



State aid support for the social economy: services of general economic interest

Thematic discussion paper

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1 Introduction

This thematic paper focuses on the granting of State aid as compensation for the provision of Services of General Economic Interest (“SGEI”). SGEI are important services that public authorities of the European Union (“EU”) Member States classify as being of general interest and, therefore, subject to specific public service obligations.¹ The paper also includes concrete examples of how to make use of the EU SGEI legal framework to support the objectives of the social economy.

In particular, the thematic paper discusses the key SGEI legal texts, notably the SGEI Communication, the 2012 SGEI Commission Decision and Framework, and the SGEI de minimis regulation, to clarify whether compensation for the provision of SGEI contains State aid, to avoid errors when defining a SGEI, and to learn from concrete relevant examples for the social economy.

To this extent, the paper first analyses the concept of SGEI under EU Law, with reference to the Treaties and EU legislation, as well as to the clarifications provided by the case-law of the EU Courts. It clarifies that public authorities of the EU Member States are generally entitled to identify which services ought to be classified as SGEI in their territory. The paper also explains the circumstances under which public service compensation amounts to State aid under Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), and whether this compensation has to be notified to the European Commission in light of the 2012 SGEI Commission Decision and the SGEI de minimis regulation. This first section of the paper then discusses the main conditions under which compensation for the provision of SGEI that must be notified to the European Commission can be granted under the SGEI Framework.

Secondly, the paper analyses specifically the implications of the SGEI legal framework for the social economy, and particularly the provisions of the 2012 SGEI Commission Decision related to social services, as well as the guidance provided by the European Commission in relation to social services of general economic interest.

Finally, the paper refers to the practice of the European Commission concerning social SGEI under the 2012 SGEI Package and includes concrete examples from several Member States that used SGEI to successfully support the social economy. This section also illustrates some of the most relevant findings of the recent evaluation published by the European Commission on “the State subsidy rules for health and social services of general economic interest (“SGEIs”) and of the SGEI de minimis Regulation”, and their implications for the social economy.

2 Setting the scene

2.1 SGEI fundamentals

Services of General Economic Interest are services that are considered important for the economic, social, and cultural development of a society. They are usually provided by public or private entities under a framework that ensures they are available and accessible to the entire population - especially those in need. Services of General Economic Interest are defined by public authorities and include healthcare, education, public transportation, social housing, energy, water supply, waste management, and telecommunications.

Compensation for the provision of SGEI does not confer an advantage to the recipient and therefore is not State aid under Article 107(1) TFEU if it is granted under the conditions the

¹ See in this regard the information provided by the European Commission, available at https://commission.europa.eu/topics/single-market/services-general-interest_en

Court of Justice of the EU laid down in the *Altmark* judgment,² that will be explained further below in this section. However, since the conditions set out in this judgement are quite demanding, the compensation granted to SGEI providers often must be considered State aid.

Nonetheless, under Article 106(2) TFEU State aid can be granted to compensate for the provision of SGEI. In this regard, Article 106(2) TFEU permits exemptions from the Treaty rules if this is necessary for the performance of particular tasks assigned to an undertaking entrusted with the operation of a service of general economic interest.³

The first step in applying this provision is to determine whether the undertaking receiving compensation has been entrusted with a genuine SGEI.

SGEI definition

EU law does not define the scope for the existence of an SGEI. The absence of a clear definition of SGEI has been recognised by the European Courts.⁴ The concept of SGEI “roughly corresponds to the concept of ‘public service’ used by certain Member States [and the] Court of Justice has also sometimes used both terms as though they are synonymous.”⁵ Similarly, the European Commission has stated that “Public Services (generally identified in the Treaties as SGEI) occupy a vital role in the shared values of the Union”.⁶ Despite the absence of a legal definition, some constituent elements of the notion of SGEI can be inferred from the Treaties, secondary law and Commission documents as indicated below:

- Regarding primary law, under Article 14 TFEU, SGEI form part of the common values of the Union and promote social and territorial cohesion. Similarly, Article 36 of the EU Charter of Fundamental Rights states that the Union recognises and respects access to SGEI with a view to promoting the social and territorial cohesion of the EU. In addition, Protocol No 26 to the Lisbon Treaty on services of general interest underlines the essential role and broad discretion of national authorities to define SGEIs, their diversity (geographical, social and cultural situations), and some of their features, such as high level of quality, security and economic accessibility, equal treatment and promotion of universal access and user rights.
- Secondary law also provides some guidance as to which services can be considered SGEI. In particular, Directive 2006/123/EC (Services Directive),⁷ provides that SGEI are services performed for an economic consideration. In addition, services may only be defined as SGEI if they carry out special tasks in the public interest. Examples of these include postal services and utilities.

² C-280/00 *Altmark* [2003] ECR I-7747.

³ Judgments of 23 October 1997, *Commission v France*, C-159/94, EU:C:1997:501, paragraph 54 and of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 106. As the EU Court of Justice has noted “In allowing derogations to be made from the general rules of the Treaty in certain circumstances, Article 106(2) TFEU seeks to reconcile the Member States’ interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Union’s interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market. C-660/15 P, *Viasat Broadcasting v European Commission*, [2017] EU:C:2017:178, para. 31

⁴ Case T-289/03, *BUPA*, EU:T:2008:29, para 165.

⁵ Buendía Sierra, J.L., “Article 106 - Exclusive or Special Rights and Other Anti-Competitive State Measures”, in Faull and Nikpay: *The EU Law of Competition*, Third Edition, at page 849. See for a reference, e.g.: Case C-18/88 RTT [1991] ECR I-5980, para 22 “The exclusion or the restriction of competition on the market in telephone equipment cannot be regarded as justified by a task of a public service of general economic interest within the meaning of Article 90(2) of the Treaty.”

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the committee of the regions, Reform of the EU State Aid Rules on Services of General Economic Interest COM (2011) 146 final, p. 2.

⁷ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68.

- The European Commission has defined SGEI as ‘economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention’.⁸

In the *BUPA* judgment, the General Court clarified that a universal service does not always require the service to be provided to the whole population or to the whole territory of a Member State. In addition, the mandatory nature of an SGEI does not exclude that the provider of the SGEI may have a certain scope for action. Member States must also clarify the reasons why the service in question differs from other economic activities and therefore deserves to be considered an SGEI.⁹

In addition, according to well-settled case-law of the EU Courts, Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The Commission’s competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI, and to assessing any State aid involved in the compensation.¹⁰ The General Court has linked the limits in the Commission’s powers to the EU Law principles of subsidiarity and proportionality.¹¹

The Court of Justice has in some instances rejected the national categorisation of a given service as an SGEI, such as in the case of port activities which were the object of a legal monopoly or the management of copyrights.¹² Similarly, the European Commission has considered in some cases that the definition of a service as SGEI was manifestly wrong, such as tourism promotion,¹³ economic development,¹⁴ or broadband limited to business parks, not benefitting the population at large.¹⁵

Assuming a genuine SGEI has been properly defined, is State aid involved in the compensation granted for the provision of the SGEI?

For public compensation for the provision of an SGEI to be State aid, the conditions of Article 107(1) TFEU must be fulfilled. Consequently, the recipient must first be considered as an undertaking carrying out an economic activity, as discussed in the recent *Casa Regina Apostolorum* case, discussed below.

Secondly, the compensation must be granted directly or indirectly through State resources.

Thirdly, public service compensation must distort or threaten to distort competition, and affect trade between Member States. These elements of the notion of aid were discussed in the first thematic paper, although some references to the notion of effect on trade in this context will be made in the last section of this paper.

Finally, the compensation must confer an economic advantage to the recipient.

Box 1: Casa Regina Apostolorum case – non-economic activities

⁸ Communication from the European Commission, ‘A Quality Framework for Services of General Interest in Europe’, COM(2011)900, at 3.

⁹ Case T-289/03, *BUPA*, EU:T:2008:29, pp. 167-189.

¹⁰ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8 of 11.1.2012, p.4, at point 46.

¹¹ *Id.* At paragraph 167.

¹² Case 127/73, *BRT II* [1974] ECR318, paragraph 23; Case C-179/90 *Port of Genoa* [1991] ECR I-5931, para 27;

¹³ State aid SA.31550 (2012/C) (ex 2012/NN) – Germany *Nürburgring*, para. 192.

¹⁴ Commission Decision C (2004) 4343 final of 16 November 2004, case N381/2004 – France – *Projet de réseau de télécommunication haut débit des Pyrénées Atlantiques* (OJ C 162, 2.7.2005, p.5), para. 53.

¹⁵ SA.21748 (N890/2006) *projet de contrat de concession pour la "conception, réalisation et exploitation d'un réseau à très haut débit sur le sud-est toulousain (SICOVAL)*, para. 35.

The Court of Justice of the EU has recently found in the *Casa Regina Apostolorum* case that the Commission rightly considered the healthcare services provided under the Italian national health service as not economic in nature, and that in such context, public hospitals were not undertakings.

The judgment confirms the decision of the General Court and the well-settled case-law of the Union Courts according to which Union law does not, in principle, affect the competence of the Member States to organise their social security systems and that, in order to assess whether an activity pursued within the framework of a social security scheme is not of an economic nature, it is necessary to carry out an overall assessment of the scheme in question and to take account of the following factors: the pursuit by the scheme of a social objective, the implementation by the scheme of the principle of solidarity, the absence of any profit-making purpose of the activity pursued and the supervision of that activity by the State.

In addition, that fact that also private healthcare providers operated within the public healthcare system and patients had – to some extent – a free choice between public and private providers did not alter the conclusions that the social security system at issue was not of an economic nature. Support measures to those hospitals did not therefore constitute State aid within the meaning of Article(107) TFEU. Consequently, in the absence of activities of an economic nature and, hence of undertakings, the Commission did not need to apply Article(106) TFEU, the main provision related to SGEI under the Treaties, and the principles set out in the *Altmark* judgment, which are explained below.¹⁶

In the case of compensation for the provision of an SGEI, such assessment is based on the conditions laid down by the Court of Justice of the EU in the *Altmark* judgment.¹⁷ Particularly, if all so-called *Altmark-criteria* are fulfilled, the compensation granted by public authorities to an SGEI provider does not contain State aid. The European Commission has published guidance to further clarify the conditions set by the Court in the *Altmark* judgment.¹⁸ In a nutshell, these cumulative criteria are the following:

1. **Entrustment Act:** The Member State must issue a legally binding public act that formally entrusts a company with a specific service. Depending on the legislation in Member States, the entrustment act may take the form of a legislative or regulatory instrument or a contract. According to the Commission, the entrustment act (or acts) must contain the following information:
 - a) the content and duration of the public service obligations;
 - b) the undertaking and, where applicable, the territory concerned;
 - c) the nature of any exclusive or special rights assigned to the undertaking by the authority in question;
 - d) the parameters for calculating, controlling and reviewing the compensation; and
 - e) the arrangements for avoiding and recovering any overcompensation.¹⁹

To this extent, The Court of Justice recently emphasized that just because a service is labelled as being of general interest in national law does not automatically mean that every service provider is obligated to fulfil specific public service duties as stated in the first condition of *Altmark*. Instead, the responsibility for operating the SGEI must be officially assigned to the relevant undertaking through one or more official acts, which can be determined differently by each Member State.²⁰

2. **Parameters of compensation:** The parameters of the compensation must be defined in advance. Only the costs directly associated with the provision of the SGEI

¹⁶ Case C-492/21 P, *Casa Regina Apostolorum*, EU:C:2023:354

¹⁷ C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, EU:C:2003:415.

¹⁸ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ 8 of 11.1.2012, p.4.

¹⁹ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 4–14, at 52.

²⁰ C-91/17 P y C-92/17 P, *Cellnex*, EU:C:2018:284, paragraphs 84-85.

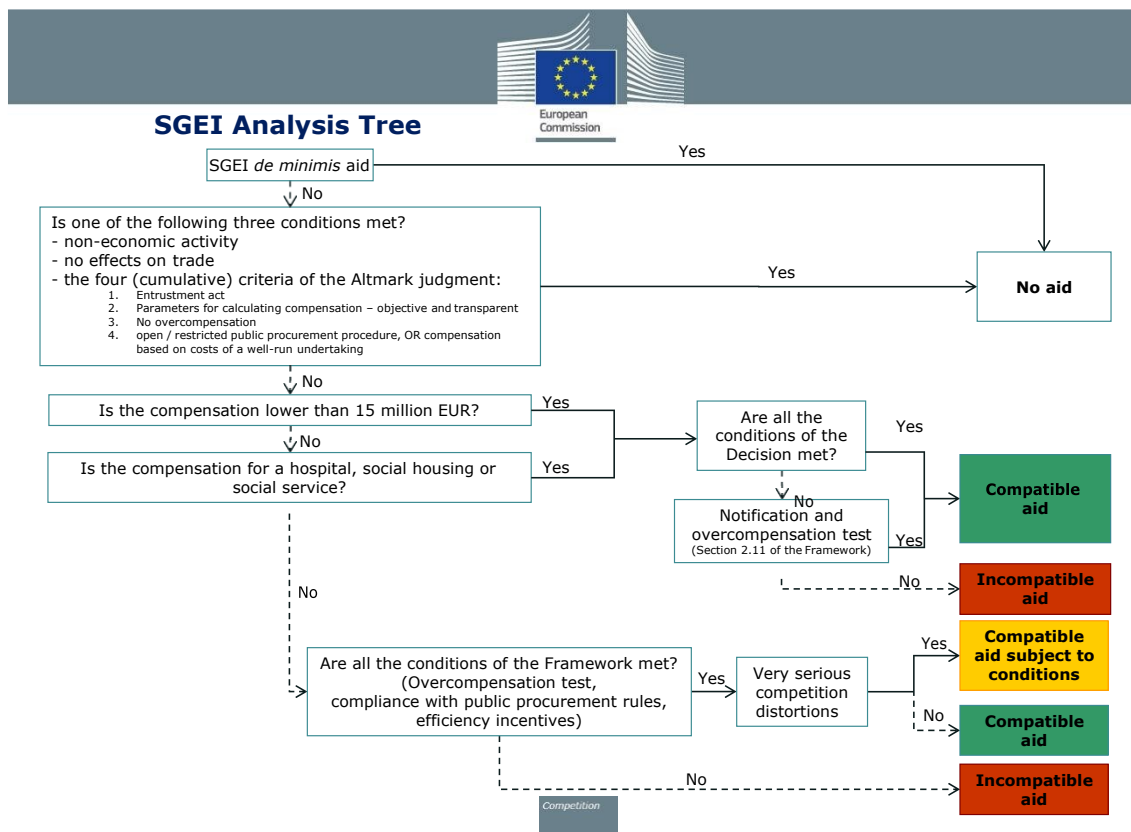
can be considered in that context and the revenue accruing to the undertaking from the provision of the SGEI must be deducted. A reasonable profit can be granted as part of the compensation.²¹

3. **Overcompensation must be avoided:** the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit²²; and
4. **Selection of SGEI provider:** the SGEI provider must be selected under an appropriate open and transparent tendering procedure at the least cost to the community or through a benchmarking exercise in an open, transparent and, possibly, competitive procedure.²³

As mentioned before, these criteria are demanding, and therefore often, the compensation provided by public authorities to SGEI providers contains State aid under Article 107(1) TFEU.

If the compensation granted for the provision of an SGEI constitutes State aid, does it have to be notified to the European Commission?

Generally, according to EU law (Article 108(3) TFEU), all planned State aids must be notified to the European Commission before they can be granted. The following tree summarises the applicable legal framework concerning the granting of State aid for the provision of SGEI:



²¹ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, cit. at point 56.

²² Id. point 60. See also point 61 for the concept of reasonable profit: "Reasonable profit should be taken to mean the rate of return on capital (85) that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk.[...]"

²³ Id., at points 63-77.

Source: https://competition-policy.ec.europa.eu/system/files/2021-04/SGEI_analysis_tree_en.pdf

However, under certain conditions, State aid in the form of public service compensation can be granted without having to notify the European Commission. In particular, when the public service compensations fulfil the criteria foreseen in the SGEI de minimis Regulation²⁴, or in the '2012 Commission SGEI Decision'.²⁵

The SGEI de minimis Regulation clarifies that certain compensation measures not exceeding EUR 500,000 over any period of three fiscal years do not need to be notified to the European Commission. The following are relevant criteria provided for in the Regulation:

- The EUR 500,000 ceiling includes any form of the de minimis aid and cannot be cumulated with any compensation for the provision of the same SGEI, regardless of whether or not it constitutes State aid.
- Public authorities may provide the compensation for the SGEI (up to the ceiling) as a grant, a loan or a loan guarantee.
- The beneficiary undertaking should be entrusted in writing with the service of general economic interest in respect of which the aid is granted but entrustment requirements are lighter than those specified in the SGEI Decision/Framework.
- SGEI de minimis aid may not be granted to undertakings in difficulty.
- Public authorities must inform the undertaking in writing of 1) the prospective amount of the aid and 2) the de minimis character of the aid.
- The SGEI de minimis Regulation does not require verification of the costs incurred in providing the service and consequently no check for overcompensation is needed.²⁶

The 2012 Commission SGEI Decision declares certain types of SGEI compensation constituting State aid beyond 'de minimis' aid of EUR 500,000²⁷ compatible and exempted from notification. The following are relevant criteria provided for in the Decision:

- The Decision applies to compensation for the provision of SGEI up to EUR 15 million per service per year. Compensation provided above this threshold must generally be notified to the Commission under the SGEI Framework (discussed below).
- The Decision introduces specific rules for social SGEI: no maximum compensation threshold applies to them (see in particular next section)
- The Decision does not apply to public service compensation granted to undertakings in the field of road/rail transport (there are rules for that sector, in Regulation (EC) No 1370/2007)
- The Decision includes specific provisions concerning the content of the entrustment (see Article 4).
- The Decision applies where the period for which the undertaking is entrusted with the operation of the SGEI interest does not exceed ten years.

²⁴ Commission Regulation (EU) No 360/2012 of 25.4.2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest Official Journal L 114 of 26.4.2012, p. 8

²⁵ Commission Decision 2012/21/EU of 20.12.2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7 of 11.1.2012, p. 3.

²⁶ Guidance based on information provided by the Commission Staff Working Document, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, Brussels, 29.4.2013 SWD(2013) 53 final/2, p. 52

²⁷ As of May 2023.

- Under the Decision, SGEI providers do not need to be selected under a public tender procedure.
- The amount of compensation shall not exceed what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit.
- The Decision provides guidance on the acceptable compensation to SGEI providers: The compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts (“net costs”) and a “reasonable profit”. For the purposes of the Decision, “reasonable profit” generally means the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the service of general economic interest for the whole period of entrustment, taking into account the level of risk. In any case, though, a return on capital not exceeding the relevant swap rate plus 100 basis points is considered “reasonable”.
- The Decision includes transparency requirements for compensation exceeding EUR 15 million given to a company that operates both within and outside the realm of general economic interest services. This provision becomes important when considering social services, as they may receive aid exceeding EUR 15 million under the Decision.
- The Member States shall keep available, during the period of entrustment and for at least ten years from the end of the period of entrustment, all the information necessary to determine whether the compensation granted is compatible with this Decision.

If the compensation granted for the provision of a SGEI (i) constitutes State aid, and (ii) has to be notified to the European Commission, under which conditions can the compensation be lawfully granted?

In that case, the compensation must be in line with the conditions set out in the SGEI Framework.²⁸ The Framework applies to State aid for SGEI that falls neither under the SGEI de minimis regulation nor the SGEI Decision applies. The Commission will assess notified SGEI-aid on the basis of these criteria. This means that if the aid meets all relevant criteria, the Commission will declare the aid compatible with the internal market. The relevant criteria are the following:

- **Definition of SGEI:** It recalls that Member States have wide discretion to define SGEI but imposes limits. The aid can only be given to a “genuine” SGEI that is correctly defined. It is mandatory to launch a public consultation or other appropriate instruments to take the interests of users and providers into account.
- **Public service obligations:** Member States cannot attach specific public service obligations to services that are already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions.²⁹
- **Entrustment act:** The public service obligations and the methods of calculating compensation must be specified in an entrustment act; the Framework lays down specific requirements for what the entrustment act must include.

²⁸ Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15–22.

²⁹ Id. at point 13.

- **Duration of the entrustment:** in principle, it should not exceed the period required for the depreciation of the most significant assets necessary to provide the SGEI.
- **Public procurement:** if EU public procurement rules (including Treaty principles) are not complied with, compensation for the provision of an SGEI cannot be declared compatible under the Framework.
- Absence of discrimination in cases where several undertakings are entrusted with the same SGEI: The compensation should be calculated on the basis of the same method in respect of each undertaking.
- **Compensation:** Normal method for the calculation of the net cost is the “net-avoided cost methodology” (explained in detail in the Framework) and the revenues from special or exclusive rights are counted as part of the compensation.
- **Indications on reasonable profit:** more precise guidance on how to calculate it than in the SGEI Decision.
- **Incentives for quality services:** Member States must introduce incentives for the efficient provision of SGEI of a high standard, unless they can duly justify that it is not feasible or appropriate to do so.
- **Visibility:** Member States must publish information on the Internet or by other appropriate means regarding each SGEI compensation.

2.2 SGEI and the social economy

Social services, or social services of general economic interest, are not mentioned in the Treaties. Neither are they defined by the case-law of the European Courts.

The 2012 Commission SGEI Decision recognises the specific characteristics and the positive impacts of social services. In particular, Article 2(1)(c) of the 2012 Commission SGEI Decision stipulates that significant amounts of State aid can be granted for the provision of services ‘meeting social needs as regards’:

- health and long-term care,
- childcare,
- access to and reintegration into the labour market,
- social housing,
- and the care and social inclusion of vulnerable groups’.³⁰

The qualification of a service as a social service under the 2012 Commission SGEI Decision has an immediate advantage vis-à-vis other SGEI, namely that there is no economic threshold to the compensation that the providers of these type of services can receive for their provision. Consequently, Member States can grant as much compensation as they consider necessary for the provision of these services without notifying the European Commission, provided that they define them properly and meet the rest of the criteria enshrined in the 2012 Commission SGEI Decision (i.e. entrustment, parameters of compensation etc.). For instance, the provision of free information services in the national language has been defined as an SGEI that could benefit from State aid up to 15 EUR million

³⁰ Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380), [2012] OJ L7, 3–10, at Recital 11 and Article 2(1)(c).

under the SGEI Commission Decision without notifying the European Commission.³¹ However, in the case of a social SGEI, for example, aid to provide childcare services, Member States can grant aid beyond 15 EUR million under the SGEI Commission Decision without notifying the European Commission, thus benefiting from greater flexibility in the provision of this type of service.

The European Commission has provided additional guidance concerning social services under Article 2(1)(c) of the 2012 Commission SGEI Decision. In particular, the European Commission has clarified that:³²

- The list of social services in Article 2(1)(c) is an exhaustive list. Nevertheless, as long as Member States stay within the scope of Article 2(1)(c), Member States can specify in more detail in the entrustment act the specific services they want to be provided, for example, which types of childcare, under which conditions and for which beneficiaries.
- The definition of social services is very broad and covers the most important areas of social services. Should a particular social service not be covered by the definition of social services in Article 2(1)(c), the compensation might still be exempted from notification under Article 2(1)(a) of the Decision, as long as the compensation does not exceed an annual amount of EUR 15 million.
- The term 'childcare' is a broad concept that covers different forms of care for and supervision of children in different organisational settings.
- The wording 'meeting social needs' in Article 2(1)(c) does not restrict the services mentioned in the list. As long as the services defined qualify as genuine SGEIs, the Decision can apply to all respective services. For instance, the Decision can be applied to all childcare services, not only if they are provided for families with financial difficulties.
- The term 'social inclusion of vulnerable groups' is a broad concept and could cover, for example, social integration services for people with disabilities, social assistance services for migrants, services for the homeless, parenting support services, services supporting over-indebted persons or social services for the lesbian, gay, bisexual and transgender (LGBT) community.
- The term 'access to and reintegration into the labour market' refers to different types of services that aim at facilitating the employability. Professional training only falls under Article 2(1)(c) of the Decision if it allows access to or reintegration into the labour market or if it fosters the social inclusion of a vulnerable group. Therefore, for example, professional training for the long-term unemployed falls under Article 2(1)(c) of the Decision. If the professional training, in contrast, is for persons already in employment, it would normally not fall under Article 2(1)(c) of the Decision, unless it were to provide for the inclusion of a vulnerable group.
- Public authorities in the Member States might define social and work integration as social services and entrust social and work integration enterprises with a SGEI. In these cases, the SGEI Decision applies to those services, which can also receive State aid under the GBER or the general de minimis Regulation.

³¹ State Aid SA.61014 (2021/N) – Slovenia Aid to the Slovenian Press Agency (STA) – SI.

³² Guidance based on information provided by the Commission Staff Working Document, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, Brussels, 29.4.2013 SWD(2013) 53 final/2, at pages 56-58.

Box 2: Are home cleaning services SGEI?

The Third Biennial Report on social services of general interest provides an example of a service *i.e.* Home cleaning services, that in principle does not have a 'general interest' character, as it is provided satisfactorily under normal market conditions. However, due to the fact that the service at stake targets a group traditionally considered vulnerable or disadvantaged, such as persons with disabilities, it becomes a service that falls within the scope of SGEI, and particularly within the concept of social service of general economic interest.³³

Moreover, the European Commission also clarified that social service providers can carry out other activities, but they can receive compensation only for SGEI activities [under the SGEI legal framework].

3 Concrete examples and 'cases'

The European Commission has adopted several decisions concerning social SGEI under the 2012 SGEI Package that were discussed in the first thematic discussion paper, to which reference is made.³⁴ In addition, the Commission confirmed in 2014 that compensation to establish and operate the UK National Employment Savings Trust (hereafter "NEST") to extend low-cost pension savings to those with low to moderate earnings constitutes a valid SGEI and remains compatible under Article 106(2) TFEU.³⁵ As the Commission summarised in 2010 "NEST has been entrusted with a Service of General Economic Interest (SGEI) to admit any worker automatically enrolled by their employer, even if the cost of administering the account is greater than the revenue derived from charges. NEST benefits from a subsidised loan from the Government to fill the costs and funding gap faced by NEST. Instead of paying commercial rates on the loan, NEST will pay the interest corresponding to the government's own cost of borrowing. The State aid consists in the difference of NEST's own refinancing terms and interest rate compared to the one received by the Government."³⁶ The NEST decisions confirm that both under the previous and the current SGEI framework, the adoption of a measure to facilitate low-cost pension savings to employees with moderate earning, a measure notably benefiting SMEs, can be defined as a genuine SGEI with a clear social aim under the SGEI Framework, beyond the categories of social services enshrined in Article 2(1)(c) of the SGEI Commission Decision.

Furthermore, examples of social services considered as SGEI by the EU Member States can be found in the reports that they must submit every two years according to Article 9 of the 2012 Commission SGEI Decision and paragraph 62 of the 2012 Commission SGEI Framework.³⁷ The following examples of social services can be highlighted:

³³ Commission staff working document, 3rd Biennial Report on Social Services of General Interest, Accompanying the document Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020 [2013] SWD 40 final, p. 10.

³⁴ See, in particular, Commission decision of 4 April 2018 on State aid SA.38469 - Sheltered employment in Sweden (OJ C 198, 7.7.2017, p. 4); Commission decision of 17 March 2022 on State aid SA.49313 Alleged illegal State aid to ENS (Ente Nazionale Sordi) (OJ C 204, 8.6.2018, p. 3); Commission Decision of 5.7.2016 on State aid SA.19864 - 2014/C (ex 2009/NN54) implemented by Belgium Public financing of Brussels public IRIS hospitals Commission decision Brussels, 5.7.2016, C (2016) 4051 final.

³⁵ Commission decision Case N 158/2009-United Kingdom 'Establishment of the National Employment Savings Trust-NEST', OJ C 96, 29.3.2011, p.1.

³⁶ State aid SA.36410 (2014/N) – United Kingdom Modifications to the National Employment Savings Trust – NEST.

³⁷ The reports can be consulted in the national language and English at https://competition-policy.ec.europa.eu/state-aid/legislation/sgei_en

In Germany:³⁸

- Supplementary grants for wage costs in addition to the integration grants for older workers and supplementary grants in respect of material costs paid to providers of employment.
- Compensation to cover the personnel costs of social enterprises for socio-educational support and professional guidance of people who were formerly unemployed for long periods of time and are now employed staff subject to social security contributions in such enterprises.
- Compensation to maintain and create rehabilitated, low-cost housing and to alleviate the burden on housing markets, as well as to create and safeguard affordable rental housing.
- The demand-oriented, interconnected and coordinated use of funding to initiate and finance assistance measures for the benefit of long-term unemployed and low-skilled people after the age of 25, in order to achieve the greatest possible positive impact with the available funding.

In Greece:³⁹

- ‘Special Actions to Integrate Young People with Disabilities into Employment’, an integrated intervention aimed at serving the social need to ensure access to and reintegration into the labour market for young people with disabilities and/or chronic conditions, through an integrated package of measures to provide counselling, continuing vocational training, certification and work experience.
- Support services for the organisation and operation of camps for vulnerable groups of the population.
- Counselling, training, certification and support for the entrepreneurship skills of individuals from vulnerable social groups, to advance them and to try to reintegrate them into employment, and to encourage their social reintegration.

In Spain:⁴⁰

- Aid for the recruitment of staff who are specialised in giving support or assistance to vulnerable people during the integration process (e.g. subsidies to cover the wage costs of specialist staff who provide support to those persons during the integration process).
- Aid to encourage the employment of vulnerable people by the beneficiary undertakings (partial subsidising of wage costs).
- Subsidies for the provision of integrated guidance, support and assistance services for the integration of people with disabilities or mental health disorders.
- Coverage of 50% of the energy bill owed by individuals or households at risk of homelessness.

³⁸ HT.2807 – Services of general economic interest: Reporting pursuant to the SGEI Decision of 2012 and the SGEI Framework of 2012; specifically: Report of the Federal Republic of Germany for 2020 and 2021. Berlin, 30 June 2022. Pp. 4, 6, 7, and 15.

³⁹ Hellenic Republic, Ministry of Finance, Secretariat-general for economic policy directorate-general for state aid and assistance central state aid unit, SGEI report for the year 2022 (In accordance with the 2012 SGEI Decision and the SGEI framework 2012). Pp. 34, 49, and 51.

⁴⁰ Ministry of Foreign Affairs, European Union and Cooperation, Secretary of State for the European Union, Directorate-General for Internal Market Coordination and other EU policies, State aid. Services of General Economic Interest. 2022 report (for 2020 and 2021) submitted pursuant to the 2012 SGEI Decision and the 2012 SGEI Framework. Pp. 64, 83, and 101.

In Poland:⁴¹

- Creating and providing rented or cooperative housing to persons of moderate (statutorily limited) incomes preventing them from addressing their housing needs on the market
- Construction of residential premises by two entities in the form of limited liability companies, followed by renting out of these premises to persons whose earnings are low enough to preclude them from obtaining a mortgage to buy a home in the commercial market, but too high to make them eligible for municipal social housing.
- Housing estate rental services entrusted by the municipalities to social housing associations.
- Subsidies for meals sold in 'milk bars' awarded after an application submitted by the operator

In Sweden:⁴²

- Compensation for creating meaningful and empowering work for persons with disabilities resulting in a reduced capacity for work (Samhall)
- Compensation to employers for purchasing workplace rehabilitation support to make it possible for employees to return to work
- Compensation for organising and providing housing for the elderly.
- Compensation to cover the costs of subletting by higher education institutions

Box 3: An example in detail:

Aid to access to and reintegration into the labour market in Germany

SGEI Definition:

To integrate the long-term unemployed into the labour market within the meaning of Article 2(1)(c) of the SGEI Commission Decision, compensation is paid for the provision of services of general economic interest to cover the personnel costs of social enterprises for socio-educational support and professional guidance of people who were formerly unemployed for long periods of time and are now employed staff subject to social security contributions in such enterprises.

Entrustment: Grant decision (administrative act) and the corresponding annex.

Duration: 26 months

Aid instrument: Grant

Compensation:

Under Article 5(1) of the SGEI Commission Decision, compensation granted with respect to entrustment corresponds to the net costs incurred by the entrusted undertaking in discharging its public service obligation. The grant does not exceed what is required, according to the expenditure set out in the financing plan, to cover the net costs incurred in providing the SGEI defined above. The amount of any net costs for which compensation is to be provided is ascertained from the undertaking's business plan. The net costs eligible for compensation are calculated as the difference between the net costs incurred by the undertaking in performing the SGEI concerned and the net costs it would have incurred in the absence of any such obligation (the net-avoided-cost method). As part of the interim proof procedure pursuant to point 6.1.a of the General Ancillary

⁴¹ Report. Services of general economic interest ('SGEI'): report to be submitted following the 2012 SGEI Decision and the 2012 SGEI Framework. Pp. 2, 6, 11 and 14.

⁴² Government Offices of Sweden, Memorandum, 6 May 2022, N2021/02899, Ministry of Enterprise and Innovation, Report on services of general economic interest 2020-2021. Pp. 4 (57), 10 (57), 13 (57), and 16 (57).

Conditions for Grants from EU Funds (national regulation), the beneficiary must also compare the revenue and expenditure generated from the SGEIs for the previous financial year. A form for this purpose is provided by the granting authority as an annex to the application form.

Arrangements for avoiding and repaying any overcompensation:

For the duration of the public service obligation, the beneficiary must, on request, provide supporting documents for each year. It must also provide accounting evidence that the aid does not exceed the net costs of providing the SGEIs. Final proof is provided at the end of the entrustment period. Regular checks are carried out to ensure that compensation for SGEIs meets the conditions laid down in the SGEI Exemption Decision and, above all, that the beneficiary does not receive more compensation than that provided for in Article 5 of the SGEI Exemption Decision. Further checks may be carried out by the granting authority independently of the above, as part of verifying the funding request / proof of use. If the checks conducted by the granting authority to ascertain whether the payment made to the beneficiary in the form of a grant has been used correctly show that the revenues earned by the beneficiary for providing services of general economic interest exceed the net costs (overcompensation), the authority asks the beneficiary to repay the surplus amount at the same time as it informs the latter of the audit outcome. This does not apply if the overcompensation does not exceed 10% of the amount eligible for compensation. In this case, the surplus amount not exceeding 10% is credited to the following calendar year in such a way as to reduce the compensation scheduled for that year by 10%.⁴³

Finally, the European Commission has recently published the results of the evaluation of “the State subsidy rules for health and social services of general economic interest (“SGEIs”) and of the SGEI de minimis Regulation”.⁴⁴ While the evaluation concludes that the 2012 SGEI generally reached the objectives of clarification and simplification, it also noted that “there is room for improvement, in particular, to clarify certain concepts such as economic/non-economic activity, effect on trade, reasonable profit, market failure and social housing. Moreover, it appears that there may be a need to reconsider the SGEI de minimis ceiling and to align the SGEI de minimis Regulation with the general de minimis Regulation [The evaluation also suggests] that costs associated with the application of the requirements set by the SGEI rules should be reduced.”⁴⁵

Regarding the definition of State aid in this context, the Commission acknowledged that the distinction between economic and non-economic activities provided in the SGEI Communication is not always clear-cut and that some Member States had criticised the difficulty of maintaining separate accounts for commercial and non-commercial activities. The Commission also clarified that “certain activities have a purely local impact and consequently no effect on trade [consequently there is also no State aid and the SGEI rules do not come into play] if:

- a) the beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States;
- b) it cannot be foreseen, with a sufficient degree of probability, that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment.⁴⁶

⁴³ HT.2807 – Services of general economic interest: Reporting pursuant to the SGEI Decision of 2012 and the SGEI Framework of 2012; specifically: Report of the Federal Republic of Germany for 2020 and 2021. Berlin, 30 June 2022. Pp. 4-7.

⁴⁴ Commission Staff Working Document Evaluation, Evaluation of the State subsidy rules for health and social services of general economic interest (“SGEIs”) and of the SGEI de minimis Regulation. {SWD(2022) 389 final}

⁴⁵ Commission Staff Working Document, Executive Summary of the Evaluation, Evaluation of the State subsidy rules for health and social services of general economic interest (“SGEIs”) and of the SGEI de minimis Regulation.{SWD(2022) 388 final}, at page 2.

⁴⁶ Commission Staff Working Document Evaluation, Evaluation of the State subsidy rules for health and social services of general economic interest (“SGEIs”) and of the SGEI de minimis Regulation. Cit., at p. 38.

In relation to the foregoing, the Commission decision on the support granted to Santa Casa da Misericórdia de Tomar in Portugal, discussed in the first thematic report, can be mentioned as an example of the granting of public support for the provision of social services, in particular health services, which does not have an effect on trade, and therefore does not qualify as State aid.⁴⁷ In this regard, the Commission also referred to an opinion of the European Economic and Social Committee (EESC) from 2022, stating that “when health and social services are provided in a market context, they have an essentially local dimension with no real demand-side cross-border relevance. The local dimension is even more evident when social and health services are managed by social economy entities with the involvement of local communities, with a view to social cohesion and in the public interest.”⁴⁸

The evaluation concluded that the concept of social housing, does not appear as such unclear but is “considered as an obstacle in providing the SGEI adapted to the population’s need.”⁴⁹ The Commission also noted that several public authorities experience difficulties with the concept of reasonable profit under the 2012 SGEI Commission Decision and Framework “and that some Member States are not using the possibility to grant compensation up to the reasonable profit for fear of being in breach due to the complexity of calculating this profit. The Commission services [also acknowledged] that acquiring information to determine a reasonable profit can be challenging, especially for activities with a social character and that acquiring comparative data to determine the reasonable profit can be burdensome.”⁵⁰ Interesting for this workshop’s , the Commission noted that “The European Economic and Social Committee (EESC) came back on the reasonable profit concept in an own-initiative opinion from 2022, essentially requesting further guidance and notably how to deal with undertakings that ‘[keep] ploughing the profits back into [their] own activities and [describe themselves] as a social economy entity or enterprise’”.⁵¹ In this context, the biannual report submitted by Poland provides an example of the calculation of reasonable profit in the context of an SGEI concerning social housing, in particular concerning compensation for the construction of residential premises by two entities followed by renting out of these premises to persons with low earnings.⁵²

The evaluation concluded that “there is a need to clarify/simplify further the rules to ensure stronger coherence between the general and the SGEI de minimis Regulations as regards the notion of “single undertaking”, the provisions on mergers and acquisitions, and the application of the de minimis rules to undertakings in difficulty, which should be addressed to simplify further the enforcement of both Regulations. In addition, there is a call for better coherence between the SGEI rules and Protocol 26 annexed to the TEU and TFEU on services of general interest; Article 14 TFEU; the Charter of Fundamental Rights; and the

⁴⁷ Commission decision of 9 August 2016 on State aid SA.38920 (2016/NN) Alleged grant support to Santa Casa da Misericórdia de Tomar (SCMT) (OJ C 406, 4.11.2016, p. 6).

⁴⁸ *Id.*, at p. 37.

⁴⁹ *Id.* At p. 41.

⁵⁰ *Id.*, at pp. 33-34.

⁵¹ *Id.*, at p. 33.

⁵² Report. Services of general economic interest (‘SGEI’): report to be submitted following the 2012 SGEI Decision and the 2012 SGEI Framework, at page 9: “Reasonable profit may not exceed the rate of return on capital employed at the level of the swap rate on the investment increased by a bonus of 100 basis points. The appropriate swap rate published by the European Commission for a 10-year period applicable as of the date of the entrustment of the investment’s implementation is considered the swap rate for the investment. For the purpose of determining reasonable profit, the capital employed by an enterprise for implementing the investment in a given year is the sum of the initial value of fixed assets acquired by the enterprise on a progressive basis, i.e. in the given year and in the preceding years, and employed in the given year for implementing the investment. Where in a given year a fixed asset is acquired or liquidated, the calculation of the capital employed for the implementation of the entrusted investment should take account of the initial value of the fixed asset in proportion to the number of days on which the fixed asset was used to implement the investment/medium-average value of equity employed for the implementation of the investment.

European Pillar of Social Rights, to ensure clarity within EU rules and to simplify their enforcement.”⁵³

Finally, a participant in the evaluation “advocated for the specific recognition in the SGEI rules of operators active in the so-called “social economy” (i.e. where profits can be made but they will not be distributed to shareholders). In the respondent’s view, this would make the SGEI rules even more relevant. [The Commission noted that] This is in line with the call from the EESC and other organisations to recognise the special position of social economy enterprises.”⁵⁴

4 Conclusions

According to the Social Economy Action Plan, “existing EU rules in relation to services of general economic interest (SGEI) open up considerable possibilities for State aid. Entities can only benefit from this flexibility if they have been entrusted with a specific mission, i.e. the SGEI. However, public authorities do not always use this possibility to its full potential, for example in relation to the activities of social enterprises focusing on the provision of jobs for vulnerable people.”⁵⁵ In this regard, as pointed out in the recent evaluation conducted by the European Commission, the uncertainty concerning some notions, such as economic activity, effect on trade or reasonable profit, may be one of the factors explaining the lack of application of the SGEI framework to its full potential.

In this context, the paper has shown that public authorities are generally entitled under EU Law to decide which services they consider as SGEI and that compensation for the provision of SGEI may not amount to State aid, either because the conditions laid down by the Court of Justice in the *Altmark* judgment are fulfilled or due to the lack of a constitutive criterion under Article 107(1) TFEU, such as the effect on trade in the case of activities with a purely local dimension. In addition, the paper has also shown that in the case of social services, compensation for the provision of SGEI may be granted without notifying the European Commission, either under the SGEI *de minimis* or under the SGEI Commission Decision, in the latter case, irrespective of the amount of compensation provided. It is therefore suggested to make use of the flexibility allowed by the current SGEI legal framework to support even further the activities of social economy entities.

Finally, beyond discussing the conditions of the SGEI Framework to declare aid compatible, after notification, in cases where the SGEI *de minimis* regulation and the SGEI Commission Decision do not apply, the paper has provided concrete examples from Member States that used SGEI to successfully support the social economy, as well as guidance and recommendations for social SGEI provided by the European Commission with a view to assisting national authorities and stakeholders to finance crucial services for the entire society, and particularly for vulnerable groups, while maintaining a level playing field in the Internal market. In this regard, it is suggested that the experience of national authorities across Europe on social SGEI, together with the Commission decisions and guidance, provides significant information for public authorities that can be used to design and customize their own social SGEI schemes at their national and/or regional level.

⁵³ *Id.*, at p. 46.

⁵⁴ *Id.*, at p. 51.

⁵⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Building an economy that works for people: an action plan for the social economy, page 9.

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