

**EU's SG(E)I RULING AND IMPLEMENTATION**  
**SGEI: THE CASUS OF SOCIAL HOUSING IN THE**  
**NETHERLANDS**

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Sgei: the casus of social housing in the Netherlands

Discussion Paper 2012-09

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## 1. INTRODUCTION: SOCIAL SERVICES<sup>1</sup>

Social services entail a broad range of activities, from the large network industries such as energy, telecommunications, transport, audiovisual broadcasting and postal services, to education, water supply, waste management and health and go under the heading of services of general interest (SGI). Services of general interest (SGI) distinguish from ordinary economic services by the presence of public interests in quality, availability and affordability. Under EU law social services of general interest (SSGI) are not a legally distinct category within services of general interest. The term SSGI is used only in policy documents of the Commission and not in primary and secondary EU law. Treaty provisions do not mention SSGI and neither do EU harmonization measures such as the Services Directive pay attention to these services.

The situation of social services has been the subject of discussion in recent years. Social services can be of an economic or non-economic nature depending on the activity under consideration. Although they are not defined, the 2006 Communication identified two broad types of social services:

1) statutory and complementary social security schemes, organized in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability

2) other essential services “provided directly to the person”, such as social assistance services, employment and training services, social housing or long-term care.

These services are typically organized at a local level and are heavily dependent on public funding. Despite differences between EU countries, according to the Commission a general trend can be observed as regards the way in which modernization is taking place. Usually modernization is accompanied by decentralization, outsourcing and public-private partnerships. This is also the case in the Netherlands.

In general, the case law of the European Court of Justice (EJC) indicates that the EC Treaty gives Member States the freedom to define missions of general interest and to establish the organisational principles of the services intended to accomplish them. However, this freedom must be exercised transparently and without misusing the notion

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<sup>1</sup> Closing date 1 february 2012.

of general interest, and the Member States must take account Community law when fixing the arrangements for implementing the objectives and principles they have laid down. Moreover, when it comes to services of an economic nature, the compatibility of their organisational arrangements with other areas of Community law must be ensured (in particular freedom to provide services and freedom of establishment, and competition law). In the field of competition law, the ECJ has established that any activity consisting of supplying goods and services in a given market by an undertaking constitutes an economic activity, regardless of the legal status of the undertaking and the way in which it is financed. With regard to the freedom to provide services and freedom of establishment, the ECJ has ruled that services provided generally for payment must be considered as economic activities within the meaning of the Treaty. It therefore follows that almost all services offered in the social field can be considered “economic activities” within the meaning of Articles 43 and 49 of the EC Treaty. If a (social) service of general interest is regarded as economic, it is subject to internal market and competition rules. Hence, European institutions, especially the ECJ and the Commission, have the opportunity to influence the provision of SSGI. Only in case of economic activities the (local) government has to deal with state aid rules.

It is the Commission self which notes that the interpretation of 'economic activity' within (S) and SGI will remain a source of uncertainty. In the words of the Commission: “The public authorities and the operators in the field of social services of general interest perceive the constant evolution of ECJ jurisprudence, in particular for the notion of “economic activity” as a source of uncertainty. Whilst the case law and Community legislation have endeavoured to reduce this uncertainty or clarify its impact, they cannot do away with it completely”.

Social housing is an example of a source whose economic activity has led to great uncertainty. The many cases in which the Commission had to make a decision whether or not state aid is involved speak for themselves:

- N209/2001 Ireland
- N42/2004 Germany
- E 2/2005 The Netherlands
- N798/2006 Sweden

- N358/2009 Hungary

- N642/2009 The Netherlands

- N725/2009 Ireland

In the Netherlands, the decision of the Commission on social housing has led to fierce disputes. This is partly due to the size and scope of the social housing sector in the Netherlands.

In the following, the case of social housing in the Netherlands is to be further investigated. The importance of this case is not only that the decision of the Commission has far-reaching consequences for housing policy in the Netherlands and led to great uncertainty for the various actors who have to carry out its decision but the ruling also potentially has profound implications for many other housing markets in Europe.

The structure of the chapter is organized as follows. In section 2, the case highlights Dutch social housing. The relevant legal framework, typical characteristics of the Dutch social housing market and the effect of the EU ruling on Dutch social housing policy will be elaborated on. In section 3 some conclusions are drawn.

## 2. SOCIAL HOUSING IN THE NETHERLANDS

### 2.1 Introduction

In a letter dated 14 July 2005 on the financing of housing associations in the Netherlands , the European Commission expressed its doubts about whether the financing was compatible with European state aid rules. Despite the fact that this letter only contained a provisional standpoint, the message hit the Dutch social housing world like a bomb. The reason was that, in a preliminary exemption decision for the financing of services of general economic interest (SGEI) from early 2004, Dutch housing associations seemed to have been given considerable freedom to operate.<sup>2</sup> However in line with the provisional standpoint, the final exemption decision announced on 15 July 2009 confirmed the strict requirements the Commission places on this type of

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<sup>2</sup> White paper, 2004, p.13.

financing.<sup>3</sup> The letter of 14 July 2005 was one of the pivotal points in a dispute that started in 2002 and is still on going.

## 2.2 Legal framework

The decision whether an activity is to be considered of general interest lies with the (national or local) government in question. In this realm government has a large discretionary room. In principle governments are entitled to decide for themselves what activities they consider to be of 'public interest', whether or not they will recognize a service as SSGEI as well as to decide how a service is to be implemented.

However, their power is not unlimited: the European Commission (e.g. in case of a state aid notification) and the ECJ (in case of a conflict before the ECJ) can subsequently test whether or not the government has made a "manifest error" in the identification of a (S) SGEI, and whether or not the allocation has been according to the procedural requirements. Only in retrospective does the Commission correct this definition for manifest errors.

In the Decision of 14 July 2005 the Commission reports an obvious problem in the definition of SGEI. The public service definition of the Dutch housing associations is regarded as being too broad. The housing activities of the associations are not restricted to a clearly defined target group of disadvantaged citizens or socially less advantaged groups. According to the Commission, the provision of social housing may qualify as services of general economic interest only if the provision is restricted to a target group of disadvantaged citizens or socially less advantaged groups.

Furthermore, any commercial activities by the housing associations should be carried out on market terms and should not benefit from State aid. There are four aid measures from which Dutch housing associations profit:

- subsidies from the Central Fund for Housing
- guarantees from the Social Housing Guarantee Fund for the housing associations
- the housing associations' exemption from corporation tax (till 2008)
- their right to borrow money from the Dutch Municipal Bank under favourable conditions

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<sup>3</sup> N 642/2009.

The non-transparent division between public service tasks and commercial activities makes it difficult for the Commission to assess whether there is a question of overcompensation. In order to accomplish for the aid of a SGEI to be restricted to compensation, the ECJ has set four cumulative requirements, also known as the Altmark-criteria. In July 2005, the Commission adopted the Altmark package, a Commission Decision (based on Article 86(3) of the EC Treaty) that specifies the conditions under which compensation to companies for the provision of public services is compatible with state aid rules.<sup>4</sup>

With the Altmark arrest the traditional state *aid* approach is replaced by the *compensation* approach. The ECJ held that a financial compensation by the government to an undertaking entrusted with a SGEI is not State aid within the meaning of Article 107, paragraph 1 TEU (ex art. 87), when the financing will be limited to compensation for the costs of an average, well-managed company. In that case there is no advantage for the company vis a vis its competitors, which places the company in a more favourable position in the common market.

The Altmark-criteria are:

1. The beneficiary must be charged with implementing clearly defined public service obligations
2. The parameters for calculating compensation must be established in advance in an objective and transparent way
3. The compensation must not exceed what is needed to cover the costs of providing the service including a proportionate profit
4. If the company is not selected under a public procurement procedure, the level of compensation is set on the basis of an analysis of the costs of an average, well-managed company that is suitably equipped to provide the public service.<sup>5</sup>

On the positive side of the Altmark arrest the compensation for SGEI's no longer has to be notified. However, the government providing compensation must now itself apply the four cumulative criteria in order to comply with the conditions for non-notification, whereas in the traditional state aid approach, after notification, this was done by the Commission. In the case of social housing in the Netherlands the fourth criterium was not met and therefore in *legal* terms the compensation constituted (forbidden) state aid.

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<sup>4</sup> 2005/842/EC . Recently the SGEI package has been renewed as the Altmark package expired in November 2011.

<sup>5</sup> HvJ EG 24 July 2003, case C-280/00, Altmark Trans GmbH and Regierungspräsident Magdeburg t. Nahverkehrsgesellschaft Altmark GmbH, *Jur.* 2003, I-7747.

In the letter of 14 July 2005 the Commission asks the member state the Netherlands to ensure that the activities of housing associations, which profit from state aid, have a direct relationship with socially disadvantaged households. Moreover, any commercial exploitation must take place under market conditions. Furthermore the excessive structural overcapacity of social housing must be prevented. Summarising, the Dutch government must ensure that state aid does not benefit activities that are performed in competition with the market.<sup>6</sup>

The tremendous impact of these requirements on the housing system in the Netherlands can best be explained by a closer examination of the Dutch housing market.

### 2.3 The Dutch housing market and the role of housing associations

Housing markets in Europe differ from country to country. Anglo Saxon countries tend to restrict social housing strictly to the poor, whereas Continental and Scandinavian countries also build for the lower middle class. These international differences in the characteristics and the segmentation of rental markets formed the basis for theoretical research by Kemeny (1995, 2006).

Kemeny's thesis is that whereas in Anglo-Saxon countries the pursuit of a profit-driven private rental market has condemned social housing to a residual role, this is not the case in countries that have adopted a unitary rental housing strategy based on the social market approach. In the unitary market system social housing competes directly with a more regulated, and supported, private rental sector (Kemeny, 1995). The Anglo-Saxon countries have chosen to promote an unhindered profit rental market, which, he argues, inevitably leads to growth in owner occupation and the need for a residual public rental sector (Kemeny, 1995: 18).

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<sup>6</sup> European Commission, Brussels 14 July 2005, subject: Support measure no. E 2/2005 (ex-NN 93/02). see also *Parliamentary Papers II* 2005/06, 29 453, no. 30; *Parliamentary Papers II* 2004/05, 29 846, 29 453, no. 7.

Table 1. Features of dual and unitary rental markets

	Dual rental market	Unitary rental market
Objective of social housing policy	Separate non-profit from market: no direct competition between non-profit and profit rental sector	Integrated rental market, with direct competition between profit and non-profit rental sectors
Function of non-profit rental sector	Safety net	Housing for broad layers of population
Development of non-profit rental sector	Financial resources are withdrawn from the non-profit sector when it reaches a certain level of maturation (by selling housing stock at a high discount)	Growth of non-profit sector is inhibited and financial resources are not withdrawn from the sector, but object subsidies are phased out as the sector becomes more mature
Brick and mortar subsidies	Non-profit rental sector strongly subsidised	Subsidies phased out as the non-profit rental sector becomes mature
Rent levels and differentiation	No market dependent rent level and differentiation in non-profit rental sector: demand is by definition higher than supply	Market dependent rent level, at a level that is lower than the market rent
Rent subsidy	Rent subsidy strongly dependent on income but independent of rent level and housing quality	Rent subsidy determined by market forces
Segmentation of the sector	Strong market segmentation Owner occupation sector dominant Profit rental sector is for those who do not want to buy Non-profit rental sector is for those who are unable to buy (stigmatised)	Limited market segmentation Owner occupation sector less dominant Sectors compete for favours of households (tenure neutrality)
Households non-profit rental sector	Strong concentration of low income groups	Less strong concentration of low incomes, more medium and high incomes

Source: Adapted from Kemeny (1995)

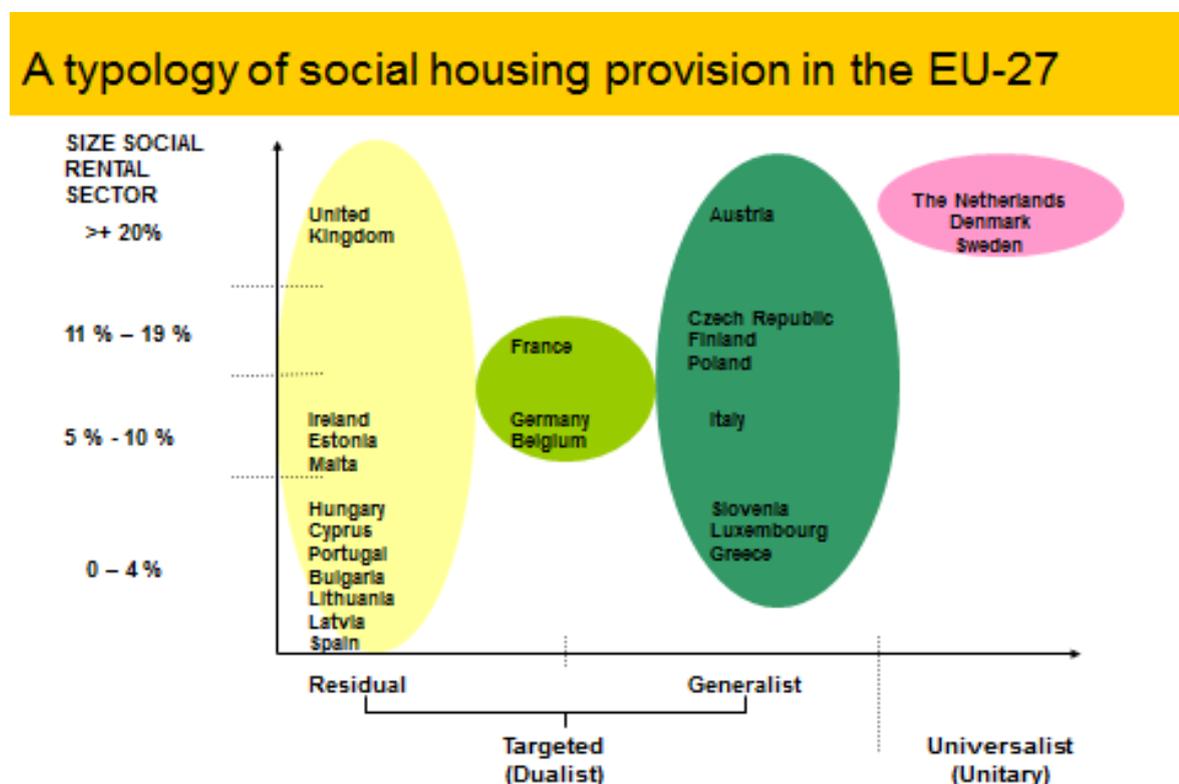
At the heart of Kemeny's work is the contrast between the dual rental market and the unitary rental market. In a dual rental market quite different rent policies are adopted in the social and private, profit seeking, sectors. In contrast, most continental European countries have adopted a unitary rental market, in which governments have, in various ways, sought to minimize differences in rents, quality and social attractiveness between the social and private parts of the rental sector. This entails forms of rent regulation but also a degree of subsidy for private landlords.<sup>7</sup> The main features of the two housing rental market models are summarized in Table 1.

What differentiates the two ways of organizing the rental sector is the role given to the non-profit sector. In the integrated rental market non-profit renting is accessible to the general public. In a dualist system, however, the non-profit sector is confined to the poor.

The provision of dwellings according to the non-profit principle has been excluded from the open rental market in English-speaking countries, in some Scandinavian countries – Norway, Finland and Iceland – and in a number of other countries. In stark contrast, in Germany, Sweden, Denmark, The Netherlands, Switzerland and Austria the economic strengths of nonprofit enterprises have been cultivated and attempts made to

<sup>7</sup> Scanlon, Kathleen and Christine Whitehead (2008), *Social Housing in Europe II: a review of policies and outcomes*. London School of Economics and Political Science (December), p.21

combine/integrate them with the open rental market.<sup>8</sup> Based upon On the basis of the classification models in rental housing, the various European countries can be characterized according to their approach of social housing (see typology below).



Source: CECODHAS Social Housing Observatory

Mainly continental countries with a corporatist regime have opted for a unitary rental market.<sup>9</sup>

The Netherlands is one of those countries. The country has the largest and most advanced of all integrated rental markets. Social rental housing in the Netherlands currently covers one third of the total housing stock (table 2, figures 2010). Despite the growth in home ownership during the latest decennia, the share of social housing hardly decreased.

<sup>8</sup> J. Kemeny (2006). Corporatism and housing regimes. *Housing, Theory and Society* 23 (1) pp. 1-18.

<sup>9</sup> J. Kemeny (2006), Corporatism and housing regimes. *Housing, Theory and Society* 23 (1) pp. 1-18.

Table 2 Dutch housing stock by sectors

<b>sectors</b>	<b>1993</b>	<b>2001</b>	<b>2010</b>
Home ownership	47%	53%	57%
Privately rented	15%	12%	10%
Social rented	35%	35%	33%
Total stock (mln)	6.0	6.7	7,1

Source: Aedes.

The social housing stock is managed by social housing associations. The first housing associations in the Netherlands were formed in 1850 by private initiatives. Amongst others churches, businesses and unions took the initiative to create better housing for the poor. In 1901 with the introduction of the Housing Act financial support to be received for this task is explicitly allowed. Under the Housing Act a housing association is an authorised institution. As authorised institution the housing association must meet with a number of housing rights and obligations in areas such as allocation and financing.

After World War II until the nineties of the last century public housing was controlled by the Dutch government in detail. In few other areas, the government was as successful as in public housing. With a relatively free rental and owner-occupied sector and a government funded and controlled social rented sector, a good and affordable housing stock was rapidly achieved.

In the early nineties a turnaround began. The government had to cut back in favour of the free market: too much of the responsibility for living was said to be in government hands. In these years government policy largely became decentralised to the municipalities and further privatised with the objective of improving efficiency as a result. The so called 'grossing up action' of 1995 was a further cut in the direct relationship between public housing and government. With the introduction of the grossing law all outstanding loans and subsidies still to be received between the government and housing associations were crossed off. Since that moment the associations have been responsible for their own exploitation losses. Nevertheless

associations are obliged to realise certain aims as described in the *Decision on the Management of Social Housing* (BBSH). In return the Social Housing Guarantee Fund (WSF) guarantees, under certain conditions, the associations' loans. Furthermore, associations can appeal for extra support from the *Centraal Fonds voor Volkshuisvesting* (CFV).<sup>10</sup>

The introduction of the BBSH meant a fundamental change in the regulation of housing associations: a switch from requirements in advance to remote monitoring and accountability afterwards.<sup>11</sup>

Table 3. Size of social housing associations (2010)

Number of dwellings	Housing associations	
	Number	Percentage
0-500	56	13%
500-5.000	228	55%
5.000-10.000	74	18%
10.000-20.000	38	9%
>20.000	22	5%
	418	100%

Source: Aedes.

As an elaboration of the Dutch Housing Act, the BBSH provides further rules, including on admission, on mergers and on pursuit of the business. Due to the public link housing associations have as authorised institution, they have some special rights and obligations. Thus, authorised housing associations active in the field of housing are free to sell their assets but solely in the interests of public housing. The definition of their domain must be defined in the statutes. Making a profit is permitted but only when serving public housing. This provision is intended to compel associations to self-

<sup>10</sup> <http://www.vrom.nl/pagina.html?id=19598#a30>.

<sup>11</sup> [http://www.wswonen.nl/Uploaded\\_Files/446\\_ce\\_BBSHAchtergronden2006.pdf](http://www.wswonen.nl/Uploaded_Files/446_ce_BBSHAchtergronden2006.pdf).

regulation. The strategy can be called a *slipstream strategy*: building social housing for the lower middle income group is done in the same neighbourhoods as the poor as part of a single housing project – so the whole neighbourhood's housing and living conditions will profit and thereby also the welfare of the broader society.

In 2010 there were 418 housing associations in the Netherlands: 14 percent of the associations possess more than 10 thousand dwellings (table 3). The average number of housing units per association is 5600.

Thirty three per cent of housing stock in the Netherlands is owned by bodies that receive state funding. In 2005, the European Commission argued having more than 30 per cent of homes belonging to the social housing sector seemed 'disproportionate'.

According to Scharpf, interference in such a range of autonomous policy choices by a member state tends to undermine the institutions and policy legacies of Continental and Scandinavian social market economies.<sup>12</sup> It makes him in an interview call for 'to refuse to comply with ECJ rulings'.<sup>13</sup> According to him EU ruling forces all countries into the same neoliberal mould by increasing home-ownership and residualising non-profit renting.<sup>14</sup> Although housing is not the concern of the EU, with the implicit encouragement of home ownership by the EU and the explicit support for home ownership in member states the rental sector will become a last resort. This policy can be seen as dismantling the unitary model by stealth.<sup>15</sup>

#### 2.4 The effect of the EU ruling on Dutch policy

The reactions by Dutch associations to the EU ruling tended to be in line with Scharpf's call. Their responses are described further below. First the Dutch government responded to the 2015 EC letter. The Dutch government did not resist to the provisional standpoint but decided to enter into negotiations with the Commission. In her 'Policy Vision' Minister Dekker addresses the letter from the Commission with its preliminary position (Dekker,2005). According to the minister, the definition of the target group of social housing should be restricted to household incomes with an amount of maximum

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<sup>12</sup> Fritz W. Scharpf (2009), The Double Asymmetry of European Integration – Or: Why the EU Cannot Be a Social Market Economy. MPIfG Working Paper 09 /12

<sup>13</sup> Scharpf Interview (2009): <http://www.social-europe.eu/2009/04/interview-the-only-solution-is-to-refuse-to-comply-with-ecj-rulings/>.

<sup>14</sup> See also Elsinga et al (2008):35.

<sup>15</sup> Elsinga et al (2008), o.c.

33,000 euros. With this figure of €33,000 the minister expects to meet with the requirement of the Commission of a limited target group. Furthermore she proposes a financial separation between the associations' social activities, funded by government, and their market activities.

Ever since the preliminary position by the Commission of 2005 there have been on-going consultations between the Dutch government and the Commission about how to proceed. Simultaneously the Minister is debating with the Parliament about a layout for the housing system in line with the requirements of European law.

*The Commission decision on state aid: limitation of the social housing target group is needed*

On 15<sup>th</sup> December 2009 the Dutch government receives the Decision by the Commission on state aid, following negotiations between the Dutch minister and the EC.<sup>16</sup> In conformity with its preliminary position of 14 July 2005 the Commission indicates that in order to be qualified as a service of general economic interest, the social housing target group has to be limited.

In the negotiations the Dutch government has promised to make several changes to the Dutch system in order to bring it in line with the European state aid rules. The most important promise is that from now on 90% of the dwellings with a monthly rent under EUR 647, that become available annually, must be allocated by the housing associations to households with the set maximum income of EUR 33.000. Dutch government and the Commission have come to an agreement. By accepting these changes, the Commission believes that the Netherlands complies with its request and therefore with the definition of service of general economic interest. The Commission decides not to raise any objections to the newly notified measure on the ground that they constitute compatible aid under Article 106 (2).<sup>17</sup> Also the Commission accepts in the same decision project aid for the revival of declining urban regions.

## Reactions

The Dutch government and the Commission have come to an agreement, but the narrow definition meets with major resistance in Dutch society.

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<sup>16</sup> Commission Decision in cases No E 2/2005 and N 642/2009 (The Netherlands, Existing and special project aid to housing corporations) of 15 December 2009

<sup>17</sup> Commission Decision, o.c., at point 109.

- *Resistance in Parliament*

Parliament does not agree with the outcome of the negotiations. Following the Decision, Parliament urges the minister to lobby amongst other member states for allies in favour of the Dutch unified social housing system and against this ruling by the EC. Moreover, in a motion Parliament asks the Dutch Government to ensure acceptance of Dutch housing associations serving a broader target group with state aid, in order to help citizens who are unable to find a house on the free market and to help associations fight segregation. Parliament fears the new narrow definition of social housing will have major consequences for the Dutch association sector, will harm national authority in determining a service as SGEI (106 paragraph 2 EC) and will thereby undermine the whole Dutch tradition of social housing.<sup>18</sup>

Under heavy lobbying by the housing associations the Minister is asked by Parliamentarians not to implement the Decision and to return to Brussels in order to reopen negotiations on the income limit.<sup>19</sup> However the motion does not get a majority vote. Because the motion on renegotiations with Brussels was not adopted, the minister is able to implement the Decision on April 1, 2011.

*Implementation of the Decision of the EC in two phases*

Initially, the ministerial regulation implementing the Decision of the Commission was due to come into force on October 1, 2010. After a motion adopted by Parliament, the minister postpones the date till January 1, 2011.

The transmission of the Decision of the European Commission into Dutch legislation eventually takes place in two phases. First, on April 1, 2011, a ministerial order is introduced regulating (i) the activities for which state aid is allowed (including social property), (ii) the housing allocation (the 90%), and (iii) the obligation to tender societal property. The second stage concerns the administrative separation of activities of housing associations and the calculation and payment of any overcompensation that is regulated by law as part of a bill amending the Housing Act (Reform Act Authorised Institutions).

The ministerial regulation identifies activities in the Netherlands for which activity or service state aid is allowed and regulates the social housing allocation as well as the

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<sup>18</sup> Motion van Bochove c.s., *Kamerstukken II*, 2008/09, 29453, nr. 125.

<sup>19</sup> Motion by Karabulut c.s. *Kamerstukken II*, 2009/10, 29453, nr. 173.

procurement of real estate.<sup>20</sup> The Dutch government plans to amend the Housing Act so that the administrative separation of housing activities performed with and without state aid will be governed by law. As of January 1, 2011, the housing associations are obliged in each lease contract to take into account the income limit of 33,614 euros and also to register the lease.<sup>21</sup> And since 1 January 2012 housing associations are allowed to rent no more than a maximum of 10% of their social houses to households with an income above 33.164. In addition, the housing associations have to take into account that for certain activities there are no longer guarantees given by the Guarantee Fund for Social Housing. Such is the case for example for the construction of apartments with a rent above the liberalisation limit and for civil property that is not on the list, as described in the ministerial order.

- Associations

*The ministerial regulation meets with deviating behaviour*

As to be expected, the housing associations reacted predominantly negative to the ministerial regulation. Thus, nearly three quarters of the directors of the associations responded positively to a call from a housing association to let social housing targets prevail over the strict execution of the EC rules. Some housing associations continue to accommodate households with an income up to 43,000 euros and take any penalties for granted.<sup>22</sup> This is the income limit, above which tenants can expect a yearly rent increase of inflation plus 5 % and in case of below this limit of inflation only, was mentioned in the coalition agreement by the Christen Democrat –Liberal cabinet called “Freedom and responsibility” (October 2010).

There are also housing associations which continue to rent housing to households with an income up to 45.000 per year. Housing associations, such as those in Amsterdam, use newspaper advertisement to show their dissatisfaction with the regime, but do carry out the rules.<sup>23</sup> One housing association has set their limit at 43,000 euros. This way it claims to still meet the European rules, as for urgent cases it only needs to reserve a few homes a year. As a result, the allocation of households with incomes between 33,614 and 43,000 euros all go within the space of 10%. The housing association will monitor carefully so that action can be taken as 10% space is fully utilised. Another

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<sup>20</sup> Stcrt., 2010, nr. 17515, p. 1.

<sup>21</sup> Since 1 January 2012 the income limit is 34.085 euro.

<sup>22</sup> Corporaties spreken met gemeentes inkomensgrens af, <http://www.aedesnet.nl>, consulted on 21 January 2011.

<sup>23</sup> <http://www.dekey.nl/huurders/sociale-huur/hoe-kom-ik-in-aanmerking>, consulted on 21 January 2011.

solution used by another housing association is the provision of rental apartments above the limit of 652, 52 euros to households with an income above the 33.614 euros, while freezing the rent for the next 5 years.

### *Housing associations lodge an appeal to the Decision*

On 30 April 2010 133 housing associations lodge a complaint to the Decision of the Commission of 15 December 2009.<sup>24</sup> According to the associations, many households run into difficulties because they are no longer qualified for a house of the social housing associations. In essence, the housing associations believe that the Commission is *abusing* its power as the Commission requires a new definition of social housing from the Dutch government. According to the housing associations, the Commission does not have the power to impose a specific definition of the concept of services of general economic interest in the social housing sector.<sup>25</sup> Aedes, the Dutch umbrella organisation, Cecodhas, the European Liaison Committee for Social Housing Cecodhas, and the French (USH) and Walloon (SWL) umbrella organisations support the associations in their procedure. Already in 2008 the French USH made public that the perception of social housing as a service of general economic interest, developed by the Commission in a letter to the Dutch government on 14 July 2005, de facto reduces access to social housing to people who are socially underprivileged, reducing the classification of social housing as a service of general economic interest to the existence “*of a direct link with socially underprivileged people*”. In other words the Commission holds an exceptionally residual perception of social housing which creates tension with the freedom of the Member States to define social housing missions, notably in terms of cohesion and social and housing diversity objectives.<sup>26</sup>

### *Commercial market players also lodge an appeal to the Decision*

In the same week of 30 April 2010 the Association of Institutional Property Investors & Vesteda, a private housing association, also lodge appeal to the Commission’s decision.<sup>27</sup> However, they defend the other side, in their opinion the Decision will obstruct the commercial house market. Dwellings owned by associations will be rented under the limit of 647 euro, although these dwellings are partly commercial.

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<sup>24</sup> Case T/202/10 (Stichting Woonlinie and others/Commission), T/203/10 (Stichting Woonpunt and others/Commission).

<sup>25</sup> Press release ‘133 corporaties in beroep bij Europees Gerecht’, 3 May 2010 < [www.aedesnet.nl](http://www.aedesnet.nl) using the search term: ‘*corporaties in beroep*’ >; Appendix to the Press release ‘133 corporaties in beroep bij Europees Gerecht, 3 May 2010: ‘*Samenvatting beroepsgronden tegen beschikking*’ < [www.aedesnet.nl](http://www.aedesnet.nl) using the search term: ‘*samenvatting beroepsgronden*’>.

<sup>26</sup> L. Ghekiere (2008), European perspectives 2009-2014. Issues of the French presidency, p.7.

<sup>27</sup> T-201/10 (IVBN/Commission).

Furthermore in their opinion the limit of the social housing group to 33,000 euro is set too high, because almost 43% of the Dutch households falls in that category.<sup>28</sup>

#### Latest developments

Since the Decision by the Commission, an increasing number of indications show that lower middle-income groups are encountering problems, as they must rely on the more expensive private housing sector. The private sector housing market does not offer houses at prices a Dutch lower middle income household can afford. A growing majority in the Dutch parliament has agreed that the minister must arrange for lower middle-income people to be eligible for social rented housing on a more frequent basis. Since then, in July 2011 a motion to that effect has been introduced by a parliamentary-wide combination of right-wing and left-wing parties.<sup>29</sup>

In October 2011 Parliamentarians demand the minister to provide information on the effects of the State aid ruling for the lower middle income group. But the Minister refuses, according to him it is too early days. As the minister is reluctant to commit to the cause, in November 2011 centre left Social democrats in Parliament threaten with a vote of no confidence if the minister, against the wish of the majority of Parliament, will continue to refuse to make more social dwellings available for lower middle-income people. However again the minister refuses and warns against the great risks of renegotiations with Brussels on the topic of state aid. According to this Christian Democrat minister all that has been won by the agreement that has been reached could be jeopardized.

On December 16, 2011 the complaint which the group of Dutch housing associations submitted to the General Court has been treated. The General Court dismissed the complaint on grounds of inadmissibility; no statement in terms of content was made.<sup>30</sup> The General Court contests the admissibility of the application for annulment of the applicants on the grounds, that the contested are not individually harmed within the meaning of Article 263 TFEU.

The social housing associations are very disappointed with the dismissal and with the lack of assessment in terms of content. The associations are still considering to go to

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<sup>28</sup> Press release, 'EU-beschikking blokkeert commerciële huurwoningmarkt. IVBN en Vesteda in beroep.' <http://www.ivbn.nl/persbericht/eu-beschikking-blokkeert-commerciële-huurwoningenmarkt>.

<sup>29</sup> TK year of session 2010-2011, 29453, nr 200.

<sup>30</sup> Case T-202/10 and T203/10.

court once again against the ruling of the General Court on non-admissibility.

On 20 December 2011 the European Commission has adopted a revised package of EU state aid rules for the assessment of public compensation for services of general economic interest (SGEI).<sup>31</sup> The new package clarifies key state aid principles and introduces a diversified and proportionate approach with simpler rules for SGEIs that are small, local in scope or pursue a social objective, while better taking account of competition considerations for large cases. All social services become exempted from the obligation of notification to the Commission, regardless of the amount of the compensation received. Previously only hospitals and social housing were exempted. The revised Altmark package seems to have no implications for social housing yet. The accord between EC and the Dutch government fits in with the new Decision according to Competition Commissioner Almunia. However, for the Dutch housing policy, this accord does not provide a solution. The substantial gap between the prices on the rental market and the market for owner-occupied dwellings has as a consequence that households with an income just above EUR 33,000 can have substantial difficulties in finding adequate and affordable housing.

### 3. CONCLUSIVE REMARKS

Nowadays social services in the Netherlands are accompanied by decentralisation, outsourcing and public-private partnerships, a modernisation which is similar to those in other member states. The social service of social housing always has been the primary concern of national governments. But recent developments in the domain of state aid make clear that housing policy simply cannot be performed without taking European law into account.

- The casus of social housing in the Netherlands shows the asymmetry in the effect of EU legislation, which varies according to ideal types of social protection. EU legislation undermines the social markets of the northern welfare states. The unitary housing market (The Netherlands, Denmark, Sweden) is forced to become a dualist market.

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<sup>31</sup> Commission Decision of 20 December 2011, C2011/9380.

- (Legal) uncertainties still exist. How far does the control of the EC go? Other European countries like France and Sweden follow the discussion closely as they fear the EC will reduce their leeway in social housing as well.

In an international context, the Dutch social rental sector is often regarded as a solid system for providing affordable housing to those who need it, without the sector being marginalized and stigmatized. The EU appears to be hostile towards the existence of unitary rental housing markets, which should receive no public subsidies, unless and until they are restricted to the poor. Only then subsidies are acceptable. Yet, paradoxically, tax deductions for owner occupiers are not counted as subsidies.

The EU ruling forces all countries into the same uniform mould. The mission appears to lead into a direction that will not tolerate divergent national systems.

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