Chapter 10
The *Altmark* Update and Social Services: Toward a European Approach

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Abstract The 2011 updated *Altmark* package exempts only particular social services from the notification requirement embedded in Article 108 (3) TFEU. This means that Member States must bring the financing of social services in line with the conditions set out in the 2011 Commission Decision (by changing some key features of the measures governing social services), in order to benefit from the carve out. This may be a rather sensitive matter, given that Member States regard social services as important elements of their domestic policies, whereas the Commission may be inclined to follow a European agenda in this context. This contribution aims to examine whether the Commission compels Member States to adopt a specific (European) model for social services. Furthermore, the contribution dwells upon the intricacies of the latest developments brought about by the 2011 *Altmark* package by investigating the implications for social services in the EU. This is done by analyzing *inter alia* the relevant case law and decisional practice, the applicable soft law documents and the relationship between SSGI and competition and free movement rules; furthermore, the 2011 Commission Decision is explored in great detail, the focus being directed at the Decision's main provisions on matters relating to definitions, act of entrustment, compensation and overcompensation, transparency, and information, as well as the role of Article 106 (2) TFEU in the context of social services. Hard law with a bearing on social services is scarce in EU law. Therefore, the 2011 Commission Decision is of great interest for social services and, as a result, for the national social welfare states, especially since, it may be argued that the Decision provides for some significant

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bits and pieces of a comprehensive model for the delivery of social services. Thus, the adoption of the updated *Altmark* package constitutes a significant step toward an EU approach to social services. Last but not least, one may argue that the path has been paved for more binding EU measures meant to further build an EU model for social services based on a balance between State involvement and social needs, on the one hand and considerations of efficiency and competition, on the other hand.

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10.1 Introduction

In its 2011 updated *Altmark* package the European Commission has decided not to carve out all kinds of social services from the notification requirement embedded in Article 108(3) TFEU, but to limit this exemption to particular social services. The Commission's measures suggest that yet another safe haven is created for certain social services, in addition to the already existing ones, such as the Services Directive.[1] However, Member States must bring the financing of social services in

[1] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* 2006 L376/36.

line with the conditions set out in the 2011 Commission Decision, in order to benefit from the carve out.[2] From the outset, it cannot be excluded that Member States, therefore, have to change some key features of the measures governing social services, particularly when it comes to issues such as the avoidance of overcompensation and transparency of the PSO entrustment process. This may prove to be a rather sensitive matter between the Member States and the Commission, given that Member States continue to regard social services as important elements of their domestic policies, whereas the Commission may be inclined to follow a European agenda in this context.

This chapter aims to examine whether the Commission compels Member States to adopt a specific model for social services, especially since the Commission has lately manifested itself as the driving force in stimulating a process of Europeanization with regard to these services. Furthermore, this contribution will dwell upon the intricacies of the latest developments brought about by the recent modernization process of the 2005 *Monti-Kroes* package by investigating the implications for social services in the EU.

This chapter approaches these topics as follows: Sect. 10.2 explores the basic concepts relating to social services in the context of the Commission's (soft) law documents, as well as in the context of the application of the EU competition and Internal Market rules to these services. Section 10.3 reveals how both the European Courts and the Commission have applied the State aid rules to social services. Section 10.4 discusses the main features of the 2011 updated *Altmark* package, with a focus on the Commission Decision's main provisions on matters relating to definitions, act of entrustment, issues regarding compensation and overcompensation, transparency and information, as well as the role of Article 106(2) TFEU in the context of social services. This chapter ends with some conclusion in Sect. 10.5.

10.2 What are Social Services?

This section explores the concept social services. It examines what these services encompass in EU law and whether the EU competition and Internal Market rules apply to them.

[2] Commission Decision 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 L7/3.

10.2.1 Definitional Issues: From Social Services to Social Services of General Interest

As early as 2004, soft law documents of the European Commission acknowledged the special features that social services possess.[3] The Commission referred to them as Social Services of General Interest (SSGI), which indicated that these services could be part of the category of Services of General Economic Interest (SGEI). In this respect, it was recognized that although SSGI belong to the competences of the Member States, EU law plays an important role regarding their delivery and financing. As it will be detailed below, in the absence of competences to legislate in the area of SSGI, the Commission has made use of safe havens and soft law measures to move the modernization of SSGI away from the Member States' autonomous policy making to a Europeanization process.[4]

Generally speaking, SSGI have a specific role to play as an integral part of the European model of society and the European economy, as a result of their contribution to several essential values and objectives of the EU, 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. These issues were clearly admitted in the Commission's first Communication on SSGI from 2006.[5] Here, the specific character of SSGI is reiterated by emphasizing that they operate on the basis of the solidarity principle, they respond to differing needs in order to guarantee fundamental human rights and protect the most vulnerable, they are not for profit and in particular address the most difficult situations, they are often part of a historical legacy, while being strongly rooted in local cultural traditions, etc.[6]

SSGI have emerged as a special form of SGEI, to the extent that Member States use the protection of the SGEI concept to shield the economic activities of an undertaking performing an SSGI from the full force of the Treaty rules. Still, no unitary definition of SSGI exists for them to emerge as a special legal category in EU law.[7] Therefore, from the outset, it should be stressed that under EU law, SSGI are not a legally distinct category of services within SGI, as this concept appears

[3] White Paper on Services of General Interest, COM (2004) 374 final. This was not the first time the concept of SSGI was mentioned; one can recall the 2001 Commission's Report to the Laeken European Council on SGI, COM (2001) 598 final.

[4] See Szyszczak 2012, pp. 27–28.

[5] Communication from the Commission—Implementing the Community Lisbon Programme—Social services of general interest in the European Union, SEC (2006) 516, COM/2006/0177 final, p. 4.

[6] Ibid, pp. 4–5.

[7] Szyszczak 2012, p. 3. Indeed Neergaard 2012 argues that even within SSGI there may be subcategories recognized by different treatment in Commission policy or European Courts' case law.

only in policy documents of the Commission and not in EU primary or secondary law or acknowledged in the European Courts' case law.[8]

In its Communications, the Commission presents a straightforward categorization of SSGI, in that two main categories of social services may exist: statutory and complementary social security schemes, organized in various ways and covering the main risks of life such as those related to aging and unemployment and other essential services provided directly to the person, which aim at facilitating social inclusion and safeguarding fundamental rights.[9] Furthermore, the 2007 Commission Communication[10] highlights the objectives and the organizational principles which characterize SSGI: they are person oriented, they play a preventive and socially cohesive role, which is addressed to the whole population, independently of wealth or income, they contribute to non-discrimination, etc.

In its soft law documents, the Commission has framed social services as SSGI and, on top of that, it has construed this concept broadly. The creation of the concept of SSGI has enabled the Commission to stimulate a process of Europeanization with regard to social services.

10.2.2 The Application of the Free Movement and Competition Rules

Is this process, which the Commission attempts to further in its soft law approach, also reflected in the case law on the Treaty provisions on free movement and competition law? This question will be addressed below.

10.2.2.1 Preliminary Issues and Soft Law References

A clear distinction should be made, depending on the activity under consideration, between the services of an economic nature, namely SSGI which constitute economic activities and those of a noneconomic nature, namely SSGI which do not constitute economic activities. The Commission Guide to the application of the EU rules on State aid, public procurement and the Internal Market to SGEI, and in particular to SSGI[11] states that the fact that the activity in question is termed 'social' is not of itself enough for it to avoid being regarded as an economic

[8] Van de Gronden 2011, p. 125.

[9] See the Commission Communication Implementing the Community Lisbon programme: Social services of general interest in the European Union, COM/2006/0177 final, p 4 and the Commission Communication A Quality Framework for Services of General Interest in Europe, COM (2011) 900 final, pp. 3 and 4.

[10] Commission Communication—Services of general interest, including social services of general interest: a new European commitment, COM (2007) 725 final, p. 7.

[11] Commission Staff Working Document, SEC (2010) 1545 final, p. 17.

activity within the meaning of the Court's case law. It should be noted that SSGI that are economic in nature could also be labeled as SGEI, if they concern special tasks entrusted by the State. This finding is important as far as the application of the EU competition law and free movement rules is concerned. Last, but not least, a similar distinction using economic criteria is to be found in Protocol No. 26 to the Treaty of Lisbon 2009 on SGI, which, besides stressing the importance of SGI, confirms that SGI is an overarching concept that should be divided into two categories: SGEI and noneconomic SGI.[12]

In deciding whether SSGI fall under the application of the EU competition and free movement rules it is important to properly assess the concepts of undertaking and economic activity. First, as far as undertakings are concerned, the CJEU[13] defines them as entities engaged in economic activities, regardless of the legal status or the manner of financing. This definition is crucial because competition law traditionally applies to undertakings.[14] With regard to the concept of economic activity, according to the judgment in *Pavlov*,[15] an economic activity is described as any activity consisting in offering goods and services on a given market, in particular if this occurs in return for remuneration and, if the provider of services assumes the economic risk involved. It is no surprise that in its Communication on the application of the EU State aid rules to compensation granted for the provision of SGEI, which is part of the updated *Altmark* package, the Commission refers to this important definition.[16] However, the 2001 Commission Communication on SGI[17] acknowledges that it is not always easy to distinguish between what should and should not be regarded as economic activity. The Commission argues that a straightforward answer cannot be given a priori and a case-by-case analysis is required.

10.2.2.2 SSGI and the Free Movement Rules

This section approaches the discussion on the applicability of the EU free movement rules to SSGI from the angle of the two-prong definition given by the Commission: social security schemes and social services provided directly to the person. In this regard, it has to be recalled that according to Articles 56 and 57 TFEU services are to be regarded as such as long as they are provided for remuneration.

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[12] Van de Gronden and Rusu 2012, p. 435.

[13] Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] *ECR* I-1979, para 21.

[14] Graham 2010, p. 301.

[15] CJEU, Joined Cases C-180/98—C-184/98 *Pavlov v Stichting Profesioenfonds Medische Specialisten* [2000] *ECR* I-6451, para 73.

[16] *OJ* 2012 C8/4.

[17] 2001/C 17/04.

Social security schemes amount to economic activities if they meet the requirements set by the CJEU.[18] Thus, the application of the TFEU free movement rules is warranted.[19] To exemplify, the CJEU gave a broad reading to the application of the free movement rules in *Freskot,*[20]while confirming that when a Member State introduces a social scheme that covers insurable risk, that particular scheme must comply with the Treaty rules on free movement. Of course, the express derogation embedded in the Treaty and the rule of reason are available means for Member States when attempting to justify their measures in such contexts. Consequently, it seems that the CJEU is prepared to assess social security schemes in the light of the Treaty provisions on free movement, if they cover insurable risks.[21] On different occasions, the European Citizenship concept also appeared to be of relevance, however the CJEU drew a sharp distinction between these free movement provisions and the free movement provisions that have an economic dimension. In *Von Chamier-Glisczinski*[22] the CJEU held that disparities between the various social security systems of the Member States do not infringe Article 21 TFEU thus sending the message that the European Citizenship provisions are not capable of breaking open national security schemes.[23] Admittedly, in *Ruiz Zambrano*[24] the CJEU held that the Treaty provisions on European Citizenship preclude any national measure that deprives Union citizens of the genuine enjoyment of their rights. However, in *McCarthy*[25] and *Dereci*[26] the CJEU stressed that these provisions cannot be applied to purely internal situations; rather they impose a ban on national measures that force Union citizens to leave the territory of the EU and have, as a result, a 'cross-border element'. Consequently, the CJEU seems to endorse a cautious approach toward European Citizenship and extending this concept is not high on its agenda.[27] In the same vein, it may be assumed that CJEU will not be prepared to derive far-reaching consequences from Article 21 TFEU for national social security systems.

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[18] See also Van de Gronden 2011, 125.

[19] See also Commission Communication—Services of general interest, including social services of general interest: a new European commitment, COM (2007) 725 final.

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

[21] See also CJEU, Case C-350/07, *Kattner Stahlbau* v *Maschinenbau- und Metall- Berufsgenossenschaft* [2009] *ECR* I-1513.

[22] Case C-208/08 *Petra von Chamier–Glisczinski* v. *Deutsche Angestellten-Krankenkasse* [2009] *ECR* I-6095.

[23] Van de Gronden 2011, p. 129.

[24] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, 8 March 2011, n.y.r.

[25] Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, 5 May 2011, n.y.r.

[26] Case 256/11, *Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike and Dragica Stevic v Bundesministerium für Inneres*, 15 November 2011, n.y.r.

[27] Adam and Van Elsuwege 2012, p. 182.

With regard to the category of services directly provided to the person, the discussion regarding the applicability of Articles 56 and 57 TFEU applies *mutatis mutandis.* The case law is diverse and is not confined only to the freedom to provide services and the freedom of establishment, as it was the case in *Sodemare,*[28] where the CJEU found that social care services provided for the elderly are caught by the Treaty provisions of free movement. In the relevant case law of the Court, the free movement of capital has also been present. In *Sint Servatius*[29] the Court analyzed the Dutch social housing scheme only in the context of this freedom and found that a prior authorization scheme for cross-border investment projects constitutes a restriction on free movement of capital, which may be justified using the rule of reason.[30]

10.2.2.3 SSGI and EU Competition Law

Regarding the applicability of the Treaty rules on competition the discussion may follow a similar twofold pattern: social security schemes and social services provided directly to the person.

With regard to the former category, the case law of the Courts[31] shows that whereas the majority of statutory social security schemes, which are predominantly based on the principle of solidarity and subject to substantial State control, are not seen as economic activities, complementary schemes will, in contrast, be usually caught by the competition rules. The principle of solidarity plays a key role in the CJEU's case law, as shown in *Freskot* and *Kattner Stahlbau*. In the latter case, the Court found that the managing bodies concerned were not engaged in economic activities and therefore competition law did not apply, however the free movement rules were applicable in this particular case. As a consequence, one could argue that the scope of free movement rules is broader than the scope of the rules on competition,[32] a conclusion also drawn by the Commission in its Communication on the application of the EU State aid rules to compensation granted

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

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

[30] See Szyszczak 2011, pp. 9–11.

[31] CJEU, Case C-160/91 *Poucet et Pistre* [1993] *ECR* I-637; CJEU, Case C-67/96 *Albany* [1999] *ECR* I-5751; CJEU, Joined Cases C-115/97, Case C-219/97 *Drijvende bokken* [1999] *ECR* I-6121 and CJEU, Case C-437/09, *AG2R Prévoyance v Beaudout Père et Fils SARL*, judgment of 3 March 2011 (n.y.r.). In *AG2R* the Court adopted a remarkable standard in evaluating the relevant factors and despite the fact that the scheme under review was characterized by a high degree of solidarity and although the managing body was held to be non-profit-making and under a certain level of state control (even if monitoring the functioning of the scheme had been devolved to representatives of the parties), it was considered to be an undertaking engaged in an economic activity, since the level of State control was not substantial. See also Kerstin 2011, pp. 474–475.

[32] Szyszczak 2009, 210.

for the provision of SGEI.[33] One of the latest trends that may be observed in practice is the introduction by Member States of competition elements in statutory schemes. This approach is regarded as a sign of modernisation of social policy. In such a situation the Commission will not hesitate to find the existence of an economic activity opening the door for the application of competition rules.[34] A similar outcome (namely applicability of EU competition rules) will be noticed in cases[35] where the national legislator in designing a complementary social security scheme has opted for a mix between competition and solidarity.[36]

If this is the case, the salvation comes from the SGEI concept (subject to whether the SSGI in question is of an economic nature) as embedded in Article 106 (2) TFEU, which may justify possible restrictions of free competition. Such competition issue could also arise under EU State aid law, as, for example, the rights and tasks conferred on managing bodies of (complementary) social security schemes which are also supported by transfers of financial resources, State aid problems may occur under the application of Article 107 TFEU. Going beyond the issue of financial resources transfers, in *Freskot* the Court argued that other State aid issues may also occur in relation to the possibility of compulsory social security schemes conferring benefits on the companies that are covered thereunder.[37]

With regard to social services provided directly to the person the CJEU decided in *Höfner*, *Job Centre*[38] and in the Irish case on social housing[39] that organizations providing this kind of services are engaged in economic activities, since such services are market oriented regardless of the public or private law type of designation performed by member States. The Court does not pay much attention to the principle of solidarity in such cases and therefore a large diversity of social services provided directly to the person fall under the incidence of EU competition rules. Consequently, since many such social services are financed by public means the discussion on the applicability of the State aid rules may be brought in the picture in a similar fashion as with regard to social security schemes. Thus, the SGEI concept can play an important role in this respect, which is confirmed by the case law in this field. Member States that model the relevant activities pertaining to social services provided directly to the person (especially funding of social housing activities) in the form of SGEI missions have the option to invoke justifications related to these missions.[40]

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[33] *OJ* 2012 C8/4.

[34] See for example the *Zorgverzekeringswet* case, Decision of the Commission of 22 December 2005 on the introduction of a risk equalization system in the Dutch Health Insurance, N541/2004 and N542/2004—C(2005) 1329 fin.

[35] Such as CJEU, Case C-116/97 and C-117/97 *Brentjens* [1999] *ECR* I-6025.

[36] Van de Gronden 2011, p. 139.

[37] Paragraph 82 of the *Freskot* ruling.

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

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

[40] See Van de Gronden 2011, p. 146.

10.3 Case Law and Decisional Practice on State aid and SSGI

The previous section has shown that many SSGI are not immune from EU competition and internal market law. As a consequence, Member States must observe the Treaty provisions on State aid, when financing the provision of these services. Below, the case law and decisional practice regarding State aid and SSGI will be outlined, but first, the most significant rulings on the main principles of SGEI will be discussed.

10.3.1 The Case Law on the Conceptual Issues

As already outline in other chapters of this volume, in its case law, the CJEU developed a special approach to State aid and issues of general interest. The opportunity arose in the context of the *Altmark* case.[41] In this case, the Court held that compensatory measures for the execution of public service obligations (PSO) do not constitute State aid, provided that the four conditions listed in paras 88–93 of the judgment are met: the undertaking is charged with the execution of a PSO, the parameters of the amount of the compensation are established in an objective and transparent manner, the compensation does not exceed what is necessary, and in the case of absence of public procurement for the contract concerned, the amount of the compensation is determined on the basis of the expenses a well-run undertaking would have incurred. The importance of the *Altmark* ruling is emphasized by certain remarkable elements: first, PSO and SGEI are similar concepts,[42] in that they both relate to certain special tasks that state bodies impose on undertakings. Second, a major advantage of the approach developed in *Altmark* is that compensation measures do not need to be notified to the Commission and they are not subject to the standstill provision (which may have led to recovery of illegal aid).[43] Thus, it may be argued that by delivering its judgment in *Altmark* the CJEU has developed a jurisdictional approach to State aid.[44] Third, without giving Member States *carte blanche*, the *Altmark* ruling extended their powers to finance PSO.[45] Last but not least, as it will be detailed below, the judgment in *Altmark* judgment seems to have inspired the European courts in furthering the SSGI concept in State aid cases. However, inconsistencies regarding the interpretation of

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

[42] As detailed below, this view is consistent with the GC's approach in *BUPA* (paras 161 and 162).

[43] See Nistor 2011, p. 262.

[44] See Van de Gronden 2009, p. 11.

[45] See Van de Gronden 2011, p. 140 and Fiedziuk 2010, p. 280.

the *Altmark* criteria in the case law of the Courts and in the Commission's decisional practice and (soft) law documents are certainly present.

At the heart of the *Altmark* approach is the entrustment of SGEI missions. With regard to this issue, the recent case *AG2R Prévoyance* is of great importance.[46] This case concerned a supplementary health care scheme, set up by representative organizations of employers and trade unions in the bakeries sector, the management of which was assigned to an insurer (AG2R). In this case, the CJEU had to decide whether a task to preform SGEI was allotted to the insurer concerned. It is striking that not much was made of the need for a formal act of entrustment.[47] The Court following the approach in *BUPA*[48] and *TV2/Danmark,*[49] accepted that the designation of the task to provide SGEI may be construed on the basis of semi-collective actors (of a private nature) entrusting special operators with this task[50]: provident operations may be entrusted not only to provident societies and mutual insurance associations, but also to insurance companies.[51] Therefore, the CJEU found that AG2R was entrusted with the provision of SGEI. All in all, this recent case law of the CJEU seems to convey the message that the European judiciary seems to adopt a more relaxed approach regarding the requirement of entrustment. If, until recently, the Court required an explicit act of entrustment by a public body,[52] lately 'implicit acts of entrustment' may also be inferred from general obligations and conditions laid down in national legislation. As it will be detailed below, this stance seems to be at odds with the Commission's approach as embedded in (soft) law documents and its decisional practice.

10.3.2 Social Security Services

As already outlined in Sect. 10.2, various social security services, most notably supplementary schemes, are caught by the Treaty provisions on competition, including those on State aid. As a result, Article 107 TFEU was applied by both

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[46] Supra note 31.

[47] Paragraph 73 of the ruling states that it still remains to be determined whether AG2R is entrusted with the operation of services of general economic interest within the meaning of Article 106(2) TFEU. See also Sauter 2011a, p. 6.

[48] GC, Case T-289/03 *British United Provident Association* [2008] *ECR* II-81.

[49] Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark* v *Commission*, [2008] *ECR* II-02935.

[50] See also Van de Gronden and Rusu 2012, pp. 421–422.

[51] Also, according to para 65 of the ruling, as an undertaking engaged in an economic activity, AG2R 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.

[52] See for example CJEU, Case C-159/94 *Commission* v *France (energy monopolies)* [1997] *ECR* I-5851.

the European judiciary and the Commission to these services. In *Freskot*, for example, the CJEU was called upon to consider the transfer of financial sources to a body managing a social security scheme. The CJEU held that the managing body concerned was not engaged in economic activities, as the compulsory scheme at issue was predominately based on the principle of solidarity. The CJEU moved on by pointing out that Article 107(1) TFEU could nevertheless be violated, as the beneficiaries were undertakings. The cover provided was related to damages suffered by agricultural undertaking from natural risks. As a result, it had to be examined whether the compulsory scheme at issue constituted an economic advantage for the operators covered thereunder. The main question was whether, in the absence of a compulsory scheme, it had been possible to have obtained insurance cover against natural risks at contribution rates corresponding to those due under this compulsory scheme. However, the CJEU was not sufficiently appraised by the relevant points of fact and law in order to answer this question. It was therefore left to the referring domestic court to settle this matter. Admittedly, the *Freskot* case is not representative for the issues that are at play in social security matters, because in this case the beneficiaries were undertakings. Then again, the CJEU took an important decision by holding that social benefits can constitute State aid, if undertakings belong to the group of beneficiaries.

A lot of attention was drawn to the *BUPA* case.[53] This case concerned a supplementary health care scheme and therefore the institutions administering it were undertakings for the purposes of EU competition law. As these bodies were engaged in a system of risk equalization, financial resources were transferred to one of these bodies, which raised a State aid issue. The Commission decision to approve the Irish system concerned was challenged before the General Court. This court examined whether the Irish measures under review were justifiable in the light of the *Altmark* conditions. In finding that these conditions were met the General Court took two remarkable decisions. In the first place, it derived an SGEI mission from the general obligations (such as open enrollment and community rating) laid down in the Irish health legislation. In line with the approach adopted by CJEU in *AG2R* the General Court does not require an explicit act of entrustment. In this regard, it should be noted that in *BUPA* it was contended that SGEI and PSO are identical concepts. Furthermore, the fourth *Altmark* condition, that takes the expenses of a well-run company as a benchmark, was moderated.[54] It was believed that in a health insurance case this condition cannot strictly be complied with. What mattered the most in the General Court's view was that the Irish system of risk equalization did not amount to offsetting costs resulting from inefficiency.[55] As there is a gray area between the costs of an efficient firm and the costs of a firm operating inefficiently, in *BUPA* the General Court adhered to a

[53] Supra note 48.

[54] See also Schweitzer 2011, p. 30.

[55] Sauter 2009, p. 279.

flexible approach to *Altmark* and, by doing so, left a considerable margin of appreciation to Member States in matters of financing health insurance.[56]

Strikingly, in contrast with the approach adopted by the General Court in *BUPA*, the Commission departed from a strict reading of the fourth *Altmark* condition in the *Zorgverzekeringswet* case.[57] At issue was the Dutch system of risk equalization, which was set up in order to guarantee access for all to private health insurance cover. In the Netherlands, private insurers administer the basic health care schemes. The Commission was of the opinion that Dutch health insurance companies were engaged in economic activities and that therefore, the flow of funds, which is at the heart of the operation of a risk equalization scheme, should be assessed under the EU State aid rules. Its most significant finding was that the Dutch system did not aim at compensating costs; rather it is concerned with tackling problems of risk. Consequently, the fourth *Altmark* condition was not fulfilled in the view of the Commission. Eventually, the Commission approved the Dutch system on the basis of Article 106 (2) TFEU, by arguing that compensation of the costs, incurred by insurers due to patients with high-risk profiles, is necessary in order to guarantee open enrollment. It is clear from the outset that in *Zorgverzekeringswet* the Commission applied the *Altmark* conditions stricter than the General Court did in BUPA. However, the approaches of these two institutions had one thing in common: like the General Court the Commission derived an SGEI mission from general obligations, which were laid down in the Dutch Act on Health Insurance.

To date, *Zorverzekeringswet* is the most important case decided by the Commission. In other cases, the Commission was also confronted with issues of financing social security services. For example, in *Arctia Shipping*[58] the Commission approved financing given by the Finnish government to a specific company that took over employees of a former State enterprise. The aim of this financing was to compensate for the costs caused by the fact that these employees had lost their rights of the supplementary government pension. As the company concerned was not entrusted with the operation of an SGEI, the Commission cleared the transfer of money on the basis of Article 107(3)(c)TFEU. By levelling out the differences in pension costs caused by the transfer of workers from a State enterprise to a private company the Finnish government restored the level playing field. It is apparent from this case that the Commission is sensitive to arguments related to the special features of pension rights.

In the case on the *Reform of the organization of the supplementary pension regime in the banking sector*[59] the Commission had to examine whether the

[56] See De Vries 2011, pp. 302–305 and Van de Gronden 2009, p. 18.

[57] Supra note 34.

[58] Decision of the Commission of 6 July 2010 in case N152/2010-Compensation to Arctia Shipping Oy with respect to supplementary pension rights of its employees, C(2010) 4505 Final.

[59] Decision of the Commission of 10 October 2007 in case N 597/2006—Reform of the organization of the supplementary pension regime in the banking sector, *OJ* 2007 C308/9.

measures that changed the contributions due by the banks constituted State aid. As the reform did not release the banks from financial charges resulting from the general system of social security, the Commission concluded that the entire operation did not amount to State aid and, therefore, Article 107(1) TFEU was not violated.[60] The nonapplicability of the State aid rules relieved the Commission of the task to examine whether the pension scheme concerned could be regarded as SGEI (or PSO).

10.3.3 Social Services Provided Directly to the Person

An important case for State aid and social services provided directly to the person is the *Dutch Social Housing* case.[61] At issue in this case was the financing of the organization of the Dutch social housing sector. The Dutch government was forced to review its system of financing this sector after the Commission had posed some critical questions about the transfer of financial resources to housing companies.[62] It was decided to improve the financial transparency of the measures concerned and to oblige the social housing companies to introduce a system of separate accounts.[63] What is even more important is that these companies must rent 90 % of their dwellings to less advantaged persons. This target group was defined as households having an income below 33.000 euro per year.[64] In the view of the Commission the precise definition of the target group led to a clear delineation of an SGEI mission. Furthermore, the Commission was not opposed to renting out 10 % to higher income groups, since this practice would stimulate social mixity and social cohesion in urban areas in the Netherlands. Consequently, the Commission approved the Dutch social housing system on the basis of Article 106 (2) TFEU. It is striking, however, that the Commission refused to clear the financial measures concerned in the light of the *Altmark* approach. It claimed that in particular the fourth condition of this approach was not fulfilled.[65] In other words, the Commission continues to depart from a strict reading of this condition. It should be noted that the Commission decision was challenged as it was claimed that the Commission does not have the authority to intervene in national policies on social

[60] See Boeshertz and Frederick 2008, p. 34.

[61] Commission Decision of 15 December 2009 in cases No E 2/2005 and N 642/2009 (The Netherlands, Existing and special project aid to housing corporations).

[62] Cf. also Lavrijssen and De Vries 2009, p. 408.

[63] See e.g. the letter of the Minister of Housing of 13 September 2005, Woningcorporaties, Kamerstukken II (Dutch Official Parliamentary Documents), 29 453, no. 20.

[64] This threshold was recently raised up to EUR 34.850,00. See http://www.europadecentraal.nl/europesester/643/2123/.

[65] See para 14 of the Commission Decision of 15 December 2009 in cases No E 2/2005 and N 642/2009 (The Netherlands, Existing and special project aid to housing corporations).

housing and Services of General (Economic) Interest.[66] At the writing of this chapter, the General Court had not handed down its judgment in this case yet.

Another important case is the Irish case on social housing.[67] In Ireland, the Housing Finance Agency (HFA) raised funds at the finest rates on the capital market and it then advanced these funds to the institutions providing social housing services to the most socially disadvantaged households. As in the Dutch case, the Irish system was approved, because these institutions were entrusted with a clearly defined SGEI mission. The Commission clearance was based on Article 106(2) TFEU and, apparently, it was believed that the *Altmark* conditions were not met.

It is apparent from the analysis above that Article 106(2) TFEU plays a large role in the Decisions on social housing, as the Commission based the compatibility of the national systems under review with the EU rules on State aid on this Treaty provision. Great importance was assigned to the clear definition of a particular SGEI mission. From an EFTA case it is apparent what will happen if a clear mission is absent. In *Icelandic Housing Financing Fund* the EFTA surveillance authority contended that the Icelandic competent authorities had failed to designate an SGEI mission and, as a result, the State aid measures were not justifiable in the light of Article 106(2) TFEU.[68]

10.3.4 Evaluation

In social housing cases a consistent approach, which departs from a strict reading of the fourth *Altmark* condition and the need of a well-defined SGEI mission, is developed by the Commission. However, these two features of the Commission approach are at odds with recent case law of both the CJEU and the GC. It should be pointed out that these two EU Courts seem to prefer to interpret the condition of the expenses of a well-run company in a flexible way and to derive SGEI entrustments from general obligations. The strict views of the Commission seem not to match with an important development emerging from the case law of the European judiciary, which has increasingly a more flexible take on SGEI and State aid.

10.4 The 2011 Commission Decision

The 2011 Commission Decision assigns great value to social services. It creates a safe haven for a considerable amount of these services. It goes without saying that the special position of social services is clearly an added value of the recent update

[66] This appeal is registered as GC, Case T-201/10, Case T-202/10 and Case T-203/10.

[67] Supra note 39.

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

of the *Altmark* package. The 2011 Commission Decision puts forward that services provided by operators such as hospitals and other enterprises in charge of social services have special characteristics that need to be taken into account.[69] These special characteristics explain that aid given to the providers of social services does not necessarily lead to competition distortions. Therefore, the transfer of a relatively great amount of financial resources to these providers does not meet with insuperable difficulties. In contrast with the general exemption, which is lowered from compensation not exceeding the amount of EUR 30 million to compensations below EUR 15 million, all social services are exempted from the Treaty provisions on State aid. In other words, the Commission has introduced a generous regime for social services. This does not mean, however, that no conditions apply to national compensatory measures taken with regard to social services. Below the conditions of the 2011 Commission Decision will be discussed in relation to social services. In this regard, it should, however, be noted that the 2011 Commission Decision is only relevant in so far as one or more conditions set out in *Altmark* are not fulfilled.[70] In the event that all these conditions are met, the national measure concerned does not constitute State aid for the purposes of Article 107 TFEU and no assessment under the 2011 Commission Decision needs to be carried out.

10.4.1 Social Services Covered

The first question that should be addressed is which social services are covered by the 2011 Commission Decision. Article 2 sets out how social services are defined. By drafting this provision, the Commission did not take any elements from its soft law documents on SSGI. The definition of SSGI, which is repeatedly given in the Commission Communications, is absent in Article 2. Consequently, the Commission has decided not to carve out all kinds of SSGI but to limit this exemption to particular social services. The first section of Article 2 identifies these services, which will be discussed below.

10.4.1.1 Hospital Services

The first section under (b) of this provision identifies medical care services provided by hospitals, including emergency services, as social services. The concept of 'hospital' is not defined in the Decision or in any other document of the updated *Altmark* package. Yet, it is clear from the wording of the section 1 under (b) that the

[69] See recital 11 of the Commission Decision 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 services of general economic interest, 2012/21/EU.

[70] Cf also Thouvenin 2009, pp. 114 and 115.

entity concerned should provide 'medical care'. For the rest, the Decision is silent on what is meant by a hospital. As a result it may be assumed that both aid granted to public and private hospitals could benefit from the generous exemption of the Commission Decision. It is striking that no guidance is given on how to determine whether a particular entity qualifies as a hospital. Therefore, considerable room for maneuver is left to the Member States. Nevertheless, it may be assumed that from the perspective of EU law the claim of a Member State that a particular operator is a hospital will be subject to some review and, if necessary, will be rejected when the line of reasoning of the Member State concerned is not adequate. In order to verify whether a particular provider should be regarded as a hospital, Union Institutions, such as the Commission and the CJEU, could take definitions used in other areas of EU law. For example, it is apparent from the Services Directive, which also contains an important carve-out for health care, that services provided '…to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession..'[71] are regarded as health care services. Furthermore, it can be derived from the Directive on patients' rights in cross-border health care that a hospital presupposes the presence of medical infrastructure, equipment and accommodation facilities.[72]

In this regard, mention should be made of an important indication given in Article 2 section 1 under (b). The pursuit of activities ancillary to hospital services, such as research, does not prevent the exemption from being applicable. It is, of course, reasonable to allow for investments in research (which could lead to ground-breaking results for the treatment of patients) or for engagement in other activities closely related to care. In our view, the test to be carried out in this respect should be whether the ancillary activities are concerned with curing patients and are necessary in order to contribute to the process of diagnosing and treating.

In this regard, it should be noted that the concept of a 'hospital' is increasingly used as a safe haven. Pursuant to Article 8 of the Directive on patients' rights in cross-border health care it is permitted to restrict the free movement of patients, if this is necessary for the purposes of the planning of hospital care. The 2011 Commission Decision assigns a similar role to the term hospital. In the long run, therefore, it will be inevitable to give a clear and transparent definition of this term at EU level.

10.4.1.2 Other Social Services

Article 2 under (c) exempts a wide range of social services from the State aid rules. In this provision, these activities are described as '…services of general economic interest meeting social needs as regards health and long term care, childcare,

[71] See recital 22 of Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on Services in the Internal Market, *OJ* 2006 L376/page number missing.

[72] See recitals 12, 40 and 41, and Article 8 section 2 of Directive 2011/24/EU of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, *OJ* 2011 L88/45.

access to and reintegration into the labor market, social housing and the care and social inclusion of vulnerable group…'.

It cannot be ruled out that the specific social services mentioned by Article 2 section 1 under (c) will be subject to questions of interpretation. The organization and delivery of social services varies from Member State to Member State and, as a result, the interpretation of what constitutes health and long-term care, childcare, access to (and reintegration into) the labor market, social housing and the care and social inclusion of vulnerable groups, is dependent on the differing legal and social traditions of the EU Member States. Yet, the outcome of this debate is crucial, as the financing of these services falls entirely outside of the scope of the Treaty provisions on State aid (provided that the other relevant conditions are met as well). By listing specific social services the Commission has given to the Member States a great incentive to label all kinds of services as one of the social services mentioned in Article 2 section 1 under (c). It may be expected that, as a result, a lot of interpretation questions will arise under this provision and, therefore, the Commission will be forced to give guidance, which would come down to defining the services listed.

Like medical care, social services are carved out from the scope of the Services Directive. It should be noted that the 2011 Commission Decision adopts an approach different from the Services Directive in this respect. In contrast with Article 2(2)(j) of the Services Directive, which exempts specific social services in so far as these services are provided by the State or by bodies mandated or recognized by the state, Article 2 of the 2011 Commission Decision does not refer to any state role. It should nevertheless be noted that state involvement is a key element in Article 4 of this Decision, which sets out the criteria for the entrustment of an SGEI mission. But provision by the state or mandates and recognitions given by the state do not completely overlap with entrustments by the state. As a consequence, Member States designing the provision of social services should pay close attention to subtleties of social services exemptions of both EU measures. Another remarkable difference is that labor market integration activities benefit from the exemption of the 2011 Commission Decision, whereas these services are absent in the social services exemption of the Services Directive. Furthermore, the 2011 Commission Decision speaks of 'the care and social inclusion of vulnerable groups', while the Services Directive refers to the 'support of families and persons permanently or temporally in need'. One cannot help thinking that these services largely overlap but, as long as no clear guidance is given in this respect, it cannot be excluded that differences may exist between these two categories. All in all, no coherent approach to the definitions of the various social services is adopted (yet) leading to a fragmentation of EU policy.[73]

[73] Szyszczak 2012.

10.4.1.3 Evaluation: From SSGI Back to Social Services

From the foregoing, it is apparent that no general definition of the concept social services has been given. Rather, the Commission has preferred to enumerate *particular* services. This approach is not a surprise, as it is very difficult to formulate a definition of social services that fits every Member State. Nevertheless, the enumeration of the services in Article 2 under (c) seems to contain at least one element of such a definition, because it refers to services '…meeting social needs…'. This suggests that such needs are at the heart of the provision of social services. In any event, it may be assumed that a comprehensive definition of social services could interfere with the Member States' view of what services deem to have a social character and, a as a result, would meet fierce opposition from these States. Therefore, the Commission took the safe route by simply listing a couple of social services and to exempt these services from the scope of the Treaty provisions on State aid.

It is striking that this list does not match well with the definition of the concept SSGI given by the Commission in its Communications. From this definition, it is apparent that not only services directly provided to the person but also social security services are of a social character. Furthermore, the analysis of the case law in Sect. 10.3 shows that several social security schemes fall within the ambit of the Treaty provisions on competition, including those on State aid. Moreover, in its Communication on the application of the EU State aid rules to compensation granted for the provision of services of general economic interest,[74] which is part of the updated *Altmark* package, the Commission also contends that some social security schemes have economic features, which prompts the applicability of the Treaty provisions on State aid. It is, therefore, a pity that the 2011 Commission Decision fails to exempt these schemes from the scope of these provisions. The lessons that could be learned from the *BUPA* and *Zorgverzekeringswet* cases[75] are that EU State aid rules are capable of putting under pressure the operation of social security schemes that play a key role in the welfare states of the Member States. It is hard to understand why a safe haven should be created for social housing and for what reason social security services are not caught by a generous exemption. Both social services are of eminent significance for all EU Member States. By not including social security schemes in the exemption of Article 2 section 1 under (c) the Commission has—we assume unintentionally—given priority to social services directly provided to the person (such as social housing) over social security services (that have economic features).

[74] *OJ* 2012 C8/4.

[75] Supra notes 34 and 48.

10.4.2 Act of Entrustment

A very important condition for invoking the exemption of the 2011 Commission Decision is related to the issue of entrustment. The Decision sets out a couple of criteria that are considerably strict and, on top of that, stresses the importance of administrative requirements.

To start with, Article 2 section 2 of the 2011 Commission Decision provides that the exemption only applies if the period for which the undertaking is entrusted with the operation of the SGEI mission does not exceed 10 years. The rationale behind this requirement is clear: by limiting the duration of a particular SGEI mission, the Commission has made possible that the right to provide SGEI will be given to other enterprises. This would stimulate competition and market access from operators coming from other Member States. Missions granted for a longer period than 10 years are only allowed, if a significant investment that needs to be amortised over a period in excess of 10 years is required. The 2011 Commission Decision acknowledges that, for example, in social housing such investments should be made in order to provide accommodation for low-income groups. Yet, also in these circumstances the duration of the mission concerned should be limited in time. Permanent entrustments of SGEI mission do not seem to be acceptable under the 2011 Commission Decision.

Of great importance is Article 4 of the 2011 Commission Decision. This Article requires that the operation of an SGEI is entrusted to an undertaking '…by way of one or more acts…'. On first sight this requirement seems to be drafted in a flexible way, as it accepts that an SGEI mission can be derived from various acts. However, by setting out which elements must be included in the act(s) of entrustment Article 4 makes it impossible to derive such a mission from general obligations as the GC and the CJEU did in recent case law, and which, in fact, the Commission itself did in *Zorgverzekeringswet*.[76] It is simply not possible that general obligations address all issues listed in this provision of the 2011 Commission Decision.

The first paragraph of Article 4 points out that the form of the act(s) of entrustment may be determined by the Member States, but the list of requirements applicable to such an act or acts limits the room of maneuver considerably. To start with, the entrustment act must specify the content and duration of the PSO (SGEI mission). As already stated, in principle the duration ought not to exceed 10 years. Furthermore, it should be clear to which undertaking the special tasks are assigned and, where applicable, also on which territory it will provide its services. Moreover, the nature of the exclusive or special rights granted should be specified. On top of that, the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation concerned should be outlined in the act(s) of entrustment. The 2011 Commission Decision is very much concerned with the issue of overcompensation. Therefore, arrangements for avoiding and

[76] Supra note 34.

recovering any overcompensation should be included in the act(s) of entrustment. A remarkable requirement applicable to the act(s) of entrustment is the last one mentioned in Article 4. Pursuant to this requirement reference to the 2011 Commission Decision must be made.

It is clear from the outset that the approach adopted by the Commission is largely different from the recent case law of the GC and the CJEU on social services; in this case law, SGEI missions were derived from general obligations.[77] Strikingly, it does not even match with its own decision taken in the *Zorgverzekeringswet* case, where the Commission cleared a Dutch system of risk equalization, which is one of the pillars of the statutory health care scheme in the Netherlands, on the basis of a flexible interpretation of the requirement of entrustment.

The tensions between the recent case law and the 2011 Commission Decision lead to the finding that a public service obligation within the meaning of the *Altmark* judgment is construed more easily in State aid cases on social services, than the existence of an act of entrustment for the purposes of the 2011 Commission Decision can be proven. Consequently, the finding that no public service obligation is present and that, therefore, the *Altmark* approach does not apply, leads automatically to the conclusion that the conditions of the 2011 Commission Decision are also not met.

In any event, the drafting of Article 4 has important consequences for national social service policies. This provision obliges Member States to introduce several mechanisms for cost control in the provision and organization of social services. One of the most important issues is avoiding overcompensation. In other words, Member States should oblige their social service providers to live up to efficiency standards. Furthermore, the tasks of these providers must be described with great precision. On top of that, the entrustment of the task to provide the services concerned should be limited in time. This requirement could lead to important changes in the national tradition of social services provision.

10.4.3 Issues Relating to Compensation/No Overcompensation

The 2011 Decision, Communication and Framework forming the updated *Altmark* package contain extensive provisions with regard to compensation for discharging PSO. This stresses the importance that the Commission attaches to correctly calculating the amount of the compensation and also to avoiding situations of overcompensation, which are prone to have disruptive effects on the competitiveness of the markets concerned. The fact that the Commission is highly concerned with compensation/overcompensation issues is also emphasized by the depth of the relevant provisions of the 2011 Decision, in comparison with its 2005

[77] See Sauter 2011b, p. 229.

predecessor Decision. In this respect, one may notice that the Commission chose to qualify its approach to the compensation issue by providing more concrete guidelines as to how compensations should be evaluated.

To start off, the amount of compensation shall not exceed what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit.[78] The natural continuation of this provision is that Member States shall require the undertaking concerned to repay any overcompensation received. The language used in Article 5 of the 2011 Decision seems to be more exact than the one preferred in the 2005 Decision. While the provisions regarding the calculation of costs and revenues remained mainly untouched, the 2011 Decision seems to insist on the notion of net costs. This is probably because the Commission acknowledged the technical challenges that such calculation may pose in practice. In this respect, the Commission provides alternative methods of calculation of these net costs: either as the difference between costs and revenues as defined in paras 3 and 4 of Article 5, either as the difference between the net cost for the undertaking of operating with the public service obligation and the net cost or profit of the same undertaking operating without the public service obligation. The 2011 Framework furthers the net costs discussion by providing that the preferred method of calculation should be performed according to the net avoided cost methodology, this being regarded as the most accurate method of calculation, however, not always feasible or appropriate. Should this be the case, the Commission will also accept the cost allocation methodology.[79] One may notice that by allocating extensive attention to the net cost calculation discussion and by providing stricter and more economically grounded criteria, the Commission aims to cover any possible gaps that the 2005 package may have had in this respect. However, it may be the case that postulating clearer guidelines regarding the calculation of net costs will result in lower compensation in practice. In any case, further practical developments will clarify if this assumption may be verified.

In the same vein, the 2011 Decision thoroughly defines the concept of 'reasonable profit' as a part of the concept of compensation. This is important because the notion of 'reasonable profit' clearly relates to situations that in practice may lead to cases of overcompensation, depending on the correctness of assessing the profit level, which is (or is not) reasonable. Thus, it is crucial not only to set clear criteria on how to define profitability, but also to define the benchmark against which profitability should be judged. In this respect, the Commission seems to be drawing on concepts of financial economics when stating that level of risk (which is dependent of the sector concerned), the type of service, and the characteristics of compensation should be taken into account when defining this benchmark.[80] The relevant provisions of the 2011 Decision are considerably more forceful than the provisions of the 2005 Decision, allowing less room for interpretation when the

[78] See Article 5, para 1 of the 2011 Decision.

[79] See paras 25–31 of the 2011 Framework.

[80] See Article 5, para 5 of the 2011 Decision.

reasonableness of the profit is assessed. This is a reflection of the Commission's response to the stakeholders' concerns regarding the lack of a clear benchmark for the calculation of 'reasonable profit' in the 2005 package. In this respect, the comparative approach regarding the rate of return of other undertakings in the sector, undertakings situated in other Member States, or if necessary, undertakings in other sectors has been partly abandoned. This move is meant to enhance legal certainty while avoiding situations that allow for overextensive and inappropriate interpretations of the rather loose term 'reasonable profit', the features of which may vary from sector to sector and from Member State to Member State. Furthermore, the Commission chose to complete the discussion on 'reasonable profit' by drawing concrete guidelines on how to determine the rate of return on capital or, if the specific circumstances do not allow for such an assessment, what other proxies may be used to determine profit level indicators. Surprisingly, in para 8 of Article 5 the Commission returns to the comparative approach by providing that whatever indicator is chosen in establishing the reasonableness of the profit, Member States shall be able to prove that the profit does not exceed what would be required of a typical undertaking considering whether or not to provide the service, for instance by providing references to returns achieved on similar types of contracts awarded under competitive conditions. All in all, one may argue that the changes brought about by the 2011 reforms are likely to result in a reduction in the level or 'reasonable profit' due to the move from an appropriate (comparative) rate of return on capital (given the risk incurred) approach (in the 2005 package) to a reference rate pertaining to the internal rate of return or to the return on capital employed, equity or assets benchmark (in the 2011 package).[81]

In any case, according to the 2011 Framework, the 'reasonable profit' will be assessed from an *ex ante* perspective (based on expected profits rather than on realized profits) in order not to remove the incentives for the undertaking to make efficiency gains when operating activities outside the SGEI. Speaking of efficiency gains, the Commission seems to place a great deal of attention on this particular issue. Article 5, para 6 of the 2011 Decision states that in determining what constitutes a 'reasonable profit', Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency, which shall not reduce the quality of the service provided. The 2011 Framework seems to be using a stronger formulation, by providing that in devising the method of compensation, Member States must introduce incentives for the efficient provision of SGEI of a high standard, unless they can duly justify that it is not feasible or appropriate to do so.[82] The following paragraphs of the Framework provide concrete guidelines as to the different ways in which efficiency incentives can be designed. Regardless of the approach chosen, both the Decision and the Framework provide that due attention should be given to the quality of the service provided, which should not be offset by any efficiencies realized. Furthermore,

[81] See Coppi 2011.

[82] See para 39 of the 2011 Framework.

efficiency gains should be in line with the standards laid down in the Union legislation, thus emphasizing the fact that the Commission is unlikely to compromise on the quality standards that market operators and Member States should abide to. This approach is consistent with the Commission's general endeavor relating to welfare enhancement. After all, one could easily argue that a great deal of welfare enhancement stems from stimulating economic efficiency and maintaining high-quality standards for services provided, especially given the current economic crisis conditions the EU is facing.

Last but not least, Member States should make sure that undertakings are not receiving compensation in excess of the amount determined in accordance with Article 5 of the 2011 Decision. Of course, since overcompensation is not necessary for the operation of the SGEI, it constitutes incompatible State aid. In this respect, repayment of the excess compensation amounts is necessary. What is remarkable with regard to the control of overcompensation provisions in the 2011 Decision is the fact that the paragraph regarding the social housing sector has been deleted. This is probably connected to the new categorization (hospital services and other social services) that the Decision adheres to, as described in Sect. 4.1 of this chapter. In any event, where the amount of overcompensation does not exceed 10 % of the amount of the average annual compensation, such overcompensation may be carried forward to the next period and deducted from the amount of compensation payable in respect of that period.[83]

What are the compensation/overcompensation implications for social services? First, it must be acknowledged that this discussion has to be related to the efficiency concerns that the Commission is exhibiting lately. And this is so, not only because efficiencies may lead to societal welfare enhancement, as already discussed above, but also because efficiency gains in the context of social services may also be prone to lead to overcompensation. In this respect, a careful framework needs to be designed at Member States' level in order to insure a correct and economically sensible use of the benefits stemming from such gains. Generally speaking, by providing extensive discussions on efficiency issues both in the 2011 Decision and in the 2011 framework, the Commission clearly sends the message that it is preoccupied with stimulating the efficient delivery of (social) services. As far as the Member States are concerned, this may lead to a certain change of policy, at least for those Member States that had in place systems of delivery of social services which were not necessarily guided by efficiency considerations. As things currently stand, these Member States must provide incentives for efficient delivery of quality services, and also stimulants and rewards for achieving productive efficiency gains. On top of this, according to Article 5, para 6 of the 2011 Decision and para 41 of the 2011 Framework these gains should be shared in a balanced manner between the undertaking, on one hand and the Member States and/or users, on the other hand. What are the consequences for these actors in the context of the delivery of social services? As far as the undertakings are

[83] Article 6, para 2 of the 2011 Decision.

concerned, the realization of these efficiency gains, or on the contrary, failing to meet the projected gains will result in increases or decreases of the level of compensation received. Consequently, as far as Member States are concerned, this may result in public savings. Last but not least, the users/consumers may be affected in direct or indirect ways. For example, in the context of social housing, the realization of efficiency gains may result in lower rents. Also, in Member States that instituted social services based on contributions, achieving efficiency gains may result in lower contributions being paid by the users. In a more indirect manner, consumers may also benefit from such efficiency gains in lower taxation levels that they may be subjected to.

10.4.4 Information and Transparency

The 2011 Decision contains provisions[84] on the availability of information necessary to determine whether the compensation granted is compatible with the Decision, just like the 2005 Decision did. The Member States must comply with the Commission's investigative requests with regard to compatibility of the compensations awarded. The novelty introduced by the 2011 Decision relates to the period that Member States must keep the information available. According to the 2011 developments, this period extends over the whole duration of the entrustment, as embedded in the act of entrustment, according to Article 4 (a) of the 2011 Decision, and over of period of 10 years from the end of the period of entrustment. This amounts to an extension of the timeframe that this information should be kept available, since the 2005 Decision required member States to maintain the relevant information for a period of 10 years, without any mention of the duration of the entrustment. It is imaginable that in practice this extended obligation will not pose considerably more severe burdens on the Member States; however, the new provision is likely to improve legal certainty and transparency relating to the appropriateness of the compensation granted.

Another novelty brought about by the 2011 Decision is contained in Article 7 on transparency. What is striking is that this Article made its way into the text of the Decision after the consultation procedure relating to the adoption of the 2011 package ended. The provisions of Article 7 are clearly transparency enhancing and are rather straightforward in setting clear obligations for the Member States to appropriately publish information relating to the contents of the entrustment act and to the amounts of the aid granted on a yearly basis. This provision pertains only to undertakings which have additional commercial activities outside the scope of the SGEI. This is even more important having in mind the practical problems that might occur in connection to establishing the correct proportion of costs and revenues pertaining to the activities relating to the SGEI on one hand, and the

[84] Article 8 of the 2011 Decision.

other activities performed by the undertaking concerned on the other hand. In this respect, Article 5, para 5 of the 2011 Decision, and para 44 of the 2011 Framework both require beneficiaries to keep separate accounts for activities falling inside and outside the scope of the SGEI they perform. Also, according to Article 5, para 9 of the 2011 Decision, no compensation shall be granted in respects of the costs pertaining to the activities falling outside the scope of the SGEI. The practical difficulties mentioned above are conceivable if one also takes into account the generous choice of calculation methods that the Commission has put forward in para 31 of the 2011 Framework. Concluding, one may argue that while Article 8 of the 2011 Decision insures a basic level of transparency with regard to all situations covered by the Decision, in Article 7 the Commission chose to specifically insure that transparency is provided for in practical situations which may be particularly prone to opaque transactions.

An increased level of transparency is important as far as social services are concerned and one may argue that Articles 7 and 8 of the 2011 Decision indeed afford this basic level of transparency. What this means is that Member States must observe the transparency requirement when they design this type of service. In other words, if the Commission took the first step in affording increased transparency in the field of social services, it is now up to the Member States to comply with this requirement and also further the degree of transparency conferred. The Commission's concern with regard to a transparent functioning of social services is even more emphasized by the strict requirements regarding the entrustment act, as embedded in the 2011 package. Instituting such stringent criteria when it comes to the entrustment act sends the message that the Commission is careful in avoiding any lack of transparency that may stem from a more relaxed approach of finding the existence of entrustment from less exact, or more general legal provisions. Furthermore, since overcompensation is prone to occur also in the context of delivery of social services, the Commission seems to be paying close attention to the transparency relating to these aspects as well, by setting clear rules of calculating the net costs, the revenues and the 'reasonable profit' elements of the compensatory amounts. In this respect as well, going beyond the basic level of transparency afforded by the Commission in Articles 7 and 8 of the 2011 Decision, it is up to the Member States to further the level of transparency with regard to possible issues of overcompensation that may occur in connection to the delivery of social services.

10.4.5 The Role of Article 106(2) TFEU

The 2011 Commission Decision comes into play, if the *Altmar*k conditions do not apply. It is apparent from the analysis above that the European Courts' readings of these conditions are less strict than the requirements set out by the Commission in its Decision. Nevertheless, it cannot be ruled out that compensatory measures taken by a Member State will not pass the flexible *Altmark* test or the criteria of the 2011 Commission Decision. In that case, Article 106(2) TFEU comes into play.

In its Communication, European Framework for State aid in the form of public service obligation,[85] the Commission contends that Article 106(2) TFEU is relevant, only in so far as the national compensatory measure at hand is subject to the prior notification requirement.[86] From this statement, it should be derived that a Member State cannot invoke this Treaty provision in order to justify State aid without prior permission from the Commission. Although on this point—strikingly—no case law is available, the position of the Commission seems fully in line with the system introduced by the CJEU in *Altmark*. Meeting the conditions of this ruling leads to lifting of the obligation to notify, whereas, in contrast, the application of Article 106(2) TFEU to State aid measures should be verified by the Commission.

A very important point of departure of the Communication European Framework for State aid in the form of public service obligation is that it is only permitted to invoke Article 106(2) TFEU if the service concerned is not provided on the market and cannot satisfactorily be supplied on the marketplace as well.[87] In examining whether services cannot be offered in a market environment the Commission will confine its assessment as to whether the Member States have not made a manifest error. Yet, this approach of the Commission has considerable consequences for the Member States, as Article 106(2) TFEU will only be applied if no other means are available. Supporting services that are in the interest of society is not possible, if commercial operators already provide them adequately. In the view of the Commission State aid is a policy instrument of last resort. So, under a review based on Article 106(2) TFEU, not only the presence of acts of entrustment matters but also the level of market failure is of interest.

In this respect, it should be noted, however, that for many social services it could be argued that the services offered on the market place do not meet the social needs of society. It may be assumed that in many cases access for all to a particular service is an issue that is hard to solve. To a certain extent, a political debate on what is the necessary level of provision of social services in society seems inevitable.[88] After all, these services are at the heart of the social welfares states. But it should be awaited how these things play out, as the Commission will only engage in an assessment based on the test of manifest error. On top of that many compensatory measures will benefit from the *Altmark* approach and the 2011 Commission Decision.

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[85] *OJ* 2012 C8/15.

[86] See para 7 of this communication. See also para 48 of the Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest.

[87] See para 13 of this Communication.

[88] Neergaard rightly noted that the claim that SGEI is a concept of EU law seems to be in conflict with the point of departure that the competence to define SGEI missions is vested with the Member States. See Neergaard 2011, p. 41. Debates between the EU institutions and the Member States on the exact contours of SGEI are, therefore, inherent in the EU approach to these services.

In its Communication European Framework for State aid in the form of public service obligation, the Commission points to the importance of the act of entrustment. This act should meet the same requirements as set out in the 2011 Commission Decision. As a result, national compensatory measures that are not in line with this Commission Decision for reasons of failing to meet the strict requirements for entrustment are not justifiable on the basis of Article 106 (2) TFEU either.

Therefore, Article 106(2) TFEU is only of any help, if other conditions of the 2011 Commission are not met, which do not apply (similarly) under Article 106(2) TFEU. For example, the Commission puts forward that the duration of the period of entrustment should be justified on the basis of objective criteria, such as the need to amortise nontransferable fixed assets. In contrast with the 2011 Commission Decision, it is not required that in principle the duration of the SGEI mission should not exceed a period of 10 years. On this point Article 106(2) TFEU seems to allow for more flexibility.

The 2011 Communication, which explains how the Commission will use its powers under Article 106 TFEU, also clarifies the preferred approach relating to the parameters for calculating the compensation. Paragraphs 54 and 55 of the Communication state that these parameters should be established in advance in an objective and transparent manner (without necessarily using a rigid formula) in order to ensure that they do not confer an economic advantage that could favor the recipient undertaking over competing undertakings. Should the undertaking at hand carry out activities falling both inside and outside the scope of the SGEI, the provisions of the Communication are in keeping with those of the 2011 Decision, in the sense that only the costs directly associated with the provision of the SGEI can be taken into account when calculating the compensation.[89] This assertion is also valid when talking about incentive criteria relating to the quality of services provided and productive efficiency gains in the context of establishing 'reasonable profit'.[90] Speaking of this, the Communication pays due attention to the 'reasonable profit' discussion. If 'reasonable profit' is part of the compensation, the entrustment act must clearly establish the criteria for its calculation. This may pose problems given the tensions between the recent case law and the 2011 Commission Decision which emphasize differences in flexibility regarding the approach of the Commission and the CJEU concerning the constitutive elements of the entrustment act. Also, one striking fact when talking about the calculation of the 'reasonable profit' is that the Communication seems to allow comparisons regarding the rate of return of other undertakings in the sector, undertakings situated in other Member States, or if necessary, undertakings in other sectors, whereas the 2011 Decision seems to have abandoned this approach in favor of a more pragmatic reading of the features that would make profit reasonable.

[89] See para 56 of the 2011 Communication and Article 5, para 9 of the 2011 Decision.

[90] See para 61 of the 2011 Communication and Article 5, para 6 of the 2011 Decision.

As compensatory measures could be justifiable both in the light of the *Altmark* approach and the 2011 Commission Decision, the added value of Article 106 (2) TFEU is limited. Yet, the Commission has given a clear statement, which is of great importance for social services. State aid given in order to compensate for the costs of an SGEI mission is justified, in so far as the services concerned cannot be provided on the market place adequately. In other words, the Commission has a clear and political view on how the provision of social services should be organized. The point of departure is the market forces and competition, whereas State intervention by means of subsidies and similar financial advantages serves as a means of last resort.

10.5 Conclusions and Evaluation

The Commission has created a generous exemption for financial compensation measures for social services. The 2011 Commission Decision is not the first action taken on the EU level in order to address issues related to these services. In contrast with many communications, this Decision is of a binding nature. Hard law with a bearing on social services is scarce in EU law. Therefore, the 2011 Commission Decision is of great interest for social services and, as a result, for the national social welfare states.

As this Decision exempts various social services from its scope, it identifies which services are supposed to meet the social needs of the population of the Member States. By doing so, it has influenced the priority setting in the delivery of social services. It is remarkable that by identifying the social services covered by the Decision the Commission did not draw any inspiration from its own definition of SSGI. As a result, no social security scheme (having an economic character) such as supplementary pension and health care schemes benefit from the exemption of the 2011 Commission Decision. It is apparent from the case law and decisional practices that these social services have given rise to more litigation than other social services. Yet, the generous exemption of the updated *Altmark* package applies solely to other social services, such as social housing and, by so doing, gives—possibly unintentionally—priority to these services. In our view, it seems inevitable that in the long run the Commission will be forced to pay due consideration to its own soft law approach to SSGI by setting out under which circumstances the provision of (economic) social security services ought to be financed.

In its present form, the 2011 Commission Decision does not define the social services covered. However, it may be assumed that interpretation problems will arise as to what hospital services, social housing, etc. constitute. As a result, the Commission and also the European Courts will be called upon to define these services. The need to give definitions is likely to have spillover effects: these definitions will lead to the Europeanization of social services and as a result to a European approach to important features of the social welfare states. At EU level,

the main characteristics of social housing, hospital services, health and long-term care, childcare, access to and reintegration into the labor market, etc. will be outlined.

Although many issues are not settled (yet), the analysis of the updated *Altmark* package, as it stands now, already reveals some features, which are regarded as important elements of social services. To start with, the services offered should meet the social needs of society. This requirement is explicitly mentioned in Article 2 of the 2011 Commission Decision.

Furthermore, of great importance is a clear act of entrustment. It should be outlined with great precision what social task is entrusted to a particular operator. In contrast with important case law, such as *AG2R*[91] and *BUPA*,[92] the Commission continues to adhere to an explicit act of entrustment. This has significant consequences for social services. In order to avoid State aid problems, Member States must clearly delineate the social services that are of general interest in their national laws and decisions. Transparency on which services are financed and for what reason compensation was given is a key issue.

Another important element is the introduction of efficiency mechanisms. The Commission requires that the Member States take these mechanisms as point of departure, when financing SGEI missions. This implies that Member States verify whether the social services providers operate in an efficient way. As it is not permitted to compensate costs resulting from inefficiencies, Member States are forced to oblige their social services' providers to live up to efficiency standards. In other words, the distortion of competition resulting from the State aid given is partly 'compensated' by efficiency mechanisms.

In this regard, it is also important to note that the duration of an SGEI mission should be limited and, in principle, should not exceed a time period of 10 years. This means that other operators than the incumbents the public authorities of a Member State usually do business with should be given the opportunity to supply the services concerned. Competition should not entirely be eliminated. In this regard, it should be noted that State aid control is concerned with use and abuse of State resources in a competitive environment.[93]

It would go too far to argue that the Commission has introduced a comprehensive model for the social services delivery. Nevertheless, the 2011 Commission Decision provides for some significant bits and pieces of such a model: the organization and provision of social services should be based on clear State involvement (act of entrustment), the aim to meet particular social needs, transparency principle, efficiency considerations and a certain degree of competition.

For the Europeanization process of social services, the adoption of the updated *Altmark* package was an important development. A significant step toward an EU approach to social services is taken. In our view, the path is paved for more

[91] Supra note 31.

[92] Supra note 48.

[93] Von Danwitz 2011, p. 115.

binding EU measures in order to further build an EU model for social services based on a balance between State involvement and social needs, on the one hand and considerations of efficiency and competition, on the other hand.

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