

## DEFINING THE CONCEPT OF ‘SERVICES OF GENERAL INTEREST’ IN LIGHT OF THE ‘CHECKS AND BALANCES’ SET OUT IN THE EU TREATIES

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Received on 4 September, 2012; accepted on 12 November, 2012

**Abstract.** *This article aims to shed some light on the concepts embedded in the expressions ‘services of general interest’ (‘SGI’), ‘services of general economic interest’ (‘SGEI’), ‘non-economic services of general interest’ (‘NSGI’) and ‘social services of general interest’ (‘SSGI’). It is submitted that the expression ‘SGI’ conveys a general concept which comprises both SGEI and NSGI. SGEI may be distinguished from NSGI in that only the former involve an economic activity. In contrast to SGI, SGEI and NSGI, the expression ‘SSGI’ is nowhere to be found in primary EU law. This means that it is for the EU legislator and, as the case may be, for the Member States to define such expression. Furthermore, this article supports the contention that a definition of the principles and conditions underpinning the operation of SGI must be capable of adapting to changing times and social perceptions, whilst being respectful of the vertical and horizontal allocation of powers set out in the Treaties. Vertically, a definition of SGI must not impinge upon the powers retained by the Member States. In the absence of harmonisation, it is for the Member States to define the services they consider to be of general interest, unless they commit a manifest error of assessment. In the presence of*

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\* All opinions expressed herein are personal to the author.

*EU harmonising measures, the margin of discretion enjoyed by the Member States is, if still existent, narrowed down, given that national authorities are required to comply with the objectives pursued by the EU legislator. Horizontally, a definition of SGI must not encroach upon the prerogatives of the Commission in the realm of competition law. Moreover, in light of Article 9 TFEU and secondary EU legislation, the specific features of SSGI must be taken into consideration when determining the compatibility with EU State aid rules of public service compensation awarded to the providers of those services. An EU conceptual framework for the SGI must thus be the result of a constructive dialogue between the different levels of governance, as well as of a balanced solution among different policy areas in relation to which the EU enjoys competences.*

**Keywords:** *services of general interest, vertical and horizontal allocation of powers in the European Union.*

## Introduction

Stakeholders have often complained that the debate on services of general interest ('SGI') suffers from a lack of clarity on terminology.<sup>1</sup> This is due to the fact that the expressions 'SGI' and 'services of general economic interest' ('SGEI') are not defined in the Treaties.<sup>2</sup> In addition, the expressions 'SGI', 'SGEI' and 'social services of general interest' ('SSGI') are often used interchangeably and inaccurately.<sup>3</sup> In this regard, the purpose of the present contribution is thus to shed some light on those basic concepts. Before proceeding to examine each one of them, I would like to make two general observations.

Unlike the expressions 'SGI' and 'SGEI', the expression 'SSGI' is nowhere to be found in the Treaties.<sup>4</sup> Articles 14 TFEU and 106(2) TFEU only focus on SGEI. The same applies to Article 36 of the Charter which lays down the right to access to SGEI. For its part, Protocol (No 26) on SGI contains the expressions 'SGI', 'SGEI' and 'non-economic services of general interest' ('NSGI'). But no mention is made to SSGI. The

1 See Commission Communication, 'Quality Framework for Services of General Interest in Europe', of 20 December 2011, COM (2011) 900 final ('the 2011 Commission Communication'), at 3.

2 See e.g. Rodrigues, S. The application to services of general economic interest, notably to social services of general interest, of the EU rules related to state aids, public procurement and the internal market. One year after the Commission's Guide - SEC(2010)1545 final. *European Journal of Social Law*. 2011, 4: 255.

3 See the 2011 Commission Communication, *supra* note 1, at 3.

4 Communication from the Commission - Implementing the Community Lisbon programme - Social services of general interest in the European Union {SEC(2006) 516}, COM/2006/0177, at 4 ('under [EU] law, social services do not constitute a legally distinct category of service within [SGI]'). In the same way, see van de Gronden, J. W. Social Services of General Interest and EU law. In: Szyszczak, E.; Davies, J.; Andersen, M.; Bekkedal, T. (eds.) *Developments in Services of General Interest*. The Hague: Springer, 2011, p. 125 (who argues that '[t]he term SSGI is used only in policy documents of the Commission and not in primary and secondary EU law').

latter is a concept coined by the political institutions of the EU and of the Member States. This difference is by no means irrelevant. Since the expressions ‘SGI’, ‘SGEI’ and ‘NSGI’ are set out in EU provisions of constitutional ranking, it is for the European Court of Justice (the ‘ECJ’) to define the concepts embedded therein. By contrast, when defining what is to be understood by SSGI, one must turn to the EU legislator and, where appropriate, to national authorities. Needless to say, the definition of SSGI provided for by the political institutions of the EU and of the Member States must be consistent with primary EU law as interpreted by the ECJ.

Moreover, SGI may be examined under two competing socio-economic models.<sup>5</sup> On the one hand, from an ordoliberal perspective, SGI may be seen as derogation from the Treaty provisions on competition. Supporters of that model argue that, just as any derogation from the substantive law of the EU, the concept of ‘SGI’ is to be interpreted restrictively. Otherwise, Member States would be encouraged to qualify certain activities as SGI in order to circumvent the obligations imposed on them by the Treaty provisions. Accordingly, a broad reading of the expression ‘SGI’ would adversely affect interstate trade and would eventually lead to the fragmentation of the internal market. On the other hand, SGI may be seen as the symbol of the European social model,<sup>6</sup> according to which Member States try to counter market forces which, in the absence of any public control, would prevent certain groups – for example, persons facing financial and economic difficulties or who are geographically isolated – from having access to SGI. For some Member States, SGI are part and parcel of their national identity the protection of which is guaranteed by the Treaties, notably by Article 4(2) TEU. In accordance with this second socio-economic model, EU institutions must strive to protect SGI from any threat which may impair their proper functioning.

The EU must, however, not really choose between those two competing socio-economic models, as the role of SGI in the EU legal order is being defined by striking a fair balance between the general interest pursued by such services and the effectiveness of the relevant Treaty provisions governing the internal market.

A constructive debate on SGI must therefore be open to nuances. It is only by striking the said balance that one may portray the role of SGI in the EU legal order accurately. When interpreting primary EU law, it will be for the ECJ to set out the basic elements that must be included in such balance. When the EU legislator has adopted measures, the ECJ will interpret and apply them in ways consistent with that same balance.

## 1. Services of General Interest: A general Category

Only in Protocol (No 26) reference is made to the expression ‘SGI’. This Protocol contains three different concepts. First, as its title shows, it serves to stress the importance

5 Lenaerts, K.; Gutiérrez-Fons, J. A. « Le rôle du juge de l’Union dans l’interprétation des articles 14 et 106, paragraphe 2, TFUE » *Revue Concurrences*. 2011, 4: 7.

6 Karayigit, M. T. The Notion of Services of General Economic Interest Revisited. *European Public Law*. 2009, 15: 575.

of SGI. Second, Article 1 provides some clarifications regarding Article 14 TFEU. It lists, in a non-exhaustive fashion, the values underpinning the principles and conditions governing the operation of SGEI. Finally, Article 2 states that '[t]he provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise [NSGI]'.

In light of a systematic interpretation of Protocol (No 26), it seems that the expression 'SGI' conveys a 'general' concept which comprises both SGEI and NSGI. This is actually how the Commission understands the expression 'SGI'.<sup>7</sup>

Moreover, in relation to the vertical allocation of powers between the Union and its Member States, the distinction between SGEI and NSGI is of crucial importance. Whilst in relation to SGEI, the Union shares competences with the Member States, national measures relating to the provision, commission and organisation of NSGI fall outside the scope of application of EU competition law. This does not mean, however, that no other Treaty provisions may apply to NSGI. As explained below, Member States must comply with the Treaty provisions on free movement and EU citizenship.

## 2. Drawing the Distinction between SGEI and NSGI

The distinguishing feature as between SGEI and NSGI lies in the fact that the former always involve an economic activity. The Treaty provisions on competition only apply to 'undertakings' which are defined as natural or legal persons who carry out an economic activity, i.e. 'any activity consisting in offering goods and services on a given market'.<sup>8</sup> However, if a SGI operates exclusively under the principle of solidarity and is subject to public control, or that service is linked to the exercise of State prerogatives and to the fulfilment of State responsibility towards the population,<sup>9</sup> then such a SGI does not involve an 'economic activity' within the meaning of competition law.<sup>10</sup> That SGI will be qualified as a NSGI and thus, the Treaty provisions on competition will not

7 See the 2011 Commission Communication, *supra* note 1, at 3 ('SGI are services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations [...]. The term covers both economic activities [...] and non-economic services. The latter are not subject to specific EU legislation and are not covered by the internal market and competition rules of the Treaty. Some aspects of how these services are organised may be subject to other general Treaty rules, such as the principle of non-discrimination').

8 See Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; Joined Cases C-180/98 to C-184/98 *Pavlov and Others*, paragraph 75.

9 Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30, concerning the control and supervision of air space, and Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paragraphs 22–23, concerning anti-pollution surveillance of the maritime environment.

10 See, in the same vein, Communication from the Commission of 11 January 2012 on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, [2012] OJ C 8/4 ('the 2012 Commission Communication'), paragraph 16, which, in light of the case-law of the ECJ, provides the following examples of activities involving 'the exercise of public authority': '(a) the army or the police; (b) air navigation safety and control; (c) maritime traffic control and safety; (d) anti-pollution surveillance; and (e) the organisation, financing and enforcement of prison sentences'.

apply. In the field of social security and health care,<sup>11</sup> this can be seen in cases such as *Poucet et Pistre*,<sup>12</sup> *FENIN*,<sup>13</sup> *AOK Bundesverband*<sup>14</sup> and, more recently, in *Kattner Stahlbau*.<sup>15</sup>

However, the question whether an activity has an economic nature is not answered in the same way as to all Treaty provisions to be applied to the case at hand. Thus, the freedom to provide services, enshrined in Article 49 TFEU, covers all services which are ‘normally provided for remuneration’,<sup>16</sup> but services may still ‘be provided for remuneration’ if they involve an activity based on the principle of solidarity. Indeed, Article 49 TFEU applies even if the service is not paid for by those benefiting from it.<sup>17</sup> It follows that the principle of solidarity underpinning NSGI excludes the application of the Treaty provisions on competition, but not those on free movement and EU citizenship.

## 2.1. NSGI and the Treaty Provisions on Free Movement

Sickness insurance schemes normally operate under the principle of solidarity: the contributions made by healthy members of such a scheme are used to fund medical treatment provided to members in need of healthcare. Alternatively, solidarity may also take place where a Member State funds its national healthcare system by having recourse to the general budget. This means that patients do not pay for medical treatment themselves. Instead, they receive ‘benefits in kind’. For both types of regimes, the ECJ has held that Article 49 TFEU applies.<sup>18</sup> In so doing, it rejected the thesis according to which, just as state education,<sup>19</sup> hospital services were ‘special’ and did not constitute

11 See the 2012 Commission Communication, *supra* note 10, paragraphs 21 et seq., which states that public hospitals that are ‘directly funded from social security contributions and other State resources and provide their services free of charge to affiliated persons on the basis of universal coverage’ are not ‘undertakings’ for the purposes of the Treaty provisions on competition law. By contrast, ‘services which independent doctors and other private practitioners provide for remuneration at their own risk are to be regarded as an economic activity. The same principles would apply as regards independent pharmacies’.

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

13 Case C-205/03P *FENIN v Commission* [2006] ECR I-6295.

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

15 C-350/07 *Kattner Stahlbau* [2009] ECR I-1513.

16 See e.g. Case C-159/90 *Society for the Protection of Unborn Children Ireland v Grogan* [1991] ECR I-4685.

17 See Case C-352/85 *Bond van Adverteerders and Others* [1988] ECR 2085.

18 See e.g. Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44–46; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 100, and Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92.

19 Neither the Treaty provisions on free movement nor those on competition law apply to State educational services which form part of the national educational system, are mainly or entirely funded by the State and are under State supervision, since they do not have an economic nature. The fact that private operators can provide similar services is not relevant in that respect. See e.g. Case 263/86 *Humbel* [1988] ECR 5365; and Case E-5/07, *Kindergarten*, judgment of the EFTA Court of 21 February 2008 (holding that

an economic activity for the purposes of application of the freedom to provide services. In its view, there is an 'economic link' owing to the fact that cross-border patients have to advance the payment for the medical services he or she receives in the host Member State. The fact that those patients then get reimbursed by the Member State of affiliation is not sufficient to call into question that link.<sup>20</sup>

In order to guarantee the stability of national healthcare systems, affiliation to an insurance scheme is often compulsory and the number of healthcare providers is limited. This means that an insured person may only receive medical treatment from professionals who have concluded contractual agreements with or form part of that scheme. Often, if a patient wishes to receive medical treatment from professionals other than those belonging to the insurance scheme, he or she must request a prior authorisation. In this regard, the ECJ has consistently held that a system of prior authorisation deters 'the patients concerned from applying to providers of hospital services established in another Member State and constitutes, both for those patients and for service providers, an obstacle to the freedom to provide services'.<sup>21</sup> However, it is legitimate for the Member State of affiliation to restrict the freedom to provide services, if such restriction is necessary to counter 'the risk of seriously undermining the financial balance of a social security system'.<sup>22</sup> Likewise, the objective of maintaining a balanced medical and hospital service open to all is an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services.<sup>23</sup> Moreover, any restriction to the freedom to provide services must comply with the principle of proportionality, i.e. it must not exceed what is objectively necessary for that purpose, meaning that the same result may not be achieved by less restrictive rules.

Accordingly, even if the Treaty provisions on competition are not applicable to NSGI, the Treaty provisions on free movement may still apply to those services. Article 2 of Protocol (No 26) must thus be interpreted in this vein. Whilst 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

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public kindergartens in Norway do not involve economic activity). However, see the 2012 Commission Communication, *supra* note 10, paragraph 28, which states that a distinction should be drawn between publicly funded education and 'services financed predominantly by parents or pupils or commercial revenues. For example, commercial enterprises offering higher education financed entirely by students clearly fall within the latter category. In certain Member States public institutions can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic'. Moreover, the fact that neither the Treaty provisions on free movement nor those on competition law apply to State educational services does not rule out the application of other Treaty provisions, notably Articles 18, 19, and 20 TFEU. See, e.g., Case 293/83 *Gravier v City of Liège* [1985] ECR 593 and Case C-73/08 *Bressol* [2010] ECR I- 2735.

20 *Müller-Fauré and van Riet*, *supra* note 18, paragraph 89, and *Watts*, *supra* note 18, paragraph 89.

21 *Smits and Peerbooms*, *supra* note 18, paragraph 69, and *Müller-Fauré and van Riet*, *supra* note 18, paragraph 44, and *Watts*, *supra* note 18, paragraph 98.

22 *Smits and Peerbooms*, *supra* note 18, paragraph 72, and *Müller-Fauré and van Riet*, *supra* note 18, paragraph 73, and *Watts*, *supra* note 18, paragraph 103.

23 *Smits and Peerbooms*, *supra* note 18, paragraph 73, and *Müller-Fauré and van Riet*, *supra* note 18, paragraph 67, and *Watts*, *supra* note 18, paragraph 104.

of financing that scheme, the Member States must nevertheless comply with [EU] law when exercising those powers.<sup>24</sup> The ruling of the ECJ in *Kattner Stahlbau* illustrates this point.<sup>25</sup>

## 2.2. Kattner Stahlbau: an Example

In *Kattner Stahlbau*, Kattner, a private limited company active in steel construction and the manufacture of staircases and balconies, decided to cancel its compulsory affiliation to Maschinenbau- und Metall- Berufsgenossenschaft (Employers' liability insurance association in the mechanical engineering and metal sector, 'MMB'). However, MMB informed Kattner that cancelling the affiliation was legally impossible. Kattner challenged that decision, arguing that compulsory affiliation to MMB was contrary to the freedom to provide services as it was prevented from entering into a contract with a Danish insurance company prepared to insure it against accidents at work, occupational diseases and accidents on the way to and from work, on the same terms as MMB. It also alleged that MMB's position as exclusive provider was in breach of ex Articles 81 EC and 82 EC (now Articles 101 TFEU and 102 TFEU), i.e. the Treaty provisions on competition.

At the outset, the ECJ examined whether the latter provisions were applicable to MMB, i.e. whether MMB was an 'undertaking' within the meaning of Articles 101 TFEU and 102 TFEU. In this regard, it pointed out that the insurance scheme at issue in the main proceedings operated under the principle of solidarity.<sup>26</sup> First, it was financed by contributions the rate of which was not systematically proportionate to the risk insured.<sup>27</sup> Second, the members of the scheme at issue constituted a 'risk community reflecting the risks incurred in that branch of industry'.<sup>28</sup> This meant that readjustment mechanisms were put in place where a member of that scheme had significantly exceeded the average expenditure of all the members. Finally, 'the value of the benefits paid by employers'

24 See e.g. *Kattner Stahlbau*, *supra* note 15, paragraph 74 (referring to *Smits and Peerbooms*, *supra* note 18, paragraph 46).

25 See also Case C-355/00 *Freskot* [2002] ECR I-5263 (where the ECJ examined the compatibility of a Greek social security scheme in agriculture which imposed a compulsory insurance against damage caused by natural risks, with the freedom of establishment).

26 See the 2012 Commission Communication, *supra* note 10, paragraphs 18 *et seq.*, which lists, in a non-exhaustive fashion, the factors that may be relevant when determining whether a social security scheme is governed by the principle of solidarity, namely '(a) whether affiliation with the scheme is compulsory; (b) whether the scheme pursues an exclusively social purpose; (c) whether the scheme is non-profit; (d) whether the benefits are independent of the contributions made; (e) whether the benefits paid are not necessarily proportionate to the earnings of the person insured; and (f) whether the scheme is supervised by the State'. In the same way, the Commission considers that the following factors may be relevant when determining whether a social security scheme involves an economic activity: '(a) optional membership; (b) the principle of capitalisation (dependency of entitlements on the contributions paid and the financial results of the scheme); (c) their profit-making nature; and (d) the provision of entitlements which are supplementary to those under a basic scheme'. If a scheme combines 'features of both categories, [then] the classification of the scheme depends on an analysis of different elements and their respective importance'.

27 *Kattner Stahlbau*, *supra* note 15, paragraph 44.

28 *Ibid.*, paragraph 47.

liability insurance associations such as MMB is not necessarily proportionate to the insured person's earnings'.<sup>29</sup> As to the supervision by the State, the ECJ found that the degree of latitude enjoyed by MMB was strictly delimited by German law, given that the German legislator had laid down the factors that must be taken into account in calculating the contributions payable under the scheme at issue, as well as an exhaustive list of benefits that could be provided under that scheme.<sup>30</sup> Hence, the ECJ ruled that MMB operated in accordance with the principle of solidarity and under State control. MMB could not therefore be considered as an undertaking for the purposes of the Treaty provisions on competition.

However, the ECJ found that such scheme restricted the freedom to receive services of undertakings that are covered by it, as it prevented those undertakings from approaching providers of insurance services established in Member States other than the Member State in which they are affiliated.<sup>31</sup>

As to the justification of the restriction, the compulsory affiliation to the statutory insurance scheme at issue sought to ensure the financial equilibrium of one of the traditional branches of social security, in this case, insurance against accidents at work and occupational diseases. That objective, the ECJ recalled, constituted an overriding reason in the general interest protected by EU law.<sup>32</sup> As to the principle of proportionality, the ECJ observed that a compulsory affiliation scheme such as that of MMB was apt to ensure the financial equilibrium of a branch of social security. By grouping together all undertakings covered by that scheme within risk communities, that scheme was able to operate in accordance with the principle of solidarity. As to whether the compulsory affiliation scheme went beyond what was necessary to attain the objective pursued, the ECJ left this determination to the national court, making, nonetheless, two observations. First, it found that the statutory insurance scheme at issue did not preclude undertakings covered by it from taking out supplementary insurance with private insurance companies. Second, and most importantly, such scheme sought to avoid 'cream skinning': the ECJ observed that, in the absence of a compulsory affiliation, private insurance would focus on attracting customers with 'good' risks, 'leav[ing] employers' liability insurance associations such as MMB with an increasing share of 'bad' risks, thereby increasing the cost of benefits, particularly for undertakings with older employees engaged in dangerous activities; those associations could no longer offer pensions at an acceptable cost to such undertakings. Such a situation would arise particularly in a case where [...] the statutory insurance scheme at issue, inasmuch as it applies the principle of solidarity, is characterised, in particular, by the absence of a strictly proportionate link between contributions and risks insured'.<sup>33</sup>

Thus, *Kattner Stahlbau* shows that the scope of application of the Treaty provisions on free movement is broader than that of the Treaty provisions on competition. As van

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29 *Kattner Stahlbau*, *supra* note 15, paragraph 55.

30 *Ibid.*, paragraph 62.

31 *Ibid.*, paragraph 83.

32 *Ibid.*, paragraph 85.

33 *Ibid.*, paragraph 90.

de Gronden observes, free movement law is ‘capable of breaking open social security schemes, whereas the role of competition law is limited in this respect’.<sup>34</sup>

### 3. Services of General Economic Interest

#### 3.1. General observations

Article 14 TFEU provides that, without prejudice to the competence of the Member States, the Council and the European Parliament shall adopt in accordance with the ordinary legislative procedure regulations defining the principles and conditions which enable SGEI to fulfil their mission. Those regulations shall also set the conditions to provide, to commission, and to fund such services. Introduced by the Lisbon Treaty, the last sentence of Article 14 TFEU thus provides a new legal basis by virtue of which the EU legislator may put in place a general conceptual framework for SGEI.

For its part, Article 106(2) TFEU provides that undertakings entrusted with the operation of SGEI ‘shall be subject to the rules contained in the Treaties, in particular to the rules on competition law, 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’. In order to guarantee the proper functioning of a SGEI, Article 106(2) TFEU allows Member States to derogate from ‘the rules contained in the Treaties’. Arguably, such derogation is not limited to the Treaty provisions on competition so that Article 106(2) TFEU may also be relied upon by Member States in order to derogate from other Treaty provisions such as those on free movement.<sup>35</sup> Indeed, the case-law of the ECJ reveals that Article 106(2)

34 van de Gronden, J. W., *supra* note 4, p. 138.

35 In favour of such a reading, see Buendía Sierra, J. L. *Exclusive rights and State monopolies under EU law*. Oxford: OUP, 1999; Hatzopoulos, V. Recent Developments of the Case Law of the ECJ in the Field of Services. *Common Market Law Review*. 2000, 37: 80–81, and Szyszczak, E. *The regulation of the State in competitive markets in the EU*. Oxford: Hart Publishing, 2007, p. 217. However, see Bekkedal, T. Article 106 TFEU is Dead. Long live Article 106 TFEU! In: Szyszczak, E.; Davies, J.; Andenæs, M.; Bekkedal, T., *supra* note 4, p. 61–102 (who argues that Article 106(2) TFEU may not operate as a derogation from the Treaty provisions on free movement. The reasons are twofold. First, he posits that Article 106(2) TFEU appears to allow derogations from free movement which pursue economic objectives. Nevertheless, this is at odds with the line of case-law according to which such derogations are not permitted under free movement law. Second, the principle of proportionality does not operate in the same way under Article 106(2) TFEU as under the Treaty provisions on free movement. Under Article 106(2) TFEU, the ECJ applies a ‘soft version’ of the principle of proportionality. Conversely, in the realm of free movement law, the ECJ applies a ‘strict version’ of that principle. In addition, he argues that, to date, there is no example in the case-law of the ECJ where a justification to a restriction on free movement has been grounded in Article 106(2) TFEU alone. However, T. Bekkedal seems to obviate the fact that justifications based on financial considerations have been occasionally qualified as overriding reasons in the general interest protected by EU law. For example, see *Watts*, *supra* note 18, paragraph 71 (where the ECJ held that it was legitimate for Member States to plan and rationalise ‘efforts in the vital healthcare sector so as to avoid the problems of hospital overcapacity, imbalance in the supply of hospital medical care and logistical and financial wastage’). In addition, in the context of free movement law, the ECJ also applies a ‘soft version’ of the principle of proportionality where EU law does not require Member States to attain the same level of protection. In the absence of a protectionist intent, the ECJ favours ‘value diversity’. See e.g. *Joined*

TFEU has been applied in cases involving free movement matters.<sup>36</sup> In addition, when applying that Treaty provision, the ECJ is called upon to strike a balance between, on the one hand, guaranteeing the effectiveness of EU (competition) law and, on the other hand, safeguarding the general interest pursued by national authorities. Stated simply, Article 106(2) TFEU must be read in light of the principle of proportionality.

In addition to those two Treaty provisions, Article 36 of the Charter sets out the right to access to SGEI. It states that '[t]he Union recognises and respects access to [SGEI] as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union'.

Although Articles 14 TFEU, 106 TFEU and Article 36 of the Charter refer to the expression 'SGEI', they fail to define it. In the same way, there is no general definition of SGEI in secondary EU legislation.<sup>37</sup> The EU legislator has instead opted for 'sector-specific definitions' of SGEI in the fields which have been subject to harmonisation.<sup>38</sup>

It follows that, as EU law currently stands,<sup>39</sup> there is no uniform criterion laying down a clear and precise regulatory definition of SGEI.<sup>40</sup> For some scholars, the absence of a general definition of SGEI may be explained by the fact that those services have a dynamic and evolving nature.<sup>41</sup> In this regard, W. Sauter argues that '[p]erceptions of what such services comprise, or what they do not, vary between time and place [...] Because the concept of SGEI is a fluid one, providing a list of such services merely serves by way of example'.<sup>42</sup> Despite that conceptual vacuum, he posits that one may

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Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, paragraph 68 (where the ECJ ruled that 'the fact that one Member State imposes more stringent rules than another in relation to the protection of public health does not mean that those rules are incompatible with the Treaty provisions on the fundamental freedoms').

36 See e.g. Case C-157/94 *Commission v the Netherlands* [1997] ECR I-5699; Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949.

37 But see the 2011 Commission Communication, *supra* note 1, at 3 (where the Commission provides the following general definition of SGEI: 'SGEI are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. The [public service obligation] is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission.')

38 Lenaerts, K.; Gutiérrez-Fons, J. A., *supra* note 5, p. 6.

39 See Case T-289/03 *BUPA v Commission* [2008] ECR II-81, paragraph 165 ('[i]t must be made clear that in [EU] law and for the purposes of applying the [FEU] Treaty competition rules, there is no clear and precise regulatory definition of the concept of an SGEI mission and no established legal concept definitively fixing the conditions that must be satisfied before a Member State can properly invoke the existence and protection of an SGEI mission, either within the meaning of the first *Altmark* condition or within the meaning of Article [106(2) TFEU]').

40 Karayigit, M. T., *supra* note 6, p. 577.

41 See, in this vein, the 2012 Commission Communication, *supra* note 10, paragraph 12 (holding that '[t]he economic nature of certain services can therefore differ from one Member State to another. Moreover, due to political choice or economic developments, the classification of a given service can change over time. What is not a market activity today may turn into one in the future, and vice versa').

42 Sauter, W. Services of general economic interest and universal service in EU law. *European Law Review*. 2008, 33: 167.

infer from soft-law, sector-specific EU legislation, the case-law of the ECJ and that of the European General Court (the ‘EGC’) some features shared by all SGEI. In his view, those common features are the economic nature of the services provided, the imposition of public service obligations,<sup>43</sup> their universal nature, their continuity and affordability, their universal coverage, as well as their focus on user and consumer protection.<sup>44</sup>

For example, the following services have been qualified as SGEI: the services provided by network industries (such as energy, telecommunications),<sup>45</sup> postal services, public emergency services,<sup>46</sup> water supply, waste management, public service broadcasting,<sup>47</sup> sectoral pension schemes,<sup>48</sup> and mooring services for vessels in ports.<sup>49</sup>

#### 4. Providing a Definition of SGEI Consistent with the ‘Checks and Balances’ Set out in the Treaties

If, in accordance with Article 14 TFEU, the EU legislator ever decides to provide a general definition of SGEI, such a definition would have to incorporate the principles and conditions listed in Protocol (No 26).<sup>50</sup> It would also have to be compatible with Article

43 See the 2012 Commission Communication, *supra* note 10, paragraph 48. Referring to Case C-205/99 *Analir* [2001] ECR I-1271, paragraph 71, the Commission considers that ‘it would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions [...] As for the question of whether a service can be provided by the market, the Commission’s assessment is limited to checking whether the Member State has made a manifest error’.

44 Sauter, W., *supra* note 42, p. 175–176.

45 In relation to network industries, it is worth noting that the qualification of a service as a SGEI may depend on the market circumstances of the case at hand. For example, the Commission opines that ‘in areas where private investors have already invested in broadband network infrastructure (or are in the process of expanding further their network infrastructure) and are already providing competitive broadband services with adequate coverage, setting up parallel broadband infrastructure should not be considered as a SGEI. In contrast, where investors are not in a position to provide adequate broadband coverage, SGEI compensation may be granted under certain conditions’. See the 2012 Commission Communication, *supra* note 10, paragraph 49.

46 See e.g. C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, and Case C-160/08 *Commission v Germany* [2010] ECR I-3713.

47 See e.g. Joined Cases T-568/08 and T573/08 *M6 v Commission* [2010] ECR II-3397 (confirmed by Case C-451/10P *TFI v Commission*, order of 9 June 2011, not yet reported).

48 See e.g. Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 98 – 111.

49 See e.g. *Corsica Ferries France*, *supra* note 36.

50 See Article 1 of Protocol (No 26) which states: ‘[t]he shared values of the Union in respect of [SGEI] within the meaning of Article 14 [TFEU] include in particular:

- 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.’

36 of the Charter in so far as it must guarantee access to SGEI. Most importantly, such a general definition must comply with the principle of conferral and with the principle of institutional balance.

#### 4.1. The Vertical Allocation of Powers

The principle of conferral guarantees that, when interpreting the expression 'SGEI', the ECJ and, as the case may be, the EU legislator must respect the competences retained by the Member States. In *Olsen v Commission*, the EGC held that 'Member States have wide discretion to define what they regard as [SGEI]. Hence, the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error'.<sup>51</sup> In the same way, in *BUPA v Commission*, the EGC added that 'the Member State has a wide discretion not only when defining a [SGEI] mission but also when determining the compensation for the costs, which calls for an assessment of complex economic facts'.<sup>52</sup> In this regard, the EGC held that the Commission's review powers are limited 'to ascertaining whether, first, the system is founded on economic and factual premises which are manifestly erroneous and whether, second, the system is manifestly inappropriate for achieving the objectives pursued' and 'whether there has been a manifest error in the exercise of the wide discretion of the Member State as regards the way of ensuring that the SGEI mission may be achieved under economically acceptable conditions'.<sup>53</sup> By way of example, such an error may take place where activities such as advertising or sponsoring are qualified as SGEI.<sup>54</sup>

Moreover, Article 14 TFEU states that, when laying down the general principles and conditions underpinning the operation of SGEI, the EU legislator must comply with Article 4(2) TEU, which states that '[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities'. Introduced by the Lisbon Treaty, the reference to Article 4(2) TEU provides the constitutional basis for the margin of discretion enjoyed by the Member States. Neither the ECJ nor the EU legislator are entitled to second-guess the determinations made by national authorities as to whether a service is of general interest, unless the latter commit a manifest error of assessment.

However, the margin of discretion enjoyed by the Member States when defining a SGEI is narrowed down where the EU legislator has harmonised a given field.<sup>55</sup> This can

51 See Case T-17/02 *Olsen v Commission* [2005] ECR II-2031, paragraph 216 (confirmed by order of the ECJ Case C-320/05P *Olsen v Commission* [2007] ECR I-131).

52 See *BUPA v Commission*, *supra* note 39, paragraph 214.

53 *Ibid.*, paragraphs 266–268. See also the 2012 Commission Communication, *supra* note 10, paragraph 46.

54 See Rodrigues, S., *supra* note 2, p. 257. See also Communication from the Commission on the application of State aid rules to public service broadcasting [2009] OJ C 257/1, at 8 (holding that the following economic activities may not qualify as SGEI: 'advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games, sponsoring or merchandising').

55 See Case C-206/98 *Commission v Belgium* [2000] ECR I-3509, paragraph 45. See also the 2012 Commission Communication, *supra* note 10, paragraph 46 (which states that '[w]here specific Union rules exist, the Member States' discretion is further bound by those rules, without prejudice to the Commission's duty to carry out an assessment of whether the SGEI has been correctly defined for the purpose of State aid control'). See also Buendía Sierra, J. L.; Muñoz de Juan, M. Some Legal Reflections on the Almunia

be seen in the context of Article 106(2) TFEU. In the absence of harmonising measures, the ECJ applies a ‘soft’ version of the principle of proportionality. This is illustrated by cases such as *Corbeau*,<sup>56</sup> *Almelo*<sup>57</sup> and *Ambulanz Glöckner*,<sup>58</sup> where the ECJ found that the monopoly granted to the undertaking entrusted with the operation of a SGEI complied with the Treaty provisions on competition, in spite of the fact that the scope of such monopoly went beyond that of the SGI. By contrast, where the EU legislator has adopted harmonising measures, the ECJ applies a rather ‘strict’ version of the principle of proportionality. This means that national authorities must comply with the objectives pursued by the EU legislative framework. Any derogation from that framework, if possible, must be subject to strict conditions. This point is illustrated by the ruling of the ECJ in *Federutility and Others*.<sup>59</sup>

In that case, the ECJ was asked to interpret Directive 2003/55,<sup>60</sup> which ‘is designed progressively to achieve a total liberalisation of the market for natural gas in the context of which, in particular, all suppliers may freely deliver their products to all consumers’.<sup>61</sup> As of 1 July 2007, Directive 2003/55 provides that the price for the supply of natural gas must be determined solely by the operation of supply and demand. However, Article 3(2) contains an exception to that principle: Member States are allowed to impose ‘public service obligations’ on undertakings operating in the gas sector, which may in particular concern the ‘price of supply’. Thus, the question was, in essence, to what extent a Member State may rely on Article 3(2) of Directive 2003/55 with a view to imposing on undertakings operating in the gas sector public service obligations in order, in particular, to ensure that the price of the supply of natural gas to final consumers was maintained at a reasonable level. At the outset, the ECJ pointed out that Article 3(2) enables the Member States to accommodate two competing interests. On the one hand, Directive 2003/55 pursues to establish a ‘competitive market in natural gas’. On the other hand, Directive 2003/55 also seeks to reassure the Member States that liberalisation of the natural gas market would not be carried out to the detriment of consumers. Accordingly, when having recourse to Article 3(2) of Directive 2003/55, national authorities must strive to accommodate those two competing interests pursued by the EU legislator. Next, the ECJ proceeded to lay down some detailed guidelines as to how that balance had to be struck, i.e. the way in which the principle of proportionality was to be applied. ‘First, such an intervention must be limited in duration to what is strictly necessary in order to achieve its objective, in order, in particular, not to render permanent a measure which, by its very nature, constitutes an obstacle to the realisation

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Package. *European State Aid Quarterly*. 2012, 2(Supplement): 70 (who argue that ‘Member States cannot define the concept of SGEI where this has already been done through EU harmonization measures’).

56 Case C-320/91 *Corbeau* [1993] ECR I-2533.

57 Case C-393/92 *Almelo* [1994] ECR I-1477.

58 Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

59 Case C-265/08 *Federutility and Others* [2010] ECR I-3377.

60 Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ [2003] L176/57.

61 *Federutility and Others*, *supra* note 59, paragraph 18.

of an operational internal market in gas [...] Secondly, the method of intervention used must not go beyond what is necessary to achieve the objective which is being pursued in the general economic interest [...] Thirdly, the requirement of proportionality must also be assessed with regard to the scope *ratione personae* of the measure, and, more particularly, its beneficiaries'.<sup>62</sup> Finally, the ECJ held that public service obligations be clearly defined, transparent, non discriminatory and verifiable, and that they guarantee equal access for EU gas companies to consumers.'

## 5. The Horizontal Allocation of Powers

Article 14 TFEU states that a general definition of SGEI must be adopted 'without prejudice [...] to Articles 93, 106 and 107 [TFEU]'. In other words, reliance on that Treaty provision must comply with the powers of the Commission in the realm of competition law. For example, such a general definition of SGEI could not encroach upon the powers granted to the Commission when determining whether public service compensation granted to an undertaking entrusted with the operation of a SGEI constitutes aid and, if so, is compatible with the internal market.<sup>63</sup> In turn, when enforcing EU competition law, the Commission must pay due respect to the principles and conditions laid down in secondary EU legislation on the basis of which SGEI must operate. A joint reading of the relevant Treaty provisions would thus suggest that the Commission is to operate as follows.

In the absence of EU harmonisation measures, the Commission must limit itself to controlling whether there is a manifest error of assessment in qualifying an economic activity as a SGEI. Next, it will proceed to apply the four cumulative criteria laid down in *Altmark*<sup>64</sup> for public service compensation granted to an undertaking entrusted with the operation of a SGEI not to constitute aid so that the prior notification obligation laid down in Article 108(3) TFEU does not apply. Those cumulative criteria are the following: First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally,

62 *Federutility and Others*, *supra* note 59, paragraphs 33–43.

63 See, in this regard, Buendía Sierra, J. L.; Muñoz de Juan, M., *supra* note 55, p. 69 (who argue that 'despite the fact that the Treaty of Lisbon introduced a possible new legal basis, nothing in the Treaty forces the Commission to use Article 14 TFEU. In fact, the main rules governing SGEIs were not modified with Lisbon. Indeed, Article 14 TFEU starts by recalling that the promotion of public services must be guaranteed "without prejudice of Article 93, 106 and 107 of the Treaty". As a consequence, rules on State aid remain applicable for the compensation of SGEIs. This is maybe one of the reasons why [in relation to the new SGEI package, below n 73] the Commission did not choose to make the proposal under Article 14 TFEU but instead relied on its powers conferred by Article 106(3) TFEU').

64 Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

where the undertaking that is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred. If one or more of the *Altmark* criteria are not met, then public service compensation constitutes State aid and is subject to Articles 93, 106, 107 and 108 TFEU.<sup>65</sup>

## 6. Social Services of General Interest

As mentioned above, the expression ‘SSGI’ is nowhere to be found in primary EU law.<sup>66</sup> It is thus for the EU legislator and, as the case may be, for national authorities to define the concept embedded in that expression. Of course, in so doing, they must respect the definitions of ‘SGI’, ‘SGEI’ and ‘NSGI’ laid down in the Treaties, Protocol (No 26) and Article 36 of the Charter.

In this regard, in its 2011 Communication, the Commission states that SSGI may include ‘social security schemes covering the main risks of life and a range of other essential services provided directly to the person that play a preventive and socially cohesive/inclusive role’.<sup>67</sup>

Since the social nature of a SGI is not sufficient in itself to classify that service as non-economic,<sup>68</sup> a distinction should be drawn between ‘non-economic SSGI’ and ‘social SGEI’. As mentioned above, whilst the Treaty provisions on competition do not apply to SSGI being NSGI, they do so in relation to social SGEI. The question is then whether the adjective ‘social’ brings an added value to the concepts of ‘NSGI’ and to that of ‘SGEI’. In my view, the reply should be in the affirmative.

It is worth noting that the Lisbon Treaty has introduced a number of provisions, which aim to highlight the ‘social aspects’ of the European integration project.<sup>69</sup> For the purposes of our study, it is worth examining Article 9 TFEU in some detail. The latter states that ‘[i]n 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

65 See e.g. Case T-354/05 *TFI v Commission* [2009] ECR II-471.

66 Sinnave, A. What’s New in SGEI in 2012? – An Overview of the Commission’s SGEI Package. *European State Aid Quarterly*. 2012, 2: 354 (who points out that ‘[t]he main difficulty has been the lack of an established definition of “social” services’).

67 See the 2011 Commission Communication, *supra* note 1, at 4.

68 See Rodrigues, S., *supra* note 2, p. 256 (‘[t]he main relevant criteria to pave the way towards an exception or an exclusion of the EU rules is not the social nature of the service, but the economic or non-economic nature of such service’).

69 See e.g. Article 3(3) TEU which states that the Union ‘shall work for [...] a highly competitive social market economy, aiming at full employment and social progress’. See also Title IV of the Charter, entitled ‘Solidarity’ (see Articles 27–38).

level of education, training and protection of human health'. Compared to its predecessor (ex Article 127(2) EC), Article 9 TFEU goes beyond macroeconomic employment issues. In *de Santos Palhota*, AG Cruz Villalón qualified that provision as 'a "cross-cutting" social protection clause'.<sup>70</sup> The Advocate General relied on that provision (as well as on Article 31 of the Charter) with a view to arguing that '[a]s a result of the entry into force of the Lisbon Treaty, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. 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, [...] is expressed in practical terms by applying the principle of proportionality'.<sup>71</sup>

In relation to SSGI being NSGI, if the ECJ were to follow the interpretation of Article 9 TFEU put forward by AG Cruz Villalón, the compatibility of a SSGI with the Treaty provisions on free movement would not be examined under a strict version of the principle of proportionality. On the contrary, in the absence of discriminatory State measures, the general interest pursued by the SSGI in question and the right to free movement would stand on an equal footing.

As to social SGEI, the interpretation put forward by AG Cruz Villalón suggests that, when applying the *Altmark* criteria, the Commission may not 'tilt' the balance in favour of the Treaty provisions on competition, but is required to follow a more 'balanced' approach. Indeed, Article 9 TFEU is a horizontal Treaty provision which is addressed to the 'Union' as a whole, and not only to the EU legislator. This means that when the Commission 'implements' EU competition policy, it must bear in mind 'the social dimension of EU integration'. In the Commission's own words, social SGEI 'have specific characteristics that need to be taken into consideration'.<sup>72</sup>

That might explain why when adopting the 'New SGEI Package'<sup>73</sup> – in particular its Decision on the application of Article 106(2) TFEU to State aid in the form of public

70 See Opinion of AG Cruz Villalón in Case C-515/08 *de Santos Palhota and Others*, judgment of 7 of October 2010, n.y.r., paragraph 51.

71 *Ibid.*, paragraph 53.

72 See Recital 11 of Commission Decision 2012/21/EU of 20 December 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, [2012] OJ L 7/3.

73 The new SGEI package is composed of four different legal instruments, namely a new Communication, *supra* note 10, a revised Decision, *supra* note 72, a revised Framework (Communication from the Commission — European Union framework for State aid in the form of public service compensation, [2012] OJ C8/15), and a new *de minimis* Regulation (Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European

service compensation granted to certain undertakings entrusted with the operation of SGEI (the ‘2011 Commission Decision’)<sup>74</sup> – the Commission placed ‘greater emphasis on social SGEI’.<sup>75</sup> It is worth recalling that, if one or more of the *Altmark* criteria are not met, then public service compensation constitutes State aid. However, if that public service compensation falls within the scope of application of the 2011 Commission Decision, it is deemed compatible with the internal market and exempted from the prior notification obligation provided for in Article 108(3) TFEU.<sup>76</sup> In order for public service compensation to fall within the scope of the 2011 Commission Decision the social SGEI at issue must be clearly identified; the undertaking benefiting from the public service compensation must have been specifically entrusted with the operation of that service; and there must be no overcompensation.<sup>77</sup>

The threshold for the application of the 2011 Commission Decision to SGEI in general has been reduced. For example, whilst the 2005 Commission Decision was applicable to annual compensation for the service in question of less than EUR 30 million, the 2011 Commission Decision covers ‘compensation not exceeding an annual amount of EUR 15 million for the provision of [SGEI] in areas other than transport and transport infrastructure’.<sup>78</sup> However, in relation to social SGEI,<sup>79</sup> no economic threshold is laid down in the 2011 Commission Decision.<sup>80</sup>

Additionally, compared to the 2005 Commission Decision,<sup>81</sup> the 2011 Commission Decision has expanded the type of social SGEI which are covered by that exemption.<sup>82</sup> Whilst the 2005 Decision was limited to ‘public service compensation granted to

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Union to *de minimis* aid granted to undertakings providing services of general economic interest, [2012] OJ L 114/ 8). The purpose of the new SGEI Package is twofold: it seeks to clarify some basic concepts relating to SGEI, whilst promoting a diversified, flexible and proportionate approach. See generally Kamaris, G. The reform of EU state aid rules for services of general economic interest in times of austerity. *European Law Review*. 2012, 33: 55, and Sinnaeve, A., *supra* note 66.

74 See *supra* note 72.

75 See Gérardin, D. Editorial: The New SGEI Package. *Journal of Competition Law & Practice*. 2012, 3: 2.

76 Article 3 of the 2011 Commission Decision states: ‘State aid in the form of public service compensation that meets the conditions laid down in this Decision shall be compatible with the internal market and shall be exempt from the prior notification obligation provided for in Article 108(3) [TFEU] provided that it also complies with the requirements flowing from the Treaty or from sectoral Union legislation’.

77 The added value of the 2011 Commission Decision lies in the fact that it aims to facilitate the application of the third and fourth criteria laid down in *Altmark*. See Kamaris, G., *supra* note 73, p 59. For example, Article 5 thereof lists the efficiency factors that must be taken into account when awarding public service compensation to the undertaking entrusted with the operation of a SGEI.

78 See Article 2(a) of the 2011 Commission Decision.

79 See Articles 2(b) and 2(c) of the 2011 Commission Decision.

80 See Recital 11 of the 2011 Commission Decision (‘undertakings in charge of social services [...] should also benefit from the exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the general compensation threshold laid down in this Decision’).

81 Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, [2005] OJ L312/67.

82 See Sinnaeve, A., *supra* note 66, p. 355; and Righini, E. The Reform of the State Aid Rules on Financing of Public Services Paving the Way towards a Clearer, Simpler and more diversified Framework. *European State Aid Quarterly*. 2012, 2(Supplement): 13.

hospitals and social housing undertakings carrying out activities qualified as [SGEI] by the Member State concerned', Article 2(c) of the 2011 Commission Decision also covers 'compensation for the provision of [SGEI] 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'.<sup>83</sup> For Sinnaeve, the notion of 'care and social inclusion of vulnerable groups' is flexible and broad enough to catch any residual type of social services not explicitly mentioned in Article 2(c) of the 2011 Commission Decision, such as services addressing the needs of refugees, immigrants, disabled persons or drug addicts. Accordingly, she takes the view that 'Member States will in future be able to benefit from the exemption for most, if not all, social services'.<sup>84</sup>

Moreover, if State aid in the form of public service compensation does not meet the conditions set out in the 2011 Commission Decision, then prior notification is required. When examining the compatibility of such aid with the internal market, the Commission is obliged to take into account Article 9 TFEU. For example, the derogation contained in Article 107(2)(a) TFEU must be interpreted in light of Article 9 TFEU.

In summary, when determining whether public service compensation constitutes State aid and, if so, whether it is compatible with the internal market, one must take into account Article 9 TFEU which is a horizontal social protection clause. Deference to that Treaty provision must thus take place at all stages of the Commission's assessment, i.e. when interpreting the four cumulative criteria laid down in *Altmark*, when interpreting its 2011 Decision, and when interpreting the derogations from State aid rules set out in Article 107 TFEU.

## Concluding Remarks

Shedding some light on the expressions 'SGI', 'SGEI', 'NSGI' and 'SSGI' is not an easy task. The reasons are twofold. First, as mentioned above, SGI have a dynamic and evolving nature. A definition of the principles and conditions underpinning the operation of SGI must be capable of adapting to changing times and social perceptions. Second, a definition of SGI must be respectful of the vertical and horizontal allocation of powers. Vertically, a definition of SGI must not impinge upon the powers retained by the Member States. In the absence of harmonisation, it is for the Member States to define the services they consider to be of general interest, unless they commit a manifest error. In the presence of EU harmonising measures, the margin of discretion enjoyed by the Member States is, if still existent, narrowed down, given that national authorities are required to comply with the objectives pursued by the EU legislator. Horizontally, a definition of SGI must not encroach upon the prerogatives of the Commission in the realm of competition law. An EU conceptual framework for the SGI must thus be the

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83 See Rodrigues, S., *supra* note 2, p. 266.

84 Sinnaeve, A., *supra* note 66, p. 355.

result of a constructive dialogue between the different levels of governance, as well as of a balanced solution among different policy areas in relation to which the EU enjoys competences.

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## TERMINO „VISUOTINĖS SVARBOS PASLAUGOS“ APIBRĖŽIMAS PER EUROPOS SĄJUNGOS SUTARTYSE ĮTVIRTINTO „STABDŽIŲ IR ATSVARŲ“ PRINCIPO PRIZMĘ

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**Santrauka.** Straipsnyje siekiama atskleisti tokių terminų kaip „visuotinės svarbos paslaugos“ (SGI), „visuotinės ekonominės svarbos paslaugos“ (SGEI), „visuotinės svarbos ne ekonominio pobūdžio paslaugos“ (NSGI) ir „visuotinės svarbos socialinės paslaugos“ (SSGI) sampratą. Terminas „visuotinės svarbos paslaugos“ atspindi bendrą koncepciją, apimančią tiek ekonominio, tiek ne ekonominio pobūdžio visuotinės svarbos paslaugas. Skirtingai nei pirmieji trys minėti terminai, Europos Sąjungos pirminėje teisėje nėra vartojamas terminas „visuotinės svarbos socialinės paslaugos“. Tai reiškia, kad paliekama ES teisės aktų leidėjui arba valstybėms narėms apibrėžti šio termino reikšmę. Be to, šiame straipsnyje laikomasi pozicijos, kad principų ir sąlygų, būtinų „visuotinės svarbos paslaugų“ veikimui, samprata turi sugebėti prisitaikyti prie besikeičiančių aplinkybių ir socialinių iššūkių, bet kartu išlaikyti pagarbą vertikaliam ir horizontaliam įgaliojimų pasiskirstymui, kuris įtvirtintas ES Sutartyse. Vertikalčiai „visuotinės svarbos paslaugų“ apibrėžimas neturi kėsintis į valstybėms narėms išlikusias teises. Kai nėra bendro suderinimo, valstybėms narėms paliekama teisė apibrėžti visuotinės svarbos paslaugų ratą, nebent jos daro akivaizdžių vertinimo klaidų. Taikant ES harmonizavimo priemones, valstybių narių diskrecijos teisė yra susiaurinama, atsižvelgiant, kad nacionalinės valdžios institucijos turi laikytis ES teisės aktų leidėjo nustatytų tikslų. Horizontalčiai „visuotinės svarbos paslaugų“ apibrėžimas neturi kėsintis į Komisijos išimtinės teises konkurencijos teisės srityje. Be to, remiantis Sutarties dėl Europos Sąjungos veikimo 9 straipsniu bei ES antrinės teisės aktais, turi būti atsižvelgiama į „visuotinės svarbos socialinių paslaugų“ specifika, nustatant suderinamumą su ES valstybių pagalbos taisyklėmis dėl kompensacijų už teikiamas viešas paslaugas. ES konceptualus pagrindas „visuotinės svarbos paslaugų“ įgyvendinimui turi būti parengtas, atsižvelgiant į konstruktyvų skirtingų valdymo lygių dialogą, taip pat į subalansuotus sprendimus įvairiose politikos srityse, kuriose ES turi kompetenciją.

**Reikšminiai žodžiai:** „visuotinės svarbos paslaugos“, vertikalus ir horizontalus įgaliojimų pasiskirstymas Europos Sąjungoje.

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