Conservative administrations of the 1980s. The incoming Thatcher Government of 1979 inherited high levels of unemployment amongst a population in which life expectancy had increased, and the bureaucracy of a welfare system that was perceived to discourage thrift. A landslide victory at the 1983 General Election reinforced the Conservative neo-liberal agenda and led to a review of welfare provision with a radical programme of privatisation and deregulation, reform of the Trade Unions, tax cuts and the introduction of market mechanisms into health and education with the aim of reducing the role of government and increasing individual self-reliance.

Notwithstanding the paradox of social welfare bureaucracies charged with cost-containment, the model that has developed in the United Kingdom provides a highly inclusive coverage of social protection. Healthcare provision remains universal and together with social services is financed through general taxation whilst an extensive range of flat rate and means tested cash benefits for non-active adults and those employed earning below particular thresholds is provided through contributory schemes.[17]

20.3 The UK Welfare State in the Twenty-First Century

Healthcare, together with adult services, particularly with long-term care, share a natural nexus in service provision, but one marked by budgetary division and a complex funding allocation. Government commitments to transform health and social care have long been advanced as progressive, and have provided for a contemporary UK social services model that is characterised by the 'personalisation' of service delivery. The Health and Social Care Act 2001, the National Health Service and Health Care Professions Act 2002 and the Health and Social Care (Community Care and Standards) Act 2003 laid the foundation for the PPI framework by establishing patient and carer consultation forums together with regulatory audit and inspection functions.[18]

This section highlights the characteristics of the UK *models* of social services that, as understood by UK citizens, accommodate the universal provision of health services, the diverse range of local authority services that encompass, *inter alia*, children's services, care in the community and longterm care for the old and

[17] Zeitlin and Trubek 2003, pp. 101.

[18] Allen 2009, pp. 249–250.

disabled (and that may, or may not, be subject to means testing and/or contributions), through to the needs-based provision of social housing. As these services have undergone recent changes we see, at least in most sectors of social services provision, the emergence of a needs-based and rights-based service framework with a hybrid of marketised public and private sector provision in which private law is encroaching into areas that were once the province of public law, and where both private law and public law fields now have to contend with human rights provisions: for law, the consequences of modern social services reforms are still unravelling.

20.3.1 Health Provision

The contemporary model of health provision in the UK is one marked by a desire for demand-side reforms with the intention of providing more choice and a much stronger voice for patients, and supply-side reforms that encourage a liberalised market with more freedom to innovate and improve services. Transactional reforms are intended in which money follows the patient so as to reward the best and most efficient service providers whilst incentivising others to improve. At the same time, system management reforms have been designed to improve decision making in the areas of quality, safety, fairness, equity and value for money. Such characteristics identify a national health service established on the principle of universalism but subject to continuous reform that began with the Labour Government's NHS Plan in 2000.[19] This *patient centric* plan called for sustained investment and reform to ensure that it could deliver the core aim of providing high-quality care for every patient dependent on need, not the ability to pay. Financially, the approach acknowledged a need to consistently achieve the best use of resources in a taxpayer-funded service and that for the reforms to be successful, patients would need to be fully engaged in decisions and choices about their own health and healthcare.

These changes to the NHS were intended to bring a greater focus to the prevention of illness through tackling inequality of access and by empowering individuals to make choices that would improve and protect their own health. The plan established 10 core principles for its twenty-first century modernisation programme that included the acknowledgment that 'health care was a basic human right'; that the NHS 'would shape its services around the needs and preferences of individual patients, their families and their carers'; that 'health services would continue to be funded nationally'; that 'quality was not just to be restricted to the clinical aspects of care, but to include quality of life and the entire patient

[19] NHS, The NHS Plan: A Plan for Investment, a Plan for Reform, Cm 4818-I, 2000. Available at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_118522.pdf (last accessed on 15 April 2011).

experience'; and that the 'NHS will respect the confidentiality of individual patients and provide open access to information about services, treatment and performance.'[20]

Such an individualistic approach, encouraging patient choice, is reflected at the EU level where citizens' empowerment is recognised as a core value through which the patient is encouraged to become increasingly active and influential in decisions over their own wellbeing.[21] Such market-individualism in relation to patients' access to cross-border health services and to NHS resource allocation received significant publicity and consequential legislative change at both the EU and national levels, following the *Watts* case.[22] Codification of case law at the EU level continues to promote market-individualism and the prioritization of investment of finite resources through the entry into force of the new Directive on the application of patients' rights in cross-border healthcare.'[23, 24]

Pre-empting this Directive, the UK Government, which had 'become increasingly engaged with the prospect of enhanced patient mobility across the EU',[25] introduced statutory provisions with corresponding guidance to cover the authorisation and re-imbursement of fees for patients seeking cross-border treatment.[26] McHale has identified that, in this attempt to delimit the impact of free movement cases, the UK had left considerable scope for argument in relation to the definitions that set out what would constitute *special services* requiring prior authorisation.[27] In particular, she highlighted as being 'particularly controversial' the requirement for prior authorisation where the provision of a service 'involves the use of specialised or cost intensive medical infrastructure or medical equipment',[28] a provision that we now find replicated in substance, but still lacking definition, in the Directive.[29]

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[20] ibid, pp. 3–5.

[21] Commission, *White Paper, Together for Health: A Strategic Approach for the EU 2008-2013*, COM(2007) 630 final, 23 October 2007, p. 4.

[22] CJEU Case C-372/04 R *(on the application of Watts)* v. *Bedford Primary Care Trust, Secretary of State for Health* [2006] *ECR* I-4325, and see, McHale 2011, pp. 243–256.

[23] Newdick 2011, p. 219, citing CJEU Case C-157/99 *Geraets-Smits* v. *Stichting Ziekenfonds Vgz, Peerbooms* v. *Stichting Cz Groep Zorgverzekeringen* [2001] *ECR* I-5473.

[24] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011, on the Application of Patients' Rights in Cross-Border Healthcare. *OJ* 2011 L 88; See Szyszczak 2011, pp. 103–131, for a detailed analysis of the issues and tensions surrounding the drafting and background to this Directive.

[25] McHale 2011, p. 261.

[26] The National Health Service (Reimbursement of the Cost of EEA Treatment) Regulations (England and Wales), SI 2010 No. 915, 2010. What is this?

[27] McHale 2011, p. 253.

[28] Department of Health, Cross Border Healthcare and Patient Mobility: Revised Advice on Handling Requests from Patients for Treatment in Countries of the European Economic Area—Guidance to the NHS London, Department of Health, 2010, para 7.7(d). Available at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_115252.pdf. (last accessed on 18 April 2011).

[29] Directive 2011/24/EU, Article 8(2)(a)(ii).

At a UK seminar in 2009, arranged by the Kings Fund to consider the implications of the UK Regulations, and then the draft Directive,[30] it was identified that the Directive presented *commercial opportunity* for health care providers:

> …both in marketing their services to patients in other EU countries and in seeking co-operation agreements or joint ventures with other health care providers…[with] an opportunity for trusts with a strong brand or offering specialist treatments with high success rates to encourage applications from health tourists as a means of boosting income.[31]

With such a focus on revenue opportunity, and the Commission's clear guidance that 'SSGIs that are economic in nature are SGEIs',[32] it is unsurprising that the provisions of the new Directive place obligations on the Member States similar to those public service obligations we would associate with the large 'economic' network service sectors. Under these obligations Member States are required to provide contact points for patients to obtain information on the general conditions, criteria and formalities associated with access to cross-border health care; to ensure that such information be applied in an objective, transparent and non-discriminatory way; that transparent complaints procedures are in place; that patients can have access to a record of their treatment and, with some 'necessary and proportionate' caveats that the principle of non-discrimination with regard to nationality shall be applied to patients from other Member States.[33] Such obligations now sit alongside the UKs Regulations that have entrusted Primary Care Trusts (PCTs), as the commissioning agents for NHS services, with responsibility for putting in place transparent procedures and criteria for dealing with prior authorisation requests for cross-border treatment and reimbursement.[34]

20.3.2 Local Authority Provision of Social Services

Discussion of the full range of social services provided through the statutory obligations placed on local authorities is beyond the scope of this chapter. What this chapter provides is a brief overview of some key social service sectors that emphasise the diversity of responsibility allocated to local government. The adult social care and community care sectors of social services are both closely associated with the health and well-being of vulnerable citizens and both represent areas where commissioning and procurement has encouraged competition and choice through the use of private and third sector providers. Such arrangements provide for a range of service provision models in which local authorities may

[30] Harvey and Maybin 2010.

[31] Ibid. p. 11.

[32] SEC(2010) 1545, p. 17.

[33] Directive 2011/24/EU, Articles 4 and 6.

[34] Department of Health 2010, para 4.5.

choose from in-house (public sector) supply; contracted out sole supply to private and third sector providers; the development of quasi-market provision and, over time, the development of end-user driven market choice:

> The decision about which public services model to use will depend on a range of factors such as the ability of end users…to exercise choice, the number of existing and potential suppliers and the nature of the particular public service and the market.[35]

In contrast, the provision of children's services and welfare has become even more firmly entrenched in the public realm than it did over two decades ago, although the rhetoric of 'individual choice' in relation to the selection of service providers in this sector has emerged as government policy.[36]

20.3.2.1 Adult Social Care

Responsibility for adult social care and carers rests with local social services authorities which provide or arrange for the provision of a range of services through social services departments, and in some cases by health authorities and other organisations. Examples of such services include care homes, day centres, equipment and adaptations, meals and home care. The range of persons who may receive these services include older people, people with learning disabilities, physically disabled people, people with mental health problems and carers. Adult social care also includes the mechanisms for delivering these services, such as assessments and direct payments, and the safeguarding of adult procedures that are primarily the responsibility of social services departments. In law, the term 'community care services' has a specific meaning under section 46(3) of the NHS and Community Care Act 1990[37] and is defined as services which a local authority may provide or arrange to be provided under any of the following provisions:

> Part 3 of the National Assistance Act 1948;
> Section 2 of the Chronically Sick and Disabled Persons Act 1970[38];
> Section 45 of the Health Services and Public Health Act 1968;
> Section 254 and Schedule 20 of the NHS Act 2006;
> Section 192 and Schedule 15 of the NHS (Wales) Act 2006; and
> Section 117 of the Mental Health Act 1983.

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[35] Office of Fair Trading, Commissioning and Competition in the Public Sector, 2011, p. 24. Available at: http://www.oft.gov.uk/shared_oft/reports/comp_policy/OFT1314.pdf (last accessed on 12 April 2011. For a discussion on the ability of end-users (consumers) to exercise choice, see Davies 2011.

[36] HM Government 2011, paras 3.3, 4.5 and 6.8.

[37] Law Commission 2008, p. 1.

[38] Section 2 of the Chronically Sick and Disabled Persons Act 1970 is included by virtue of being an extension of Section 29 of the National Assistance Act 1948 as determined in case law. See, High Court QBD, *R* v. *Kirklees MBC ex p Daykin* (1997–1998) 1 Community Care Law Reports 512.

The Health and Social Care Act 2008 established the Care Quality Commission (CQC) as the regulator of all health and adult social care services. The Act defines the Commission's powers and duties, and represents the modernisation and integration of health and social care. It contains some new powers of enforcement that were not held by any of the predecessor organisations, the Commission for Social Care Inspection, the Healthcare Commission or the Mental Health Act Commission. The CQC is the statutory regulator for adult healthcare in England, with responsibility for the registration, inspection and promotion of quality care for adults in NHS, charitable and private hospitals; private, local authority or charitable care homes; and care or support delivered directly into a person's own home. Its regulatory function also extends to the registration of primary dental care, primary medical services and independent ambulance services. In addition to registering with the CQC, care providers in England have been required to comply with The Health and Social Care Act 2008 (Regulated Activities) Regulations 2010.

The essential standards of quality and safety set out in the 2008 Act and the Regulations 2010 consist of 28 requirements and associated outcomes. Amongst these, the statutory provisions reflect the individualistic and outcome focussed model whereby people are expected to experience effective, safe and appropriate care, treatment and support that meets *their* needs and protects *their* rights in clean environments, with effective management, trained staff and respect for human rights.

20.3.2.2 Community Care

Community care is a complex area providing services mainly to adults who have care needs that are arranged or provided by the local authority: for example, to help individuals to carry on living in their own home and retain as much independence as possible. Such community care services may include home care services providing help with personal tasks such as bathing and washing, getting up and going to bed, shopping and managing finances; home helps to provide assistance with general domestic tasks; adaptations to the home that could include the installation of a stair lift or downstairs lavatory, the lowering of kitchen work tops or the fitting of hand rails in the bathroom; the provision of meals; or recreational and occupational activities. Provision of such services is subject to a needs assessment by the local authority for anyone who appears to need a community care service because they are elderly, disabled or suffering from a physical or mental illness. Such assessments may involve a number of specialists and could involve a social worker, a physiotherapist and/or an occupational therapist.

The rules governing which community care services must be paid for, and how much can be charged, are complicated and may vary from one local authority to another with some local authorities only charging for selected services while others may charge for all services that they are allowed to charge for. However, for those who live in Scotland and are aged 65 or more, personal care or personal support care at home is provided free of charge.

20.3.2.3 Children's Services and Welfare

The Children and Young Persons Act 1969 introduced compulsory measures for local authorities to take over the parental rights of a child. This was followed by provisions in the Local Authority Social Services Act 1970 that brought together the hitherto disparate areas of social work into generic local authority Social Services Departments. The principle responsibilities for the local authority are the safeguarding and promotion of the welfare of children in their area who are in need, including disabled children, and so far as is consistent with that duty, to promote the upbringing of such children by their families. The local authority is under a duty to investigate where a child is suffering, or likely to suffer, significant harm and, in court proceedings to apply a welfare checklist that includes the wishes and feelings of the child. Comprehensive reform of child law was introduced by the Children Act 1989 that brought together public and private law provisions for the first time whilst removing the link with the criminal law for young people. The provisions of the 1989 Act can be seen as an attempt to reduce the intervention of the state in the affairs of the family on the basis that parents are responsible for looking after their children. The provisions of the 1989 Act did however introduce the concept of *likely* significant harm into the threshold for care and supervision orders and gave local authorities greater powers to investigate actual or suspected child abuse.

After the 1997 election of the New Labour government, and despite ongoing developments and reviews of child care provisions during the 1990s and later, structural problems with the coordination of child welfare agencies were highlighted with the death of 8-year-old Victoria Climbié.[39] Prompted by the circumstances leading up to her death, during which the family were known to 'four different local authority social service departments, two hospitals, two police child protection teams and a family centre run by the NSPCC (National Society for the Prevention of Cruelty to Children)',[40] an inquiry was established under Lord Laming. Published in 2003, the report has been presented as providing the opportunity for introducing 'wide-ranging and radical changes…[under which] the tragic circumstances experienced by Victoria Climbié mean that the role of the state will become broader, more interventive, and regulatory at the same time.'[41] Contrasting with the other sectors of social services in the UK that may be characterised by marketisation and private sector delivery, Parton argues that this *expansion of the public role* has 'major implications on civil liberties and human rights of the citizen'.[42]

[39] Parton 2008.

[40] Ibid. p. 167, n. 3.

[41] Ibid. p. 167.

[42] Ibid.

The Children Act 2004, and specifically the change for children programme in England[43] introduced after the Laming Report,[44] provided for the establishment of a new Children's Commissioner for England, who also has a broader UK role for reporting on non-devolved matters, and has counterparts in Wales, Scotland and Northern Ireland. The role of the Commissioner is to raise awareness of the best interests of children and young people, to report annually to Parliament, and to look at how bodies, including Government and the public and private sectors, listen to children and young people. The Commissioner is able to investigate individual cases that have wider implications for public policy, highlight failures in complaints procedures and make recommendations for improvements.

Under the Act, Local Authorities have a duty to make arrangements to promote co-operation between agencies in order to improve children's well-being and key partners have a duty to take part in those arrangements. The Act also provides a new power to allow pooling of resources in support of these arrangements and creates a duty for the key agencies who work with children to put in place arrangements to make sure that they take account of the need to safeguard and promote the welfare of children when doing their jobs. Local authorities are obliged to set up statutory Local Safeguarding Children Boards and, for those local authorities identified as less than excellent under a Comprehensive Performance Assessment, to establish a Children and Young People's Plan. Local authorities have also been required to put in place a Director of Children's Services and to establish an integrated inspection framework to inform future inspections of all services provided for children. Only very recently in the Open Public Services White Paper do we find a new rhetoric calling for 'individual choice' in relation to the selection of providers and new powers for local community or voluntary sector organisations to challenge and run children's services.[45]

20.3.3 Social Housing

Provision of social housing in the UK began as a welfare service typically allocated according to need. Although local council housing has a history stretching back to 1919, it was a post Second World War housing boom that saw the social rented sector expand to over 5 million homes that, by 1980, accounted for almost a third of the total housing stock. By the mid-1970s however poor asset management and public spending cuts were marking the beginning of a decline in local authority housing provision: a decline that was accelerated by the

[43] HM Government, Every Child Matters: Change for Children, 2004. Available at: http://media.education.gov.uk/assets/files/pdf/e/every%20child%20matters%20change%20for%20children.pdf (last accessed on 18 April 2011).

[44] Laming 2003.

[45] HM Government 2011, see also this chapter, Sect. 20.5.3.

Conservative administration after 1979 such that by 1990 'the era of council house building was effectively over'.[46]

A characteristic of the British social housing sector was once the major role played by local authorities and the relationship between local authority housing and income distribution, where the local authority housing sector was 'dominated by households in the lowest two income deciles'.[47] With the demise of local authority rented accommodation, new pressures emerged through central government reforms that Cowan and McDermont argue ushered in a new post-public sector, post-welfarist reality that marks the use of *social housing* as a label for a complex mesh of housing tenure.[48] The Local Government, Planning and Land Act 1980 had dramatically influenced the capital financing framework for local authorities, curbing new housing development such that by the late 1980s social housing, in contrast to public housing, was being provided through a mixed economy comprising the residual council stock, private landlords and housing associations. Housing associations became the dominant providers of new social housing stock with access to private sector loans as private sector undertakings and, with the introduction of the Housing Act 1988, were able to offer assured tenancies equivalent to private-sector landlords. The policy objective of this reform was based on the reasoning that:

> There has been too much preoccupation with controls in the private sector and mass provision in the public sector. This has resulted in substantial numbers of rented houses and flats which are badly designed and maintained and which fail to provide decent homes.[49]

The Government's rationale was to provide greater choice *to the customer* with a shift towards the private sector as a consequence of the public sector having paid little attention to the wishes or views of tenants. The emphasis on greater *consumer choice* could, it was argued, only be achieved by offering a variety of forms of ownership and management that would help 'to break down the monolithic nature of large estates'.[50]

The contemporary UK model for social housing is now based primarily on a private rented sector that is demarcated by the parameters of need, affordability and regulation. The definition of need is not fixed but changes over time such that ideas of who can/should be classified as 'in need' is 'mobilised' by central government through statutory guidance under a provision made in s169 of the Housing Act 1996.[51] Because the definition of housing need may change over time, Cowan and McDermont make the point that 'housing need is a device that is capable of

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[46] Pawson 2006, p. 769.

[47] Ibid. p. 770.

[48] Cowan and McDermont 2008, p. 161.

[49] Secretaries of State for the Environment and Wales, Housing: the Government's Proposals, Cm 214, London, HMSO, 1987, para 1.3.

[50] Ibid. para 1.4.

[51] Cowan and McDermont 2008, pp. 166–168.

manipulation': manipulation that they suspect extends beyond the remit of housing into broader welfare principles that have developed from an originally inclusive device into one of exclusion.[52] They also identify that: '[p]ersonal subsidy in the form of housing benefit payments to tenants in private rented accommodation intimately links part of that sector with the social sector'.

The enabling of low-income and vulnerable households to pay high rents through the provision of welfare benefit is, they suggest, 'precisely what has made it possible for local authorities to use the private sector to meet their statutory duties under homelessness legislation.'[53] Affordability has not confined social housing to the not-for-profit sector and where the Conservative government of 1995 introduced the concept of social housing as a 'product', the Housing Act 2004, introduced by the then Labour government, included provision for private sector social housing to become possible on a for-profit basis. Such private sector providers are not subjected to registration but are regulated under a contract and accreditation system initially administered by the Housing Corporation[54] but now, following the Housing and Regeneration Act 2008, by two new bodies, the Homes and Communities Agency and the Tenant Services Authority (TSA).

In its second biennial report on social services of general interest the Commission stresses an increasingly important role for the self-regulation of binding quality standards and recognises the English co-regulation framework, developed by the TSA, that relies on service providers developing standards with the involvement of tenants and according to local demand.[55] The UKs relationship with the Commission on matters of social housing has not been without its tensions, particularly in the area of public procurement and related tendering processes. Failure by local authorities, and housing associations registered as social landlords, to adhere to the transparency requirements of EU public procurement directives have led to the Commission pursuing infringement proceedings against the UK in the form of 'reasoned opinions' under what is now Article 258 TFEU.[56] Such difficulties in either the understanding or application of EU procurement rules to SSGI are not specific to the UK and the Commission argues, generally, that public authorities and service providers active in the social field often perceive EU rules as 'an obstacle to organising and financing high-quality social services' or wrongly assume that the rules 'entail liberalisation, privatisation or deregulation of the social services sector'.[57] The report asserts that

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[52] Ibid. pp. 170 and 172.

[53] Ibid, 174.

[54] Cave 2007, p. 34.

[55] Commission, *Commission Staff Working Document: Second Biennial Report on Social Services of General Interest*, SEC(2010) 1284 final, 22 October 2010, p. 48.

[56] For example, Glasgow Housing Association, Reasoned Opinion IP/09/1458 of 8 October 2009 and City of York Council, Reasoned Opinion IP/09/1000 of 25 June 2009. The case against the City of York was later closed with the Commission stating that 'Taxpayers can now be sure that the contract will be awarded to the company offering best value for money…', IP/10/507 of 5 May 2010.

[57] SEC(2010) 1284 final, p. 71.

the EU procurement rules allow the selection of the most cost-effective service supplier and 'largely take into account the specific nature of social services.'[58] In particular, the report highlights the simplified circumstances under which a grant of aid for the financing of SGEIs under the Monti-Kroes package of measures, subject to Article 106(2) TFEU, applies both to SGEIs and SSGI that have an economic nature.[59] It also makes clear that the granting of special or exclusive rights to certain service providers is subject only to the same justifications and procedural transparency as those applying to SSGIs and that those social services to which the Services directive does not apply, still fall within the field of application of the internal market rules. For its part, the UK Government, in its guidance on how the state aid rules impact upon funding for the delivery of public services, emphasises the benefits of the block exemption provisions for SGEIs that '…clears all compensation for social housing…regardless of the amount, if the conditions are met' and covers '[a]id of any amount for…social housing—provided that providers are carrying out SGEIs.'[60]

20.4 Organisation and Delivery

20.4.1 Blurred Boundaries and Legal Issues

The blurring of the public/private divide in the UK has become a characteristic of social services provision and leads to the debate in national law of what may define a body as 'public' and therefore subject to the public law provision of judicial review. The field is further complicated by the overlap in social service delivery where healthcare merges with long-term residential care and where residential care merges with the provision of social housing. The debate reflects societal concerns of accountability arising out of contemporary privatisation policies and the corresponding expansion of private law into hitherto public domains. In *Servite Houses*, such concerns were suggested by Moses J. as raising one of the most significant issues in public law, and in which there was so often a conflict between incommensurable values.[61] This debate however is not only concerned with the definition of what may constitute a 'public body' it extends into a human rights debate concerning the potential right to *respect* for privacy, home and family life

[58] Ibid.

[59] Ibid. p. 72.

[60] BIS, Department for Business Innovation and Skills, Guidance on How the State Aid Rules Impact Upon Funding for the Delivery of Public Services Including Services of General Economic Interest (SGEI), 2009, pp. 2 and 15. Available at: http://www.bis.gov.uk/files/file53292.pdf. (last accessed on 23 March 2011).

[61] High Court QBD, *R.* v. *Servite Houses ex p. Goldsmith* Case Analysis I695DF140E4281(2001) 33 H.L.R. 35 [2001] A.C.D. 4.

enshrined in Article 8 of the European Convention on Human rights and Fundamental Freedoms (ECHR) and the public *function* of 'bodies' providing services within the meaning of Section 6(3) of the Human Rights Act 1998 (HRA).

Servite Houses concerned a housing association residential care home in which the local authority, Wandsworth, had arranged for two elderly women to be housed. They were initially assured by the housing association that they could stay there for life, as long as their health allowed it but, 3 years later, the charitable housing association determined the home to be uneconomical and moved to close it. In the ensuing litigation, judicial review was held not to be available against the private housing provider, because its relationship with the local authority was *commercial*. Separately, and engaging with a functional debate in *Aston Cantlow*,[62] the House of Lords provided some analysis of section 6(3) of the Human Rights Act, identifying that, on the one hand, a 'core' or 'standard' public authority body which is entirely governmental in nature must comply with ECHR rights. Yet, on the other hand, section 6(3)(b) was also held to envisage a second kind of public authority, of a 'functional' or 'hybrid' nature, in which certain of its functions may be functions of a public nature but that in relation to any of its 'private' acts, such a body is not acting as a public authority. An analysis that still leaves unclear what definition should be attached to 'private' acts.

The Court of Appeal has consistently upheld that a body which merely acts on behalf of the government in carrying out a duty under a *contractual* obligation does not take on the public character of government. Such a public character requires a continuing operational relationship that goes beyond contractual obligation and regulation with regard to the way in which the services are provided. In his review of the case law concerning the contemporary provision of social housing by registered social landlords, Alder concludes that in a judicial review context '*Servite* suggests that, a fortiori, they would not be regarded as exercising public functions since their powers are essentially contractual' yet, in 'the human rights context it is arguable that they could be functional public authorities in relation at least to their stewardship of publicly funded projects'.[63]

The blurred boundaries of health, social care and social housing provision are particularly relevant to the growing market in residential care for the elderly where, distinct from provision in the general housing association sector, residential care is dominated by typically small scale, for-profit, private companies.[64] Cowan and McDermont identify that as many as 300,000 UK residents of care homes are funded by local authorities and that of all the care homes in England and Wales, in excess of 90 % are run by the private or voluntary sector.[65] Amongst the largest of these companies, Southern Cross, provides residential, nursing, respite, dementia,

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[62] High Court, Chancery, *Aston Cantlow Parochial Church Council* v. *Wallbank* [2004] 1 *AC* 546.

[63] Alder 2007, pp. 63–64.

[64] Drakeford 2006, p. 933.

[65] Cowan and McDermont 2008, p. 178.

end of life care and care for people with physical or learning disabilities to over 37,000 residents. Following a dispute between Southern Cross and the family of one of the residents, YL, an 84-year-old female suffering from dementia, YL was threatened with eviction. YL sought to resist the eviction order, relying on a human rights argument concerning respect for private and family life, provided for by s.6(3)(b) HRA and Art.8 ECHR. At issue was whether a privately-owned care home, when providing care to a resident pursuant to agreements made with a local authority under s.21 of the National Assistance Act 1948 Act, was performing functions of a public nature for the purposes of s.6(3)(b) of the HRA and was thus a public authority obliged to act compatibly with Convention rights. The subsequent litigation in the case of *YL*[66] illustrates a continuing trend in the expansion of private law and competition into the area of SSGIs. Birmingham City Council was the local authority with the statutory duty of making the arrangements for the provision of residential accommodation for YL under the 1948 National Assistance Act and had a contract with Southern Cross for them to provide such services and to receive payment for her placement. By a majority, the House of Lords found against YL with one opinion reasoning that:

> …Southern Cross is a company carrying on a socially useful business for profit. It is neither a charity nor a philanthropist. It enters into private law contracts with the residents in its care homes and with the local authorities with whom it does business. It receives no public funding, enjoys no special statutory powers, and is at liberty to accept or reject residents as it chooses…and to charge whatever fees in its commercial judgment it thinks suitable. It is operating in a commercial market with commercial competitors…. the fees charged by Southern Cross and paid by local or health authorities are charged and paid for a service. There is no element whatever of subsidy from public funds….It is simply providing a service or services for which it charges a commercial fee.[67]

This analysis by Lord Scott continues a trend in domestic litigation that has been followed since the appearance of the HRA where courts have had to consider the hybrid nature of 'public authority' where the delivery of social services is contracted out to private providers. In *Poplar Housing v Donoghue*[68] the Court of Appeal's reasoning strongly suggested that for a private entity to be bound by the obligations of the HRA it would require public characteristics that extended beyond a mere contractual relationship, even if the private undertaking was a not for profit charity.[69] Yet, as Palmer points out in her analysis of the *YL* judgment, because 'a contract is the usual vehicle to achieve privatisation or contracting out,

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[66] House of Lords, *YL (by her litigation friend the Official Solicitor) (FC) (Appellant)* v. *Birmingham City Council and others (Respondents)* Case Analysis I854[2008] 1 *A.C.* 95 [2007] 3 *W.L.R.* 112 [2007] *H.R.L.R.* 32 [2007] *H.L.R.* 44.

[67] Ibid. per Lord Scott, paras 26–27.

[68] CA Civ, *Poplar Housing and Regeneration Community Association Ltd* v. *Donoghue* [2001] *EWCA Civ* 595; [2002] *Q.B.* 48; [2001] 3 *W.L.R.* 183; [2001] 4 *All E.R.* 604.

[69] See also, High Court, QBD, *R (on the application of Heather and others)* v. *Leonard Cheshire Foundation and another*, [2002] 2 All ER 936; [2002] *EWCA Civ* 366.

the majority's conclusion is likely to dramatically limit the effect of section 6(3)(b) HRA.'[70] Horizontal private law arrangements dominate the relationships between the providers and users of social services such that Palmer concludes that 'the approach of the House of Lords to human rights protection, where former public functions are now administered by private bodies, leads to a gap in human rights protection in the United Kingdom and is antithetical to the development of a human rights ethos in the exercise of power by private institutions.'[71]

20.4.2 Devolution and the Quasi-Federal Nature of UK Legislative Competence

The Scottish Parliament and the Northern Ireland Assembly have a primary legislative competence in areas of devolved responsibility that includes health, social work and housing. They also exercise executive responsibility in other matters where the primary responsibility remains with Westminster. The National Assembly for Wales currently enjoys a somewhat lower level of competency with only secondary legislative and executive responsibility for areas that include health, personal social services and housing and a need for Westminster's approval for any changes to primary laws. Keating identifies that currently there remains a high degree of functional dependence between devolved areas and areas of competence reserved centrally by Westminster. This he identifies 'is particularly noticeable in welfare state matters where, generally speaking, Westminster has reserved cash payments while personal social services…and housing are devolved.' However, Keating also highlights tensions that are 'already evident' in the application of housing benefit where the Scottish Executive has tried to claim back from the Westminster funds that would be saved by its new scheme for financing long-term care for the elderly.[72]

The common UK welfare state currently provides for practical and political limitations to the tensions associated with devolution. The shared assumptions of a post-war welfare state with broadly equivalent basic services free at the point of use engender a 'social citizenship' in the UK that has been linked to a *British* identity. However, Scotland's decision concerning long-term care for the elderly has made provision for non-means tested, free personal and nursing care, merely dependent on the age of the individual and whether they live in a care home or in their own home[73] provided sufficient a test to such an identity as to provoke 'politicians and the media into discovering all manner of 'anomalies''.[74] We should not overstate

[70] Palmer 2008, p. 601.

[71] Ibid. p. 587.

[72] Keating 2001.

[73] Community Care and Health (Scotland) Act 2002.

[74] Keating 2001.

the issues and, as Keating points out, only 'marginal differences in welfare state provision are likely under devolution…but radical changes would destabilize the whole settlement'[75] and in that context he suggests that:

> … if a future government were extensively to privatize the welfare state, promoting private schools and medicine and charging for services, the devolved administrations would automatically lose their corresponding public funding and have to respond. Alternatively, they would seek to reopen the settlement and gain their own powers of taxation.[76]

20.4.3 Regulation and the Social Care Market

Market-based regulation and competition in social services in the UK has as its objectives lower costs and improved responsiveness to individual need. However, Enjolras argues that due to high entry costs and dependency upon public funding there is insufficient competition among service providers, and limitations on performance evaluation that may limit the efficiency of competitive regulation.[77] He cites the increased use of public tendering as a source of transaction costs that should be integrated into the analysis when comparing the efficiency of various provision modes. With continuity an important consideration in the context of social services provision, long-term relationships between providers and the regulator usually develop, limiting the effect of competitive tendering and contracting. More generally, difficulties associated with the evaluation of performance and service quality within the field of SSGIs may also limit the effectiveness of market based regulation. Evaluative interventions are typically subject to lengthy investigations whilst outcomes and service quality measures are complex and costly to obtain with informational asymmetries between provider and regulator limiting the regulator's ability to assess performance, quality and costs.[78]

Enjolras' paper presents a discussion of the issues of a developing role for society in the governance and modernization of social services processes at the European level. He draws the distinction between 'two radically different regulative conceptions reflected into two different governance regimes: market based or competitive governance v civic-based or partnership governance.'[79] His study of quasi-market regulation, he suggests, may be exemplified by the English regulative framework within the field of long-term care services. Long-term care services in the United Kingdom are financed and organised differently according to whether they are classified as healthcare or social care. Health services are funded

[75] Ibid.

[76] Ibid.

[77] Enjolras 2009, p. 284.

[78] See Ibid.

[79] Ibid. p. 274.

by central government from tax revenues. Social care services are funded by local government (known as local authorities) that generate revenue from local taxes (known as council tax) and user charges in addition to receiving central government grants. Since the 1980s, as long-stay hospital provision has declined and residential care and nursing home provision have increased, there has been a shift away from free at the point of delivery social care services towards means-tested services. Enjolras identifies:

> The process of accessing public services involves an assessment of care needs and arrangement of a package of care required to meet those needs. A care manager (typically a social worker employed by the local authority) may be involved in co-ordinating the assessment and organisation of care….Users, their families and potential providers are all involved in the process of decision-making. Once a care package has been agreed, the user is means-tested.[80]

Individuals assessed as eligible for a package of care can opt for a direct payment so that they can buy equipment or services themselves. Similarly, not every demand for care is mediated by public authorities and people can directly approach independent sector home care providers or care homes, but there are no public subsidies other than a contribution to *nursing* home fees, funded by the NHS, for health needs aspects of a person's care.

20.5 Recent Developments

At the time of writing, social services in the UK are faced with measures to introduce radical changes that are positioned to address economic challenges and modernising efficiency but that also, inevitably, give rise to ideological debate as the design of components of the overall model are further shifted away from the Beveridge model of the mid-twentieth century. Three key legislative developments, the Welfare Reform Bill 2011,[81] the Health and Social Care Bill 2011[82] and the Open Public Services White Paper[83] are now progressing through the legislative process.

20.5.1 Welfare Reform Bill 2011

The Bill introduces *inter alia*, an integrated working age benefit called universal credit as a personal independence payment scheme to replace an existing disability

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[80] Ibid. p. 285.

[81] Available at: http://services.parliament.uk/bills/2010-11/welfarereform.html.

[82] Available at: http://services.parliament.uk/bills/2010-11/healthandsocialcare.html.

[83] Available at: http://files.openpublicservices.cabinetoffice.gov.uk/OpenPublicServices-WhitePaper.pdf.

living allowance; a restriction on housing benefit entitlements for social housing tenants whose accommodation is larger than they need; and a cap to the total benefit that may be claimed.

Universal credit is intended to replace existing working and child tax credit systems, housing benefit, council tax benefit, income support and other income related allowances and will be paid to people both in and out of work. It will include a basic standard allowance with additional elements for those with responsibility for children or young persons, housing costs and other particular needs. However, to qualify for assistance, claimants are obliged to meet work related requirements that will focus on interviews, preparation for work, job search and/or availability dependent on the claimant's particular circumstances. Benefit sanctions are intended for failure to meet such work-related requirements and there is provision for a taper to reduce benefit as earnings increase, although hardship payments are intended to be available in certain circumstances. Amongst the critical commentary, it has been suggested that these proposals will force single parents with children aged over five to seek work or suffer loss of benefits and, that whilst universal credit will improve income for 2.7 m households, around 1.7 m households will receive lower benefits.[84]

The personal independence payment (PIP) is to have two components, a daily living component and a mobility component. The daily living component comprises a standard rate where the individuals' ability to carry out activities is limited by their physical or mental condition and an enhanced rate where their daily living activity is *severely* limited. Similarly, the mobility component also comprises a standard and an enhanced rate dependent on the degree to which the individuals' ability to carry out mobility activities is limited by their physical or mental condition.[85] Amongst the most contentious of the proposals, it has been argued that this change will initiate a 20 % reduction in the costs of the existing disability living allowance, a saving that the government would argue is essential given a 30 % increase in the number of claimants in the 8 years to 2011.[86]

Under the proposed changes housing support would be reduced with a reported negative effect on around 1.4 million households. Benefits are to be pegged to the consumer prices index (CPI) rather than the retail price index (RPI), breaking the link between housing costs and the amount of housing benefit such that indexed benefits can be expected to lag behind rent increases.[87] Further changes to housing policy would see working age claimants of housing benefit who live in local

[84] See Ramesh 2011.

[85] Draft regulations for Personal Independence Payment are available at: http://www.dwp.gov.uk/policy/welfare-reform/legislation-and-key-documents/welfare-reform-bill-2011/personal-independence-payment-briefing/.

[86] DWP, Government's response to the consultation on Disability Living Allowance reform, 2011, p. 3, Available at: http://www.dwp.gov.uk/docs/dla-reform-response.pdf (last accessed on 18 May 2011).

[87] UK Government Impact Assessment, Housing Benefit: Uprating Local Housing Allowance Rates by CPI from April 2013, p. 2. Available at: http://www.dwp.gov.uk/docs/hb-lha-cpi-uprating-wr2011-ia.pdf.

authority and housing association property that is considered to be too large are to be required to make up any shortfall between the rent and their housing benefit entitlement or move to smaller, and more inexpensive, accommodation.[88] A policy intended to contain housing benefit expenditure in the social rented sector, and to align the benefits in that sector with those applying to claimants in the private rented sector where housing benefit is based on the reasonable accommodation needs of the household.

Surviving a proposed amendment by opposition politicians the Bill retains provisions relating to the administration of social security benefits that include the capping of all benefit payments at £26,000 for a workless family, and £18,000 for a single person. Yet opposition arguments identify that whilst the savings associated with the cap may be clear, the costs are less certain. Karen Buck, Labour Member of Parliament for Westminster North suggests, for example, that the benefit cap will interact 'in a destructive way with the universal credit and will… have all kinds of perverse and unintended consequences.'[89] As tensions emerge in the political dialogue between the Conservative and Liberal Democrat coalition partners it is unclear as to how radical the actual effects of this Bill will be as it takes effect in law.

20.5.2 Health and Social Care Bill 2011

The Labour Government's rhetoric of increasing democratic accountability and public voice in the health service delivery model is reflected in the current Coalition Government's Health and Social Care Bill 2011. The Bill proposes to create an independent NHS Board to allocate resources and provide commissioning guidance; to increase GPs' powers to commission services on behalf of their patients; promote patient choice and to reduce NHS administration costs. It sets out to develop 'Monitor', the body that currently regulates NHS foundation trusts, into an economic regulator to oversee aspects of access and to encourage competition in the NHS, and to establish a new independent complaints body to make the NHS more accountable to patients and the public. To achieve such aims, the Bill intends to compel all hospitals in England to become semi-independent foundation trust hospitals and to radically cut bureaucracy and management costs by 45 %.

Inevitably contentious, the Bill 'has received lacklustre support from many staff groups, open hostility from others and has been lambasted in much of the press. This opposition was not merely political—it stemmed from genuine fear and anxiety that the reforms would not deliver the improvements that we all want.'[90]

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[88] UK Government Impact Assessment, Housing Benefit: Size Criteria for People Renting in the Social Rented Sector. Available at: http://www.dwp.gov.uk/docs/eia-social-sector-housing-under-occupation-wr2011.pdf.

[89] Buck 2011.

[90] NHS, Future Forum: Summary Report on Proposed Changes to the NHS, 2011, p. 9. Available at: http://webmail.le.ac.uk/CFS%20OWA%20Logon.asp. (last accessed on 13 June 2011).

In response to such comment and criticism, in April 2011, the Government announced that it would take advantage of a natural break in the legislative timetable to 'pause, listen and reflect'. It established a 8-week listening exercise and called for reflection on the most contentious areas which centred on the four core themes of choice and competition, clinical advice and leadership, patient involvement and public accountability and education and training.

Established as an independent advisory panel, the NHS Future Forum comprised of clinicians, patient representatives, voluntary sector representatives and others from the health field. It was charged with encouraging engagement with the listening exercise, to listen to people's concerns and to report back to the Prime Minister, Deputy Prime Minister and the Secretary of State for Health outlining improvements to the modernising provisions of the Bill. Reporting back on 13 June 2011, the NHS Future Forum, whilst having acknowledged a genuine need for reform, have recommended a number of significant changes that, if adopted by the Government, would reduce the degree of marketisation of health services that were set out in the original Bill. Amongst its proposals, the NHS Future Forum report suggests:

- a move away from the idea of handing the NHS budget to GPs towards a 'genuine multi-professional involvement and leadership at all levels in the system…[with] input to the commissioning process.'[91]
- that the concept of 'choice' to be about more than just choice of provider, that the exercise of choice should 'help support better quality and more integration between health and social care.'[92]
- that '[m]ost importantly, the Bill should be changed to be very clear that [the regulator] Monitor's primary duty is *not* to promote competition, but to ensure the best care for patients. As part of this, they must support the delivery of integrated care.'[93]
- 'that shared decision making should be the norm, and that the declaration of 'no decision about me, without me' must permeate the culture throughout the health and care system….that the definition of 'patient involvement' in relation to the duty 'to involve' and duty 'to promote patient involvement' is made stronger and clearer in the Bill.'[94]
- the taking of 'sufficient time to ensure an orderly and safe transition to the new arrangements for planning and commissioning education and training.'[95]

[91] Ibid. p. 28.
[92] Ibid. p. 24 [emphasis added].
[93] Ibid. p. 25.
[94] Ibid. p. 26.
[95] Ibid. p. 29.

20.5.3 The Open Public Services White Paper

In July 2011, the UK government published its 'Open Public Services White Paper'[96] with the objective of finding ways to deliver better services for less money. Whilst it has a UK wide scope, it recognises the regional autonomy of the devolved administrations in Scotland, Wales and Northern Ireland to determine their own approach to public service reform. Acknowledged as ambitious by the government,[97] the White Paper outlines the government's modernising approach for the organisation and delivery of UK social services. It is an agenda set out on a number of principles for social service delivery where, the rhetoric suggests, individual choice is developed and increased through decentralisation of power and responsibility; where the provision of services is opened up to new providers in voluntary, public and private sectors; where fairness of access is complemented by accountability measures for service providers and sectoral Ombudsman services to champion consumer complaints and enforce choice rights.

Choice is seen as dependent on opening up provision to a range of providers of different sizes with opportunities for existing public sector staff to establish new autonomous organisations within a deregulated public sector environment. The opportunity for such autonomous public service mutuals to flourish is supported through the governments Localism Bill,[98] but other actors will also see opportunities in decentralisation, and John Cridland, Director General of the Confederation of British Industry (CBI) has indicated that whilst 'it is right to recognise the benefits mutuals and smaller providers can offer, the principle of any willing provider also means large firms should be able to bring their expertise to bear.'[99]

For individual services the White Paper indicates that the government will explore legislating to enshrine an overarching *right to choice*,[100] a choice that is to be balanced against a principle of accountability and responsiveness extended to all organisations in receipt of public money.[101] For those services amenable to commissioning, the default will be one where the state commissions' service from a range of diverse providers through a process of competitive bidding in which payment by results and/or incentives may be built into contracts.[102] Quality of service in this open services provision model is to be ensured through licensing

[96] HM Government 2011.

[97] Ibid. para 4.8.

[98] Clause 68, Localism Bill. Available at: http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0090/2012090v1.pdf.

[99] CBI, Let's Get on With Public Service Reform, CBI News Briefing, 2011. Available at: http://www.cbi.org.uk/ndbs/press.nsf/0363c1f07c6ca12a8025671c00381cc7/b138dc6bbeea19e4802578ca0052a842?OpenDocument, (last accessed on 14 September 2011).

[100] HM Government 2011, para 6.7.

[101] Ibid. para 1.23.

[102] Ibid. para 5.2.

and registration a by sectoral regulator and through the development of redress processes making 'the most effective use of the Ombudsmen.'[103]

The rhetoric is of modernisation, but the proposed model has stark parallels with the operating models for SGEIs in the liberalised networked services area and it is difficult to see how the economic arrangements inherent in provision of decentralised social services could not be categorised as SGEIs, or perhaps 'welfare SGEIs', rather than SSGI at the EU level. The general interest criterion in each of the social service sectors is being developed through specific public service obligations in the form of the quality standards defined by the regulator. In the opinion of the UK government, open public services have the potential to raise the average performance of public services and to 'narrow the gap between outcomes for different social groups' but only if 'we recognise the limits of a pure market approach, and ensure that we intervene in public service markets to advantage those who would otherwise lose out. We are therefore establishing financial incentives and regulatory interventions to tilt the playing field to ensure fair opportunities.'[104]

20.6 Conclusions

The UK model for social services has a long history marked by frequent legislative change and overlapping, interrelated, economic, social, organisational and political challenges. Sector specific and framework primary legislation is extensive with the flexibility of secondary legislation provided for by statutory instruments. For many sectors, contemporary social services can be characterised within a needs and rights-based framework in which services are delivered through a marketised hybrid of public and private sector provision. The recipient of services has come to be recognised as a consumer for whom personalisation of the service has become necessary and regulation of service provision essential. Even with regard to children's welfare, ensuring a *choice of provider* within a regulated environment has become central to the government's agenda.

The approach to modernisation is increasingly challenging the traditional ethos of the welfare state and traditional notions of solidarity. New structural paradigms of social service organisation call for multiple providers in which competition and choice are seen as the basis for quality improvements. As a consequence, we find the appearance of an economic component that is evident in the private law relationships that exist between public authorities and service providers, and between the service providers and the users. The range of UK social service provision encompasses, in addition to health, those statutory and complementary social security schemes, and other essential services, provided directly to the

[103] Ibid. para 3.7.

[104] Ibid. para 3.15.

person that are recognised at the EU level as SSGIs.[105] Yet, the prevalence of economic components suggests that any sectoral scrutiny of the UKs social services by the EU institutions would be more likely to result in a SGEI assessment (*welfare SGEI*?): at least according to the Commission's guidance on the application of European Union rules on state aid, public procurement and the internal market.[106]

The recent legislative initiatives of the UK government acknowledge that social services play a preventive and social cohesion role that consists of customised support to facilitate social inclusion, safeguard fundamental rights and support families in caring for the most vulnerable members of society. Yet, if UK social services are likely to attract an *economic* classification, then they will be subject to the provisions of Articles 14 and 106(2), and Protocol 26, TFEU as SGEIs. Such a classification is however not restrictive and acknowledges the 'wide discretion of national, regional and local authorities in providing, commissioning and organising services…as closely as possible to the needs of the users' the 'diversity between various services…and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations' and 'a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.'[107]

Of greater concern is the nature of those *user rights* as called for in Article 1 of Protocol 26 TEU/TFEU. As we have seen, choice of service provider, with funding following choice, is the political mantra for a consumerised social services platform in which, increasingly, the consequences of commercial relationships are placing social outcomes for vulnerable people consequential on their *private law* relationship with the provider. The offsetting of end user service provision to third party providers places *public law rights* at arm's length and restricts the applicability of *human rights* provisions that only apply in a public law setting. Modernisation of social services is presenting new and interesting challenges at the interface of these disparate sources of normative law. With growing economic and demographic challenges to cost containment and funding mechanisms, a better understanding of the legal consequences of social services reform is called for.

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[105] COM(2006) 177 final, p. 4.

[106] SEC(2010) 1545 final, p. 17.

[107] Article 1 Protocol 26 TEU/TFEU.

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Chapter 21
The Provision of Social Services in Italy Between Federalization and Europeanization

Francesco Costamagna

Abstract This chapter examines the Italian system for the provision of social services, by looking at its defining features, its historical development, and those factors that are contributing to reshape it. Particular attention is devoted to the federalist reform and to the impact of EU internal market law.The Italian system has undergone several major changes over the last decade, tentatively moving toward more advanced models developed by other European States. After the Reform of Title V of the Constitution of 2001, the provision of social services is a matter pertaining to regions' and local authorities' exclusive competence. The integrated system introduced at the national level by Law no. 328 of 8 November 2000 still represents a common point of reference. The key features of this system are its universalistic nature, the strong presence of private actors, mainly belonging to the so-called 'Third Sector,' and its federalist structure. The federalization process can surely contribute to make the system more efficient, but, on the other hand, it might represent a major threat for the country's shaky social cohesion. Central authorities would be called upon to act in order to avoid this risk, but so far, they have not made use of the powers conferred to them by the Constitution. The application of public procurement law, mainly of EU origin, is another factor that has contributed to unsettle the regulatory framework, especially with regard to the delivery of these services. Social services have been traditionally shielded against the application of these norms, by making reference to their function and to the nature of their providers, mainly nonprofit entities. Italian judges and, then, lawmakers have gradually changed their attitude, by adhering to the position of the CJEU. The process is still far from complete, as the transition toward a market-based approach is still troublesome.

F. Costamagna (✉)
Faculty of Law, University of Turin, Turin, Italy
e-mail: Francesco.costamagna@unito.it

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Contents

21.1 Introduction

This chapter analyzes the Italian system for the provision of social services. The system and, more generally, the Italian welfare state are experiencing exceptionally hard times, due to the paucity of resources available to fund their functioning in a period of dire economic crisis. In the case of Italy, the situation is worsened by the interplay between the effects of the crisis and other factors—both economic and legal ones—having a more structural character. This is the case, on the one hand, for the high level of public debt, the low productivity rates, and the magnitude of the gray and illicit economy. On the other hand, recent legislative reforms, as well as the impact of EU internal market law, have further unsettled an already fragmented regulatory framework, introducing new elements of confusion.

The present analysis will examine the Italian legal framework concerning social services, focusing, more in detail, on its key features in the light of the ongoing federalist reform and EU law's impact. Federalization and Europeanization are, indeed, two forces that are contributing to reshape the system, affecting both its organization and functioning.

This chapter is structured as follows. The first two sections seek to place the system for the provision of social services within the context of the Italian welfare state, by taking into consideration the latter's main features, as well as offering a brief overview of its historical development. Then, the analysis deals with the legal framework governing the system itself. Preliminarily, there is the need to clarify what the concept of 'social service' means in the Italian legal order, also

comparing it with the definition elaborated at EU level. Subsequently, the analysis focuses on the organization and the functioning of the system, by mainly looking at the most relevant pieces of legislation in this field, its founding principles and the mechanisms for the delivery of social services.

21.2 Main Features and Classification of the Italian Welfare State

The Italian welfare system has a hybrid nature, combining features typical of corporatist regimes with others normally present in social-democratic ones. As for the latter, the main example is represented by the existence of a National Health Service, a universal health care system, established in 1978 following the British scheme. This is why some scholars[1] have questioned the choice of Esping-Andersen[2] to label the Italian welfare state as a corporatist welfare regime. Instead, they proposed a new taxonomy, adding a category—the Southern European welfare regime—to include countries such as Portugal, Spain, Greece, and Italy.[3] Apart from the obvious geographical proximity, all these welfare states share some features that distinguish them from the other groups. The distinctive characteristics are: the fragmentation and ineffectiveness of the social protection system; the presence of a health provision system built according to universalistic principles; a pervasive political 'clientelism' in the management of welfare services, a strong influence of the Church and a major role for the family as welfare provider.

All these features are very much present in the Italian welfare state[4] and, to some extent, they may help to understand why, despite a level of social expenditure broadly in line with the EU average,[5] its results are still unsatisfactory and, in any case, well below those attained by the more advanced European countries.[6]

A first element that must be taken into consideration is the composition of the social expenditure in Italy. Notwithstanding some recent reforms, almost 60 % of the outlays are earmarked for old age and survivors' pensions.[7] Moreover, the Italian system shows another type of distortion,[8] concerning the distribution of

[1] Ferrera 1996, pp. 17–37.

[2] Esping-Andersen 1990.

[3] Gal 2010, pp. 283–296 proposes to extend the family in order to include some Mediterranean countries, such as Cyprus, Israel, Malta and Turkey.

[4] Ferrera 2006, pp. 42–50.

[5] Eurostat found that in 2008 average expenditure for social protection accounted for 26.4 % of GDP in the 27 EU countries (27.5 %) in the Euro area), while Italy was at 27.8 %.

[6] Rostagno and Utili 1998, p. 4, characterized the Italian welfare system as 'the poverty of welfare'.

[7] *Source* OECD Social Expenditure Database.

[8] Ferrera 2006, pp. 45–47.

benefits among different categories of beneficiaries. Some groups of workers, such as those employed in the public sector or in large companies, enjoy high levels of social protection, while others are far less protected or even excluded from the protection system. The latest group includes, *inter alios*, those who work in the grey economy, which, especially in some regions is still very large and growing.[9] This type of distributive fragmentation is a direct consequence of the politicization of the Italian welfare state. Social welfare programs have been traditionally manipulated by political parties as a leverage to strengthen their electoral support. This has greatly undermined the possibility of elaborating a coherent strategy for the creation of a more efficient and effective welfare state.[10]

The inadequacy of the solutions offered by State's institutions has forced the family to take on a role that is unique even if compared with other Southern-European countries. In many cases, especially in periods of economic crisis, the family may well represent the only available 'social shock absorber', in particular for those that fall outside the 'official' social security net. Familialism is a consequence of the strong influence that the Catholic Church has had, and still has, on the development of the Italian welfare state, especially with regard to social assistance. Many of the defining features of the Italian welfare state, such as the prominent role played by the principle of horizontal subsidiarity,[11] reflect this situation. The qualified presence of the Church in this sector, which predates that of the State, and the influence of Catholic social teachings are all factors that contributed to shape the Italian welfare state but that, as noted by some scholars, represented 'a fetter to State provision of services, particularly those related to social care and family social reproduction'.[12]

Over the last decades a new element of fragmentation, a geographical one, has emerged. The unity of the Italian welfare state has been further dismantled in the transition towards federalism. Several key aspects, such as health care and social assistance, have been devolved to the exclusive competence of regions and local authorities. This is a move than can prove to be beneficial for the provision of welfare services, bringing the decision-making process closer to the need of the population. On the other hand, there is the risk that the new allocation of competences might end up cementing the differences already existing between richer and poorer regions, depriving the latter of the resources necessary to provide even basic social services.[13] The existence of such a 'social divide' is vividly demonstrated by the phenomenon of patients' interregional mobility: a one-sided

[9] The Italian Institute for Statistics (ISTAT) estimates that the shadow economy accounts for more than 17 % of the Italian GDP. However, these figures may well be too optimistic, failing to capture this phenomenon at its full extent.

[10] Ferrera 2006, p. 46.

[11] See *infra*, para 4.3.

[12] Esping-Andersen 1996, p. 67.

[13] On the relationship between welfare and federalism see Torchia 2002, pp. 713–740; and more in general, the studies published in Obinger et al. 2005.

flux of patients that moves from Italy's southern regions toward northern regions' hospitals and clinics. In this regard, the Italian legislator has adopted some measures aimed at solving the problem or, at least, minimizing its worst consequences. The Italian Constitution reserves to the Central State the power of determining the essential levels of services' provision concerning the enjoyment of civil and social rights that have to be guaranteed on the entire national territory.[14] However, the implementation of these measures has been slow so far and it is still doubtful whether they can represent a valid buttress against the geographical fragmentation of the Italian welfare state.

21.3 The Italian Welfare State and the Provision of Social Services: A Historical Overview

The origins of the modern Italian welfare state can be dated back to 1898, when, on 17 of March, a decree[15] was adopted on accidents at work, providing for compulsory insurance for certain categories of industrial workers. In that same year, there was also the establishment of the National Insurance Fund for Invalidity and Aging,[16] an insurance fund mainly financed by voluntary contributions of workers and employers.[17] In 1919, this type of insurance became compulsory for employed workers with the creation of the National Fund for Social Insurance.

In the interwar period the Italian welfare system, following a trend that was common to many other European States, entered into the so-called 'consolidation phase',[18] widening its social security net. However, the system was still extremely fragmented, with a plethora of bodies, some of them created by the Fascist regime, charged with the management of schemes that covered six main areas of risk: aging, sickness, job accidents, and occupational diseases, unemployment, tuberculosis, and family allowances.[19] Health care and social assistance were provided by private operators, either religious bodies or mutual associations, together with the so-called *Istituzioni Pubbliche di Assistenza e Beneficienza* created already in 1890 by the Law no. 6972 of 17 July 1890 ('Crispi Law').

In the aftermath of the Second World War, the reform of the welfare state was a priority for all the main political constituents of the newly born republican State.

[14] On this issue see Sect. 21.4.

[15] Royal Decree No. 30 of 17 March 1898.

[16] Law No. 350 of 17 July 1898.

[17] Conti and Silei 2005, p. 52.

[18] Ferrera 2006, p. 25.

[19] Conti and Silei 2005, p. 115.

Politicians from all sides of the Parliament were strongly in favor of restructuring the Italian welfare system on a universal basis[20] and thus, moving away from the corporatist model which was widely perceived as an awkward leftover of the Fascist period. Unfortunately, such a design never materialized, due to economic, social, and political reasons.[21] A dire economic situation, an underdeveloped system of industrial relations and the radicalization of the political debate were all factors that held back the reform of the Italian welfare state. This notwithstanding, the 1950s and 1960s represented a golden period for the system. In 1950, the social insurance was made compulsory for all employed workers, while in the following years new insurance schemes were introduced for other categories.[22] A similar path was followed also with regard to the provision of health care to workers, extending it to categories that had hitherto been excluded. The political and social tensions that erupted at the end of the 1960s led to the adoption of new measures. In 1969,[23] for instance, there was the introduction of a social pension for destitute citizens aged above 65 years old: a noncontributory measure that represented a first, albeit rather limited, step toward the establishment of a truly universal welfare system.

The economic crisis that hit the international economy in the 1970s was severely felt also in Italy, leading to the adoption of austerity programs. However, this situation did not affect much social services' provision, or stall the reforming process that had started in the previous decade.[24] In particular, there was the adoption of measures dealing with the role of women in the society and in the family, seeking to redress a situation that was no longer acceptable, nor economically sustainable. Another important result was the establishment of the National Health Service in 1978.

The expansionary phase of the Italian welfare system came to an end in the 1980s,[25] when the need to reduce the public debt put a check on a dramatically increasing social expenditure. Cost-cutting measures took absolute precedence on any prospect of a comprehensive reform of the system. A similar path was followed also in the 1990s, when the necessity to meet the Maastricht convergence criteria imposed the adoption of measures that could help to reduce the ratio of the government deficit to the gross domestic product. To this end, in 1995, a major

[20] See the work of the Commission for the reform of the social security system, chaired by the socialdemocrat Ludovico D'Aragona, Ministero del Lavoro e della Previdenza Sociale, Relazione della Commissione per la riforma della previdenza sociale (*Report of the Commission for the Reform of Social Security*), II ed. Accresciuta degli Atti della Commissione medica, Rome, 1949, p. 125.

[21] Ferrera 1993, pp. 233–239.

[22] Agricultural laborers (1958), artisans (1959) and traders (1967).

[23] Article 26 of Law No. 153/1969 of 1 May 1969.

[24] Conti and Silei 2005, p. 179.

[25] Ferrera 2006, p. 27.

reform of the entire pension system took place, imposing a partial transition to a contribution-related scheme and introducing a flexible retirement age.[26]

This notwithstanding, a series of legislative measures adopted in the second half of the 1990s and at the beginning of the 2000s seemed to usher a new era for the Italian welfare state and, in particular, for the provision of social services. The Budget law for 1998 created a Fund for social policies[27] and it introduced, albeit in a limited number of municipalities[28] and on a temporary basis, a minimum social income for all those living under the poverty threshold (258.23 Euros/month). Furthermore, a series of legislative measures were adopted to ensure better services in favor of disabled,[29] minors[30] and the social integration of migrants,[31] as well as to introduce an allowance for families with more than three children. Lastly, and more importantly, in the year 2000 a framework law[32] was also adopted for the creation of an integrated system for the provision of social services. However, this season was short lived and many of these reforms were either abandoned or never fully implemented, mainly because of the changes intervening on the political stage.[33]

The situation hardly improved in the following years. The economic crisis that started in the United States in 2008 and, then, rapidly spread all over Europe is putting under great pressure the Italian welfare system.[34] A huge, and rising, public debt, high unemployment rates, and low growth rates are weighting heavily on an already weak system. In particular, the crisis is affecting the funding of the social security system, as, on the one hand, higher unemployment asks for increased expenditure by social insurance funds, while, on the other, taxes and social contributions are dwindling. A situation that has been made even worse by recent austerity measures adopted by the Italian Government[35] that, by severely reducing the funds provided to local authorities, are seriously undermining the system's capacity to meet even basic social needs. In this period, financial

[26] With the so-called 'riforma Dini': Law No. 335 of 8 August 1995.

[27] Law No. 449 ('Budget Law for the year 1998') of 27 December 1997.

[28] At the beginning, the Minimum income was introduced in 39 municipalities and, in the year 2000, it was extended to other 267 municipalities.

[29] Law No. 284 of 28 August 1997.

[30] Ibid.

[31] d.P.R. No. 286 of 25 July 1998.

[32] Law No. 328 of 8 November 2000. For a more detailed analysis of the Law and of the system for the provision of social services see Sects. 4 and 5.

[33] The minimum social income, for instance, was canceled by the Budget Law for 2003.

[34] For instance, in 2008 the outlays for unemployment benefits registered a 110 % increase compared to the previous year. On the effects of the crisis on the welfare state worldwide see Busch 2010, pp. 7–11.

[35] Law Decree No. 138 of 13 August 2011, transposed and amended in Law No. 148 of 14 September 2011.

sustainability of the security net has become once again the main priority and most of the measures adopted just look at this objective, paying little, if any, attention to their effects on the overall functioning of the system.[36]

21.4 The Design of Important Legislation for the Provision of Social Services

One of the main pieces of legislation concerning social services is the Law no. 328 of 8 November 2000. The Act aimed at establishing an integrated system for social services, filling a gap that had been underlined even by the Constitutional Court.[37] Indeed, the only previous attempt at comprehensively regulating the sector was made in 1890 with the so-called 'Crispi Law'.[38] Since then, several acts have been adopted, but all focusing on certain specific issues or contingent problems. The Law no. 328/2000 sought to remedy to the ensuing fragmentation of the system, by creating a more coherent legal framework for the provision of social services.

The legal significance and impact of this act has been affected by the Reform of the Title V of the Constitution that took place just 1 year after its adoption.[39] The Constitutional reform conferred the regulation of social services to the exclusive competence of regions. However, the Law no. 328/2000 is still regarded as an important reference point for several reasons. First of all, the Law implements Constitutional principles that have not been touched by the 2001 Reform and that have, thus, to be fully respected by regions in the exercise of their normative competences. Second, the Law had a strong federalist flavor, somewhat anticipating the subsequent Reform by presenting many solutions that would have been broadly in line with it. Accordingly, it comes as no surprise that many, if not all, regional laws[40] adopted after the entry into force of the new Title V of the Constitution still make express reference to the Law no. 328/2000, considering it as the framework within which they operate.

In the following paragraphs, the analysis will focus on key features of the Italian system for the provision of social services, looking at the Law no. 328/2000, as well as at the relevant regional laws. Preliminarily, it is necessary to examine the definition of 'social services', a concept that seems to resist any attempt to precisely determine its scope.

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[36] Pizzuti 2009, pp. 215–220.

[37] Constitutional Court, Sentence No. 174/1981, in Giurisprudenza Costituzionale, 1981, 1527.

[38] Law No. 6792 of 17 July 1890.

[39] Constitutional Law No. 3 of 18 October 2001.

[40] See, for instance, Regional Law of Emilia Romagna No. 2 of 12 March 2003; Regional Law of Piemonte No. 1 of 8 January 2004.

21.4.1 The Definition of 'Social Services' and the Distinction With Other Sectors of the Welfare State

The first time in which the term 'social services' was used in a legislative measure was in the Decree no. 616/1977, which conferred some normative competences to the then newly created regions in the social field. Here, the notion was intended to cover a wide array of activities, such as public charity, urban and rural police, health care, vocational training and cultural heritage, held together by the fact that they were directed at meeting the population's social needs.

In the following years, the definition was progressively refined, narrowing down its scope.[41] In the Legislative Decree no. 112/1998,[42] it was used to encompass only those activities directed at addressing needs and difficulties that any individual could face in his lifetime. This 'restrictive' definition of social services has gained widespread acceptance and it has subsequently been retained, *inter alia*, in the Law no. 328/2000. This definition bears some resemblance to the one elaborated by the Commission in its Communication of 2006 on social services of general interest (SSGI) in the EU.[43] In both cases, the emphasis is put on the function of these activities—i.e., contributing to the social inclusion of those persons that are experiencing some difficulties—rather than on other aspects, such as their organization or functioning. However, the Italian definition is narrower than the EU definition, encompassing only part of the activities that the Communication of 2006 considers as SSGIs. Indeed, the Legislative Decree no. 112/1998 makes clear that social security's schemes and health care are excluded from the category.[44]

Although far more precise than older and broader versions, this definition still leaves open several problems that seem to derive from the inherently flexible nature of the category.[45] The relationship with health care represents a good case in point, as there are many instances where the distinction between the two is troublesome. There are indeed a wide array of activities, such as those concerning mental health problems, long-term conditions and people with disabilities that combine both health and social care aspects. A situation that has led the Italian legislator to revise the traditional approach—based on the institutional separation between health and social care, as well as on differing financing and organizational

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[41] Albanese 2007b, pp. 1897–1900.

[42] Article 128 of the Legislative Decree No. 112/1998 of 31 March 1998.

[43] Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union*, COM(2006) 177 final, 26 April 2006, p. 4.

[44] It must be recalled that also the Commission's Communication of 2006 excluded health services from the SSGIs' category. However, it is safe to assume that this exclusion occurred just for practical reason, i.e. to avoid any possible obstacle to the adoption of the Directive on patients' rights in cross border health care (Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the Application of Patients' Rights in Cross-Border Healthcare, *OJ* 2011 L 88, pp. 45–65).

[45] Albanese 2007a, pp. 131–146.

regimes—and tentatively move toward a new paradigm founded on the integration between the two.[46] The evolution is far from completed, as there are several issues concerning the relationship between health and social care that are still ill-defined.

A similar situation occurs also with regard to social security. Traditionally, these two components of the welfare state have been distinguished on the premise they have different sources of funding and aims.[47] The approach is consistent with Article 38 of the Italian Constitution, which provide for a different treatment of social assistance and social security. However, there are some areas where the distinction seems to fade away, especially due to the tendency of the Italian legislator to place social assistance's measures in the social security's cauldron. A confusion that reflects the lesser status that social assistance has traditionally enjoyed within the Italian welfare state, having been considered for long time just as having an ancillary role to play.

21.4.2 The (Belated) Move Toward Universalism

A key feature of the Law no. 328/2000 is the creation of a system for the provision of social services on a universal basis, representing, thus, a major step forward for the Italian welfare state.

The shift toward universalism emerges already in Article 1 of the Law no. 328/2000. The very first paragraph of the provision stipulates that the Republic ensures to persons and families an integrated system for social services and it eliminates, or reduces, those conditions of individual or familial need that might derive from an inadequate income, social difficulties, or lack of autonomy. Apart from 'geographical' limitations,[48] it is worth noting that the Article does not refer to specific categories of persons, using instead the term 'individuals' without further specifications. A choice that is made even clearer by Article 2, which specifies that the integrated system is universal in scope. The same approach has found its way also in all the regional laws adopted after the Constitutional reform,[49] so much as to be considered an integral part of the modern Italian welfare state.

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[46] See Decree of the President of the Council of Ministries of 14 February 2001. The act offers some guidance as to the provision of those services having both a social and health care dimension.

[47] Catini 2010, p. 643.

[48] Article 2(1), makes clear that the integrated system is open to Italian and EU citizens, and regular resident foreigners and refugees (but only for emergency services). Many regions have decided to broaden the substantive scope of the integrated system, by opening it also to non accompanied minors, pregnant women (this is the case for Tuscany), and by removing the limits for refugees.

[49] See, for instance, Article 1(4) Regional Law of Umbria No. 26 of 28 December 2009; Article 4 Regional Law of Calabria No. 23 of 5 December 2003; Article 2 Regional Law of Piemonte No. 1 of 8 January 2004.

The shift toward a universalistic model represents a victory for all those that are against the idea, which prevailed for a long time, of a 'residual' welfare state.[50] Such a move, albeit certainly new, is far from being revolutionary, representing the (belated) implementation of norms and principles already contained in the original version of the Italian Constitution of 1948. In particular, the principle of universalism can be read into Article 3 of the Constitution,[51] which imposes upon the Republic the duty to remove those obstacles having an economic or social character that might limit individuals' freedom and equality, thus encroaching upon their full development and participation to the political, economic, and social organization of the State. The provision is the foundation upon which the Republic has been built, requiring it to perform functions that go well beyond those of the 'classical' liberal State. Indeed, the second paragraph of the norm codifies the principle of substantive equality, which represents the cornerstone of the welfare state,[52] completing, and substantiating the principle of formal equality contained in the first paragraph. In this regard, it has been further observed that there exists a strong linkage among this provision and the rights and freedoms recognized by Article 2 of the Constitution. Indeed, the realization of the principle of substantial equality is to be seen as a prerequisite for the enjoyment of these rights.[53]

21.4.3 The Involvement of Private Operators: The Role of the 'Third Sector'

The integrated system established by the Law no. 328/2000 and reproduced by the regional laws adopted after the Constitutional Reform of 2001 grants a key role to private operators in the management and delivery of social services. The aim is not to create a national (or regional) service for social services, as occurred for health care,[54] but rather to build a network of public, and private subjects to pursue an established set of objectives. The Law no. 328/2000 codified a practice, based on the public–private cooperation that was already well-established in many Italian regions, especially northern ones regions.

The presence of private operators in this sector is not an absolute novelty,[55] as it even predates that of the State. The establishment of an integrated system aims at bringing the important contributions of all these actors into a more coherent legal framework, with a clearer allocation of competences and responsibilities between public and private bodies. In doing so, it builds a better defined operational space for

[50] Pizzolato 2007, p. 118.
[51] Mattioni 2007, p. 6.
[52] Giorgis 1999, pp. 13–26.
[53] Albanese 2007a, pp. 44–45; Giorgis 1999, p. 5.
[54] Pastori 2007, p. 75.
[55] La Porta 2007, p. 168.

the application of the principle of horizontal subsidiarity, which can be read as imposing upon public authorities not just a negative obligation, i.e., not to interfere with the activities performed by these subjects, but also a positive one, i.e., supporting and assisting it. This proactive version of the principle, which can be found in both Articles 1 and 5 of the Law no. 328/2000, as well as in regional laws,[56] have been subsequently given express recognition also by Article 118, last paragraph, of the Constitution, as modified in 2001.[57] The provision stipulates that State, Regions, Metropolitan Cities, Provinces, and Municipalities have to promote the initiatives of citizens, taken either on an individual, or a collective basis.

The majority of private operators in the social sector are nonprofit subjects, often indicated as belonging to the so-called 'third sector'. The Law no. 328/2000 and the regional laws fully acknowledge this situation, granting to these actors a preferential treatment and, in certain cases, even excluding profit-making providers from the system. This was the case, for instance, with a Law of the *Regione Lombardia*,[58] according to which only nonprofit entities could apply for and obtain from the regional authorities a certificate of suitability to participate in the planning and organization of social services of a health care nature for elderly people, as well as to get the reimbursement for the provision of these services. This solution was challenged in front of the Administrative Regional Tribunal by some profit-making companies for being incompatible with EU rules on freedom of establishment and competition law. The Administrative Tribunal decided to refer the matter to the CJEU, which held that allowing only nonprofit entities to participate in the running of the system is not incompatible with internal market rules, if, as in the present case, the system is based on the principle of solidarity.[59]

No precise definition of this category is provided for by any of these legislative measures, which tend to use the concept rather loosely. Generally speaking, 'third sector' is a notion that finds its origins in the socioeconomic sphere and that is used to refer to all those nongovernmental entities that do not operate for a profit motive, i.e. without the redistribution of revenues, and that carry out activities of general interest.[60] The main problem is that the concept encompasses a quite dispersed universe of entities that goes from some operating in quasi-entrepreneurial fashion, as it is the case for social enterprises[61] and certain social cooperatives, to others that are centered on goals of general philanthropic nature, such as volunteer organizations. The heterogeneity of the category has not deterred the Italian

[56] For instance, Article 2(2) Regional Law of Piemonte No. 1 of 8 January 2004.

[57] Rescigno 2002, p. 4.

[58] Regional Law of Lombardia No. 39 of 11 April 1980.

[59] CJEU, Case C-70/95 *Sodemare* [1997] *ECR* I-3395, para 29.

[60] Wendt and Gideon 2011, p. 255.

[61] Regulated by the Law No. 118 of 13 June 2005 and the Legislative Decree No. 155 of 24 March 2006.

legislator to treat it as a whole. A choice that, overlooking the considerable differences, in terms of organization, financial capabilities and functioning that exist between these entities, often proves to be troublesome.

Third sector organizations play a key role within the integrated system for social services, performing various activities. The Law no. 328/2000 and the regional laws strive to encourage their participation not just in the delivery of the services, but also in the planning activities that take place at regional and 'zonal' levels[62] and that aim at ensuring the coherence of the system. This means that third sector operators can play a role since the very early phases of the process, participating in the identification of the objectives of the system, as well as to the choice of the tools to be deployed in order to meet them.

The recognition of such a prominent status to third sector organizations cannot be taken as entailing a diminished role for public authorities. The primary responsibility for the functioning of the system remains indeed upon the latter. The mere fact that private organizations perform functions of general interest cannot lead to their assimilation to public authorities, who are bound to ensure that system works in the public interest.[63] A different reading of the system designed by the Law no. 328/2000 and regional laws would mean turning back the clock to a period where the State played only a residual role in the field of social services. The existence of such a difference between the two is confirmed by the fact that the participation of third sector organizations to the system is subjected to the control of public authorities through an accreditation process that makes sure that the structure and activities of these operators are functional to the public interest. This is not to say that private operators cannot freely pursue their objectives, as expressly recognized by Article 38 of the Constitution. However, they might do so outside the integrated system.

21.4.4 Federalism and Social Services: A Risk for Social Citizenship?

The federalization of the provision of social services is now a key feature of the Italian system. The process started even before the Constitutional Reform of 2001. The Law no. 328/2000 attributed a major role to regions and local authorities, granting the primary responsibility for the delivery of services to the municipalities and limiting the State to marginal functions.[64] However, there is little doubt

[62] In particular, at regional level there is the definition of the overall targets to be achieved, the criteria for accreditation and authorization of private partners, the monitoring and evaluation criteria, while at the zonal (i.e. holding together a number of municipalities) level there is definition of more specific targets and of the tools to achieve them. The degree of the participation of third sector organizations varies according to the region considered, on this see Albanese 2007a, pp. 163–177.

[63] Albanese 2007a, pp. 178–195.

[64] Saraceno 2005, pp. 8–10.

that the Reform of Title V of the Constitution has brought the process to a new level, conferring the provision of social services to regions' and local authorities' exclusive competence.

The choice, implementing the principle of subsidiarity enshrined in Article 118, first paragraph, of the Constitution, can positively affect the efficiency of the system, bringing it closer to its beneficiaries.[65] On the other hand, there is little doubt that such a process may further contribute to dismantle the country's already shaky social cohesion. A risk that could be at least diminished if the central government were to exercise those powers that still retain in the social field. It must be recalled, indeed, that the federalization process has not completely deprived the State of its capacity to exercise important functions in the social sector, being even able to directly affect the provision of social services.[66]

This is the case, for instance, with the management of cash social benefits' schemes, such as the social allowance for destitute persons older than 65-years-old, the civil invalidity pension, the attendance allowance, the family allowance and the maternity allowance, that are still controlled and managed at the central level. These measures still represent the bulk of the Italian social system, as they absorb the best part of the financial resources for social assistance.[67] Such a situation has disrupted any attempt to build a modern welfare state centered around the provision of high-quality services. The distortion in the allocation of resources is difficult to cure, representing a direct consequence of the politicization of this sector, as cash transfers have been largely used by politicians as a leverage to enlarge their electoral base.

Furthermore, Article 118, second paragraph, letter m, of the Constitution expressly reserves to the State the right, and the duty, to determine the essential levels of those performances concerning civil and social rights that are to be guaranteed on the whole national territory.[68] The identification of the essential levels is widely considered as one of the main measures that can reduce the above-

[65] There is the risk that the austerity measures adopted by the government to cope with the economic crisis that hit the country since 2008 might leave local authorities without the necessary resources to effectively exercise their competences in the social field. Over the period 2008–2011 the funds provided by the central government to the regions for the organization and delivery of social services have gone from 1,231 millions of Euros to 178 million of Euros. The situation is bound to further deteriorate after the austerity measures adopted by the Italian Government in August 2011. The Law Decree No. 138 of 13 August 2011 impose a reduction of 104,75 billions of Euros for the years 2011, 2012, 2013 and 2014 on Regions', Provinces', and Municipalities' funding.

[66] Other forms of interference can come from the exercise by the central government of cross-cutting competences, such as in the fiscal and competition fields.

[67] The Budget Law for 2011 that left almost untouched the resources for cash transfers, while further reducing those for the provision of social services. The Fund for social policies will have Euros 275 millions, while they were Euros 929 million in 2008; the Fund for family policies was lowered to Euros 52 million from Euros 346 million in 2008. Some funds, such as that for non self-sufficient people or for childhood, were reduced to zero (Pasquinelli 2011).

[68] A similar provision could already be found in Article 9 of the Law No. 328/2000.

mentioned risk that the federalization of social services' provision could widen the social divide already existing between richer and poorer regions.[69] The retreat of the central State from this sector might, indeed, represent a major threat for the country's social cohesion.[70] In this sense, the choice to reserve to the State the right to determine the essential levels can serve as a buttress against the disintegration of the welfare state, protecting the fundamental core of social citizenship.[71] It is worth observing that the mechanism is complemented by Article 120, second paragraph, of the Constitution, which allows the central government to step in and substitute regions and local authorities to ensure that essential levels are met.

This mechanism does not represent an element of absolute novelty in the Italian welfare state. The Legislative Decree no. 502 of 30 December 1992 introduced the concept in the health care sector, to indicate all those provisions and services that the National Health Service had to guarantee on the entire national territory.[72] The Law no. 328/2000 transposed it to the social sector,[73] without, however, giving a precise definition of its content. Article 22, para. 2, simply makes reference to a number of interventions, such as anti-poverty, income-supporting and attendance measures, to be adopted by the State, but it does so in rather vague and generic terms. Unfortunately, the constitutionalization of the mechanism has done little to solve the problem. So far, there has been no attempt at comprehensively defining, through the adoption of a legislative act,[74] the scope and the content of the essential levels in the social sector, while, on the other hand, the federalist process is marching ahead.

The need to fill this gap has prompted a lively debate on the definition of the essential levels of protection. A proposal worth to be carefully examined is the one that argues for a definition of the essential levels as subjective rights and thus, as entitlements judicially enforceable directly by individuals. The approach seems to fit well with Article 117 of the Constitution, which expressly links essential levels to social (and civil) rights.[75] Construing essential levels as rights would strengthen the protection of the 'minimum core'[76] of social citizenship,[77] granting to individuals the possibility to have recourse to judicial remedies should the State fail to meet their basic social needs.[78] This would entail a precise definition of their beneficiaries, of

[69] Ranci Ortigosa 2008, p. 2; Balboni 2007, p. 30.

[70] Da Roit 2008, p. 16; Saraceno 2005, p. 9.

[71] Losana 2010, pp. 122–123.

[72] The essential levels of assistance in the healthcare sector had been first defined by the Decree of the President of the Council of the Ministries of 29 November 2001, later modified by the Decree of the President of the Council of the Ministries of 23 April 2008.

[73] Molaschi 2008, pp. 186–191.

[74] The need for the adoption of a legislative act has been repeatedly stressed by the Constitutional Court (see Sentence of 28 June 2006, No. 248). See also Satta 2007, pp. 506–512.

[75] Rodotà 1999, pp. 118–120.

[76] On this concept see CESCR, The Nature of States Parties Obligations (Article 2(1)), General Comment 3, E/1991/23, 1990, para 10.

[77] Albanese 2007a, pp. 72–76.

[78] Molaschi 2008, pp. 254–257.

the tools for their enforcement and of their content. As for the latter, many scholars[79] propose to adopt a multidimensional approach, so to take into consideration several aspects, such as the type of intervention, the area in which it operates, the number and typology of beneficiaries, the access conditions, the quality standards and last, but not least, the costs (if any) to be paid directly by the beneficiaries.[80]

Although certainly desirable under many perspectives, the adoption of this approach is likely to give rise to several problems. First of all, regions have already made clear their firm opposition to any use of the essential levels as a tool to encroach upon their competences. The Conference of Regions[81] has pointed out that the State should just determine the objectives to be achieved, leaving the choice of the means to regional and local authorities.[82] This approach seems to be hardly compatible with the idea of having the definition of enforceable rights, as this move would require the State to go much further than merely identifying objectives.

Secondly and, to some extent, more importantly in a period of dire economic crisis such as the present one, there is a problem of resources. Defining essential levels as individual rights would require a radical change in the funding system, which is still centered on the offer and not on the demand.[83] However, the resources currently available are far too limited to this end. In a period such as the current one, this is a problem that cannot be solved by increasing public outlays. A more viable solution seems to be offered by a rationalization of public expenditures, so to rebalance the relationship between the resources allocated for cash benefits and those for services.

In any case, financial constraints should not be used as an excuse for further delaying the implementation of a mechanism that is rooted in the Constitution and that is necessary to preserve the country's social cohesion. What could be done is to start implementing it gradually, beginning from certain specific sectors, such as child poverty and non self-sufficiency.

21.5 The Delivery of Social Services: The Impact of EU Law

21.5.1 Two Main Options for the Delivery of Social Services

The delivery of social services is a matter falling within the competence of municipalities that, in many instances, have to exercise it in an associated form,

[79] There are some slight differences among scholars on this point. See Ranci Ortigosa 2008, pp. 5–6; Da Roit 2008, pp. 18–20; Leone 2006, pp. 8–12; Comino et al. 2005, p. 125.

[80] Da Roit 2008, pp. 31–36.

[81] A body composed of regions' and autonomous provinces' representatives and that serves as a liaisons with the central Government.

[82] Conferenza dei Presidenti delle Regioni e delle Province autonome 2003, p. 28.

[83] Da Roit 2008, p. 17.

through *consortia* or unions. This activity has to be carried out within the framework set forth at the regional and zonal level, where, with the participation of third sector organizations and local authorities' representatives, the planning phase takes place. Municipalities are, thus, entrusted with the administrative powers necessary to pursue the objectives identified therein. Such a division of labor among the different levels of government had already been codified in the Law no. 328/2000 and further confirmed, or even reinforced, in the regional laws adopted after the reform of the Title V of the Constitution.

Another key feature of the Italian system for the delivery of social services is the strong and qualified presence of third sector's entities.[84] A situation that is not just recognized, but even *encouraged* in all the main pieces of legislation adopted at national, regional, and local levels. A choice that, albeit fully in line with the history of the sector, is to be reassessed in the light of the progressive infiltration[85] of EU internal market law's principles in a sector that had been traditionally considered immune from it. In particular, the Italian system is struggling to find a workable balance between the 'personalization'[86] of social services and the need to ensure a level playing field among all the candidate providers, especially during the selection phase.

For the delivery of social services, municipalities may choose to either procure them from accredited operators that meet specific performance requirements or directly entrust the activity to a provider.[87] The first option refers to those cases where services are purchased by competent authorities—either directly or indirectly with the emission of vouchers to the beneficiaries that may freely choose among a plurality of providers—from several different operators. This is the model that has been followed by the Law no. 328/2000 and, subsequently, by many regions[88] with regard to residential and semi-residential services, with the creation of an accreditation mechanism to this end. The second option is the one that has traditionally been used in Italy, calling upon a private operator to act on behalf of public authorities for the delivery of social services.

Such a duality of options was expressly provided for in a Decree of 30 March 2001, adopted on the basis of Article 5 of the Law no. 328/2000 to provide guidance to regions on the entrustment of social services to third sector's

[84] Their presence is getting stronger in a period of dire economic crisis such as the present one. In many instances, third sector organizations are forced to intervene in order to compensate the increasing inability of public authorities to provide even basic social services.

[85] Although initially used in a negative sense—i.e. to describe a phenomenon that was perceived as having only a disruptive effect on national welfare states—here the term has a neutral value. Indeed, it is used to describe a situation in which 'economic' rules have gradually crept into a sector that has been traditionally considered as being excluded from their scope of application. It is a phenomenon that cannot be taken as having only negative effects upon the welfare state, since, if duly regulated, it might well contribute to its modernization.

[86] Albanese 2007a, pp. 137–146.

[87] In some cases, municipalities may decide to provide the services directly.

[88] See, for instance, Article 35 Regional Law of Umbria No. 26 of 28 December 2009; Article 30 Regional Law of Piemonte No. 1 of 8 January 2004.

operators. The fate of the act is very much similar to that of Law no. 328/2000; although no longer binding after the Reform of Title V of the Constitutions, it is still considered as a reference point by many regional laws.[89]

21.5.2 The Creation of a Regulated Market for Social Services: The Authorization Accreditation Agreement Procedure

Law no. 328/2000 and most regional laws stipulate that any provider, being it private or public,[90] that wants to be part of the integrated system for the provision of residential and semi-residential services has to go through a three-step procedure that comprises the authorization, the accreditation, and the conclusion of an agreement with the competent authorities.

Authorization and accreditation, albeit closely related, perform different functions.[91] The first is required for all the operators that want to engage in the provision of social services, ensuring that their activity respects certain basic requirements and, hence, it is not harmful for the beneficiaries. On the other hand, the accreditation is needed when the provider wants to become part of the integrated system and receive payments from public authorities. The mechanism serves, thus, to make sure that the activity of the provider not only respects certain basic requirements, but it is carried out in the public interest, i.e. it is functional to pursue the objectives set forth by public authorities.[92] To this end, the accredited provider has still to enter into an agreement with the entrusting authorities, aimed at precisely defining the types of activity that have been accredited, the quality standards to be respected and fees' levels.

The three-step procedure for the creation of a regulated market for social services has been transposed, without solving many of the questions left open by the Law no. 328/2000, at regional level. The implementation of the model has brought differing results, even with regard to key aspects.[93] Some regions, for instance, have chosen to directly control the accreditation mechanism,[94] while others have

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[89] Baroni 2007, p. 709.

[90] This is not the case for services directly provided by municipalities.

[91] This notwithstanding, the Trentino-Alto Adige's legislation makes no difference between authorization and accreditation.

[92] Albanese 2007a, pp. 204–210.

[93] For a complete overview, see Ministero del Lavoro e delle Politiche Sociali (2006) I modelli di affidamento dei servizi sociali e l'attuazione dei sistemi di accreditamento (*Models for the Entrustment of Social Services and the Implementation of Accreditation Systems*), 2006, pp. 11–12. Available at: http://db.formez.it/fontinor.nsf/b966f27599017389c1256c5200300e09/96CAD558F882CC3CC125711C0048458C/$file/Modelli%20di%20affidamento.pdf *(last accessed on 11 June 2012).*

[94] This is the case of Valle d'Aosta and Calabria.

left it to municipalities.[95] In other cases, following more closely the model of Law no. 328/2000, regional laws give to the region the duty to establish the criteria for accreditation, leaving to municipalities the task to apply, and enforce them.[96] Differences can also be observed with regard to the scope of the mechanism, as some regions use it also for services not having a residential or semi-residential character, such as educational ones.[97] Lastly, a similar pattern can also be found with regard to the relationship between accreditation and the planning phase. Only a limited number of regions have set up systems that establish a strict correlation between the number of accredited activities and the social needs identified during the planning phase, using, thus, the accreditation as a way to check the offer of services also from a quantitative perspective.[98]

All in all, the implementation of the mechanism and, in particular, the creation of a regulated market for social services, has been sluggish. In many cases, the accreditation is not used to give more options to the beneficiaries, but simply as a precondition for the subsequent entrustment of the service.

21.5.3 The Entrustment of Social Services: How to Select the Provider?

The delivery and management of social services have been traditionally entrusted to public, private or mixed entities, which are bound to perform the activity in accordance with the requirements set forth by the entrusting authority.

Today, the main issue relating to the entrustment of social services concerns the selection of the provider. Direct entrustment has been the commonplace in the social sector, with little or no space at all for competitive procedures. The situation has progressively changed over the last decade, mainly because of the strong influence of EU law.

Social services have been traditionally shielded against the application of procurement law, by making reference to their function, considered incompatible with the adoption of market-like mechanisms, and to the nature of their providers, mainly nonprofit entities.[99] A line of reasoning that is clearly inconsistent with that of the CJEU, which has repeatedly made clear that the only relevant element to determine the applicability of these rules is the nature of the activity, i.e. whether it has an economic character, and not the legal status of the providing entity.[100]

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[95] Abruzzo, Liguria, Lombardia, Molise, Piemonte and Umbria.

[96] Emilia-Romagna, Puglia, Toscana and Veneto.

[97] See, for instance, Calabria, Marche and Veneto.

[98] This is what happens, for instance, in Abruzzo, Marche, Calabria and Piemonte.

[99] TAR Umbria, 24 October 2003, No. 821; TAR Molise, 10 March 2004, No. 262 or TAR Campania, Napoli, sez. I, 30 April 2003, p. 4203.

[100] CJEU, Case C-119/06 *Commission* v. *Italy* [2007] *ECR* I-168.

The approach has gradually made its way in the Italian case-law, finding express recognition even at normative level. The Law Decree no. 269 of 30 September 2003[101] introduced in Article 113 and 113-bis of the *Testo Unico degli Enti Locali* (TUEL) two different regimes for economic and noneconomic local public services. This distinction replaced the one between industrial and nonindustrial local public services that was present in the previous version of the TUEL and that had been the object of an infringement procedure commenced by the Commission in June 2002.[102] The Act does not define the two categories, leaving the task to the courts. A solution that, as confirmed by the CJEU, suits better the ever-changing nature of a distinction that needs to be drawn *in concreto* and not by using abstract formulas.

The criteria used by Italian courts to draw the distinction are those elaborated by the CJEU to define the notion of 'enterprise' in the field of competition law.[103] The decisive element is whether the activity has an economic character, i.e. whether, at least potentially, there is a market for it. In a case concerning the entrustment of the management of a municipal swimming pool, the *Consiglio di Stato* (Italy's supreme administrative court) made clear that the fact that this was just a small sport facility mainly offering courses at discounted rates for the poorer layers of the local community was not relevant, as its management was potentially able to create an income stream.[104] By resorting to the 'potential market' approach the Italian judges seem to go even further than the CJEU, which, at least in cases concerning social services, tends to adopt a more cautious stance,[105] mainly focusing[106] on those elements, such as the fact that the activity is based on the principle of solidarity, that serve to exclude its economic nature. The approach has been developed in a number of decisions concerning the application of internal market law to social activities.[107] In the above-mentioned *Sodemare* case, for instance, the CJEU ruled out the possibility of applying internal market rules to the welfare system created by the *Regione Lombardia*, as, notwithstanding the presence of commercial operators offering similar services and, thus, of a market for these activities, it was based on the principle of solidarity. This was because, as pointedly observed by the CJEU, the system was 'designed as a matter of priority

[101] Converted into Law No. 326 of 24 November 2003.

[102] Bonura 2010, p. 516.

[103] Although this is a competition law's notion, the CJEU is increasingly making reference to it in order to determine the applicability of public procurement norms. On this evolution see Caranta 2008, p. 301.

[104] Consiglio di Stato, sezione V, 27 August 2009, No. 5097.

[105] On the risks of the 'potential market' approach see Conclusions of the AG Poiares Maduro in his Opinion of 10 November 2005 in CJEU, Case C-205/03 *FENIN* [2006] *ECR* I-6295, para 12.

[106] Driguez 2006, p. 250.

[107] See the so-called 'social solidarity rulings' (Hervey 2000, p. 31) such as, *inter alia*, CJEU, Case C-218/00 *Cisal di Battistello Venanzio* [2002] *ECR* I-691, paras 38–42 and CJEU, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] *ECR* I-2493, paras 47–56.

to assist those who are in a state of need owing to insufficient family income, total or partial lack of independence or the risk of being marginalized, and only then, within the limits imposed by the capacity of the establishments and resources available, to assist other persons who are, however, required to bear the costs thereof'.[108] A line of reasoning that seems far more lenient than that adopted by the Italian judges in their decisions.

Another feature that confirms the strict approach taken by the Italian judges is the choice to take into account not just the activity *per se*, but the entire set of operations carried out by the provider. This has led, for instance, the *Consiglio di Stato* to consider unlawful the direct entrustment of the management of a foster care community, of a childhood educational center and social canteen, of a home care service and a meals' delivery service for elderly and destitute people. The court motivated this decision by pointing out that these activities, although clearly not having an economic character, had been entrusted to a company, i.e. a profit-making entity, that was carrying out also other activities having an economic character. According to the judges, in cases such as the present one the deciding factor is the overall economic structure of the provider, which allows for using profits generated by economic activities to compensate the losses deriving from noneconomic ones.[109] In any case, the adoption of this approach is troublesome, being inconsistent with the functional approach developed at EU level and, more worryingly, imposing the adoption of market-oriented procedures even with regard to activities that have not an economic nature.

Moving, then, to the legislative level, it must be observed that Article 113 and 113-bis of the TUEL provided for different regimes for the entrustment of economic and noneconomic local public services, a category that also comprises social services. The first provision, concerning economic activities, was subsequently modified, at least in part, by the Law Decree no. 112 of 25 July 2008,[110] which, at Article 23-bis, envisaged three main modalities for the management of these services.[111] The first one was through a private company to be selected with a competitive procedure respecting the principles of publicity, equal treatment, and proportionality elaborated at EU level. The second option was to resort to a mixed public–private company in which, again, the selection of the private partner had to be done in a competitive manner. The third possibility was to entrust the management of the service to a public company owned by the local authority, provided that the arrangement respects the requirements for the in-house providing set forth by the CJEU in *Teckal*.[112] However,

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[108] CJEU, Case C-70/95 *Sodemare* [1997] *ECR* I-3395, para 29.

[109] Consiglio di Stato, sez. V, 30 August 2006, No. 5072.

[110] Converted into Law No. 133 of 6 August 2008.

[111] The provision has been modified by Article 15 of the Law Decree No. 135 of 25 September 2009.

[112] (a) The contracting authority must exercise a control which is similar to that which it exercise over its own departments and (b) the in-house entity carries out the essential part of its activities with the controlling authority (CJEU, Case C-107/98 *Teckal* [1999] *ECR* I-8121, para 50). See Caranta 2010, pp. 13–52.

Article 23-bis severely restricted the possibility to resort to the in-house providing for the management of local public services of economic nature, by allowing the recourse to this arrangement only in exceptional cases, i.e. whether there was no possibility to resort to the market for the provision of the service, and with the previous approval of the Authority for competition and market.[113]

The provision, erroneously justified as being imposed by EU law, had been challenged in front of the Constitutional Court by a number of regions[114] and, ultimately, it was abrogated by a popular referendum held in June 2011.[115] However, just few months later the Italian Government decided to reinstate, with only some slight changes, the discipline contained in Article 23-bis.[116] Article 4 of the Law Decree no. 138 of 13 August 2011[117] confirms indeed that, as a rule, local authorities have to adopt competitive models for the management of local public services of economic character, imposing the use of the same procedures already contained in the abrogated provision. The recourse to in-house providing is still considered as an exception to the rule. The legislative measure modifies the conditions under whose local authorities can make use of these arrangements, by replacing the authorization of the Authority on competition and market with a quantitative limit. Paragraph 13 of Article 4 restricts the possibility to have recourse to in-house providing only for services having an economic value of less than 900,000 Euros. The introduction of a threshold of this magnitude looks unduly restrictive, especially if compared with EU law,[118] and too rigid, as it does not allow for an assessment of the circumstances that might justify the recourse to this arrangement.[119]

As for non-economic local public services, Article 113-bis TUEL recognized to local authorities greater freedom in selecting the provider, allowing them, in the case of cultural services, to directly entrusting them to nonprofit subjects. The use of the verbs at the past tense is, because in 2004 the Constitutional Court declared the provision incompatible with the allocation of competences provided for by the

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[113] A detailed analysis of decisions adopted by the Authority in this regard can be found in Cappiello and Mazzantini 2010, pp. 701–714.

[114] Emilia-Romagna, Liguria, Marche, Piemonte, Puglia, Toscana and Umbria.

[115] The referendum has been declared admissible by the Constitutional Court, judgment of 26 January 2011, No. 24 and it was held on 12–13 June 2011.

[116] In its decision on the admissibility of the referendum on Article 23-bis (judgment of 26 January 2011, No. 24), the Constitutional Court pointed out that the abrogation of the provision would have not determined the revival of the previous discipline contained in Article 113 TFEU. According to the Constitutional Court, the gap would have been filled by the direct application of EU rules.

[117] Converted into Law No. 148 of 16 September 2011.

[118] As recognized also by the Constitutional Court in judgment of 26 January 2011, No. 24.

[119] In a communication to the Government and the Parliament of 26 August 2011 (AS864), the Authority for Competition and Market highlighted that this provision might end up leading to the adoption of elusive behaviors by local authorities, such as breaking down the service into smaller parts, so to avoid the ban on the use of in-house arrangements.

new Title V of the Constitution.[120] The discipline of noneconomic local public services is, indeed, a matter that pertains to regions' and local authorities' exclusive competence. With regard to social services, the legal landscape is quite diversified, with the co-existence of many different solutions, going from direct entrustment to, far less often, the use of competitive procedures. Several regional laws follow the model of the Decree of 20 March 2001, imposing the recourse, in the case of entrustment, to restricted or negotiated procedures.[121] A favorable treatment is normally reserved to nonprofit organizations, by using award criteria that enhance their close relationship with local communities and their social needs. Furthermore, regional laws tend to rule out the possibility to use the lowest price as award criterion, referring instead, to the most economic advantageous offer[122] and, thus, granting greater leeway to entrusting authorities.

The transition toward the market is still troublesome, mainly because of the nature and functions of the activities involved. Indeed, it cannot be overlooked that these services, even those that might be considered as 'economic activities', are not just as 'any other service', performing functions that go well beyond the creation of a stream of revenues. In this context, the application of competitive management models could certainly have a positive impact in breaking down 'dangerous' linkages between local public authorities and some providers that do not make any good for the quality of the service. At the same time, there is the need to ensure that the recourse to these schemes is adjusted to suit a system that is very much based on the personal relationship between the operator and the beneficiaries and that it is aimed to guarantee fundamental human rights and protect the most vulnerable.

Furthermore, the recourse to competitive procedures raises some problems with regard to volunteer organizations. As said above, these entities represent a well-established and qualified presence in the social sector, so much as to be recognized as one of its defining feature also by the European Commission, which labeled them as 'expression of citizenship capacity'.[123] Their importance has been fully recognized also in the Italian legislation: Article 5 of the Law no. 328/2000, for instance, asked regions to adopt all the necessary measures to enhance the contribution of volunteer organizations in the delivery of social services.

At the same time, there are cases where they are excluded from the provision of more articulated services, allowing them to play just an ancillary role, because of their nature and structure.[124] These elements caused much debate also with regard to the participation of volunteer organizations to public procurement procedures for the provision of social services having an economic character. Italian

[120] Constitutional Court, judgment of 27 July 2004, No. 272.

[121] See, for instance, Article 32 Regional Law of Umbria No. 26 of 28 December 2009 and Article 31 Regional Law of Piemonte No. 1 of 8 January 2004.

[122] Caranta and Richetto 2010, pp. 147–157.

[123] COM(2006) 177, p. 5.

[124] Article 3 Decree of the President of the Council of Ministers of 30 March 2001.

administrative courts have repeatedly endorsed administrative decisions that excluded them from these procedures, as the possibility to have recourse to non-paid job would enable them to submit tenders at lower prices than those of other competitors and, thus, could disrupt the correct functioning of the selection procedure.[125] In a first moment, the approach received wide support not just in the case-law, but also in the literature.[126] However, the reference to the nature of the service provider to determine its capacity to take part to competitive procedures was clearly incompatible with EU law.[127] Indeed, as made clear by the CJEU in a case concerning the entrustment of an ambulance service by the *Regione Toscana*,[128] the fact that volunteer organizations can rely upon their particular structure to submit tenders at a lower price than other organizations cannot lead to their exclusion from the procedure. The reasoning elaborated by the CJEU has finally found its way also in the national case-law, as demonstrated also by some decisions adopted by the supreme administrative court.[129]

21.6 Conclusion

The analysis demonstrated that the Italian system for the provision of social services is still looking for an equilibrium among many divergent forces that are upsetting its balance and, in the end, jeopardizing its capacity to offer adequate responses to the needs of its beneficiaries.

The system has undergone several major changes over the last decade, seeking to find greater coherence and tentatively moving toward more advanced models developed by other European States. The adoption of Law no. 328/2000, with the introduction of an integrated system for the provision of social services based on the principle of universality, was rightly seen as a breakthrough, giving to the Italian system a more coherent legal framework. However, its implementation has been troublesome, also because of the federalist reform that, initiated just one after the adoption of the Law, conferred the provision of social services to regions', and local authorities' exclusive competence.

The paper has highlighted that this move can surely represent an opportunity to make the system more efficient and effective, bringing the decision-making process closer to the beneficiaries. On the other hand, it also constitutes a major threat for the country's social cohesion, as it may increase the deep social divide already

[125] TAR Lombardia, Sez. III, 14 March 2003, No. 459; TAR Veneto, Sez. I, 13 November 2003, No. 481; TAR Piemonte, Torino, Sez. II, 12 June 2006, No. 2323; TAR Campania, Napoli, Sez. I, No. 6411.

[126] Michiara 2005, p. 106.

[127] Caranta and Richetto 2010, p. 155.

[128] CJEU, Case C-119/06 *Commission* v. *Italy* [2007] *ECR* I-168.

[129] Consiglio di Stato, Sez. VI, 16 June 2009, No. 3897.

existing between richer and poorer regions. To avoid this risk, the Constitution, in its revised form of 2001, conferred to the State the power of identifying the essential levels of the provisions to be ensured on the whole national territory. This mechanism, that should preserve the core of social citizenship, has yet to be implemented, while, on the other hand, the federalist process is marching ahead.

Another element that is unsettling the system is the infiltration of EU's internal market norms. This is a development that is affecting the functioning of the system and, in particular, the relationship between public authorities and private operators. The latter, especially nonprofit entities are a well-established and qualified presence in the social sector since long time. Their importance for the functioning of the system has been fully recognized at both Constitutional and legislative level, allowing them to be part of the system during both the planning phases and the delivery of the services.

The application of internal market principles has forced the Italian authorities to reassess their relationship with private providers, especially with regard to the selection process. Italian courts have gradually accepted the criteria elaborated by the CJEU to determine the applicability of public procurement rules, based on the assessment of the economic nature of the activity, setting aside the idea according to which the social sector was in any case excluded from the scope of application of these rules. In doing so, they have adopted an even stricter stance than the CJEU, by mainly resorting to the 'potential market' approach and by paying little attention to the existence to other factors, such as the solidarity principle, that may exclude the economic nature of the activity. Furthermore, legislative acts, mainly adopted at regional level, have imposed the recourse to competitive procedure also in the social sector. However, the progressive opening to the market has proved to be controversial and it is still far from complete. The main issue here is to find a workable balance between the need to safeguard the quality and accessibility of these services, by exercising a strong control over the choice of the provider, and to avoid the creation of less-than-transparent linkages between public authorities and private providers.

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Chapter 22
SSGIs in the Czech Republic

Kristina Koldinská

Abstract This chapter provides a case study of a Central European social system after the demise of Communism. It tests whether a new social model is emerging in central and eastern European states. The chapter examines the narrow definition of social services in the Czech Republic, asking whether the current definition of social services reflects the wider understanding of SSGI emerging in the EU hard and soft law. The chapter takes a case study the situation of Roma in the Czech Republic revealing how EU law and policy has influenced social policy.

Contents

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K. Koldinská (✉)
Faculty of Law, Charles University, nam. Curieových 7, Praha 1,
Czech Republic
e-mail: koldinsk@prf.cuni.cz

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22.1 Introduction

SSGIs are often defined as services for people and families, and include childcare, long-term care for the elderly and frail, and health services. They may also include basic education, basic cultural amenities (e.g. public libraries) and sports facilities (e.g. swimming pools). Such services are usually financed by budgetary appropriations or social security contributions, and, to a limited extent, by user contributions (user payments).[1]

In the context of the Czech Republic there is a tendency to interpret the above definition more narrowly. Social services normally do not include basic education and basic cultural amenities or sports facilities, and for that reason this chapter will focus only on social services in a narrower sense: services for people and families which include childcare, long-term care and integration services for socially excluded people. Social services in the Czech Republic are usually financed by budgetary appropriations and by user contributions, private sponsorship is often also an important source of financing of social services.

It might prove more suitable to use the definition of characteristics of SSGIs provided in 2007 by the EC Commission:

- they operate on the basis of the solidarity principle, which is required, in particular by the non-selection of risks or the absence, on an individual basis, of equivalence between contributions and benefits;
- they are comprehensive and personalised, integrating the response to differing needs, in order to guarantee fundamental human rights and protect the most vulnerable;
- they are not for profit, in particular to address the most difficult situations and are often part of a historical legacy;
- they include the participation of voluntary workers, expression of citizenship capacity;
- they are strongly rooted in (local) cultural traditions. This often finds its expression in the proximity between the provider of the service and the beneficiary;
- an asymmetric relationship between providers and beneficiaries, that cannot be assimilated with a 'normal' supplier/consumer relationship and requires the participation of a financing third party.[2]

This chapter will focus on Czech legislation on social services as part-social assistance system. The main concern is, whether the current concept of SSGI is reflected enough in the national legislation on social services.

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[1] Marcou and Wollmann 2010, p. 1.

[2] Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committe and the Committee of the Regions, A single market for twenty-first Century Europe,* COM(2007) 724 final, 20 November 2007.

In order to search the answer to the above-mentioned question, this chapter will first present a brief discussion concerning the possible definition of a welfare state model which could be applied in the Czech Republic and similar countries (Sect. 22.1). Over the last 20 years, social reforms in Central and Eastern Europe have represented one of the most exciting and undoubtedly unprecedented periods in European history. The specifics that accompanied these reforms may lead to the conclusion that there may be a new social model, or more such models, belonging to post-communist countries, particularly the countries of Central and Eastern Europe.

This chapter will also briefly point to the historical development of social services included in the system of social assistance as a part of a socialist social security system, inspired by the soviet concept of social security (Sect. 22.2). The historical and legislative development of this system of social security will be briefly explained in this paper.

Both above-mentioned aspects (the aspect of modelling the welfare state and also the historical aspect) will be discussed in greater detail, as they appear crucial to any further discussion on the EU SSGI concept which might be applied to Central and Eastern European countries.

The above question cannot be answered without a more detailed focus on legislation on and organisation of the SSGI. A special attention to these aspects will be paid in Sects. 22.3 and 22.4. The following section will then reflect on the relationship between the national legislation on SSGI and EU law and underline some possible future developments in this regard.

The situation of Roma and steps taken in order to reduce social exclusion of this ethnic group in the Czech Republic will be pointed out as an always important and useful example of the influence of EU integration. Some possible positive steps also in the field of SSGI will be discussed in the last section (Sect. 22.6) of this chapter.

22.2 The Model of Czech Welfare State: A Central European Model?[3]

If the welfare state model must be characterised in the case of the Czech Republic, to do so is not as simple as in the case of other countries belonging to 'classical' welfare state models. Twenty years following the end of communist regimes it might be considered whether the countries of Central and Eastern Europe have something in common so unifying that the possibility of a new model of welfare state can be contemplated. In fact, Central and Eastern European post-communist countries may be identified as countries combining the following:

[3] This part of the paper is based on findings provided more extensively in Koldinská 2010, pp. 213–230.

- A Communist past that must not be underestimated in the context of the development of the social state, especially with regard to the fact that the Communist regime bequeathed to the reformers of the social state a pronounced heritage consisting of the fact that the social security of citizens had become an inherent part of distribution policy under the conditions of a planned economy. Added to this is the reality that the populations of these countries were to a great extent used to the state taking care of everything, so the first steps, in particular, towards liberty were very difficult to manage.
- This past also carries with it a tradition according to which, for 40 years, the populations of these countries had grown accustomed to being taken care of by the state in every way, and they would resist any liberalisation of social protection, resulting in traditionalism, because any change, in their view, is only for the worse. This has a major impact on any modelling.
- There was the need to reform the concept of the social state as a whole in a relatively short time, so it was necessary to carry out reforms quickly and effectively, in order for these to go as far as possible in sync with the transition from a planned economy to a market economy. This in itself, however, is clearly unlikely to provide the answer to the question of whether the outcome of reforms in the region would result in the creation of a new model of social state.
- Entry into international organisations, especially the Council of Europe and the EU, whose instruments have no direct impact upon the concept of the social state as such (each Member State draws up its own social policy), but which do have some important aspects bearing on social protection, such as employment protection and the prohibition of discrimination. The EU does undoubtedly influence the further development of the state and social policies through the OMC in areas of pension reform, the struggle against social exclusion and, to some extent, policies in the area of health. Nor can we ignore the principle of free movement of population, which has implications for social security and its coordination.

Draxler and Vliet,[4] however, have come up with the idea that the countries of Central and Eastern Europe represent a group within the EU that is significantly different from the dominant model of the social state. Montanari, Nelson and Palme,[5] arguing against a single European model of the social state, state that these social states have socio-political traditions distinct from the rest of Europe, due to the influence of the Soviet model, as well as historically distant influences, such as that of the Austro-Hungarian monarchy. The authors argue that, under these influences, social reforms in these new states are going in a different direction than those elsewhere in Europe.

This argument can be accepted to a large extent, too, given the fact that the social states in other countries are also a product of their relatively distant pasts, giving rise to such different development of the social state in individual member

[4] Draxler and van Vliet 2010, pp. 115–135.

[5] Montanari et al. 2008, pp. 787–810.

countries that the European Union itself very soon gave up on the idea of harmonisation of social policy, which today is generally considered unacceptable. A Communist past can therefore be generally described as a relatively strong unifying element, which could indicate, if not a common or similar development of social reform, then at least one of the common denominators of the stages of reform.

In relation to the communist past, Fenger[6] argues that, among the post-communist countries, it is possible to distinguish three types of social model:

1. The social model of the former Soviet Union countries (such as the Baltic states, Russia and Ukraine),
2. The social model of the post-communist European-type (among them Bulgaria, the Czech Republic, Slovakia, Croatia and Hungary), and
3. The social model of the third group of countries of this region (which include, for example, Romania, Moldova and Georgia).

It is therefore possible to propose further distinctions within Fenger's otherwise useful modelling. Fenger concluded that post-communist social states cannot be reduced to any of Esping-Andersen's models or other established types of social state. His analysis, however, has not identified one specific type of post-communist social state.

Thus it appears that, if we are planning to identify a specific group of countries with similar development of social reforms, conditional on similar development in politics and the economy, we may perhaps point to those states that include the Czech Republic, Poland, Slovakia, Hungary and Slovenia, i.e. the countries of the former Vyszegrad Four. The eventual model of this social state might be called the 'vyszegrad' or 'CEE model' (using the English abbreviation for the countries of Central and Eastern Europe). The common characteristics of this model would be the following:

- Relatively satisfactory economic and social development in recent years.
- Adoption of a functioning system of social insurance.
- With a few exceptions, these countries have undergone a quite radical reform of pension insurance.
- Relatively high protection of labour and industrial relations.
- These countries have created a functioning network of social assistance, which must nevertheless be further expanded and made more effective, including improving the status of non-governmental organisations.

All the above-mentioned countries also shared some challenges:

- An aging population, which puts further demands on the reform of pensions and healthcare.

[6] Fenger 2007, pp. 1–30.

- The need to introduce to some extent into society a culture of equal rights and opportunities.
- The need, using social tools, to deal effectively with the integration of certain groups, particularly Roma.[7]

It should be noted, however, that these countries differ from each other in their attitudes, their relationship to global institutions and by the style of individual reforms undertaken.

In essence, the European social model is to some extent shaken by the influence of the entry of new member states into the EU, especially because not only are their social costs far lower than those in other EU countries, but also their social systems are not so generous. At the same time demographic development will contribute to a further decline in social spending in Central and Eastern Europe.[8] In future it can be expected that the new EU Member States will find other priorities when their economies connect more with the functioning of the economies of older Member States. At present, however, it appears that Europeanisation is a weak force and EU expansion has complicated the process of convergence of social policy.[9] On the other hand, however, among the consequences of EU expansion it is also possible to discern certain trends towards the convergence of social policies directly influenced by the European social model.[10]

Did the countries of Central and Eastern Europe thus bring any positive influence to bear on the European model of social rights? According to the author of this work, there are perhaps two moments that can be considered as signifying the positive influence of these countries on the European concept of fundamental, and in particular social, rights.

The first is the realisation that it is possible to carry out social reform relatively well and in a relatively short period of time, so that social systems respond to the modern concept of the social state without also reneging on their historical origins.

As for the second aspect of the positive impact of the new Member States' perception of the social rights model, it can then be shown that, with the entry of these countries into the EU, and also their presence in the Council of Europe, their institutions were forced to reflect more on the question of social integration, particularly in relation to the Roma population. The countries of Central and Eastern Europe have a relatively large proportion of the Roma minority in their populations. For Europe as a whole this is essentially a new phenomenon, and is especially a question that needed to be addressed from the moment Roma became more visible within the borders of the EU. Thanks to this there has been a slow consideration of the presence of Roma ethnic groups in European populations in

[7] Here it is possible to add a note on the situation of the homeless which, for the countries of Central and Eastern Europe, represented, thanks to their Communist past, a thus-far unknown, and hidden phenomenon.

[8] Draxler and van Vliet 2010, pp. 115–135.

[9] Ibid.

[10] Compare Vasconcelos Ferreira and Figueiredo 2005.

the OMC instruments, in projects supported by the European Union, and in some Council of Europe instruments. The integration of Roma should therefore be one very important task for social services in the Czech Republic. As will be argued in this chapter, although some efforts have already been undertaken, the country still has a long way ahead, not only in the field of social integration, but also in legislation on social services as such.

22.3 Brief Overview of the Historical Development of SSGIs in the Czech Republic

This section will concentrate on historical development of social services in the Czech Republic. For this purpose, it might be of interest to go a bit deeper into history.

The system of so-called 'public care for the poor' was introduced by legislation in the second half of the nineteenth Century. It was conceptualised as assistance provided by local municipalities to poor people who resided on the territory of the municipality and had therefore a right of domicile towards the municipality. Based on this right of domicile, the citizens of the municipality were entitled to poor relief, including social security according to their need, which had to be proved. Act No. 59/1868 which legislated for 'public care for the poor', including social services, was established during the period of the Austro-Hungarian monarchy—of which the Czech lands were a part—during which the concept of general human rights was established. The objective was to realize a right to proper existence—the right to life. This was something completely new, as until that time the problem of poverty was typically solved through more repressive measures than through real assistance for the poor. This assistance was understood as a system of rules according to which the necessary assistance should be provided to the poor. It was seen as an important step towards the welfare of the whole of society.[11]

This system was in function until 1956, when the whole system of social security in the socialist Czechoslovakia started to follow the soviet model of social security, including social assistance. Social services, originally provided by a great number of NGOs at that time, started to be centralised, while private subjects, including churches and religious orders, were not allowed to provide services on their own. At the end of communism, there were even some social services homes run directly by the Ministry of Labour and Social Affairs. The system focused on services provided in homes run by municipalities working under state control. This development resulted in the total devastation of what was a well-developed system established between the two world wars. At the end of the 1980 s, there was a state-run system oriented on residence services with almost no services provided

[11] For further information see Hácha et al. 1929, pp. 437–441.

outside of homes, with no possibility for NGOs to be active and with a very limited support for caring families. No quality standards were respected.

Social assistance, which included social services, was defined by Act No. 100/1988 Coll., on social security. The definition placed the main responsibility for social assistance, including social services, with the State, or with state-controlled regions or districts. Almost no competencies were ascribed to municipalities. The definition also underlined the fact that the assistance should be secured to persons who were not able to help themselves.[12] Assistance was therefore not only guaranteed, but it was the responsibility of the state to secure it, without any special focus on the activity of the person in need.

Social assistance, including social services, was being provided only to certain groups of people in need: to families with children, heavily handicapped citizens, old citizens, citizens who needed special help and citizens not adapted to society. Such categorisation was quite problematic, as it was stigmatizing and also not adequate to respond to new needs, especially at the end of the 1980s.[13]

Also, social services were not legislated for in a satisfactory manner. There was almost no provision for clients who wished to remain at home and receive only ambulant services. The scale of services was very limited and oriented towards residence types of services provided to certain categories of people in need. There were almost no integration services.[14]

The above-mentioned problems were faced even during the 1990s and also in the first years of the twenty-first Century. This was due to the fact that reform of the social assistance system came as late as in 2006. No agreement was reached for a very long time, even though the first proposal for a new social assistance act was presented by the government as early as 1994.[15] The new system of social assistance, including social services, therefore had to solve the following problems:

- Non adequate role of the State in the system of social assistance.[16]
- Unsatisfactory scale of legislated social services.
- Lack of a system of standards of quality of social services.
- Lack of a system of licensing or authorisation of providers of social services.
- Unsatisfactory security for caring family members.
- Too narrow a range of the types of social services that could be provided under the legislation in force.
- Too strong a focus on residential services and almost no space for services provided for example on the street or at clients' homes.

[12] See Article 73 of the Act No. 100/1988 Coll., on social security.

[13] On social services and social assistance during the socialist time see further Koldinská 2000, p. 96; Haberlová and Šilhánová 1992.

[14] Tröster 2010, pp. 256–258.

[15] Koldinská 2000, p. 112.

[16] On administration of social security inherited in early 1990 s see Baar et al. 1994, pp. 98–108.

It is therefore logical that there were big expectations as regards the new system of social services established in 2006 through Act No. 108/2006 Coll., on social services.[17]

22.4 Design of Important Legislation Regarding SSGI

Although the government stated to work on the first proposals of the new system of social assistance as early as in 1994, it took 12 years to adopt the Social Services Act.

Currently, the social services system in the Czech Republic is regulated by Act No. 108/2006 Coll., on Social Services, and by the Ministry of Labour and Social Affairs Decree No. 505/2006 Coll., implementing some provisions of the Social Services Act.

The term 'social services' is defined more narrowly in the Czech Republic than it is in discussions at the EU level. Social services provide support and assistance to persons in adverse social situations in a form that preserves their human dignity, respects individual human needs, while at the same time bolstering the capability for social inclusion of every individual in his or her natural social environment. The legal definition of social services also underlines the social integration aspect and the fight against the social exclusion.[18]

The Social Services Act offers the following fundamental instruments:

- It guarantees free social counselling for every person.
- It offers a very diverse range of social service type, from which a person can freely choose according to financial possibilities or other individual preferences.
- People dependent on the assistance of another person due to their age or state of health are provided a social security benefit—a social allowance.
- The Act guarantees that the services provided will be safe for the user, professional and adapted to people's needs.
- The Act also gives the public room to participate in the decision-making processes pertaining to the scope, types and accessibility of social services in their municipality or region.[19]

Social services represent the aggregate of specialised activities helping a person to overcome his or her adverse social situation. Because such situations have various causes, there is a whole spectrum of social services on offer.

Social services are classified according to three basic areas[20]:

[17] Kostečka and Tomeš 1993; Rys 1996; Samek 1993.

[18] Article 2 para 2 of the Act No. 108/2006 Coll.

[19] See the Explanatory note to the Social Services Act Bill.

[20] Article 32 of the Act No. 108/2006 Coll.

- Social counselling, usually specialised for a certain target group or situation, with basic counselling being an integral component of all social services.
- Social care services include services the main objective of which is to arrange for people's basic needs, which cannot be provided without another person's care and assistance.
- Social prevention services namely serve to prevent the social exclusion of persons who are endangered by socially adverse phenomena.

Social services are also classified according to the place of their provision[21]:

- Field-based services are provided at a person's place of residence, i.e. in his/her household, or at the place where he/she works, studies or spends his/her spare time. Examples of these types of services include community care services, personal assistance or field-based programmes for endangered youth.
- To receive out-patient services, a person must visit specialised facilities such as counselling facilities, day-care centres for disabled people or contact centres for people at risk of becoming dependent on addictive substances.
- In-residence services are provided in facilities where a person, at a certain stage of his/her life, lives all year round. These are mainly senior citizens' homes or homes for the disabled, as well as so-called sheltered housing for people with medical disabilities, or asylum homes for mothers with children or homeless people.

An important principle is the possibility to combine various types of services and also to be able to combine services with the assistance and support of the family or other close persons.

There are some public statistics provided by the Ministry of Labour and Social Affairs on the system of social services[22]:

Social services are provided to approximately 700,000 clients, i.e. approximately 7 % of the population of the Czech Republic. The network of social services does not cover the territory of the Czech Republic in an entirely uniform manner. Access to services is better in the cities. The system for providing a network of services meeting citizens' needs is based on the planning of social services, which is based on an evaluation of citizens' needs, the capacity possibilities of providers and the objectives of public administration. The planning of social services is chiefly the obligation of regional self-governing authorities. The Social Services Act guarantees that clients, service providers and municipalities can participate in planning and decision-making processes.

A total of 55,000 employees work in the social services sector (converted to full-time jobs). Employees working in the social services sector represent

[21] Article 33 of the Act No. 108/2006 Coll.

[22] Following figures are taken from a document of the Ministry of Labour and Social Affairs for the year 2010 called 'Vybrané statistické údaje o financování sociálních služeb a příspěvku na péči'. Available at: http://www.mpsv.cz/files/clanky/9198/Analyza_fin_SS.pdf (last accessed on 20 June 2011).

approximately 1.2 % of the total number of people employed in the Czech Republic. Of this number, 38,000 employees work in direct care, which means they provide a service in direct contact with the client.

Social services are financed by more than one source. In 2009, the total cost of the social services system was approximately 26 billion CZK (ca 1,061 billion Euro), i.e. approximately 0.72 % of the Czech GDP. Clients'contributions accounted for 35 % of this total cost, with territorial self-governing authorities contributing 25 %, the state budget 30 % and the funds of the public health insurance contributing 3 % (usually with the concurrence of health and social care in senior citizens'homes or homes for the disabled).

22.5 Organisation of the Delivery of SSGIs

In the Czech Republic there was a spontaneous development of non-governmental social services providers following 1989. Today there are many such providers especially in cities. Their forms and field of activity is highly variable and non-governmental providers represent an indispensable part of the provision of social services in the Czech Republic. Social services may be provided by any legal entity or natural person meeting the statutory conditions. In the Czech Republic, social services are provided by some 2,500 service providers. Social services providers are listed in the social services register, a publicly accessible database enabling a service to be searched for by a number of criteria.[23]

Social services may only be provided on the basis of registration of the provider of the social services.[24] Registration is understood to mean the issuing of licences to provide concrete types of services.[25] These licenses are issued by regional authorities in administrative proceedings based on an assessment of whether the provider is capable of meeting all the conditions prescribed by the Act. The meeting of all the conditions prescribed by the Act, including quality standards of social services,[26] is verified in the form of an inspection made of the social services. If the provider does not meet these conditions, the licence to provide these social services may be withdrawn. The fundamental measure of the quality of social services is compliance with human rights when providing social services.

The provision of social services is based on a contractual principle ruled in the Social Services Act.[27] A contract on the provision of social services is concluded

[23] On the role of social services providers see Molek 2011.

[24] Articles 78–89 of the Act No. 108/2006 Coll. .

[25] The public register of social services providers is available at: http://iregistr.mpsv.cz/socreg/vitejte.fw.do;jsessionid=3EBA92CE5C73D3F08E6D9F5BA0F1182E.node1?SUBSESSION_ID=1308910642495_1 (last accessed on 20 June 2011).

[26] Quality standards are included in the Annex 2 to the Ministry of Labour and Social Affairs Decree No. 505/2006 Coll., implementing some provisions of the Social Services Act.

[27] Articles 90–91 of the Act No. 108/2006 Coll.

between the services provider and the client. This is meant to enforce the position of the client of social services. Negotiation of the contract concerning the service type and the scope of the services according to the individual needs of the persons, including specific conditions for the provision of the service, is an important step aimed at exercising the free will of the persons to whom the services are provided. The contract on the provision of social services must be concluded in writing, except in cases where this is not possible or appropriate (e.g. telephone crisis assistance or low-threshold facilities for children and the youth). The character of the contract is that of a private-law contract and is governed by the provisions of the Civil Code.[28]

The contract allows the user of the services to enforce the agreed scope of service and obligates the provider to provide the service in a way that is safe and professional for the user. The provider of the services is selected by the user of social services. The provider can provide services only upon an authorisation to provide social services. This authorisation is provided by public authorities (regions) upon a claim and certain conditions which have to be met (like certain education of the personnel, adequate instruments and spaces to provide services, etc.).

On the other hand, the person in need of social services sometimes could have some difficulties to choose properly a services provider and to keep own position as a relevant contractual partner. The social services client is often in a weaker position than the provider.[29]

22.5.1 Care Allowance: A Support for Clients of Social Services

A care allowance is intended to strengthen the competencies of persons dependent on the assistance of another person and the circle of close persons, so that each individual can elect the most effective manner of having his needs provided for. In fact, in the past, the client received only a very low amount on social benefit (the pension benefit was increased by a small amount in case of the need of long-term care). A benefit has been provided to caring family members. The whole concept has been changed when the Social Services Act was adopted and the person in the need of long-term care now receives a fairly high level of benefits.

A care allowance can be provided to people who, mainly due to their adverse state of health, are dependent on the assistance of another person in the area of common acts of personal care and self-sufficiency. Acts of personal care are understood to mean mainly such daily acts which pertain to arranging for or receiving food, personal hygiene, dressing and movement. Self-sufficiency is understood to mean acts which allow a person to participate in social life, i.e. the

[28] See a commentary to the Social Services Act: Králová and Rážová 2009.

[29] See e.g. Koldinská 2006, p. 7 et seq.

ability to communicate, to dispose of money or personal effects, to arrange one's personal affairs, to cook a meal, to wash and to clean up.

The ability to take care of ones self and to be self-sufficient varies from person to person, which is the reason why the Act recognises four degrees of dependence on the assistance of another person, ranging from slight dependence to total dependence. A care allowance is graduated according to the degree of dependence, with its amount primarily derived from the usual costs connected with care.[30] This is a care allowance rather than a full reimbursement of the costs of care, either in the form of care provided by social services providers or care provided by close persons.

A care allowance allows for the arrangement of care in a natural environment, i.e. it helps to cover the costs incurred by the people close to the recipient of the care. The optimal model is the sharing of care duties between the informal circle of close persons (family members or other persons providing care) and registered social service providers.

An application for this type of allowance may be lodged with a municipal authority of a municipality with extended powers in whose catchment area the applicant has his/her permanent or reported residence. In the first instance, the applicant must submit an application for a care allowance and include all required information, i.e., in addition to personal data, also details on the manner in which the allowance is to be paid, and information about who will arrange for the necessary care. This step is followed by the process of assessing the degree of dependence on the assistance of another person, which is to be instigated by a social worker. The social worker conducts a social investigation in the environment where the applicant lives.

The allowance may only be applied towards the costs of arranging for assistance and support for the person dependent on the assistance of another person. It can also be 'used' as payment for care arranged by a social services provider, and can also be used to pay for the costs incurred by the carer, i.e. the family member or other person who is not a social service provider. It can also be presumed that both manners of using the allowance stipulated above will be combined by the beneficiary as required. The manner in which an allowance is used falls under the control of employees of municipal authorities of municipalities with extended powers. A municipal authority may appoint a special beneficiary who shall arrange for the correct use of the allowance, should it discover that an allowance is not being used correctly. If it is discovered that the allowance is being misused, the municipal authority shall cancel the entitlement to the allowance.[31]

The total monthly costs of care allowances show a stable level of EUR 50—55 million, or EUR 650 million (i.e. 0.5 % of GDP) when extrapolated to a full year.

[30] From 800 CZK (some 33 Euro) in the first degree of (slight) dependence to 12000 CZK (some 495 Euro) in the fourth degree of (total) dependence. see Article 11 of the Act No. 108/2006 Coll.

[31] Cf. Articles 23–28 of the Act No. 108/2006 Coll.

The total number of benefit claims acknowledged ranges from 240–250,000 persons monthly.

From the point of view of age, almost 60 % of beneficiaries are over 75 years old. As far as the manner of use is concerned, the care allowance is used predominantly for care provided by a physical person, i.e. most frequently a member of the family, with the percentage declining slightly as the grade of dependence increases and hence the percentage of care provided by registered social service providers grows.[32]

22.6 The Impact of EU Law on the Provision of SSGIs in the Czech Republic

As the system of social services has been operating already for some years and some problems have been identified, some amendments to the social services act were proposed recently. It was proposed that the system of social services should be simplified a little, that there should not be a taxative enumeration of services in the act, which could hinder the development of newly established services; and it was also proposed that some legislative problems in the act be removed or reduced (e.g. the enumeration of ten social needs would replace some 32 points which are currently assessed for purposes of determining whether health conditions are fulfilled to be able to claim the right to care allowance).[33]

As regards the impact of EU law on the provision of SSGI in the Czech Republic, it must be stated that the impact has not yet been felt. The Ministry of Labour and Social Affairs has funded a legal study, the main research question of which concerned the impact of the EU SSGI concept in the Czech law.[34] The study focused mainly on the *Altmark* package and discussed the impact of the EU law and of the CJEU case law on the public competititon and internal market issues in providing the SSGI.

This does not mean, that the EU law would not have any impact on the Czech legislation and policy in the area of social services, or social policy as such. In fact, the social rights started to be better promoted after the Czech Republic joined the EU, especially as a result of the Member State's duty to implement the EU secondary law. This happened in the areas of labour rights

[32] Figures were taken from a document of the Ministry of Labour and Social Affairs for the year 2010 called 'Vybrané statistické údaje o financování sociálních služeb a příspěvku na péči.' Available at: http://www.mpsv.cz/files/clanky/9198/Analyza_fin_SS.pdf (last accessed on 20 June 2011).

[33] More detailed information in Czech language is available at: http://www.mpsv.cz/files/clanky/10702/18042011.pdf (last accessed on 20 June 2011).

[34] Analysis of the legal environment of the EU and Czech Republic in the area of social services in the public interest, including their financing. Available at: http://www.mpsv.cz/files/clanky/11573/Pravni_analyza_I.pdf (last accessed on 20 October 2011).

(e.g. the health and safety at the workplace, employee's councils, etc.), equality (antidiscrimination act has been adopted recently as a result of obligation to implement the EU equality directives), etc.

A typical example of social inclusion of Roma could be taken to explain this. In the final part of this chapter, attention will be focused on the situation of Roma in the Czech Republic and the possible impact of EU hard and soft-law on the issues of Roma social inclusion.

22.7 Possible Impact of the EU Law on Roma Integration in the Czech Republic

For many years it has been argued that Roma are one of the most excluded groups in Europe and the most prominent group at risk of poverty in the region of Central and Eastern Europe.[35] In addition, Roma represent one of the most important minorities in this region. Around 70 % of the European Gypsy population (some eight million people) live in Central and Eastern Europe.[36] The Czech Republic is a country that is often criticised because of the situation of the Roma population. The Roma population represents some 3 % of the total population (some 300,000). A great part of the Roma population lives in very poor conditions, which is connected with their (historically determined) social exclusion.

The Fundamental Rights Agency identifies following rights, which are often violated in connection with Roma:

- Discrimination in access to jobs—a major factor contributing to Romani unemployment.
- Discrimination in access to education—less favourable treatment of Roma children whereby they are given less attention from teachers.
- Discrimination in access to housing—segregated housing and homelessness.
- Discrimination in access to healthcare—abuses and violations of the right to equal access to health services.
- Racist violence and crime—consequences of stereotyping and discrimination.[37]

In the Czech Republic, the larger part of the Roma population lives more or less integrated, in houses or apartment blocks. This however does not mean that the situation of Roma in the Czech Republic is much better than in other central

[35] Ringold et al. 2005.

[36] The terms Roma and Gypsy are often used interchangeably; a practice which is imprecise. 'Gypsy' refers to the whole ethnic group, including travellers, whereas 'Roma' constitutes one ethnicity, sometimes meaning simply those Gypsies from Central and Eastern Europe.

[37] Fundamental Rights Position of Roma and Travellers in the European Union, available at: http://fra.europa.eu/fraWebsite/attachments/roma-travellers-factsheet_en.pdf (last accessed on 4 May 2011).

European countries. In 2006, a rather shocking study[38] was published, according to which some 80,000 people in the Czech Republic live in some 300 localities, which may be described as 'ghetto'. Most of those people were Roma. According to the cited study, all the segregated localities are almost exclusively inhabited by Roma. This may lead to the conclusion that Roma segregated localities exist not only because of social problems, but also because of discrimination, which leads to segregation and practical exclusion from the majority society.

There is one more important aspect of the Roma situation in the Czech Republic, which could confirm the above conclusion. A majority of Roma pupils in the Czech Republic go to special schools primarily conceived of as being for slightly mentally handicapped children. It is obvious that this is not due to the lower intelligence of Roma children. In the majority of cases Roma children are sent to special schools because of their difficulties in following lessons and inappropriate behaviour. These incapacities of many Roma children have their roots of course in unsatisfactory housing and a detrimental social situation in general. Frequently sending Roma children to special schools has its consequences on the level of education of the Roma population in general. In relation to the Czech Republic, in an important judgment the European Court of Human Rights held such practice to constitute discrimination against Roma children.[39]

Within Europe, given the importance of the legal and political order of the ECHR, the Council of Europe may be expected also to contribute to the efforts to eliminate discrimination against Roma. Article 14 ECHR prohibits discrimination on any of the stated grounds, including sex and race, which head the list. Some authors argue that the ECHR has been inadequate as an anti-discrimination device because of the narrow scope of its non-discrimination provision.[40] Others, however, underline as an advantage of Article 14 ECHR the fact that it uses an open-ended list of discriminatory grounds, through use of the phrase 'any grounds such as'. The potential strength of the Council of Europe in the field of anti-discrimination has been increased also by the adoption of Protocol No. 12 to the ECHR, which provides for a general prohibition of discrimination and aims to remove the limitations of the existing provision. However, within the territory of the EU this protocol lacks efficacy, as only six of the Member States have ratified it.

The Council of Europe contributed an important policy instrument, when it established ECRI, a monitoring body to combat racism, xenophobia, anti-semitism and intolerance from the perspective of the protection of human rights. Its remit is to review Council of Europe Member States' legislation and policy, propose further action and study international legal instruments in the field of combating racism and xenophobia. ECRI's action covers all necessary measures to combat

[38] Analysis of socially excluded Roma localities, prepared by Gabal Analysis and Consulting (GAC). Available at: http://www.gac.cz/documents/brozura_4.pdf

[39] *D.H. and Others* v. *the Czech Republic* Judgment of 13 November 2007 No. 57325/00. For an analysis of this judgment see Arnardóttir 2009, pp. 53–71; Degener 2011, pp. 29–46.

[40] Van Boven 2002.

violence, discrimination and prejudice faced by persons or groups of persons on the grounds of race, colour, language, religion, nationality and national or ethnic origin. ECRI is clearly one of the possible organisations that could be active in promoting the situation of Roma in Europe by way of its recommendations addressed to the governments of Council of Europe Member States.[41]

Without doubt the Council of Europe has great potential to combat racial discrimination. Its activities may well be accompanied by more intensive consideration of discrimination issues by the European Court of Human Rights. However, as regards substantive equality for Roma, current policy-making activities and proposals for further measures emanating from the EU and its institutions appear more likely to achieve that goal.

After Article 13 EC (now Article 19 TFEU) was adopted, a discussion on possible hierarchy of grounds has been started, where race is at the top (by reason of the Race Equality Directive[42]) and age is at the bottom of the scale.[43] From the point of view of material scope, the Race Equality Directive remains the broadest, as its scope goes beyond labour market equality, prohibiting racial and ethnic discrimination as regards social advantages, education, access to and supply of goods and services.[44]

The equality principle acquired an important position also within the CFREU, in which a whole chapter (III) is dedicated to equality. Article 21 of the Charter covers all of the six grounds listed in Article 19 TFEU, as well as additional grounds such as social origin, genetic features, language, political or other opinion, membership of a national minority, property and birth. The list is open-ended, which would support the possibility to address also multiple discrimination cases.

Does this mean therefore, that the EU law, when defining race and ethnic origin, as best protected grounds would solve effectively the problems of discrimination based on race or ethnic origin? Currently some optimism could be expressed, as e.g. it has been lately argued, that:

> The Roma dispute illustrates an evolution of the EU's role from a passive enforcer of negative obligations via-avis fundamental rights to a more pro-active role, in which anti-discrimination becomes a fully fledged EU policy, enforced through complex governance architecture.[45]

It is difficult to argue, that EU hard-law alone would constitute an adequate instrument to combat such a difuse and complex issue, as the discrimination based

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[41] Current ECRI recommendations can be found on the Council of Europe's website available at: www.coe.int/t/dghl/monitoring/ecri/activities/GeneralThemes_en.asp (last accessed on 31 May 2011).

[42] Council Directive 2000/43/EC of 29 June 2000, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, *OJ* 2000 L 180/22.

[43] Schiek 2002, pp. 291–314; Howard 2006, pp. 445–470.

[44] Schiek Ibid. observes that as a result of this broad material scope gender discrimination has been downgraded from its previously dominant position.

[45] Dawson and Muir 2011, pp. 751–775.

on race and ethnic origin nowadays is. Equality law exists simply to protect victims of discrimination who wish to take active measures to challenge the injustice they experienced personally in an individual situation. Of much greater relevance are effective policy measures, targeted at a particular group and intended to resolve its specific problems. In this context, positive action measures, an instrument falling between pure law and pure policy, need to be examined.[46]

For the purposes of addressing discrimination, the possibility of using positive action as permitted under the Race Equality Directive may also be considered. The Equality Directives simply permit positive action and do not make it mandatory; a situation probably also resulting from the view that positive action measures always contradict the principle of equal treatment and as such constitute a form of discrimination.[47] Certain authors argue that in the specific field of ethnic origin and race equality it is inadequate simply to permit positive action, which in other contexts—no judgment of the CJEU exists interpreting the positive action provisions of the Race Equality Directive—has been subject to strict interpretation by the CJEU.[48] Such a strict interpretation of existing positive action provisions may limit the opportunity to take appropriate measures to protect against discrimination.

As a result, assessments such as those of ENAR which conclude that in the absence of mandatory positive action the anti-discrimination model will never be effective, particularly for the most vulnerable groups in society, must be treated with considerable scepticism. On the other hand, some positive obligations are completely necessary if substantive equality for Roma is to be reached. Simply to permit the adoption of measures without the introduction of mandatory obligations would temper the move towards substantive equality. Therefore, the possibility to introduce positive obligations in relation to discrimination with a focus on Roma needs to be examined. The only field in which they have already been introduced through mainstreaming is gender equality. The added value of mainstreaming seems to be that it is anticipatory, as it prevents discriminatory effects through a prior assessment.[49]

In the case of Roma, positive obligations are to be recommended for at least two reasons. First, there is an urgent need for systematic measures to mainstream equality for Roma. Second, in the specific case of Roma (disadvantaged in education, often isolated in poor housing), the individual claim-based possibilities provided by the equality directives are simply too meagre and ineffective.[50] The logical conclusion is that in the absence of positive obligations the situation of Roma in Europe will hardly improve at all. For that reason, any proposed OMC strategy on Roma inclusion should be positively rated.

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[46] Koldinská 2011, pp. 241–259.

[47] Howard 2008, pp. 168–185.

[48] Henrard 2007.

[49] Howard 2008, pp. 168–185.

[50] Koldinská 2009, pp. 249–277.

In fact, an interaction between law and policy is essential if the situation of Roma is to be improved. Legal instruments alone are inadequate, as law is unable to respond to the specific problems of one section of an ethnic group. Nor are policy instruments alone sufficient, as these are unenforceable and do not guarantee active protection against intersectional discrimination in individual cases. Instead, both types of instruments are needed. Law is needed to define specific anti-discrimination rules which may be used to protect the rights of the victim before a court and to obtain a remedy. Law and policy are capable of interacting through positive action measures and positive obligations. Both are present in current EU law and policy and may be present also in national legislation and policy. To improve the position of Roma most effectively, mainstreaming should be practised at least in the most problematic areas: housing, education, employment and health care. This has implications primarily for social rights.[51]

The interaction of law and policy is therefore one of the most appropriate ways to attain substantive equality for Roma, whereas the concept of SSGIs specialised at social inclusion of Roma could play an important role. This is apparent also from the Strategy on Roma inclusion, recently adopted by the EP.[52] One example of the possible impact of European concepts in this regard could be the Decade of Roma Inclusion.[53] The Czech Republic is a part of this initiative. When it held the presidency, it presented the following priorities[54]:

Inclusive Education: making Roma inclusive policies based on empirical evidence and the opportunities to collect and use ethnically–disaggregated data. The Czech Republic focuses on inclusive education as its first priority, especially on evaluating methods for the collection of disaggregated-ethnic data to identify the academic results of Roma children in schools. An emphasis is placed on using information about the proportion of Roma and non-Roma pupils in localities as a basis when developing strategies for the increased inclusion of Roma children and pupils in mainstream education. An emphasis is also placed on the role played by local government in the process of improving opportunities for bettering the education of Roma children.

Well being and Rights of Children: The living situation and rights of children should be reflected in all priority areas. This priority stresses the need to focus on the living situation in which Roma children in Europe find themselves. This priority will be presented in the context of the need for a safe environment in which children can receive the care necessary for their personal development and education. Roma children face different challenges across the states participating in the Decade of Roma Inclusion. The following have been considered important: (1)

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[51] Koldinská 2011, pp. 241–259.

[52] Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0043&language=EN (last accessed on 20 June 2011).

[53] Available at: http://www.romadecade.org/

[54] Following cited from the document 'Priorities of the Czech presidency in the Decade of Roma Integration'. Available at: http://www.vlada.cz/assets/ppov/zalezitosti-romske-komunity/en_Czech-priorities.doc (last accessed on 4 May 2011).

the possibility of increasing Roma children's educational opportunities and (2) the chance for their individual development in the current environment.

Roma Women—viewing integration policy in all areas. The way Roma women view integration policy was the third key priority of the Czech Presidency of the Decade of Roma Inclusion 2005–2015. This priority focuses on discourse on the emancipation of Roma women and on women as an important link in the shaping of integration concepts. The first angle of this priority concentrates on the position and role of Roma women, i.e. on the influence wielded by Roma women involved in integration programmes in Roma communities, in particular with regard to working with children and their attitude towards education. The second angle is the emancipation of Roma women. This emancipation offers active education, labour market participation, career-building and independence. Many Roma girls believe their future lies in motherhood, and are unaware that attaining a certain level of education and successfully finding a job are crucial if they are to stabilize the socio-economic situation of their family. The main aim was to produce a manual which will build on the experience of Roma women and assist the development of integration policies and measures targeted at the Roma minority. For this purpose, a special international panel of Roma women will be set up to participate in programmes of conferences and seminars, thus ensuring that the impact of individual actions is presented from the perspective of Roma women.

Implementation of Integration Policies at Local Level, focusing on local and regional government. At the EU level, the issue of Roma inclusion has figured on the agenda of several presidencies; both the current and upcoming trio of countries to hold the Presidency of the EU Council seem set to continue dealing with this issue in detail. There therefore appears to be a strong central will (in terms of national policies) to seek the right answers for coexistence between Roma and the majority, for addressing social exclusion and the role of Roma in society, and for introducing sensitive measures relating to housing, employment, education and health. Another priority for the Czech Presidency of the Decade was to increase local government motivation to implement central policies and strategies or to create local policies for full integration and feedback. Discussion will also address the amendment of legislation affecting integration on a local level.

Media and the Image of the Roma. Media sensationalism and the sensitivity of issues presented by the media in connection with Roma often form a generally negative media image of Roma, which is then presented to general society. For the successful implementation of integration measures locally, it is necessary to promote the positive perception of these measures to the majority of society.

The Roma Integration Decade is decisively one very important instrument for Roma integration, as it is based on international collaboration and exchange of good practices, and can therefore influence also the specific approach in each country, including the concept of SSGI.

It is not easy to positively tackle the problems of Roma people, as these are complex and accompanied by the prejudice of the majority population (which has reached a very high level in all central European countries). Nevertheless, many

examples of good practices may be named and many social services provided by NGOs and churches could be listed.

It might be worth mentioning that since 2009 there has been a new governmental Concept of Roma Integration for the years 2009–2013,[55] which is one of the most important documents in recent years, as it aims to unify and strengthen all activities aimed at the integration of Roma and to provide them with a common framework.

This document includes the following important areas in which the Czech Republic aims to promote Roma integration:

- Promoting Roma culture and language.
- Education (especially basic education).
- Employment.
- Tackling indebtedness of Roma families.
- Housing.
- Social protection.
- Health care.
- Prevention of criminality.

In this connection the focus is put on the participation of Roma and Roma organisations and on the activities of regions and municipalities. There is still a long way ahead, but it is expected that this concept could help to speed up the process.

22.8 Conclusion

The Czech Republic is one among a group of countries which had to liberate themselves from the heritage of a socialist model of social security, including the concept of social services. In this connection it has been shown, that it might be useful to reflect on a new model of welfare state, or at least on some amendments to the concept of a European social model.

If the research question presented in the introduction of this chapter has to be answered, it should be said that the EU law has not played much of a role until now regarding SSGIs in the Czech Republic. As regards SSGIs, in the Czech Republic, as an example of a central European country, the discourse should still be focused on social services in a narrower sense, as this is how they are legislated especially in the Social Services Act. This act represents a modern approach to the concept of social security, even though it may be criticised for several reasons.

The last part of this chapter focused on social inclusion of Roma. It may follow that the EU SSGI concept could be used in the future, inter alia, to improve the

[55] Available in Czech at: http://www.vlada.cz/assets/ppov/zalezitosti-romske-komunity/dokumenty/Koncepce-romske-integrace-2010—2013.pdf (last accessed on 20 June 2011).

situation of Roma people in the Czech Republic. Social services are one of the most effective instruments in the process of inclusion of socially excluded people. This is true for education and specific social services provided to Roma children and their parents during the education process. Also many other SSGIs might be taken into account and specially focused on Roma, like further education and vocational training, special courses for Roma women, spare time activities for Roma children, etc. The situation of Roma and their integration is indeed still among the greatest challenges for the whole Czech social security system, including SSGIs.

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Part V
Conclusions

Chapter 23
Conclusions

Erika Szyszczak, Ulla Neergaard and Johan W. van de Gronden

Contents

23.1 Aims and Ambitions

These Conclusions tease out a number of themes and policies that continually appear in the guise of SSGIs in EU law and policy. *Part II* of the Conclusions addresses the way in which several authors identify the Europeanization of SSGI. *Part III* examines the lack of a coherent definition of SSGI in the European Courts' case law and EU legislation, soft law and soft governance communications and processes, resulting in many differences in terminology. *Part IV* acknowledges the actual and potential impact of the Treaty of Lisbon 2009 on the future regulation of

U. Neergaard (✉)
The Law Faculty of the University of Copenhagen, Copenhagen, Denmark
e-mail: ulla.neergaard@jur.ku.dk

E. Szyszczak (✉)
The University of Leicester, Leicester, UK
e-mail: ems11@leicester.ac.uk

J. W. van de Gronden (✉)
The Law Faculty of the Radboud University Nijmegen, Nijmegen, The Netherlands
e-mail: j.vandegronden@jur.ru.nl

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SSGI at the Member State and EU level. *Part V* offers some final Conclusions on the future research potential on SSGI.

Our ambition recognised the limitations of even attempting to provide an exhaustive account of SSGIs in the EU. The focus of the book is to offer a deeper understanding of this area of law and policy at different levels and points of departure. The project has been selective and has revealed the importance of charting the *processes* of the evolution of SSGIs, especially the actors and stakeholders involved and the various governance processes deployed: new governance and conventional governance processes alongside the role of national and European Courts.

In taking this approach we note how a number of recurrent themes are emerging in the T.M.C. ASSER Press book series on *Legal Issues of Services of General Interest* and feel justified in isolating SSGIs as a topical and particularly complex, problematic and controversial issue in EU policy. A significant contrast between Services of General *Economic* Interest and *Social* Services of General Interest in the EU is the relative lack of litigation in the field of SSGIs. In contrast to SGEI, where litigation has emerged testing the role of competition and the market freedoms in the creation and delivery of SGEI, litigation in the field of SSGI is only starting to emerge and in an ad hoc manner.[1] Instead, greater emphasis is placed upon legislative policy towards SSGI and use of exemptions or 'safe havens' for SSGIs and the use of soft law and new governance processes.

We are conscious that we have used the EU as our point of departure for the analysis of SSGIs and that we have adopted the conventional methodological tools of analysing how the EU is shaping the debate over SSGIs as well as the conventional analytical categories for the organisation of this investigation. Thus, for example, we have used the free movement, competition and procurement rules as organising concepts, and, for example, used the concepts of 'economic' and 'non-economic activity', or 'undertaking' to analyse how SSGIs fit with the EU legal and conceptual framework. This is because this book is a first step to charting the emergence of a new concept in the EU and analysing how it is being shaped by EU law and policy. We have also offered some theoretical and interdisciplinary perspectives and analysed how far certain Member States are influencing, or are influenced by, EU developments.

23.2 The Europeanization of SSGI

Several authors argue that the range of involvement by EU law, policy and processes has led to the Europeanization of SSGIs.[2] Here Europeanization is used to

[1] Discussed in the chapter by van de Gronden.

[2] See the chapters by Bauby, Szyszczak, Sindbjerg Martinsen, Baeten and Palm, van de Gronden and van Meerten.

describe the processes where changes to national policy are influenced by EU developments. This is a remarkable conclusion given the limited EU competence to legislate and regulate social services and social policy. It is also remarkable given the limited amount of litigation on SSGIs at the EU level. It is even more remarkable given that many chapters emphasise the perceived inherent tensions between national (and sub-national) SSGI policy and EU policies.

Rather than keeping national SSGI policy and EU policy in separate spheres, the EU processes have led to possibilities of a stronger interaction between the two, leading to Europeanization. Van de Gronden argues that both the scope and policy options available to national administrations are circumscribed and influenced by EU developments. However, the process is subtle. For example, rather than striking down national policy on SSGIs the CJEU often frames its disapproval of national SSGI schemes by focusing upon principles of good governance.

The Europeanization of SSGIs has taken place in a subtle manner avoiding head on clashes between national administrations and the EU through the soft persuasive soft processes employed by the Commission, harnessing a wide group of stakeholders in consultative processes and by staging the adoption of different levels and forms of soft law. A good example of this process is seen, more recently, after the conference and after the chapters of this book were written. The European Commission has made significant inroads into the delivery of SGIs by adopting a Communication on a Quality Framework for Services of General Interest in Europe.[3] This Communication confirms that social security schemes covering the main risks of life, along with a range of other essential services provided directly to the person that play a preventative role against certain risks, alongside providing cohesion and inclusion are within the concept of SGEI addressed by the Communication. The Commission states that although the CJEU does not classify some social services, for example, statutory social security schemes as economic activities and caught by EU law the CJEU has also stated that the 'social' nature of a service is not decisive in taking such schemes wholly outside of the scope of EU law. Thus as Rodrigues concludes: 'The term SSGI consequently covers both economic and non-economic activities.'[4]

The Communication addresses the issue of quality for SGIs, referring to the voluntary European Quality Framework for Social Services adopted by the Social Protection Committee in October 2010. This is a different kind of soft law and a significant process, discussed by Szyszczak, where the Commission is using a technique of referring to documents adopted or published by other stakeholder institutions and actors brought into the political arena by the Commission and their role is reinforced by the Commission. The outcome, seen in the Communication, makes inroads into the Member States' competence for the delivery of SSGI by creating a voluntary reference model to develop quality tools in the form of standards or indicators at the appropriate level for the definition, measurement and

[3] COM(2011) 900.

[4] Rodrigues 2011, p. 267.

evaluation of quality in SGEIs. This a form of 'soft' convergence, which also could be used as a reference tool to allow for out-of-state providers to deliver SSGIs in future liberalised markets for such services.

One aspect of Europeanization, discussed in several chapters, that has emerged as a result of the case law of the European Courts is the manner in which the free movement provisions of the TFEU have been used, along with the concept of Citizenship of the Union, to challenge the 'bounded space' of Member State welfare states. Ferrera has described this process as a spatial reconfiguration in relation to an emerging transnational social citizenship in the EU.[5] This aspect of Europeanization is analysed in the chapters by Sindbjerg Martinsen and Tryfonidou. In analysing the case law from *Martínez Sala* and *McCarthy* to *Zambrano*,[6] the widely held conclusions are that, after a tentative start, the expansive reading of the Citizenship of the EU provisions in the TFEU by the CJEU has opened the door to an embryonic form of pan-European social solidarity for non-economically active European citizens (and, in certain circumstances, their families). This approach is confirmed in the subsequent ruling in *Derici*.[7] In doing so, the Court has also dismantled the rigidly functionalised logic of the free movement of persons provisions originally created in the 1957 Treaty of Rome by forging a strong connection between Union Citizenship and access to state welfare benefits.[8] This, however, serves to emphasise the continuing importance in EU law benefitting individuals who are opportunistic and is achieved in an individualistic (and some would say selfish) resort to EU law to gain transnational access to welfare

[5] Ferrera (2004).

[6] CJEU, Case C-85/96 *María Martínez Sala* v. *Freistaat Bayern* [1998] *ECR* I-2691; CJEU, Case C-434/09 *McCarthy,* judgment of 3 March 2011 CJEU, Case C-34/99 *Zambrano,* judgment of 8 March 2011.

[7] CJEU, Case C-256/11 *Murat Derci and Others v. Bundesministerium für Inneres* [judgment of 20 November 2011]. Here the CJEU followed the logic of *Zambrano* that cases involving the expulsion of parents from the territory of a Member State were not classic free movement cases under Directive 2004/38/EC. Instead, the CJEU addressed the issues with reference to the fundamental citizenship rights in Article 20 TFEU. The Court reiterates (para 64) that Article 20 precludes national measures which deprive EU citizens of the genuine enjoyment of the substance of these rights. It confirmed that Article 20 rights are protected where no internal EU border has been crossed. Significantly, the Court held that a Member State must have regard to the protection of private and family life, as enshrined in Article 8 of the ECHR *and* Article 7 of the Charter of Fundamental Rights of the EU. The CJEU has held that the meaning and scope of both Articles is the same (CJEU, Case 400/10 PPU *McB.* V. *L. E.* McB [judgment of 5 October 2010]). Thus it should be concluded that Article 7 CFR should be applied in cases of EU law (*Dereci* and *Zambrano*) and Article 8 ECHR in purely internal situations.

[8] Gubboni 2011. At the same time the Commission is also addressing the strengthening of rights to social and other welfare benefits for workers who are engaged in economic activity. See for example: *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, COM(2012) 131 final (21 March 2012). See also the proposal to strengthen collective rights: *Proposal for a COUNCIL REGULATION on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services*, COM (2012) 130/3.

benefits. It does not delve into issues of how host states may finance out-of-state claims to its welfare benefits. This aspect of Europeanization may undermine national underpinnings of welfare schemes based upon solidaristic principles and could eventually be the decisive element leading to the greater non-state provision of some services, as is seen in the country reports/case studies contained in this book.

A different aspect of Europeanization is seen in the discussions by Tryfonidou and Flynn of how the principles of free movement and non-discrimination may make inroads into the Member States' autonomy to choose how a SSGI operates. This complements the findings in the chapter by van de Gronden who also shows how the principles of 'good' EU governance may leave the structure and financing of SSGIs within the competence of the Member States but the implementation of policies may not be immune from EU law scrutiny. While much of the focus of SGEIs generally is upon the free movement and state aid provisions of EU law, the chapter by Flynn reveals how free movement of capital provisions have the potential to influence the future planning of SSGIs, particularly where SSSGIs are financed from the tax system of the Member State. Flynn also raises issues of how Member States' tax incentives may encourage, or impede, the provision of SSGIs by non-state bodies, especially charitable bodies that may rely upon donations from individuals. These are important research questions for the future because of the sensitivity of the issues: the Member States need to protect national taxation systems for the financing of SSGIs, but on the other hand tax incentives may be one instrument to encourage private funding of SSGIs.

The conclusion that SSGIs are being Europeanized is even more remarkable in the light of Protocol No. 26 to the TEU and TFEU which aims to demarcate the competences of the Union and the Member States in the area of non-economic services of general interest. Although confusing in the use of terminology Article 2 states: 'The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise *non-economic services of general interest*.' (our emphasis). From the discussion of case law, especially in the field of competition law[9] 'non-economic services of general interest' can be equated with 'non-economic SSGI'. Thus Protocol No. 26 could be viewed as the same political response from the Member States to the developments towards SGEIs in case law and the ever expanding competence of EU law as was seen in the introduction of Article 16 EC by the Treaty of Amsterdam 1997. An important element of this political process is *not* to exclude discussion of the role of SGEIs in Europe, but to acknowledge the positive role that the Member States and the Union can play in European integration:

> The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

[9] See the chapters by Slot and Heide-Jørgensen.

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.[10]

This is a significant development from the original stance of the original Treaty of Rome 1957 where non-economic activity was not caught by the competence of what was then EEC law and economic social services of general interest were seen a *derogation* from the fundamental economic rules of the integration process. The chapters of Baquero Cruz, Szyszczak and Manunza and Berends discuss the recognition of the role of SGEIs and SSGIs in the modernisation of EU law and the 'Europe 2020' project. The realisation of the need to address the role of SGEIs is a thread running through this book, resulting from the tendency in the Member States towards the marketisation of SSGIs. The Monti Report 2010 paved the ground for integrating SGEI into the internal market project.[11] Subsequently Commission documents have identified a role for procurement as a central and indispensable instrument for delivering the competitiveness and growth agenda for the EU and see the role of public services as central to that agenda.[12] Part of the 'Europe 2020' agenda is the modernisation of the procurement rules in the EU and special attention is paid to social services involving services to the person which would fall within the scope of SSGIs: social, health and education services. These services are seen as having an essentially local dimension—or in EU language—would not affect trade between the Member States. It is assumed that these services would not attract competition from out-of state service providers. They are also seen—again in EU language—as having a de minimis effect on the single market and on competition. Thus, the new proposals create a special regime for SSGIs above EUR 500,000, unless there are special factors to take into account, for example, EU financing for cross-border projects.[13] The usual procurement principles of transparency and equal treatment will apply, as will undertakings to

[10] Protocol No. 26, Article 1.

[11] Mario Monti, (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 José Manuel Barroso**.**

[12] Commission Communication, *Europe 2020, A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020 final; *Commission Communication to the European parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a Single Market Act, COM* (2010) 608 final.

[13] *European Commission Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services, COM* (2011) 895 final; *Proposal for a directive on public procurement, COM*(2011) 896 final; *Proposal for a Directive on the award of concession contracts, COM*(2011) 897 final.

ensure that the contracting authorities are able to apply specific quality criteria to their choice of providers.

Similar policy responses are also seen in the modernisation of the state aid rules relating to the financing of SGEIs.[14] According to the Press Release of the Commission:

> The new package clarifies key state aid principles and introduces a diversified and proportionate approach with simpler rules for SGEIs that are small, local in scope or pursue a social objective, while taking account of competition considerations for large cases.[15]

The measures reflect the changing economic and constitutional climate of the EU as well as a modernisation and 'more economic' approach towards regulating the financing and operation of SGEI in Europe.

The processes of Europeanization have brought about significant changes to SSGIs in a fragmented and subtle manner. It is almost as if a silent revolution has occurred which has yet to be fully documented and commented upon. The manner in which change has occurred leaves us to conclude that the overall aims of modernisation and Europeanization are not clearly articulated. This lack of clarity makes it difficult for the Member States and other stakeholders to participate fully in the processes and to react to changes. Bearing in mind the perceived threats to traditional national welfare states from the EU integration project,[16] this process of modernisation requires close monitoring, and in particular the role of the citizen and the consumer in consultation and negotiation processes.

23.3 Differences in Terminology

An analysis of EU law and policy, and national approaches, shows that the concept of SSGIs lacks precision and may be used as an umbrella or generic concept to embrace a wide range of social services and social provisions in national and EU law and policy. This diversity and inconsistency is intensified and amplified when

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[14] *Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest*, OJ 2012 C 8/4; *Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union 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* 2012 L 7/3; *Communication from the Commission, European Union framework for State aid in the form of public service compensation,* OJ 2012 C 8/15. *Draft Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ* 2012 l C 8/23. [The de minimis Regulation was adopted in April 2012]. See Geradin 2011.

[15] *State aid: Commission adopts new rules on services of general economic interest (SGEI)* IP/11/1571, 20/12/2011.

[16] For a critical view see Scharpf (2009) and Joerges (2011). Cf the chapter by Baquero Cruz.

we examine the path breaking study 'Mapping of Public Services' analysed by Bauby in charting the range of SGIs across the twenty seven Member States[17] and also in the country case studies and reports provided in the chapters by Wehlander and Madell (Sweden), Becker (Germany), Davies (United Kingdom), Costamagna (Italy) and Koldinská (Czech Republic). The national reports show that the EU terminology is not adopted at the national level and that national responses to the issues posed by SSGIs continue to be historically and culturally specific. The lack of fit between national policy and EU policy may be handled in a discrete way when complaints are made to the Commission and litigation takes place before the European courts. For example, Wehlander and Madell show how Sweden, traditionally viewed as a 'strong' welfare state, has embraced far-reaching market-oriented reforms of its schooling system which have, so far, been handled sympathetically by the Commission. But greater guidance may be necessary if national reforms continue to move in the direction of commercial activities, not sufficiently imbued with public interest values. All five country reports/case studies reveal the changing extent of direct state provision of social welfare services, with an emphasis upon not *who* provides the services but the issue of special regulation, how financial provision is organised and structured and the extent of underpinning general welfare values in the quality and access to the services.

Sindbjerg Martinsen sees the tensions between the historic welfare state of the Member States and EU developments as a potential area of competence creep whereby the use of safe havens at the national level may not be enough to protect the future planning of national welfare policies at the central and local level. Thus knowledge of EU policy, but also involvement in the stakeholder community created by the Commission may be a necessary condition of national multi-level governance processes in the future. Thus the conclusions drawn by Ross are also pertinent: the role of local governance and solidarity require joint responsibility across the traditional boundaries of EU and national competence, engaging a range of actors to secure effective SSGIs in an EU society that recognises a range of social values, especially the values of citizenship and social inclusion

Not all analyses of the impact of EU law and policy stress the negative effects in terms of the relationship between national law and policy and EU law and policy. A recurrent theme is the need to develop the symbiotic relationship between national and EU law and policy, and analyses of how this has been enhanced after the Treaty of Lisbon 2009. However, our reading of the Commission's strategy and the development of national policies from the country reports leads to the conclusion that a more complex EU multi-level structure, or architecture, is required to harness the dynamics of the provision of SSGIs at the national level and this must move beyond a vertical EU-Member state relationship to attract a transnational element if greater competition is to be seen in the procurement of SSGIs.

[17] CEEP, Mapping of the Public Services, 2010.

Neergaard makes sense of the complex map of SSGI and introduces a new typology to analyse Services of General Interest in the form of an evolving family. As many chapters show, the role and place of SSGIs as a new generation, almost in embryonic form, of SGIs is problematic because it could be argued that even *within* the concept of SSGIs there are different forms emerging, for example, health care SGIs, education SGIs, social security SGIs and so on. These are not explicit labels but can be applied through the analysis of the special way in which certain SSGIs are treated by the European Commission and the European Courts.

The concept of SSGIs has not been used by the European Courts. Several cases analysed in the chapters show how the European Courts are prepared to recognise that certain social services of general interest should be treated differently, either in the non-application of the economic rules of the EU, especially the free movement and competition rules, or in a softer, gentler application of these rules and the application of the principle of proportionality.[18]

In contrast, SSGI is a concept increasingly deployed by the European Commission in soft law and new governance documents. The concept was first mentioned by the European Commission in 2001 but several chapters reveal that the concept did not begin to take shape or attract significant EU attention until 2008 against the backdrop of the emerging economic and financial crisis. The significance of SSGIs is acknowledged in the modernisation of the single market programme and within the context of the changing balance between economic and social values in the primary Treaties of the EU (the TEU and TFEU).

Somewhat paradoxically Protocol No. 26, Article 2, introduces the term 'non-economic services of general interest', placing them firmly within the competence of the Member States to provide, commission and organise. However, as we have seen in the chapter by Tryfonidou, the development of the concept of Citizenship in EU law has an impact upon non-economic SGIs and the Member States' policies are not totally immune from EU intervention.

This concept of non-economic SGIs is in tune with the case law of the European Courts in demarcating 'economic' and non-economic' activity as is shown in the chapters by Slot and Heide-Jørgensen and yet we would conclude that the Europeanization process has introduced greater subtlety and nuances to the way in which the choice and delivery of SSGIs may be affected by EU law and policy. As Heide-Jørgensen points out, to date EU level litigation has focused more on the state aid rules. In future, there may be the potential for a greater role for the competition law provisions where the state delegates the provision of SSGIs to non-state (private) bodies, and where the state continues to regulate the area.

In terms of hard primary and secondary law we see a greater divergence of treatment of SSGIs and different terminology deployed. In terms of general EU

[18] See for e.g. GC, Case T-289/03 *BUPA* [2008] *ECR* II-81.

law, for example, in the state aid provisions,[19] the services Directive[20], or the procurement rules, a wide range of social services are given special treatment or excluded altogether from the application of the EU provisions. As Szyszczak concludes, this leads to the fragmentation of the concept and policy responses towards SSGIs at the EU level.

Other chapters show how specialised sectoral approaches, for example the area of pensions (van Meerten, Schelkle) and health care (Baeten and Palm) also rely upon conventional concepts of free movement and competition law but these may be inadequate and limited tools to address particular issues. Paradoxically, however, in some sectors the impact of the free movement rules may lead to more invasive EU intervention (and indeed regulation, not only of the substantive rules but also in the governance processes and structures) of SSGIs, seen for example, in the recent adoption of the Directive on patients' rights discussed by Baeten and Palm.[21] The use of the EU free movement and competition rules to challenge national SSGIs inevitably results in negative integration with EU policy responses lagging behind commercial and economic development. We are seeing a more proactive response from the EU to colonise areas where issues emerge with EU soft law and governance used to 'lag' the often chaotic EU legal architecture.[22] Thus, different and new conceptual frameworks may be necessary to tackle emerging issues of SSGI provision where EU legislative competence is limited. This is explored by van Meerten in relation to the exceptionally complex area of occupational pensions. As is shown in other chapters, the symbiotic nature of national and EU regulation is evident and crucial for the solution of the problems between the national regulation of occupational pensions and EU economic freedoms. This requires a mix of different legislative tools. A theme which will need appraisal in the research questions in future years will be to analyse the coherence of the EU responses to emerging issues

23.4 The Treaty of Lisbon 2009

A thread that runs through many chapters is that the Treaty of Lisbon 2009 was a significant turning point in the treatment of SSGIs in EU law and policy. Several chapters comment on the reluctance of the European Commission to utilise the new legislative competence for SGI found in Article 14 TFEU and instead soft law and soft governance appears as the preferred regulatory route for the European

[19] Articles 107–109 TFEU and the application of Article 106(2) TFEU.

[20] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ 2011 L88/45.

[21] The impact of the Directive is explored in greater detail in van de Gronden et al. (eds) (2011) and de la Rosa (2012).

[22] The concept of soft law as a multi-purpose 'lagging' tool is suggested in the chapter by Szyszczak.

Commission.[23] Previous proposals from the Commission to introduce hard EU law in this area (in the form of a framework regulation or directive) appear to be completely buried. It is noteworthy that in the post-Treaty of Lisbon 2009 era, the Commission has been proactive in it its use of soft law communications and also attempted greater clarity and coherence in the modernisation of existing provisions that affect SSGIs, for example the state aid rules on financing public services and the procurement rules. The impact of Protocol No. 26 is also recognised as a potential interpretative and teleological tool in framing the competence debate on SSGIs.

23.4.1 A Constitution of Social Governance

Our conclusion is that the impact of the Treaty of Lisbon 2009 on SSGIs is significant. Schiek coins a new phrase, the idea of a 'constitution of social governance' to capture the new balance, or even recalibration of socio-economic values derived from the changes made by the Treaty of Lisbon 2009. Several chapters acknowledge that a change in direction for the EU is signalled in the focus away from the old Article 4 EC aim of an 'open market economy with free competition' towards an aim of a 'highly competitive social market economy' found in Article 3 TEU with a set of new values for the sustainable development of the EU based upon economic growth.[24] These values are established in Articles 2 and 3 TEU with clear indications of the role and value of solidarity in Europe. However, it is still too early to determine the exact nature of the 'social market economy' with few indications provided in primary law, or to date, case law.

23.4.2 Perceived Tensions Between Social and Economic Values

The new balance of socio-economic values in the EU could provide a catalyst for overcoming the perceived inherent tensions between Member State and EU policies. Baquero Cruz examines, and questions, the traditional stand point of seeing economic and social values and interests as inherently incompatible. Yet, as many chapters reveal, many of the points of tension on national SGEIs are focused upon

[23] See Rodrigues 2009. Cf. Houben 2008 who argues that Article 1 of Protocol No. 26 might be interpreted as enabling a framework directive for SGIs. Fiedziuk 2011 suggests that the Commission could use Article 14 TFEU to create a framework for SGEI based on either a status quo or a progressive approach.

[24] See Regner 2011; Jaaskinen 2011. In contrast see Gubboni 2011, p. 253 who argues: 'Despite the generous statements of principles of the new Treaties reformed at Lisbon, it will be extremely difficult… to reverse the essentially political deficit of social solidarity that makes the process of integration so asymmetrical, and the horizon of the 'social market economy' in Europe as weak and as uncertain as ever.'.

issues of inefficiency, lack of modernisation, protectionism, absence of consumer choice, and lack of accountability. To date, the clash of national values against EU economic freedoms has been managed in EU level litigation through the use of proportionality and the use of justifications allowing the Member States a margin of manoeuvre in how to frame SGEIs. Thus, as with other authors, Baquero Cruz offers up the possibility of the new post-Treaty of Lisbon 2009 values being used by the EU institutions in unblocking the tensions with national policy discourses. One conclusion is that the new values in EU law may act as a moderating force across the EU where there are differences between the Member States on how to modernise social welfare services.

23.4.3 A New Role for Solidarity

One conclusion and solution to the tensions between EU and national discourses on SSGIs that we might draw from the analysis of Ross is that the newly emphasised role for solidarity in the EU may be a powerful tool for integrating national and EU policy towards SSGIs and integrate them into the mainstream tools for integration. Several examples of this role can already be found in European Commission consultations of stakeholder engagement and policy documents. Schiek argues that in the concept of a 'constitution for social governance', distilled from the changes made by the Treaty of Lisbon 2009, a conceptual framework could emerge for expanding EU competence(s) that mediate existing perceived Member State-EU tensions. Although the range of stakeholders already involved in consultative processes is wide the new mix of state-private-hybrid provision of SSGIs emerging in the Member states requires recognition of the role of providers of SSGIs, not only regulators. This would include commercial and non-state providers, to create truly transnational dimensions of policy-making in SSGI provision. A factor which is also neglected is the role of what were once perceived to be beneficiaries of welfare services, but in the new language of EU law would be viewed as consumers.

23.4.4 The Neglected Fundamental/Human Rights Dimension

The new values of the Union are reinforced by Article 6(1) TEU which declares that the Charter of Fundamental Rights of the EU 'shall have the legal value as the Treaties'. However, the Charter is not incorporated into the main body of the Treaties or the Protocols. Additionally, several clauses of the Treaties pave the way for accession of the Union to the European Convention on Human Rights and Fundamental Freedoms.[25] This is one significant conceptual area where the *quality*

[25] Article 6(2) TEU; Protocol No. 8, Article 218 TFEU.

and *accessibility* of SSGI provision could be tested, alongside issues of individual and collective rights. There would appear to be a new set of social rights emerging under EU law, based on concepts of citizenship, a status of consumer and also based upon procedural rights.[26] It is not evident how such rights fit with traditional concepts of fundamental rights.[27] Several authors refer to the Charter of Fundamental Rights for the EU but it is an under-developed area in policy-formulation and case law in relation to SSGIs in the EU. Therefore, it is perhaps too early in the legal development of these concepts to provide definitive answers to the new dimension and impact fundamental rights may have upon SSGIs and this dimension is under-researched in this book. It is a research question for the future.

23.4.5 Subsidiarity and Local Governance

A link may be made between the new role for local and small SGEIs in the 'Europe 2020' project and the new constitutional arrangements for subsidiarity and local governance. Baeten and Palm point out that for the first time in EU primary law, the TEU recognises the principle of regional and local self-government.[28] Together with the strengthening of the principle of subsidiarity, the TEU creates the idea of a pluralistic and diverse Union that may contribute to the strengthening of economic and social integration.[29] Thus *Union* policies can be developed, and implemented at the local level without centralisation, *and* be solidaristic in effect. This is acknowledged, for example, in the modernisation of the single market programme.[30] Currently, as Manunza and Berends argue, it is possible for delivery of many SSGI to slip outside of the public procurement rules. The Commission has moved the modernisation of SSGI forward by suggesting that the choice of SSGI provider may be based upon a wider range of factors, other than price. This allows for local factors to be taken into account, alongside improvements in the quality of

[26] See Szyszczak and Davies 2011; Davies 2011.

[27] See Gubboni 2011.

[28] Article 4(2) TEU states that the Union will 'respect regional and local self-government' when legislation is contemplated. Article 2 of Protocol No. 2 states that the Commission is obliged, before proposing a legislative act, in its consultations (and where appropriate) take into consideration the regional and local dimensions of the envisaged act. Article 5 of Protocol No. 2 states that every draft Union legislative act must include an assessment of its impact upon local and regional levels and in the case of draft Directives the Commission should explain the implications for the Member States, including any regional legislation that may be required.

[29] The principle of subsidiarity is now contained in Article 5 TEU. The principle includes references to local and regional competence. (Article 5(3) TEU).

[30] Seen particularly in *COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Towards a Single Market Act For a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another*, COM (2010) 608/final 2.

delivery as well as addressing other concerns, for example, environmental quality issues pursued at the local and EU level. Thus Manunza and Berends continue a thread identified elsewhere in the book, of seeing transparency and accountability as important EU-led principles in the choice and delivery of SSGI. A second thread which runs through the EU dimension to SSGI is to modernise the delivery of SSGI through competition, based on quality criteria.

23.5 Final Conclusions

We are aware that this is the first book to take SSGIs as an organisational concept examining them through the lens of EU developments. Our aim was to explore how SSGIs are emerging by unravelling the different ways the concept is identified in differing areas of EU law and policy, alongside tensions with the national understanding of what is traditionally viewed as 'social welfare provision' and its regulation. We have analysed how these tensions are currently being managed and have concluded that in the post-Treaty of Lisbon 2009 era the EU possesses a range of legal tools, governance processes, principles and values to address the issues emerging. In particular, we would argue that the Europeanization of SSGIs is more profound—and through the use of soft law and soft governance processes has achieved greater acceptance from the Member States—than is often realised in conventional EU law understanding of the competence issues.

We conclude with hopes of new ambitions to encourage further research and analysis of the way in which SSGIs are being regulated at the national level and the role of Europeanization in shaping the future of social services in what we anticipate will increasingly be liberalised markets.

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