



## BRIEFING FOR MEMBERS

# STATE AID TO SOCIAL SERVICES (UPDATE)

## What is state aid and what is its current context?

State aid occurs whenever public resources are used to provide assistance to certain businesses, service providers or services which, as a result of the aid received, gain a position of advantage in the market over other competitors which do not receive such resources. As a result of this, state aid can distort competition among economic operators by favouring certain businesses or service providers over others.

At the same time, state aid, as any subsidy in general, is an important tool for governments and when used adequately, can help remedy market failures, boost growth, employment and competitiveness in the economy. For instance, state aid can have a key role in guaranteeing that the provision of social services reaches users' groups whose demands would be unmet under a pure market logic –e.g. if the cost of provision is onerous without public aid due to geographical reasons, large investments needed or lack of a critical mass of users, etc.–

The current economic crisis has brought state aid back to the forefront of public policies aimed to overcome the worst effects of economic downturns. In this regard, and according to the European Commission 2014 State Aid Scoreboard<sup>1</sup> the amount of state aid channelled to the financial sector accounted for EUR 441.9 billion in 2013 only. Such 'crisis-related aid' represented the vast majority of state aid granted over the last crisis years. In contrast, 'non-crisis aid' accounted for a much modest EUR 62.7 billion Euros in 2013. Furthermore, this figure represented a 21.0% drop from the peak in non-crisis aid registered in 2009 (EUR 79.4 billion). This decrease is basically due to budgetary constraints in Member States and the prioritization of crisis-related aid.

## How is the European Union involved?

State aid and, in particular, its control constitutes a key element of the EU single market and a cornerstone in safeguarding free and fair competition across Member States. EU rules, therefore, define the criteria to assess if (i) public authorities' funding constitutes state aid or not and (ii) in case it is state aid, whether it is permitted or not.

Member States are generally required to notify their action on state aid to the European Commission –unless aid belongs to exempted categories–. The Commission has all the competence to decide on the legality of state aid. Such competence over state aid ruling and management is enshrined in Articles 107 to 109 of the Treaty on the Functioning of the EU (TFEU). The European Commission allows for state aid in specific cases falling under any of the following three broad categories: **regional aid**, which is granted to promote the economic development of certain disadvantaged areas; **horizontal aid**, aimed at benefitting the economy as

<sup>1</sup> [http://ec.europa.eu/competition/state\\_aid/scoreboard/financial\\_economic\\_crisis\\_aid\\_en.html](http://ec.europa.eu/competition/state_aid/scoreboard/financial_economic_crisis_aid_en.html)





a whole, for instance through R&D; and **sector-specific aid**, which is granted to fix structural problems in specific sectors. The latter is the category under which the so called services of general economic interest (SGEI) fall. SGEI are services classified as being of public importance and include health and social services.

## What is specific about SGEI?

SGEI have special characteristics as compared to other economic activities. SGEI are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) under a market logic. Examples are transport networks, postal services and social services.

Even if social services may operate in a market framework, SGEI are not and cannot be satisfactorily provided by the market 'under conditions such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State'. State aid is, in these cases, acceptable because, if only commercial interest was considered, the undertakings entrusted with these services would not assume them to the same extent or under the same conditions. Furthermore, subsidies can be justified because SGEI are services addressed to citizens or provided in the interest of society as a whole. Member States have a wide margin of discretion for definition of SGEI –as enshrined in Protocol 26, art.1 of the EU Rules Applicable to State Aid– and the European Commission only steps in case of manifest error.

## The 2012 SGEI Package

Following a public consultation and subsequent revision process, the European Commission adopted a new package on SGEI in 2012. The Package redefined the conditions under which state aid in the form of public service compensation can be compatible with EU rules. The specific approach to SGEI aimed to introduce a proportionate approach to this category of services, with simpler rules for social undertakings which are often small, have a local scale and serve a social objective.

The package consists of four instruments that apply to all authorities in Member States that grant compensation for the provision of SGEI.

- A. A **Communication (2012/C8/02)**<sup>2</sup> aimed at clarifying basic concepts related to state aid which are relevant to SGEI. It therefore helps to interpret art. 107 of the TFEU. In particular, it clarifies that we are talking about state aid only when all the following conditions apply:
- a. no *de minimis* rule applies
  - b. the subsidy comes from the state, it is paid to certain operators only, the subsidized activity is of economic nature, regardless of its legal status and the way in which it is financed (in state aid terminology, this means that the recipient is an undertaking).
  - c. the subsidy has an effect on trade and brings a distortion, either actual or potential, of competition
  - d. any of the four criteria laid down by the Altmarm ruling of the European Court of Justice<sup>3</sup> is not fulfilled
    - i. there is a clear definition of the public service obligations that the recipient undertaking is discharging; i.e. there is an entrustment act.

<sup>2</sup> [Communication \(2012/C8/02\)](#) on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest.

<sup>3</sup> [Case C-280/00](#) (2003), Altmarm Trans GmbH and Regierungspräsident Magdeburg vs. Nahverkehrsgesellschaft Altmarm GmbH



- ii. the parameters for calculating the compensation are objective and transparent
- iii. There is no overcompensation; compensation does not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations
- iv. The recipient undertaking has been chosen after a public procurement procedure or, at least, the level of compensation needed has been decided based on costs of a well-run undertaking.

## B. A **Regulation 360/2012**<sup>4</sup> on SGEI *de minimis*

EU state aid rules do not apply to smaller amounts of aid. In these cases, state compensation is deemed unproblematic because it is too low to have an impact on trade, competition and the general functioning of the EU internal market.

For this reason, the European Commission adopted in 2012 a threshold of exemption of up to EUR 500,000 per undertaking over a period of three fiscal years. Any support below that threshold granted to SGEI providers does not constitute state aid. The recipient of financial support has to check that every source of public financial support within these three years, including ESIF funds, has to be included as part of the 500.000 Euros. This threshold accounts for the specific nature of SGEIs and, therefore, is higher than the general *de minimis* limit applicable to ordinary undertakings (EUR 200,000 over three years). The current *de minimis* Regulation will be in force until the end of 2018.

## C. A **Decision 2012/21/EU**<sup>5</sup> lays down the conditions under which state aid applied to undertakings above the *de minimis* threshold and where none of the conditions in the Communication applies, is deemed as 'compatible' and therefore allowed.

The Decision also specifies the conditions under which Member States have to notify compensations to the European Commission. As a result of this piece of legislation, a wide range of social services are exempted from notification, including health and long-term care, childcare, access to and reintegration in the labour market, social housing and the care and social inclusion of vulnerable groups. This constitutes a significant progress from the previous provision, where only hospitals and social housing were exempted from notification.

All other SGEIs falling outside this category are also exempted from notification if the amount of compensation received is lower than EUR 15 million a year. The applicability of the Decision is limited to SGEI entrusted for a maximum duration of 10 years.

In all cases, the operation of the SGEI is dependent on an act of entrustment issued by the subsidizing authority, which has to include the following elements in order to deem the aid compatible: (i) a detailed description of the content and duration of the public service obligation entrusted, (ii) a definition of the undertaking entrusted, (iii) a description of the compensation mechanism and the parameters established to calculate, control and revise the compensation granted, (iv) provisions ensuring control against

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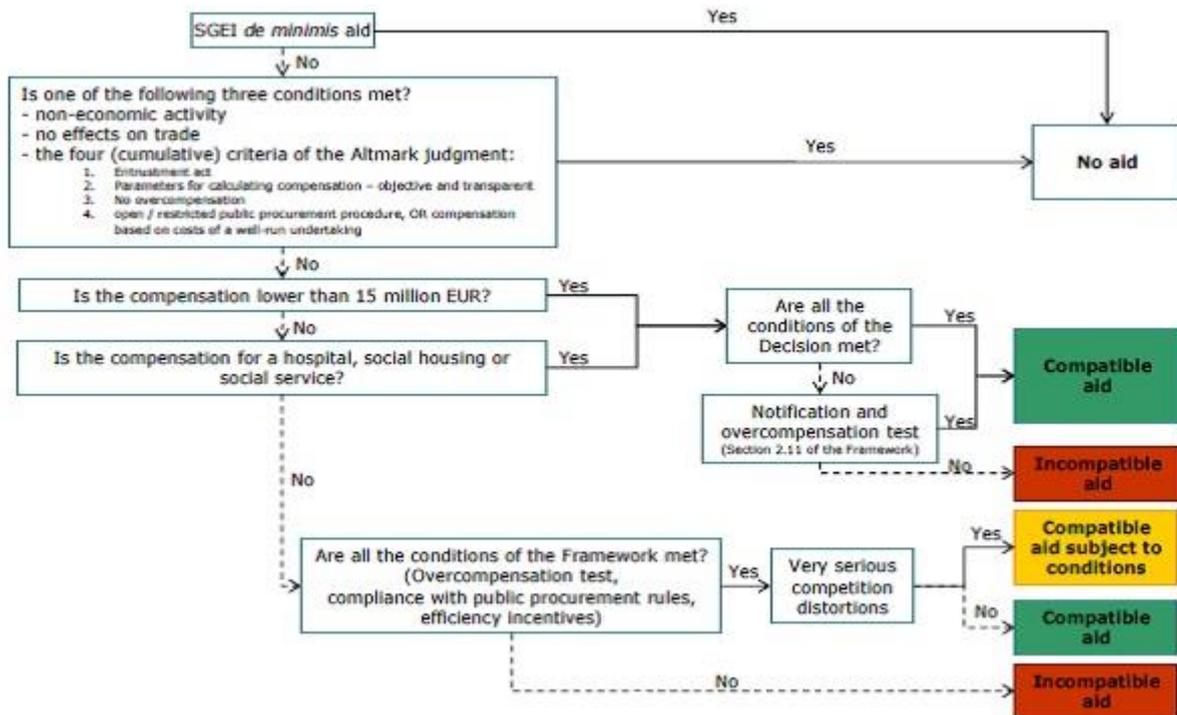
<sup>4</sup> [Regulation 360/2012](#) on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest.

<sup>5</sup> [Decision 2012/21/EU](#) 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.



overcompensation (checks by Member States at least every 3 years) and, finally, (v) a reference to the Decision. Figure 1 synthesises the conditions that need to be checked to understand if a public subsidy constitutes aid or not, and if such aid is compatible.

**Figure 1** Decision tree to assess state aid



Source: *European Commission*

It is important to note that the need for entrustment of a service provider to qualify a service as a SGEI constitutes a requirement which may go beyond the usual conditions under which public authorities at the Member State level fund social services (for instance, through an authorization only).

D. The fourth instrument included in the package is a **Framework**<sup>6</sup> aimed to assess large compensation amounts granted to operators of SGEI, but outside the social services field.

## When do you need to look at state aid rules and when to public procurement?

State aid rules apply when public authorities are offering subsidies to service providers. This is a different context from the one where public authorities contract services from the open market through issuing a call for tenders. In this case, when public authorities act as contractors, they are bound by public procurement rules.

<sup>6</sup> [Communication from the Commission \(2012/C 8/03\)](#), European Union framework for State aid in the form of public service compensation.



Such rules have also been subject to revision through Directive 2014/24/EU, which is now in the final stages of its transposition phase in Member States (deadline is April 2016<sup>7</sup>). The specificity of social, health and other services provided directly to the person was also recognized in this Directive, which recognized (Recital 114) the freedom of contracting authorities to choose service providers in the way they consider most appropriate, with or without a procurement process, for contracts below the EUR 750,000 threshold (art.4, d).

The element that defines the adequate legal framework in each case –state aid or public procurement– has to do with the party that defines the service to be provided. If the service is defined in advance by the public authority, who then looks for a tenderer to execute the service, public procurement rules apply. Instead, if a need but not as service is defined by the authority and/or a provider proposes a service to be subsidized, the rules on state aid should apply.

## What Eurodiaconia has done on state aid and would like to do next

Eurodiaconia has been looking at state aid rules (and public procurement) over the last years because they touch at the core of how health and social services provided by our members are financed. Based on members' experiences, Eurodiaconia responded to the consultation on state aid rules launched by the European Commission in 2010. Eurodiaconia worked closely with partners to highlight areas of concern and see that a package of state aid rules took into greater consideration elements in the interest of SGEI.

Since the approval of the package, Eurodiaconia has been looking with interest to the problems encountered by providers of social services faced against the complexities of state aid rules. With this regard, you may inform the Eurodiaconia secretariat of any problem related to the funding of your activities through subsidies, especially those related to the complexity of procedures, the granting of written entrustments in accordance to the Decision rules, unfair requests of state aid notifications or the need to revise the *de minimis* threshold. With respect to the latter, in advance of its revision in 2019, Eurodiaconia is already advocating for an increase in the *de minimis* threshold to EUR 1 million.

## Further reading

[European Commission Guide to the application of EU rules on state aid](#), 2013

[European Commission \(Directorate-General for Competition\) presentation on the 2012 SGEI package](#)

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<sup>7</sup> Eurodiaconia produced a briefing with [Key Points For The Transposition Of Directive 2014/24/EU On Public Procurement](#) (2015)