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3rd Biennal Report on Social Services of General Interest

Accompanying the document

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1. INTRODUCTION

Investing in high-quality, affordable and efficient social services is needed today more than ever. This report, which is part of the Social investment Package, will help public authorities and stakeholders to understand and implement the revised EU rules on social services and thus to invest in the sector in a safer way, in compliance with the EU legal framework.

At the same time, by applying EU rules on State aid and public procurement in a correct way, as shown in the report, public authorities will be able to reap the benefits in terms of transparency, efficiency and responsiveness to social purposes that these rules offer: they will thus maximise the return of the resources that they are investing in social services.

Social services of general interest at the heart of the EU policies

In 2006, for the first time, the European Commission described in a Communication¹ what constitute Social Services of General Interest (SSGI). It identified two broad types of services, namely:

- statutory and complementary social security schemes covering the main risks of life; and
- services provided directly to the person, such as social assistance services, employment and training services, childcare, social housing or long-term care for the elderly and for people with disabilities.

In 2007,² the Commission refined its analysis of SSGI and highlighted a certain number of objectives that social services pursue — such as responding to vital human needs, contributing to non-discrimination and creating equal opportunities. The Commission also highlighted the principles of organisation which are common to these services — such as solidarity, proximity, comprehensiveness, personalisation and an asymmetric relationship between user and provider.

Both documents show that social services play a prevention and social cohesion role in European societies. They not only help people to live in dignity and enjoy their fundamental rights, but also to fulfil their potential and to take part in society.

In recent years, moreover, the social services sector has shown its potential for creating jobs. The Commission highlighted this in its first and second *Biennial Reports on social services of general interest* published in July 2008³ and October 2010⁴ and in the Employment Package adopted in April 2012.⁵ More recently, the EU Employment and Social Situation Quarterly

¹ *Implementing the Community Lisbon programme: Social services of general interest in the European Union*, COM(2006) 177 of 26 April 2006.

² See the Commission Communication *Services of general interest, including social services of general interest: a new European commitment*, COM(2007) 725 final of 20 November 2007.

³ SEC(2008) 2179 of 2 July 2008.

⁴ SEC(2010) 1284 of 22 October 2010.

⁵ See in particular the Communication *Towards a job-rich recovery*, COM(2012) 173 final of 18 April 2012, p.6.

Review of December 2012⁶ has indicated that the share of employment in the ‘white jobs’ sector⁷ grew from 8.4% to 10.1% between 1995 and 2011 and that this was among the very few sectors recording a net job creation between 2008 and 2011, when employment dramatically declined in the EU.⁸

Social services are therefore essential for fostering inclusive growth: economically, expenditure on these services enhances human capital and thus is a form of investment, a **social investment** with mid- to long-term return to individuals, society and the economy as a whole.

This is why the Annual Growth Survey 2013,⁹ when calling for additional efforts to promote social inclusion and to tackle poverty, asks the Member States to ensure ‘*broad access to affordable and high-quality services such as social and health services, childcare, housing and energy supply*’.

The contribution social services can make to the Europe 2020 Strategy¹⁰ has also been expressed in Country Specific Recommendations adopted as part of the 2011 and 2012 ‘European Semesters’. These recommendations were addressed to 18 Member States and covered a variety of social services (childcare, long-term care, family support services, public employment services, training and life-long learning). They encouraged the Member States to increase the provision of these services, to make them more effective and more efficient, to improve their quality and to ensure they are widely available and affordable.

Moreover, ‘*enhancing access to affordable, sustainable and high-quality services, including healthcare and social services of general interest*’ is one of the ‘key actions’ for the European Social Fund (ESF) — according to the *Common Strategic Framework* drawn up by the Commission¹¹ to help Member States plan for the next structural fund programming period.

In recent years the Commission has also been working to improve the quality of social services — for example by financing local authorities’ and stakeholders’ initiatives¹² and by playing an active part in the work of the Social Protection Committee (SPC), which led to the adoption in October 2010 of the *voluntary European Quality Framework for Social Services*.¹³

⁶ See: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1776&furtherNews=yes>

⁷ The ‘white jobs’ sector combines health and social services.

⁸ According to the EU Employment and Social Situation Quarterly Review of December 2012, while 4.4 million jobs were lost in the age group 15-64 between 2008 and 2011, more than 1.4 million jobs were created in the health and social service sector. The growth was continuous from 2008 to 2011.

⁹ COM(2012) 750 final of 28 November 2011.

¹⁰ See the Commission Communication *Europe 2020 — A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 of 3 March 2010.

¹¹ SWD(2012) final of 14 March 2012.

¹² These initiatives are set out in Chapter 2, section 2.4, of the *Second Biennial Report*, quoted in footnote 4 above.

¹³ SPC/2010/10/8 final, 6.10.2010. The *voluntary European Quality Framework for Social Services* was set out in the *Second Biennial Report* quoted in footnote 4 above.

The on-going debate on the application of EU rules to SSGI

The political recognition of the social services' role in the European social model, the encouragement for Member States to deliver high-quality, affordable and effective social services and, more specifically, the promotion of social services' quality do not exhaust the debate about social services at EU level. Another issue has dominated the scene for at least the last decade: the **application of EU rules on State aid, internal market and public procurement to social services**.

This issue has been so controversial as to be considered a '*persistent irritant in the European public debate*', as Mario Monti put it in his report on the Single Market in May 2010.¹⁴ Indeed, in recent years, several public authorities and civil society organisations representing service users and providers have claimed that the EU rules create unnecessary difficulties. They claim these rules make it harder to organise and finance the services; that they lead to the liberalisation, privatisation and deregulation of the sector, and to the provision of poor-quality services.

For instance, in 2010, the Informal Network of Social Service Providers (INSSP) published a report of a seminar about the impact of EU legislation on social services which states that the EU rules '*in many cases impact in a negative manner on the sector of social NGOs, part of the social economy, and specifically on the quality of social services*'. INSSP admits however that the negative effects '*are not only due to the EU rules but also linked to the way national and local authorities implement these rules. Some authorities misunderstand the rules or implement them in a way that is more restrictive than necessary ...*'.¹⁵

The Commission has argued against these views, explaining that EU rules already take into account the specific characteristics of social services and that, if the public authorities apply them correctly, these rules can help them organise and finance high-quality cost-effective social services in a transparent manner. Member States have an ample choice of modes of organisations of the services in line with their traditions and cultural backgrounds.¹⁶

The Commission has also published two sets of 'frequently-asked questions' (FAQs) offering guidance on State aid and public procurement.¹⁷ It has set up an interactive information service (IIS),¹⁸ answering questions from citizens, public authorities, service users, service providers and other stakeholders. In December 2010, the FAQ documents were updated and put together as a *Guide to the application of the European Union rules on state aid, public*

¹⁴ *A new strategy for the single market at the service of Europe's economy and society - report to the President of the European Commission José Manuel Barroso*, by Mario Monti, 9 May 2010.

¹⁵ For an overview of the doubts and misunderstandings about the application of EU rules to SSGI, see section 4.3 of the first *Biennial Report*, quoted in footnote 3 above.

¹⁶ For an overview of the Commission's policy approach to this issue see Chapter 3, section 3.1, of the *Second Biennial Report*, quoted in footnote 4 above.

¹⁷ SEC(2007) 1514 and SEC(2007) 1516 of 20 November 2007. The FAQs were presented in section 4.4 of the first *Biennial Report* quoted in footnote 3 above

¹⁸ This service is accessible on the following webpage:
http://ec.europa.eu/services_general_interest/registration/form_en.htm

*procurement and the internal market to services of general economic interest, and in particular to social services of general interest.*¹⁹

To promote dialogue with all the stakeholders and to help them understand the EU rules, the Commission (together with the rotating Presidencies of the Council) organised three SSGI Forums. These were held in Lisbon in September 2007, in Paris in October 2008 and in Brussels in October 2010. The Commission has also regularly discussed this issue with the Member States, in particular within the SPC.²⁰

In the same logic, in 2006,²¹ the Commission undertook to establish ‘*a monitoring and dialogue procedure in the form of biennial reports*’ in order to ‘*improve the reciprocal knowledge of operators and the European Commission of questions concerning the application of Community rules to the development of social services and to deepen the exchange of information between the operators and the European institutions*’

The contents of the third Biennial Report

This third *Biennial Report* gives an account of the two most significant developments of the last two years at EU level affecting SSGI. First, on 20 December 2011 the Commission published a comprehensive package which includes new State aid rules applying to services of general economic interest (SGEI — see Chapter 2 of this report) and proposals for new Directives on public procurement and concessions (see Chapter 3). The package was introduced by the Commission Communication ‘*A Quality Framework for Services of General Interest in Europe*’,²² which sets out in a comprehensive manner the Commission’s approach to services of general interest (SGI).

The new set of rules both on State aid and public procurement²³ represents real progress, as it brings the clarification and simplification that Member States and civil society organisations have been wishing for. Moreover, these new rules are more flexible, predictable and proportionate. Being simpler to comply with, the new rules will make life much easier for public authorities in the Member States and, at the same time, benefit citizens by making the organisation and financing of social services more efficient and effective.

Second, following the adoption of the new State aid rules, the Commission updated in February 2013 the 2010 Guide on EU rules applying to SGEI and in particular to SSGI.²⁴

¹⁹ SEC(2010) 1545 final of 7 December 2010. The 2010 Guide was presented in section 3.6 of the *Second Biennial Report*, quoted in footnote 4 above. See also the Commission press release on the 2010 Guide (IP/11/106 issued on 28 January 2011).

²⁰ See section 3.4 of the *Second Biennial Report* quoted in footnote 4 above.

²¹ See the Commission Communication *Implementing the Community Lisbon programme: Social services of general interest in the European Union* quoted in footnote 1 above.

²² COM(2011) 900 of 20 December 2011.

²³ The proposals of the Commission for a directive on public procurement (COM(2011) 896 final of 20.12.20011) and on concessions (COM(2011) 897 final of 20.12.20011) are still under negotiation. See: http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm.

²⁴ Quoted in footnote 19 above.

The 2013 Guide,²⁵ like its predecessor and the FAQs²⁶, is a Staff Working Document prepared by the Commission's services to help public authorities better understand and apply EU rules. Like the 2010 Guide, it covers the three main sets of EU rules applying to SGEI: State aid, public procurement and internal market rules. It takes the form of very concrete questions, inspired by the questions that the Commission officials receive through the Interactive Information Service²⁷ and through their regular contacts with public authorities, service users and providers and other civil society representatives and stakeholders, and simple, yet comprehensive, answers. These answers, while they do not bind the European Commission as an institution, express the position of the services responsible for monitoring the application of EU rules and having a thorough knowledge of such rules.

The 2013 update does not only reflect the changes on State aid rules but also takes into consideration the work done by the SPC informal working group on the application of EU rules to SSGI,²⁸ which was mandated by the Council to conduct an *analysis of the new guide prepared by the Commission services on State aid, internal market and public procurement rules.*²⁹

This updated guide (see Chapter 4) is a further step in providing clarity and guidance to public authorities and service providers, helping them implement the new rules in a correct way and thus making it easier, more cost-effective and safer to **invest in social services**.

The first two *Biennial Reports*³⁰ had a section presenting data on employment trends in the sector and on social services expenditure. These data are now presented in the EU Employment and Social Situation Quarterly Review of December 2012.³¹

²⁵ SWD(2013) 53.

²⁶ Quoted in footnote 17 above.

²⁷ See footnote 18 above.

²⁸ The analysis of the SPC informal working group was carried out through a questionnaire circulated in 2012 to the Member States *via* the SPC. The result of the analysis will be published in the report of the informal working group to the SPC, due in September 2013.

²⁹ See Council Conclusions *Social Services of General interest: at the heart of the European Social Model*, 8 December 2010, 17566/10 SOC 828.

³⁰ Quoted on footnotes 3 and 4 above.

³¹ See footnote 6 above.

2. THE NEW STATE AID PACKAGE FOR SERVICES OF GENERAL ECONOMIC INTEREST³²

As stated by Commission Vice-President Joaquim Almunia, on the day of its adoption, the SGEI package ‘provides Member States with a simpler, clearer and more flexible framework for supporting the delivery of high-quality public services to citizens which have become even more necessary in these crisis times’.

Often known as the ‘Almunia package’, it consists of four instruments. They apply whenever public authorities in the Member States (be they national, regional or local authorities) finance SGEI. They therefore apply to social services of an economic nature.

The contents of the Almunia package

- the Communication³³ clarifies the basic concepts of State aid which are relevant for SGEI;
- the revised Decision³⁴ defines the conditions under which financing for a SGEI (the ‘public service compensation’) is compatible with the internal market and does not need to be notified to the Commission;
- the revised Framework³⁵ sets out the rules the Commission will use when assessing SGEI compensation that is not exempted from notification by the Decision. All such compensation has to be notified to the Commission that will then decide on its compatibility with the internal market;
- the SGEI *de minimis* Regulation³⁶ provides that SGEI compensation which amounts to less than €500 000 per undertaking³⁷ over three fiscal years does not fall under State aid scrutiny.

³² On the new package see: Nicola Pesaresi, Adinda Sinnaeve, Valérie Guigue-Koeppen, Joachim Wiemann, Madalina Radulescu, *The New State Aid Rules for Services of General Economic Interest*, and, by the same authors, *The New State Aid Rules for Services of General Economic Interest (SGEI): the Commission Decision and Framework of 20 December 2011* and *The SGEI Communication*, published in Competition Policy Newsletter 2012/1 (http://ec.europa.eu/competition/publications/cpn/cpn_2012_1_en.html).

These articles have been a source of inspiration for the redaction of this chapter of the 3rd Biennial Report.

³³ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.01.2012, p. 4.

³⁴ Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

³⁵ European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.01.2012, p. 15.

³⁶ Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

³⁷ ‘**Undertaking**’ refers to the economic unit. Therefore different legal entities forming part of a group would constitute one undertaking.

The Almunia package is the updated version of a package adopted by the Commission in 2005 in the aftermath of the Altmark judgment.

The Altmark judgment

In the Altmark judgment³⁸ the Court of Justice held that the public service compensation granted by public authorities to the providers of services of general interest does not constitute State aid if four cumulative criteria are met:

- first, the service provider 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 service provider 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 service provider, if well run and adequately equipped, would have incurred.

In other words, the Court ruled that financing an SGEI is not State aid if it is meant to fund a well-identified task (the first criterion), if the financing conditions have been defined in a clear and transparent way, ensuring that it does not exceed the costs of the SGEI (the second and third criteria), and if the service is provided in a cost-efficient manner (the fourth criterion).

If these four criteria are not met, the financing of a social service of economic nature (*e.g.* a grant given by a local authority to an NGO providing long-term care to the elderly) constitutes State aid. Such State aid could be illegal and the NGO that received the grant would have to repay it to the public authority.

Following the Altmark judgment, the Commission, aware that in many instances the financing of SGEI in the Member States might not have met the four Altmark criteria and might thus constitute State aid, decided to provide legal certainty and to clarify the conditions under which State aid for the provision of SGEI would be compatible with the internal market. It therefore published **in 2005 a first package, known as the ‘Monti-Kroes’ or ‘Altmark’ package**, consisting of a Decision³⁹ and a Framework.⁴⁰

³⁸ Case C-280/00 Altmark [2003] ECR I-7747.

³⁹ 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.

⁴⁰ Community Framework for State aid in the form of public service compensation, OJ C 397, 29.11.2005.

The experience gained with the application of the 2005 package led to its revision in 2011, following a wide-ranging consultation of stakeholders.⁴¹

The four instruments of the new package are explained in greater detail below. They are **particularly relevant for social services as these services are highly dependent on public financing**.⁴² Social service providers regularly receive grants and other forms of financing that might not fulfil the four Altmark criteria and could thus constitute potentially illegal State aid.

Complying with the State aid package is therefore a must to ensure the legality of such public financing and thus secure the investment needed for social services.

2.1. The Communication: clarifying the basic concepts to make it easier to apply State aid rules

The Communication is a novel feature of the 2011 package as for the first time a document in the package clarifies the basic concepts, a need expressed on various occasions by the public authorities in the Member States and by the service providers.

On the basis of the rulings of the Court and of the Commission's decision practice, the Communication explains some general concepts, such as 'undertaking' and 'economic activity', 'State resources' and 'effect on trade' relevant for the application of State Aid rules.

The Communication underlines that, just because a service is financed in a particular way, or the service provider is a non-profit organisation, this does not mean that the financing of the service by a public authority falls outside State aid control: **State aid rules apply to the financing of social services of an economic nature even if the body providing the service has a non-profit status.**

When clarifying the **distinction between economic and non-economic activities**, the Commission presents an overview of Court rulings on social security schemes. It refers to the criteria used by the Court to determine whether a social security scheme is solidarity-based and therefore does not involve an economic activity and does not fall within the scope of State aid rules. The Court considers, for example, whether membership of the scheme is compulsory or voluntary, whether it has a social purpose, whether the benefits depend on the contributions made or are proportionate to the earnings of the person insured, and whether there is State supervision of the scheme.

The Commission also provides **guidance on meeting the four Altmark criteria** —which, if complied with, means that the financing of a social service does not count as State aid.

In relation to the first Altmark criterion (the **existence of a service of general economic interest**), the Communication explains that:

- SGEI are services with special characteristics that distinguish them from other economic activities;

⁴¹ On the review process that led to the adoption of the SGEI package currently in force, see: http://ec.europa.eu/competition/state_aid/legislation/sgei_archive_en.html.

⁴² On the weight of public expenditure in financing social services see section 2.2.1 of the first *Biennial Report* quoted in footnote 3.

- Member States have a wide margin of discretion in defining an SGEI and the Commission only checks for manifest error;
- a public service obligation cannot be imposed for an activity which already is or can be satisfactorily provided by the market ‘under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State’;
- a SGEI must be addressed to citizens or be in the interest of society as a whole.

The third element of clarification in the above list is very useful for social services. Take, for instance, services that are provided satisfactorily under normal market conditions to address a demand from the general public. Normally, there would be no room for a public service obligation. However, if the same type of service is provided for vulnerable or disadvantaged people, the public authorities may have specific requirements regarding its price, quality, continuity and accessibility that differ from the conditions under which the service is provided by the market. Such requirements would, in particular, aim at making sure the service responds to the needs of the vulnerable or disadvantaged people and that they can afford it. **Therefore, as the requirements of the public authority are not met by the market, the public authority may consider the provision of the service to these people as being of ‘general interest’.**⁴³

A typical case

Home cleaning services are normally provided by the market to the general public. At the same time, they can be part of the delivery of social policies, such as long-term care programmes, aiming to ensure that the elderly or people with disabilities continue living within their communities and not in institutions. In these circumstances, home cleaning services for the elderly or for people with disabilities could acquire a ‘general interest’ character that they do not have when they are provided to the rest of the population. A public authority could therefore define such home cleaning services as SGEI and could organise and finance their provision so as to ensure that these users have access to these services (for example, by providing them free of charge or at a price lower than the market price).

The Communication provides guidance on ‘the’ essential tool for the definition of a SGEI — the **act of entrustment** that defines the obligations of the service provider. It reminds the reader that this act may take a variety of forms, depending on the legislation in force in the Member State concerned, and that it must include a certain number of elements (clear identification of the obligations of the service provider; parameters for calculating, controlling and reviewing the compensation; arrangements for recovering any overcompensation).

The Communication also provides clarification on the **compensation parameters**, which have to be established in advance in an objective and transparent manner. No specific formula is required, but it must be clear from the outset how the compensation will be calculated.

In order to avoid **overcompensation**, the amount of the public service compensation must be limited to what is necessary to cover the costs incurred in discharging the public service obligation, taking into account receipts and a reasonable profit. The reasonable profit should be taken to mean the rate of return on capital required by a typical company considering whether or not to provide the service, taking into account the risk level.

⁴³ It is worth recalling that not all SSGI are addressed to vulnerable or disadvantaged people.

The Communication also deals with the **interplay between State aid and public procurement rules** when it comes to meeting the fourth Altmark criterion. This section offers guidance on the degree to which the use of the different public procurement procedures and the different award criteria foreseen in the Public Procurement Directives can ensure that the service is provided ‘at the least cost to the community’ and therefore satisfy the first leg of the fourth Altmark criterion.

The guidance can be summarised as follows:

- the **open procedure** is sufficient to ensure compliance with the first leg of the fourth Altmark criterion;
- the **restricted procedure** is in principle sufficient to do so;
- the **negotiated procedure with prior publication** and the competitive dialogue are sufficient only in rather exceptional cases;
- the **negotiated procedure without publication** is not sufficient.

As regards **award criteria**, the ‘**lowest price**’ criterion is generally sufficient. The criterion of the ‘**most economically advantageous tender**’ (**MEAT** - which can include criteria relating to the quality of the service as well as environmental and social criteria) is sufficient provided that the award criteria are closely related to the subject-matter of the service provided.

A typical case

A local authority which uses an open call for tender to select a provider of training services for the long-term unemployed can safely presume that the compensation it gives to this provider complies with the 4th Altmark criterion.

The Communication also provides guidance for situations where the provider is not selected through a public procurement procedure and therefore a comparison with a typical well-run provider is necessary to ensure the cost-effectiveness check that the fourth Altmark criterion requires.

2.2. The Decision: aid for social services does not need to be notified

The Decision sets out the conditions under which public service compensation (i.e. the financing of a service of general interest by a public authority) that constitutes State aid is compatible with the internal market and does not need to be notified to the Commission.

This is the component of the 2011 package which brings the most significant simplification for the providers of social services. Under the 2005 Decision, the only services exempted from prior notification regardless of the level of financing were social housing and hospitals.⁴⁴ The 2011 Decision in Article 2(1)(c) extends the scope of this exemption to all **services ‘meeting social needs as regards health and long term care, childcare, access to and**

⁴⁴ For all other services, including social services other than social housing, the 2005 Decision set a public service compensation threshold of €30 million per year. This threshold was complemented by a threshold of € 100 million for the service provider’s average annual turnover before tax. Public financing which exceeded €30 million per year, or which was granted to a provider having a turnover higher than €100 million, had to be notified to the Commission. Such a large amount was considered likely to affect trade and competition to such an extent that a specific analysis by the Commission services was deemed to be necessary.

reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups.⁴⁵

For the remaining SGEI, the notification threshold of the Decision has been lowered from €30 million to €15 million of annual compensation per SGEI and the threshold for the turnover of the service provider has been eliminated.

This alleviates the administrative burden for the public authorities in the Member States: when they finance social services, they no longer have to go through the process of notifying the financing measures to the Commission. This is also good news for the social service providers as they too are spared the burden of following the notification process.

The exemption of notification for SSGI reflects the diversified and proportionate approach followed by the Commission in its reform of State aid rules:⁴⁶ the degree of the Commission's State aid scrutiny depends on the nature and scope of the service provided. In other words, the Commission recognises that the risks for competition are much greater for large-scale activities with a clear EU-wide dimension than for social services often organised at local level.

To achieve as much legal certainty as possible for public authorities and service providers, the exemption applies to an exhaustive list of social services. However, this list (see above) is very broad and explicitly covers the most important areas of social services such as health and long term care, childcare, services for the access to and reintegration into the labour market and social housing. Moreover, the terms '*care and social inclusion of vulnerable groups*' have a very broad meaning and allow the Member States the necessary flexibility to include different types of services intended for the social groups who most need them, in accordance with the variety of needs and preferences of users that may result from different geographical, social or cultural situations among the Member States.⁴⁷

⁴⁵ The 3rd SSGI Forum had recommended enlarging the number of SSGI benefiting from the exemption of notification (See *Summary Report of the 3rd Forum on Social services of General Interest (SSGI)*, coordinated by Manuel Paolillo and Stéphane Rodrigues, p. 191).

⁴⁶ See the Commission Communication *Reform of the EU State aid rules on Services of General Economic Interest*, COM(2011) 146 final of 23 March 2011.

⁴⁷ See Protocol No 26 to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

The term ‘*care and social inclusion of vulnerable groups*’ could encompass, for example:⁴⁸

- social integration services for people with disabilities;
- shelters and other services for the homeless;
- centres assisting women or children who are victims of violence;
- services to support over-indebted persons;
- social assistance to migrants;
- parenting support services for disadvantaged families;
- social services for the LGBT⁴⁹ community.

While the public authorities do not have to notify their financing of social services, they must nevertheless establish a clear and precise act of entrustment and ensure that the service provider does not receive any overcompensation. Indeed, the 2011 Decision confirms the **two main conditions for compatibility** set out in the 2005 Decision: **entrustment** and **absence of overcompensation**, verified by regular checks.

The **duration of the entrustment period** (the period during which the service is entrusted to a given provider by a decision of the public authority) has been limited to a **maximum of 10 years**, unless the provision of the service of general interest requires significant investment which needs to be amortised over a longer period. This may be the case for instance in the social housing sector.⁵⁰ This condition, which was not laid down in the 2005 Decision, is justified because the extent to which a particular compensation measure affects trade depends not only on the sector concerned and the average amount of compensation per year but also on the overall duration of the entrustment.

For instance, a fifteen-year entrustment with an annual public service compensation of €1 million is likely to affect competition and trade more than several consecutive shorter entrustments with the same annual compensation amount. This is because short consecutive entrustments give the public authority repeated opportunities to switch provider, in a context of competing service offerings.

The 2011 Decision introduces another novelty in relation to the act of entrustment: it must contain a **reference to the Decision** itself. This has been added to enhance transparency and compliance with the rules.

As in the 2005 Decision, the amount of **compensation** must not exceed the net costs, including a reasonable profit. Above this limit, the provider receives an ‘overcompensation’ which cannot be justified by the need to provide the SGEI.

⁴⁸ Insofar as these can be considered as economic activities.

⁴⁹ Lesbian, Gay, Bisexual, Transgender.

⁵⁰ See recital 12 of the Decision.

The Decision proposes **two methodologies to calculate the net cost**: (i) as the difference between the costs incurred in providing the SGEI⁵¹ and the revenue earned from it (i.e. the **methodology based on cost allocation**), or (ii) as the difference between the net cost for the providers of operating with the public service obligation and the net cost or profit of the same provider operating without the public service obligation (i.e. the **net avoided cost methodology**).

To calculate the **reasonable profit**, the Decision refers to the rate of return on capital that would be required by a provider considering whether or not to provide the service, taking into account the degree of risk. The Decision then provides a safe harbour: profit below the swap rate plus a liquidity premium of 100 basis points is considered to be reasonable in any event. Moreover, to discourage the use of *ex post* full compensation schemes, the 2011 Decision lays down that this safe harbour becomes a profit cap if the provision of the SGEI is not connected with a substantial commercial or contractual risk, in particular when the net cost incurred in providing the SGEI is essentially compensated *ex post* in full.

The change of indicator for the reasonable profit compared to the 2005 Decision reflects the shift from an accounting approach to an economic approach. It also matches the way public authorities go about deciding what budget to allocate to an SGEI. However, where it is not feasible to use the rate of return on capital, other profit indicators are allowed.

Finally, for **controlling the overcompensation**, the Decision takes a multi-annual rather than an annual approach, with checks carried out every three years. This had been a recommendation of the 3rd SSGI Forum.⁵²

A typical case

A public authority wishes to pay an NGO €45 million per year for a period of seven years to provide services for the homeless. Under the Decision, it can safely do so if it imposes on the NGO a clear legal obligation to provide specific services for the homeless. The document stating this obligation does not need to be called ‘act of entrustment’ but it has to include a reference to the Decision and has to clearly state the tasks the NGO has to perform, the parameters used to calculate the amount of compensation involved, the systems that will be put in place afterwards to control the compensation and ensure that there is no overcompensation and the arrangements set out to recover any overcompensation that might occur. Assuming the NGO has no revenue for providing the service, which is totally free for the beneficiaries, the amount of compensation can be calculated quite simply as the sum of the costs that the NGO will incur in providing the services requested by the regional authority.

A notification to the Commission is not needed insofar as this financing is in line with the 2011 Decision. Before the 2011 Decision, the Member State would have had to notify this financing to the Commission, as it exceeds the €30 million threshold laid down in the 2005 Decision.

⁵¹ If a service provider is providing not only an SGEI but also a purely commercial service, the costs incurred include an appropriate contribution to the costs common to the provision of both services.

⁵² See *Summary Report of the 3rd Forum on Social services of General Interest (SSGI)*, quoted in footnote 45 above, p. 192.

2.3. The Framework – when aid has to be notified

The Framework sets out the rules that the Commission will follow to assess aid to SGEI that is not exempted from notification by the Decision and that therefore the Commission has to analyse to decide on its compatibility with the internal market.

The compatibility conditions set by the Framework are more stringent than those laid down in the Decision as the Framework covers aid which *a priori* has a bigger impact on competition and trade. This is because the amount of aid is higher than €15 million and it does not concern hospitals or social services. This again illustrates the diversified and proportionate approach the Commission adopted in the 2011 package.

The table below highlights the main changes introduced in the 2011 Framework as compared to the 2005 Framework. Moreover the compatibility conditions underlined in the table below are required only in the 2011 Framework and not in the 2011 Decision: this is because of the higher degree of scrutiny in the Framework as compared to the Decision.

Framework 2005	Framework 2011
<p>Compatibility conditions:</p> <ul style="list-style-type: none">• Genuine SGEI• Entrustment act• Overcompensation test (annual check)	<p>Compatibility conditions:</p> <ul style="list-style-type: none">• Genuine SGEI• Entrustment act• Duration of the entrustment period• <u>Public consultation</u>• <u>Compliance with the Transparency Directive</u>• <u>Compliance with EU public procurement rules</u>• <u>Absence of discrimination</u>• <u>Overcompensation test based on ex ante multi-annual approach, efficiency incentives and the ‘net avoided cost methodology’</u>• <u>Strengthened transparency</u>• <u>Possibly additional requirements for particularly distortive aid</u>

Given the focus on social services, this report will not provide a detailed description of these changes or of the more stringent compatibility conditions set out in the Framework: in line with its proportionate and diversified approach, the Commission decided that some of the provisions of the Framework should not apply to public service compensations that would normally be covered by the Decision but which failed to fulfil all the conditions of the Decision.⁵³

⁵³ See paragraph 61 of the Framework.

In such cases of **simplified assessment** the following compatibility conditions do not apply:

- the public consultation on the public service needs;
- the compliance with Union public procurement rules;
- the absence of discrimination;
- the compulsory use of the net avoided cost methodology;
- the inclusion of efficiency incentives in the compensation mechanism;
- the additional requirements for particularly distortive aid.

2.4. The SGEI *de minimis* Regulation: making it simpler to finance small amounts

Adopted in April 2012, the SGEI *de minimis* Regulation is a novelty introduced by the Almunia package. Under this new Regulation, which complements the general *de minimis* Regulation,⁵⁴ public service compensation amounting to less than €500 000 per undertaking⁵⁵ over three fiscal years is deemed not to constitute State aid. This threshold is higher than the one in the general *de minimis* Regulation,⁵⁶ based on the consideration that an SGEI provider incurs costs which are directly associated with its public service obligation under the entrustment act. The aid element in the compensation is therefore presumably much lower than the amount actually granted, and the Commission assumes that a €500 000 compensation does not affect trade in the internal market.

This new SGEI *de minimis* Regulation makes it considerably easier for local public authorities to comply with State aid rules when financing small social services.

The act of entrustment under the *de minimis* Regulation is simpler than under the 2011 Decision and Framework.⁵⁷ It does not have to contain all the information set out in the Decision and in the Framework: it just has to entrust the provider with a specific task and make clear that the financing is granted for this task.

Unless the Member State concerned has established a register of *de minimis* aid, the public authority has to inform the service provider in writing of the *de minimis* character of the aid, obtaining its confirmation that it is not getting any other financing that would make the total amount exceed the *de minimis* threshold.

⁵⁴ 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.

⁵⁵ See clarification on ‘undertaking’ in footnote 37 above

⁵⁶ €200 000 over three fiscal years.

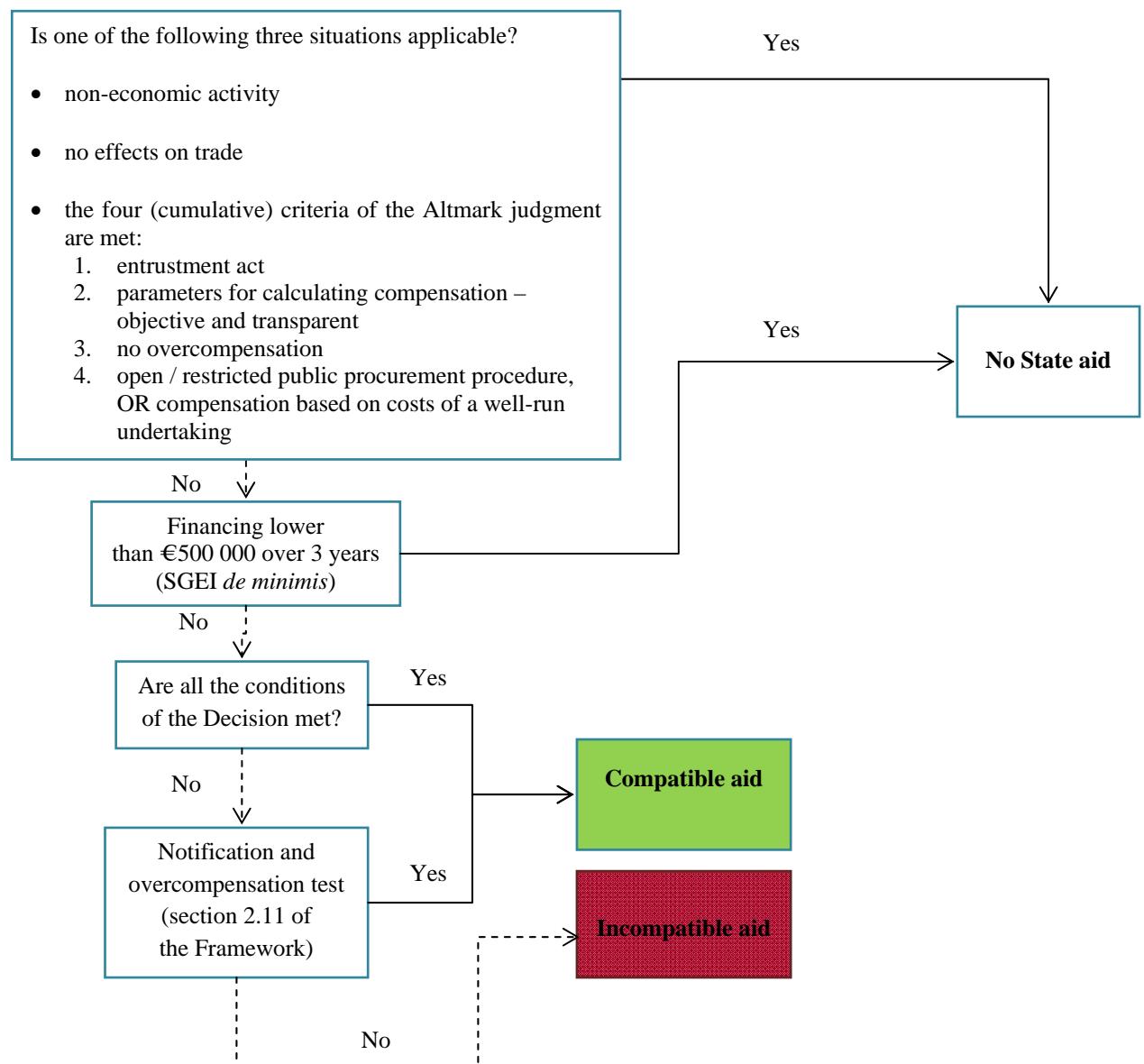
⁵⁷ See recital (6) of the Regulation.

A typical case

A municipality wishes to pay an NGO to provide parenting support services. The cost of these services over a period of three years is less than €500 000. All the local council has to do is clearly identify this service as a service of general economic interest and make sure that the beneficiary does not get any other financing covered by the SGEI *de minimis* Regulation.

If it does so, its financing will comply with EU State aid rules.

The graph below summarises the steps to be followed in the analysis of public financing to SSGI. It shows the conditions under which it is possible to finance social services in compliance with EU State aid rules.



Thanks to the differentiated and proportionate approach followed in the reform of State aid rules, the procedures for financing social services have been further simplified and clarified.

The Commission has taken in due consideration the fact that, in the present economic conditions, social services are particularly needed and require financial support from public authorities. At the current stage of development of the internal market, such financial support, even for large amounts, does not necessarily produce a great risk of distortion of competition.

Public authorities will thus fully reap the benefits that EU State aid rules can offer for the organisation and financing of high-quality, cost-effective social services: ensuring that public money is well used to fulfil clearly identified social policy objectives and is not diverted to cross-subsidise other activities.

The State aid rules analysed in this chapter deal with the definition of the level of financing that a social services provider will receive from the public authority responsible for organising that service. The service in question could be long-term care for the elderly, or for people with disabilities. It might be childcare, or social housing, or training people to help get them back to work.

However, when organising and financing social services, public authorities must not only identify the amount of the financing, but also address another type of questions: Who will provide the service: the public authority itself or an external provider? If an external provider, how will it be selected? It is in this context that public procurement rules may come into play.

All too often, public authorities assume that by complying with State aid rules they have ensured the legality of their financing arrangements, even without applying public procurement rules. In fact, the correct application of State aid rules does not exclude as such the need to comply with public procurement rules.

3. MODERNISING PUBLIC PROCUREMENT RULES

3.1. The rules currently in force: a light regime for social services

Public authorities in the Member States have to apply EU public procurement rules to social services when they decide to outsource their provision to an external provider against remuneration (i.e. in return for being paid). However, **it remains entirely up to them to decide whether to outsource the service or to provide it themselves, either directly or via an ‘in-house’ service provider.**⁵⁸

A typical case

A municipality is not obliged by EU rules to outsource the provision of childcare in its territory to private companies. It can have its own publicly-owned childcare centres and staff them with its own employees.

It can also create and finance an ‘in-house’ structure which will organise and manage the childcare centres.

Moreover, public authorities can outsource and finance the provision of social services in ways that do not entail signing a public contract: they can, in an open, transparent and non-discriminatory way, grant **licences or authorisations** to all service providers that meet the conditions for service provision it lays down beforehand.⁵⁹

It is also possible that a public authority is **merely financing** an initiative – for instance by an NGO - to provide a social service to the community.⁶⁰

The EU public procurement rules therefore apply only when a public authority has decided to outsource the provision of a service to an external provider – whether profit or non-profit – that the public authority pays for providing the service.⁶¹

The rules at present in force⁶² already take into account the specific characteristics of the social services’ sector: a public authority that decides to outsource a social service against

⁵⁸ With the term ‘in-house provision’, the Court refers to a situation where a public authority, or various public authorities jointly, provide a service themselves, albeit acting through a legally distinct entity which

(i) the public authority/ies **controls/control in a way similar to its/their own departments**, and
(ii) carries/y the **essential part of its activities with the controlling public authority/ies**.

In this case, the public authority/ies and the legally distinct entity are regarded as one and public procurement rules do not apply to their relation. See Q&A 199 of the 2013 Guide for further details on the concept of ‘in-house provider’.

⁵⁹ For further details on this alternative approach, see Q&A 216 of the 2013 Guide.

⁶⁰ On the notion of ‘mere financing’ see Q&A 218 of the 2013 Guide.

⁶¹ Q&A 218 of the 2013 Guide describes the criteria which can help to establish whether the relation between the public authority and the service provider implies an obligation to provide a service against remuneration and therefore triggers the application of EU public procurement rules.

remuneration and intends to conclude a **public service contract** has to comply only with a very limited number of rules laid down in **Directive 2004/18/EC**⁶³ and therefore enjoys **considerable latitude in terms of choice of procedures** compared to other sectors.

Public authorities nevertheless have to comply with the **Treaty principles of transparency, equal treatment and non-discrimination, mutual recognition and proportionality**.⁶⁴ This means, in particular, that the authority must:

- **adequately advertise** its intention to outsource the provision of the social service and to conclude a public service contract with an external provider; and
- **deal in a non-discriminatory and impartial way** with all the providers that have shown an interest in such a contract.⁶⁵

If it wants to outsource the provision of social services by granting a **concession**,⁶⁶ it will have to comply with the Treaty principles of transparency, equal treatment and non-discrimination, mutual recognition and proportionality.⁶⁷

Public authorities can also, at various stages of the public procurement procedures, introduce requirements concerning the quality, continuity and comprehensiveness of the service in question.⁶⁸

This shows that public procurement rules currently in force not only guarantee transparency in selecting the service provider and cost-effectiveness for the benefit of the service users and the tax payer, but also that they do so while ensuring the quality of the social services concerned.

A typical case

A regional authority intends to outsource the delivery of its long-term care services for the elderly. It intends to do so by signing a public service contract with an external provider, who it will pay for doing the work. The regional authority therefore has to draw up the ‘technical specifications’, clearly stating the object of the contract (i.e. the exact nature of the services to

⁶² See 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, OJ L 134, 30.4.2004, p. 114.

⁶³ See **Article 21 of the Directive 2004/18/EC** which sets out that only the provisions of two articles of that Directive apply to **non-priority (Annex II B) services**, such as social services. These provisions require that **technical specifications** must be laid down at the start of the procurement process and that the **results of the award procedure must be published**. It is also worth recalling that the Directive applies only if the contract at stake exceeds the threshold for its application, i.e. €200 000.

⁶⁴ The Treaty principles already apply even if the Directive threshold is not exceeded as long as the contract has a cross-border interest (On the notion of cross-border interest, see Q&A 201 of the 2013 Guide).

⁶⁵ For more details on the obligations deriving from the principles of transparency and non-discrimination, see Q&A 202 of the 2013 Guide.

⁶⁶ On the distinction between a public service contract and a concession see Q&A 200 of the 2013 Guide.

⁶⁷ See footnote 65 above.

⁶⁸ See Q&A 204 of the 2013 Guide.

be provided, the level of quality that must be ensured and the level of qualification that the staff providing the service must have).

The regional authority can either define its requirements in a very detailed way or, if it wishes to avoid standardisation and promote innovative solutions, it can define performance or functional requirements that allow it to clearly identify its objective but leave a certain amount of flexibility as to how that objective is to be achieved. It can thus open up scope for innovative solutions.

The regional authority has to define the criteria it intends to use when choosing the provider. It does not necessarily have to accept the cheapest offer but can set ‘award criteria’ which combine the price with other criteria,⁶⁹ such as supplementary quality levels on top of the requirements laid down in the section of the technical specification describing the object of the contract. These supplementary quality requirements will help it select the winner from among all the candidates.

The duration of the contract, that can be longer than one year so as to ensure continuity, must also be stated.

Then, the regional authority has to make known its intentions to conclude a contract for the provision of long-term care services for the elderly, and has to publicise the document which spells out those intentions. It can do so, for instance, via the press or on its own website. The level of publicity will depend on the size of the contract.

Once it receives offers from potential providers, the regional authority can negotiate with them to further refine its requirements and to find out more about their offers.⁷⁰ In these negotiations, however, the regional authority will have to treat all the candidates in a fair and non-discriminatory way, without giving any advantage to one of them.

Once the regional authority has chosen one provider on the basis of the criteria set out in advance, it will then have to publish the information that the contract has been concluded with that provider.

The regional authority can also select more than one provider, so as to give the people living in that region the chance to choose the provider that suits them best.

3.2. The 2011 Commission proposal: simpler, clearer and more adapted public procurement rules.

The current EU legislation on public procurement, which is already very flexible, could be further improved thanks to the reform of public procurement rules that the Commission launched in December 2011.

Overcoming the distinction between priority and non-priority services in Directive 2004/18/EC, the Commission proposal for a new Public Procurement Directive⁷¹

⁶⁹ The Most Economically Advantageous Tender (MEAT) criterion already mentioned in section 2.1 above.

⁷⁰ National public procurement might however not allow for a negotiated procedure and impose instead an open procedure.

⁷¹ Quoted in footnote 23 above.

sets out a **specific, lighter and simpler regime for social services, more suited to their specific characteristics and to the need to ensure quality**. The proposed Directive justifies this approach by pointing out in recital (11) that social services contracts have a limited cross-border dimension and that the particular context in which these services are organised ‘varies widely amongst Member States, due to different cultural traditions’.⁷² The Commission argues that the Member States should enjoy a wide margin of discretion in the organisation of the choice of the service providers, given the importance of the cultural context and the sensitivity of social services.

The main components of the proposed regime are the following:

- a **threshold of €500 000**, higher than for other goods or services, below which EU public procurement rules will not apply.⁷³ Contracts below this threshold are presumed not to be of interest for providers based in other Member States unless there are concrete indications of the contrary.⁷⁴ This implies that, below this threshold, in the absence of cross-border interest, the Directive would not apply. Nor would the Treaty principles, such as the transparency requirement and the obligation to treat economic operators equally without discrimination. This clarification on cross-border interest for social services contracts had been sought *i.a.* by the Council in 2010.⁷⁵

This specific threshold reflects a proportionate approach as it **excludes the application of EU public procurement rules to the outsourcing of social services of a very low economic value**. It thus **simplifies life for public authorities that organise small social services**.

- **flexibility in the Member States’ choice of procedures as long as the Treaty principles of transparency and non-discrimination are complied with**. Member States remain free to determine the procedural rules applicable, while respecting the basic principles of transparency and equal treatment.⁷⁶

⁷² See the following extracts of Recital (11): ‘Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as **services to the person, such as certain social, health and educational services**. These services are provided within a **particular context** that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, [...] Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the **importance of the cultural context and the sensitivity of these services**, Member States should be given **wide discretion** to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of **basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers** [...].’

⁷³ See Article 4(d) of the Directive which reads as follows: ‘This Directive shall apply to procurements with a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds: [...] (d) EUR 500 000 for public contracts for social and other specific services listed in Annex XVI’.

⁷⁴ See Recital (11): ‘Services to the person with values below this threshold will **typically not be of interest to providers from other Member States**, unless there are concrete indications to the contrary, such as Union financing for transborder projects’.

⁷⁵ See Council Conclusions of 8 December 2010 quoted in footnote 29 above.

⁷⁶ See Article 76.1 (‘Member States shall **put in place appropriate procedures** for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators [...].’) and Article 75 (‘1. Contracting authorities intending to award a public contract

The new proposal spells out the obligations to ensure **transparency**: public authorities must publish a **contract notice** and a **contract award notice**. In other words, a public authority that intends to outsource a social service must, by means of a contract notice, adequately publicise its intention so that potential providers from other Member States can express their interest in this contract. In addition, the public authority must publish the notice of the award decision, once it is taken, to ensure that any aggrieved party can challenge this decision in the appropriate courts. As for the **principle of equal treatment**, the public authority must treat in a non-discriminatory manner all potential providers that have shown interest in the contract.

The new proposal enhances legal certainty as the obligations of the public authorities are now clearer.

- **increased attention to the specific characteristics of social services.**⁷⁷ As spelled out in Article 76, Member States are invited to define procedures which are suited to the specificities of social services and which ensure their quality, continuity, and accessibility. To facilitate the task of the public authorities in defining what a good-quality social service is, recital (11) adds a reference to the quality criteria set out in the voluntary European Quality Framework for Social Services adopted by the SPC in 2010.⁷⁸
- **the right for Member States to prohibit their public authorities from awarding social services solely on the basis of the price and to maintain only the possibility of awarding such services on the basis of criteria combining quality and price.**⁷⁹ Using the MEAT award criterion⁸⁰ - which at present is just an option - might become therefore compulsory in the Member States that choose to do so. This change in the rules follows the recommendation to promote the MEAT expressed *i.a.* at the 3rd SSGI Forum,⁸¹ by the Council⁸² and by the Informal Network of Social Service Providers.⁸³

for the services referred to in Article 74 shall make known their intention by means of a contract notice. 2. Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice. [...].')

⁷⁷ See Article 76 ('1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter [...] allowing contracting authorities to take into account the specificities of the services in question. 2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation [...]').

⁷⁸ The relevant extracts of Recital (ii) read as follows: '*The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee*'. The voluntary European Quality Framework for Social Services adopted by the SPC is quoted in footnote 13 above.

⁷⁹ See Article 76 *in fine*: '*Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service*'.

⁸⁰ See section 2.1 above.

⁸¹ See *Summary Report of the 3rd Forum on Social services of General Interest (SSGI)*, quoted in footnote 45 above, p. 194.

⁸² See Council Conclusions quoted in footnote 29 above.

This – and the previous change - is meant to address an often heard criticism that public procurement procedures for social services lead to cheap and poor-quality services.

Recital (11) also reminds the reader that the Public Procurement Directive does not make it an **obligation to outsource social services**, that **alternatives to public procurement procedures** are possible⁸⁴ and that public procurement rules do not apply to ‘mere financing’.⁸⁵

Annex XVI of the proposal lists in a rather comprehensive way the services to which this specific, light regime would apply if they are outsourced by public authorities in the Member States:

- health and social services;
- administrative educational, healthcare and cultural services;
- compulsory social security services;
- benefit services;
- other community, social and personal services;
- services furnished by trade unions;
- religious services.⁸⁶

Further clarification comes also from the codification of the rulings of the European Court of Justice concerning the exceptions to the application of public procurement rules for ‘**in-house provision**’⁸⁷ and for certain other **forms of cooperation among public authorities aimed at carrying out tasks in the public interest**.⁸⁸ This codification⁸⁹ does not specifically concern social services but is particularly interesting for them: indeed, in the social services sector, local public authorities might wish to cooperate in providing social services to achieve certain economies of scale or to complement each other’s offers. The codification will enhance legal certainty and facilitate such cooperation. This is again a positive answer to the invitation

⁸³ See Report quoted in the Introduction.

⁸⁴ The Council had recommended this clarification. See Council Conclusions quoted in footnote 29 above.

⁸⁵ See the following extracts of Recital (11): ‘*Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination*’.

⁸⁶ All these services are currently covered by Annex II B of the Directive 2004/18/EC.

⁸⁷ On the meaning of ‘in house provision’, see footnote 58 above.

⁸⁸ See the judgment in Case C-480/06 Commission v Germany [2009] ECR I-4747, often known as *Hambourg* case.

⁸⁹ See Article 11 of the proposal.

addressed by Mario Monti ‘*to address the perceived areas of friction with the policy autonomy of national and local authorities*’.⁹⁰

The legislative proposal on public procurement also provides for an increased number of possibilities to **take account of social considerations in procurement procedures**. Although this does not apply only to procurement of social services but also of other services as well as of goods and works, these features of the proposal are also worth pointing out in this report.

- First, the Commission proposes that, among the **criteria for the award of a contract**, public authorities should be able to specify **characteristics relating to the working conditions of persons participating directly in the process of production or supply of the good or service involved**.⁹¹ The working conditions may concern the **protection of health and favouring the social integration of disadvantaged persons or members of vulnerable groups**.⁹² Such award criteria should be applied in accordance with Directive 96/71/EC on the posting of workers.⁹³
- Second, it has also extended the **possibilities of reserving public contracts for certain types of actor in the social economy**, those committed to the social and professional integration of people with disabilities and of disadvantaged workers, such as the long-term unemployed.⁹⁴

The aim is to ensure that when public authorities buy the goods and services they need, they can **use procurement strategically** to promote employment and social inclusion. This approach is therefore fully in line with **Article 9 of the TFEU**, which calls on the Union, when defining and implementing its policies and activities, to ‘*take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection and the fight against exclusion*’. This is also consistent with the Europe 2020 Strategy and the attention it pays to inclusive growth. Since public authorities spend around 18% of the EU’s GDP on buying goods, works or services, they should be able not only to obtain them in a transparent and efficient way, but also to use that significant amount of funds as leverage for inclusive growth.

This goes hand in hand with the increased possibility of supporting other common societal goals such as the protection of the environment, higher resource and energy efficiency, combating climate change as well as promoting innovation.

On 20 December 2011 the Commission also adopted a proposal for a Directive of the European Parliament and of the Council on the **award of concession contracts**⁹⁵ which follows by and large, as far as social services are concerned, the same diversified and proportionate approach as the proposal on public procurement. As social services are often

⁹⁰ See report quoted in footnote 14 above.

⁹¹ See Article 66 and recital (41) of the proposal.

⁹² See recital (41) of the proposal.

⁹³ OJ L 18, 21.1.1997, p.1.

⁹⁴ See Article 17 of the proposal.

⁹⁵ Quoted in footnote 23 above.

outsourced through concessions, the proposal is very pertinent and has the merit of clarifying for the first time the rules which apply in this field.

The co-decision procedure for the adoption of the Directives on public procurement and concessions progressed well in 2012: on 10 December 2012 the Council adopted a ‘general approach’ on the concerned proposals. The European Parliament’s Committee for the Internal Market and Consumer Protection (IMCO) adopted its report on the Directive on public procurement on 18 December 2012; the report on the Directive on concessions was adopted on 24 January 2013. Both the Council and the IMCO Committee of the Parliament accept the proposed extension of the provisions on reserved contracts and the new proposed lighter regime for social services, but with an increase of the corresponding threshold from €500 000 to €750 000.

4. THE 2013 GUIDE

Following the adoption of the SGEI package, the Commission published on 15 February 2013 an updated version of its *Guide to the application of the European Union rules on state aid, public procurement and internal market to services of general interest (SGEI), and in particular to social services of general interests (SSGI)*.

The update of the Guide⁹⁶ does not introduce major changes to its structure. However, to make it easier to read and to refer to the answers, the numbering of the questions is now continuous from 1 to 237 instead of being split per chapter and section. The Guide gives more straightforward answers to a certain number of questions. It also provides an increased number of examples based on the Commission decision practice and case law.

While the chapter which has been more heavily redrafted is the one on State aid, a few modifications have also been made to Chapter 2 on ‘Concepts of SGEI’. In particular:

- Q&A 11 on the possibility of classifying a service as a SGEI even when other operators are providing it in the market has been redrafted to take into account the guidance on this issue provided in the Commission Communication on the application of State aid rules which is part of the package;⁹⁷
- the issue of provision at market conditions in the near future has been addressed in Q&A 12.

These Q&As on the classification of SGEI address in particular questions on this issue posed by Member States’ experts in the SPC informal working group.

Chapter 3 on State aid, now called ‘The new State Aid SGEI package’ and structured according to the different documents included in the package, starts with a number of Q&As (14 to 19) which broadly present the package documents. Moreover, to guide public authorities in their analysis, a graph has been added,⁹⁸ presenting the different questions a public authority must ask to determine which instrument of the SGEI package it should apply to public service compensation. A simplified version of that scheme, specific to social services, is included at the end of Chapter 2 of this report.⁹⁹

Two new Q&As that are particularly relevant for service providers have also been added: Q&A 22 clarifies the fact that the package does not impose obligations on service providers and Q&A 21 explains that the SGEI provider can ask the entrusting authority on what legal basis a financing has been granted. Both Q&As will help therefore service providers understand better the implications of the State aid package on them and are particularly useful as the providers ultimately bear the risk of having to reimburse compensation granted in violation of the State aid rules.

⁹⁶ Quoted in footnote 25 above.

⁹⁷ See section 2.1 above and in particular page 10.

⁹⁸ See Q&A 20 of the Guide.

⁹⁹ See page 17 above.

The concepts of ‘economic’ and ‘non-economic activity’ have also been further clarified in line with the guidance provided in the SGEI Communication. In particular, the Guide now provides two new examples of non-economic activities: the provision of childcare in Norway according to a 2008 judgment of the EFTA Court and the organisation of public hospitals in Spain in line with a 2003 ECJ ruling.¹⁰⁰ Moreover the Guide explains that the examples of non-economic activities provided in the Communication are not exhaustive¹⁰¹ and recalls that the classification of economic and non-economic activities can change over time,¹⁰² thus addressing concerns expressed on many occasions by Member States experts, notably in the SPC working group, by service providers and by other stakeholders.

In line with the Communication, the Guide has also been enriched with additional examples on local SGEIs which do not seem to affect trade between Member States.¹⁰³ One in particular refers to the provision of long-term mental health care.

The status of the service providers, which is the object of frequent debate in the social services field, has been addressed in the new Q&A 32: responding to whether public authorities can give preference to some types of service providers, the Guide recalls that State aid rules do not prevent Member States to do so and refers to Q&As 209 and 227 as regards public procurement and internal market rules.

Complementing the guidance provided by the SGEI Communication on the fulfilment of the fourth Altmark criterion, the Guide:

- reminds public authorities that fulfilling the fourth Altmark criterion by organising a tender does not lead *per se* to the fulfilment of the other three criteria. Nevertheless the contract signed following the tender procedure and the tender documents can contain all necessary specifications that would ensure compliance with the other three Altmark criteria (see Q&A 62);
- explains why the provision of a SGEI should be compensated according to the ‘least cost for the community’ criterion and clarifies what this criterion implies: as already mentioned above,¹⁰⁴ the criterion of the ‘least cost for the community’ is broader than the lowest price and can be complied with by using the ‘most economically advantageous offer’ criterion, as long as the award criteria are closely related to the subject-matter of the service provided. This will allow to use in the award phase a variety of elements referring to the quality of the services as well as other social and environmental criteria (see Q&A 63);
- explains what is meant in the Communication by open, restricted and negotiated procedures (see Q&As 65, 66 and 67);
- clarifies what is meant with ‘generally accepted market remuneration’ which is the best benchmark to assess the compensation that an efficient undertaking requires, in the second alternative of the fourth Altmark criterion (see Q&A 71).

¹⁰⁰ See box in Q&A 27.

¹⁰¹ See Q&A 29.

¹⁰² See Q&A 30.

¹⁰³ See box in Q&A 38.

¹⁰⁴ See section 2.1 and, in particular, page 11.

The Guide also recalls that compensation that does not comply with the fourth Altmark criterion and thus constitutes State aid can still be compatible with the internal market in line with the Decision or the Framework.¹⁰⁵

A typical case

A municipality applies a negotiated procedure with prior publication to select the provider of family assistance services as it believes this procedure is particularly suitable for this very complex choice. As seen in section 3.1 above, this will be in line with EU public procurement rules. As the negotiated procedure with prior publication is in principle not sufficient to comply with the fourth Altmark criterion,¹⁰⁶ the financing provided by the municipality to the selected service provider may qualify as State aid. However, the financing can be granted in compliance with the SGEI Decision presented in section 2.2 above and thus be compatible with the internal market.

New Q&As on the act of entrustment have also been added to the Guide. They address the following points:

- the authorities entitled to entrust the provision of a service (Q&A 49);
- whether the provider can itself define the contents of the act of entrustment (Q&A 50);
- whether a public authority can entrust the provision of a service to the same provider at the end of an entrustment period (Q&A 57);
- whether an act of entrustment is also necessary under the SGEI *de minimis* Regulation (Q&A 76).
- whether, under the SGEI Decision, the duration of an entrustment can exceed 10 years (Q&A 101) and whether it is still possible to authorise a provider for an unlimited period (Q&A 102);
- why there is a new requirement in the Decision to add a reference to the Decision in the entrustment act (Q&A 115).

A key Q&A in the section on the Altmark decision is the one which explains in details the differences between the 2005 and the 2011 Decisions (Q&A 111).

Moreover, in that section, the Guide addresses one issue which is very relevant for social services: the boundaries of the exemption of notification from which these services benefit. In particular:

- it explains that the list of social services exempted by the Decision, i.e. services '*meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups*', is exhaustive to ensure legal certainty, yet broad enough to encompass the most important areas of social services. By including services relating to 'the care and social inclusion of vulnerable groups' it gives the public authorities

¹⁰⁵ See Q&A 67 *in fine*.

¹⁰⁶ See page 11 above.

the necessary flexibility to grant support to a wide variety of social services in accordance with the specific needs of their community (see Q&As 93 and 94);¹⁰⁷

- it clarifies the meaning of the terms ‘childcare’ (Q&A 96), ‘meeting social needs’ (Q&A 97), ‘social inclusion of vulnerable groups’ (Q&A 98), ‘access to and reintegration into the labour market’ (Q&A 99);
- it confirms that aid to social and work integration enterprises can be covered by the Decision (Q&A 100).

The Commission services have also updated the Q&As on the compensation that can be granted in line with the Decision¹⁰⁸ as well as those on the entry into force of the Decision and on the transition period.¹⁰⁹

As explained *supra*,¹¹⁰ the section of the Guide which focuses on the Framework is not particularly interesting for the social services area. The section on the SGEI *de minimis* Regulation, in contrast, is very useful for the provision of social services and in particular the following Q&As are worth mentioning:

- Q&A 74 explains the difference between the SGEI *de minimis* Regulation and the general *de minimis* Regulation;
- Q&A 75 recalls the methods to ensure that the €500 000 ceiling is respected;
- Q&A 77 explains the advantage of using the SGEI *de minimis* Regulation compared to the Decision: a lighter act of entrustment and no need to check for overcompensation;
- Q&A 78 reminds that it is possible to cumulate aid granted under the two *de minimis* Regulations up to the ceiling of € 500 000: **in other words, if a provider has received €200 000 over three years under the general *de minimis* Regulation, it can receive in the same period up to € 300 000 under the SGEI *de minimis* Regulation;**
- Q&A 79 clarifies that a service provider cannot receive compensation under the SGEI Decision and compensation under the SGEI *de minimis* Regulation for the provision of the same service. If it provides two different services, it can receive compensation under the Decision for the provision of one service and under the SGEI *de minimis* Regulation for another (Q&A 80).
- Q&A 81 explains that cumulation between compensation received under the Decision or the Framework and compensation received under the SGEI *de minimis* Regulation is also possible if these compensations concern different periods of time.

Addressing concerns expressed in the SPC working group and in debates at the European Parliament¹¹¹, the Commission services have also updated the questions concerning the

¹⁰⁷ On this point, see also section 2.2 above.

¹⁰⁸ See, in particular, Q&As 123, 131 to 136, 140, 141 and 143.

¹⁰⁹ See Q&As 151 to 153.

¹¹⁰ See section 2.3 of this report.

¹¹¹ See in particular the debate at the *Intergroupe* on Public services on 19 September 2012 on which a press release is published in <http://www.francoiseastex.org/2012/09/financer-les-siegs-par-les-fonds-structurels-une-clarification-simpose.html>.

application of State aid rules to financing granted by public authorities using resources from the European Social Fund, the European Regional Development Fund and the European Agricultural Fund for Rural Development.¹¹²

Finally, in the Chapter on State aid, the Guide provides guidance on the interaction between State aid and public procurement rules, anticipating issues that are further developed in Chapter 5 of the Guide. In particular:

- Q&A 113 recalls that the SGEI Decision does not require the selection of the least expensive provider;
- Q&A 114 and 188 respectively recall that the compliance with the Decision in particular and with the SGEI package in general does not mean that the applicable public procurement rules would not have to be complied with.

What is now needed is to ensure that the Guide is distributed widely to the public authorities in the Member States. Within the SPC working group, Member States' experts have reported that many public authorities, especially at regional and local level, and service providers were not aware of the 2010 Guide. The Commission services will therefore continue to promote the Guide in collaboration with the Member States and with civil society organisations.

¹¹² See Q&As 189 to 196.

5. CONCLUSIONS

The reforms of the EU rules applying to SSGI – both the State aid package already applicable and the public procurement proposals to be adopted by the legislator - bring the answers and the solutions that Member States and stakeholders were looking for:

- with the State aid package the Commission has followed Mario Monti's invitation to '*examine [...] all possibilities to further increase the flexibilities of the rules applicable to financial compensation, including through an increase of thresholds and/or through expanding the list of activities for which compensation does not have to be notified irrespective of the amounts involved*';¹¹³
- the proposed public procurement regime for social services follows the same logic of simplification and of a diversified and proportionate approach: it is clearer and simpler than the one currently provided for the 'Annex II B' non-priority services and is much lighter than the standard regime for other goods and services set out in the proposal currently under discussion. It also takes better account of the specific characteristics of social services thanks to the attention it pays to quality, continuity and comprehensiveness and to the flexibility it provides on procedures.

The improvement of the rules has been a result of the thorough consultations that the Commission has undertook both on State aid and on public procurement and of the ongoing dialogue on SSGI with Member States (notably within the SPC) and with stakeholders.

The simplification and clarification of the State aid rules should be an incentive for public authorities to apply these rules to the social services sector, without the obstacles created by the complexities and burdens of a notification procedure and the fears of possible misunderstanding.

Similarly, the lighter and more adapted public procurement regime should facilitate the acceptance of public procurement rules by those who perceive these rules as burdensome and not suited to social services. At the same time, the reforms at EU level might offer the opportunity to scrutinise national procurement legislation which did not fully avail of the potential for flexibility and quality assurance that EU rules offer in the social services field. When transposing the Public Procurement Directives, Member States may choose to follow the most innovative options that these Directives offer – such as the prohibition of the lowest price award criterion or the introduction of specific and adapted procedures for social services.

It is now the task of the public authorities to fully apprehend these rules and use them to design high-quality and cost-effective social services meeting the needs of their citizens.

To help with the implementation of the rules, the updated Guide already provides answers to concrete questions relating to the new State aid package. While the 2013 update reflects the changes brought to State aid rules by the SGEI package, another update shall follow once the directives on public procurement and on concessions have been adopted by the EU legislator. This is in line with the wish expressed by public authorities and stakeholders for the Guide to be regularly updated to take into account changes in legislation and new case law.

¹¹³ See report quoted in footnote 14 above.

Others questions can be dealt with within the Interactive Information System.¹¹⁴ Member States, service providers' and users' organisations as well as other stakeholders, at EU and at Member States' level, can also help raise awareness on the rules through information and training initiatives. The Commission services will support and encourage these efforts through their regular dialogue with public authorities and stakeholders and through specific seminars and meetings at European and local level.

The long process of dialogue and exchange in which the Commission and all stakeholders in the area of SSGI have been engaged since 2006 is bearing fruit just as high-quality and efficient social services are needed more than ever.

A better understanding and a correct application of the EU rules on State aid and public procurement will help public authorities to make better use of the resources to be invested in social services: it will secure the legality of financing, as far as EU rules are concerned, and will increase the effectiveness, transparency and efficiency of public spending. In other words, thanks to the EU rules, investing in social services will deliver a greater return for people living in Europe.

¹¹⁴ See footnote 18 above.