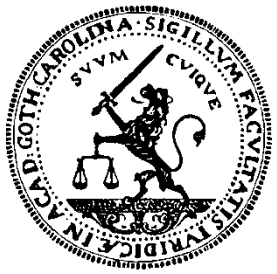

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Housing policy and EU State Aid Law

Legal implications of policy choices in Sweden and The Netherlands

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Contents

Preface

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Abbreviations

AG Advocate General

CFREU Charter of Fundamental Rights of the European Union

CJEU Court of Justice of the European Union

EU European Union

MS Member States

PSC Public Service Compensation

PSO Public Service Obligation

SGEI Services of General Economic Interest

SGI Services of General Interest

TEU Treaty on European Union

TFEU Treaty on the Functioning of the European Union

OJ Official Journal of the European Union

Introduction

i. Background

In recent years there has been a deficit of housing in Sweden, affecting both metropolitan areas and municipalities with less population.[1] The situation has deteriorated with the increase in immigration which entails a greater need for housing apart from housing for young people, the elderly or people with disabilities. The responsibility for provision of housing is on the municipalities[2] as the owners of the public municipal housing companies which act in a 'business-like way'.[3] In a report published in 2015,[4] the Swedish government highlighted the importance of EU State aid rules on Services of General Economic Interest (hereinafter 'SGEI') and the possibility for municipalities to use such rules to fulfil their housing provision obligation, thereby overcome the housing deficit.[5]

Accordingly, there have been a number of questions raised by the public authorities in the Member States (hereinafter 'MS') concerning State aid rules, in particular the precise conditions under which compensation for Public Service Obligations (hereinafter 'PSO') constitute State aid, and the conditions under which State aid may be regarded as compatible with the internal market.[6] To that end, the CJEU in the *Altmark*[7] judgment set out the

[1]Boverket, Housing Market Survey 2017 http://www.boverket.se/sv/samhallsplanering/bostadsplanering/bostadsmarknaden/bostadsmarknadsenkaten-i-korthet/.

[2] Lag (2000:1383) om kommunernas bostadsförsörjningsansvar (hereinafter 'Law on Municipal Housing') §1.

[3] Lag (2010:879) om allmännyttiga kommunala bostadsaktiebolag (hereinafter 'Law on Public Municipal Housing Companies) §2.

[4] SOU (2015:58) 'EU och kommunernas bostadspolitik (hereinafter 'EU and Municipal Housing Policy').

[5] There is no unequivocal definition of housing shortage, but it is possible to put either a market or a political perspective on the concept. Also, it is difficult to determine whether currently there is a surplus or deficit of housing in Sweden as the calculations depend on the initial assumption of when the market is in equilibrium. See Goran Katinic, *Perspectives on housing construction, Economic Commentaries, Sveriges Riksbank*, No.2, 2018.

[6] SWD (2013) 53 final, Guide to the application on the State aid, public procurement and the internal market to SGEI and in particular to social services of general interest, Brussels 29.04.2013 (hereinafter 'SWD (2013) 53 final').

[7] Case C-280/00, *Altmark* [2003] ECR I-7747, paras 88-94.

four criteria, fulfilment of which escapes the application of Article 107(1)[8] and ultimately 108 (3) of the TFEU.[9]

Following *Altmark* and the increasing reliance on Article 106 (2) of the TFEU in the State aid context, the Commission adopted the *SGEI Package*[10] to further clarify the key concepts underlying the application of the State aid rules to Public Service Compensation (hereinafter 'PSC).[11] The novelty *Altmark* brought was that, if the compensation paid for the discharge of the PSO does not exceed the costs incurred in the performance of that obligation according to the four cumulative criteria set in *Altmark*, the compensation does not constitute State aid, therefore there is no need to rely on Article 106 (2) of the TFEU.[12] Even though some of the criteria set in *Altmark* are similar to the criteria in Article 106 (2) of the TFEU, the latter remains to be a distinct provision. This is confirmed by the case law of the Court[13] stating that if the four cumulative criteria under *Altmark* are not met, the compensation still amounts to State aid, therefore may be subject to Article 106 (2) of the TFEU.

Ultimately, as it is stated in Protocol 26 of the TFEU, MS enjoy a wide discretion in providing, commissioning and organising SGEI. Thus, the MS have the freedom to define SGEI and the role of the Commission[14] is to check for manifest error of assessment.[15] Such assessment was carried out in the Commission decision regarding housing corporations in the Netherlands.[16] The decision concerns two closely related case on the aid granted to 'Woningcorporaties'[17] (hereinafter 'wocos') for which the Commission received complaints. Ultimately, the Netherlands had to undertake

[8] Article 107 (1) of the TFEU defines the concept of a State aid under EU law. It provides that aid granted by a MS or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between MS, be incompatible with the internal market.

[9] Article 108 (3) of the TFEU is the notification provision. It requires plans to grant or alter aids to be notified to the Commission in sufficient time to enable it to submit its comments.

[10] Consisting of a Communication, Decision, Framework and a De Minimis Regulation.

[11] Kelyn Bacon, "*European Union Law of State Aid*", 3rd Edition, Oxford Competition Law, 19 January 2017.

[12] Ibid.

[13] Case T-388/03 *Deutsche Post and DHL International v Commission* [2009] ECR II-199.

[14] SWD (2013) 53 final, p 24.

[15] Erika Szyszczak & De Gronden, 'Financing Services of General Economic Interest: Reform and Modernization'. Szyszczak argues that in the absence of specific sectoral rules, the Commission acknowledges that the MS have a wide margin of discretion in defining a service as an SGEI and the Commission's power is limited to checking whether the MS has made a manifest error in definition and assessing that any public service compensation is not a State Aid.

[16] C (2009) 9963 final, State aid No E 2/2005 and N 642/2009 – The Netherlands 'Existing and special project aid to housing corporations', Brussels 15 December 2009 (hereinafter 'C (2009) 9963 final').

[17] Woningcorporaties are housing corporations in the Netherlands.

commitments for amending the existing aid scheme[18] in order to bring it in line with the EU State aid rules.

ii. Research questions and thesis objective

SGEI is not defined in the TFEU or the secondary legislation. However, Article 14 TFEU introduces a legal ground for the adoption of principles and conditions that would enable MS to fulfil their missions in providing, commissioning and funding of the SGEI.[19] Moreover, Article 106 (2) of the TFEU provides that any Treaty rule, including those concerning competition and free movement, may be disapplied for a SGEI.[20] The application of Article 106(2) of the TFEU does not prevent a measure from being classified as State aid; rather, it goes to the question of whether a measure constituting State aid can be regarded as compatible with the internal market. Therefore, a State aid measure in favour of an SGEI may be found compatible with the internal market where the conditions of Article 106(2) of the TFEU are satisfied.[21]

Moreover, the growing importance of SGEI on EU level is predominant. In the words of the European Parliament: "public services must be of high quality and accessible to all sections of the population..." expressing its views with concern with regards to the restrictive stance taken by the Commission, which, in relation to State aid for social housing associations, classifies the services provided by such associations as SGEI only if they are reserved for socially disadvantaged citizens or socially less advantaged groups.[22]

This thesis aims to determine whether the State aid rules and the rules relating to the compensation for PSO are applicable to the housing policy in Sweden in light of the SGEI Package; Commission Decisions on social housing schemes in Ireland,[23] and Commission decision regarding housing

[18] The State aid scheme granted by the Netherlands to wocos will be discussed in depth in the third chapter.
[19] Article 14 of the TFEU.
[20] Burke, Jarleth M, "A Critical Account of Article 106(2) TFEU: Government Failure in Public Service Provision". Oxford: Hart Publishing, Hart Studies in Competition Law, Bloomsbury Collections. Web. 19 Apr. 2018.
[21] Kelyn Bacon, "*European Union Law of State Aid*", 3rd Edition, Oxford Competition Law, 19 January 2017, p 106.
[22] European Parliament Resolution on reform of the EU State aid rules on SGEI (2011/2146), par. 18.
[23] C (2004) 2205 final, 'State Aid N 89/2004 - Ireland', Guarantee in favour of the Housing Finance Agency (HFA), 'Social housing schemes funded by the HFA', Brussels 30.06.2004. C (2005) 4668 final, 'State Aid N 395/2005 – Ireland', Loan Guarantee for social infrastructure schemes funded by the Housing Finance Agency, Brussels, 07.12.2005.

corporations in the Netherlands. In order to explore this research question, the provision of housing in Sweden shall initially be examined in light of Article 106 (2) of the TFEU which renders the State aid compatible with the internal market if the aid is granted to undertakings entrusted with the operations of SGEI. In this context, the thesis provides legal analysis of the development of the conditions for compensation for the public services, as set by *Altmark* judgment, which escape classification as State Aid under Article 107 (1) of the TFEU. Finally, the thesis intends to identify the legal consequences of different policy choices regarding housing in Sweden and the Netherlands in light of EU State aid rules. Therefore, in order to answer to this question, the thesis calls for an assessment of the Commission decision regarding housing corporations in the Netherlands.

iii. Method and materials

The research will be conducted based on the legal dogmatic method.[24] Legal dogmatic research is best described as research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, views and concepts with a view to solving unclarities and gaps in the existing law.[25] Legal doctrine serves three main goals: description, prescription and justification.[26]

In order to answer the question on applicability of the State aid rules and rules relating to compensation for PSO, describing the existing law, respectively the TFEU provisions governing State Aid is essential. This method will require an understanding of the legal method of the CJEU; in particular the *teleological interpretation* of the treaty provisions in order to achieve the ultimate objective of the provisions.

The method of teleological interpretation may be defined as the method of interpretation used by courts, when they interpret legislative provisions in the light of the purpose, values, legal, social and economic goals these provisions aim to achieve.[27] The leading case in this context is the *Altmark* judgement which calls for a detailed analysis. Other relevant cases such as *BUPA*[28] and

[24] Jan M. Smits "*What is legal doctrine*? On the aims and methods of legal-dogmatic research", Maastricht European Private Law Institute, September 2015.
[25] Ibid p 5.
[26] Ibid p 8.
[27] Grewe "A comparison of the Methods of Interpretation of Domestic Constitutional Courts and the European Court of Human Rights", ZaöRV 2001.
[28] Case T-289/03 BUPA v Commission [2008] ECR II-81.

Fred Olsen[29]*, etc.*, will be taken into consideration. Moreover, the secondary legislation and soft law instruments of the EU will be analysed.

The post-Altmark Package includes a Communication[30], Decision[31], Framework[32] and Regulation[33] which are crucial for assessing the housing policy in terms of SGEI. Article 14 TFEU and Protocol 26 of the TFEU concerning the SGEI will also be considered. In connection to the question on the policy choices regarding housing in the Netherlands and Sweden, it is necessary to conduct a *comparative analysis* of the housing policies followed by each country; examine how those policies were implemented and the legal consequences of such policies.

iv. Delimitation

The research is focused on the applicability of the Treaty provisions governing State aid, more specifically the rules relating to the compensation for PSO to the housing policy in Sweden. Therefore, the assessment of the application is delimited to the EU primary law that provides the legal framework for State aid rules; the EU secondary legislation providing for the key concepts underlying the application of the State aid rules to PSC, and the CJEU's case law related to SGEI.

The paper does not cover public procurement rules related to the field of State aid. Moreover, it does not cover the relationship between the Treaty rules on State aid and the provision on SGEI provided for, in Article 36 of the CFREU.[34]

As the thesis aims to assess the applicability of the rules relating to compensation for PSO to the housing policy in Sweden in light of the Commission decision regarding housing corporations in the Netherlands, the comparative analysis is delimited to the policy choices in the Netherlands

[29] Case T-17/02 Fred Olsen SA v Commission [2005] ECR II- 2031.
[30] Communication 2012/C 8/02 from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (hereinafter 'SGEI Communication') OJ L 7, 11.1.2012.
[31] Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106 (2) of the 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 (hereinafter 'SGEI Decision') OJ L 7, 11.1.2012.
[32] European Union framework 2012/C 8/03 for State aid in the form of public service compensation (2011) (hereinafter 'SGEI Framework') OJ C 8, 11.1.2012.
[33] Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the TFEU to *de minimis* aid granted to undertakings providing services of general economic interest (hereinafter 'SGEI de minimis Regulation') OJ L 114, 26.4.2012.
[34] Charter of Fundamental Rights of the European Union [2016] OJ C 202/396.

only, even though a discussion on other MS's housing provision would be interesting, it falls outside the scrutiny of this research.

v. Outline

The thesis is divided in four chapters. The first chapter provides for a general overview of the housing policies in Sweden and the Netherlands, including the legislative framework covering housing provision in each country.

The second chapter examines the SGEI in connection to the housing policy, including the case law of the CJEU on SGEI and the SGEI Package adopted therein. It serves to answer the question on the applicability of the rules relating to compensation for PSO to the housing policy in Sweden.

The third chapter provides for the assessment of the Commission decision regarding housing corporations in the Netherlands with a comparison to the Commission Decisions on social housing schemes in Ireland as a necessary discussion in answering the question on the applicability of the rules relating to compensation for PSO to the housing policy in Sweden.

The fourth chapter will discuss the legal implications of the policy choices regarding housing in Sweden and the Netherlands.

The thesis will be followed by a conclusion.

1. General overview of housing policy in Sweden and the Netherlands

For the purposes of answering the research questions, this chapter provides for a general overview of the two different housing provision models in Sweden and the Netherlands. Accordingly, it explains that the responsibility for provision of housing in Sweden is incumbent on the municipalities,[35] whereas in the Netherlands, social housing provision remains a prerogative of the private non-profit sector.[36] Moreover, it includes the legislative framework covering housing provision in each country.

1.1 Swedish housing policy: *municipal housing model*

In Sweden, the concept ¨*social housing*¨ is not used.[37] The term ¨**allmännytta**¨ ("for the benefit of everyone")[38] is used to describe the housing sector which has four main distinguishing characteristics: it operates on a non-profit basis; it is almost entirely owned by municipalities; it is open to everyone, i.e. it is not only directed at specific target groups; and its rents have been given the role of serving as the main norm for rental levels across the entire rented housing sector.[39] Accordingly, the obligation of provision of housing is on the municipal housing companies, which must work for the purpose of promoting public benefit and must have a general interest objective by promoting the supply of housing in the municipality, not only housing for the most vulnerable but for all kinds of people.[40] Although it is the municipalities that are the main owners of the Swedish non-profit housing sector, it is not the municipalities themselves but the State that has defined, what may lawfully be authorised as a non-profit housing company.[41]

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[35] Law on Municipal Housing §1.
[36] CECODHAS Housing Europe's Observatory, Housing Europe Review 2012, "The nuts and bolts of European social housing systems", Brussels 2011, p 25.
[37] Ibid p 76.
[38] Boverket, The National Board of Housing, Building and Planning, 'A history of the Swedish system of non-profit municipal housing', October 2008.
[39] Ibid.
[40] CECODHAS Housing Europe's Observatory, Housing Europe Review 2012, "The nuts and bolts of European social housing systems", Brussels 2011, p 76.
[41] Boverket, The National Board of Housing, Building and Planning, 'A history of the Swedish system of non-profit municipal housing', October 2008.

The authorisation of housing companies as non-profit was mainly connected to the State's financial support of housing construction until early 1990s.[42] Housing companies falling under the definition of the non-profit municipal housing company were provided financial support by the State, respectively they were given access to particularly favourable financial subsidies by the State. The decisive defining criteria were that: (a) the company should be non-profit, and (b) it should be under municipal control.[43] Such policy was followed as a necessary instrument for achieving the objectives of national housing policy.

With the adoption of the Law on Public Housing Companies in 2002[44], the definition of non-profit municipal housing companies was no longer connected to the State's financial support, however the law introduced the conditions for a housing company to be authorised as non-profit. According to the law, (i) the company had to run without profit; (ii) the company's activities must consist principally of managing properties in which rental dwellings are provided, and (iii) the company is approved as a public housing company.[45] The third condition however, did not apply to the municipal housing companies. This means that municipal housing companies did not need to be approved as non-profit as long as they had controlling influence[46] over the housing company. As a result, privately-owned companies can also be authorised as non-profit if they fulfil the first two conditions set out in Article 1. To sum up, a municipality, which has a controlling influence over the housing company and fulfils the first two conditions under Article 1, it is by definition – i.e. without needing to receive special authorisation as non-profit and is simply named "a municipal housing company".[47]

[42] Ibid.
[43] Ibid.
[44] Lag (2002:102) om allmännyttiga bostadsföretag (hereinafter 'Law on public housing companies).
[45] Ibid §1.
[46] Ibid §2. Controlling influence meant that the municipality owns shares in a limited liability company or in an economic association with more than with more than half of all votes in the company or association, and it has the right to appoint or resign more than half of the members of the Board of Directors of the company or association.
[47] Boverket, The National Board of Housing, Building and Planning, 'A history of the Swedish system of non-profit municipal housing', October 2008.

1.1.1 Current legislative framework on housing provision

As stated earlier, the provision of housing in Sweden is incumbent on the municipalities. The Swedish Instrument of Government stipulates that the public institutions shall secure the right to housing.[48] Moreover, the Swedish Local Government Act provides that the municipalities may themselves attend the matters of general concern which are connected with the area of municipality.[49] Thus, the main legislation covering the provision of housing is a sequel of such government policy.

1.1.1.1. Law on Municipal Housing

The housing provision act provides that each municipality shall, with guidelines, plan for housing supply in the municipality.[50] The purpose of the planning shall be to create the conditions for everyone in the municipality to live in good housing and to promote appropriate measures for housing supply. The guidelines for housing supply adopted by the municipalities must clearly specify the objectives for housing construction and development, and the data should be based on the analysis of demographic trends, demand for housing, housing needs for specific groups and market conditions.[51]

1.1.1.2. Planning and Building Act

Planning and Building Act contains provisions on the planning of land and water areas, and on construction. As stipulated in the Act, the purpose is, with regards to the freedom of the individual, to promote societal progress with equal and proper living conditions and a clean and sustainable habitat, for people in today's society and for future generations.[52] The Act is followed by an Ordinance[53], which contains technical provisions, e.g. requirements for construction works or performance or safety measures.

[48] The Instrument of Government of Sweden §2.
[49] The Swedish Local Government Act, Ch.2 §1.
[50] Law on Municipal Housing §1.
[51] Ibid §2.
[52] Planning and Building Act (2010:900) §1.
[53] Planning and Building Ordinance (2011:338).

1.1.1.3. Law on Public Municipal Housing Companies

The Law on Public Municipal Housing Companies was adopted in 2010 which repeals the Law on Public Housing Companies, dated 2002. Accordingly, the law brought some changes in the housing sector.[54] It defines municipal housing companies as public limited liability companies over which a municipality or several municipalities jointly have a controlling influence for the purpose of public interest.[55] The company's activities must consist principally of managing properties with apartments for rent, it shall offer the tenants the possibility to influence the housing and the company,[56] and promote housing supply in a municipality or municipalities.[57] The controlling influence means that 'a municipality or several municipalities jointly own half of the shares in a limited liability company with more than half of all the votes in the company.[58]

A crucial change in the new law is the introduction of the 'business-like principle'.[59] Accordingly, public municipal housing companies shall operate according to the business-like principle[60], which means that there shall be no special advantages (no direct municipal support or particularly favourable loans, and in the case of municipal guarantees, those should be offered at market price) but the companies have to be run on their own merits, with the same required rate of return as comparable private housing companies.[61]

The business-like principle was introduced in the Swedish Government report, which later on resulted in the introduction of this principle in the Law.[62] The report was intended to examine the operating conditions of non-profit housing companies, in particular whether the Swedish system of municipal housing companies needed to be changed to conform with EU competition and State aid rules.[63]

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[54] CECODHAS Housing Europe's Observatory, Housing Europe Review 2012, "The nuts and bolts of European social housing systems", Brussels 2011, p 76.
[55] Law on public municipal housing companies §1.
[56] Such influence includes taking part in the decision-making process in improving housing and living conditions, e.g. negotiating fair and reasonable rental prices. This is usually done through membership in Unions of Tenants in Sweden.
[57] Law on public municipal housing companies §1.
[58] Ibid.
[59] It was first introduced in a Swedish government report 'EU, allmännyttan och hyrorna' (EU, Public Service and Rents). The mandate of the report was to examine the operating conditions for non-profit housing companies.
[60] Law on public municipal housing companies §2.
[61] CECODHAS Housing Europe's Observatory, Housing Europe Review 2012, "The nuts and bolts of European social housing systems", Brussels 2011, p 76.
[62] SOU (2008:38) 'EU, allmännyttan och hyrorna' (hereinafter 'EU, Public Service and Rents'), Swedish Government Report, 2018.
[63] Ibid.

The report proposed two models: business-oriented municipal housing LLC and prime cost-oriented municipal housing LLC. However, the wording of Article 2 further provides that:

- this does not prevent the public municipal housing companies to receive such support, if it has been (1) approved by the European Commission; (2) provided under regulations adopted by the European Commission under Article 108(4) of the TFEU; or (3) considered compatible with the internal market and exempted from the notification requirement under Article 108 (3) of the TFEU.[64]

There is no further clarification of this provision in the law. However, it was mentioned in the Government report that business-oriented municipal housing LLC should be allowed to accept aid in two cases: if the European Commission has approved the aid in the individual case, or if the aid is acceptable under the rules of EU law pertaining to de minimis aid or rules on block exemptions.[65]

1.2 Dutch housing policy: *private non-profit housing model*

There is no single definition of ¨*social housing*¨ in the Netherlands, although Constitution states that the promotion of adequate housing is the object of the care of public authorities.[66] Social housing is provided by the 'Woningcorporaties – Social Housing Corporations', which are private non-profit organisations (associations or foundations). As social enterprises, these specially registered entities, pursue social goals. They ensure an adequate supply of affordable, good-quality homes for the less privileged in society and those on lower and middle incomes.[67] Social housing corporations function according to the revolving fund principle.[68] This implies that the income that housing associations receive from letting and selling homes is sufficient to cover their investments in new affordable housing, housing refurbishment and neighbourhood regeneration.[69] Thus, Dutch housing

[64] Law on public municipal housing companies §2.
[65] SOU (2008:38) 'EU, Public Service and Rents', p 38.
[66] CECODHAS Housing Europe's Observatory, Housing Europe Review 2012, "The nuts and bolts of European social housing systems", Brussels 2011, p 64.
[67]'Dutch social housing in a nutshell', Aedes, Dutch associations of social housing organisation, July 2013.
[68]Joris Hoekstra, Social housing in the Netherlands: The development of the Dutch social housing model, OTB Research Institute for the Built Environment / Delft University of Technology, June 2013.
[69] Ibid.

associations function without receiving any direct government subsidies,[70] and they operate in the legal form of a foundation or association, i.e. the State (including municipalities) does not control them.[71] However, for their general activities, registered social housing corporations can benefit from three-layer security scheme to guarantee the loans they contract with banks to finance their social housing activities.[72] First, *The Central Fund for Social Housing* (CFV) which is financed through charges levied on all social housing organisations, is a special independent public body that ensures financial supervision of the organisations, notably through yearly reports that classify organisations depending on their solvency and liquidity.[73] The second security instrument is *The Guarantee Fund for Social Housing* (WSW), a private organization created by housing organisations themselves that acts as solidarity fund among them. This fund enables social housing organisations to benefit from favourable conditions and interest rates when financing their activities on the open capital market.[74] The final layer includes *The Dutch State and Municipalities* who act as a guarantor of last resort through the WSW with interest-free loans in the event the sector can no-longer overcome its financial problems and the WSW is nearly exhausted.[75]

1.2.1 Legislative framework on social housing

Regulation of social housing in the Netherlands dates back to 1901 when the Dutch Housing Act[76] was adopted. The Law integrated social housing corporations in the Dutch housing policy and placed them under government supervision.[77] The Act provided that the role and power of the local authorities on housing provision ought not to change with the adoption of the Act; they were able to take measures for the purpose of housing improvement, however with a few exceptions.[78] It allowed the local authorities to e.g. buy and sell land, build houses, lend money to private builders or public utility housing societies. The main significance of the Act may be seen in the following facts: 1. it compels local authorities to take some measures which

[70] Ibid.
[71] C (2009) 9963 final.
[72]'Dutch social housing in a nutshell', Aedes, Dutch associations of social housing organisation, July 2013.
[73] Ibid.
[74] CECODHAS Housing Europe's Observatory, Housing Europe Review 2012, "The nuts and bolts of European social housing systems", Brussels 2011, p 64.
[75]'Dutch social housing in a nutshell', Aedes, Dutch associations of social housing organisation, July 2013.
[76] Dutch Housing Act 1901.
[77] Windy Vandevyvere and Andreas Zenthöfer, 'The housing market in the Netherlands', European Commission/Directorate General for Economic and Financial Affairs, Economic Papers 457, June 2012.
[78] Dutch Housing Act 1901.

had previously been at their option only; 2. it bestows some new powers on them; 3. some local authority measures are made subject to the approval of the Provincial Government (County Council); 4. financial aid for housing purposes may be granted by the State.[79]

1.2.1.1 Dutch Housing Act 2015

The introduction of the, considerably revised, Housing Act 2015 marks the social consensus on the domain of public housing. The law creates clarity on the housing market through clear rules for social rent. The core task of social housing corporations is to ensure that people with a low income can live well and affordably. The law guarantees the quality of social housing, limits the financial risks and arranges an appropriate allocation of social housing to the target group.[80]

The adoption of the new housing act was triggered by several events, however the most significant is the Commission Decision regarding housing corporations in the Netherlands. [81] In this case, the Commission took the view that the State support provided to social housing organisations were not compatible with EU State aid rules. Moreover, in 2014 the Dutch Parliamentary Inquiry Committee for Housing Associations carried out an inquiry into the structure and the functioning of the housing associations sector in the Netherlands and presented a very critical final report at the end of October 2014.[82]

Finally, misconduct arose in parts of the housing corporation sector. There were incidents due to administrative failure and financial mismanagement. A social debate arose about remuneration practices and some housing corporations took unacceptable financial risks in certain commercial projects.[83] The main features of the Dutch Housing Act are the following:

- First, the definition of core tasks of the housing corporation is provided. Thus, the law stipulates that the housing corporations will return to their core tasks of building, renting and managing social

[79] Ibid.
[80] De Woningwet 2015 in vogelvlucht https://www.rijksoverheid.nl/documenten/publicaties/2015/03/17/woningwet-2015-in-vogelvlucht.
[81] C (2009) 9963 final.
[82]Available at: https://www.houseofrepresentatives.nl/news/parliamentary-committee-inquiry-housing-associations-present-its-final-report.
[83] De Woningwet 2015 in vogelvlucht.

housing for disadvantaged citizens and socially less advantaged groups.[84]

- Second, it allows them to engage in commercial activities, however under conditions and within the restrictions made by the government and the European Commission.[85]
- Third, the Act makes a clear separation of the social activities (*activities covering SGEI*) and activities in the commercial sector (*non-SGEI activities*). Thus, housing organisations have to separate their social and commercial activities, either legally or administratively.[86] Commercial activities will be allowed only after a strict market test and the commercial entity shall operate under market conditions.[87]
- Fourth, as the housing corporations contribute to the municipal housing policy, such contribution shall be laid down in *performance agreements* between the municipality, the residents' organisation and the housing corporation.[88]
- In terms of governance, it sets rules for the qualities of directors and for the internal supervision of housing corporations. As a result, the stakeholder will have more influence on the business operations of the housing organisations,[89] *and*
- A new supervisory body called the Housing Associations Authority shall be established. The role of this supervisory body is to assesses the management and the financial situation of the housing corporations and its subsidiaries.[90]

[84] Dutch Housing Act 2015.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] De Woningwet 2015 in vogelvlucht §3.
[89] Ibid § 5.
[90] Ibid § 6.

2. Services of General Economic Interest and Housing Provision

In this chapter the paper provides the discussion on SGEI in connection to the housing provision. In particular, the subsequent sub-chapters cover the concept of SGEI, meaning of SGEI under Article 106 (2), the case law of the CJEU, including Altmark ruling which set out the criteria under which MS can finance their SGEI without incurring the application of EU State aid rules, and an analysis of the SGEI Package. Finally, it includes the concept of social housing with an emphasis of provision of housing as a SGEI.

2.1 The concept of SGEI

The expression 'services of general economic interest' is not defined in the TFEU.[91] SGEI is mentioned in Article 14 of the TFEU, which mandates both the Union and the MSs, each within their respective powers and competences, to take care that SGEI operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions.[92] It provides a new legal basis for the European Parliament and the Council to adopt, on the basis of a proposal by the Commission, regulations establishing the principles and conditions referred to.[93] However, its provisions should be without prejudice to the application of the treaty competition provisions on the SGEI, more specifically the Article 106 and 107 of the TFEU.[94] This is due to the fact that under competition rules on SGEI, the compensation granted to the undertakings entrusted with the operation of SGEI are subject to State aid scrutiny, unless they fulfil the four cumulative criteria established in the Altmark judgment.

Moreover, Lisbon Treaty recognizes the essential role of public services and this is reflected in Protocol 26 to the TFEU, according to which the shared values of the Union include, in particular, *a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights*, as well as *the wide discretion of national, regional and local*

[91] Wish and Bailey, 'Competition Law', Oxford University Press, 7th Edition, 2012.
[92] COM (2011) 146 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Reform of the EU State Aid rules on Services of General Economic Interest, Brussels, 23.3.2011 (hereinafter 'COM (2011) 146 final').
[93] Ibid.
[94] Article 14 of the TFEU.

authorities in providing, commissioning and organising [SGEIs].[95] Protocol 26 of the TFEU stresses the importance of SGI, but it also confirms that SGI is an overarching concept that should be divided into two categories: SGEI (which are economic in nature) and non-economic SGI.[96] The concept of SGEI may apply to different situations and terms, depending on the MS, and EU law does not create any obligation to designate formally a task or a service as being of general economic interest, except when such obligation is laid out in Union legislation (e.g. universal service in the postal and telecommunication sectors).[97] If the content of an SGEI – i.e. PSO – is clearly identified, it is not necessary for the service in question to be designated 'SGEI'. The same is true of the concept of social services of general interest (SSGIs) that are economic in nature.[98] The economic *vs* non-economic distinction is important in terms of the application of EU competition rules on such services. To sum up, EU competition rules do not apply to all services of general interest (SGI), but only to those that are "economic" in nature, i.e. to SGEI. Also, social services of general interest (SSGI), which can be both economic and non-economic in nature, are only subject to EU competition law where they are indeed economic.[99]

A clarification of SGEI was further provided in the Quality Framework of the Commission.[100] It stipulates that 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.[101] Moreover, the PSO 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.[102] With the adoption of the Quality Framework, the 2011 SGEI Package and the Directive on Concessions,[103] Wehlander argues that the Commission has launched a new phase in the Europeanisation of public services, but it is

[95] COM (2011) 146 final.
[96] Financing Services of General Economic Interest: 'Reform and Modernization', edited by Erika Szyszczak, and de Gronden, Johan Willem van, T.M.C. Asser Press, 2014.
[97] SWD (2013) 53 final.
[98] Ibid.
[99] COM (2011) 146 final.
[100] COM (2011) 900 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Quality Framework for SGI in Europe', Brussels 20.12.2011 (hereinafter 'COM (2011) 900 final').
[101] Ibid.
[102] Ibid.
[103] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

unclear how the path taken is related to the constitutional framework on SGEIs, in particular regarding social services.[104]

Both Protocol 26 of the TFEU and the Quality Framework mention the 'universality' of SGEI. Accordingly, in his opinion in the case *Federutility v Autorita per l'energia elettrica e il gas*, AG Colomer stated that the provision of SGEI should be uninterrupted (continuity); for the benefit of all consumers throughout the relevant territory (universality); at uniform tariff rates and of similar quality, irrespective of specific situations or of the degree of economic profitability of each separate transaction (equality).[105] However the General Court in recent judgments has stated that, it does not follow from Community law that, in order to be capable of being characterised as an SGEI, the service in question must constitute a universal service in the strict sense.[106] In addition, Protocol 26 of the TFEU clearly states that national, regional and local authorities enjoy a wide discretion in providing, commissioning and organising SGEIs. This is supported by the case law of the General Court as well. In *Fred Olsen*, the Court stated that it must be noted that, as the Commission states in point 22 of its Communication on SGI in Europe, MS have wide discretion to define what they regard as SGEI.[107] It further stipulates that, the definition of such services by a MS can be questioned by the Commission only in the event of manifest error.[108]

2.1.1 SGEI under Article 106 (2) of the TFEU

Article 106(2) forms an integral part of the EU policy on SGEIs.[109] It seeks to reconcile the MS' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market.[110] Szyszczak argues that, even though the Commission and the General Court preferred to see the payment for public services as a State aid issue, Article 106 (2) TFEU contains a 'Community' (now EU) concept of 'services of general economic

[104] C. Wehlander, "Who is afraid of SGEI? SGEI in EU law with a Case Study on Social Services in Swedish System of Choice", Doctoral Dissertation, Umeå University, 2015.
[105] AG Opinion on Case C- 265/08 *Federutility v Autorita per l'energia elettrica e il gas* [2010] ECR I- 000, paras 54–55.
[106] Case T- 289/03 *BUPA v Commission* [2008] ECR II- 81, [2009] 2 CMLR 1043, para 186.
[107] Case T- 17/02 *Fred Olsen SA v Commission* [2005] ECR II- 2031, para 216.
[108] Ibid.
[109] Kelyn Bacon, "*European Union Law of State Aid*" 3rd Edition, Oxford Competition Law, 19 January 2017.
[110] Burke, Jarleth M, "A Critical Account of Article 106(2) TFEU: Government Failure in Public Service Provision". Oxford: Hart Publishing, Hart Studies in Competition Law. Bloomsbury Collections. Web. 19 Apr. 2018.

interest' and is seen as an exception, a justification, derogation, escape clause or a switch rule to the free market and competition rules of the EU.[111] Thus, the application of Article 106(2) does not prevent a measure from being classified as State aid within the meaning of Article 107 (1); rather, it goes to the question of whether a measure constituting State aid can be regarded as compatible with the internal market.[112] Nor could it, once such a classification has been made, allow the MS concerned not to notify the measure pursuant to Article 108 (3) of the Treaty.[113]

Article 106 (2) provides that:

> *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue- producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, 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. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*

Article 106 (2) refers to certain 'undertakings'.[114] This means that to be able to rely on the exception, the entities in question must carry out 'economic activities'. In principle, two different types of undertakings fall within the scope of Article 106 (2): first, those undertakings entrusted with the management of SGEI and, secondly, those undertakings which are revenue-producing monopolies.[115] For the purposes of this research, only the first category of the undertakings is relevant. Accordingly, 106 (2) refers to those undertakings (either public or private[116]) that have been entrusted the operation of SGEI by an *act of a public authority*.[117]
As Article 106 (2) is a provision which permits, in certain circumstances, derogation from the rules of the Treaty, there must be a strict definition of those undertakings which can take advantage of it.[118]

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[111] Financing Services of General Economic Interest: 'Reform and Modernization', edited by Erika Szyszczak, and de Gronden, Johan Willem van, T.M.C. Asser Press, 2014.
[112] Case T-125/12 Viasat Broadcasting v Commission EU: T: 2015:687, paras 76–100.
[113] Case C-172/03 *Heiser* [2005] ECR I-1627, para 51.
[114] The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.
[115] Faull & Nikpay: The EU Law of Competition, 3rd Edition, Oxford Competition Law, 1 March 2014.
[116] Case 127/73 BRT II [1974] ECR 318, para 20.
[117] Case 172/80 *Züchner* [H] ECR 2030, para 7.
[118] Case 127/73 *BRT and SABAM* [1974] ECR 313, para 19; Case C-242/95 *GT-Link* [1997] ECR I-4449, para 50; Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para 37.

2.1.1.1 Entrustment

In order for the derogation under Article 106 (2) to apply, the undertaking in question must have been entrusted by the public authorities with the operation of a SGEI.[119] Thus, it is not enough in itself that the undertaking performs that service; it must have been entrusted with that performance, which will mean that it is under certain obligations.[120] The General Court stated in *Fred Olsen SA v Commission,* that the entrustment of the task at undertakings own request does not call into question the application of Article 106 (2) as long as the entrustment derives from an act of public authority.[121] The public entity that grants the task in question to an undertaking must do so in the exercise of its functions as a public authority and may be carried out by an act of the State in the exercise of its prerogative power; either via a legal provision and/or via another public law instrument (regulation, public law contract, grant, etc).[122]

2.1.1.2 Necessity

The use of the word 'obstruct' serves as the touchstone for determining the degree of incompatibility that must arise between the application of those rules and provision of a particular SGEI. As such, this is interpreted as the necessity test under Article 106 (2).[123] Therefore, the treaty rules may be set aside in so far as it is necessary for the undertaking to perform the tasks of assigned to them.[124]

2.1.1.3 Proportionality

The proportionality test is found in the wording '*in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned…'* of Article 106 (2) of the TFEU.[125] The test is considered to be fulfilled when the following three elements are proved: (a) that a causal link exists between the measure and the objective of general

[119] Cases T-204 and 270/97 *EPAC* [2000] ECR II-2267, para 125.
[120] Wish and Bailey, 'Competition Law', Oxford University Press, 7th Edition, 2012.
[121] Case T-17/02 Fred Olsen SA v Commission, para 188.
[122] Faull & Nikpay: The EU Law of Competition, 3rd Edition, Oxford Competition Law, 1 March 2014.
[123] Burke, Jarleth M, "A Critical Account of Article 106(2) TFEU: Government Failure in Public Service Provision". Oxford: Hart Publishing, Hart Studies in Competition Law. Bloomsbury Collections. Web. 19 Apr. 2018.
[124] Case C-159/94 *Commission v France*, ECR I-5815, para 95.
[125] Case C-67/96 *Albany* [1999] ECR I-5751.

interest; (b) that the restrictions introduced by the measure are balanced by the benefits to the general interest; and (c) that the objective of general interest cannot be achieved through other less restrictive means.[126]

Accordingly, even if an activity is accepted as an SGEI it still has to be shown that compliance with the Treaty rules would 'obstruct the performance' of the particular tasks assigned to the undertaking.[127] In the case *Corbeau*, the Court of Justice stated that it is contrary to Article 106 (2) for the legislation of a MS which confers on a body the exclusive right to collect, carry and distribute mail, to prohibit under threat of criminal penalties, an economic operator established in that State from offering certain specific services on that market.[128] Even if those services are separate from services of general economic interest, MS cannot make such a prohibition, in so far as those services do not compromise the economic equilibrium of the SGEI performed by the holder of the exclusive right.[129] Thus, the Court accepted that the operation of a basic postal system providing a universal service is an SGEI and that the normal principles of competition law will not apply to the extent necessary to preserve it through cross-subsidy.[130] As a result, the undertaking must have 'economically acceptable conditions' and be able to perform its task in 'conditions of economic equilibrium'.[131]

Similarly, in *Viasat Broadcasting UK Ltd v European Commission*, the General Court reaffirmed that the exemption from the competition rules should not affect the development of trade to an extent that would be contrary to the interests of the European Union.[132] With the final sentence of Article 106 (2) of the TFEU, respectively 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.[133]

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[126] Faull & Nikpay: The EU Law of Competition, 3rd Edition, Oxford Competition Law, 1 March 2014.

[127] Alison Jones & Brenda Sufrin, 'EU Competition Law: Text, Cases, and Materials', Oxford Competition Law, 6th Edition, 11 August 2016.

[128] Case C-320/91, Corbeau [1993] ECR I-2533, para 21.

[129] Ibid.

[130] Alison Jones & Brenda Sufrin, 'EU Competition Law: Text, Cases, and Materials', Oxford Competition Law, 6th Edition, 11 August 2016.

[131] Case C-320/91, Corbeau [1993] ECR I-2533.

[132] Case C-660/15 P *Viasat broadcasting UK v Commission* EU:C: 2017:178.

[133] Koen Lenaerts, "Defining the concept of 'services of general interest' in the light of 'checks and balances' set out in the EU Treaties", Vice-president of the Court of Justice of the European Union, 12 November 2012.

2.2 *Altmark* ruling

In its judgment in *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH,*[134] the ECJ held that PSC did not constitute State Aid within the meaning of Article 107 of the TFEU provided that four cumulative criteria were met. Where the four criteria are met, PSC does not constitute State Aid, and Articles 107 and 108 of the TFEU do not apply. If the MS do not comply with the criteria, and if the general conditions of Article 107(1) of the TFEU are met, PSC constitutes State Aid. The Altmark ruling was an important turning point for the modernisation of State aid, addressing the financing of SGEI, but also addressing the quality and delivery of public services in a competitive environment.[135]

2.2.1 The four cumulative criteria

PSC is not a State aid if four cumulative criteria are met:

1. The recipient undertaking is actually required to discharge PSO and those obligations have been clearly defined;[136]
2. The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;[137]
3. The compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the PSO, taking into account the relevant receipts and a reasonable profit for discharging those obligations;[138]
4. Where the undertaking which is to discharge PSO is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations,

[134] Case C-280/00 *Altmark* [2003] ECR I-7747.
[135] Financing Services of General Economic Interest: 'Reform and Modernization', edited by Erika Szyszczak, and de Gronden, Johan Willem van, T.M.C. Asser Press, 2014.
[136] Case C-280/00 *Altmark* [2003] ECR I-7747, para 89.
[137] Ibid 90.
[138] Ibid 92.

taking into account the relevant receipts and a reasonable profit for discharging those obligations.[139]

If the four cumulative criteria are not met, the compensation for public service is considered State aid, and it raises the question whether it could be an aid compatible with Article 106 (2) of the TFEU. However, the conditions laid down in *Altmark* – particularly the fourth one – are rather difficult to fulfil. As a result, the vast majority of cases of the public support to the provision of SGEI were assessed on compatibility grounds.[140] For example, in the case GEMO,[141] the General Court did not assess the application of the *Altmark* criteria. It rather assessed whether the measure was a State aid. On the contrary, in his opinion[142] on the case, AG Jacobs has listed detailed arguments against a generalised application of State aid approach in all cases, underlining the advantages of compensation approach where the measures could be assessed under the *Altmark* criteria. In contrast, in the case *Traghetti,*[143] the CJEU applied the *Altmark* criteria but it found that none of the criteria were fulfilled where the payments were made on account without establishing prior and stringent criteria for a PSO.[144]

Even though the *Altmark* judgment identifies four distinct conditions, those are not totally independent of each other. As regards the last three, there is an internal consistency and, in that sense, a certain degree of interdependence.[145] In cases under Commission investigation, the burden of proof lies on the MS who needs to prove that all four criteria have been met. In a notified aid to the Commission, Irish authorities notified the scheme related to 'Public Service Obligation in respect of new electricity generation capacity for security of supply'.[146] The Irish authorities proved that all four criteria were met, consequently the notified aid did not constitute State aid within the meaning of Article 107 of the TFEU. On the contrary, in a national court, depending upon the national procedural rules, it may be for a competitor alleging an unlawful grant of aid to show that at least one of the Altmark conditions is not met.[147] Accordingly, in the case *Laboratoires Boiron*, the CJEU accepted the observation of the French court that under provisions of national law on

[139] Ibid 93.
[140]Financing Services of General Economic Interest: 'Reform and Modernization', edited by Erika Szyszczak, and de Gronden, Johan Willem van, T.M.C. Asser Press, 2014.
[141] Case C-126/01 GEMO [2003] ECR I-13769.
[142] Opinion of Advocate General Jacobs in the Case C-126/01, delivered on 30 April 2002.
[143] Case C-140/09, Fallimento Traghetti del Mediterraneo SpA v. Presidenca del Consiglio dei Ministri judgment of 10 June 2010.
[144] Erika Szyszczak, 'Research Handbook on European State Aid Law', Edward Elgar Publishing, 2011.
[145] Case T-125/12 Viasat Broadcasting v Commission EU: T: 2015:687, para 80.
[146] C (2003) 4488 final, State aid N 475/2003 – Ireland, Public Service Obligation in respect of electricity generation capacity for security of supply, Brussels 16.12.2003.
[147] Kelyn Bacon, "*European Union Law of State Aid*" 3rd Edition, Oxford Competition Law, 19 January 2017.

the burden of proof, an economic operator which alleges in support of its claim for repayment that the measure at issue amounts to State aid can be required to show that the so-called 'Altmark' conditions are not met. It adds that the failure to produce the evidence necessary for that operator's claim to succeed may be the only impediment to proving that that measure amounts to State aid.[148]

The fulfilment of the four cumulative criteria, from a procedural point of view means escaping the application of Article 108 of the TFEU, which requires the compensation to be notified to the Commission. However, it must be noted that the Commission still has the freedom to take up cases on its own initiative and if it considers that the conditions laid down in the Altmark are not met, it may proceed with the recovery of the compensation for a certain SGEI. Nevertheless, while some of the *Altmark* conditions are similar to the conditions for compatibility under Article 106(2), the Court has confirmed that Article 106(2) remains a distinct provision, applying in circumstances where PSC does not meet all the (rather strict) *Altmark* conditions and must therefore be recognised as including an amount of State aid.[149] With regards to the strict application of the criteria under Altmark, in the case *BUPA*, the General Court pointed out that, in the light of the particular nature of the public service mission in certain sectors, it was appropriate to show flexibility with regard to the application of the judgment in *Altmark*, by referring to the spirit and the purpose of the conditions stated therein, in a manner adapted to the particular facts of the case.[150] Finally, in *Danmark v Commission*, the General Court held that the criteria laid down in *Altmark*, concerning transport, which is unquestionably an economic and competitive activity, could not be applied as strictly to the hospital sector, which did not necessarily have such a competitive and commercial dimension.[151] The *Altmark* criteria is further clarified in the SGEI Package.

2.3 SGEI Package

Following the ruling in *Altmark*, the Commission adopted the first SGEI Package[152] in 2005. The package was subject to reform,[153] following the

[148] Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529, para 25.
[149] Kelyn Bacon, "*European Union Law of State Aid*" 3rd Edition, Oxford Competition Law, 19 January 2017.
[150] Case T- 289/03 *BUPA v Commission* [2008] ECR II- 81, [2009] 2 CMLR 1043.
[151] Case T-674/11 *TV2/Danmark v Commission* EU: T: 2015:684.
[152] Post-Altmark package consisted of the following legal instruments: Commission Decision 2005/842/EC; Community Framework OJ 2005 C 297/4; Commission Directive 2005/81/EC.
[153] COM (2011) 146 final.

public consultations on the application of the current package, conducted by the Commission in 2010. The rationale behind the reform of the package was to further clarify the key concepts relevant for the application of the State aid rules to SGEI, including the scope of those rules and the conditions for the approval of SGEI aid by the Commission.[154] In addition, the Commission aimed to offer a more diversified and proportionate response to the different types of SGEI, in particular to make the degree of State aid scrutiny dependent on the nature and scope of the services provided.[155] As a result, the Commission adopted the new package in 2011, consisting of four legal instruments which will be discussed in the next sub-chapters.

2.3.1 Communication

The Communication[156] provides: (i) an extensive overview of key concepts of the application of State aid rules to SGEI compensation, and (ii) a detailed explanation of the Commission's approach to how the *Altmark* criteria should be fulfilled in order for a measure not to be classified as State aid.[157] It focuses on those State aid requirements that are most relevant for PSC. The clarification on when the selection of the provider by a public procurement procedure allows for the provision of the service "at the least cost to the community" is one of the major innovations of the Communication.[158] Clarification is also provided for when the provider is not selected by a public procurement procedure and a comparison with a typical well-run undertaking is necessary.[159]

2.3.2 Decision

The legal basis for the SGEI Decision[160] is Article 106 (3) of the TFEU. The decision provides a 'safe harbour' for certain kinds of aids for SGEI.[161] It sets out the conditions under which the State aid in the form of PSC granted to undertakings entrusted with the operation of SGEI, is compatible with the internal market pursuant to Article 106 (2) of the TFEU, therefore exempt

[154] Ibid.
[155] Ibid.
[156] SGEI Communication.
[157] Financing Services of General Economic Interest: 'Reform and Modernization', edited by Erika Szyszczak, and de Gronden, Johan Willem van, T.M.C. Asser Press, 2014.
[158] Nicola Pesaresi, "New State Aid Rules for Services of General Economic Interest".
[159] Ibid.
[160] SGEI Decision.
[161] Wish and Bailey, 'Competition Law', Oxford University Press, 7th Edition, 2012.

from the notification requirement under Article 108 (3) of the TFEU.[162] Such exemption means exemption from the prior notification obligation provided for in Article 108(3) of the Treaty provided that it also complies with the requirements flowing from the Treaty or from sectoral Union legislation.[163] The Decision further stipulates that the exemption does not rule out the possibility for MS to notify a specific aid project.[164] In the event of such a notification, or if the Commission assesses the compatibility of a specific aid measure following a complaint or *ex officio*, the Commission will assess whether the conditions of this Decision are met. If that is not the case, the measure will be assessed in accordance with the principles contained in the Framework.[165]

The Decision applies to five categories of aid, namely aid for: (i) transport and transport infrastructure, (ii) hospitals providing medical care, (iii) social needs (including reintegration into labour market, social housing and social inclusion of vulnerable groups), (iv) air or maritime links to islands, and (v) airports and ports.[166] The threshold of the compensation is set to EUR 15 million per year, and the Decision only applies where the period for which the undertaking is entrusted with the operation of the service of general economic interest does not exceed 10 years.[167] The Decision states that 'social services', including the provision of 'social housing for disadvantaged citizens or socially less advantaged groups', may require an amount of aid beyond the threshold provided in the Decision.[168] This is due to the fact that they have special characteristics to be taken into account and that larger amounts for compensation for social services do not necessarily produce a greater risk of distortions of competition.[169] Moreover, the duration of 10 years provided in the Decision can be extended in cases of 'social housing', if it is justified due to the need for significant investment.[170]

The main provisions of the Decision are the following:

- *Entrustment*, meaning that the operation of SGEI must be entrusted to the undertaking, by one or more acts, the form of which is to be determined by the MS itself.[171] It further stipulates that the act of entrustment should include the content and duration of the PSO, the territory of the concerned undertaking, the nature of any exclusive of

[162] SGEI Decision, Article 1.
[163] Ibid Article 3.
[164] Ibid Preamble 26.
[165] Ibid.
[166] Ibid Article 2.
[167] Ibid Article 2.2.
[168] Ibid Preamble 11.
[169] Ibid.
[170] Ibid Preamble 12.
[171] Ibid Article 4.

special right assigned to the undertaking, a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation; and the arrangements for avoiding and recovering any overcompensation.

- *Compensation,* stating that the amount of compensation shall not exceed what is necessary to cover the net cost incurred in discharging the PSO, including a reasonable profit. The reasonable profit should be taken to mean the rate of return on capital required by a typical company considering whether or not to provide the service, taking into account the risk level.[172]
- *Control of overcompensation,* which obliges the MS to make sure that the compensation granted to the undertakings does not exceed the amounts allowed by the Decision.[173]

2.3.3 Framework

The third instrument of the SGEI Package is the Framework[174] which applies to PSC only if it constitutes State aid which is not covered by the SGEI Decision, therefore subject to notification requirement under Article 108 (3) of the TFEU.[175] For the first time, the Commission has introduced the notion of 'genuine SGEI' in the Framework. Thus, Article 2.2 states that the aid must be granted for a genuine and correctly defined service of general economic interest as referred to in Article 106 (2) of the TFEU. Apart from the requirements of an entrustment act by a MS[176] and overcompensation which are similar to the SGEI Decision, the Framework provides for additional criteria. Such additional criteria include compliance with Union public procurement rules,[177] including any compliance of transparency, equal treatment and non-discrimination.

2.3.4 De Minimis Regulation

The final instrument of the SGEI Package is the de minimis Regulation,[178] which provides that aid granted to undertakings providing a SGEI should be

[172] Ibid Article 5.
[173] Ibid, Article 6.
[174] SGEI Framework.
[175] Ibid Article 7.
[176] The SGEI Framework provides that the term 'Member State' covers the central, regional and local authorities.
[177] SGEI Framework, Article 2.6.
[178] SGEI de Minimis Regulation.

deemed not to affect trade between MS and/or not to distort or threaten to distort competition provided that the total amount of aid granted for the provision of SGEI received by the beneficiary undertaking does not exceed EUR 500 000 over any period of three fiscal years.[179] As a result, the aid shall be exempt from notification requirement under 108 (3) of the TFEU, if the conditions laid down in paragraphs 2 to 8[180] of Article 2 are fulfilled.

2.3.5 Assessment of a measure under the SGEI Package

The interaction between the instruments of the SGEI Package is fairly complicated, if not unclear. However, the Commission has provided some guidance with regards to the steps to be followed in order to determine which instrument of the SGEI Package may apply to public service compensation.[181] Accordingly, **the first step** includes assessing whether the measure falls under the **SGEI de Minimis Regulation**. Thus, if the aid granted to the undertaking does not exceed **EUR 500 000** over any period of **three fiscal years**, the measure does not constitute State aid.[182] However, if the aid is not covered by the SGEI de Minimis Regulation, **the second step** calls for an assessment of the aid under the ***Altmark* criteria as specified in SGEI Communication**. In order to fulfil the Altmark criteria, the SGEI Communication initially provides that the MS has to **clarify the existence of a SGEI** as they are services that exhibit special characteristics as compared with those of other economic activities. It notes that MG have a wide margin of discretion in defining their SGEI and the Commission only checks for manifest error, however the MS have to **clearly define the SGEI** and it must be addressed to citizens or be in the interest of society as a whole.[183] It further stipulates that a PSO cannot be imposed for an activity which already is or can be provided satisfactorily by the market "under conditions". Moreover, the PSO has to be assigned by way of an **act of entrustment** which defines the obligations of the undertaking entrusted with the operation of a SGEI, and of the public authority. Additionally, *Altmark* criteria requires the establishment of the **parameters of compensation** in advance in an objective and transparent manner. In order to **avoid overcompensation**, the amount of the PSC must be limited to what is necessary to cover the costs incurred in discharging the PSO, taking into account receipts and a reasonable profit.

[179] Ibid Article 2.
[180] These paragraphs contain e.g. the ceiling should be expressed as a cash grant; transparent aid; the threshold cannot be exceeded, etc.
[181] SWD (2013) 53 final.
[182] SGEI de Minimis Regulation, Article 2.2.
[183] SGEI Communication, Preamble 50.

Finally, the compensation offered must either be the result of a **public procurement procedure** which allows for selection of the tenderer capable of providing those services at the least cost to the community, or the **result of a benchmarking exercise** with a typical undertaking, well run and adequately provided with the necessary means.[184] As a result, if the measure fulfils the **Altmark** criteria, the aid does not constitute State aid under Article 107 of the TFEU. However, if the measure does not fulfil the *Altmark* criteria, then **the third step** requires assessment under the **SGEI Decision**. If the aid granted to the undertaking entrusted with the operation of a SGEI does not exceed an annual amount of **EUR 15 million**, it is exempted from the notification requirement provided that other conditions of the Decision are met. If the aid in question is granted to undertakings providing **social services** e.g. social housing, the exemption from notification applies regardless the amount of the compensation, provided that the conditions of the Decision are met. Main conditions of the SGEI Decision include: **entrustmen**t of the undertaking with the SGEI task; limitation of the **compensation** to what is necessary to cover the net cost uncured in discharging the PSO, including a reasonable profit; and control of **overcompensation**. If the condition under the SGEI Decision are met, the measure constitutes compatible aid with the internal market and exempt from the requirement of prior notification laid down in Article 108 (3) of the TFEU.[185] However, if not, the measure must be assessed under the **SGEI Framework** as **the fourth and final step**. Under the Framework, (a) the aid must be granted for a genuine and correctly defined SGEI; (b) undertakings must be entrusted with the operation of a PSO by an act of **entrustment**; (c) obligation to comply with the **public procurement** rules, including requirements of transparency, equal treatment and non- discrimination; (d) amount of **compensation** not exceeding what is necessary to cover the net cost of discharging the PSO; and (e) control of **overcompensation**. If the aid fulfils the criteria set in the Framework, it can be found compatible with the internal market pursuant to Article 106 (2) of the TFEU, however it is still subject to the prior notification requirement under Article 108 (3) of the TFEU.[186] If the aid does not fulfil the criteria set in the Framework, the aid constitutes incompatible aid.

[184] SGEI Communication, 62.
[185] SGEI Decision, Article 1.
[186] SGEI Framework, 7.

2.4 Social housing in the EU

The scope and definitions of social policies vary considerably between EU MS, as they respond to welfare regimes that have historically developed according to different models.[187] In order to respect these differences, the EU legislation provides a wide margin of discretion for individual MS in defining what they consider a SGEI, with the Commission's role to verify the absence of manifest errors in the definition.[188]

Accordingly, there is no clear definition of 'social housing' in the SGEI Package. However, as mentioned in section 2.3.2, the SGEI Decision provides an exemption from notification to the undertakings in charge of social services, especially services for 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.[189] It further provides that undertakings in charge of provision of social housing for disadvantaged citizens or socially less advantaged groups should also benefit from the exemption from notification. It is evident that this is a narrow definition of social housing as it restricts it only to housing for disadvantaged citizens or socially less advantaged groups. The SGEI Decision further stipulates that such category who due to solvency constraints are unable to obtain housing at market conditions, should also benefit from the exemption from notification, even if the amount of compensation they receive exceeds the general compensation threshold laid down in the Decision.[190]

In an EU Parliament Resolution on social housing in the EU,[191] the EP on the one hand, underlines the essential role of MS and their discretion in providing, commissioning and organising the provision of social housing, and on the other, asks the Commission - on the basis of an exchange of best practices and experience between the MS, and taking into account the fact that social housing is conceived and managed in different ways - to clarify the definition of social housing.[192] The EP also notes that a definition of social housing and of the beneficiaries should be the result of a democratic discussion process in order that the different traditions of the MS may be taken into account.[193]

[187] 'Social Housing in the EU', Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, 2013.
[188] Ibid.
[189] SGEI Decision, Article 2.
[190] SGEI Decision, Preamble 11.
[191] European Parliament resolution of 11 June 2013 on social housing in the European Union (2016/C 065/04).
[192] Ibid 6.
[193] Ibid 14.

Lastly, in the Second Biennial Report on SSGI,[194] the Commission defines social housing as:

> *the provision of housing at below market price to a target group of disadvantaged people or socially less advantaged groups as well as to certain categories of key workers. The target group as well as the exact modalities of application of the system are defined by the public authorities. Social housing providers can also provide other related services to the target group.*

2.5 Provision of housing as a SGEI

As stated in the Quality Framework, 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 PSO is imposed on the undertaking by an act of 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.[195] Accordingly, the SGEI Package clearly categorizes social housing as an SGEI. However, there is criticism[196] at the Commission for its overly restrictive and narrow interpretation with regards to the social housing for disadvantaged citizens or socially less advantaged groups. Accordingly, there are several cases where the provision of housing, a few being subject to controversy, was assessed under the definition of SGEI.

2.5.1 The Swedish cases in 2002 and 2005

In 2002 and 2005, the Swedish Property Federation filed two complaints to the Commission regarding the financial support granted to the Municipal Housing Companies in Sweden.[197] The support included an initial EUR 300 million in subsidies to municipal housing companies, in addition to purchasing non-viable housing from municipal housing companies for conversion to other uses and providing them with equity capital and loan

[194] SEC (2010) 1284 final, Second Biennial Report on social services of general interest, Commission Staff Working Document, Brussels 22.10.2010.
[195] COM (2011) 900 final.
[196] 'Better EU rules for better services of general interest in housing'. A letter sent to Margrethe Vestager, Commissioner for Competition, Housing Europe, Brussels 2016.
[197] CP115/02 'Financial Support Granted to Swedish Municipal Housing Companies'. First complaint was filed on 1 July 2002 and the second on 30 May 2005.

guarantees. [198] The EPF argued that the 'utility value' principle in Sweden which enabled the municipal housing companies to set the benchmark for all rents in the market, was a distortion to competition and disadvantaged the private competitors.[199] Accordingly, the Commission challenged the Swedish universalistic model of social housing, given that it does not only provide housing for disadvantaged groups, but rather for all citizens, and consequently does not comply with the restrictive definition of social housing as a SGEI.[200] These cases led the Swedish government to liberalise the social housing sector in 2007, removing this service from the list of SGEI and abolishing the PSC for the Municipal Housing Companies.[201] In the Governmental Bill on Municipal Housing Companies,[202] it is emphasized that neither housing supply in general nor Local and Regional Authorities' responsibility for housing supply to any part ought to be characterized as SGEI.[203]

2.5.2 The Irish cases in 2004 and 2005

The first case involved State guarantees provided to the Housing Finance Agency (HFA) in Ireland, in order to raise funds on the capital market at preferential terms, which are then advanced to (a) municipalities as well as (b) voluntary housing bodies, to be used by both of them for the provision of social housing.[204] The notified measure was initially assessed under the *Altmark* criteria, however the Commission concluded that the fourth criterion was not fulfilled.[205] Ireland claimed that the local authorities as well as the voluntary housing bodies provide a service of general economic interest, namely the provision of social housing for allocation to disadvantaged households. Accordingly, the Commission continued to the assessment of the measure under Article 106 (2) of the TFEU.[206] The Commission concluded

[198] Ibid.
[199] 'Social Housing in the EU', Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, 2013.
[200] Ibid.
[201] Ibid.
[202] Proposition 2009/10:185, 'Allmännyttiga kommunala bostadsaktiebolag och reformerade hyressättningsregler', (hereinafter 'Governmental Bill on Municipal Housing Companies 2009/10:185').
[203] C. Wehlander, "Who is afraid of SGEI? SGEI in EU law with a Case Study on Social Services in Swedish System of Choice", Doctoral Dissertation, Umeå University, 2015.
[204] C (2004) 2205 final, Subject: 'State Aid N 89/2004 – Ireland', Guarantee in favour of the Housing Finance Agency (HFA), 'Social housing schemes funded by the HFA', Brussels 30.06.2004.
[205] C (2004) 2205 fin, 4.2.5.
[206] The Commission stated that an aid measure can be authorised under Article 106 (2) of the TFEU if the following condition for applying this provision are fulfilled. First (a), the recipient undertaking must actually have a public service obligation to discharge, and the obligation must be clearly defined. Secondly (b), the undertaking must have been entrusted

that, the municipalities as well as the voluntary housing bodies were entrusted with a *clearly defined SGEI*, therefore the measure was compatible with Article 106 (2) of the TFEU.

Similarly, in the second case, the measures notified by the Irish authorities included two types of aid to the HFA: 1) the guarantee by the Minister of Finance of the HFA's fundraising for the purpose of making loans to local authorities to fund infrastructure elements ancillary to social housing; and 2) the provision of cheap guaranteed funding by the HFA to local authorities for the purposes of their infrastructure activities ancillary to social housing.[207] Accordingly, the fourth *Altmark* criterion not being fulfilled, the Commission assessed the measures under 106 (2) of the TFEU. The conclusion was that the content of the service and the task of the housing-funding-system and the local authorities are accurately defined in the law, therefore clearly defined SGEI.[208] The measures were found to be compatible with Article 106 (2) of the TFEU. Both cases will be assessed in more detail in Chapter 3.

2.5.3 The French case in 2012

The case involves the French National Union of Property Owners (UNPI) who filed a complaint to the European Commission concerning subsidies granted by the French State to organisations that provide social housing.[209] UNPI argues that the funding model of the French social housing is not compatible with the EU rules on State aid for SGEIs.[210] Accordingly, there is a misuse of the public service mission of operators providing public housing, which should only be available to low-income individuals.[211] Basically, a part of the social housing stock, owned by the local authorities, does not provide income thresholds for access and therefore is not specifically targeted to disadvantaged citizens. As a result, UNPI argues that such aid is not financing SGEI, therefore is incompatible with competition rules and internal market. The Commission has not yet issued a decision on the French housing case.

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with the public service task. Third (c), the compensation must not exceed what is necessary to cover the costs incurred in discharging the public service obligation. Fourth (d), the development of trade must not be affected contrary to the interests of the Community.

[207] C (2005) 4668 final, Subject: State Aid N 395/2005 – Ireland, 'Loan Guarantee for social infrastructure schemes funded by the Housing Finance Agency', Brussels, 07.XII.2005.

[208] C (2005) 4668 final, 3.2.

[209] 'Social Housing in the EU', Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, 2013.

[210] Ibid.

[211] S. Mosca, ´Social Housing´, Complaint lodged with Commission over French subsidies, 5 July 2012.

3. Commission Decision regarding housing corporations in the Netherlands

In this chapter the paper discusses the Commission decision regarding housing corporations in the Netherlands with a comparison to the Commission Decisions on social housing schemes in Ireland.[212] The Decision concerns two closely related cases concerning State aid to housing corporations – wocos – in the Netherlands. After several years of consultations between the Commission and the Dutch authorities, by the letter of 4 December 2009, the European Commission endorsed commitments made by Dutch authorities to bring the social housing system into line with EU State aid rules as a SGEI.[213]

3.1 Complaints received by the Commission

The main complaint received by the Commission was filed by the Association of Institutional Investors in the Netherlands (IVBN), which addresses the distortions in the Dutch housing market in a comprehensive manner.[214] IVBN had mainly five arguments supporting its claim that the aid received by wocos was a distortion to the housing market to the detriment of private competitors, because wocos was competing in commercial markets with private companies. The arguments of IVBN are the following:

- *First*, the activities of wocos is expanding to the market of expensive dwellings which goes beyond the sector of social housing. Given the aid they receive from the State, this creates unfair competition to the private companies competing with wocos. Wocos is constructing owner-occupied houses and dwellings for high-income customers. According to IVBN, this exceeded the scope of activities of wocos;[215]
- *Second*, a clear definition of their activities is necessary to establish fair competition in the rental market. Any activity of wocos targeted to higher income groups or higher-rent dwellings should be operated on the same conditions as those of the private competitors. State aid

[212] C (2009) 9963 final.
[213] Erika Szyszczak, 'Research Handbook on European State Aid Law', Edward Elgar Publishing, 2011.
[214] CP 126/2007,'Vereniging van Institutionele Beleggers in Vastgoed', Nederland, 16 April 2007.
[215] C (2009) 9963 final.

should be restricted only to the provision of social housing to disadvantaged citizens and should be strictly separated from commercial activities;[216]

- *Third*, the target population of wocos should not include categories of population that cannot be considered disadvantaged citizens;[217]
- *Fourth*, IVBN claims that wocos artificially classify dwellings as social housing. They do so by setting the rents below the rent ceiling as defined by the Dutch law because otherwise their market conform rent would be higher; and
- *Fifth*, not only wocos but all other providers of the Dutch social housing should benefit from the State support on the same level as wocos.

3.1.1 Measures benefiting wocos

Following the complaints received by IVBN, before assessing the existence of State aid the Commission initially identified the types of measure the wocos were benefiting from the State. Accordingly, wocos were benefiting from four different types of measures. **Measure (a)** consisted of state guarantees for their borrowings from the Social Housing Guarantee Fund (WSW), which was estimated to be EUR 300 million on a yearly basis in the form of lower financing costs.[218] The second **measure (b)** included the support from the Central Housing Fund (CFV), which is not financed from general taxation, but it redistributes funds from financially healthier wocos to the weaker ones. CFV is divided in two types of aid.[219] First, the '*regular project aid*', which is a direct grant to wocos experiencing difficulties in financing a particular aid; and the '*rationalisation aid*', which can be a soft loan or a direct loan for wocos experiencing financial difficulties in general.[220] The following **measure (c)** included the sale of public land by the municipalities at price below the market value.[221] Finally, **measure (d)**, wocos could borrow from the Dutch Municipality Bank (BNG).[222]

[216] Ibid.
[217] Ibid.
[218] Ibid 3.I.9 (a).
[219] Ibid 3.I.9 (b).
[220] Ibid.
[221] Ibid. 3.I.9 (c).
[222] Ibid. 3.I.9 (d).

3.1.2 Does the measure constitute aid within the meaning of Article 107 TFEU?

In order for a measure to constitute aid within the meaning of Article 107 TFEU, the aid has to provide the undertakings with an economic advantage;[223] it has to be granted through State resources[224] and must be imputable to the State;[225] the aid must be selective in the nature,[226] and finally, it must distort or threaten to distort competition and affect intra-Community trade.[227] Article 107 applies to 'undertakings, thus the Commission assessed whether wocos were regarded as undertakings. The case law of the CJEU provides that an undertaking is any entity, regardless of its legal form, which engages in economic activity which can be either profit or non-profit that involves economic trade.[228] Moreover economic activity includes offering goods and services on the market.[229] The activities of wocos include renting out dwellings to individuals, renting out public purpose buildings, renting out commercial premises, construction and maintenance of local infrastructure, which can all be characterised as offering services and goods on the market.[230] Moreover, they compete on the housing market with other private landlords in terms of rental activities, sale of owner-occupied dwellings and development of local infrastructure. As a result, the Commission concluded that ***wocos were regarded as undertakings*** within the meaning of Article 107 of the TFEU.

With regards to the criterion of economic advantage, the ECJ has made it clear that the concept of aid covers not only positive benefits, such as subsidies, but also measures that mitigate the charges an undertaking would normally bear.[231] State includes both regional and central government.[232] In case *France v Commission*, ECJ confirmed that the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures.[233] Therefore, Article 107 covers both public and private bodies established by the State.[234] In terms

[223] Case C-280/00 *Altmark* [2003] ECR I-7747, paras 83-4.
[224] Case C-379/98 Preussen Elektra [2001] ECR I-2099.
[225] Case T-358/94 Air France v Commission [1996] ECR II-2109, para 55.
[226] Case C-172/03 Heiser [2005] ECR I-1627, para 40.
[227] Case C-372/97 Italy v Commission [2004] ECR I-3679, para 44.
[228] Case C-41/90 *Höfner* [1991] ECR I-1979.
[229] Case C-118/85 *Commission v Italy* [1987] ECR I-2599.
[230] C (2009) 9963 final, para 12.
[231] Craig & De Burca, EU Law, 6 ed, Oxford University Press, 2015, p 1133.
[232] Ibid.
[233] Case C-482/99 France v Commission [2002] ECR I-4397.
[234] Craig & De Burca, EU Law, 6 ed, Oxford University Press, 2015, p 1137.

of selectivity, the measure most not be general, which applies without distinction to all undertakings in all economic sectors. It must therefore favour certain undertakings or the production of certain goods.[235]

In the case *Italy v Commission*, the CJEU stated that in assessing and aid, the Commission is not required to establish that such aid has a real effect of trade between MS and that competition is actually being distorted.[236] Thus the examination must simply be whether the aid is '*liable*' to affect trade between MS and distort competition.[237] Moreover, in *Philip Morris Holland BV v Commission*, ECJ confirmed that if the aid strengthens the financial position of an undertaking as compared to others within the EU, the intra-Community might be affected.[238]

With regards to the first measure, the Commission concluded that the guarantees provided by WSW were certainly providing wocos with an economic advantage, given that they were reducing borrowing costs. Considering that the scheme was set up by the State, the guarantees were imputable to the State. Moreover, the guarantees were provided free of charge directly through the State resources and only provided to the wocos, but not private landlords, therefore selectivity criteria were fulfilled.[239] Selectivity is certainly enhancing wocos' competitive position in the housing market vis-à-vis their competitors, thus the measure distorts competition. Finally, Commission considered that given the high level of cross-border investment in real estate and the significant role of the wocos in the Netherlands, the measure is liable to affect intra-community trade. Accordingly, Commission concluded that ***measure (a) constitutes aid*** within the meaning of Article 107 (1) of the TFEU.

With regards to the second measure – the support from CFV, the Commission concluded that all conditions under Article 107 were clearly met. However, the condition of the measure granted through State resources required a more detailed assessment due to the fact that CFV's funds ('regular project aid' and 'rationalisation aid') were private and not public resources.[240] The Commission applied the criteria set by the CJEU in *Pearle* judgment,[241] fulfilment of which would determine whether obligatory contributions collected by an intermediary body from all the enterprises of a certain

[235] Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 v Commission [2006] ECR I-5479.
[236] Case C-372/97 *Italy v Commission* [2004] ECR I-3679, para 44.
[237] Ibid.
[238] Case 730/79 Philip Morris Holland BV v Commission [1990] ECR I-953.
[239] C (2009) 9963 final, 3.2 (15).
[240] Ibid (16).
[241] Case C-345/02 Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV v Hoofdbedrijfschap Ambachten [2004] ECR I-07139.

business sector would not be regarded as State resources.[242] The Commission concluded that the criteria were not met in the case of the support from CFV, as the fund was set up and run by the State and certainly served as an instrument of State policy.[243] Thus, ***measure (b) involved a transfer of State resources.***

With regards to measure (c), the sale of land which was public resource, by the municipalities (imputable to the State), at a price below the market value (an economic advantage) and only sold to wocos (selectivity) was clearly ***constituting State aid*** within the meaning of Article 107 of the TFEU.[244]

Finally, the ***measure (d)*** – borrowings from BNG, was also found to ***constitute aid*** where the Commission considered two points:

(a) *market-conformity of the loans* – BNG was offering loans with lower interest rates for the wocos than a normal bank would be able to offer under market conditions hence there exists an advantage to the wocos.[245]
(b) imputability cannot be excluded for the fact that BNG takes the decisions on the loans to wocos without any State interference.[246]

At the time of the notified measure by the Dutch authorities, the law in force for the financing of social housing was the Dutch Social Housing Law of 1901 which was modified several times. However, the system of financing social housing was already established before the entry into force of the Treaty[247] in the Netherlands, thus subsequent changes did not substantially amend the existing aid character of the system.[248] It follows from the case law that not all modifications to the provisions providing for the aid transform an existing aid into a new aid, therefore, adjustments not affecting the substance of the aid do not change the classification of the measure.[249] The Commission

[242] The four criteria in *Pearl* judgment were: 1) The measure in question is established by the professional body that represents the enterprises and the employees of a business sector and does not serve as an instrument for the implementation of policies established by the state; 2) The goals of the measure in question are fully financed by the contributions of the enterprises of the sector; 3) The way of financing and the percentage/amount of the contributions are established in the professional body of the business sector by representatives of employers and employees, without any state interference; 4) The contributions are obligatorily used for the financing of the measure, without the possibility for the state to intervene.
[243] C (2009) 9963 final, 3.2 (18).
[244] Ibid (20).
[245] Ibid (22).
[246] Ibid (23) and (24).
[247] There are a number of categories of existing aid, derived from the case law of the CJEU and Council Regulation 2015 /1589 laying down detailed rules for the application of Article 108 of the TFEU. The first category involves aid which existed prior entry into force of the TFEU in a MS and are still applicable after the entry into force of the TFEU in a MS.
[248] C (2009) 9963 final, 3.III (36).
[249] Ibid.

concluded that the Dutch system for financing of social housing constitutes an ***existing aid***.[250]

3.1.3 Comparison to Irish cases regarding existence of aid

In contrast, in the Irish cases,[251] the guarantees provided by the Irish State to Housing Finance Agency (hereinafter 'HFA') **did not constitute State aid within the meaning of Article 107** of the TFEU, whereas the social housing schemes funded by HFA to municipalities and voluntary housing bodies and the cheap guaranteed funding by HFA to local authorities, were found **compatible State aid pursuant to Article 106 (2)** of the TFEU.

In the first case, the Irish authorities notified to the Commission, a legislative measure, namely Section 17 of the Housing (Miscellaneous Provisions) Act 2002 which was expanding the activities and responsibilities of the HFA.[252] HFA is a special public credit institution benefiting from State guarantees that provides dedicated financing for social housing purposes.[253] According to the new legislative measure, HFA will be:

a) given increased borrowing powers (the limit was increased to EUR 6 billion);[254]
b) able to lend directly to approved voluntary housing bodies engaged in the provision of social housing (the eligible category for housing provided by these bodies are persons whose need for accommodation is included in the Housing Act; homeless persons and returning indigent emigrants);[255]
c) empowered to finance local authorities' capital expenditure relating to water services projects; and
d) empowered to finance local authorities' capital expenditure relating to waste management.[256]

Accordingly, the Commission assessed the *State guarantee in favour of HFA*. Given the fact that HFA was regulated by public law[257] its activities were limited to providing financing for social housing purposes only. The limits on

[250] Ibid.
[251] C (2004) 2205 final & C (2005) 4668 final.
[252] Ibid 3.
[253] Ibid 19.
[254] Ibid 3.6 (a).
[255] Ibid 3.8 to 11.
[256] Ibid 7 to 15.
[257] Ireland Housing Finance Agency Act 1981.

the lending powers of HFA mean that the advantage accruing to HFA as a credit institution by virtue of the State guarantees cannot be exploited by HFA to allow it to compete with commercial banks in lending money to third parties.[258] Therefore, the guarantees granted by the State remain within the sphere of financing of the State.[259] In light of this, Commission concluded that HFA ***did not constitute an undertaking***, ***thus not State aid*** within the meaning of Article 107 of the TFEU.

In the second case, the Irish authorities notified to the Commission a legislative measure, namely Section 17 of the Housing (Miscellaneous Provisions) Act 2002 in conjunction with Section 56 of the Housing Act 1966.[260] The legislative measure included: 1) the guarantee by the Minister of Finance of the HFA's fundraising for the purpose of making loans to local authorities to fund infrastructure elements ancillary to social housing.[261] The Commission invoked the same line of reasoning as in the first case and concluded that HFA was ***not an undertaking*** and the measure ***did not constitute State aid*** within the meaning of Article 107 of the TFEU.

3.2 Commitments undertaken by the Dutch authorities

The Dutch authorities made commitments to amend the functioning of wocos and the measures benefiting them, in order to comply with the EU law. The commitments were taken in three main categories:

- *Construction and renting out of dwellings to individuals* will target the group of socially disadvantaged households who are defined as individuals with an income not exceeding EUR 33,000. The maximum rent will amount to EUR 647.53. The allocation of dwellings will cover 90% of the targeted group, with a credible monitoring mechanism on the level of each individual woco and shall include financial sanctions for wocos not respecting the allocation ratio. The remaining 10% will be allocated on the basis of objective criteria and social prioritisation. In case any individual woco receives any excess compensation, it shall be subject to repayment.[262] The

[258] C (2004) 2205 final. 4.2.2 (28).
[259] Ibid.
[260] Pursuant to that provision, the activities of local authorities in Ireland may involve the provision not only of dwellings but also of other infrastructural elements, which are ancillary to the provision of dwellings, such as roads or playgrounds.
[261] C (2005) 4668 final, 3 (18) (1).
[262] C (2009) 9963 final, III.6 (41) (i).

procedure of the allocation of dwellings will be conducted in a transparent manner and on an objective, also in order to avoid abuses, a complaint/judicial review system will be put in place.[263]

- In *infrastructure*, only aid that is strictly ancillary to social housing will benefit from the support measure. Other regular infrastructure will not benefit from the aid and will be subject to regular tendering procedures. [264]
- *Construction and renting out of public purpose buildings* is an obligation of wocos. These buildings are owned and maintained by wocos and let out to non-governmental organisations and public bodies. Due to their true public service purpose, wocos is obliged to rent out these buildings at a rent lower than the market rent. Moreover, the aid is restricted to minimum salary.[265] The tendering process of the construction will be conducted by wocos. There shall be a monitoring mechanism and non-compliance with it will result in the reimbursement of the aid.[266] Finally Dutch authorities underlined that all activities other than those listed, will be excluded from the aid, including construction and sale of owner-occupied dwellings and construction and renting out of commercial real estate.[267]

3.2.1 Compatibility assessment of the 'new aid'

Commission Decision on wocos included a new *aid scheme for the revival of declining urban regions*, which was notified to the Commission by the Dutch authorities in November 2009. The scheme called 'special project aid' with a budget of EUR 750 million for a duration of 10 years, consisted of direct grants to wocos and included:

a) Projects of construction and renting out of dwellings with a maximum monthly rent of EUR 647,53 to individuals with a yearly income not exceeding EUR 33 000; and

b) Projects of construction and renting out of public purpose buildings.[268] The new measure was different from the previous measures. Firstly, because it targeted only selected and most needy urban communities which were selected on the basis of socio-economic indicators such as the level of income, unemployment, literacy and crime rate, etc. Secondly, it was financed through a different mechanism, namely from a new special levy on

[263] Ibid.
[264] Ibid (41) (ii).
[265] Ibid (41) (iii).
[266] Ibid.
[267] Ibid.
[268] C (2009) 9963 final, 81.

the wocos operating outside the problematic urban zones.[269] However, the Dutch authorities underlined that the new aid will be made available under the same conditions as the existing aid.[270] It should be noted that the assessment of the new aid by the Commission was conducted in the same manner as the existing aid.[271] In order to avoid repetition, only the outcome, namely the conclusion of the assessment should be mentioned. Thus, Commission concluded that: (a) ***measures constitute aid*** within the meaning of Article 107 of the TFEU; (b) ***measures are compatible aid*** under Article 106 (2) of the TFEU.

3.2.2 Can the measure be declared compatible aid under Article 106 (2) TFEU?

All four measures benefiting wocos constituted State aid within the meaning of Article 107 of the TFEU. Commission then examined the measures in light of Article 106 (2) of the TFEU, i.e. as potentially compatible aid for the financing of a SGEI.[272] It emphasized that Article 106 (2) provides for a derogation from the prohibition contained in Article 107 of the TFEU, provided that the aid was necessary for the performance of SGEI and proportionate in its effects on trade.[273] The measures in question involve financing for the PSC for social housing which falls within the scope of application of the SGEI Decision[274] and SGEI Framework[275]. It must be noted that both instruments were part of the former SGEI Package of 2005,[276] as they were still in force at the time the Commission decision on the case was taken. Having said that, the Commission examined the compatibility of the aid to wocos in light of following criteria:

1. Genuine public service mission – the Commission reiterated that MS have a wide margin of discretion in definition of services that would classify as

[269] Ibid 82.
[270] See Section 3.2.
[271] See Sections 3.1.2 and 3.2.1.
[272] Ibid 44.
[273] Ibid 46.
[274] Commission Decision of 28 November 2005 on the Application of Article 86 (2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest 2005/842/EC.
[275] Community Framework for State aid in the form of public service compensation, (2005/C 297/04).
[276] The former SGEI package consisted of three legal instruments: A Decision, Framework and Transparency Directive. The Package was adopted in 2005 following the Altmark ruling and it was called the Monti-Kroes Package. Following a reform process conducted by the Commission, Monti-Kroes Package was replaced by the new SGEI Package (so called 'Almunia Package').

SGEI and the role of the Commission is ensure that no manifest error has been made in such definition. The Dutch authorities regard the provision of housing by wocos as a necessary measure in order to meet the housing needs of the people who cannot afford housing without assistance. The Commission noted that the *maximum rent of EUR 647.53* ***is acceptable*** as it is crucial for the citizens who cannot afford rents in the market price. Therefore, this is possible due to the PSO entrusted to wocos. IVBN had argued that wocos were building owner-occupied buildings, in excess of its PSO. Commission concluded that in order to respond to the local housing needs, it is sometimes not possible for wocos to postpone or alter investments, thus wocos may build owner-occupied dwellings.[277] Wocos provide relatively low rents, increase of which is regulated and limited by law. Aid granted to wocos is not limited in time which is *also acceptable by the Commission*, since this conforms with the very nature of the PSO.

2. Public service is clearly defined – SGEI Decision provides that social housing may qualify as a SGEI if it is social housing provided for disadvantaged citizens or socially less advantaged groups. In the present case, the Dutch authorities have defined the target group as socially disadvantaged households who are individuals with an income not exceeding EUR 33,000. Commission concluded that this ***definition is accepted*** as the income ceiling corresponds with a clearly defined target group (considering that the average income in the Netherlands is approximately EUR 38,000 per year). Finally, as committed by Dutch authorities, Commission accepted the exclusion of commercial activities of wocos from the benefit of aid as valid within the public service definition, given that it addresses the concerns about the negative effects on competition with the private competitors.

3. Entrustment – the public service mission is entrusted to wocos by the Dutch Housing Act of 1901 and more detailed ministerial decrees.[278] In terms of SGEI Decision entrustment criteria include the nature and the duration of the public service. As defined in the Dutch Housing Act, the nature of the public service is defined as provision of social housing by wocos, whereas the duration is undetermined. With regards to the undertaking and territory concerned, the undertakings concerned are the wocos and the SGEI is provided in the entire territory of the Netherlands. Finally, the parameters for calculating, controlling and reviewing the compensation, Commission stated that the Dutch authorities have committed to keep separate accounts between the activities of wocos benefiting from aid and activities not benefiting from aid, and as such will be subject to individual audit. As a result, Commission concluded that the public service is ***properly entrusted*** to the wocos.[279]

[277] C (2009) 9963 final, III.7.1.
[278] Ibid III.7.2.
[279] Ibid.

4. Absence of overcompensation – Commission noted that the 'at-arms-length' principle will be applied with regards to the separate accounts of the activities of wocos benefiting from aid and activities not benefiting from aid. This separation will make it possible to identify the receipts and the revenues of the public service, thus making the overcompensation identifiable.[280] In addition, the legal obligation of wocos not to have profit and the monitoring and calculation of the grant amounts by the CFV, will ***satisfy the criteria of control of overcompensation*** under the SGEI Decision.
As a result, Commission concluded that the aid for provision of social housing was ***compatible under Article 106 (2) of the TFEU***.

3.2.3 Comparison to Irish cases regarding compatibility of aid

Commission's decisions on social housing in Ireland concerned the assessment of the social housing schemes funded by HFA, see 3.1.3. The scheme functioned in such way that the municipalities were using the funds raised by HFA and then transferring those funds to the voluntary housing bodies. However, the status of the voluntary housing bodies differs from the municipalities, as the latter are not State bodies.[281] In order to operate, these bodies need to be approved by the State, be non-profit and operate in the social housing sector only, without engaging in any other commercial activity. However, both municipalities and voluntary housing bodies were active in the housing market and their activities were economic. Given the fact that they were financed by HFA which is State resource, such financing was granting them an advantage compared to other actors on the market, therefore the competition was distorted. In addition, the market was open to foreign investors thus having an effect on trade between MS. Commission concluded that the social housing schemes funded by HFA ***constitute State aid*** within the meaning of Article 107 of the TFEU. Commission then moved forward to the assessment under the *Altmark* criteria, because the Irish authorities claimed that the municipalities and voluntary housing bodies were providing housing for disadvantaged households, which is a service in the general economic interest. Commission stated that, since neither were chosen by a public procurement procedure because they exercise a competence on social housing, the fourth *Altmark* criterion was not met. It added that the Irish authorities have not provided information substantiating that they are being compensated according to the costs of a typical undertaking[282], thus it is

[280] Ibid III.7.3.
[281] C (2004) 2205 final. 4.2.3 (32).
[282] C (2004) 2205 final. 4.2.3 (45).

possible that they enjoy a financial advantage which puts them in a better competitive position vis-à-vis competitors. Thus, assessment under Article 106 (2) was put in place. Regarding the definition of social housing as a SGEI, the Irish Housing Act of 1966 defines the content of the service and the task of provision of housing by the municipalities and voluntary housing bodies. Beneficiaries are socially disadvantaged households who cannot afford to buy or rent houses on a market price. Therefore, Commission concluded that the provision of social housing is a legitimate public task of the State, which fulfils the first condition of Article 106 (2) of the TFEU. Condition of entrustment was also fulfilled, since the HFA was established by the Housing Finance Agency Act of 1981 which clearly defined the tasks of HFA, the municipalities and voluntary housing bodies in terms of provision of housing. Furthermore, Commission carried out the proportionality test of the compensation. Given that the financing by HFA was used for performing the public social housing obligation only (exclusively to the disadvantaged households), and to cover the costs incurring from such obligation insofar as they could not be otherwise covered, the measures fulfilled the condition that no overcompensation should exist for the public service costs.[283] Accordingly, social housing is recognized as a legitimate element of public policy which is not liable to affect the development of trade to the extent contrary to the Community interest, therefore the Commission concluded that the measures were ***compatible State aid*** pursuant to Article 106 (2) of the TFEU.

4.Legal implications of policy choices in housing provision in Sweden and the Netherlands

This chapter will discuss the legal implications of different policy choices Sweden and the Netherlands have opted for, with regards to the provision of housing. It argues that, Sweden chose not to define provision of housing as a SGEI due to the universalistic approach it follows towards provision of housing. On the other hand, following the Commission decision on wocos, the Netherlands chose to invoke the targeted approach and define social housing as SGEI provided to disadvantaged citizens or socially less advantaged groups.

[283] Ibid 57.

4.1 Sweden: Provision of housing not defined as a SGEI

It is undisputed that provision of housing in Sweden is treated as a general interest and is based on the universalistic approach. Universalistic models of housing provision consider housing to be a primary public responsibility, thus hold the objective of providing the whole population with decent quality housing at an affordable price.[284]

In Sweden, provision of housing as a general interest is reflected in numerous laws and regulations. The Swedish Instrument of Government provides that while exercising their public powers, public institutions have a responsibility to secure the right to housing for all citizens.[285] Moreover, in the wording of the Swedish Local Government Act, *the matters of general concern* that the municipalities may attend (which are connected with the area of municipality) include *provision of housing*. Even though the wording general interest is not explicitly used in the national laws, it implies that provision of housing is a general interest which must be provided to all citizens.

The responsibility of the municipalities for provision of housing is regulated by the Law on Municipal Housing which has a purpose of creating the conditions for everyone to live in good housing. Moreover, Law on Public Municipal Housing Companies, underlines that the provision and promotion of housing as the principal activities of the municipalities is for the purpose of *public interest*. However, there is neither definition nor any indication at any instance by the Swedish law or authorities, that the provision of housing is a 'service of general economic interest'.

After the adoption of the SGEI Package of 2005, the Swedish authorities were looking at the possibilities of defining their SGEI tasks. Several arguments were put forward in this regard. Swedish authorities argued that *first*, tax-financed services cannot be regarded as economic for the purpose of EU law; *second*, there is no need for SGEI in sectors where the use of procurement excludes the occurrence of State aid; *third*, there are no clear SGEI tasks in the housing sector, and *fourth*, the SGEI concept and rules are subject to legal uncertainty.[286] Accordingly, it follows from the case law of the CJEU that social services cannot be regarded as non-economic and be excluded from the

[284] 'Social Housing in the EU', Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, 2013.
[285] The Instrument of Government of Sweden §2.
[286] C. Wehlander, "Who is afraid of SGEI? SGEI in EU law with a Case Study on Social Services in Swedish System of Choice", Doctoral Dissertation, Umeå University, 2015.

scope of EU competition law only because that they are tax financed.[287] Furthermore, the argument related to procurement stems from the fourth *Altmark* criterion which excludes the application of State aid rules if the undertaking entrusted with the SGEI was chosen in a public procurement procedure. In the Governmental Bill on municipal housing companies[288] it was emphasized that neither housing supply in general nor local and regional authorities' responsibility for housing supply to any part should be characterized as SGEI, as local authorities willing to entrust tasks that are not economically profitable would apply the procurement rules. [289]

Another argument includes the lack of clear SGEI tasks and the legal uncertainty therein. It cannot be argued that there is a single concept of SGEI for the purpose of EU law. Nor is there a single understanding of SGEI for the purpose of Article 14 of the TFEU or Article 106 (2) of the TFEU.[290] EU legislation provides the MS with a wide margin of discretion in defining their SGEI, however their definition may be subject to manifest error of assessment by the Commission. It has been noted in the case law of the CJEU that, at the outset, even though the MS have a wide discretion when determining what it regards as an SGEI, that does not mean that it is not required, when it relies on the existence of and the need to protect an SGEI mission, to ensure that that mission satisfies certain minimum criteria common to every SGEI mission within the meaning of the TFEU.[291] Worth mentioning, in the SGEI Communication, it is stated that the Commission considers that it would not be appropriate to attach specific PSO 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.[292] This clearly is an introduction of a new limit as to what is capable of constituting a 'true SGEI'.[293]

When the SGEI Package of 2005 was adopted, in the words of the Competition Commissioner Neelie Kroes "these new rules will not only ensure that public authorities remain free to define which public services they wish to support financially and the level of support, but also ensure transparency and guard against cross-subsidies for non-public service activities". Indeed, the SGEI Package of 2005 and the SGEI Package of 2011

[287] Case C-41/90 *Höfner* [1991] ECR I-1979.
[288] Governmental Bill on Municipal Housing Companies 2009/10:185.
[289] C. Wehlander, "Who is afraid of SGEI? SGEI in EU law with a Case Study on Social Services in Swedish System of Choice", Doctoral Dissertation, Umeå University, 2015.
[290] Ibid.
[291] Case T-289/03 BUPA v Commission [2008] ECR II-81.
[292] SGEI Communication, para 48.
[293] Financing Services of General Economic Interest: 'Reform and Modernization', edited by Erika Szyszczak, and de Gronden, Johan Willem van, T.M.C. Asser Press, 2014.

brought some clarification of the key concepts relevant for the application of State aid rules to SGEI, however legal uncertainties seem to remain present. An example is the wording in the SGEI Communication stating that 'the Commission considers that the services to be classified as SGEIs must be addressed to citizens or be in the interest of society as a whole'. This was confirmed by the CJEU in the case *BUPA*, which stated that MS have to ensure the presence of an act of the public authority entrusting the operators in question with an SGEI mission and the universal and compulsory nature of that mission.[294] In contrast, the SGEI Decision in relation to State aid for social housing, classifies the services as a SGEI only if they are reserved for socially disadvantaged citizens or socially less advantaged groups.

The Swedish National Board of Housing, Building and Planning published a report in 2012[295] emphasizing the possibility of the municipalities in fulfilling their housing missions through entrusting the municipal housing companies with tasks of SGEI. It was followed by a Government Report published in 2015 which clearly stated that provision of housing should not be defined as a SGEI in Swedish law.[296]

The predominant statement that housing should not be regarded as a SGEI was underlined in the Governmental Bill on Municipal Housing Companies.[297] In the Bill, it is noted that public municipal housing companies together with a large number of private companies should provide housing for everyone. The alternative to limiting their role to the provision of social housing i.e. provided to disadvantaged citizens or socially less advantaged groups, as it was concluded in the Commission decision regarding housing corporations in the Netherlands, is not a desirable development. In conclusion, the Government was therefore of the opinion that ***housing provision should not be defined as a SGEI, either in general or in parts***.[298]

This position of the Swedish government was also taken in the Governmental Bill called 'A new Local Governmental Act',[299] underlining that municipalities and county councils have the possibility to assess when an economic service is of general economic interest and that they can entrust such a service in individual cases. However, it may be questioned whether the proposed provision (inclusion of SGEI tasks in the municipal law) provides clarification, as there is no clear national or EU definition of the concept of

[294] Ibid.
[295] SABO, Boverkets översyn av bostadsförsörjningslagen, Rapport 2012:12.
[296] SOU (2015:58) 'EU and Municipal Housing Policy'.
[297] Governmental Bill on Municipal Housing Companies 2009/10:185.
[298] Ibid.
[299] Regeringens Proposition 2016/17:171, 'En ny komunallag', (A new Local Government Act) 2017.

SGEI. Against this background, the Government considered that the reference should not be included in the municipal law.[300]

It must be noted that the definition of provision of housing as a SGEI could be a possibility for the municipalities to fulfil their housing obligations. In the Council Recommendation on the 2017 National Reform Programme of Sweden, it was stated that Sweden has been experiencing rapid and persistent house price growth especially in the main urban areas.[301] As one of the key drivers is the ongoing housing supply shortage which is linked to the weak competition in the construction sector and does not receive appropriate attention.[302] However, the Swedish policy-makers seem to be reluctant to define the provision of housing as a 'service of general economic interest', particularly, after the limitation by the Commission of the definition of social housing to a clearly defined target group of disadvantaged citizens or socially less advantaged groups.

4.2 The Netherlands: Social housing regarded as a SGEI

The Netherlands is known as one of the countries in the EU with the universalistic approach towards the provision of social housing. It has the highest share of social housing in Europe, accounting to 32% of total housing stock.[303] Access to social housing was never restricted on the basis of income and was virtually open to all citizens.[304] However, following the Commission Decision on Housing Corporations (wocos), the system was reformed, and the approach shifted towards the targeted model. Targeted models consider the market to be in charge of allocating housing resources to individuals, and therefore the objective is to satisfy only the excess of housing demand not satisfied by the market.[305]

In order to bring the notified measures in line with the EU State aid rules, in its decision on wocos, the Commission listed a number of appropriate

[300] Ibid.
[301] COM (2017) 526 final, 'Council Recommendation on the 2017 National Reform Programme of Sweden', Brussels 2017.
[302] Ibid.
[303] CECODHAS Housing Europe's Observatory, Housing Europe Review 2012, "The nuts and bolts of European social housing systems", Brussels 2011.
[304] Ibid.
[305] 'Social Housing in the EU', Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, 2013.

measure to be committed by the Dutch authorities. In the words of the Commission, "*limitation of social housing to a clearly defined target group of disadvantaged citizens or socially less advantaged groups*" in line with the SGEI Decision is a necessary measure. After long consultations with the Commission, the Dutch authorities accepted this definition which resulted in the implementation of the new rules with a ministerial decree from January 2010 and a new Housing Act from January 2011.[306] It must be noted that this limitation has raised discussions and debate in terms of clashing with the 'principle of subsidiarity' mentioned in Article 1 of the Protocol 26 as it restricts the provision of social and affordable housing and ensuring socially diverse communities and cities.[307] The amendments to the Housing Act also included the separation of public service activities and commercial activities which should follow the rules of separation of accounts and adequate controls.

Although the new SGEI Package and the decision provide some clarity about the conditions for State aid to Dutch social housing, issues have been raised that indicate negative effects, particularly in regard to the provision of sufficient affordable housing for middle income groups and the restructuring of neighbourhoods.[308] Due to the gap between the prices in rental market (which are low) and owner-occupied dwellings (which are considerable high) and the restriction of supply to households with an income under EUR 33.000, the middle income groups have difficulties in finding housing in the owner-occupied market.[309] In addition, the restricted public service to provide SGEI removed other core tasks, which are realised by suppliers of social housing in the neighbourhoods and districts.[310] In its final report on SSGI, the European Commission states however that social housing 'encompasses the development, rental / sale and maintenance of homes at affordable prices, as well as the allocation and management of these, including residential neighbourhoods and districts.[311]

The Commission decision on wocos was challenged by a large number of organisations involved in social housing. In 2010, they brought an action under Article 263 of the TFEU for annulment of the decision, in relation to aid measure E 2/2005.[312] The applicants argued that by introducing an income threshold for access to social housing, the Commission went beyond its

[306] C (2009) 9963 final.
[307] 'Better EU rules for better services of general interest in housing'. A letter sent to Margrethe Vestager, Commissioner for Competition, Housing Europe, Brussels 2016.
[308] Hugo Priemus &Vincent Gruis, "Social Housing and Illegal State Aid: The Agreement between European Commission and Dutch Government", International Journal of Housing Policy, March 2011.
[309] Ibid.
[310]'Dutch social housing in a nutshell', Aedes, Dutch associations of social housing organisation, July 2013.
[311] Study on Social Services of General Interest, Final Report, European Commission, 2011.
[312] Case T-203/10 '*Stichting Woonpunt and Others* v *Commission',* EU: T:2011:766.

powers, imposing the Netherlands with its own definition of social housing and thus violating what should be a prerogative of individual MS.[313] However, the General Court rejected the action for annulment as inadmissible.

Conclusion

The thesis discussed the application of State aid rules on SGEI to the provision of housing in Sweden. The conclusions were drawn in light of the SGEI package, the Commission Decision on housing corporations in the Netherlands and Commission Decisions on social housing schemes in Ireland.

As the thesis shows, Sweden follows a municipal housing model whereby the responsibility of housing provision lies on the municipalities who have an obligation under the law to create conditions for good housing for everyone. The provision of housing is carried out by the municipal housing companies over which the municipalities have a controlling influence for the purpose of public interest. Until the entry into force of the Law on Public Municipal Housing Companies in 2010, the municipal housing companies could benefit from financial support from the State in form of subsidies or loan guarantees.

However, after the complaints received by Commission regrading the incompatibility of this financial support with the EU State aid rules, Sweden gradually liberalised the housing market, initially by removing the utility value principle and abolishing public service compensation for the municipal housing companies. With the new law, the municipal housing companies have to act according to the *business – like principle*, meaning they have to be run on their own merits, with the same required rate of return as comparable private housing companies.

Given the issue of *housing deficit*, the Swedish government underlined the importance of EU State aid rules on SGEI and the sought the possibility for the municipalities to employ those rules in order to overcome the housing deficit.

The thesis analysed the requirements under the SGEI Package which was adopted following the Altmark judgment where the ECJ concluded that the

[313]'Social Housing in the EU', Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, 2013.

compensation for PSO does not constitute State aid within the meaning of Article 107 of the TFEU, provided that four cumulative criteria are met.

The criteria set in Altmark is enshrined in the SGEI Package. The main requirement, in particular under the SGEI Decision includes the *entrustment* of the undertaking with the operation of SGEI. Thus, it requires MS to *define the housing provision as SGEI.* In addition, the SGEI Framework requires the aid to be granted for a *genuine and correctly defined SGEI* as referred to in Article 106 (2) of the TFEU. Thus, the provisions of the SGEI Package require Sweden to clearly define the housing provision as a SGEI and as such entrust the municipal housing companies with the operation of SGEI.

The research further illustrates that MS enjoy a wide margin of discretion in defining what they consider to be a SGEI, and the role of the Commission is to *only check for a manifest error in the definition of the SGEI*. However, it must be noted that the Commission still has some power in limiting this discretion.

As it was illustrated in the Commission Decision on housing corporations in the Netherlands, the Dutch authorities had to make commitments in order to bring the measures in line with the EU State aid rules. Amongst many, the main commitment included the acceptance of the definition of social housing to a clearly defined target group of disadvantaged citizens or socially less advantaged groups, as provided in the SGEI Decision. The Dutch social housing definition included the group of socially disadvantaged households who are defined as individuals with an income not exceeding EUR 33,000. This definition passed the manifest error of assessment of the Commission.

In the Commission Decision regarding social housing schemes in Ireland, the measures were assessed under Article 106 (2) of the TFEU but not the SGEI Package. Similarly, Irish authorities provided for a definition of social housing targeted to socially disadvantaged households. The Commission accepted the definition stating that the provision of social housing is a legitimate public task of the State, which fulfils the first condition of Article 106 (2) of the TFEU. The measures further passed the *necessity and proportionality* tests under Article 106 (2) of the TFEU.

As the thesis shows, the Swedish government, however, has repeatedly stated that, due the lack of clarity in the Swedish and EU law of the definition of SGEI, *housing provision should not be defined as a SGEI, either in general or in parts.* This statement is regardless the fact that the Swedish government recognizes that the municipalities have the possibility to define their housing provision tasks as a SGEI. Thus, the thesis concludes that Sweden can benefit from the SGEI Package, however the government seems to be reluctant in defining housing as a SGEI.

Adoption of the Commissions definition would certainly enable the municipalities to fulfil their obligation in providing more housing, especially at the time when there is a deficit and the supply doesn't meet the demand. Moreover, the examples of the Dutch or Irish authorities could be taken into account when defining SGEI. This way, the Swedish government would lift the burden of defining SGEI from the municipalities and provide a clear use of the SGEI package. However, it remains to be seen whether Sweden will give up on the universalistic approach with regards to housing, given the long tradition of ¨**allmännytta**¨ it follows.

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