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# 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

In the context of the consultation process launched by the Commission communication on social services of general interest (SSGIs) of April 2006[1], the Commission received a number of questions concerning the application of the European Union rules on state aid, public procurement, and the internal market to services of general economic interest (SGEIs), and in particular to SSGIs. The purpose of this document is to provide answers to the questions concerning the application of state aid rules to SSGIs and SGEIs. The document is also intended to provide answers to the questions concerning the application of the rules on public procurement to SSGIs in order to clarify the obligations on public authorities when they buy social services in the market. Finally, the document provides answers concerning the application of the Treaty rules on the freedom to provide services and the freedom of establishment (hereinafter: 'internal market rules') to SSGIs and the application of the rules in the Services Directive[2] to SSGIs.

Where possible, the answers refer to case law or to specific provisions of the applicable texts to guide interested readers who would like to have further information. This document is a first update of the working papers published in 2007 and its aim is to reflect the new questions received by the Commission, either through the Interactive Information Service established in January 2008, or at meetings between the Commission services, public authorities and other stakeholders. The update also takes into account developments in case law, any changes to the applicable legislative framework, and discussions in this field in the Social Protection Committee [3].

This document is a working paper prepared by the Commission's services. It provides technical explanations, in particular on the basis of concise and sometimes simplified summaries of the legislation and case law on state aid, public procurement and the internal market and, in relation to state aid, of Commission decisions on SGEIs and in particular SSGIs. This document is not binding on the European Commission as an institution.

1 Communication from the Commission *Implementing the Community Lisbon programme: Social services of general interest in the European Union*, COM(2006) 177 final, SEC(2006) 516.

2 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).

3 See *Report by the Social Protection Committee on the application of Community law to SSGI*, November 2008, in: http://ec.europa.eu/social/main.jsp?catId=758&langId=en.

## 1. INTRODUCTION

A number of questions have been raised concerning the **application of the state aid rules to services of general interest**. These questions concern in the first place the precise conditions under which compensation for public service obligations constitutes state aid. Second, they concern the conditions under which state aid may be regarded as compatible with the Treaty on the Functioning of the European Union (TFEU), the practical application of these conditions, and clarifications concerning the obligation to notify such aid to the Commission.

In its judgment in *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH* (*Altmark*)[4], the Court of Justice of the European Union (the Court) held that public service compensation did not constitute state aid within the meaning of Article 107 of the TFEU provided that four cumulative criteria are met[5].

Where the four criteria are met, public service compensation does not constitute state aid, and Articles 107 and 108 TFEU do not apply. If the Member States do not comply with the criteria, and if the general conditions of Article 107(1) TFEU are met, public service compensation constitutes state aid.

In such cases, Article 106 TFEU and, for land transport, Article 93 TFEU, allow the Commission to declare compensation for services of general economic interest (SGEIs) compatible with the internal market. The Commission Decision of 28 November 2005 on the application of Article 86(2) EC (now Article 106(2) TFEU) to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEIs[6] (hereinafter: 'the Decision') and, for land transport, Regulation (EC) No 1370/2007 of the European Parliament and of the Council[7] (hereinafter: 'Regulation 1370'), specify the conditions under which certain compensation arrangements are compatible with Articles 106(2) and 93 respectively and are not subject to the prior notification requirement of Article 108(3) TFEU. Other public service compensation must be notified to the Commission, which will assess its compatibility on the basis of the Community framework for state aid in the form of public service compensation[8] (hereinafter: 'the Framework') and, for land transport, Regulation (EC) No 1370/2007.

The *Altmark* judgment, the Decision and the Framework have made a significant contribution to clarifying and simplifying the applicable rules. Nonetheless,

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

5 For further details, see the answer provided at 3.1.

6 Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, p. 67.

7 Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

8 Community framework for state aid in the form of public-service compensation, OJ C 297, 29.11.2005, p. 4.

governments and stakeholders have raised a number of questions about the practical application of the legal framework to specific cases.

The following questions and answers refer mainly to social services of general economic interest and to transport, but they also apply to SGEIs in general.

Questions have also been raised concerning the **application of the European rules on public procurement to social services of general interest (SSGIs)**.

The questions relate to the conditions under which public procurement rules apply to SSGIs, the scope of the rules and how the rules allow account to be taken of the specific features of SSGIs.

With regard to the first point, it should be stressed that the European rules on public procurement do not require public authorities to outsource an SSGI. They are free to decide to provide the service themselves, directly or in-house. They may also decide to provide the service in cooperation with other public authorities under the conditions laid down by case law.

The rules on public procurement/concessions apply only if a public authority decides to entrust the provision of a service to a third party in return for payment.

Against this background, if the public authority decides to award a public service contract, the contract will fall within the scope of Directive 2004/18/EC only if the relevant threshold amounts for the application of the Directive are met[9]. However, social services and health contracts are not subject to all the provisions of Directive 2004/18/EC[10]; they are subject only to a very limited number of that Directive's provisions[11], and to the fundamental principles of Union law, such as the requirement to treat all economic operators in an equal and non-discriminatory manner.

Public services contracts[12] whose value is below the application thresholds of the Public Procurement Directives and services concessions (regardless of their amount) fall outside the scope of the Public Procurement Directives and are subject only to the fundamental principles of the TFEU (non-discrimination, transparency, etc.) in so far as the contracts involve a cross-border element. In the absence of a cross-border element, the contracts also fall outside the scope of the TFEU.

The following questions and answers are intended to provide greater clarification as to the conditions and arrangements for applying the rules on public procurement to SSGIs, by addressing all the issues raised most frequently in questions, such as the provision of services by an in-house organisation or as part of cooperation between

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9 Article 7 of Directive 2004/18/EC.

10 Social services and health services are among the services listed in Annex II B to Directive 2004/18/EC. Contracts for such services are subject only to a limited number of provisions of the Directive (on the distinction between the services listed in Annexes II A and II B, see Articles 20 and 21 of Directive 2004/18/EC). Annex II B also includes an explicit reference to social services and health services. The codes referred to therein may be consulted on the DG Internal Market website at www.simap.europa.eu.

11 The technical specifications must be laid down at the start of the procurement process, and the results of the tendering process must be published, as required by Article 23 of Directive 2004/18/EC read in conjunction with Articles 23 and 35(4) of Directive 2004/18/EC.

12 Irrespective of the nature of the services.

public authorities, public-private sector partnerships, service concessions and the scope of the fundamental principles of the TFEU.

The intention is also to provide a more detailed explanation of the many options available to public authorities when it comes to taking account in their public procurement of the specific features of SSGIs, in particular of all the qualitative requirements that they consider appropriate to meet the complex needs of users. We hope that these clarifications will reply to the questions asked on this subject by the different stakeholders and will support and provide greater encouragement to public authorities in their pro-active measures to ensure that citizens enjoy high-quality social services.

The same rationale lay behind the preparation of the answers to questions concerning the **application of the internal market rules to SGEIs, and SSGIs in particular**. By internal market rules what is meant is the rules in the TFEU on the freedom of establishment and the freedom to provide services (Articles 49 and 56 TFEU) and in the Services Directive.

SSGIs are covered by the internal market rules in the TFEU where they constitute an 'economic activity' within the meaning of the Court's case law on the interpretation of those articles. Certain SSGIs may also be covered by the Services Directive.

The answers provided in this document are intended to clarify the options available to the Member States to set or maintain a regulatory framework for these services in order to guarantee their accessibility and quality, and therefore take account of the specific nature of SGEIs, and of SSGIs in particular, whenever those rules are applied. Social policy objectives may justify the application of measures to govern the social services sector in particular. Likewise, this document also makes clear that the Services Directive contains a range of provisions that recognise and take account of the specific features of the social services that have not been excluded from the scope of the Directive.

## 2. CONCEPT OF SGEI

### 2.1. What is a service of general interest (SGI)?

Protocol No 26 to the TFEU concerns SGIs. However, it does not define the concept. In Union practice, the concept of SGI refers to services, whether 'economic' or not, that the Member States regard as being of general interest, and which they therefore subject to specific public service obligations. The concept covers services of general economic interest (SGEIs) that fall within the scope of the TFEU and non-economic services of general interest, which are not subject to the rules in the TFEU.

### 2.2. What is a service of general economic interest (SGEI)? Do public authorities have to introduce this concept into their domestic law?

The concept of SGEI appears in Articles 14 and 106(2) TFEU and in Protocol No 26 to the TFEU, but it is not defined in the TFEU or in secondary legislation. In Union practice, the term refers in general to services of an economic nature that the public

authorities in the Member States at national, regional or local level, depending on the allocation of powers between them under national law, subject to specific public service obligations through an act of entrustment (on the concept of 'act of entrustment', see the answers to questions 3.4.1 and 3.4.13) on the basis of a general-interest criterion and in order to ensure that the services are provided under conditions which are not necessarily the same as prevailing market conditions.

The Court has established that SGEIs are services that exhibit special characteristics as compared with those of other economic activities[13].

The concept may apply to different situations and terms, depending on the Member State, and Union law does not create any obligation to designate formally a task or a service as a service of general economic interest. If the content of an SGEI – i.e. the public service obligations – is clearly identified, it is not necessary for the service in question to be called 'SGEI'. The same is true of the concept of social services of general interest (SSGIs) that are economic in nature.

### 2.3. What is a social service of general interest (SSGI)?

The concept of SSGI is not defined in the TFEU or in secondary legislation. The communication *Implementing the Community Lisbon programme: Social services of general interest in the European Union*[14] identified two main groups of SSGIs in addition to health services proper:

– statutory and complementary social security schemes, organised 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;

– other essential services provided directly to the person. These services that play a preventive and social cohesion role consist of customised assistance to facilitate social inclusion and safeguard fundamental rights. They comprise, first of all, assistance for persons faced by personal challenges or crises (such as debt, unemployment, drug addiction or family breakdown). Secondly, they include activities to ensure that the people concerned are able to completely reintegrate into society (rehabilitation, language training for immigrants) and, in particular, return to the labour market (occupational training and reintegration). These services complement and support the role of families in caring for the youngest and oldest members of society in particular. Thirdly, these services include activities to integrate people with long-term health or disability problems. Fourthly, they also include social housing, which provides housing for disadvantaged citizens or socially less advantaged groups. Certain services can obviously include all four of these dimensions.

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[13] Cases C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 27; Case C-242/95 *GT-Link A/S* [1997] ECR I-4449, paragraph 53; and Case C-266/96, *Corsica Ferries France SA* [1998] ECR I-3949, paragraph 45.

[14] COM(2006) 177 final, 26 April 2006.

Moreover, the communication *Services of general interest, including social services of general interest: a new European commitment*[15] highlighted the objectives and the organisational principles which characterise SSGIs.

As these two communications make clear, SSGIs may be of an economic or non-economic nature, depending on the activity under consideration. The fact that the activity in question is termed 'social' is not of itself enough[16] for it to avoid being regarded as an 'economic activity' within the meaning of the Court's case law. SSGIs that are economic in nature are SGEIs (see the answer to question 2.2).

### 2.4. Do the Member States have any discretion when it comes to defining SGEIs?

Public authorities in the Member States, whether at national, regional or local level, depending on the allocation of powers between them under national law, have considerable discretion when it comes to defining what they regard as services of general economic interest[17] (on the concept of SGEI, see the answer to question 2.2). The only limits are those imposed by Union law (see the answer to question 2.6) and manifest error of assessment (see the answer to question 2.7).

### 2.5. Can the Commission provide a list of criteria for the public authorities to use to determine whether a service is in the nature of a service of general interest?

The scope and organisation of SGEIs vary considerably from one Member State to another, depending on the history and culture of public intervention in each Member State. SGEIs are therefore very diverse and disparities may exist in relation to users' needs and preferences because of different geographical, social and cultural situations. Accordingly, it is essentially the responsibility of the public authorities at national, regional or local level to decide the nature and scope of a service of general interest.

In accordance with the principles of subsidiarity and proportionality, the EU takes action only where necessary and within the limits of the powers conferred on it by the TFEU. Its action respects the diversity of situations in the Member States and the roles devolved to national, regional and local authorities to ensure the well-being of their citizens and promote social cohesion, while guaranteeing democratic choices in relation to the level of the quality of services, for example.

Therefore it is not for the Commission to provide a list of criteria to determine the general interest of a particular service. It is for the public authorities in the Member States to determine whether or not a service is in the general interest.

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15 COM(2007) 725 final, 20 November 2007.

16 Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, paragraph 118; Case C-218/00 *INAIL* [2002] ECR I-691, paragraph 37; and Case C-355/00 *Freskot* [2003] I-5263.

17 Case T-17/02 *Fred Olsen* [2005] ECR II-2031, paragraph 216; Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraphs 166-169; Case T-309/04 *TV2* [2008] ECR II-2935, paragraphs 113 *et seq.*.

## 2.6. Does EU law impose limits on Member States' discretion when defining SGEIs?

In sectors which have been harmonised at Union level[18], and where objectives of general interest have been taken into account[19], the Member States' discretion cannot be exercised contrary to the rules governing such harmonisation.

**Sectors harmonised at Union level:**

- Where Union harmonisation rules refer only to certain specific services, the Member States have considerable discretion in defining additional services as SGEIs. For example, in the electronic communications sector, the Member States are required to lay down the universal service obligations provided for by the Directive, but they have discretion to go further than the Directive in defining electronic communication services as SGEIs.

## 2.7. Are there examples of limits to the manifest error of assessment by the Member States when defining SGEIs?

The freedom of the Member States to define SGEIs is subject to review for manifest errors of assessment by the Commission and the Union's courts[20].

Against this background, action by the Commission is intended only to prevent errors that could be inconsistent with the rules in the TFEU.

The Court's case law and the Commission's decision-making practice illustrate certain limited examples of manifest error.

**Examples:**

- Port operations, i.e. the loading, unloading, transhipment, storage and movement in general of goods or any equipment in national ports, are not necessarily services of general economic interest, which exhibit special characteristics as

18 For example, telecommunications and the postal and energy sectors have been harmonised at Union level. See Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51 (as amended by Directive 2009/136/EC, OJ L 337, 18.12.2009, p. 11); Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, 21.1.1998, p. 14 (as amended by Directives 2002/39/EC, OJ L 176, 5.7.2002, p. 21 and 2008/06/EC, OJ L 52, 27.2.2008, p. 3); Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, OJ L 211, 14.8.2009, p. 55.

19 Case C-206/98 *Commission* v *Belgium* [2000] ECR I-3509, paragraph 45.

20 Case T-17/02 *Fred Olsen* [2005] ECR II-2031, paragraph 216; Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraphs 165 *et seq*. Moreover, the Member States' discretion cannot be exercised in the face of the applicable harmonisation rules – see the answer to question 2.6.

21 Case C-179/90, *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 27; Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 53; and Joined Cases C-34/01 to C38/01 *Enirisorse* [2003] I-14243, paragraphs 33-34.

22 Communication from the Commission on the application of State aid rules to public service broadcasting, OJ No C 257, 27.10.2009, p. 1.

compared with the general economic interest of other economic activities[21].

- Activities consisting in advertising, e-commerce, the use of premium-rate telephone numbers in prize games, sponsoring or merchandising. Including them in the ambit of the audiovisual public service remit is a manifest error of assessment[22].

### 2.8. Is it possible to regard certain financial services as SGEIs?

Certain financial services, such as the universal banking service, may be regarded as SGEIs. The Commission has already accepted such definitions from the Member States on a number of occasions[23].

### 2.9. Can the creation and retention of jobs in an undertaking for the purposes of expanding its research and development activity (in biopharmacy, for example) be regarded as an SGEI?

It does not seem possible to regard the creation or retention of jobs in a given undertaking as an SGEI. SGEIs are services to the public and this aspect is not present in this case and cannot, therefore, be used to justify a measure under Article 106(2) TFEU.

On the other hand, the State may wish to participate in the financing of such an activity, but that would constitute state aid to the undertaking in question (biopharmacy, for example). Such participation may be perfectly compatible with Union law, for example under the Community framework for state aid for research and development and innovation[24] or the general block exemption Regulation[25] for aid to employment, training or SMEs, depending on the intended purpose of the public intervention (support for research, development of employment or training, SMEs, etc.).

The rules on prior notification, eligible costs, eligibility conditions, etc. of the planned aid will have to be assessed on the basis of the applicable texts, which will help to ensure that, where necessary, the aid is compatible with Article 107(3) TFEU.

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23 Commission decisions concerning state aid No N 514/2001 – United Kingdom - Modernisation of the UK benefit payment system and provision of access to universal banking services through post offices, OJ C 186, 6.8.2003, http://ec.europa.eu/community_law/state_aids/comp-2001/n514-01.pdf; state aid No N 244/2003 - United Kingdom - Credit Union Provision of Access to Basic Financial Services, OJ C 323, 20.12.2005, http://ec.europa.eu/community_law/state_aids/comp-2003/n244-03.pdf; state aid No C 49/2006 – Italy - Poste Italiane – distribution of postal savings certificates, OJ L 189, 21.7.2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:189:0003:0037:EN:PDF; state aid No N 642/2005 - Sweden – Posten AB, OJ C 291, 5.12.2007, http://ec.europa.eu/competition/state_aid/register/ii/doc/N-642-2005-WLWL-en-22.11.2006.pdf; state aid No N 650/2001 – Ireland – An Post, OJ C 43, 27.2.2007, http://ec.europa.eu/community_law/state_aids/comp-2001/n650-01.pdf.

24 Community framework for state aid for research and development and innovation, OJ C 323, 30.12.2006, p. 1.

25 Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (Articles 107 and 108 TFEU), OJ L 214, 9.8.2008, p. 3.

## 3. QUESTIONS ON THE APPLICATION OF THE STATE AID RULES TO SGEIS AND IN PARTICULAR TO SSGIS

### 3.1. Applicability of the state aid rules to SGEIs

#### *3.1.1. When do the state aid rules in the TFEU apply to the organisation and financing of SGEIs?*

The competition rules apply only to 'undertakings'. This concept covers any entity engaged in an economic activity, regardless of the entity's legal status or the way in which it is financed[26].

#### *3.1.2. When does an activity qualify as 'economic' within the meaning of the competition rules?*

Any activity consisting in offering goods and/or services in a given market is an economic activity within the meaning of the competition rules[27]. In this context, the fact that the activity in question is termed 'social' or is carried on by a non-profit operator (on non-profit operators, see the answer to question 3.1.6) is not in itself enough[28] to avoid classification as an economic activity.

**Examples of activities regarded as economic in previous Commission decisions and Court judgments:**

- Employment procurement activity carried on by public employment agencies[29].
- Optional insurance schemes operating according to the capitalisation principle, even where they are managed by non-profit organisations[30]; the capitalisation principle means that the insurance benefits depend solely on the amount of contributions paid by the recipients and the financial returns on the investments made.
- Emergency transport services and patient transport services[31].
- Services such as the carrying out of customs formalities, relating in particular to the import, export and transit of goods, as well as other complementary services such as services in the monetary, commercial and tax fields, which customs agents offer by taking on the related financial risks[32].

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26 Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451.

27 Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; and *Pavlov*.

28 *Pavlov*, paragraph 118; Case C-218/00 *INAIL* [2002] ECR I-691, paragraph 37; and Case C-355/00 *Freskot* [2003] ECR I-5263.

29 Case C-41/90 *Höffner and Elser* [1991] ECR I-197, paragraph 21.

30 Case C-244/94 *FFSA* [1995] ECR I-4013, paragraphs 17-22; Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 80-87.

31 Case C-475/99 *Glöckner* [2001] ECR I-8089, paragraph 20.

32 Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 37.

- The provision by legal entities, set up by employers or trade union organisations and authorised by the State, of assistance to employees and employers related to the completion of income tax returns, and other related advice[33].

- The management of transport infrastructure[34].

- Medical services provided either in a hospital environment or outside such an environment[35].

- The provision of funds to municipalities and voluntary housing bodies for housing at lower rents; the provision of general mortgage funds, affordable housing schemes intended to provide low-cost housing, rental subsidy schemes and grant schemes for elderly and disabled persons, as well as socially disadvantaged households[36].

- The provision of infrastructure ancillary to social housing, such as roads, shops, playgrounds, places of recreation, parks, allotments, open spaces, sites for places of worship, factories, schools, offices and other buildings or land and such other works and services, which is needed to ensure a good environment for social housing[37].

On the concept of economic activity within the meaning of the TFEU rules on the internal market, see the answer to question 6.2.

### *3.1.3. May members of a liberal profession constitute 'undertakings' within the meaning of the competition rules?*

Yes. The Court of Justice has taken the view that medical specialists may provide, in their capacity as self-employed economic operators, services in a market, namely the market in specialist medical services, and thus constitute undertakings. The fact that they provide complex and technical services and the fact that the practice of their profession is regulated cannot alter that conclusion[38].

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33 Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 63.

34 Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR 1-9297.

35 Case C-157/99 *Smits* [2001] ECR I-5473, paragraph 53; Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16; Case C-159/90 *Society for the Protection of unborn children* [1999] ECR I-4685, paragraph 18; Case C-368/98 *Abdon Vanbraekel* [2001] ECR I-5363, paragraph 43; Case T-167/04 *Asklepios Kliniken* [2007] ECR II-2379, paragraphs 49-55.

36 Commission Decision on state aid No N 89/2004 - Ireland - Guarantee in favour of the Housing Financing Agency, Social housing schemes funded by the HFA, OJ C 131, 28.5.2005, http://ec.europa.eu/community_law/state_aids/comp-2004/n089-04.pdf.

37 Commission Decision in case N 395/05 - Ireland – Loan guarantee for social infrastructure schemes funded by the Housing Finance Agency (HFA), OJ C 77, 5.4.2007, http://ec.europa.eu/community_law/state_aids/comp-2005/n395-05.pdf.

38 Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451.

### *3.1.4. When does an activity qualify as non-economic for the purposes of the competition rules?*

Two relevant categories of activities which have been determined to be non-economic are:

- Activities related to the exercise of state prerogatives

Activities linked to the exercise of state prerogatives by the State itself, or by authorities functioning within the limits of their public authority, do not constitute economic activities for the purposes of the competition rules. In this context, it is irrelevant whether the State is acting directly through a body forming part of the state administration or by way of a separate body on which it has conferred special or exclusive rights[39].

**Examples of non-economic activities linked to the exercise of state prerogatives:**

- Activities related to the army or the police.
- The maintenance and improvement of air navigation safety[40], security[41], air traffic control, maritime traffic control and safety[42].
- Anti-pollution surveillance[43] is a task in the general interest that forms part of the essential functions of the State as regards the protection of the environment in maritime areas.
- The organisation, financing and enforcement of prison sentences in order to ensure the operation of the penal system[44].
- The financing and supervision of the construction of railway infrastructure[45].
- When coal mines are closed, the provision of funds for the reclamation and supervision of sites, and for the eradication of the consequences of mining activity[46].

39 Case 118/85 *Commission* v *Italian Republic* [1987] ECR 2599, paragraphs 7 and 8.

40 Case C-364/92 *SAT/Eurocontrol* [1994] ECR I-43, paragraph 27; Case C-113/07 P *Selex Sistemi Integrati* v *Commission* [2009] ECR I-2207, paragraph 71.

41 Commission Decisions in case N 309/2002 of 19 March 2003, Aviation security – compensation for costs incurred following the attacks of 11 September 2001, OJ C 148, 25.6.2003, and in case N 438/2002 of 16 October 2002, Aid in support of public authority functions in the Belgian sector, OJ C 284, 21.11.2002, http://ec.europa.eu/community_law/state_aids/transports-2002/n438-02-fr.pdf.

42 Commission Decision in case N 438/02 of 16 October 2002, Belgium – Aid to port authorities, OJ C 284, 21.11.2002, http://ec.europa.eu/community_law/state_aids/transports-2002/n438-02-fr.pdf.

43 Case C-343/95 *Calì & Figli* [1997] ECR I-1547, paragraph 22.

44 Commission Decision in case N140/2006 – Lithuania – Allotment of subsidies to the State Enterprises at the Correction Houses, OJ C 244, 11.10.2006, http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/N-140-2006-WLWL-en-19.07.2006.pdf.

45 Commission Decision concerning state aid No N 478/2004 – Ireland - State guarantee for capital borrowings by Coràs Iompair Éireann (CIÉ) for infrastructure investment, OJ C 207, 31.8.2006, http://ec.europa.eu/community_law/state_aids/transports-2004/n478-04.pdf.

- Certain activities of a purely social nature

The case law has provided a set of criteria under which certain activities with a purely social function have been considered non-economic.

**Examples of non-economic activities of a purely social nature:**

- The management of compulsory insurance schemes pursuing an exclusively social objective, functioning according to the principle of solidarity, offering insurance benefits independently of contributions[47].
- The provision of public education financed as a general rule by the public purse and carrying out a public service task in the social, cultural and educational fields towards the population[48].

### *3.1.5. When a public authority provides information and advice to citizens within its area of responsibility, does it engage in an economic activity within the meaning of the competition rules?*

The provision of general information by the public authorities (at national, regional or local level) concerning the way in which the competent bodies apply the rules under their responsibility is inextricably linked to the exercise of their public authority. This activity is not regarded as an economic activity within the meaning of the competition rules.

### *3.1.6. May the TFEU rules on state aid apply to non-profit service providers?*

Yes. The mere fact that an entity is non-profit-making does not mean that the activities which it carries on are not of an economic nature[49]. The legal status of the entity providing SSGIs does not affect the nature of the activity concerned. The relevant criterion is whether the entity concerned pursues an economic activity.

For example, a non-profit association or a charitable organisation pursuing an economic activity will constitute an 'undertaking', but only for that part of the activity

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46 Commission Decision CZ 45/2004 and CZ 110/2004 – Czech Republic - State aid to the Czech coal industry 2003-2007, OJ C 87, 1.4.2006, http://ec.europa.eu/dgs/energy_transport/state_aid/doc/decisions/2004/2004_0045_cz_cz.pdf.

47 Case C-159/91 *Poucet et Pistre* [1993] ECR I-637; Case C-218/00 *Cisal and INAIL* [2002] ECR I-691, paragraphs 43-48; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] ECR I-2493, paragraphs 51-55.

48 Case 263/86 *Humbel* [1988] ECR 5365, paragraph 18; Case C-318/05 *Commission* v *Germany* [2007], not yet reported, paragraphs 74-75, and Commission Decisions concerning state aid Nos N 118/00 – Public grants to professional sports clubs, OJ C 333, 28.11.2001, p. 6, http://ec.europa.eu/community_law/state_aids/comp-2000/n118-00.pdf; NN 54/2006 – Prerov Logistics College, OJ C 291, 30.11.2006, p. 18 http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/NN-54-2006-WLWL-EN-08.11.2006.pdf; EFTA Surveillance Authority Decision No 39/07/COL on public financing of municipal day-care institutions in Norway: http://www.eftasurv.int/media/esa-docs/physical/11305/data.pdf.

49 Joined Cases 209/78 to 215/78 and 218/79 *Van Landewyck* [1980] ECR 3125 and Case C-244/94 *FFSA and Others* [1995] ECR I-4013, paragraph 21.

which is economic. The competition rules will not apply to their non-economic activities.

**Example:**

The provision of emergency transport services and patient transport services by non-profit organisations may constitute an economic activity. Public service obligations may make the services provided by such organisations less competitive than comparable services rendered by other operators not bound by such obligations, but that fact cannot prevent the activities in question from being regarded as economic activities[50].

### *3.1.7. Are social action centres which manage SSGIs (such as services for elderly and disabled people) subject to the state aid rules?*

One cannot generalise about whether or not local social assistance centres are subject to the competition law rules, and specifically to the state aid rules, as this depends on the activities they carry out.

If a centre of this type runs a meals-on-wheels or home care service, for instance, and the same services could be provided by other service providers, whether public or private, then the centre is supplying services in a market and is thus performing an economic activity within the meaning of the competition rules (see the answer to question 3.1.2).

This does not, however, imply that all the centre's activities should be classed as economic in nature; it may also perform an activity involving social protection only, such as making public welfare payments to people on benefits, which would not constitute an economic activity.

### *3.1.8. Does the distribution of vouchers by a municipality to certain categories of individual users to enable them to acquire SGEIs constitute state aid?*

The Member States, including local authorities, can provide this type of support to people using these services under the conditions laid down in Article 107(2)(a) of the TFEU, which stipulates that aid must have a social character and be granted to individual consumers without discrimination related to the origin of the products concerned.

### *3.1.9. Does social assistance granted to certain beneficiaries such as low-income households (depending, for example, on their actual expenditure on an SGEI and/or other objective criteria arising from their individual situation) and paid directly to the service provider under a 'third party pays' arrangement constitute state aid?*

If there is, for instance, a risk that the assistance provided may not fulfil its social purpose if it is paid directly to the beneficiary, a social organisation may decide to

[50] Case C-475/99 *Glöckner* [2001] ECR I-8089, paragraph 21.

pay part or all of it to the party providing the service concerned (e.g. a social housing landlord or a school canteen for children).

Such a payment will not constitute state aid to the service provider if the amount paid under a 'third party pays' arrangement and the basis on which it is calculated remain clearly defined and closely linked to the final beneficiary, who must be a natural person. This implies that the transfer does not confer any other advantages on the service provider. For instance, the total amount of rent payable to the service provider must be established independently and in advance, so that the remaining rent payable by the beneficiary is genuinely reduced by the amount which the service provider has already received from the social organisation concerned.

### *3.1.10. Certain SGEIs are often provided in a local context. Do they really affect trade between Member States?*

In the field of state aid law, the effect on trade does not depend on the local or regional character of the service supplied, or on the scale of the activity concerned. The relatively small amount of aid provided or the relatively small size of the entity which receives it do not in themselves rule out the possibility that trade between Member States might be affected[51]. Even a small amount of aid can boost the services supplied by one service provider, thereby making it more difficult for other European companies to supply the same services on the local market.

However, on the basis of its own experience the Commission has established ceilings below which it believes that aid will not affect trade or competition. For instance, 'aid not exceeding a ceiling of EUR 200 000 over any period of three years does not affect trade between Member States and/or does not distort or threaten to distort competition and therefore does not fall under Article 87(1) of the Treaty. As regards undertakings active in the road transport sector, this ceiling should be set at EUR 100 000[52].

**General example of effect on trade between Member States**

Subsidies payable to Dutch service stations located near the German border, as a result of the increase in national fuel prices following the rise in excise duties in the Netherlands, affected trade between Member States, since their purpose was to mitigate the disparity between the level of excise duties payable in the Netherlands and the amount of excise duty levied on light oils in Germany[53].

**Example of effect on trade between Member States where SGEIs are concerned**

Public subsidies for running regular coach services in the municipality of Stendal, Germany, paid to a company which provided only local or regional transport and did

51 Cases T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraphs 48 to 50, C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 81-82 and C-172/03 *Heiser* [2005] ECR I-1627, paragraphs 32-33.

52 Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid.

53 Commission Decision 1999/705/EC of 20 July 1999, OJ L 280, 30.10.1999, p. 87 confirmed by ECJ Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163.

not provide any transport services outside its country of origin, could have an impact on trade between Member States[54].

### *3.1.11. Is there really an effect on trade in cases where a single operator provides a specific SGEI in a region?*

Even if an operator providing a specific SGEI (as in the case of specialised medical care or ambulance services) is the only operator in the region or local community because there are no others there, this does not rule out the possibility of operators from other Member States being interested in providing the SGEI in question. This means that one cannot rule out the possibility of there being a potential impact on trade between Member States.

### *3.1.12. Are there any examples of local SGEIs which do not really seem to affect trade between Member States?*

The Commission has taken a number of decisions on state aid where state measures to fund local services (irrespective of whether the latter are SGEIs, SSGIs with an economic character or purely commercial services) have been deemed not to affect trade between Member States:

**Examples of measures considered to have no effect on trade between Member States**

- In the case of the Dorsten swimming pool[55], it was considered that an annual subsidy for the construction and operation of a public swimming pool in Dorsten which would be used only by the local population could not affect trade between Member States.

- In the case of the Irish hospitals[56] the view taken was that a system of capital allowances aiming at the creation of facilities for relatively small local public hospitals, serving a local hospital market with clear undercapacity, could not attract investment or customers from other Member States and could not, therefore, affect trade between Member States.

- In the case of service areas in Tenerife[57], it was considered that subsidies granted for the construction by local road haulage associations of municipal service areas for their members could not affect trade between Member States, as they were for

54 ECJ, *Altmark trans and Regierungspräsidium Magdeburg*, cited above, paragraph 77.

55 Commission Decision in case N 258/2000 – Germany – Leisure Pool Dorsten, IP/001509 of 21.12.2000, OJ C 172, 16.6.2001, p. 16 http://ec.europa.eu/community_law/state_aids/comp-2000/n258-00.pdf.

56 Commission Decision in case N 543/2001 – Ireland – Capital allowances for hospitals, OJ C 154, 28.6.2002, p. 4 http://ec.europa.eu/community_law/state_aids/comp-2001/n543-01.pdf.

57 Commission Decision in case NN 29/02 – Spain - Aid for installation of service areas in Tenerife, OJ C 110, 8.5.2003, p. 13, http://ec.europa.eu/community_law/state_aids/transports-2002/nn029-02.pdf.

local use only

- In the case of local museums in Sardinia[58], the view taken was that funding museum-related projects of a limited size and budget would not affect trade between Member States, as – except in the case of a few major museums with an international reputation - people from other Member States were not liable to cross borders for the primary purpose of visiting these museums.

- It was ruled that funding for Basque theatrical productions[59] did not affect trade between Member States because these were small-scale productions put on by local micro-enterprises or small companies, their potential audience was restricted to a specific geographic and linguistic region, and they could not attract cross-border tourism.

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### *3.1.13. What if an activity is economic and affects trade between Member States?*

If an activity is economic and affects trade between Member States, it is covered by the competition rules.

### *3.1.14. Does the application of the competition rules mean that the Member States are required to change the ways in which their SGEIs are organised and run?*

The fact that the competition rules apply does not imply that public authorities are required to ensure that there are a large number of service providers on the market. Nor does it mean that public authorities are obliged to abolish those special or exclusive rights already granted to service providers which are necessary for and proportionate to the performance of the SGEIs concerned. The public authorities can grant such rights provided that they do not go beyond what is necessary to enable service providers to carry out their task of providing services of general interest under economically acceptable conditions[60]. Similarly, the public authorities are not under any obligation to privatise providers of SGEIs.

### *3.1.15. What if a public authority provides compensation for a service of general interest which is deemed to be of an economic character?*

Public service compensation provided by a public authority to a service provider may constitute state aid if the criteria established by the Court of Justice in its *Altmark* ruling are not cumulatively met (see the answers to the questions under 3.2.1) and the other state aid[61] criteria are also met. Nevertheless, the fact that public service

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58 Commission Decision in Case N 630/2003 – Italy – Local museums - Sardinia, OJ C 275, 8.12.2005, p 3, http://ec.europa.eu/community_law/state_aids/comp-2003/n630-03.pdf.

59 Commission Decision in case N 257/2007 – Spain – Grants for theatrical productions in the Basque country, OJ C 173, 26.7.2007, p. 2.

60 Cases C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 14-16, C-67/96 *Albany* [1999] ECR I-5751, paragraph 107.

61 That is, 1) the transfer of resources and imputability to the State, 2) effect on trade between Member States and distortion of competition, 3) economic advantage, and 4) the selective nature of the measure in question.

compensation constitutes state aid does not in itself mean that it is not permissible, as it may be compatible with the TFEU (see the answers to questions 3.2.4 and 3.2.5).

### *3.1.16. How can a public authority finance an SGEI?*

Member States have a wide margin of discretion when it comes to organising and financing their SGEIs. Public authorities can allocate a subsidy or a tax benefit, but they can also award an exclusive or special right to the service provider in order to ensure that the SGEI is provided, as long as this right does not go beyond what is necessary to allow the SGEI to be performed under economically acceptable conditions[62].

### *3.1.17. Do the state aid rules impose a specific organisational model on the public authorities as regards SGEIs?*

The public authorities have considerable discretion as regards the way in which they choose to manage the SGEIs which they put in place. Under the state aid rules, the public authorities are at liberty to organise and finance their SGEIs as they see fit, provided that the compensation they provide in this context does not go beyond what is necessary to ensure that the SGEIs are performed under economically acceptable conditions, in accordance with Article 106(2) of the TFEU (for these conditions see the answers to the questions under 3.2.9).

### *3.1.18. Can the financial sums granted in connection with the transfer of powers between public bodies in the context of decentralisation be classed as state aid?*

The concept of state aid draws no distinctions on the basis of the level (central, regional, local or other) at which it is granted. However, it applies only in the case of a transfer of resources to one or more undertakings or sectors which meet(s) the conditions laid down in Article 107(1) of the TFEU.

Where financial transfers are made within state structures, on the other hand (from the state to the regions, or from a department to municipalities, for example), purely in line with the transfer of public powers and in a way that does not relate to economic activity, there is no transfer of state resources such as to confer an advantage on an undertaking.

### *3.1.19. Does funding an in-house body - within the meaning of the rules on public procurement - which provides SGEIs imply ruling out the application of the state aid rules?*

The term 'in-house' is used in public procurement law, while the state aid rules fall under competition law. Whether or not the competition rules, and in particular the state aid rules, are applicable depends not on the legal status or the nature of the body providing SGEIs, but on the 'economic' character of the activity performed by that body. According to settled case law, any activity that consists in supplying goods and/or services in a particular market is an economic activity within the meaning of the competition rules (for examples of economic activities within the meaning of the competition rules, see the answer to question 3.1.2). Consequently, if the public

[62] Cases C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 14-16, C-67/96 *Albany* [1999] ECR I-5751, paragraph 107.

funding of an economic activity performed by an in-house body within the meaning of the rules on public contracts meets the conditions laid down in Article 107(1) of the TFEU[63] and does not meet all the conditions set out in the *Altmark* judgment (for these conditions, see the answer to question 3.2.1), the state aid rules are applicable.

In this context, it should be recalled that when financial transfers are made within state structures (from the state to the regions, or from a department to municipalities, for example), purely in line with the transfer of public powers and in a way that does not relate to any economic activity, there is no transfer of state resources to an undertaking, which means there is no state aid.

## 3.2. Altmark ruling and SGEI Package

### *3.2.1. What does the Court state in the Altmark ruling?*

In *Altmark*, the Court of Justice held that public service compensation **does not constitute state aid** within the meaning of Article 107 of the TFEU provided that four cumulative criteria are met.

- First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.
- Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- Third, the compensation cannot 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 and a reasonable profit.
- Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the bidder capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, if well run and adequately equipped, would have incurred.

**Examples of cases where the Commission considered that the *Altmark* criteria were met and consequently the compensation did not constitute state aid:**

- The finance provided for a scheme promoting investments to ensure security of electricity supply in Ireland was not considered to be state aid;

(a) The provision of new electricity reserve generation capacity to cope with electricity demand at any time of the year, including in peak periods, was

[63] That is, 1) economic advantage 2) effect on trade between Member States and distortion of competition, and 3) the selective nature of the measure in question.

deemed to be an SGEI.

(b) Moreover, the open, transparent and non-discriminatory competitive procedure had been organised in such a way as to guarantee that all of the other three conditions set out in the *Altmark* decision were met[64].

- Subsidies financing broadband infrastructure in France were not deemed to be aid either because;

- Universal access to broadband (and high-speed broadband) infrastructure for the whole country was an SGEI.

(b) Specific parameters predefined the amount of compensation in the concession contract.

(c) There was no risk of overcompensation, as the parameters for calculating compensation were precisely defined in the operators' business plans, which were based on the specific data provided by the public authority itself. Another reason why there was no risk of overcompensation was the fact that the public authority had required the operators who were to provide the service to set up an *ad hoc* company for that purpose which would guarantee the neutrality of the service provider concerned; moreover, there were better fortunes clauses in case profits were to rise above a given level.

(d) The needs of the project and what the candidates had to offer were analysed in depth and in detail. Moreover, the procedure chosen enabled the most efficient candidate offering the service at least cost to the community to be selected[65].

In the *Dorsal* case, the Commission considered that the fourth *Altmark* criterion was met because a thorough comparative analysis of the specific needs of the project and the candidates' tenders as well as the competitive procedure itself enabled compensation to be estimated on the basis of the costs that would be incurred by a well-run and adequately equipped undertaking[66].

- The Commission found that the rated fees paid by 'Casa Depositi e Prestiti' – a state-controlled financial body – to 'Poste Italiane' were not considered to be state aid:

(a) The distribution of postal savings books was deemed to be an SGEI.

(b) The market fee was an appropriate estimate of the level of costs that would be

64 Commission Decision in case N 475/2003 – Ireland - Public service obligation in respect of new electricity generation capacity for security of supply, OJ C 34, 7.2.2004, p. 8.

65 Commission Decision in case N 381/2004 – France – Setting up of a high speed infrastructure in Pyrénées-Atlantiques, OJ C 162, 2.7.2005, p. 5 http://ec.europa.eu/community_law/state_aids/comp-2004/n381-04.pdf.and the Commission Decision on aid N 331/2008 – France – High-speed broadband in the Hauts-de-Seine Department, not yet published: http://ec.europa.eu/community_law/state_aids/comp-2008/n461-08.pdf.

66 Commission Decision in case N 382/2004 – France – Setting up of a high-speed infrastructure in the Limousin region (Dorsal), OJ C 230, 2.7.2005, p. 5 http://ec.europa.eu/community_law/state_aids/comp-2004/n461-08.pdf

67 Commission Decision in case C 49/06 – Poste Italiane – Banco Posta – Remuneration paid for the distribution of postal savings financial products, OJ C 31, 13.2.2007.

incurred by a typical, well run and adequately equipped undertaking in the same sector, taking into account receipts and a reasonable profit from discharging its obligations. The fourth *Altmark* criterion was thus met[67].

### *3.2.2. Can a Member State use a pre-established reference cost for the purposes of applying the criterion relating to the costs of a typical well-run undertaking?*

The Member States have the option of using a pre-established reference cost with a view to applying the second limb of the fourth *Altmark* criterion, provided that they can justify this. If this cost was obtained in a reliable way, is based on sound data and is in line with market values, it can be considered to correspond to 'the costs incurred by a typical undertaking that is well run and suitably equipped' within the meaning of the fourth *Altmark* criterion.

**Examples of Commission practice as regards reference costs**

- The consideration paid to Poste Italiane for the distribution of postal savings books (*libretti postali*) was lower than the reference amounts for similar financial products on the market; the compensation paid in this context was therefore deemed to meet the criterion of a typical, well-run and suitably equipped undertaking, and did not constitute aid, since the other three *Altmark* criteria were also met[68].

However,

- As regards the use of predetermined statistical costs supplied by the Czech authorities in order to calculate the amount of compensation, no proof was provided that these costs were representative of those that would be incurred by a typical, well-run and suitably equipped undertaking [69].

### *3.2.3. What are the consequences of the application or non-application of the Altmark criteria?*

Where all the *Altmark* criteria are met, the public service compensation does not constitute state aid.

Where at least one of the *Altmark* criteria is not met, but the other state aid criteria[70] are fulfilled, the public service compensation constitutes state aid.

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68 See Commission Decision on aid C 49/06, *op. cit.*, paragraphs 85–93.

69 Commission Decision on state aid C 3/2008 (ex NN 102/2005) – Czech Republic concerning public service compensations for Southern Moravia Bus Companies, OJ L 97, 16.4.2009, paragraphs 82-83.

70 That is, (1) transfer of state resources and imputability to the state, (2) an effect on trade between the Member States and distortion of competition, and (3) the selective nature of the measure concerned.

### *3.2.4. What are the consequences if compensation for an SGEI is indeed deemed to be state aid?*

The fact that public service compensation constitutes state aid **does not mean that such compensation is forbidden.** This compensation is compatible with the TFEU when the conditions specified in the Decision[71] or the Framework[72] are met[73].

### *3.2.5. What are the respective objectives of the Decision and the Framework? Are there any differences between the two?*

Both texts specify the conditions under which public service compensation constituting state aid is compatible with the TFEU.

The **main difference** lies in the fact that public service compensation covered by the Decision **does not need to be notified** to the Commission. Once the criteria of the Decision are met, the Member State concerned may grant the compensation without delay. However, when the conditions set out in the Decision are not met (because larger amounts of compensation are involved, for instance), the compensation must be notified in advance to the Commission so that it can check whether the state aid concerned is compatible with the TFEU.

The purpose of the Framework is to lay down the precise conditions under which aid taking the form of public service compensation which is notified to the Commission can be considered compatible with the internal market, in accordance with the provisions of Article 106(2) of the TFEU.

### *3.2.6. In what cases is the Decision applicable?*

**Scope of the Decision; it applies to:**

- public service compensation of less than EUR 30 million on an annual basis, granted to undertakings with an annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned.
- public service compensation granted to hospitals carrying out activities classed as services of general economic interest by the Member State concerned, irrespective of the amount.
- public service compensation granted to social housing undertakings carrying out activities classed as services of general economic interest by the Member State

[71] Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, p. 67.

[72] Community Framework for state aid in the form of public service compensation, OJ C 397, 29.11.2005, p. 4.

[73] In the land transport sector this compatibility is governed by Regulation 1370/2007. As regards air and maritime transport, this compatibility can be assessed on the basis of the Community Guidelines of 2005 on financing of airports and start-up aid to airlines departing from regional airports, Commission Communication 94/C 350/07 on the application of Articles 92 and 93 of the Treaty in the aviation sector, OJ C 350, 10.12.1994, p. 5, or the Community guidelines on state aid to maritime transport, OJ C 13, 17.1.2004.

concerned, irrespective of the amount.

- in the field of transport, this Decision applies only to public service compensation for maritime links to islands granted in accordance with sectoral rules, on which annual traffic does not exceed 300 000 passengers; the Decision applies also to public service compensation for airports and ports whose average annual traffic during the two financial years preceding that in which the SGEI was assigned does not exceed 1 000 000 passengers in the case of airports and 300 000 passengers in the case of ports.

***3.2.7. There are cases in which the undertaking receiving public service compensation belongs to a group of undertakings or is an ad hoc company set up to provide an SGEI. Under these circumstances, does the threshold of a turnover of EUR 100 million apply to a single legal entity or to the group of undertakings?***

The purpose of the Decision is to exclude small amounts of compensation granted to undertakings with a limited turnover from the obligation to notify. In view of this, the restrictions imposed on competition can be considered to be limited. Under these circumstances, and in line with the general state aid policy of the Commission and the Court of Justice, however, the economic weight of any group to which the undertaking that receives aid may belong should be taken into account.

Consequently, the turnover referred to in Article 2 of the Decision includes the turnover of the group to which a branch may be affiliated, or the turnover for all co-contractors in the case of an *ad-hoc* company set up to provide an SGEI.

***3.2.8. Are the thresholds of an annual compensation of EUR 30 million and a beneficiary turnover of EUR 100 million, provided for in Article 2(a) of the Decision, cumulative? What is the effect of this?***

Yes, the thresholds of an annual compensation of EUR 30 million and a beneficiary turnover of EUR 100 million during the two financial years preceding that in which the aid is granted, provided for in Article 2(a) of the Decision, are cumulative.

In practice, this means that the public authorities of the Member States can grant aid in compliance with the Decision without notifying the Commission as long as the aid does not exceed EUR 30 million per year and the turnover of the beneficiary undertakings does not exceed EUR 100 million during the two financial years preceding the year when the aid is granted. If the amount of the annual compensation does not exceed EUR 30 million but the beneficiary undertaking has a turnover of more than EUR 100 million or vice versa, the aid must be notified to the Commission to be examined on the basis of the Framework.

***3.2.9. What are the compatibility conditions established by the Decision and the Framework?***

The conditions established by the Decision and the Framework are similar.

**Compatibility criteria. The Decision and the Framework essentially require:**

- An act of entrustment specifying, in particular, the nature and duration of the public service obligations, the undertaking and the territory concerned, the nature of any exclusive or special rights assigned to the undertaking, the parameters for calculating, controlling and reviewing the compensation, and the arrangements for avoiding and repaying any overcompensation.

- The compensation must not exceed what is necessary to cover the costs incurred in discharging the public service obligations; a calculation of all costs as well as all types of revenue received is necessary to this end.

- The control of overcompensation by the Member State's public authorities.

***3.2.10. Do airports with more than 1 million passengers fall within the scope of the Decision in cases where the public service compensation is less than EUR 30 million and the undertaking managing the airport has an annual turnover of less than EUR 100 million?***

Yes. In such cases, the most favourable threshold will apply[74].

In this context, it is important to note that state aid to the air transport sector is governed by the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (hereinafter 'the 2005 Guidelines') and by Commission Communication 94/C 350/07 on the application of Articles 92 and 93 of the Treaty in the aviation sector. These guidelines allow the possibility for certain economic activities carried out by airports to be considered by the public authorities as constituting SGEIs. In exceptional cases, the overall management of an airport can be considered an SGEI as long as it is limited to activities linked to its basic activities.

**Example:**

A public authority might impose public service obligations on an airport located, for example, in an isolated region, and might decide to pay compensation for these obligations. It is important to note that the overall management of an airport as an SGEI should not cover activities which are not directly linked to its basic activities (that is to say, commercial activities, including construction, financing, use and renting of land and buildings, not only for offices and storage but also for hotels and industrial enterprises located within the airport perimeter, as well as shops, restaurants and car parks).

***3.2.11. What is the relationship between the Decision and Regulation 1370/2007?***

The Decision does not apply to public service compensation in the land transport sector[75]. Compensation for public service obligations in the rail and road passenger transport sector is governed by Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007. Compensation granted in compliance with the provisions of this Regulation is exempted from the obligation of prior notification.

74 See Recital 19 of the Decision.

75 See Recital 17 of the Decision.

### *3.2.12. What is the difference between the Framework and the compatibility rules specific to the transport sector?*

The Framework does not apply to the transport sector[76]. In the transport sector, the specific rules are laid down in Regulation (EC) No 1370/2007, in Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community[77] and in the 2004 Community guidelines on state aid to maritime transport[78].

### *3.2.13. What is the difference between the conditions in the Altmark judgment and the conditions laid down in the Decision and the Framework?*

The *Altmark* judgment establishes when a measure comes within the scope of the concept of state aid while the Decision and the Framework establish the conditions under which compensation constituting state aid can be allowed. The main substantive difference between the judgment and the SGEI Package concerns the amount/calculation of the compensation.

According to the fourth criterion of the *Altmark* judgment, in order not to constitute state aid[79] the amount of the compensation must be defined:

– through an open, transparent and non-discriminatory public procurement procedure, which would allow for the selection of the tenderer capable of providing the services at the least cost to the community; or

– through a procedure whereby the public authorities have to determine the amount of the compensation on the basis of an analysis of the costs of a typical undertaking, well run and adequately equipped.

According to the **Decision**, the amount of the compensation does not necessarily have to be determined through a public procurement procedure, or by comparison with the costs of a typical well run undertaking.

As long as the public authority proves that the compensation granted corresponds to the net costs estimated on the basis of the precisely defined parameters included in the act of entrustment and that there is no overcompensation, the compensation in question is regarded as state aid compatible with the TFEU rules[80].

**Example:**

A public authority decides to entrust an operator with the provision of an SGEI and to provide it with financing for this service. There are three possible scenarios:

- The SGEI in question is provided by an operator selected through a tendering

[76] See point 3 of the Framework.
[77] OJ L 293, 31.10.2008, p. 3.
[78] Commission Communication C(2004) 43, Community guidelines on State aid to maritime transport, OJ C 13, 17.1.2004, p. 3.
[79] As long as the other three criteria of the *Altmark* judgment are met (see 3.1).
[80] As long as the other conditions laid down in the Decision are met (see 3.5).

procedure at a price of 90. In accordance with the *Altmark* criteria, the compensation of 90 will not constitute state aid.

- The SGEI is provided by an operator at a net cost of 90. If this cost of 90 corresponds to that of a typical undertaking, well run and adequately equipped, in accordance with the *Altmark* criteria the compensation of 90 will not constitute state aid.

- The Decision will regard compensation that exceeds 90 (e.g. 100) as compatible state aid provided that the compensation corresponds to the total net costs actually incurred by the operator in providing the SGEI.

### *3.2.14. Since when have the Decision and the Framework applied? Are they retroactive?*

The Decision has applied since 19 December 2005, the date of its entry into force.

The Commission has been using the Framework as the basis for examining all SGEI cases since 29 November 2005, which was the date of its publication in the *Official Journal* and of its entry into force. Those cases included compensation amounts notified before that date but not granted by that date. The Commission examines all other cases, i.e. compensation amounts that were not notified before 29 November 2005 but were granted before the publication date, on the basis of the provisions in force at the time they were granted[81].

It should be recalled that both texts incorporate mainly the case law of the Court of Justice and the Commission's decision-making practice relating to the application of Article 106(2) TFEU.

### *3.2.15. Does the SGEI Package establish the right of undertakings to receive aid in the form of public service compensation?*

Under Article 107(1) TFEU state aid is incompatible with the TFEU, except where the derogations provided for by the Treaty itself apply. Hence the principle is that state aid is not permitted and can be granted only exceptionally in the cases and in compliance with the conditions provided for by Article 107(2) and (3) and Article 106(2) TFEU. Consequently, there is no right on the part of undertakings to state aid.

The SGEI Package does not establish the right of undertakings to receive aid in the form of public service compensation, but it defines compatibility conditions for such aid where the public authorities of the Member States decide to organise and finance SGEIs by means of state aid.

## 3.3. Notification of aid exceeding the thresholds in the Decision

### *3.3.1. Is it necessary for aid exceeding the thresholds laid down in Article 2(a) of the Decision to be notified to the Commission?*

The Decision applies to public service compensation of less than EUR 30 million, granted to undertakings with an annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the

[81] See point 26 of the Framework.

service of general economic interest was assigned. As regards hospitals and social housing undertakings, there is no limitation on the amounts which are exempted from notification.

These thresholds are already high and should cover the vast majority of local social services.

If the compensation exceeds the thresholds, prior notification is required. It will be assessed in accordance with the provisions of the Framework, which are analogous to the substantive conditions of the Decision. Notification does not mean that the compensation is automatically incompatible with the Treaty, but because of the high amount of aid concerned and the higher risk of distortion of competition, the aid must be assessed by the Commission in order to ensure that all the compatibility conditions have actually been met.

### *3.3.2. Where aid in the form of public service compensation can be exempted from notification on the basis of the Decision, is there an obligation to send the Commission an information sheet?*

When applying the Decision, national authorities are not under any obligation to send the Commission an information sheet. The only procedural obligations that the Decision imposes on Member States are that the Member States keep available for the Commission, for a period of at least ten years, all the elements necessary to establish whether the compensation granted is compatible with the Decision[82] and that they submit periodic reports, every three years, on the implementation of the Decision[83].

### *3.3.3. Where a State refuses the request of a region or of other local communities to notify aid in the form of public service compensation, is it possible for the public communities to act on their own? Could the Commission take action against this Member State?*

The notification procedure is initiated by the Member State concerned[84]. The procedure is carried out primarily between the Commission and the national authorities of the Member State concerned. Consequently, from the point of view of the EU rules on state aid, the decision to notify an aid scheme or an individual aid award is for the Member State and not for the local or regional communities[85].

Where aid that should be notified to the Commission in accordance with the existing rules is implemented without prior notification, it constitutes illegal state aid. The implication is that the matter could be brought before a national court, for example by the competitors of the aid recipient. In such a case, the national court would have to note this illegality and order that the aid be recovered, independently of its possible compatibility with the internal market, which only the Commission has the competence to establish. At the same time, the Commission could act *ex officio* or following a complaint and examine the measure concerned. The examination

82 See Article 7 of the Decision.

83 See Article 8 of the Decision.

84 See Article 108 TFEU and Article 2 of Regulation (EC) No 659/1999 of 22 March 1999 laying down implementing rules for Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

85 See Article 108 TFEU.

concludes with a decision which, in the event that the aid is incompatible, will demand its recovery.

### 3.4. The concept of 'act of entrustment' within the meaning of the Decision and the Framework

#### *3.4.1. What is the objective of an 'act of entrustment' for the purposes of the Decision and the Framework?*

An act of entrustment is necessary in order to set out the terms of the organisation of a public service task. It is the official act which entrusts the provision of an SGEI to the undertaking and spells out the task of general interest of the undertaking concerned, as well as the scope and the general operational conditions of the SGEI. A public service assignment is necessary in order to define the obligations of the undertaking and of the State. In the absence of such an official act, the specific task of the undertaking is unknown and fair compensation cannot be determined.

#### *3.4.2. What types of acts of entrustment are considered to be adequate for the purposes of the Decision?*

The Decision only requires that the act of entrustment take the form of one or more official acts having binding legal force under national law. The specific form of the act (or acts) may be determined by each Member State, depending among other things on its political and/or administrative organisation.

According to the basic rules of administrative law, every local, regional or central public authority needs a legal basis in order to define an SGEI and finance it. Consequently, the notion of act of entrustment can largely correspond to the legal basis that the public authority concerned chooses in each case at its own discretion. It is not necessary that this act bears the title of act of entrustment. It is also not necessary that Member States establish a special legal framework for adopting acts called 'acts of entrustment'.

There is therefore no standard 'one size fits all' act of entrustment; it depends both on the public authority entrusting the service and on the activity concerned.

It should be noted that under the state aid rules the requirements of an act of entrustment are rather basic: this does not exclude the possibility for Member States' authorities to add more detail to the act of entrustment, such as, for example, quality requirements.

An approval or authorisation given by a public authority to a service provider, authorising it to provide certain services, does not correspond to the notion of act of entrustment. This is because it does not create an obligation for the operator to provide the services concerned, but just allows it to exercise an economic activity by offering certain services in a market. An example could be the authorisation given to an operator to open a childcare centre or a centre for elderly people based only on the operator's compliance with public health, safety or quality rules.

**Examples of acts of entrustment:**

- Concession contract and tender documents[86]
- Ministerial programme contracts[87]
- Ministerial instructions[88]
- Laws[89] and Acts[90]
- Yearly or multiannual performance contracts[91]
- Legislative decrees[92] and any kind of regulatory decisions, as well as municipal decisions or acts.

### *3.4.3. Is an act of entrustment necessary even for an SSGI?*

The competition rules apply to services of general interest that are economic in nature (for the concept of economic activity for the purposes of the competition rules, see the answer to question 3.1.2). The fact that the activity in question may be called 'social' is not of itself enough to avoid classification as an 'economic activity' within the meaning of these rules (see the answer to question 3.1.2). Thus, entrustment being one of the necessary conditions for public service compensation to be compatible with the Treaty, it is mandatory for operators responsible for SGEIs, including SSGIs that are economic in nature.

### *3.4.4. Does the concept of act of entrustment within the meaning of Article 106(2) TFEU and of the SGEI Package correspond to the concept of 'mandated provider' within the meaning of Article 2(2)(j) of the Services Directive?*

The concept of act of entrustment within the meaning of Article 106(2) TFEU and the SGEI Package and that of 'mandated provider' referred to in Article 2(2)(j) of the Services Directive are two consistent concepts, in that they presuppose the existence

86 Commission Decision in case N 562/05 - Italy - Proroga della durata della concessione della Società Italiana del Traforo del Monte Bianco (SITMN), OJ C 90, 25.4.2007, http://ec.europa.eu/community_law/state_aids/transports-2005/n562-05.pdf.

87 Commission Decision in case NN 51/06 - Italy - Poste Italiane SpA: compensation by the Member State for universal postal service obligations 2000-2005, OJ C 291, 30.11.2006, http://ec.europa.eu/community_law/state_aids/comp-2006/nn051-06.pdf.

88 Commission Decision in case N 166/05 - UK - Government rural network support funding to Post Office Limited, OJ C 141, 16.6.2006, http://ec.europa.eu/community_law/state_aids/comp-2005/n166-05.pdf.

89 Judgment of the Court of First Instance in Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-741, paragraphs 182 and 183.
Commission Decision in case NN 8/07 – Spain – Financiamento de las medidas de reducción de plantilla de RTVE, OJ C 109, 15.5.2007, http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/NN-8-2007-WLWL-07.03.2007.pdf.

90 Commission Decision in case N 395/05 – Ireland – Loan guarantees for social infrastructure schemes funded by the Housing Finance Agency (HFA), OJ C 77, 5.4.2007, http://ec.europa.eu/community_law/state_aids/comp-2005/n395-05.pdf.

91 Commission Decision in case C 24/2005 – France – Laboratoire national de métrologie et d'essais, OJ L 95, 5.4.2007, p. 25.

92 See the judgment of the Court (Third Chamber) in Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* v *Giuseppe Calafiori* [2006] ECR I-2941.

of an obligation for the SGEI provider to provide the service. The existence of an obligation to provide is an essential element of both concepts.

On the other hand, the two concepts have different functions. The first concept is one of the preconditions that have to be met before public service compensation can be regarded as compliant with the conditions of the *Altmark* case law or as compatible with Article 106(2) TFEU, and possibly exempted from notification (if it falls within the scope of the Decision), while the second concept aims at delimiting the scope of the exclusion of certain social services from the ambit of the Services Directive.

Thus, under the SGEI Package, which specifies the conditions under which certain state aid measures are compatible with Article 106(2) TFEU, the act of entrustment corresponds to the official act that entrusts the undertaking with providing an SGEI. In this case, besides establishing an obligation to provide the service, as indicated above, the act of entrustment must also define the nature and duration of the public service obligations, the entities entrusted with providing the services, the compensation calculation parameters, and the safeguards to avoid overcompensation.

In the context of the Services Directive, the Commission takes the view that for a provider to be regarded as 'mandated by the State' within the meaning of Article 2(2)(j) it must be under an obligation to provide a service entrusted to it by the State. A provider under an obligation to provide a service, for instance as a result of a public procurement procedure or service concession, can be regarded as a provider 'mandated by the State' within the meaning of the Services Directive. This also applies to any other type of measure taken by the State provided that it involves an obligation for the provider in question to provide the service.

Consequently, an operator receiving an act of entrustment within the meaning of the SGEI Package will also be regarded as 'mandated' within the meaning of the Services Directive. Under the state aid rules, the act of entrustment will require, of course, compliance with additional conditions, relating in particular to the mechanisms implemented in order to ensure that the aid received does not exceed the costs incurred by the service provider (see the answers to the questions in Chapters 3.5 and 3.6).

### *3.4.5. Does the following constitute an act of entrustment within the meaning of the Decision and the Services Directive: an official decision by a regional public authority defining a vocational training social service of general interest and entrusting management of this to one or more training entities?*

An official decision by a regional public authority, with binding legal force under national law, that defines (a) the nature and duration of the public service obligations, (b) the undertaking or undertakings entrusted with these obligations and the territory concerned, (c) the nature of any exclusive rights granted to the undertaking(s), (d) the parameters for calculating, controlling and reviewing the compensation, and (e) the arrangements for avoiding and repaying any overcompensation (in accordance with Article 4 of the Decision) may constitute an act of entrustment within the meaning of the Decision.

Such a decision constituting an act of entrustment within the meaning of the Decision also constitutes an act mandating the provider within the meaning of the Services

Directive because it creates an obligation on the undertaking(s) in question to provide the service.

On the other hand, if the decision in question imposes the obligation to provide the service but does not include the conditions listed in Article 4 of the Decision, it constitutes an act mandating the provider within the meaning of the Services Directive but not an act of entrustment within the meaning of the SGEI Package.

As regards the application of the Services Directive, see the answer to question 7.9.

***3.4.6. In the case of an SGEI co-financed by several public authorities, is it necessary for each of the public authorities concerned to adopt its own act of entrustment or is it possible to refer, when granting the compensation, to the act of entrustment issued by the SGEI's 'lead' or organising authority?***

From the point of view of the state aid rules, there is no template act of entrustment; this act must be adapted to the national law of the Member State concerned under which it must establish the obligation of the selected provider to provide the service. Thus, the question whether an act of entrustment within the meaning of the SGEI Package, adopted by a 'lead' public authority such as a region, is also valid for other authorities (for instance a municipality or another region) is without doubt primarily a matter for national law.

Examples of acts which could constitute an 'act of entrustment' within the meaning of the SGEI Package in the case of an SSGI/SGEI co-financed by several public authorities:

- An act issued by a region and then approved by a municipal council decision; the approving decision can also constitute an act of entrustment by the municipality concerned.
- An act of entrustment issued and approved jointly by a region, a county and a municipality or by two municipalities and two regions for a given SGEI to be provided by one or more given providers.

As a general rule, once an act of entrustment establishes the conditions set out in Article 4 of the Decision, the chosen form of legal act and the number of public authorities concerned do not influence its nature as an act of entrustment within the meaning of the SGEI Package.

***3.4.7. Where a public authority wishes to entrust several SGEIs to one or more service providers, is it necessary for that authority to adopt several acts each corresponding to one SGEI?***

It is not necessary to adopt several acts of entrustment each corresponding to one SGEI or one service provider. Nevertheless, the act of entrustment must indicate the nature, duration and other necessary details of each public service obligation imposed on each operator by the public authority. It is not necessary to specify each specific service if the content and scope of each SGEI are sufficiently precise.

### *3.4.8. Should the act of entrustment specify a 'task' or 'specific activities' to be performed?*

The act of entrustment does not have to specify each and every activity involved in the provision of an SGEI.

Where it is not possible to spell out the services concerned more precisely, a broad definition of the public service task can be accepted, as long as the scope of the task is clearly set out. Nevertheless, the more precisely an entrustment defines the task assigned, the greater the level of protection from challenge under the state aid rules (for example by competitors) for the compensation granted.

It is also in public authorities' discretion and best interest to specify further the requirements linked to the performance of SGEI tasks, for instance by stating quality requirements or making appropriate public consultation when defining the tasks to be entrusted. In this way, not only is the quality of the SGEI improved, but also transparency towards citizens and taxpayers is increased.

### *3.4.9. How to draft an act of entrustment concerning services such as SSGIs that have to be on the one hand viewed globally, and on the other tailored to the specific needs of individual users? Does the act of entrustment have to describe each service to be provided?*

The act of entrustment has to specify the nature and duration of the public service obligations, the entities entrusted with the provision of the services, the parameters for calculating the compensation (but not the exact amount of compensation to be awarded), and the safeguards to avoid overcompensation.

It is not always necessary to include in the act of entrustment each type of service to be provided. For instance, there is no need to refer to each type of healthcare service needed, 'daily medical assistance at home for elderly people in the city of x', say, may be sufficient. However, the act of entrustment must allow the correct allocation of costs between the SGEI and the non-SGEI activities which the service provider may offer.

Certain types of SGEI, such as assistance to elderly or disadvantaged people, may require different types of service within the framework of an overall public service task. The purpose of the act of entrustment is not to restrict the organisation of the provision of SGEIs, but to set out a clear framework in which those services are provided and the scope of the services concerned.

The elements that have to be included in the act of entrustment for the purposes of the state aid rules do not in any way limit the discretion public authorities have in defining and organising their SGEIs. Member States and public bodies have a wide margin of discretion when it comes to defining the public service tasks they want to put in place, and the precise/highly detailed services which form part of these tasks do not necessarily have to be specified[93].

[93] It should be noted that the wide margin of discretion Member States have in defining their public service tasks is always subject to control for manifest error by the Commission and the Court of Justice.

Public authorities can go beyond the basic requirements of the act of entrustment and specify criteria that they want to set for the purpose of improving the performance of the undertakings entrusted with SGEIs. The Decision and the Framework just require the definition of the SGEI task in the context of which new or improved SGEIs will be delivered.

**Examples:**

- Where a public authority wants to set up a centre or home assistance service for elderly people, it will be sufficient to specify in the act of entrustment that the provider of the SSGI has been entrusted with the task of setting up a centre that will provide the assistance needed by the elderly people, taking into account the multiplicity of these needs, in particular where necessary at the medical, psychological and social level or, in the case of assistance at home, services such as medical assistance at home, meal delivery, home cleaning services, etc.

- Where a public authority wants to set up a support centre for young unemployed people, it will be sufficient to specify that the service provider has been entrusted with the task of organising a support service for the young unemployed which will provide them with the necessary training but will also include other services directly related to the effective reintegration of the persons being assisted.

***3.4.10. Where there are other operators in the market who carry on activities similar to the services covered by a public service obligation, can the public authorities define those obligations by differentiating them from the services available in the market?***

Member States have a wide margin of discretion when it comes to defining SGEIs (see the answer to question 2.4).

For the purposes of the Decision and the Framework, the public authorities must define as precisely as possible the public service obligations they have imposed on each SGEI provider (see the answer to question 3.4.8) and the cost parameters used to calculate the compensation (see the answers to the questions in Chapter 3.5), independently of the presence in the market of other operators who may or may not be entrusted with SGEI tasks. However, where there are other operators in the market, not entrusted with an SGEI, who already offer similar services, it is even more important that the Member States clearly specify the characteristics of the service in question, in particular the conditions for its provision and its target group.

***3.4.11. How to draw up an act of entrustment concerning services that have to be adapted in the process of delivery to changing circumstances in terms of care intensity, user profiles and user numbers?***

Public authorities and service providers have, most of the time, experience of the personalised services and specific needs that may present themselves during the provision of SGEIs, and of the changing situations that may occur. On the basis of their experience, they can make a reliable estimation of the possible additional needs that may arise and reflect this estimation in the act of entrustment.

There are two possible options:

- The public authority may include in the act of entrustment an *ex post* correction mechanism which will allow for periodic revision of the task entrusted[94].

- The public authority may update the act of entrustment if it becomes clear that a specific service was not envisaged and could be supplied by the same entity.

**Example:**

A municipality would like to provide integrated services covering the various needs of elderly people (medical assistance at home, meal delivery, home cleaning services, etc.). How to ensure that the municipality can compensate the service provider for the provision of additional services responding to needs which were not initially foreseen?

It is always possible to update the act of entrustment if it becomes clear that a specific service was not envisaged and could be supplied by the same body. As indicated above, the municipality could also make an estimation of such additional services from its prior experience in the field, or define *ex post* correction mechanisms for such needs.

### *3.4.12. Does the requirement of an act of entrustment limit the autonomy and freedom of initiative of such providers as various Member States may recognise and respect according to their constitutional/legal framework?*

The requirement related to an act of entrustment does not limit the autonomy and freedom of initiative of entities which provide social services in any way at all. Such bodies are entirely free to take initiatives in developing and improving or innovating in such services and to make proposals to public authorities.

The notion of act of entrustment is flexible enough to correspond in this case to the decision of the public authority approving and financing such proposals. Therefore, in the event that a public authority approves a proposal made by a service provider, in accordance with the provisions of the Decision, the definition of the SGEI task as well as the parameters for the calculation of compensation and the safeguards to avoid overcompensation, made by the service provider, have to be included in the content of that decision/agreement or in the contract agreed between the public authority and the association.

[94] On this point see the Commission Decision in cases N 541/04 and N 542/04 – The Netherlands – Risk equalisation system and retention of reserves, OJ C 324, 21.12.2005, http://ec.europa.eu/community_law/state_aids/comp-2004/n541-542-04.pdf.

***3.4.13. Does the requirement of an act of entrustment limit the autonomy in setting priorities of local branches of an SGEI provider duly mandated at national level?***

In so far as a provider is assigned an SGEI at national level on the basis of an act of entrustment defining the nature and duration of the public service obligations, the parameters for the calculation of compensation and the safeguards to avoid overcompensation, the local branches of the provider may set priorities within the limits of the conditions laid down in the act of entrustment.

## 3.5. Compensation

***3.5.1. The Decision requires cost parameters to be defined in the act of entrustment. How is it possible to do so before offering the service?***

It is often impossible to be aware of all the details of costs when an undertaking starts providing an SGEI. Consequently, the Decision does not ask for a detailed calculation of, for example, a price per day, per meal, per care category to be reimbursed by the public funding, to be provided in advance, when this is not possible. Public authorities clearly remain free to specify such parameters if they so wish.

The Decision only requires that the act of entrustment includes the basis for the future calculation of compensation: for example that compensation will be determined on the basis of a price per day, per meal, per care category, based on an estimation of the number of potential users, etc.

What matters is that the basis on which the funding body (the State, the local authority) will finance the provider is clear. Such transparency is also beneficial to taxpayers.

**Examples:**

- In the event that a public authority wants to set up a centre for the elderly, the parameters for cost compensation could be:
  - the number of elderly people attending the centre over a one-year period;
  - the number of days spent in the centre during this period.
- In the event that a public authority wants to set up a youth unemployment support centre, the parameters for cost compensation could be:
  - the number of young unemployed people following a training course over a one-year period;
  - the equipment used and training officers' salaries over a one-year period.

***3.5.2. Even for bodies experienced in providing SGEIs, there may be a high level of cost unpredictability and a risk of* ex post *losses: unpredictable changes in the level of care required, in users' profiles, in user numbers and in the level of revenues (non-***

***payment of user fees, fluctuation in number of users, refusal of other public authorities to contribute). How can public bodies cope with this situation?***

An undertaking assigned an SGEI, especially when it starts up its activity or is of a limited size, cannot commit itself to a fixed budget or a price per unit. Obviously, if there is an increase in the number of users, the costs will also rise; if some of them cannot pay a predefined contribution, revenues will be lower, etc.

However this does not change the way the costs are incurred (salaries paid, rent, etc.) or can be established (per care category, etc.). It mainly means that the provider will face higher costs and the public body will have to pay higher compensation.

All these situations can be taken into account under the Decision and the Framework. When an estimation of changing or unpredictable situations that may arise during the provision of SGEI is not provided for in the act of entrustment, the definition of *ex post* correction mechanisms of the estimated costs in comparison with the real costs may be one way of anticipating such situations.

Two options are possible for as long as the total amount of annual compensation remains below the threshold established in the Decision:

- the public authority may define in the act of entrustment an *ex post* correction mechanism which will allow for periodic revision of the cost parameters;

- the public authority may update the act of entrustment if it sees that a cost parameter has to be modified.

### *3.5.3. How should the parameters for cost compensation (Article 4(d) of the Decision) be determined in the event that a given SGEI is financed by two or more public authorities?*

If two or more public authorities (the town and the region for instance) want to finance partially, for instance, a centre for disadvantaged persons, each authority may determine the parameters of compensation according to the service under consideration, possibly following discussions with the service provider.

The public authorities may determine their individual contributions to the compensation as they wish, as long as the total amount corresponding to all the different kinds of compensation received does not exceed the real net costs borne by the SGEI provider.

### *3.5.4. In the event that a public authority wishes to finance only a part of the annual costs of a provider assigned an SGEI, how should the compensation in question be calculated?*

The calculation of the amount of compensation concerns the costs linked to the provision of the SGEI. The costs to be taken into account are those incurred for the provision of the SGEI. What counts is that the amount of compensation does not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit on any

own capital necessary for discharging those obligations[95]. Therefore, when a public authority wishes to fund, for example, 60% of the total costs related to the provision of the service, all of these costs must be taken into account in calculating compensation.

### *3.5.5. Is it necessary to attribute a specific amount of compensation to specific costs?*

The rules on state aid do not refer to the nature of SGEI costs (e.g. salaries, maintenance of premises, specific external expenses or purchases) but to their scope, that is whether the costs are associated with the operation of an SGEI or not. It is not necessary for the public authority to set aside a specific amount of compensation for specific services within the overall public service task.

### *3.5.6. In the event that an SGEI is financed in part by a public authority and in part by its users, is it possible for the public authority to cover all costs if the SGEI is loss-making?*

In the event that an SGEI is jointly financed by a public authority and by its users and it is making a loss, due, for example, to a decline in users' contributions, the loss may be compensated by the public authority in so far as it does not lead to overcompensation and if the parameters for calculating compensation set down by the competent national authority so allow. Providing there is no overcompensation, the percentage of funding of the SGEI by the public authority may be freely determined by national legislation and is of no significance with respect to the rules on state aid.

### *3.5.7. In calculating compensation, is it possible to take into account both grants made by a public authority and services provided by a public authority to help a body discharge its public service obligations?*

According to Article 5 of the Decision, the amount of compensation includes all the advantages granted by the State or through state resources in any form whatsoever. In this respect, the exact financial or material nature of the advantages provided by the public authorities (compensation, services, etc.) is of no significance.

### *3.5.8. How should the amount of compensation for a public service be calculated in the event that the SGEI providers hold special or exclusive rights related to the discharge of a number of public service tasks?*

Article 5(3) of the Decision stipulates that profits deriving from special or exclusive rights and any other advantage granted by the State to the undertaking operating the SGEI must be included in the revenue to be taken into account and therefore reduce the compensation. The same can be done for other profits deriving from other activities if the State so decides.

Thus, under state aid law, if an SGEI is loss-making, but there is an advantage drawn from another SGEI as a result of the grant of an exclusive or special right which generates profit in excess of the level of necessary compensation referred to in the Decision, this advantage must reduce the net compensation paid accordingly.

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[95] See Article 5 of the Decision of 28 November 2005.

### *3.5.9. Is it possible for a public authority to establish in the act of entrustment that it will cover the operating losses incurred for each set period without defining any other parameters for calculating compensation?*

For the purposes of compatibility with the Decision and the Framework, Member States have to define the parameters on the basis of which compensation is calculated in the act of entrustment in order to enable the EU institutions to play their supervisory role.

Nevertheless, Member States have some leeway in the definition of the parameters of their choice in order to facilitate their financial planning, in so far as the method chosen allows for a transparent and verifiable calculation of compensation. What matters in terms of compatibility with the state aid rules is that they do not end up overcompensating SGEI operators. Member States are free to decide the manner and the level of financing of their SGEIs for as long as they abide by the EU rules. In principle, they can, therefore, define the compensation parameters in reference to covering operating losses provided that the calculation parameters make it possible to determine that there is no overcompensation.

### *3.5.10. In the event that several public bodies, including a local authority, join together with private bodies in a legal entity in order to operate SGEIs jointly, how should the presence in that entity of members which are not public authorities be taken into account when calculating compensation?*

Assuming that the members which are not public authorities provide the operator with financial contributions or some other form of support, what needs to be determined is whether such contributions must be characterised as state aid within the meaning of Article 107(1) TFEU. The contribution made by a body governed by private law can indeed be characterised as state aid if it is made by way of 'state resources'. That is the case, in particular, if the private law-governed body in question is a public undertaking within the meaning of the Transparency Directive[96] and, moreover, if the decision to grant the aid is imputable to a public authority[97]. If the contribution concerned is characterised as state aid, it must be added to the other instances of state aid and then it must be ascertained whether or not the total sum of state aid exceeds what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and, where necessary, a reasonable profit for discharging those obligations.

Moreover, if the contribution made does constitute state aid within the meaning of Article 107(1) TFEU, it must satisfy the conditions of the Decision or of the Framework, in particular in that it must comply with the provisions of an act of entrustment. The body in question can finance the SGEI on the basis of the act of entrustment (with reference to the public service obligations established by the public authorities).

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96 Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

97 Judgment of the Court of Justice in Case C-379/98 *Preussen Elektra AG* [2001] ECR I-2009, paragraph 58.

If the contribution made towards the public service obligations is not characterised as state aid within the meaning of Article 107(1) TFEU, it does not need to be added to the calculation of the overall amount of state aid; it is, however, to be added to the revenue relating to the public service obligations and thus reduces the net costs resulting from the SGEI and therefore the base for potential compensation. It does not, however, have to satisfy the conditions laid down in the Decision and the Framework.

### *3.5.11. Is there a need to keep separate accounts for an undertaking providing an SGEI, while also carrying out other, commercial, activities?*

Yes, there is a specific need and obligation for undertakings providing SGEIs while carrying out other, commercial, activities, to keep separate accounts for each separate activity. This is the best way for such undertakings to prove that the compensation allocated does not exceed the exact net costs of the SGEI provided and that thus no overcompensation is involved. At the same time separate accounting for activities falling inside and outside of the scope of the SGEI enables the Commission to assess whether the criteria laid down by the Decision and the Framework are indeed fulfilled[98].

### *3.5.12. Is there a need to keep separate accounts for a body which is entrusted with the provision of an SGEI and also engages in non-economic activities?*

In such a situation, there is no legal obligation to keep separate accounts. Nevertheless, the internal accounts should enable the identification of the costs linked to the provision of the SGEI; otherwise, the amount of compensation cannot be established. Moreover, in case of a complaint, the undertaking to which the SGEI is attributed should be able to demonstrate the absence of overcompensation.

### *3.5.13. Which costs can be compensated when an undertaking uses the same infrastructure to provide both SGEIs and economic activities which are not characterised as SGEIs?*

The undertaking must allocate costs to the two activities. Costs allocated to the SGEI may cover all the variable costs incurred in providing the SGEI, a proportionate contribution to fixed costs common to both the SGEI and non-SGEI operations, and a reasonable profit.

### *3.5.14. Should tax benefits arising from the corporate status of a body be counted among revenues within the meaning of Article 5(3) of the Decision?*

Compensation may cover the difference between the costs actually incurred in providing the SGEI and the relevant receipts. A tax benefit can be either revenue or a cost reduction. Irrespective of its nature, it has to be taken into account when determining the amount of compensation necessary to provide the SGEI.

When the tax benefit consists in a cost reduction, this means that no compensation can be awarded for the amount corresponding to that reduction. When the tax benefit consists in revenue for the service provider, this means that it will have to be deducted from the compensation to be allocated.

[98] See Article 5(5) of the Decision, and paragraph 19 of the Framework.

### *3.5.15. Should payments made under a profit-and-loss transfer agreement within a public holding be counted as revenues within the meaning of Article 5(3) of the Decision?*

In several Member States, public holding undertakings have profit-and-loss transfer agreements, pursuant to which a profitable subsidiary has to transfer its profits to the holding company, which then uses these profits to cover losses generated by a loss-making subsidiary which performs SGEIs.

Such payments received to cover SGEI losses are to be counted among revenues within the meaning of Article 5(3) of the Decision and will accordingly reduce the net costs eligible for compensation.

### *3.5.16. What is the meaning of the term 'reasonable profit' within the calculation of compatible compensation?*

According to Article 5(4) of the Decision, 'reasonable profit' means a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State[99].

Normally this rate should not exceed the average rate observed in the sector concerned in recent years[100].

### *3.5.17. For the purposes of calculating reasonable profit, the Decision and the Framework refer to a rate of return on own capital. Is it possible to use different methods to calculate reasonable profit?*

The primary meaning of the provisions concerned in the Decision and the Framework is that compensation can also include an appropriate return on own capital (ROC) employed in the provision of the SGEI in question. This return should not exceed the average market rate, taking into account the risk position of the SGEI provider.

It is true that, in addition to the return on own capital, in practice there are various different methods to calculate reasonable profit.

These methods differ both in respect to their definitions of profit and their basis of calculation.

- For the comparison of profits within and between sectors, 'earnings before interest, tax and amortisation (EBITA)' is a commonly used definition. EBITA

99 In the land transport sector, Regulation (EC) 1370/2007 defines the term 'reasonable profit' as a rate of return on capital that is normal for the sector in a given Member State and that takes account of the risk, or absence of risk, incurred by the public service operator by virtue of public authority intervention.

100 According to Article 5(4) of the Decision: 'For the purposes of this Decision 'reasonable profit' means a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State, particularly if the latter grants exclusive or special rights. This rate shall not normally exceed the average rate for the sector concerned in recent years. In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, a comparison may be made with undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector are taken into account. In determining what constitutes a reasonable profit, the Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency'.

provides a reliable indication of the operating profit of an undertaking and can be readily compared with that of other undertakings.

- EBITA can be used to express a number of different ratios (e.g. as a percentage of sales, of assets, of capital employed or of capital and reserves). The return on sales is often used for comparisons within a sector. For inter-sectoral comparisons, the return on assets (ROA) or the return on capital employed (ROCE) are more often used.

Even if both the Decision and the Framework express reasonable profit as a return on own capital, these figures may not be available or appropriate for a concrete example, whereas other data, such as the return on sales, may be available and more appropriate.

In such circumstances, it is always possible to use other rates of return, like those indicated above, in order to provide solid and reliable references for the calculation of reasonable profit. In such instances, however, notification must be given, along with an explanation of why the ROC is not relevant and why an alternative method of calculation is justified on the basis of the specificities of the case in point.

***3.5.18. When the parameters for compensation are defined for a given body, should a comparison be made with other bodies? Should a judgment be made on efficiency? How can the value of pastoral care, spiritual guidance, additional time taken, etc. be compared?***

It is for the public authority to define the extent of the remit concerned and if non-measurable tasks (for instance for elderly or disabled people, etc.) have as a consequence a higher level of costs, for instance in terms of time spent by the people providing the service. These costs can of course be taken into account and compensated. The Decision does not require any assessment of efficiency, just as it leaves judgments on the quality of service required to the public authorities concerned.

For example, when two bodies provide SGEIs for which a different level of quality is defined in the acts of entrustment, each one of the service providers will receive the compensation corresponding to its own costs incurred which differ as a result of reaching the level of quality required.

***3.5.19. Do the Decision and the Framework require the selection of the least expensive undertaking for the provision of SGEIs?***

No, this is not required by the Decision or the Framework. Member States are responsible for defining the SGEIs they want and, in particular, the quality of these services. Where the quality is higher, the costs of providing the service may be higher and the compensation can cover all the costs actually incurred by the company.

***3.5.20. The Decision and the Framework permit the payment of public service compensation but prohibit overcompensation; what does the term 'overcompensation' mean?***

The Decision and the Framework permit compensation corresponding to 100% of the real net costs of the undertaking entrusted with the operation of an SGEI, including a reasonable profit, if the public authorities so wish. The term 'overcompensation' refers to compensation which exceeds the costs effectively borne by the undertaking. The notion of overcompensation is not related to the efficiency of the undertaking concerned.

## 3.6. Control of overcompensation

***3.6.1. What effect would the establishment of a mechanism designed to avoid any overcompensation have on the obligation on the public authority to carry out checks on overcompensation?***

Given how important it is to ensure that compensation does not exceed what is necessary to cover the costs incurred by an undertaking in discharging its public service obligations, taking into account relevant revenue and a reasonable profit, a mechanism designed to avoid such overcompensation might prove beneficial. Nevertheless, the existence of any such mechanism cannot relieve Member States of their obligation to ensure that the undertaking does not in fact benefit from overcompensation, in accordance with Article 6 of the Decision and paragraph 20 of the Framework.

***3.6.2. In the event that an SGEI is jointly financed by two or more public authorities (e.g. by central government and/or a region and/or a province and/or a lower-level local authority), how should control of overcompensation be carried out?***

When an SGEI is jointly financed by two or more public authorities, the amount of compensation to be taken into account in assessing the absence of overcompensation is the total amount corresponding to all the different forms of compensation paid by all the public authorities concerned.

Apart from this, checks for any overcompensation are based on the same principles as if the SGEI were financed by just one public authority. An assessment/verification as to the absence of overcompensation can only be carried out *ex post* on the basis of the costs effectively borne by the SGEI. A full review of all the supporting evidence of these costs is the only means capable of determining and proving that overcompensation or undercompensation has occurred. In this respect, Article 6 of the Decision lays down the methods for control by the Member States and establishes the level of overcompensation which may be carried forward for a transitional period of one year, i.e. 10% of annual compensation generally and 20% in the case of social housing, provided that the social housing undertakings concerned only operate SGEIs. Such control is irrespective of the fact that the SGEI is jointly financed by a number of public bodies.

***3.6.3. In the event of overcompensation related to the joint financing of the SGEI by several levels of public authorities, how should the repayment of overcompensation be carried out as between the various levels involved?***

The way in which the repayment of any overcompensation should be shared among the various public bodies involved is a matter not for the EU but for the Member State concerned; with respect to state aid, only the elimination of such overcompensation and of the undue advantage to which it gave rise is of any relevance.

## 3.7. Undercompensation

***3.7.1. Do the state aid rules forbid the undercompensation of an SSGI/SGEI provider, i.e. paying a level of compensation which is lower than the costs related to provision of the SGEI? Does not the undercompensation of a provider give rise to an economic advantage to its competitor, which does not have to bear the financial burden of such undercompensation?***

According to the rules on state aid, the providers of SGEIs/SSGIs must not be paid any overcompensation, that is to say compensation going beyond what is necessary to discharge the tasks assigned to them. These rules do not prohibit undercompensation or a lack of compensation for SGEI providers. It is for the Member States to decide on the manner and level of financing of the SGEIs that they implement in accordance with the EU rules.

***3.7.2. For the purposes of the Framework, in the event that an undertaking entrusted with an SGEI is undercompensated, can it transfer any overcompensation that it might have received over the same period with respect to another SGEI entrusted to it?***

On the basis that the ultimate ceiling for financing of an SGEI under the state aid rules is the level where overcompensation would occur, Member States may finance the SGEIs they set up by way of compensation, but also through some other type of financing that does not result in overcompensation.

In the event that an undertaking is undercompensated for the provision of an SGEI over a specific period, the transfer of overcompensation paid over the same period with respect to another SGEI provided by the same undertaking is possible according to Section 3 of the Framework[101]. This lays down that the transfer in question must be shown in the accounts of the undertaking in question, be carried out in accordance with the rules and principles set out in the Framework, notably as regards prior notification, and be subject to proper control. In addition, overcompensation cannot remain available to an undertaking on the ground that it would constitute aid compatible with the TFEU; such aid should be notified to and authorised by the Commission or be exempted from notification under the conditions of the relevant rules.

[101] See paragraphs 22 and 23 of the Framework.

### *3.7.3. Can an undertaking entrusted with an SGEI which is undercompensated be paid provisional compensation before the end of the financial year if, after that year, it will be paid the compensation necessary for discharging its task?*

It is only overcompensation which is prohibited under the state aid rules. In the event of undercompensation, it is for the Member States to decide the methods to be used for any revision to the amount of compensation, provided that any such revision does not give rise to overcompensation. As regards the possibilities for revising the act of entrustment and the parameters for calculating compensation, see the answers to questions 3.4.11 and 3.5.2.

### *3.7.4. Can compensation allocated to cover the maintenance costs for equipment necessary to discharge the SGEI task cover the operating costs related to the same SGEI when they are undercompensated?*

When compensation is established for the operating costs as such and also for maintenance and the depreciation of investments made for the SGEI, what matters from the point of view of state aid is that all such costs are effectively recorded in the undertaking's profit and loss accounts and that it can be shown that the total amount of compensation does not give rise to overcompensation; it must also be shown that it complies with the individual decision taken by the Commission when it authorised such compensation, or with the act of entrustment from the public authority which attributed the SGEI in question in those cases exempted from notification by virtue of the Decision.

This does not prevent Member States from drafting stricter rules. A Member State could, for example, stipulate that part of the overcompensation for the specific maintenance costs of an SGEI should be repaid and not be kept by the undertaking responsible for the SGEI to cover operating costs arising from the same SGEI.

### *3.7.5. In the event that all market operators are entrusted with the same SGEI, should they all receive the same amount of compensation for provision of the SGEI within the meaning of the rules on state aid?*

Member States have a wide margin of discretion when it comes to organising and financing what they regard as an SGEI. The rules on state aid allow Member States to finance in full the net costs incurred in providing SGEIs by their providers, but do not oblige them to do so. Member States can, if they so wish, decide to pay equal flat-rate compensation to all providers, provided that such compensation does not give rise to overcompensation for the operators concerned. They are also free to undercompensate, or not compensate at all, SGEI providers. Inasmuch as public service compensation granted to SGEI providers is calculated on the basis of their effective costs and relevant revenues and does not exceed what is necessary for discharging the SGEI, such compensation can be viewed as compatible within the meaning of the state aid rules.

## 3.8. '*De minimis*' Regulation and GBER

### *3.8.1. A service provider would like to establish a support service for unemployed young people which requires financial support of EUR 150 000: do the state aid rules apply to such a grant by a public authority?*

Financing of this type may be granted without meeting the criteria laid down in the Decision, if the total amount of state resources provided over a three-year period is less than EUR 200 000. If the conditions of the *de minimis* Regulation[102] are met, such support does not constitute state aid within the meaning of Article 107(1) TFEU and would not have to be notified to the Commission.

A public authority can, therefore, make such a grant of a limited amount without further concerns as to the application of the state aid rules, even when the activity to be financed is deemed to be economic.

In all other circumstances, the measure will still be compatible, if the criteria of the Decision are fulfilled.

### *3.8.2. Can a public authority finance a pilot initiative in order to define the content of SGEI tasks?*

Yes, public authorities can launch a pilot initiative in order to define the task of the SGEI they want to put in place. In order to finance such pilot initiatives, public authorities can rely on the opportunities offered by the *de minimis* Regulation, which stipulates that Article 107(1) does not apply to the grant of aid of up to EUR 200 000 over a period of three years.

### *3.8.3. In the event that an SGEI is financed according to the* **de minimis** *Regulation, does the amount of EUR 200 000 refer to the SGEI or to the undertaking entrusted with the SGEI taking into account other activities for which the undertaking receives state resources?*

According to Article 2(2)[103] of the *de minimis* Regulation, the total amount of *de minimis* aid granted to any one undertaking cannot exceed EUR 200 000 over any period of three fiscal years. This ceiling applies to the undertaking and not to each of the activities for which the undertaking receives state resources. What matters is that the same undertaking must not receive more than EUR 200 000 over a period of three fiscal years.

### *3.8.4. In the case of a body entrusted with the provision of several SGEIs which draws up separate accounts for each SGEI, is it possible to apply the* **de minimis** *rule to each SGEI separately?*

For the *de minimis* rule to apply, the total amount of state resources, irrespective of the objective pursued, granted to any one undertaking cannot exceed EUR 200 000. Consequently, when an undertaking has a number of general economic interest tasks, the total amount that it can receive under the *de minimis* rule is EUR 200 000 over a

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102 Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5.

103 *Ibid*.

period of three years. The fact that in accounting terms individual budgets exist for these tasks is of no significance for application of the *de minimis* rule.

### *3.8.5. In the event that a body entrusted with the provision of an SGEI is also engaged in non-economic activities, is it necessary to deduct the amount of compensation paid for the non-economic SGIs for the purposes of the* **de minimis** *Regulation?*

The financing of services of general interest of a non-economic nature does not come within the scope of the state aid rules, which apply only to activities of an economic nature. The financing of non-economic general-interest tasks is therefore not regarded as financing within the meaning of the *de minimis* Regulation and does not need to be taken into account when the total amount is calculated for the purposes of applying this Regulation.

### *3.8.6. The budget for the investment outlay linked to an SSGI can be booked over a period extending over one to several years. In such circumstances, is it possible to apply the* **de minimis** *Regulation?*

The investment outlay for an SSGI can be financed by public resources under the *de minimis* Regulation provided, however, that those resources do not exceed EUR 200 000 over any three-year period, whatever the period of three consecutive years considered, as laid down in the Regulation.

In the event that the public resources exceed EUR 200 000 over three years, they may benefit from application of the Decision or the Framework, provided however that they fulfil the compatibility conditions (for these conditions, see the answer to question 3.2.9).

### *3.8.7. Do SGEIs in the social and vocational integration of unemployed people and in vocational training come within the scope of the Decision of 28 November 2005 or General block exemption Regulation (EC) No 800/2008[104]?*

A social and vocational integration or vocational training SGEI, defined as such by the State and entrusted to an undertaking by it, may come within the scope of the Decision, provided that the conditions laid down in it are fulfilled. Therefore, compensation paid to an undertaking which has been attributed a public service remit in vocational integration or training may be exempted from notification in so far as the undertaking concerned has genuinely been entrusted with this public service task; this means that an act of entrustment must be in place which clearly defines the task and the parameters for calculating such compensation with a view to avoiding any overcompensation (see more specifically the conditions in Articles 2, 4 and 6 of the Decision, and the answers to the questions in sections 3.4, 3.5 and 3.6).

However, aid for undertakings which recruit disadvantaged persons within the meaning of Article 2(18) of Regulation (EC) No 800/2008 may benefit from the notification exemption laid down in the Regulation, provided it fulfils the conditions established in Chapter I of the Regulation and those laid down in Article 40 of the same Regulation.

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104 OJ L 214, 9.8.2008, p. 3.

As far as aid for undertakings which invest in training workers within the meaning of Article 38 of Regulation (EC) No 800/2008 is concerned, it may benefit from the notification exemption laid down in the Regulation, provided it fulfils the conditions established in Chapter I of the Regulation and those laid down in Article 39 of the same Regulation.

## 3.9. SGEI Package and the rules relating to the ESF and ERDF

### *3.9.1. Is financing of SGEIs by the ESF and the ERDF state aid? Is this the responsibility of the Member States or the Commission?*

As far as the application of the state aid rules is concerned, financing granted by Member States using resources from the ESF and the ERDF constitutes state resources. The rules on state aid therefore apply to financing granted by Member States using such resources in the same way as if the financing was granted directly out of the Member State's own budget.

### *3.9.2. Does SGEI funding via resources originating from the ESF and the ERDF have to be granted in accordance with the SGEI Package? Is this the responsibility of the Member States or the Commission?*

Public subsidies granted by Member States using ESF and ERDF resources are included, like any other public funding intended to enable a company to provide services of general economic interest, in the calculation of compensation for the provision of such services, and must be granted in accordance with the SGEI Package. Responsibility for defining the parameters for calculating, controlling and reviewing the compensation in the act of entrustment rests with the national, regional or local authority setting up the service of general economic interest, regardless of the origin of the public funding allocated by that authority to the service. The power to adopt rules relating to the ESF and ERDF has no bearing whatever on the establishment of public service remits by the Member States, which is always under their responsibility.

### *3.9.3. Are state aid controls compatible with controls on ESF funding?*

State aid controls and controls on ESF funding serve different purposes: to prevent Member States from awarding aid that would distort competition, on the one hand, and to ensure that EU funding awarded to certain projects is used in accordance with the conditions governing the award on the other.

The funding for a single project may have to be examined from both of these angles. Indeed, one of the principles underlying the ESF is that of co-financing, which means that the financial support provided by the EU is systematically accompanied by public or private funding at national level. The level of EU support depends on the situation on the ground: the co-financing rate may vary from 50 to 80 % of total project costs, depending on a number of socio-economic criteria.

***3.9.4. According to the rules on managing ESF funds, only items of expenditure and receipts strictly devoted to the project being co-financed are eligible, i.e. excluding reasonable profit. In the case of an SSGI funded from ESF resources, can reasonable profit be included, as provided for in the Decision?***

The rules on state aid do indeed allow the public authority financing a project to cover 100 % of the service provider's costs plus 'a reasonable profit'. But reasonable profit is not included in the eligible amount under the ESF. In practice, the interaction between these two sets of rules is not really a problem, because under the SGEI Package the public authority is still allowed to cover the reasonable profit with its own resources, if it so wishes.

***3.9.5. What is the relationship between the control mechanism for projects co-financed by the ESF and the control of overcompensation imposed by the SGEI Package?***

Projects funded by the ESF are subject to systematic control by the authorities responsible for managing ESF operational programmes. Such controls are usually based on the audit statements required by the management authorities. It is on this basis that the management authorities, which advance the funding, are reimbursed by the ESF.

The SGEI Package, on the other hand, requires that a control mechanism be in place, but leaves it up to the Member States to decide on the detailed arrangements. The aim of this mechanism is to check that there has been no overcompensation, which the ESF checks will not necessarily establish, since they will focus on eligible costs under the ESF (the question of reasonable profit, for example, will not be examined). Although these two control mechanisms may overlap in certain areas and could even, if necessary, be combined, each has its own logic, which should be respected.

**3.10. SGEI Package and rules on electronic communications**

***3.10.1. If a Member State confers an advantage on an undertaking entrusted with public service obligations in the area of electronic communications which go beyond the scope of Directive 2002/22/EC[105], is it still possible to assess the compensation in question in the light of the state aid rules?***

Directive 2002/22/EC states that Member States are still free to introduce additional measures in their territory which are not covered by the universal service obligations provided for by the Directive, and to fund them in accordance with European law (see Article 32 and recitals 25 and 46 of the Directive).

Consequently, when a Member State confers an advantage on an entity responsible for providing telephone services accessible to the public which are not covered by the universal service obligations, as defined in Chapter II of the Directive, it should always assess the applicability of the *Altmark* criteria and the other state aid conditions (i.e. transfer of state resources and imputability, distortion of competition and effect on trade between Member States, selectivity of the measure in question), in order to determine whether or not state aid is involved.

[105] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51.

## 4. QUESTIONS RELATING TO THE APPLICATION TO SSGI OF THE RULES ON PUBLIC PROCUREMENT

### 4.1. The SSGI is provided by the public authority itself

#### *4.1.1. To what extent can a public authority decide to provide an SSGI directly itself? In other words, what room for manoeuvre do the public authorities have when deciding whether to provide a service directly or to externalise it? Is the decision left entirely to their discretion?*

It is entirely up to the public authorities to decide whether to provide a service themselves or to entrust it to a third party (externalisation). The public procurement rules only apply if the public authority decides to externalise the service provision by entrusting it to a third party against remuneration.

#### *4.1.2. The EU rules on the selection of the provider do not normally apply when public authorities provide the service directly themselves or through an internal provider (this is referred to as an 'in-house provider' situation). What are the scope and limits of the 'in-house' exception?*

The 'in-house' exception is meant to cover a situation where a public authority decides to provide a service itself, albeit acting through a legally distinct entity. In this case the public authority and the entity providing the service are effectively regarded as one. Such a relationship is covered neither by the principles of transparency, equal treatment and non-discrimination derived from the Treaty, nor by the Public Procurement Directive 2004/18/EC (hereinafter 'the Directive')[106].

The conditions for applying the principle of the in-house exception are as follows:

A) The control exercised by the public authority, alone or with other public authorities, over the legally distinct entity must be similar to that which it exercises over its own departments.

The question whether or not a public authority exercises similar control over a legally distinct entity as it does over its own departments can only be settled case by case, taking into account all the relevant legislative provisions and circumstances (legislation, articles of association of the entity in question, shareholders' agreement, etc.). The public authority must, in any case, exercise a degree of control over the entity that allows it to have a decisive influence on both the strategic objectives and the major decisions of that entity.

The Court of Justice has made it clear that if a private undertaking holds even a minority share in the capital of that third entity this will exclude the possibility of a public authority exercising over that entity a control similar to that which it exercises over its own departments[107].

and

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106 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114.

107 Case C-26/03 *Stadt Halle* [2005] ECR I-0001, paragraphs 49-50.

B) The essential part of the activities of the legally distinct entity is carried out with the controlling public authority or authorities[108].

As regards the first criterion (similar control), the Court has recognised that it is not essential for the similar control to be individual and that it can therefore be exercised jointly by several public authorities[109]. It has also confirmed that, if several public authorities control a legally distinct entity, the second criterion (essential activity) may also be met by taking into account the activity which the legally distinct entity carries out with all of the public authorities together[110]. Consequently, public procurement procedures do not have to be applied if several public authorities cooperate within a separate public entity which is subject to joint control by the public entities which own it and which carries out its essential activity with those same public entities. For further information on cooperation between public authorities see the answer to question 4.2.12.

For information about compliance with the rules on state aid in cases where the SSGI provider is linked to the public authority ('in-house provider'), see the answer to question 5.4.

## 4.2. Provision of the SSGI is entrusted to a third party against remuneration

### *4.2.1. What is the applicable legal framework when a public authority decides to externalise the provision of an SSGI against remuneration?*

If the public authority decides to externalise a service against remuneration it is bound by the provisions of EU law on the award of public service contracts or public service concessions.

Two cases must be distinguished:

A) The public authority concludes a public service contract. In this case the public authority pays the service provider a fixed remuneration. There are two possible situations:

(a) the value of the contract exceeds the thresholds for application of Directive 2004/18/EC.

If the relevant thresholds are reached[111] the public service contracts will fall within the scope of the Directive. However, under Article 21 of the Directive, health and social services contracts are not subject to all of the detailed rules of the Directive[112]; only a very small number of its articles apply. These require, in particular, that the technical

108 Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50.

109 Case C-324/07 *Coditel Brabant* [2008] ECR I-8457 and Case C-573/07 *Sea* [2009] ECR I-8127.

110 Case C-340/04 *Carbotermo* [2006] ECR-I-4137, paragraph 70, and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 62.

111 Article 7 of Directive 2004/18/EC.

112 Social services and health services are among the services listed in Annex II B to Directive 2004/18/EC. Contracts for such services are subject only to a limited number of provisions of the Directive (on the distinction between the services listed in Annexes II A and II B, see Articles 20 and 21 of Directive 2004/18/EC). The codes referred to therein may be consulted on the DG Internal Market website at www.simap.europa.eu.

specifications[113] must be laid down at the start of the procurement process (see the answer to question 4.2.4) and the results of the award procedure[114] must be published. Moreover, when awarding health and social services contracts, the public authorities must also comply with the basic principles of the TFEU, such as the transparency requirement and the obligation to treat economic operators equally, without discrimination, if and in so far as the services in question are of cross-border interest[115]. For further information about the concept of cross-border interest see the answer to question 4.2.2.

These principles, however, require only observance of the basic standards developed by the Court of Justice of the European Union and not compliance with the full set of provisions of Directive 2004/18/EC. Therefore, when externalising social services via a public service contract, public authorities already benefit from a greater margin of discretion than in other sectors.

It should be noted, however, that in the case of mixed service contracts that comprise social services and other services that are fully covered by the Public Procurement Directive[116], such as transport, scientific research, consulting or maintenance, the Directive will apply to a limited extent only – as explained above – if the value of the social service[117] is greater than the value of the other service.

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|---|
| For example, ambulance services have both a health service component and a transport service component. If the transport service exceeds the health service in value, all the provisions of the Directive will apply. If the value of the health service is higher, the Directive will apply only partially, as explained above[118]. |

(b) the value of the contract is less than the thresholds for application of Directive 2004/18/EC.

If the value of the contract to be awarded is less than the threshold for applying the Directive, the public authority must nevertheless comply with the basic rules and principles of EU law, such as the principles of equal treatment, non-discrimination and transparency, if the contract in question is of cross-border interest[119]. For further information about the exact nature of these principles see the answer to question 4.2.3.

B) The public authority grants a service concession. In this case the remuneration consists mainly of the right to exploit the service economically[120]. The concessionaire assumes the operating risk resulting from the exploitation of the service in question[121]. Public authorities granting service concessions must in all cases comply with the basic rules and principles of EU law, particularly the principles of transparency, equal

113 Article 21 read in conjunction with Article 23 of Directive 2004/18/EC.

114 Article 21 read in conjunction with Article 35(4) of Directive 2004/18/EC.

115 In other words, they are of interest to economic operators situated in other Member States of the European Economic Area. See Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraphs 29 *et seq*.

116 The services listed in Annex II A to Directive 2004/18/EC.

117 Article 22 of Directive 2004/18/EC.

118 See Case C-76/97 *Tögel* [1998] ECR I-5357, paragraphs 29-40.

119 For further information about the concept of cross-border interest see the answer to question 4.2.2.

120 See Article 1(4) of Directive 2004/18/EC.

121 See Article 17 of Directive 2004/18/EC and Court of Justice case law, particularly the judgment of 25 March 2010 in Case C-451/08 *Helmut Mueller* (not yet reported).

treatment and non-discrimination[122]. For further information about the exact nature of these principles see the answer to question 4.2.3.

### *4.2.2. What is meant by the concept of cross-border interest?*

A public contract or concession has a cross-border interest if it is of interest to economic operators situated in other Member States of the European Economic Area[123].

It is up to the public authority to evaluate the potential interest of the contract for economic operators located in other Member States on a case by case basis, unless national law provides specific guidance.

If a public contract or concession is of cross-border interest, the public authority must comply with the principles of the TFEU (non-discrimination, transparency, etc.)[124] during the procedure for awarding it. Public contracts and concessions that have no cross-border interest are not bound by the principles of the TFEU.

Thus, under certain conditions, small, local service contracts may be awarded without complying with the above principles, if the services in question have no cross-border interest for operators from other Member States and therefore have no impact on the functioning of the internal market. This might be the case if, in view of the very modest value of the contract[125] (well below the threshold for application of the Directive which currently stands at EUR 193 000[126]) and the nature of the social service and market segment involved, it is unlikely that economic operators from other Member States will be potentially interested in providing the services in question[127].

For instance, in cases involving contracts for legal services worth an average of around EUR 5 000[128] or town planning services worth between EUR 6 000 and EUR 26 500[129] the Commission considered that, in view of their low value (around 10 % or less of the threshold for application of the Directive) and the individual circumstances of the cases, the contracts in question were not relevant to the internal market.

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122 See the following judgments: Case C-324/98 *Telaustria* [2000] REC I-10745, paragraph 62; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16-19 and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 49.

123 See Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraphs 29 *et seq*.

124 Case C-59/00 *Bent Mousten Vestergaard* [2001] ECR I-9505, paragraph 20, Case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraphs 32-33, Case C-6/05 *Commission* v *Greece* [2007] ECR I-4557, paragraph 3.

125 The criterion of value alone is not sufficient to indicate that a market has no cross-border interest. As the Court of Justice ruled in Joined Cases C-147/2006 and C-148/2006 *Secap* [2008] ECR I-3565, paragraph 31 'in certain cases, account must be taken of the fact that the borders straddle conurbations which are situated in the territory of different Member States and that, in those circumstances, even low-value contracts may be of certain cross-border interest.'

126 After indexation under Commission Regulation (EC) No 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts.

127 See Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 20, which related to service concessions.

128 See press release IP/07/357, 21 March 2007.

129 See press release IP/06/1786, 13 December 2006.

Nor is the existence of a complaint relating to the contract in question sufficient evidence that it is of cross-border interest[130].

When evaluating the relevance of the contract to the internal market, public authorities can refer to the Commission interpretative communication on EU law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives[131]. This communication encompasses contracts only partially covered by the Public Procurement Directives, such as contracts for health and social services[132]. Since the communication contains a general interpretation of the concept of internal market relevance under the Treaty, it can also be used as a guide for concessions.

#### *4.2.3. What are the obligations deriving from the principles of transparency and non-discrimination?*

According to the case law of the Court of Justice of the European Union, the principles of transparency, equal treatment and non-discrimination require that the public authority's intention to conclude a public contract or a concession be adequately publicised. The advertisement may be limited to a short description of the essential details of the contract to be awarded and of the award method together with an invitation to contact the public authority. It is essential that all potentially interested service providers have the possibility to express their interest in bidding for the contract.

The public authority may then select, in a non-discriminatory and impartial way, the applicants to be invited to submit an offer and, where relevant, to negotiate the terms of the contract or of the concession. During such negotiations all economic operators should be on an equal footing and receive the same information from the public authority.

Court of Justice case law on effective judicial protection[133] requires, at a minimum, that decisions adversely affecting a person who has or had an interest in obtaining the contract, such as a decision to eliminate a bidder, should be subject to review for possible violations of the basic standards derived from EU primary law.

When applying these principles, the public authorities can draw on the Commission interpretative communication on the EU law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives. As mentioned above, this communication also deals with contracts that are only partially covered by the Public Procurement Directives ('the Directives')[134], such as contracts for the services listed in Annex II B to Directive 2004/18/EC, which include health and social services[135]. As stated at 4.2.1. and pursuant to Article 21 of Directive 2004/18/EC,

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130 See Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 34.

131 OJ C 179, 1.8.2006, p. 2.

132 As referred to in Annex II B to Directive 2004/18/EC.

133 See Case C-50/00 P *Union de Pequeños Agricultores* [2002] ECR I-6677, paragraph 39, and Case 222/86 *Heylens* [1987] ECR 4097, paragraph 14.

134 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

135 As referred to in Annex II B to Directive 2004/18/EC.

public contracts for these services are subject to certain rules of Directive 2004/18/EC only (namely the obligation to define the technical specifications in the contract documents and to publish the result at the end of the procedure) and are otherwise governed by the general principles of the TFEU (non-discrimination, transparency, etc.) if they are of cross-border interest.

Since the communication contains a general interpretation of the principles of transparency, equal treatment and non-discrimination, it can also be used as guidance for concessions, bearing in mind that these contracts usually represent a value well above the thresholds of the Public Procurement Directives and therefore, even though these Directives do not apply to service concessions, do still have to be advertised in a medium with Europe-wide coverage in accordance with the principles of the TFEU.

#### *4.2.4. How to draft specifications suitable for awarding a service contract in such a way as (i) to respond holistically to the different requirements of the users and (ii) to enable the service to be adapted to changing circumstances in terms of intensity, number of users, etc.?*

The Directive offers a wide range of possibilities for drawing up specifications[136]. It is up to the public authorities to make full use of these possibilities by requiring bidders to develop tailor-made service concepts in order to provide the best possible services of the requisite quality standard. They may, for instance, specify that bidders have to address the particular needs of certain groups of users or insist that the proposed service concept must be compatible with existing structures that are already in place. It is also conceivable that a public authority might insist that the service be operated and evaluated in a way that involves the users.

However, the bottom line is that the specifications must be drafted in a way that does not discriminate or prejudge the tender procedure at the outset.

#### *4.2.5. What other quality requirements can be included in the award of a public contract or concession for an SSGI?*

When awarding a public contract or concession for an SSGI the public authorities may include any quality requirements they consider necessary, in order to offer users a high-quality service and the best value for money. Depending on the nature of these requirements, they may come into play at different stages of the procedure:

When **setting out the technical specifications**[137], for example, the public authority may specify all the characteristics of the service which it considers useful to ensure high-quality provision (e.g. requirements to ensure continuity of service, the satisfaction of the specific needs of different categories of user, accessibility of infrastructure for people with reduced mobility, and more generally requirements relating to the quality of this infrastructure). The technical specifications of the service may be defined in the form of very detailed characteristics (which may in some cases contribute to over-standardisation of the services offered), or in terms of requirements for functional performance. The second approach usually leaves candidates a greater margin of discretion, allowing them the opportunity to suggest to the public authority

136 Article 23 of Directive 2004/18/EC, which also applies to the services listed in Annex II B to the Directive, including social services.

137 See Article 23 of Directive 2004/18/EC.

more innovative solutions/working methods for achieving the quality targets that have been set.

The experience and standard of the service provider's staff are also decisive factors contributing to the quality of the service provided. When setting out the **selection criteria**[138], the public authority may specify particular requirements for professional ability (e.g. professional experience, staff qualifications, technical infrastructure available) to ensure that the selected contractor has sufficient capacity to perform the service to the quality standards laid down by the contract.

Quality requirements may also be included in the **award criteria**[139]. The public authority is not compelled to award the contract on the basis of the lowest price, but may award it to the most economically advantageous tender. This allows it to include in the award criteria all the qualitative factors it considers important. The public authority may also use the weighting of the different award criteria to reflect the importance it attaches to the various qualitative aspects of the service.

The **conditions for performance of the contract**[140] are another way of focusing on the quality of the service. The public authority may, for example, include in the performance criteria[141] clauses requiring the contractor to ensure a proper level of training and remuneration for the staff involved in implementing the contract, provided that these are compatible with the relevant provisions of EU law. Such clauses ensure that the contractor is not tempted to cut staff costs, which might demoralise the employees in question, increase staff turnover and ultimately undermine the quality of the service delivered.

Finally, when awarding a public contract/concession for an SSGI the public authorities may adopt an integrated approach for the performance of complex services which do not have to be divided into a number of contracts but may be awarded as a single lot, to enable the user, if it so wishes, to deal with a single service provider taking responsibility for multiple related needs. They are also free to choose a suitable duration for the contract in question, to ensure the stability and continuity of the relevant service(s).

#### *4.2.6. Is it possible to amend the contract during implementation?*

Amendments during the lifetime of the contract are possible provided they do not substantially change the terms of the original tender[142]. In particular, amendments should not be so far-reaching that the outcome of the competition might have been different had they been known from the outset. This is the case if potential candidates who did not submit an offer might have been interested in participating in the tender had they known that such changes would occur.

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138 See Articles 44 and 48 of Directive 2004/18/EC.

139 See Article 53 of Directive 2004/18/EC.

140 See Article 26 of Directive 2004/18/EC.

141 For reasons of transparency, the performance criteria must be published in advance in the contract documentation. Compliance with the performance criteria cannot be verified before the contract is awarded; verification will only be possible during implementation. To ensure compliance the public authority may make provision for deterrent contractual penalties.

142 Case C-496/99 *Commission* v *CAS Succhi di Frutta SpA* [2004] ECR I-3801, paragraph 116.

#### *4.2.7. How to avoid placing too heavy a burden on small service providers, who are often the best equipped to understand the specific features of SSGIs in situations which have a strong local dimension?*

It is up to the public authority to structure the tender in a way that gives small economic operators a chance to participate and succeed. The wider the scope of the service required and consequently the more exacting the economic and financial requirements, the more difficult it will be for small service providers to participate. In the case of bigger contracts (for instance for a range of services or for services to be performed in several places), the awarding authority might consider dividing the contract into different lots that are more accessible to SMEs. In general, it is advisable for public authorities to draw up technical specifications with SMEs in mind, keeping formalities to a strict minimum.

#### *4.2.8. How to reconcile public procurement procedures which limit the number of providers selected with the preservation of a sufficient degree of freedom of choice for SSGI users?*

Public procurement procedures do not aim to limit the number of service providers selected. Contracting authorities are entirely free to choose one or several operators to satisfy their needs. Public authorities can, for example, entrust the same service concession to several operators, if this is feasible in practice, thereby guaranteeing a larger choice for users of the service.

#### *4.2.9. Is it possible to make familiarity with the local context a criterion for the selection of a service provider, this aspect often being essential for the successful provision of an SSGI?*

EU public procurement rules aim to ensure fair competition between operators across Europe in order to provide better value for money to the public authorities. A requirement of familiarity with the local context might lead to unlawful discrimination against foreign service providers. At the same time, it risks restricting the public authority's choice to a small number of local operators and consequently diminishing the beneficial effect of Europe-wide competition.

Nevertheless, certain requirements related to the local context may be acceptable if they can be justified by the particularities of the service to be provided (type of service and/or categories of user) and are strictly related to the performance of the contract.

**Examples:**

- A public authority may, for instance, require as part of the performance criteria that the successful tenderer establish a local infrastructure such as an office or a workshop or deploy specific equipment at the place of performance, if this is necessary for the provision of the service.

- A municipal authority intending to set up a women's shelter, intended particularly for women from a specific cultural minority, may specify in the call for tenders that the service provider must have prior experience of this kind of service in an environment with similar social and economic characteristics, and that the employees who will be in contact with and/or

address the needs of the women facing problems must be sufficiently familiar with the relevant cultural and linguistic context.

- A public authority that intends to put in place a job placement service targeting young unemployed adults from disadvantaged areas and addressing in an integrated way the specific difficulties encountered by the users (e.g. mental health problems, drug addiction or alcohol abuse, social housing and debt) might specify that the service provider must have prior experience with this kind of service for similar target groups. It may also indicate that the service provider must ensure that from the outset the employees dealing with the users of the service have a knowledge of the networks of social actors that already exist, with whom they will need to liaise in order to address the needs of the young unemployed adults in an integrated way.

In any event, a restriction of this kind must not go beyond what is strictly necessary to ensure adequate service provision. The Court of Justice has decided, for example, that when awarding a public contract for health services providing home respiratory treatments a public authority cannot require the potential tenderer to have, at the time when the tender is submitted, an office open to the public in the capital of the province where the service is to be provided[143].

It is the responsibility of the public authority to make sure that such conditions are objectively justified and do not result in discriminatory treatment by unduly favouring certain groups of bidders, in particular local undertakings or incumbent service providers.

The issue of the direct award of low-value contracts to small local service providers has already been addressed in the answer to question 4.2.7.

### *4.2.10. Is it possible to limit the tender to non-profit service providers only?*

Two situations have to be distinguished:

- Individual contracting authorities cannot decide themselves to limit a tender procedure to non-profit service providers. The Public Procurement Directive is based on the principles of equal treatment and non-discrimination of economic operators[144]. The Directive does not, therefore, allow contracts to be reserved for specific categories of undertaking[145], such as non-profit organisations, regardless of the type of services involved – whether listed in Annex II A or Annex II B to the Directive (e.g. social services)[146].

143 Case C-234/03 *Contse* [2005] ECR I-9315, paragraph 79.

144 Article 2 of Directive 2004/18/EC.

145 This is why a specific exception had to be included in the Directive to allow Member States to reserve the right to participate in certain contracts to a particular category of organisations, i.e. sheltered workshops where most of the employees concerned are disabled (see Article 19 of Directive 2004/18/EC).

146 The distinction between the services in Annex II A and those in Annex II B is relevant only from Article 20 of the Directive onwards.

- However, national law[147] regulating a particular activity might, in exceptional cases, provide for restricted access to certain services for the benefit of non-profit organisations. In this case public authorities would be authorised to limit participation in a tender procedure to such non-profit organisations, if the national law is compatible with European law. Nevertheless, such a national law would restrict the working of Articles 49 and 56 of the TFEU, on the freedom of establishment and the free movement of services, and would have to be justified on a case-by-case basis. On the basis of the case law of the Court of Justice, such a restriction could be justified, in particular, if it is necessary and proportionate in view of the attainment of certain social objectives pursued by the national social security system[148].

***4.2.11. Do public authorities still have the possibility of negotiating with service providers during the selection phase? This is particularly important for SSGIs given that the public authorities are not always in a position to define their needs precisely at the start of the process. It is sometimes necessary for the public authorities to have a discussion with the potential service providers.***

As mentioned in the answer to question 4.2.3, the public authorities may use negotiated procedures in order to purchase health or social services through public contracts or concessions. The public authorities in question will not be subject to the specific rules on negotiated procedures laid down in Directive 2004/18/EC, since this Directive does not apply to service concessions and contains only a few rules applicable to the services listed in Annex II B to the Directive (such as SSGIs)[149]. For this reason, when awarding a public contract or an SSGI concession, public authorities are free to organise an *ad hoc* negotiated procedure provided national law does not lay down specific rules. In any case, the general principles of transparency and non-discrimination laid down by the TFEU, in accordance with which equal treatment must be given to all the economic operators invited to participate in the negotiated procedure, are applicable to cross-border services.

147 The term 'national law' refers to general, abstract national rules, as opposed to a decision by an awarding authority in the context of a specific contract. On the other hand, the level of legislation (national or regional) is not crucial here, provided that the rules are abstract and generally applicable.

148 See Case C-70/95 *Sodemare SA* v *Regione Lombardia* [1997] ECR I-3395.

149 As stated in answer 2.2. and pursuant to Article 21 of Directive 2004/18/EC, public contracts for these services are subject only to certain rules of Directive 2004/18/EC (namely the obligation to define the technical specifications in the contract documents and to publish ex-post the result of the procedure) and are otherwise governed by the general principles of the TFEU (non-discrimination, transparency, etc.).

***4.2.12. To what extent do the public procurement rules apply to inter-municipal cooperation? This cooperation can take various forms, e.g. one municipality purchasing a service from another, or two municipalities jointly launching a public procurement procedure or creating an entity for the purpose of providing an SSGI, etc.***

The public procurement rules apply when a public authority intends to award a public service contract to a third party[150] in return for payment. It makes no difference whether the third party is a private operator or public authority.

However, as is shown by the examples below, there are situations in which public authorities entrust economic activities to other public authorities or carry out these activities jointly with other public authorities without being obliged to apply the EU public procurement rules.

- Thus, the Court of Justice recently found that public authorities could carry out the public service activities for which they were responsible by using their own resources, in cooperation with other public authorities, without the need for any particular form of organisation or the need to provide for application of European public procurement legislation to the implementation of these organisational practices.
  - (i) Cooperation between public authorities can be organised within the framework of a separate public body that meets the in-house criteria[151]. Concerning this point, see question 4.1.2.
  - (ii) The Court has also stated[152] that public/public cooperation does not necessarily require the creation of new jointly-controlled entities. According to the Court, it can be based simply on cooperation between public bodies with the sole purpose of jointly carrying out public interest tasks for which the bodies concerned are responsible. This does not necessarily mean that each public authority cooperates equally in carrying out the public interest tasks, since the cooperation can be based on sharing tasks and on specialisation. However, there must be genuine cooperation, as opposed to a public contract where one party carries out a task in return for payment. There must not be any financial transfers between the public authorities other than reimbursements of costs. The cooperation must be based solely on considerations and requirements linked to the pursuit of public interest objectives, which excludes the pursuit of profit and the participation of any private or mixed capital entities.
- Public authorities such as municipalities can of course jointly organise public procurement procedures. Thus, a public authority can launch a procedure for itself and for another public authority[153] provided it announces this at the start of the procedure. The public procurement rules will thus apply to a procedure

150 See the judgments in Cases C-107/98 *Teckal* [1999] ECR I-8121, paragraph 51, C-94/99 *ARGE* [2000] ECR I-11037, paragraph 40, and C-220/05 *Auroux* [2007] ECR I-389, paragraph 62.

151 See the judgment in Case C-324/07 *Coditel Brabant* [2008] ECR I-8457.

152 See the judgment in Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747.

153 See Article 11 of Directive 2004/18/EC on central purchasing bodies.

launched by the public authority for itself and for the other public authority/ies, but will not apply to cooperation between public authorities.

- Several public authorities can create a new entity and fully transfer to it a specific task. In this case, the public authorities do not retain any control over the service performed, which is provided by the new entity acting in full independence and under its own responsibility. In this case, no service is provided and consequently neither the Treaty nor the directives apply[154].

- When public authorities put in place structures involving mutual assistance and cooperation for no remuneration, there is no provision of services within the meaning of the Treaty and EU law is not applicable.

### *4.2.13. To what extent do the public procurement rules apply to public-private partnerships (PPPs)?*

Generally speaking, the creation of a PPP constitutes the award of a public contract or of a concession. This award is subject to the public procurement rules applicable in the case at hand, according to the type of contract involved and the value of the contract.

With regard to institutionalised PPPs (implying the existence of a mixed capital entity), it should be pointed out that, as indicated in the answer to question 4.1.2, there cannot be an "in-house" relationship between a public authority and a public-private entity in which a public authority participates jointly with a private entity. Consequently, it follows that services entrusted to a public-private entity must be awarded in accordance with the public procurement rules laid down in the Treaty or in the Public Procurement Directives. It also follows that the acquisition by a private operator of a share in the capital of an entity that performs public tasks awarded under an arrangement involving an in-house relationship puts an end to this relationship and makes it necessary to re-tender the contract or concession in question, unless the private operator has been selected in accordance with the public procurement rules.

If a public authority follows an award procedure in accordance with European public procurement law in order to select a private partner who is to perform the service contract or benefit from the service concession jointly with a public authority within the framework of a mixed public-private entity, it is no longer necessary to organise a second award procedure for provision of the service. However, if there is any substantial change in the parameters concerning the provision of the service not envisaged in the original public procurement procedure, a new procedure must be launched. For further information, please refer to the Commission communication on institutionalised PPPs[155], which explains in detail how to organise such a procedure.

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154 See Commission press release IP/07/357 of 21.3.2007, which states that the complete transfer of a public task from one public entity to another does not imply the provision of services for remuneration within the meaning of Article 49 of the EC Treaty, if the public entity to which the task has been transferred performs this task in full independence and under its own responsibility. Such a transfer of public tasks constitutes an act of internal organisation of the public administration of the Member State in question. As such, it is not subject to the Treaty and its fundamental freedoms.

155 Commission interpretative communication C(2007) 6661 on the application of EU law on public procurement and concessions to public-private partnerships (PPPs).

***4.2.14. To what extent is it possible, in the award of a public contract or of a concession for a social service of general interest, to lay down an obligation to comply with certain corporate governance rules (e.g. equal control of the enterprise by employers' representatives and trade union representatives, or inclusion of user representatives on the board of directors)?***

The Public Procurement Directives enable public purchasers to take account at the different stages of a public procurement procedure of specific requirements (which may also be of a social nature) provided that these considerations are compatible with EU law (particularly in terms of observing the principles of the Treaty – non-discrimination, transparency, etc.) and that they are indicated in the contract notice or tender documents. Furthermore, according to the above-mentioned Directives, the requirements laid down in the technical specifications, the selection criteria or the award criteria must be related to the subject matter of the contract (i.e. must serve to define the products/services sought). However, the requirements included in the performance clauses need not necessarily be linked to the subject matter of the contract, but only to the contract performance (i.e. to the tasks enabling the production of the goods or the provision of the services purchased).

If the contract in question is not covered by the above-mentioned Directives, as is the case, for example, with service concessions or public contracts whose value is lower than the thresholds for application of those Directives, the rules and principles of the TFEU, as interpreted by the Court of Justice, still apply if the contracts are of certain cross-border interest[156]. In this respect, the obligation to observe the principles laid down by the TFEU, in particular the principle of non-discrimination, also prevents the authority awarding the contract from imposing conditions not linked to the subject of the contract or to its performance, when awarding contracts not covered by the Public Procurement Directives.

Corporate governance obligations, however, particularly as regards the control of the enterprise or the presence of certain groups of persons on the board of directors of the service provider, concern the organisation of the enterprise in general, and therefore cannot be deemed either to be linked to the subject matter of the contract in question (since they are not appropriate for defining the services sought, in terms of technical features or better value for money) or to the performance of the contract (since they are not linked to the tasks needed to provide the services in question).

However, as mentioned in the answer to question 4.2.4, the public authority may require the specific service to be performed and assessed in a way involving the participation of the users, provided that this does not lead to discrimination of any kind or prejudge the award of the contract.

There are various ways of involving users to a greater or lesser extent (polls, inviting suggestions, etc.). The public authority may have precise ideas about what degree of user participation it wants. It might, for example, require the service provider that obtains the contract to have or to put in place a structure or mechanism allowing user representatives to be involved in decision-making at the contract performance stage, provided that these decisions do not change the contract and are not discriminatory. If the public authority does not have any precise ideas on this point, it may also ask the candidates to suggest approaches to ensure such participation.

156 See the judgment in Case C-324/98 *Telaustria* [2000] ECR I-10745.

### *4.2.15. How can the public procurement rules be reconciled with the public authorities' need to encourage innovative solutions that meet the complex needs of the users of SSGIs?*

The public procurement rules offer public authorities a wide range of tools for encouraging innovation.

For example, public authorities are free to define the technical specifications[157], either by drawing up detailed technical characteristics or by performance or functional requirements[158]. In the latter case, the public authorities may indicate the results sought without specifying in detail the means. This encourages the creativity of the candidates, who can identify and propose more innovative solutions in order to meet users' complex needs.

The use of variants[159] is another means of encouraging innovation. Public authorities which authorise variants can thus compare the advantages and disadvantages of a more innovative alternative to the standard solution.

Given that SSGIs are subject only to a few of the rules in Directive 2004/18/EC, the public authorities may choose the procedure they consider the most appropriate for the specific service in question, provided that the procedure chosen is in line with the TFEU principles (transparency, non-discrimination). For example, in the case of complex SSGIs for which the public authority is not in a position to identify the best way of meeting users' specific needs, it can use a procedure similar to that of the competitive dialogue[160].

### *4.2.16. What are the advertising requirements for SSGI concessions? Is publication in the EU's Official Journal possible?*

Service concessions, unlike public works concessions and public contracts, are not subject to Directive 2004/18/EC, including in particular the obligation to publish a notice in the Official Journal of the European Union. This is why until now no specific form has been available for the publication of service concessions in the Official Journal. However, service concessions are governed by the principles of the TFEU, including transparency and equal treatment. In accordance with these principles and the interpretation of the European Court of Justice in its judgment in Case C-324/98 *Telaustria*, the contracting authorities (or the contracting bodies) must guarantee potential bidders 'a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed' and hence must publish an appropriate notice having regard, among other things, to the subject matter and economic value of the concession in question.

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157 Article 23 of Directive 2004/18/EC.

158 As stated in Article 23(3) of Directive 2004/18/EC, when technical specifications are defined in terms of performance or functional requirements, 'However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract';

159 See Article 24 of Directive 2004/18/EC. Even if the social services of general interest are subject only to a limited number of the rules laid down in Directive 2004/18/EC, the public authorities may of course use the optional provisions of the Directive if they consider them useful.

160 Provided for in Article 29 of Directive 2004/18/EC for contracts subject to all the Directive's rules.

- It follows that within the limits laid down by ECJ case law, Member States/contracting authorities are free to define appropriate advertising rules to ensure the transparency of service concessions. Contracting authorities may, of course, publish notices of service concessions in the Official Journal, even if this is not required by European law.

#### *4.2.17. Are there any arrangements for outsourcing SSGIs other than public contracts and concessions that would be compatible with the principles of transparency and non-discrimination and would offer a wide choice of providers?*

Yes. The competent public authority may, for example, establish in advance the conditions for provision of a social service and, after sufficient advertising and in accordance with the principles of transparency and non-discrimination (see the answer to question 4.2.3), grant licences or authorisations to all providers meeting these conditions. Such a system does not specify any limits or quotas concerning the number of service providers; all those meeting the conditions can participate.

Providers which have obtained a licence/authorisation must provide the service at the request of the user, who will thus have the choice of several providers, at a price set beforehand by the public authority.

## 5. SIMULTANEOUS APPLICATION OF THE STATE AID RULES AND THE RULES ON PUBLIC CONTRACTS AND SERVICE CONCESSIONS TO SGEIS

### 5.1. Does EU law impose a specific form of management of SGEIs?

According to settled case law, Member States have broad discretion concerning the definition of what they consider to be SGEIs and the organisation of these services. Consequently, the public authorities are free to choose how to manage the SGEIs they set up.

In accordance with the state aid rules, public authorities can organise and finance their SGEIs as they wish, provided that the compensation granted does not exceed the amount necessary to enable the performance of the SGEI tasks under economically acceptable conditions, in line with Article 106(2) of the TFEU.

When the establishment of an SGEI gives rise to the award of a public contract or a concession (i.e. when a service is provided in return for remuneration in the form of payment of a price or by granting the right to exploit the service remunerated by a fee payable by users), the public authorities must comply not only with the state aid rules but also with the rules on public contracts and concessions. For more information see the answers to questions 3.1.15 and 4.2.1.

If management of an SGEI is awarded as part of a public procurement procedure allowing the selection of the candidate able to provide these services at the least cost to the community, and if the other conditions of the *Altmark* judgment are complied with (for these conditions see the answer to question 3.2.1), the compensation awarded does not constitute state aid within the meaning of the *Altmark* judgment.

**5.2. When a public authority finances the provider of an SGEI in accordance with the state aid rules, must it also apply the EU rules on the award of public service contracts or service concessions?**

The state aid rules and the rules on public contracts and concessions have different aims and scope. The state aid rules relate to the conditions for financing SGEIs and consequently economic SSGIs and are aimed at preventing distortions of competition caused by financing or similar benefits granted by the State and its emanations. The rules on public contracts and concessions, on the other hand, concern the conditions for awarding these services to operators. One of their main aims is to prevent the distortions of competition that may arise from the management of public funds by the contracting authorities when awarding these services. Other aims are to maximise competition in Europe and value for money, particularly for service users.

Public authorities wishing to set up an SGEI must therefore comply not only with the state aid rules but also with the rules on the award of public contracts or concessions.

The rules on public contracts apply from the time when there is an obligation to provide a specific service in return for remuneration, irrespective of the general interest objective of the service. The mere financing of an activity, however, which is usually linked to the obligation to reimburse the amounts received if they are not used for the purposes intended, does not usually come under the public procurement rules.

The legal classification of a contract as a public contract under EU law must be based on the concept of a public contract as defined in the relevant Directives (particularly Directive 2004/18/EC), irrespective of the legal classification of the contract under national law.

A contract can be covered by the definitions of public service contract or concession if:

a) the aim of the contract is to meet needs previously defined by the public authority within the framework of its competences

b) the nature of the service and the way in which it is to be provided are specified in detail by the public authority

c) the contract provides for remuneration of the service (payment of a price or granting of the right to operate the service in return for a fee payable by users)

d) the public authority takes the initiative of finding a provider to whom to entrust the service

e) the contract lays down penalties for failure to meet contractual obligations, in order to guarantee that the service entrusted to the third party is provided properly in such a way as to meet the public authority's requirements (penalties, compensation for damages, etc.)

The above criteria serve to establish whether the subject matter of the contract is indeed an obligation to provide a service in return for remuneration.

**5.3. Is it possible for the concessionaire of an SGEI to receive state aid in the form of public service compensation in order to cover the actual costs of the public service task it is entrusted with?**

Under Articles 106, 107 and 108 of the TFEU, it is up to the Member States to designate their SGEI services in accordance with the conditions laid down in the Decision. If a Member State decides that an entity is responsible for a service of general economic interest, the entity may receive public service compensation if the income from providing the SGEI does not cover the costs incurred. This compensation must not exceed the net costs actually incurred and a reasonable profit.

With regard to the rules on public contracts and concessions, the concept of service concession does not preclude granting state aid if the concessionaire continues to assume a significant part of the risk involved in operating the service. However, if the aid removes the risk involved in operating the service or renders it negligible, the contract in question might qualify as a public service contract. In this case, the detailed provisions of the Directive are applicable in principle.

However, with regard to the services indicated in Annex II B to the Directive, such as social services, only certain provisions of the Directive are applicable (see the answer to questions 4.2.1 and 4.2.3). The system applicable to social services of cross-border interest is therefore similar whether it is a service concession or a public service contract.

**5.4. Does the exception whereby the public procurement rules do not apply to in-house operations mean that the state aid rules do not apply either?**

If a situation is not covered by European public procurement law, this does not automatically mean that it is also excluded from the EU state aid rules.

For information on the EU state aid rules see the answer to question 3.1.19.

For information on the EU rules on public procurement see the answer to question 4.1.2.

**5.5. What are the objective criteria for determining that a certain level of compensation neutralises the operating risk?**

The concept of risk is an essential element of the concept of concession. According to the definitions of works concession and service concession in Article 1(3) and (4) of Directive 2004/18/EC, a concession is a contract with the same characteristics as a public contract, except for the fact that the consideration for the works/the provision of the services consists either solely in the right to exploit the work/service or in this right together with payment.

The concept of exploitation, implying the existence of a risk, is therefore essential in order to determine whether a service is a concession. Thus, in accordance with Court of Justice case law (in particular the judgments in Cases C-300/07 *Oymanns* and C-206/08 *Eurawasser*), a concession exists only if a significant part of the operating risk is transferred to the operator.

Verification of the existence of a significant risk can only be done on a case-by-case basis. The risks to be taken into account are those involved in providing the service or making available or using the work, particularly the risk associated with demand. In principle, the operator can be deemed to assume a significant part of the risks if there is any uncertainty as to the return on the investment.

The absence of significant risk, where the compensation is sufficient to neutralise or render negligible the operating risk, entails re-classifying the service concession contract as a service contract, with the resulting legal consequences (i.e. the contract can be annulled in the event of a breach of the public procurement rules).

## 6. GENERAL QUESTIONS RELATING TO THE APPLICATION TO SGEIs, AND SSGIs IN PARTICULAR, OF THE TREATY RULES ON THE INTERNAL MARKET (FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES)

The "Treaty rules on the internal market" here refer to the provisions of the Treaty on the Functioning of the European Union (TFEU) on the freedom of establishment (Article 49 of the Treaty) and the freedom to provide services (Article 56 of the Treaty). With regard to the rules on public procurement, see the part of the document dealing with public procurement (Chapter 4).

### 6.1. When do the Treaty rules on the internal market (Articles 49 and 56 TFEU) apply to SSGIs?

SSGIs are covered by the internal market rules in the TFEU (Articles 49 and 56) where they constitute an 'economic activity' within the meaning of the Court's case law on the interpretation of those articles. Certain SSGIs may also be covered by the Services Directive. However, 'non-economic' activities are not covered by any of these rules. For more information on the concept of 'non-economic' activity within the meaning of the Treaty rules on the internal market, see question 6.3.

The concept of 'economic activity' is a concept in EU law which has been progressively developed by the Court on the basis of Articles 49 and 56 of the TFEU. Since this concept defines the field of application of two of the fundamental freedoms guaranteed by the Treaty, it may not, as such, be interpreted restrictively[161]. For more information on the concept of 'economic activity' within the meaning of the Treaty rules on the internal market, see question 6.2.

### 6.2. When is an activity classified as 'economic' within the meaning of the Treaty rules on the internal market (Articles 49 and 56 TFEU) and of the Services Directive?

Generally speaking, only services constituting 'economic activities' are covered by the Treaty rules on the internal market (Articles 49 and 56 TFEU) and the Services Directive.

[161] Joined Cases 51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 52.

In accordance with the Treaty rules on the internal market, all services provided for remuneration must be classified as economic activities. According to Court of Justice case law, the service does not necessarily have to be paid for by those for whom it is performed[162], but there must be a consideration for the service in question.

The Court has also stated that the 'economic' nature of an activity does not depend on the legal status of the operator or of the organisation (which may be a public body or not-for-profit)[163], nor on the nature of the service (e.g. the fact that the service provided is a social security or health service does not in itself exclude it from application of the Treaty rules)[164]. The activities performed by members of a religious community or amateur sports association could thus be deemed to constitute an economic activity[165]. Furthermore, the 'economic' nature of an activity does not depend on how it is classified in national law. A service deemed in domestic law to be of the 'non-market sector' can be deemed to be an 'economic activity' under the Treaty rules referred to above. The fact that a service is provided in the general interest does not necessarily affect the economic nature of the activity.

In order to determine whether a given service constitutes an economic activity subject to the Treaty rules on the internal market and, where relevant, to the Services Directive, a case-by-case examination must be made of all the characteristics of the activity in question, particularly of the way the service is provided, organised and financed in the Member State concerned.

The Services Directive applies to all the services that are not explicitly excluded from its scope (certain social services are excluded: for more information on the application of the Services Directive to social services, see the answer to question 7.2.). Only activities of an economic nature as defined above are covered by the concept of 'service' as defined in the Directive.

For more information on the implications, for the social services concerned, of being qualified as an 'economic activity' within the meaning of the Treaty rules on the internal market, see also the answers to questions 6.5 and 6.6.

### 6.3. When is an activity qualified as 'non-economic' within the meaning of the Treaty rules on the internal market (Articles 49 and 56 TFEU) and of the Services Directive?

According to Court of Justice case law, activities that are performed without any consideration, by the State or on behalf of the State, as part of its duties in the social field, for example, do not constitute an economic activity under the Treaty rules on the internal market and the Services Directive[166].

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162 For example, the Court has considered that hospital services provided free of charge under the applicable health insurance scheme could constitute an economic activity within the meaning of the Treaty.

163 Case C-172/98 *Commission* v *Belgium*. In Case C-157/99 *Smits and Peerbooms* (paragraph 50), the Court threw out the argument that an additional condition for considering the provision of a service to constitute an economic activity within the meaning of Article 60 of the Treaty is that the service provider must seek to make a profit.

164 Judgment in *Smits and Peerbooms,* cited above.

165 Case C-196/87 *Steymann* and Joined Cases C-51/96 and C-191/97 *Deliège*.

166 Case C-109/92 *Wirth*.

**Examples**

- services provided by an organisation as part of an obligatory insurance scheme (e.g. the payment of compensation in the event of damage from natural risks)[167].

- courses provided under the national education system[168] or at an institute of higher education financed essentially out of state funds[169].

### 6.4. Are the social services not covered by the Services Directive nevertheless subject to the Treaty rules on the internal market?

The exclusion in Article 2(2)(j) of the Services Directive covers social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State itself (at national, regional or local level), by providers mandated by the State or by charities recognised as such by the State.

Services excluded from the scope of the Services Directive which constitute economic activities continue to be covered by the Treaty rules, in particular those on freedom of establishment and freedom to provide services (Articles 49 and 56 of the TFEU). National measures regulating the services excluded from the Services Directive are therefore still liable to be assessed for their compatibility with EU law by a national court or by the Court of Justice, in particular in the light of the above-mentioned Articles 49 and 56 TFEU. Measures aimed at regulating the social services sector may be justified on the grounds of social policy objectives provided these measures are proportionate to the objectives pursued. See also the answers to questions 6.5 and 6.6.

### 6.5. Can social policy objectives justify the application of measures aimed at regulating the social services sector?

According to the Court of Justice, Member States are free to set social policy objectives and, where appropriate, to define precisely the level of protection sought. However, the rules that they impose must satisfy the conditions laid down in the case law of the Court case law as regards their justification and proportionality. Restrictions on the freedoms of the internal market must be assessed by reference to

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167 In its judgment in Case C-355/00 *Freskot*, the Court considered that contributions paid to this body did not constitute economic consideration if, in particular, they were essentially imposed by the legislator and the level of the benefits provided by the insurer and the system for payment of these benefits were fixed by the legislator.

168 In its judgment in Case C-263/86 *Humbel*, the Court stresses that, in establishing and maintaining a national education system, the State is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The Court added that the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.

169 In the *Wirth* judgment referred to earlier, the Court in fact ruled that the considerations set forth in the aforementioned *Humbel* judgment applied equally to courses provided at an establishment of higher education which is financed essentially out of public funds.

the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure.

Case law has identified a number of 'overriding reasons of general interest' which constitute objectives allowing the Member States to justify restrictions on the freedoms of the internal market (e.g. objectives relating to social policy, protection of the recipients of the services, consumer protection, etc.). Generally speaking, current Court case law shows that social considerations may justify restrictions on the fundamental freedoms, for example in so far as it may be considered unacceptable to allow private profit to be drawn from the weakness of recipients of services[170]. Any measure must, however, be suitable for guaranteeing the achievement of one or more legitimate objectives invoked by that Member State and must not go beyond what is necessary to achieve those objectives.

Thus, for example, in accordance with the Treaty and (for the services included in it) the Services Directive, prior authorisation regimes for carrying out an activity can be maintained provided they are non-discriminatory, pursue an objective of general interest and are appropriate for achieving this objective and, lastly, provided the objective pursued cannot be achieved by other less restrictive measures. In the social sector, the Court has held that social policy objectives constitute 'overriding reasons of general interest' that may justify applying an authorisation regime or other measures aimed at regulating the markets provided that these systems or measures are proportionate to the objectives pursued.

### 6.6. Can Member States decide to restrict the provision of certain social services to non-profit-making service providers?

The Court of Justice has held that, according to the scale of values held by each of the Member States and having regard to the discretion available to them, a Member State may restrict the operation of certain activities by entrusting them to public or charitable bodies[171]. Any measure of this kind must, however, be suitable for guaranteeing the achievement of one or more legitimate objectives invoked by that Member State and must not go beyond what is necessary to achieve those objectives. National legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. In any event, such restrictions must be applied without discrimination.

## 7. QUESTIONS CONCERNING THE APPLICABILITY OF THE SERVICES DIRECTIVE TO SGEIS AND, IN PARTICULAR, TO SSGIS

### 7.1. Which services of general economic interest fall within the scope of the Services Directive?

Services of general economic interest (SGEIs) are covered by the Services Directive if they are not specifically excluded from its scope (as are, for instance, transport services, healthcare services, certain social services, electronic communications

170 See the judgment in Joined Cases C-447/08 and C-448/08 on gambling via the internet.

171 See judgment in Joined Cases C-447/08 and 448/08, paragraph 43, cited above. See also the previously cited Case C-70/95 *Sodemare SA* v *Regione Lombardia* [1997] ECR I-3395.

networks and services and audiovisual services). Social services have been partially excluded: they are covered by the Directive when they are provided by private operators not mandated by the State, but they are excluded when they are provided by the State, by providers mandated by the State or by charities recognised as such by the State.

For those SGEIs that have not been excluded from the scope of the Services Directive, the latter contains a whole series of "safeguards" aimed at allowing Member States to take full account of the special features of these sectors when implementing the Directive into national law. Member States will thus be able to maintain in force the national rules governing these sectors, for instance in order to guarantee high-quality services.

First, the provisions in the Directive on freedom of establishment allow Member States to take account of the special features of SGEIs. In particular, the review and assessment of certain requirements under national law, which Member States had to carry out in accordance with the Directive, "should not obstruct the performance of the particular task assigned to SGEIs" (Article 15(4)). Moreover, pursuant to Articles 9 to 13, Member States are entitled to maintain in force authorisation schemes governing the access to or the exercise of a service activity (including SGEIs) in all cases in which such authorisations are not discriminatory, are justified by an overriding reason relating to the public interest and are proportionate.

Second, the Directive provides that the freedom to provide services clause, set out in Article 16, does not apply to SGEIs (pursuant to an explicit derogation in Article 17).

Generally speaking, the implementation work carried out by the Member States shows that the Directive is beneficial for the modernisation of our economies and benefits both service providers and consumers. During the implementation phase, the Commission was not made aware of any particular problems arising from the application of the Directive to SGEIs.

Information on the laws adopted by the Member States to implement the Services Directive and links to the various legislative texts once available can be found at: http://ec.europa.eu/internal_market/services/services-dir/documents_en.htm

### 7.2. Which social services have been excluded from the Services Directive and when do the Directive's provisions apply to these social services?

Some social services have been excluded from the scope of the Services Directive. The exclusion set out in Article 2(2)(j) of the Services Directive does not cover all social services but only those relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State (at national, regional or local level), by providers mandated by the State or by charities recognised as such by the State. Since this provision derogates from a general rule, the exclusion must, according to the settled case law of the European Court of Justice, be strictly interpreted.

On the other hand, the social services not covered by Article 2(2)(j) of the Directive (for instance, childcare services which are not provided by the above-mentioned providers) are subject to the regulatory framework established by the Services Directive.

It is worth mentioning that there is a whole series of provisions in the Directive which recognise and take account of the special features of the social services that have not been excluded from the Directive's scope. For instance, the Directive does not question the possibility of Member States to regulate the access to and the exercise of these services in order to guarantee their quality. Under Articles 9 to 13 of the Directive, Member States may keep their authorisation schemes governing access to a service activity and the exercise thereof such an activity provided that such schemes are not discriminatory and are justified and proportionate. Social services which are covered by the Directive, and which are SGEIs, are excluded (under Article 17 of the Directive) from the freedom to provide services clause set out in Article 16 of the Directive. Lastly, the Directive does not deal with the funding of social services. It does not deal with aid granted by Member States, which comes under the rules of competition (see section on state aid). In particular, it does not concern requirements governing access to public funding or the quality standards which need to be observed for receiving public funding (see recitals 10, 17 and 28 of the Directive).

### 7.3. When implementing the Services Directive, can Member States keep authorisation schemes for social services?

Article 9 of the Services Directive imposes on Member States the obligation to review their legislation in order to identify authorisation schemes governing access to and the exercise of a service activity. Where a law requires a decision by a competent authority before a service provider can have access to or exercise an activity falling within the scope of the Directive, this is in effect an authorisation scheme that should be assessed in the light of the Directive. For each scheme (and its procedures) identified, the Member State had to carry out an evaluation during the implementation period based on the rules laid down in Articles 9 to 13 of the Directive. Thus all authorisation schemes relating to access to or the exercise of a service activity falling within the scope of the Services Directive had to be evaluated, as part of the implementation of the Directive, in the light of the principle of non-discrimination, the existence or not of overriding reasons of general interest and, where appropriate, the proportionality of the measures concerned.

Depending on the outcome of the evaluation, Member States were required to abolish the authorisation schemes that were incompatible with Article 9 or replace them with less restrictive measures that were compatible with the Directive.

Moreover, it should be noted that the authorisation schemes excluded from the Services Directive still come under the Treaty rules, in particular those concerning freedom of establishment and freedom to provide services (Articles 49 and 56 of the TFEU). They are thus still liable to be assessed for compatibility with EU law by a national court or by the Court of Justice, in particular in the light of the above-mentioned Articles 49 and 56 TFEU. See also the answers to questions 6.5 and 7.4.

**7.4. Where the same authorisation scheme applies to services both excluded from and included in the scope of the Directive, does this scheme come under the provisions of the Directive? If so, must the Member State set up separate authorisation schemes for the excluded and included services?**

Where the same authorisation scheme applies to services both excluded from and included in the scope of the Directive, this scheme does indeed come under the provisions of the Directive.

However, the Directive does not require the Member State to set up separate authorisation schemes depending on whether or not a service comes within the scope of the Directive, nor does it prohibit a Member State from establishing separate schemes. The main thing, from the point of view of the Directive, is that the Member State must ensure that the authorisation schemes relating to services within the scope of the Directive are brought into line with the Directive (for further details, see the answer to question 7.3).

**7.5. Does Article 2(2)(j) of the Services Directive apply to social services relating to nurseries and day care centres for children furnished by providers mandated by the State or the local authorities or by any other body mandated for this purpose?**

Social services relating to nurseries and day care centres are covered by the exclusion in Article 2(2)(j) of the Services Directive if they are provided by the State itself (at national, regional or local level), by providers mandated by the State or by charities recognised as such by the State.

Social services relating to nurseries and day care centres provided by providers not mandated by the State are not excluded from the scope of the Directive. See also the answer to question 7.2.

**7.6. Article 2(2)(j) of the Services Directive states that the social services must be provided by the 'State' or by 'providers mandated by the State'. What does the concept of 'State' cover in this context?**

First, it must be pointed out that the purpose of this Article is to define the scope of the exclusion from the Directive of certain social services. Since this provision derogates from a general rule, the exclusion must, according to the settled case law of the European Court of Justice, be strictly interpreted.

Pursuant to Article 2(2)(j) some social services (both those provided by the 'State' and those provided by 'providers mandated by the State') have been excluded from the scope of the Directive. In accordance with recital 27 of the Directive, the concept of State within the meaning of Article 2(2)(j) covers not only the central state administration but also all regional and local authorities. A provider mandated by the State within the meaning of the Directive is a natural or legal person, in the public or private sector, to whom the State, as defined above, has entrusted the obligation to provide a certain service instead of providing it directly itself. Thus to benefit from the exception laid down in the Directive, the question whether it is a social service provided by the State or by a public body entrusted with the obligation, explicitly by and on behalf of the State, to provide this service, for instance by means of a law, is not decisive.

**7.7. What does the concept of 'providers mandated by the State' (Article 2(2)(j)) cover?**

The Commission takes the view that, for a provider to be regarded as 'mandated by the State' within the meaning of Article 2(2)(j), it must be under an obligation to provide the service entrusted to it by the State. A provider under an obligation to provide a service, for instance as a result of a tendering procedure or service concession, can be regarded as a provider 'mandated by the State' within the meaning of the Services Directive. This also applies to any other type of measure taken by the State provided that it involves an obligation for the provider in question to provide the service. See also the answer to question 3.4.4.

**7.8. Is the concept of 'mandated provider' set out in the Services Directive (Article 2(2)(j)) the same as the concept of 'act of entrustment' within the meaning of Article 106(2) TFEU and of the SGEI package?**

See the answer to question 3.4.4.

**7.9. Does the following constitute an act of entrustment within the meaning of the Services Directive: an official decision by a regional public authority defining a vocational training social service of general interest and entrusting management of this to one or more training undertakings by means of a service concession, with the granting of public service compensation?**

Where an official decision by a regional public authority entrusts to a training undertaking a service concession involving the management of a vocational training social service of general interest, the undertaking cannot be regarded as a 'mandated provider' within the meaning of Article 2(2)(j) unless it is under an obligation to provide the service. Each individual case must be examined in the light of the specific circumstances.

In addition, under Article 2(2)(j) of the Directive, read in conjunction with recital 27 of the Directive, the vocational training service provided by a provider mandated by the State cannot be regarded as excluded from the scope of the Directive unless it fulfils the conditions of recital 27, being aimed at people 'who are permanently or temporarily in a particular state of need because of their insufficient family income or total or partial lack of independence' and for those 'who risk being marginalised', for instance the unemployed.

Lastly, it must be pointed out that the services excluded from the scope of the Services Directive still come under the TFEU rules, in particular those on freedom of establishment and freedom to provide services (Articles 49 and 56 TFEU). See also the answer to question 6.4. As regards the application of the rules on state aid to this type of measure, see the answer to question 3.4.5.

**7.10. What does the concept of 'charities recognised as such by the State' (Article 2(2)(j)) cover?**

The concept is specific to the Services Directive, hence its interpretation does not depend directly on concepts existing in the national laws of Member States or in other EU instruments. It is intended only to identify certain operators whose services can be excluded from the scope of the Directive by virtue of Article 2(2)(j), namely

social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by charities recognised as such by the State.

Thus in accordance with the Services Directive, the concept of 'charities recognised as such by the State' means not only that the providers of the services in question must be non-profit-making but also that they must perform activities of a charitable nature (specifically recognised as such by the authorities) for third parties (in other words, not their members) in need. It follows from this *inter alia* that mere recognition as a non-profit-making organisation (for instance for tax purposes) or the general interest nature of the activities performed are not enough in themselves for an organisation to be regarded as coming under the heading of "charities recognised as such by the State". Nor can mere approval by the State be regarded as a sufficient criterion in itself for an organisation to be regarded as coming under this heading (and thus for its activities to be excluded from the scope of the Services Directive).

Referring to this concept in its implementation handbook[172], the Commission quoted the following as examples of charities within the meaning of the Directive: "churches and church organisations which serve charitable and benevolent purposes". Whether or not such an organisation is religious or lay is not decisive, however, for the purposes of defining the scope of the exclusion of social services from the Services Directive. It follows that the services provided by an organisation whose charitable nature has been recognised by the State are excluded from the Services Directive pursuant to Article 2(2)(j) irrespective of whether the organisation concerned is lay or religious.

[172] Handbook on implementation of the Services Directive, available at the following website: http://ec.europa.eu/internal_market/services/services-dir/documents_en.htm