

Article 106 (2) TFEU in Case Law

Internalization and Customized Balancing of Welfare and Market Interests

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Abstract: *The EU law on public services is characterized by the need to reconcile competing EU and Member States interests as well as to accommodate both market and welfare interests. This paper explores how the Court of Justice of the EU (CJEU) and the Commission conduct this multi-level balancing of interests in the context of Article 106 (2) TFEU. To provide a full picture, this balancing is assessed by looking into both the requirements for the derogation and its scope of application. In essence, it is suggested that the EU has internalized the aforementioned struggle of interests. On the one hand, the EU, represented by the CJEU and the Commission, has assumed an increasingly dominant role by gradually limiting the autonomy and margin of discretion of the Member States regarding the provision, commission and financing of public services. On the other hand, it is argued that Article 106 (2) TFEU allows only a 'customized and limited derogation' from market and competition rules and has to be construed in consideration of the 'general compatibility test' which identifies economic activities in the first place. As a whole, Article 106 (2) TFEU constitutes a working system that reconciles potentially conflicting interests in favour of functioning public services. However, it is crucial that its premises and limits are respected.*

Keywords: *services of general interest – SGI; services of general economic interest – SGEL; public services; welfare; (concept of an) undertaking; State aid; competition law; public service obligation; principle of proportionality*

I. Introduction

Public services or services of general interest (SGI), as they are called in the European Union (EU) law, lie at the heart of a welfare state. Contrary to standard market services¹, they are not provided based on an individual (economic) interest, but are classified as being of public or general interest, hence important to everyone. If such services qualify as economic activities² (i.e. services of general

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¹ Similarly, Ulla Neergaard, *Services of General Economic Interest: The Nature of the Beast*, in THE CHANGING LEGAL FRAMEWORK FOR SERVICES OF GENERAL INTEREST IN EUROPE 17, 20 (Markus Krajewski, Ulla Neergaard and Johan Van de Gronden eds., 2009).

² See chapter II.A. below.

economic interest, SG(E)I), they are subject to the EU market rules;³ otherwise they are called non-economic SGI (neSGI) and remain mostly subject to national law only.⁴

In its beginnings as an Economic Community, the EU generally refrained from dealing with SG(E)I. However, during the last thirty years the EU, as a political actor, as well as the CJEU⁵ in its case law became increasingly active. Today, an EU constitutional framework on the law of SG(E)I has emerged. In addition to Article 106 (2) TFEU, which has been part of the EU Treaties since the beginning, Article 14 TFEU, Article 36 of the Charter of Fundamental Rights of the EU (CFR) and the Protocol (No. 26) on services of general interest to the Treaty of Lisbon (SGI Protocol) shape the legal and political approach of the EU to SG(E)I.

Article 14 TFEU, which obliges the EU and the Member States to 'take care that SG(E)I operate on the basis of principles and conditions [...], which enable them to fulfil their missions', epitomises the emancipation of such services from a mere hindrance to competition to an EU legal concept in its own right. The SGI Protocol sheds some light on the 'shared values' SG(E)I are purportedly based on and emphasizes the 'essential role and the wide discretion' of Member States' authorities 'in providing, commissioning and organising' such services as well as their diversity and the importance of 'a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights'. Finally, SG(E)I are even referred to in the context of fundamental rights. The unprecedented Article 36 CFR requires the EU to recognize and respect the 'access to services of general economic interest as provided for in national law and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union'. Further clarification and interpretation of these constitutional rules are provided by extensive case law and numerous soft law instruments of the Commission, which serve as guidelines and add details to the often cryptic general provisions.

Due to their particular nature, social and welfare interests as well as economic and market interests of the EU and the Member States shape the organisation and the functioning of SG(E)I. Their provision often requires concessions that conflict with the principle of undistorted competition and a free market; in a way, they may even be perceived as 'legal irritants'⁶. Thus, the EU law on SG(E)I and its constitutional framework are characterized and shaped to a very significant extent by the necessity to reconcile potentially conflicting interests on (at least) two levels: First, EU interests and the interests of the various Member States are not necessarily concurring and therefore require balancing. Second, on a more substantive level, the rules to ensure a functioning internal market, in particular the rules on competition, have to be adjusted to accommodate public services. In other words, market and welfare interests have to be balanced.

³ The term 'EU market rules' is meant in this paper to encompass free movement law as well as competition and State aid law.

⁴ For more details regarding the classification of services as SGI, SG(E)I or neSGI see Mustafa Karayigit, *The Notion of Services of General Economic Interest Revisited*, 15 EPL 575 (2009); Neergaard, *supra* note 1, at 17; Julia Raptis, *Wirtschaftliche oder nichtwirtschaftliche Dienstleistungen von allgemeinem Interesse - Probleme der Abgrenzung*, 64 ZÖR 53 (2009).

⁵ The term CJEU is used for references to the Court of Justice of the EU, including the European Court of Justice (ECJ) and the General Court (GC).

⁶ Mario Monti, *A new strategy for the single market: at the service of Europe's economy and society. Report to the President of the European Commission, José Manuel Barroso*, 9 May 2009, at 73, as cited by Wolf Sauter, *Public Services and the Internal Market: Building Blocks or Persistent Irritant?*, 21 ELJ 738, 738 (2015).

This paper explores how this multi-level balancing of interests is conducted in the context of Article 106 (2) TFEU – a provision that represents the original (legislative) compromise between the more welfare-oriented interests of some Member States and the market-focused interests of other Member States and the EU, and one which has been crucial to the balancing of conflicting interests ever since. On the one hand, this work takes a broad perspective and looks beyond the derogation stipulated by Article 106 (2) TFEU by inquiring into the latter's scope of application. Arguably, how the relevant interests are balanced is also affected by the range of activities that are subject to EU competition law in general and are in principle eligible for a derogation. On the other hand, this article focuses on how Article 106 (2) TFEU is applied and construed by the CJEU and the Commission as main actors. The balancing of the aforementioned interests, as it is reflected in primary law or sectoral secondary legislation or horizontal soft law in general falls outside the scope of this work (except if such legislation is interpreted in the context of Article 106 (2) TFEU).

In a nutshell, this paper argues that the EU managed to internalize the aforementioned struggle of interests in the context of Article 106 (2) TFEU in two ways. On the one hand, the EU, represented by the CJEU and the Commission, has become a key player in public services law which firmly controls this area of law and 'calls the shots'. The autonomy and margin of discretion which the Member States enjoy regarding the provision, commission and organization of public services is increasingly restricted. Technically, the CJEU and the Commission are not trespassing the boundaries of EU law by venturing into areas that are (still) subject to Member State law. However, they make sure that EU law (as opposed to national law) covers, shapes and regulates public services as far as possible, so that the EU institutions have the final say. This is particularly visible regarding the scope of application of competition law in general and Article 106 (2) TFEU in particular. A broad understanding of an 'economic activity' and extensive transparency requirements regarding the entrustment of public service obligations ensure that a large number of public services are subject to the EU law on SGEI and under scrutiny of the Commission and CJEU (see part II *infra*).

On the other hand, as regards the substantive balancing of welfare and market interests, this paper identifies a 'balancing test' pursuant to Article 106 (2) TFEU which tolerates only a 'customized derogation' from competition rules that replaced both, the strict approach in favour of competition before *Corbeau* and the rather lenient approach after this landmark decision. Services that are generally subject to the market rules due to the economic activity involved ('general compatibility test') may not be exempted from these rules in a generalized and undifferentiated way, but only in so far as it is absolutely necessary and proportionate *stricto sensu* to allow functioning SGEI in a functioning market. A 'customized derogation' thus complements the 'general compatibility test', which identifies economic activities (SGEI) in the first place, and reconciles market and welfare interests by supporting a market-based approach for the provision of SGEI that recognizes the intrinsic value and particularities of such services by granting customized and limited derogations only (see part III *infra*).

II. The EU as the Key Player in SGEI Law

When studying the secondary and soft law surrounding Article 106 (2) TFEU and the relevant case law of the CJEU, one increasingly notices that this provision no longer addresses the inconsistencies of EU and Member States interests, but rather deals with contrasting EU interests. This internalization of the struggle of conflicting interest is particularly obvious if one takes the scope of application of Article 106 (2) TFEU into consideration. Naturally, the EU and its institutions deal with conflicts that affect EU law. Hence, it should not be surprising that the EU must be considered as the (new) key player in this area of law. However, what is curious is the extent of the reach of EU law.

The following examples show that the EU and its institutions shape this area of law not only substantively, but also by giving it a very broad scope of application, thereby ensuring that a large number of SGI is subject to EU law. Special concessions in view of the particular nature of these services can still be made, as the second part of this paper demonstrates, but only as approved by EU law.

A. The Concept of an Undertaking as a One-Size-Fits-All Modell?

1. Economic Activity as a Prerequisite

Generally, the application of the EU competition rules⁷ is contingent on the economic nature of an activity. Whereas SGEI are subject to these rules, neSGI are not. The term 'economic' as part of the notion SGEI is to be interpreted as reference to an 'economic nature' of the service rather than a (genuine) economic interest. In competition law, the understanding of what constitutes an economic activity is inextricably linked to the concept of an undertaking, which is defined by settled case law as 'any entity engaged in an *economic* activity, regardless of its legal status and the way in which it is financed'.⁸ Whether the rules on competition, including State aid, apply to a certain activity is thus solely determined by the nature of said activity and does not depend on the private or public status of the entity. In that regard, the CJEU considers 'any activity consisting in offering goods or services on a given market' as an economic activity.⁹ In view of such a broad definition, it seems as if virtually any activity might be covered; especially given that also purchasing activities are included as long as the subsequent use of the purchased goods (or services) amounts to an economic activity (e.g. resale after processing).¹⁰

However, there are a number of activities that have been qualified as non-economic activities and are thus exempted from competition law. In particular for SGI it is relevant to examine why and under which conditions some SGI, namely neSGI, are exempted from competition law altogether

⁷ Although, the free movement rules also require an 'economic activity', slightly different criteria (e.g. cross-border activity, remuneration) are used, see also Communication from the Commission, Services of general interest, including social services of general interest: a new European commitment, COM (2007) 725 final, 5; see also Okeoghene Odudu, *Economic activity as a limit to Community law*, in THE OUTER LIMITS OF EUROPEAN UNION LAW 225, 226-230 (Catherine Barnard, Okeoghene Odudu eds., 2009). Dissenting CAROLINE WEHLANDER, SERVICES OF GENERAL ECONOMIC INTEREST AS A CONSTITUTIONAL CONCEPT OF EU LAW 35 seq (2016) ('unitary interpretation').

⁸ Originally, Case C-41/90 *Höfner*, ECLI:EU:C:1991:161, para 21 (emphasis added).

⁹ Settled case law, see for example Case 118/85 *Commission v Italy*, ECLI:EU:C:1987:283, para 7; Case C-437/09 *AG2R*, ECLI:EU:C:2011:112, para 42.

¹⁰ Case C-205/03 P *FENIN*, ECLI:EU:C:2006:453, para 26.

due to their non-economic nature, while others, namely SGEI, generally fall into the scope of competition law, but may then be exempted according to Article 106 (2) TFEU.

2. Categories of Non-economic Activities

Most importantly, an activity which falls within the exercise of public or sovereign powers is not of an economic nature with regard to the EU competition rules.¹¹ Generally, such activities ‘intrinsically form part of official authority and are performed by the State’.¹² Sometimes however, also private entities are vested with public power and consequently do not qualify as undertakings with respect to such activities.¹³ For example, the ECJ found that, as a whole, Eurocontrol’s activities ‘are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority’.¹⁴

Regarding social security systems (e.g. insurance against accidents at work and occupational diseases, pension schemes), the CJEU argues that an activity is non-economic if it fulfils an exclusively social function. Besides the pursuance of a social objective¹⁵, which is not sufficient by itself, such a function is characterized by a high degree of solidarity (as opposed to the principle of capitalization) *and* a substantial extent of State control and supervision.¹⁶ As the CJEU correctly assumes, redistributive structures which are based on the allocation of benefits or the provision of services that do not reflect the contributions made to the system due to cross-subsidization may hinder the performance of such activities in a competitive market.¹⁷ On their own however, such structures – even if they contain more than just some individual elements of solidarity – are not sufficient for the qualification of an activity as non-economic. In addition, the scope of the State’s control over how the entity operates and the activity functions has to be assessed (e.g. degree of liberty to determine the amount of contributions and benefits, margin of negotiation; selection of the entity in question based on financial and economic consideration).¹⁸ Hence, if solidarity as a predominant principle makes it necessary for these activities to be managed in a certain way that is incompatible with competition and contrary to how an undertaking would normally act on a market (i.e. independent market-related decision-making), they do not qualify as economic activities. A similar, albeit (still) primarily solidarity based test without explicit reference to State

¹¹ Case C-364/92 *SAT Fluggesellschaft v Eurocontrol*, ECLI:EU:C:1994:7; Case C-343/95 *Cali & Figli v Servizi Ecologici Porto di Genova*, ECLI:EU:C:1997:160.

¹² Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of SGEI (2011 SGEI Communication), OJ 2012 C 8/4, para 16.

¹³ Each activity must be qualified separately, see Case C-49/07 *MOTOE*, ECLI:EU:C:2008:376, para 25.

¹⁴ Case C-364/92 *SAT Fluggesellschaft v Eurocontrol*, ECLI:EU:C:1994:7, para 30.

¹⁵ For example, the provision of a compulsory social protection or the continuation of performance despite non-payment of contributions or the absence of a profit-making interest.

¹⁶ Joined Cases C-159/91 and C-160/91 *Poucet und Pistre*, ECLI:EU:C:1993:63; Case C-244/94 *FFSA v Ministère de l’Agriculture*, ECLI:EU:C:1995:392; Case C-67/96 *Albany*, ECLI:EU:C:1999:430; Joined Cases C-115 to 117/97 *Brentjens*, ECLI:EU:C:1999:434; Case C-218/00 *Cisal*, ECLI:EU:C:2002:36; Case C-437/09 *AG2R*, ECLI:EU:C:2011:112. For further details and references to case law, see Commission Notice on the notion of State aid, OJ 2016 C 262/1, 6.

¹⁷ Joined Cases C-159/91 and C-160/91 *Poucet und Pistre*, ECLI:EU:C:1993:63, paras 10 and 11; Case C-218/00 *Cisal*, ECLI:EU:C:2002:36, para 39; Case C-350/07 *Kattner Stahlbau*, ECLI:EU:2009:127, paras 44 – 59; Case C-437/09 *AG2R*, ECLI:EU:C:2011:112, para 51.

¹⁸ Joined Cases C-159/91 and C-160/91 *Poucet und Pistre*, ECLI:EU:C:1993:63, para 15; Case C-218/00 *Cisal*, ECLI:EU:C:2002:36, para 43.

control, has also been applied in the area of healthcare, where public hospitals that provide their services free of charge form an integral part of a national health service and are directly funded from State resources (e.g. based on general social security contributions).¹⁹

3. A 'General Compatibility Test'

In a nutshell, the decisive criterion to identify an economic activity seems to be the (hypothetical) possibility that a certain activity may be carried out within a competitive system, i.e. 'a given market', or at least in competition for a market ('general compatibility test'). For this purpose, an entity does not actually have to be profitable or to pursue a profit-making motive.²⁰ Even the fact that certain activities 'are normally entrusted to public agencies cannot affect the economic nature of such activities', especially if these activities have 'not always been, and [are] not necessarily, carried out by public entities'.²¹ In contrast, non-economic activities are assumed to be absolutely incompatible with the concept of a (competitive) market. In any case, one has to determine the character of each activity separately, as an entity may carry out economic as well as non-economic activities at the same time. Furthermore, the purpose and motivation of an activity are not decisive, but only of subordinate importance in so far as they may reflect particular needs of an activity. In other words, SGI cannot be exempted from the scope of competition law due to the 'general interest' involved, but the fact that a certain service is of general interest may influence its general incompatibility with a competitive market (as well as the need for a customized exemption in the context of Article 106 (2) TFEU).

In the end, the concept of an undertaking in EU law is not a one-size-fits-all model. However, by giving this notion a very broad meaning, the CJEU makes sure that a significant number of activities of general interest are regulated by EU competition law, while at the same time visibly curtailing the Member State's competences in that regard.²² This interpretation is also in line with the legislative attempts of the Council and the European Parliament to open SGI in the utilities (energy, electronic communications etc) to competition. To be clear, this does not mean that such activities are subject to all rules on competition at any rate, it just enables the EU to have the final say and set the tone, because as economic activities such services are subject to EU competition law. In the context of Article 106 (2) TFEU, the EU then has a chance to balance welfare and market interests in a much more customized way by granting limited exemptions (only).

B. Transparent Entrustment of Public Service Obligations as the Key to the SGEI Derogation

Only services that qualify as SGEI in the sense of Article 106 (2) TFEU may be subject to the derogation provided therein. For that purpose, the activity in question must, first, pursue or serve to pursue an objective of general economic interest 'presenting specific characteristics as

¹⁹ Case T-319/99 *FENIN*, ECLI:EU:T:2003:50, para 38 et seq.

²⁰ Sometimes, however, at least a hypothetical chance to make profit is requested, see *Odudu*, *supra* note 7, at 231.

²¹ Case C-41/90 *Höfner*, ECLI:EU:C:1991:161, para 22.

²² Also WEHLANDER, *supra* note 7, at 83. Equally noticing the expansion of the notion of economic services by the Commission without further references: Hans-Wolfgang Micklitz, *Universal Services: Nucleus for a Social European Private Law*, in MARKET INTEGRATION AND PUBLIC SERVICES IN THE EUROPEAN UNION 63, 64 (Marise Cremona ed., 2011).

compared with that served by other economic activities²³ and, second, – to attain that objective – so-called public service obligations²⁴ have to be imposed, usually by an act of entrustment, on the undertaking in question. The derogation referred to in Article 106 (2) TFEU can only be invoked if *both* conditions (objective of general interest; imposition of public service obligation) are fulfilled. Interestingly, these conditions also correspond to the first *Altmark* criterion,²⁵ thereby suggesting that SGEl in EU law generally have to be identified by reference to an objective of general interest *and* the imposition (entrustment) of a public service obligation. Consequently, a service that is of general economic interest, but is not (or should not be) entrusted with a particular public service obligation cannot be classified as an SGEl in EU law.²⁶ This aspect is often overlooked.

As regards the first condition, it is assumed that the Member States enjoy considerable discretion to define (economic) services of general interest, i.e. to identify and determine corresponding objectives and public service obligations.²⁷ In fact, Article 1 SGI-protocol explicitly lists the wide discretion of the national, regional and local authorities in providing, commissioning and organising such services as part of the shared values of the EU in respect of SGEl. The Member States may also take account of national circumstances and objectives pertaining to their particular national policy.²⁸ Arguably, in practice the Commission and the CJEU tend to accept the assessment of a Member State that a certain service is of general (economic) interest in order to avoid any obvious interference or legal control of national policies;²⁹ thus, rejections (solely) with reference to the first criterion are actually rare.³⁰ Only with regard to certain sectors that have already been liberalized and regulated by (secondary) EU law, e.g. utility services, the EU institutions apply a stricter control in coherence with the objectives stipulated in the relevant legislation.³¹

Considerably less overall restraint is shown with regard to the second condition, namely the imposition of a public service obligation. On the one hand, emphasis is put on the actual imposition of such obligations,³² which is generally referred to as ‘entrustment’. While the act itself – be it an

²³ Case T-461/13 *Spain v Commission*, ECLI:EU:T:2015:891, para 62 (with further references); Case T-219/14 *Regione autonoma della Sardegna v Commission*, ECLI:EU:T:2017:266, para 154.

²⁴ Public service obligations is the broader concept that also encompasses universal service obligations, see MELCHER, DIENSTLEISTUNGEN VON ALLGEMEINEM WIRTSCHAFTLICHEM INTERESSE IM EUROPÄISCHEN PRIVATRECHT 35 et seq (2016).

²⁵ Case T-461/13 *Spain v Commission*, ECLI:EU:T:2015:891, para 60 (with further references).

²⁶ Cf the answer to question 11 in the Commission Staff Working Document from 29 April 2013, Guide to the application of the EU rules on state aid, public procurement and internal market to services of general economic interest, and in particular to social services of general interest (SGEl-Guide 2013), SWD (2013) 53 final/2, at 26.

²⁷ 2011 SGEl Communication, OJ 2012 C 8/4, para 46. See also Case C-265/08 *Federutility*, ECLI:EU:C:2010:205, para 29; Case C-121/15 *ANODE*, ECLI:EU:C:2016:637, paras 41–44; Case T-289/03 *BUPA*, ECLI:EU:T:2008:29, para 167.

²⁸ Case C-265/08 *Federutility*, ECLI:EU:C:2010:205, para 29; confirmed by Case C-121/15 *ANODE*, ECLI:EU:C:2016:637, para 44.

²⁹ For example, Case T-17/02 *Olsen v Commission*, ECLI:EU:T:2005:218, para 215–228 (maritime connections between the Canary Islands); case T-309/04 *TV2/Danmark and Others v Commission*, ECLI:EU:T:2008:457, para 101–124 (broadcasting SGEl).

³⁰ Examples of manifest errors include, for example, port operations as in Case C-179/90 *Merci convenzionali porto di Genova*, ECLI:EU:C:1991:464, para 27; Case C-242/95 *GT Link*, ECLI:EU:C:1997:376, para 53; Joined Cases C-34/01 to C-38/01 *Enirisorse*, ECLI:EU:C:2003:640, para 33 et seq.

³¹ See thereto Case C-265/08 *Federutility*, ECLI:EU:C:2010:205, para 32; Case C-121/15 *ANODE*, ECLI:EU:C:2016:637, para 47 et seq.

³² Case C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco*, ECLI:EU:C:2017:999, para 71 with further references.

entrustment by statute, by administrative act, by public law concession or even by contract³³ – is apparently of subordinate importance (as long as it is functional) and much liberty is given to the Member States to choose the most appropriate instrument³⁴, it is essential that the SGEI mission is of a universal and compulsory nature and that it is entrusted by a public authority, thus highlighting the connection between the state, the undertaking and the special nature of the activity.³⁵ Especially in horizontal legislation and soft law on SGEI and State aid, a special ‘entrustment act’ is required that has to conform with detailed prerequisites regarding the information contained therein (e.g. a description of the compensation mechanism).³⁶ On the other hand, public service obligations have to be ‘sufficiently clear and precise’; at least their nature, duration and (territorial) scope have to be specified.³⁷ In that regard, the Commission and the CJEU often conveniently argue that they cannot verify whether the activity in question may be covered by the concept of an SGEI if a sufficiently clear and precise definition is missing, instead of rejecting the national qualification as such. Sectoral legislation often contains specifications regarding the (substantive) features of a particular public service obligation. For example, Article 3 (2) Directive 2009/73 requires public service obligations to be clearly defined, transparent, non-discriminatory and verifiable, and to guarantee equal access for suppliers to consumers.³⁸

It is certainly true that these minimum criteria regarding the entrustment and the entrusted mission, primarily serve a documentary purpose. They require detailed information on why a service qualifies as SGEI, thereby ensuring transparency and legal certainty, and maybe even preventing abuse and encouraging a more reflexive approach of the Member States. However, they are not completely innocuous. For one thing, they make the entrustment of public service obligations more burdensome and complex. Also, they may encourage a more rigorous control of the Commission and the CJEU based (only?) on common standards, thereby giving less weight to the needs and particularities of specific national services. To some extent, the manifest error control and the establishment of minimum criteria might even invite the EU institutions to limit the discretion of the Member States in a more extensive way. For example, the 2011 SGEI Framework explicitly prohibits the Member States from attaching ‘specific public service obligations to services that are already provided or can be provided satisfactorily [...] by undertakings operating under normal market conditions’³⁹ thereby limiting the discretion of the national authorities to determine whether public service obligations are actually needed in view of a particular national situation. Moreover, in the context of a manifest error control, the Commission and the CJEU have the last word in deciding whether such services are already (or could be) provided in a way that is consistent with the public interest as stipulated by the Member State.⁴⁰

³³ See 2013 SGEI-Guide, at 40 (with further references); Communication from the Commission on the application of the EU State Aid rules to compensation granted for the provision of SGEI (2011 SGEI Communication), OJ 2012 C 8/4, para 52.

³⁴ Martin Burgi, *Die Handlungsformkategorie des Betrauungsakts im EU-Beihilferecht*, EuZW 90, 94 (2017).

³⁵ Equally, JOSE LUIS BUENDIA SIERRA, EXCLUSIVE RIGHTS AND STATE MONOPOLIES UNDER EC LAW 285 (1999); Walter Frenz, *Dienste von allgemeinem wirtschaftlichem Interesse - Neuerungen durch Art 16 EG*, EuR 901, 907 (2000); JOHANN-CHRISTIAN PIELOW, GRUNDSTRUKTUREN ÖFFENTLICHER VERSORGUNG 85 (2001).

³⁶ 2011 SGEI Decision, recital 14.

³⁷ Case C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco*, ECLI:EU:C:2017:999, para 56.

³⁸ See thereto Case C-265/08 *Federutility*, ECLI:EU:C:2010:205, and Case C-121/15 *ANODE*, ECLI:EU:C:2016:637.

³⁹ 2011 SGEI Framework, para 13. See also 2013 SGEI-Guide, 26 (answer to question 11).

⁴⁰ See also Case T-454/13, *SNCM v Commission*, ECLI:EU:T:2017:134, para 125; Case C-205/99, *Analir*, ECLI:EU:C:2001:107, para 34 (existence of a real public service need linked to a shortage of private initiative).

In sum, despite the allegedly wide discretion of the Member States to identify, provide, commission and organize such services, it is the EU and its institutions that ultimately determine what constitutes an SGEI and what does not, also outside harmonized sectors. The EU determines which of the activities that are generally subject to competition may qualify for a derogation based on Article 106 (2) TFEU. This is not alarming in itself, but it illustrates a shift in the balancing of interests and control of SGEI in favour of the EU that should not be overlooked.

III. A Customized and Limited Derogation for SGEI

While SGEI as economic activities enter the scope of application of EU competition law through the front door, Article 106 (2) TFEU provides a back door out. To be specific, Article 106 (2) TFEU allows a derogation from competition rules (and other provisions of EU primary and secondary⁴¹ law) for entities entrusted with the operation of SGEI, if the application of these rules would 'obstruct the performance [...] of the particular tasks assigned to them' and the development of trade is not 'affected to such an extent as would be contrary to the interests of the Union'.⁴²

In the following sections, this derogation is examined more closely. After explaining the understanding of this rule as a 'balancing test' (see III.A *infra*), its application in the presence and absence of secondary and soft law is contrasted (see III.B *infra*). It is argued that Article 106 (2) TFEU only allows a customized and limited derogation that is increasingly shaped by secondary and soft law and complements the general 'compatibility test' performed to identify an economic activity (see II.A.3 *supra*).

A. From a Narrowly Conceived Exception to a Balancing of Interests

Formerly neglected, Article 106 (2) TFEU gained much importance as a derogation provision in the context of the liberalization and privatization of public undertakings in the utility markets in the 1980s and 1990s. Today it is the only primary law provision on SGEI that is directly relied on by the CJEU on a regular basis. Prior to 1993, the CJEU used this provision to strengthen competition and applied Article 106 (2) TFEU in a very restrictive manner, in so far as it required the fulfilment of the particular public service task to be *incompatible* with competition rules.⁴³ In the case *Corbeau* however, it abandoned this approach. It no longer gives priority to undistorted competition over SGEI by limiting the chances of a derogation as much as possible,⁴⁴ but stipulates that a derogation

Similarly, as regards an existing 'market failure' as a precondition for an SGEI: WOLF SAUTER, PUBLIC SERVICES IN EU LAW 153 (2014).

⁴¹ The General Court appears to approve of such an interpretation in Case T-128/98 *Aéroports de Paris v Commission*, ECLI:EU:T:2000:290, para 228. Likewise, Alexis Komorowski, *Der allgemeine Daseinsvorsorgevorbehalt des Art. 106 Abs. 2 AEUV*, EuR 310, 324 (2015).

⁴² Many details regarding the impact of various financing models for SGEI on competition are provided by a recent study (2016) prepared by Ecorys for the Commission, available at <http://ec.europa.eu/competition/publications/reports/kd021641enn.pdf> (last visited Feb. 15, 2019).

⁴³ See for example Case C-41/90 *Höfner*, ECLI:EU:C:1991:161, para 24; Case 155/73 *Sacchi*, ECLI:EU:C:1974:40, para 15; Case C-260/89 *ERT*, ECLI:EU:C:1991:254, para 33; Case 41/83 *Italy v Commission*, ECLI:EU:C:1985:120, para 33 (emphasis added). For further case law, see BUENDIA SIERRA, *supra* note 35, at 305 – 316.

⁴⁴ Equally Tony Prosser, *Competition Law and Public Services: From Single Market to Citizenship Rights?*, 11 EPL 543, 551 (2005).

may be justified if the measure in question is *necessary* in order for the undertaking to fulfil its duties *under economically acceptable conditions*.⁴⁵

This (much more) generous interpretation of Article 106 (2) TFEU emphasizes the unique position of SGEI and makes the actual and proper provision of SGEI the primary condition for a derogation from competition law.⁴⁶ What counts is whether the particular public service obligation of the undertaking would be endangered without the respective measure(s). A negative financial balance or threat to the economic survival of the undertaking are not required. Actually, even a mere potential legal or factual (i.e. economic) obstruction may allow for a derogation.⁴⁷ Furthermore, the CJEU permits the Member States to grant exclusive rights to undertakings in economically profitable areas if this enables cross-subsidizing in other areas where public service obligations have to be satisfied, and thus inhibits cherry-picking of competitors.⁴⁸ However, a derogation with regard to activities, which can be separated from SGEI and which do not endanger the balance between profitable services and SGEI, cannot be justified.⁴⁹

In sum, *Corbeau* and subsequent cases are based on the assumption that the provision of SGEI cannot be reduced to being an obstacle to competition, but rather represents a value in itself. Article 106 (2) TFEU is not used as an exemption rule *strictu sensu* (anymore), but is rather applied as a balancing provision for the welfare (and economic) interests of the Member States and the EU regarding the operation of SGEI on the one hand and the establishment and functioning of the internal market on the other hand.⁵⁰ This interpretation is much more in line with the original purpose of Article 106 (2) TFEU as a compromise between the more public service-oriented and the more market-oriented systems of the Member States.⁵¹ It is also supported by the 'new' legal context of SGEI, namely Article 14 TFEU, the SGI-protocol and Article 36 CFR, which the CJEU now explicitly takes into account when interpreting Article 106 (2) TFEU.⁵² Finally, the interpretation of Article 106 (2) TFEU as a balancing rule together with the reference to a 'social market economy' that was introduced by the Treaty of Lisbon shows that (undistorted) competition should not be seen as an overarching objective of EU law, but rather as a tool that is used to enhance the functioning of the market, including its more welfare oriented aspects.

⁴⁵ Case C-320/91 *Corbeau*, ECLI:EU:C:1993:198, para 16; recently Case C-437/09 *AG2R*, ECLI:EU:C:2011:112, para 76 (emphasis added).

⁴⁶ Cf Tarjei Bekkedal, *Article 106 TFEU is Dead. Long Live Article 106 TFEU!*, in DEVELOPMENTS OF SERVICES OF GENERAL INTEREST 61, 100-102 (Erika Szyszczak et al. eds., 2011).

⁴⁷ Note the use of subjunctive, e.g. in Case C-437/09 *AG2R*, ECLI:EU:C:2011:112, para 80; Case C-67/96 *Albany*, ECLI:EU:C:1999:430, para 111.

⁴⁸ For example, Case C-475/99 *Ambulanz Glöckner*, ECLI:EU:C:2001:577, para 65.

⁴⁹ Case C-320/91 *Corbeau*, ECLI:EU:C:1993:198, para 19; Case T-260/94 *Air Inter*, ECLI:EU:T:1997:89; equally *Frenz*, *supra* note 35, at 911 et seq.

⁵⁰ See Tony Prosser, *The Limits of Competition Law*, 174 et seq (2005); ERIKA SZYSZCZAK, THE REGULATION OF THE STATE IN COMPETITIVE MARKETS IN THE EU, 139 et seq (2007). For a detailed account of case law on Article 106 (2) TFEU until 1992: FABIAN LÖWENBERG, SERVICE PUBLIC UND ÖFFENTLICHE DIENSTLEISTUNGEN IN EUROPA, 163 et seq (2001).

⁵¹ Similarly *Komorowski*, *supra* note 41, at 311.

⁵² See, for example, Case C-121/15 *ANODE*, ECLI:EU:C:2016:637, para 40.

B. Balancing in Context

1. Balancing in the Absence of Secondary Legislation and Soft Law

Despite this promising development in favour of a 'balancing test', its structure and elements as well as the required intensity of control are still subject to some discussion. Case law and corresponding analyses vary to a considerable degree.⁵³ Especially in situations, in which the CJEU cannot resort to secondary or soft law, the balancing and the elements that are taken into consideration seem to differ from case to case. Only a general 'necessity test' is applied on a regular basis. In this regard, the CJEU investigates whether a derogation from the Treaty rules is necessary for the provision of an SGEI. For example, in the case *AG2R* the CJEU found that an undertaking, which is obliged to offer cover to the employees of all undertakings in the French traditional bakery sector, would suffer from an increasing share of 'bad risks' resulting in a rise of costs which would consequently lead to lower quality services if it were not granted the exclusive right (i.e. statutory monopoly) to manage that scheme.⁵⁴ The annulment of such a right 'could have the result of making it impossible for the body concerned to accomplish the tasks of general economic interest [...] under economically acceptable conditions'.⁵⁵ Based on that assessment the CJEU considered a derogation from the rules on competition as permissible without referring to any further requirements. In contrast, the CJEU explains in the case *OTO* that Article 106 (2) TFEU – if it were indeed applicable to a system of compulsory training for chartered accountants whose SGEI nature the court seriously doubted – could not be applied in the situation at hand, *inter alia* because the restrictions on competition go 'beyond what is necessary'⁵⁶, thereby indicating a test of 'strict necessity'. An explicit and detailed assessment of proportionality *stricto sensu*, however, has not been applied in this context by the ECJ so far; though, the General Court, (at least) refers to the requirements of necessity *and* proportionality that can be derived from Article 86 (2) EC (= Article 106 (2) TFEU) in the *BUPA* case.⁵⁷

Explicit references to a least restrictive measure requirement can be found in the case *Commission v Italian Republic*⁵⁸, where the Commission had to prove the existence of a least restrictive measure, as well as the cases *Dusseldorp*⁵⁹ and *Sydhavnens*⁶⁰, where the Member States had to

⁵³ For example, the 'balancing test' has been described as a test of (strict) necessity (NINA NOLTE, DEREGULIERUNG VON MONOPOLEN UND DIENSTLEISTUNGEN VON ALLGEMEINEM WIRTSCHAFTLICHEN INTERESSE 90 (2004); SVEN SIMON, LIBERALISIERUNG VON DIENSTLEISTUNGEN DER DASEINSVORSORGE IM WTO- UND EU-RECHT 304 (2009)), of suitability (Julian Baquero Cruz, *Beyond Competition: Services of General Interest and European Community Law*, in EU LAW AND THE WELFARE STATE, 169, 195 (Gráinne de Búrca ed., 2005)) and of proportionality (BUENDIA SIERRA, *supra* note 35, at 300 et seq; Wernhard Moeschel, *Service public und europäischer Binnenmarkt*, 58 *JuristenZeitung* 1021, 1026 (2003); Gareth Davies, *What Does Article 86 Actually Do?*, in THE CHANGING LEGAL FRAMEWORK FOR SERVICES OF GENERAL INTEREST IN EUROPE, 51, 66 (Markus Krajewski, Ulla Neergaard and Johan Van de Gronden ed., 2009); *Bekkedal*, *supra* note 46, at 68 et seq; MARKUS KRAJEWSKI, GRUNDSTRUKTUREN DES RECHTS ÖFFENTLICHER DIENSTLEISTUNGEN 426 (2011)).

⁵⁴ Case C-437/09 *AG2R*, ECLI:EU:C:2011:112, para 77.

⁵⁵ *Id.*, at para 80.

⁵⁶ Case C-1/12 *Ordem dos Técnicos Oficiais de Contas*, ECLI:EU:C:2013:127, para 107.

⁵⁷ Case T-289/03 *BUPA*, ECLI:EU:T:2008:29, para 131 et seq.

⁵⁸ Case C-157/94 *Commission v Netherlands*, ECLI:EU:C:1997:499, para 58; Case C-158/94 *Commission v Italy*, ECLI:EU:C:1997:500, para 54; Case C-159/94 *Commission v France*, ECLI:EU:C:1997:501, para 101 et seq.

⁵⁹ Case C-203/96 *Dusseldorp*, ECLI:EU:C:1998:316, para 67.

⁶⁰ Case C-209/98 *Sydhavnens*, ECLI:EU:C:2000:279, para 80.

show that no other measures with a less restrictive effect existed. Generally, however, in particular regarding its most recent case law, the CJEU often only hints at a least restrictive measure requirement, while refraining from explicitly mentioning it.⁶¹ Moreover, to the author's knowledge, the suitability of a measure has not been questioned by the CJEU in such a context. Similarly, whether a derogation has an effect on the development of trade that is contrary to the interests of the EU is hardly ever mentioned as a separate condition and even more rarely assessed.

2. Balancing in Consideration of Secondary and Soft Law

Contrary to the inconsistent and heterogenous application of the balancing test in the absence of secondary and soft law, the very same test is much more consistent, refined and concise in the context of soft law, horizontal and vertical (sectoral) secondary legislation which contain more detailed rules on the relation of free competition and the provision of SGEI. Instead of a rather vague 'necessity test' that was the rule after *Corbeau* (and still is in areas that have not been harmonized), it seems that increasing regulation also led to a balancing that allows (only) very specific and limited exemptions ('customized derogations') pursuant to Article 106 (2) TFEU. In this context, the 'balancing test' turns out to require an assessment of proportionality *stricto sensu*. The application of the 'balancing test' in the context of secondary and soft law can be illustrated by reference to (a) the case law of the CJEU regarding the EU Gas Directives 2009/73 and 2003/55 and (b) the so-called '*Almunia* package' which provides general rules and guidelines for the application of the balancing test in State aid law.

(a) In both cases, *Federutility* and *ANODE*, the CJEU had to assess 'fixed prices' for the supply of natural gas against the background of Article 106 (2) TFEU and Article 3 (2) of Directive 2003/55 and 2009/73 respectively. In *Federutility*, the AEEG defined 'reference prices' which the undertakings active on the natural gas market in Italy were required to state in their commercial offers to part of their clients. In *ANODE*, a system of regulated tariffs for the sale of natural gas imposed by national legislation in France was under scrutiny. Rightly, the CJEU asserted in both cases that the public measures were measures which by their very nature constitute obstacles to the achievement of an operational and competitive internal market in gas.⁶² However, the Directive (specifying Article 106 (2) TFEU) permits intervention in favour of SGEI, if *inter alia* the principle of proportionality is complied with. The measure in question must be *suitable* (appropriate) and *necessary* for securing the objective of general economic interest which it pursues,⁶³ as well as be less of a hindrance to competition than other appropriate measures.⁶⁴ At the same time, it is also limited in scope to what is *strictly necessary*. The CJEU provides details regarding the nature of a proportionate (threefold) limitation to ensure that there is no excessive effect (proportionality *stricto sensu*). First, the duration of the measure and thus the corresponding derogation from competition rules must be limited. While the measure *per se* must not be tied to a definite expiry

⁶¹ See for example Case C-340/99 *TNT Traco*, ECLI:EU:C:2001:281, para 52; Case C-295/05 *Asociación Nacional de Empresas Forestales*, ECLI:EU:C:2007:227, para 78; Case C-543/08 *Commission v Portugal*, ECLI:EU:C:2010:669, para 93.

⁶² Case C-265/08 *Federutility*, ECLI:EU:C:2010:205, para 35; Case C-121/15 *ANODE*, ECLI:EU:C:2016:637, para 30 et seq.

⁶³ Case C-121/15 *ANODE*, ECLI:EU:C:2016:637, para 55 et seq. and 60 et seq. See also the Case C-242/10 *Enel Produzione*, ECLI:EU:C:2011:861, para 55.

⁶⁴ Case C-121/15 *ANODE*, ECLI:EU:C:2016:637, para 59.

date, at least a periodic re-examination, at close intervals, of the need to intervene and also the terms and level of intervention is to be scheduled.⁶⁵ Second, the measure must be limited *rationae personae*.⁶⁶ It must be assessed in how far a measure benefits different kinds of customers in the same way, e.g. consumers and undertakings, and whether it is really necessary that all these people are beneficiaries to achieve the envisaged objective. Hence, one has to take into account that the situation of large companies as final customers is (usually) different from that of small households, in so far as they have different needs and negotiation powers and are also dealt with differently in secondary law. Third, the scope of the intervention *ratione materiae* has to be checked. In essence, the measure must be limited to that price component or aspect, which requires intervention instead of broadly regulating all aspects.⁶⁷ As can be seen, the CJEU applies a full and detailed proportionality test in the context of sectoral legislation.

(b) Public service compensations that do not comply with the *Altmark* criteria but meet the general conditions for the applicability of Article 107 TFEU⁶⁸, constitute State aid and are subject to the respective rules.⁶⁹ Article 106 (2) TFEU allows for a derogation from the prohibition of State aid if the performance of the task(s) in question would be obstructed without State aid. In order to assist with this assessment, the Commission took legislative action in the form of a 2011 SGEI Decision and a 2011 SGEI Framework as part of the so-called '*Almunia* package'.⁷⁰ Both, the 2011 SGEI Decision and Framework, specify the 'meaning and extent of the exception pursuant to Article 106 (2) TFEU and set out rules intended to enable effective monitoring of the fulfilment of the criteria set out in that provision'⁷¹ with regard to State aid. While the Decision applies to certain types of public service compensations exempting them from the requirement of prior notification under Article 108 (3) TFEU, the Framework contains rules for the remaining public service obligations, which have to be notified to the Commission. In view of the competence of the Commission to assess the compatibility of a State measure in the context of Article 106 (2) TFEU (or, at least, to control the assessment of the Member States within the scope of the 2011 SGEI Decision) and the detailed nature of the 2011 SGEI Decision and Framework, it is no surprise that the balancing test is regularly performed by reference to the conditions stipulated therein. In other words, whenever

⁶⁵ Case C-265/08 *Federutility*, ECLI:EU:C:2010:205, para 35; Case C-121/15 *ANODE*, ECLI:EU:C:2016:637, para 62.

⁶⁶ Case C-121/15 *ANODE*, ECLI:EU:C:2016:637, para 67 et seq.

⁶⁷ *Id.* at para 64 et seq.

⁶⁸ (1) Any aid (2) granted through State resources in any form whatsoever if it (3) distorts or threatens to distort competition (4) by favouring certain undertakings or the production of certain goods (5) in so far as it affects trade between Member States. For details see Case C-142/87 *Belgium v Commission*, ECLI:EU:C:1990:125, para 25 et seq; Case C-482/99 *France v Commission – Stardust Marine*, ECLI:EU:C:2002:294, para 32 et seq; Case C-280/00 *Altmark Trans*, ECLI:EU:C:2003:415, para 74 et seq. See also the Commission Notice on the notion of State aid, OJ 2016 C 262/1.

⁶⁹ For example Case T-106/95 *FFSA v Commission*, ECLI:EU:T:1997:23, para 165; Case T-46/97 *SIC v Commission*, ECLI:EU:T:2000:123, para 83.

⁷⁰ 2011 SGEI Decision: Commission Decision 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 SGEI, OJ 2012 L 7/3; 2011 SGEI Framework: Communication from the Commission, EU framework for State aid in the form of public service compensation, OJ 2012 C 8/15; and 2011 SGEI Communication: Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of SGEI, OJ 2012 C 8/4; as well as a De minimis Regulation: Commission Regulation on the application of Articles 107 and 108 TFEU to de minimis aid granted to undertakings providing SGEI, OJ 2012 L 114/8.

⁷¹ 2011 Commission Decision, recital 7. See also 2011 SGEI Framework, para 7.

the conditions set out in these instruments are met, a derogation is granted and vice versa. Despite its non-binding soft law nature, the 2011 SGEI Framework is applied by the Commission and the CJEU in the same way as the Decision.

Interestingly, neither of the instruments lays down rules regarding the *necessity* of State aid or explains to what extent the application of the rules on competition would have to obstruct the performance of SGEI. In case law, the 'necessity requirement' is referred to occasionally, but generally not assessed at all.⁷² Evidently, with regard to State aid, the fulfilment of this condition is not questioned. Instead, the Commission focuses on defining criteria to ensure the proportionality *stricto sensu* and the compliance with the second sentence of Article 106 (2) TFEU (i.e. prohibition to affect the development of trade to such an extent as would be contrary to the interests of the EU). In a nutshell, proportionality is mainly linked with the avoidance of overcompensation. In particular, the compensation need not exceed 'what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit'.⁷³ In essence, this condition is a more detailed version of the third *Altmark* criterion⁷⁴ – although, the second to fourth *Altmark* criteria may not be directly relied on in the context of Article 106 (2) TFEU given that they are used to *disqualify* a compensation as State aid⁷⁵. By making sure that the undertaking in question receives only as much aid as it needs to discharge the public service obligation, the Commission apparently intends to strike a strictly proportionate balance. An effect on the development of trade that is contrary to the interest of the EU is explicitly addressed and mainly associated with a lack of compliance with Directive 2006/111/EC and EU public procurement rules.⁷⁶

In addition to the findings regarding the construction of the balancing test, two further observations can be made: First, the rules contained in the SGEI Framework are much stricter and more detailed than in the Decision. The submission to the notification procedure of the services referred to therein also ensures that the Commission may check and evaluate any State aid of economic significance, i.e. any public service compensation surpassing 15 million Euro with the exception of certain privileged areas, such as medical care, health and long-term care, childcare or social housing. At the same time, State aid to SGEI covered by the 2011 SGEI Decision gives the Member States considerable leeway due to the absence of an obligatory notification and less detailed rules regarding compatibility.⁷⁷ Second, the conditions set out in the 2011 SGEI Decision and Framework do not only ensure a proportionate balancing, but also foster certain ideas of how SGEI should be provided, organized and commissioned. For example, according to para 19 of the 2011 SGEI Framework, aid will be considered compatible *only* where the responsible authority complies with the EU public procurement rules, thus making the application of these rules a

⁷² Case C-660/15 P *Viasat Broadcasting UK v Commission*, ECLI:EU:C:2017:178, para 34; Case C-66/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission*, ECLI:EU:C:2017:999, para 55.

⁷³ 2011 Commission Decision, Article 5 para 1 with further details; 2011 SGEI Framework, para 21.

⁷⁴ Equally Case T-289/03 *BUPA*, ECLI:EU:T:2008:29, para 224.

⁷⁵ Case C-660/15 P *Viasat Broadcasting UK v Commission*, ECLI:EU:C:2017:178, para 33; Case C-66/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission*, ECLI:EU:C:2017:999, para 56.

⁷⁶ 2011 SGEI Framework para 18, 19 and 51 et seq.

⁷⁷ See for example the Austrian report under Article 9 (a) to (d) of the SGEI decision, which include the entrustment of obligations regarding the participation of a regional branch of the Austrian Red Cross in disaster prevention and relief as well as the operation of a show garden by Die Garten Tulln GmbH, available at http://ec.europa.eu/competition/state_aid/public_services/2015_2016/austria_en.pdf (last visited Feb. 15, 2019).

precondition, regardless of whether they are actually suitable in a particular situation.⁷⁸ Similarly, for situations in which the Member States entrust an undertaking with a public service obligation without a competitive selection procedure and very similar services are already provided or will soon be provided without such an obligation, the Commission reserves the right to require amendments if it can show that the same SGEI could be provided in a less distortive manner and at lower costs.⁷⁹ In contrast, in 2008 the General Court ruled that a competitive tendering procedure for the award of an SGEI is not a condition for the application of what is now Article 106 (2) TFEU.⁸⁰ Furthermore, the Commission puts increasing emphasis on the efficiency of SGEI provision and the promotion of a strict and transparent compensation mechanism, especially in the Framework⁸¹, but to a lesser degree also in the Decision⁸².

C. Common Elements and Variations

As these examples show, the respective configuration (and intensity) of the 'balancing test' seems to depend to a considerable degree on whether secondary legislation or soft law exists.⁸³ In the absence of such rules, the CJEU often limits its balancing test to a mere 'necessity test' without (explicitly) questioning the suitability and/or proportionality *stricto sensu* of a measure. Only occasionally the necessity test is given a rather broad scope, thus (possibly) encompassing a test of proportionality *stricto sensu*. In contrast, if secondary or soft law can be used for reference, a much more concise and detailed test is applied that tolerates only customized and limited derogations pursuant to Article 106 (2) TFEU. In some cases, this dichotomy can be explained by the lack of reference points in the absence of detailed criteria in soft or secondary law, in others it is likely that suitability and proportionality *stricto sensu* are not explicitly referred to because these elements have not been contested. Notwithstanding the reasons, however, the structure of the balancing test should be the same whether secondary or soft law exists or not.

The balancing test as it is applied in consideration of secondary and soft law should be taken as standard also in the absence of secondary and soft law. The balancing test stipulated by Article 106 (2) TFEU thus represents a (full) proportionality test which allows a limited and customized derogation only – instead of a one-sided dismissal (as assumed before *Corbeau*) and an exuberant consideration of SG(E)I (as sometimes supported after *Corbeau*). Thus, a measure which requires a derogation must be suitable to attain its objective of general economic interest, necessary to achieve that objective and be the least restrictive if other measures are equally suitable, as well as proportionate *stricto sensu* (i.e. devoid of an excessive effect; 'strictly necessary'). This interpretation is compatible with the wording of Article 106 (2) TFEU which stipulates that the Treaty rules shall apply *in so far* as their application does not obstruct the performance of the public service obligations. It is also in accordance with its objective, namely 'to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of [social,] economic or fiscal policy with the Union's interest in ensuring compliance

⁷⁸ Critically Natalia Fiedziuk, *Putting Services of General Economic Interest Up For Tender: Reflections on Applicable EU Rules*, 50 CMLR 87, 97 (2013).

⁷⁹ 2011 SGEI Framework, para 56.

⁸⁰ Case T-442/03 *SIC*, ECLI:EU:T:2008:228.

⁸¹ See the 'efficiency incentives', para 39 et seq.

⁸² Article 5 (6) 2011 SGEI Decision.

⁸³ Similarly, SAUTER, *supra* note 40, at 227. Critically, Baquero Cruz, *supra* note 53, at 197.

with the rules on competition and the preservation of the unity of the common market'.⁸⁴ While the configuration and standard of this balancing test shall be the same regardless of relevant secondary or soft law, its outcome may depend on whether specific rules exist which predefine the required balancing, i.e. in the absence of secondary law, several suitable and proportionate measures may be acceptable. Also, the intensity and details of the limits may vary depending on the situation in question. For example, in comparison with the criteria set forth in *Federutility* and *ANODE*, the time limits applied by the SGEI decision and framework regarding State aid are more generous and linked to the public service obligation instead of its compensation (e.g. any entrustment not exceeding ten years, in case of a significant investment also for more than ten years, falls into the scope of the Decision).

In view of its elements and preconditions, Article 106 (2) TFEU – understood as a customized and limited derogation – is also very similar to the ‘mandatory requirements’ as defences to indistinctly applicable rules in violation of the fundamental freedoms.⁸⁵ Both allow derogations from the Treaties, however, Article 106 (2) TFEU is not limited to the law on free movement and – contrary to the ‘objectively justifiable purposes’ of the ‘mandatory requirements’ – may also encompass economic objectives of general interest.

To interpret the balancing test pursuant to Article 106 (2) TFEU as a (full) proportionality test tolerating only a limited and customized derogation also fits the general system. Whereas the requirement of an ‘economic activity’ excludes services from the scope of competition law that are generally incompatible with it, Article 106 (2) TFEU must not grant such a general exemption; otherwise it would be devoid of any particular meaning.⁸⁶ In conformity with the system, Article 106 (2) TFEU may only grant a limited derogation *customized* to a particular situation. As such, a customized balancing test complements the ‘general compatibility test’ as it is performed to identify an economic activity. It allows a limited derogation only. While it is accepted that under certain circumstances a derogation from market law to provide economically viable SGEI may be required, such a derogation is limited in time and/or substance (scope) to what is (strictly) needed and still proportionate. In so far, the CJEU holds on to the idea of a liberalized market that will eventually provide such services under free market conditions, even if it requires some regulative restraints and derogations *at the moment* or *to a limited extent*. Thus, it is unsurprising that this customized balancing is particularly visible in markets that are intended to be fully liberalized, e.g. electronic communications and energy market. Consequently, derogations are largely tailored to the public service obligation in question. It is not the nature of an SGEI in general that is balanced with market interests in the context of Article 106 (2) TFEU, but their specific arrangement.

IV. Conclusion

Originally, Article 106 (2) TFEU represented a compromise between the more welfare-oriented interests of some Member States and the market-focused interests of other Member States and the EU. Today, Article 106 (2) TFEU remains crucial to the balancing of interests in the context of

⁸⁴ Most recently C-660/15 P *Viasat Broadcasting UK v Commission*, ECLI:EU:C:2017:178, para 31; Case C-121/15 *ANODE*, ECLI:EU:C:2016:637, para 40; Case C-265/08 *Federutility*, ECLI:EU:C:2010:205, para 28; equally Case C-67/96 *Albany*, ECLI:EU:C:1999:430, para 103 et seq.

⁸⁵ Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon'), ECLI:EU:C:1979:42.

⁸⁶ As regards the close connection between the non-applicability of competition (and market) rules due to the lack of an economic activity and the limited derogation that may be granted to SGEI pursuant to Article 106 (2) TFEU, see also above II.A.3.

public services. It is applied and construed by the CJEU and the Commission in a way that internalizes the conflicting interests as much as possible.

As regards the balancing of conflicting interests itself, this paper exposes two shifts in balance: On the one hand, with the assistance of the CJEU and the Commission, the EU emerged as the key player in the law of SGEI. It no longer cedes control of SGEI to its Member States, but confidently shapes the rules and principles that regulate this politically sensitive area of law. Interestingly, in the context of Article 106 (2) TFEU, this shift of balance in favour of EU-shaped public services results from a broad scope of application and the possibility to control what Member States declare as SGEI. Even though the CJEU and Commission nominally decide neither on the amount or nature of state support, nor on the provision of SGEI, they shape the provision, commission and organization of such services to a considerable extent as controlling instances.⁸⁷

On the other hand, the application of Article 106 (2) TFEU shows an EU preference for a market-oriented approach, however without entailing a strict primacy of market values or interests.⁸⁸ Despite the unwavering preference of the EU for competition – whether it is competition in the market or competition for the market – as an instrument to ensure the well-being of its citizens,⁸⁹ the possibility of a ‘customized derogation’ from competition law also recognises the intrinsic value of a proper functioning of SGI. Apparently – in the context of Article 106 (2) TFEU – the EU found a way to reconcile an ‘open and competitive internal market’ and the development of ‘high quality, accessible and affordable services of general interest’ as envisaged by the 2004 White Paper.⁹⁰

In total, it seems as if the CJEU and the Commission have shaped a workable system in the context of Article 106 (2) TFEU that reconciles market and welfare interests in favour of functioning public services – as long as its premises and limits are respected. These limits along with the application of Article 106 (2) TFEU in consideration of its different elements and their specific role in this system will certainly pose further challenges for the CJEU and the Commission as the EU law on SGEI is developed and expanded. Increasing control of the EU as the key player in the law of SGEI comes with the necessity to use this power responsibly. In particular, regional and cultural particularities must be given due consideration by the CJEU and the Commission. Also, it is crucial to ensure that increasingly detailed specifications for an SGEI derogation are not ultimately misused in order to promote other EU principles and instruments, such as efficiency and public procurement, which are not objectionable as such⁹¹, but might in the context of SGEI ultimately forestall a high level of quality of such services.⁹²

⁸⁷ Malcolm Ross, *The Europeanization of Public Services Supervision: Harnessing Competition and Citizenship?*, 23 Yearbook of European Law 303, 304 (2004).

⁸⁸ Equally, Stéphane Rodrigues, *Les services publics et le traité d'Amsterdam*, Revue du marché commun et de l'Union européenne 37, 38 (1998); Frenz, *supra* note 35, at 917; Baquero Cruz, *supra* note 53, at 211.

⁸⁹ Hence, the EU approach to SGEI might be summarized as ‘public service through competition’ (Christian König, *Daseinsvorsorge durch Wettbewerb!*, EuZW 481, 481 (2001).

⁹⁰ Commission, White Paper on services of general interest, COM (2004) 374, 7. Already in 2000, the Commission stated that SGEI, the internal market and competition policy complemented each other in the pursuit of the fundamental objectives of the treaties (COM (2000) 580 para 3).

⁹¹ Cf the explanation given by Commissioner *Almunia*, who refers to the necessity to take into account the decreasing public budgets in the Member State as a consequence of the financial crisis, SPEECH/11/618, SGEI reform: Presenting the draft legislation, 30.09.2011.

⁹² In the context of the *Altmark* criteria, *Renzulli* even describes the principle of efficiency as ‘the price and [...] key to exempting public service compensatory measures from classification as a State aid’, Annalisa Renzulli, *Services of General Economic Interest: The Post-Altmark Scenario*, 14 EPL 399, 399 (2008). See also Erika Szyszczak, *Financing Services of General Economic Interest*, 67 MLR 982, 990-992 (2004).

Furthermore, the close connection between the non-applicability of competition (and market) rules due to the lack of an economic activity and the 'customized derogation' that may be granted to SGEI is also an important aspect to keep in mind. The system only works in a way that is beneficial to functioning SGEI if the respective functions of its two main components (i.e. 'general compatibility test' and 'customized derogation') are respected and clearly differentiated. Although the criteria to exclude non-economic activities from the scope of competition law altogether (i.e. 'general compatibility test') and to grant an exemption pursuant to Article 106 (2) TFEU (i.e. 'customized derogation') are based on the same assumption (namely that such services may not be provided satisfactorily under normal market conditions), they cannot be congruent, because otherwise one and the same activity would be included into the scope of competition law and then exempted by Article 106 (2) TFEU for the very same reason. Accordingly, SGI, which should not be subject to competition and the general market rules in the first place, must not be 'saved' by way of exemption pursuant to Article 106 (2) TFEU. However, the very broad meaning given to the concept of an undertaking risks to allow just that. The CJEU must therefore be careful to distinguish between non-economic activities that are generally incompatible with a competitive market and economic activities that are generally compatible with a competitive market but require a limited and customized derogation. Given the alleged success of the market model for utilities and the dwindling public budgets, this distinction might gain even more importance in the future. The categorization of activities in fields such as health care, education⁹³ and research will show whether the CJEU is willing to respect the limits of competition law (and thus its own competence) or misuses the balancing test of Article 106 (2) TFEU to grant a 'customized derogation' for activities that are – as neSGI – generally incompatible with competition (and market) rules. Further research that compares and contrasts the criteria of the 'general compatibility test' and the prerequisites for a 'customized derogation' is much needed in this regard.

⁹³ Although the Commission also refers to education and research activities when elaborating on the notion of undertaking and economic activity (see 2011 SGEI Communication, para 26), the cited case law (i.e. Case C-318/05, *Commission v Germany*, ECLI:EU:C:2007:495, para 71) deals only with the infringement of free movement and should thus not be applied one to one in the context of competition law. Cf Case C-74/16 *Congregación de Escuelas Pías Provincia Betania*, ECLI:EU:C:2017:496 (education in the context of competition rules without reference to an SGEI however).