



**European Committee  
of the Regions**

**Implementation of the  
Decision and the Framework  
on SGEIs: involvement of  
LRAs in the reporting  
exercise and state of play as  
regards the assessment of  
social services as economic  
activities**

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# List of abbreviations

| <b>Abbreviation</b> | <b>Full term</b>  |
|---------------------|---|
| CEEP                | European Centre of Employers and Enterprises providing Public Services and Services of general interest |
| CoR                 | European Committee of the Regions   |
| EC                  | European Commission   |
| ECJ                 | European Court of Justice   |
| ESIF                | European Structural and Investment Funds  |
| EU                  | European Union  |
| GBER                | General Block Exemption Regulation  |
| LRA                 | Local and Regional Authority  |
| SGEI                | Services of General Economic Interest   |
| SGI                 | Services of General Interest  |
| SSGI                | Social Services of General Interest   |
| SME                 | Small and Medium-sized Enterprises  |
| TFEU                | Treaty on the Functioning of the European Union   |

# Executive summary

Services of General Economic Interest (SGEI) are economic activities that deliver outcomes serving the overall public that would not or not sufficiently be supplied by the market without public intervention. Social services, such as health care and social housing are examples of such activities. The public contribution of SGEI is linked to the overarching EU policy objectives of social and territorial cohesion. In line with subsidiarity principles, local and regional authorities (LRAs) are typically responsible for providing SGEI.

To ensure compliance with the internal market, the European Commission (EC) has outlined the rules within which SGEI may be supported financially by Member States and LRAs to ensure their sufficient provision. For more clarity and flexibility on the notion of State aid in relation to SGEI, in 2012 the EC has adopted the so-called Almunia package. This package encompasses several legal and guidance documents, such as the SGEI Decision, the SGEI Framework and the SGEI Communication. In the following years these documents have been complemented, for instance by the Commission Staff Working Document on the application of the EU rules related to SGEI and the most recent Commission's Notice on the Notion of State aid.

Any SGEI that is subject to the SGEI Decision or Framework needs to be reported by Member States every two years. This requires assessing whether the provision of a SGEI is subject to this legislative package. Decisive elements for this assessment are whether it is a market activity and who the provider is. Under certain conditions the compensation for the provision of such services does not constitute State aid.

This report focuses on the involvement of LRAs in the implementation of the SGEI legislative package and in the biennial reporting exercise. Given the complexity of the tasks to implement the legislative package and to report accordingly, this report furthermore illustrates typical problems and challenges encountered and approaches to overcome them.

An overall comparison of the Member State reports submitted in 2016, covering the provision of SGEI in 2014 and 2015, shows considerable differences in the reporting. They differ in terms of details of the information provided, degree of aggregation across regions and involving LRAs in the reporting. The involvement of LRAs varies in terms of extent of involvement. Some reports contain contributions written by LRAs, whereas in other reports their information has been collected and is visible only indirectly in the report. In some cases it is not possible to assess the involvement of LRAs at all.

The involvement of LRAs differs also between different SGEI reported. For instance, the provision of medical care by hospitals is mostly reported by national authorities, whereas LRAs mostly report on social housing and other social services. In these cases LRAs appear either as entrusting authorities or as undertakings receiving financial compensation for the service provision.

There is quite a variety of difficulties encountered by Member States and LRAs in relation to implementing the Almunia package. These include the following partially overlapping challenges:

- applying the Altmark criteria;
- differentiating economic from non-economic activities;
- calculating the compensation;
- determining reasonable profit;
- defining relevant SGEI;
- regarding the entrustment procedure;
- regarding the choice of the most suitable aid instrument;
- regarding monitoring to avoid overcompensation;
- reporting SGEI in line with the requirements.

For example, the differentiation between economic and non-economic activities is often not straightforward for LRAs. Clear definitions for such differentiations are missing in the package. Partially, there is no sufficient reference to certain social services and partially the documents are lacking specific characteristics that may help to distinguish economic and non-economic activities. Regarding the calculation of the compensation including a reasonable profit, LRAs are often challenged by lacking data for comparable services. These difficulties are complemented by open questions regarding the position of the Almunia package in relation to other (national) legislation or EU regulatory frameworks considering State aid.

The approaches to meet the requirements of the Almunia package are as varied as the involvement of LRAs and the challenges encountered. This is strongly linked to the different governance and framework conditions for providing SGEI in the Member States. Not least for social services, these differences are historically rooted. These conditions as well as cultural and institutional traditions directly affect when and how Member States and LRAs define social housing or health care as SGEI and how they calculate compensation payments. This challenges also the finding of clear-cut definitions for different social services as SGEI.

Consequently, Member States and LRAs use different rationales on how to clarify whether a certain social service is subject to the Almunia package. These



rationales range from descriptions of Member State's national legislation and outlines of typical characteristics used for the definition of a relevant SGEI to explanations why a service may not be subject to the Almunia package. Given all these differences, it is not surprising that the calculation of compensation does not always follow the methodologies as proposed by the Almunia package. The principally proposed methodologies, i.e. the net cost allocation and the net avoided cost allocation are sometimes also combined with each other or combined with other methodologies more appropriate in the respective institutional framework.

Member States and LRAs repeatedly mention the complexity of both, the appropriate implementation of the Almunia package and its reporting. This complexity requires sufficient capacities especially of the LRAs and service providers. It also creates additional costs, for instance, if LRAs have to pay for external expertise to ensure compliance with all rules. Simplification with fewer requirements regarding the rules to be considered and a lower number of relevant regulations would certainly be useful. This does not only refer to the provision of SGEI but also to the reporting requirements.

Taking all observations made into account, the purpose of the reporting exercise remains blurry for most Member States and hence the LRAs. This may also be the reason why some Member State reports are apparently less precise and specific than others. For obtaining more harmonious reports, not only should additional assistance be given to LRAs, but an explanation of the original purpose of the reporting should be clarified and communicated. Even the fundamental revision of the reporting may be required by asking what information is needed for which purpose.



# 1 Introduction

Services of General Economic Interest (SGEI) are economic activities that deliver outcomes serving the overall public that would not or not sufficiently be supplied by the market without public intervention (European Commission, 2011a). Among other outcomes, the overall public contribution of SGEI lies in the overarching objectives of social and territorial cohesion (European Commission, 2012a, paragraph 1). In line with subsidiarity principles, local and regional authorities (LRAs) are typically responsible for providing SGEI. Pursuant to the EU Treaties and the case law of the Courts of the EU, Member States have a wide discretion as to the definition of what they consider to be an SGEI. Protocol No. 26 of the Treaty on the Functioning of the European Union (TFEU) underlines "the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users" and confirms that the Treaties do not affect the competence of Member States to regulate non-economic SGI. However, Member States and LRAs have to define, organise and finance SGEI in line with national and EU rules and regulations.

## 1.1 Legislative background

To ensure compliance with the internal market, the European Commission (EC) has outlined the rules within which SGEI may be supported financially to ensure their sufficient provision. To provide more clarity and increase flexibility on the notion of State aid in relation to SGEI and to the Altmark criteria, the EC has adopted in 2012 the Almunia package for SGEI. The Almunia package consists of the following:

- 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 (European Commission, 2012a, 2012/C 8/02), hereinafter referred to as *SGEI Communication*, setting the basic concepts of State aid that are relevant to SGEI;
- Commission Decision on the application of Article 106(2) of the TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (European Commission, 2011b, 2012/21/EU), hereinafter referred to as *SGEI Decision*, providing more clarity on the obligation to notify the Commission regarding public service compensation;

- Communication from the Commission on the European Union framework for State aid in the form of public service compensation (European Commission, 2011c, 2012/C 8/03), hereinafter referred to as *SGEI Framework* that sets out the rules for assessing SGEI compensation that constitutes State aid; and the
- Commission Regulation on the application of Articles 107 and 108 of the TFEU to the *de minimis* aid granted to undertakings providing services of general economic interest, providing the lower threshold for the applicability of aid to SGEI (European Commission, 2012b, 360/2012).

This regulatory package is supplemented by the Commission Staff Working Document on "Guide to the application of the EU rules on State aid, public procurement and the internal market to SGEI and in particular to Social Services of General Interest (SSGI)" (European Commission, 2013), hereinafter referred to as *EC Guidance*. The recent Commission's Notice on the Notion of State aid provides specific clarifications on how the Commission intends to assess the State aid nature of public investments and can, therefore, in certain cases complement the SGEI package (European Commission, 2016). This notice aims to further clarify the constituting elements of State aid in relation to Article 107(1) of the TFEU and compatible public funding of infrastructure (European Commission, 2016, paragraph 5).

## 1.2 Identifying elements of SGEI

Financial support of Member States and/or LRAs shall safeguard the quality, safety, affordability, equal treatment or universal access of SGEI. Article 107 of the TFEU allows for State aid for activities with a social character and important projects of common European interest as long as they are compatible with the internal market.

For assessing the applicability of the SGEI legislative package for the provision of public services it matters whether it is a market activity and who is the provider. Two issues are raised here: firstly, the definition of when a service is provided as an economic activity and thereby qualifies as SGEI. Secondly, the question of how to determine an adequate compensation that does not constitute State aid. The correct assessment of the applicability, thus, requires several steps and differs between different types of services and compensation amount, due to the differences between the SGEI Decision and Framework. The difficulties

resulting from the differentiation between the SGEI Decision and Framework are outlined in the following chapters.<sup>1</sup>

### **Definition of SGEI and SGEI subject to the Almunia package**

The European Commission generally defines SGEI as "economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. Examples are transport networks, postal services and social services." (2)

The assessment of a public service regarding its applicability of the Almunia package, inter alia, includes an assessment of the economic nature of the activity. If the service is considered to be provided as a non-economic activity, it is not subject to the Almunia package and the public support does not constitute State aid. (1)

⇒ In consequence, the term *economic* has not got the same meaning in the general definition of SGEI and the application of the legislative framework.

Source: (1) European Commission (2012a, 2012/C 8/02, chapter 2.1) and (2) [http://ec.europa.eu/competition/state\\_aid/overview/public\\_services\\_en.html](http://ec.europa.eu/competition/state_aid/overview/public_services_en.html)

The Altmark Case Judgement by the European Court of Justice (ECJ) sets out four cumulative criteria defining when public service compensation does not constitute State aid (Court of Justice of the European Union, 2003). These so-called Altmark criteria provide the basis for further assessing the nature of the service and the terms for deciding if a compensation should be considered as State aid or not. Furthermore, this judgement provides the basis for the Almunia package outlined above. The four criteria are the following:

1. The recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.
2. The parameters on which the compensation is calculated must be established in advance in an objective and transparent manner.
3. The compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.
4. Where the undertaking that is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure that would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of

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<sup>1</sup> See, for instance, chapter 4 (Figure 2) or chapter 5 (Figure 4).

compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the appropriate means, would have incurred. (European Commission, 2013).

Apart from assessing whether the public service is subject to the Almunia package, these criteria also address the need for an entrustment act, the need to define the calculation of compensation, the principles for avoiding over-compensation and the methods applied to select a provider (European Commission, 2012, paragraph 44). Each of these steps may challenge Member States or LRAs in their implementation of SGEI and compliance with State aid.

Member States and LRAs are responsible for the identification of relevant services as SGEI as well as their provision in line with State aid principles. The European Commission's competence lies in controlling the Member States in terms of appropriate identifications of SGEI and assessing whether compensation may incur any State aid (European Commission, 2012, paragraph 46).

The Commission needs to be informed about State aid following article 108 (3) of the TFEU. Even though the Altmark Case Judgement, SGEI Decision and SGEI Framework and the *de minimis* Regulation provide the thresholds to allow for compensation to SGEI without being considered as State aid, under article 9 of the SGEI Decision and paragraph 62 of the SGEI Framework, Member States are obliged to report on the compensation to SGEI every two years. The first Member State reports were submitted in 2014; the second round of Member State reports in 2016.

A particular interest lies in the application of the Almunia package for social services. Social and healthcare services that are considered as economic activities require an assessment of their compliance with EU State aid rules. Social services are mentioned in the SGEI Decision due to their specific characteristics.

- Social services may require an amount that exceeds the thresholds of the SGEI Decision to compensate for public costs.
- A larger amount of compensation of these social services does not necessarily produce greater risk of distortions of competition.
- Undertakings in charge of these services for disadvantaged citizens or socially less advantaged groups should also benefit from the exemption notification provided by the SGEI Decision, even if the amount of compensation they receive exceeds the threshold laid down in the SGEI Decision (European Commission, 2011b).

## Key concepts

- Economic activity: Any provision of goods or services on a market is considered as economic activity (European Commission, 2012a, paragraph 11).
- Undertaking: Any entity, independently of its legal status, that carries out an economic activity is an undertaking (European Commission, 2012a, paragraph 9).

The analysis presented in this report continues on the main thoughts as presented in the CoR opinion on State Aid and SGEI (ECON-VI/013) and is based on document reviews and individual responses from Member States and LRAs<sup>2</sup>. In particular, the document review comprises the Member State reports for 2015-2016<sup>3</sup> as well as relevant legal provisions, opinions from relevant stakeholders and other studies investigating the delivery of SGEI. The opinions and documents from interest groups have been included in the analysis to complement the input provided by representatives from selected Member States and regions.

Against this background this study report aims to present how LRAs are involved in the drafting of the Member State reports on the implementation of the SGEI Decision and SGEI Framework. To do so, it starts with a short review of how the reporting obligations were met by the Member States in 2016 (chapter 2). Since LRAs are central players in implementing SGEI, their involvement in drafting the Member State reports is scrutinised in chapter 3. This is followed by a discussion of typical problems and challenges encountered by Member States and LRAs (chapter 4) and the methods and approaches they apply to meet the requirements of the SGEI legislative package (chapter 5). Chapters 4 and 5 have a special focus on social and healthcare services. The report concludes with main findings and recommendations (chapter 6).

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<sup>2</sup> Altogether four LRAs and four national authorities were asked for additional explanations on their reporting procedures and problems encountered. The explanations were given in interviews or in written statements. These are referred to in the following as 'input' from stakeholders.

<sup>3</sup> The Member State reports for 2015-2016 refer to reports submitted in 2016 that actually cover SGEI provision and related State aid provided in 2014 and 2015.





## **2 Reporting on SGEI by Member States: obligations and observed differences**

This chapter analyses how the Member States fulfil their reporting obligations regarding SGEI in order to better understand the actual reporting and highlight the differences observed between different reports. This analysis furthermore gives first insights into understanding possible difficulties encountered (see chapter 4 for more detail) and how LRAs are involved in the reporting procedure (see chapter 3 for more detail). For better illustration, examples in boxes complement the principal analysis.

### **2.1 Reporting format**

Both the SGEI Decision and SGEI Framework oblige Member States, national, regional and local authorities, to report bi-annually on the application of these two documents in their country. According to article 9 of the SGEI Decision and point 62 of the SGEI Framework, Member States shall submit reports providing a detailed overview on the different sectors covered in the two regulatory documents including:

- a description of the SGEI following the requirements in the SGEI Decision or the SGEI Framework;
- the total amount of aid granted to undertakings broken down by economic sector of the beneficiary;
- an indication whether for a particular type of service the application of the legal document gave rise to difficulties or complaints of third parties;
- any other information required by the European Commission.

Although the reporting obligations are the same for the SGEI Decision and SGEI Framework, the two regulatory documents address different types of SGEI (see Annex 1). Fulfilling the reporting obligation according to the first bullet point mentioned above tends to be the most extensive and demanding. All SGEI that were supported have to be described for all points addressed by the SGEI Decision and SGEI Framework. In short this means a description of the forms of entrustment, the duration of entrustment, aid measures, the compensation mechanism, typical arrangements for avoiding overcompensation, transparency requirements, and the amount of aid granted per SGEI.

The European Commission DG Competition, with the aim of gathering information on SGEI provision in the Member States 2015-2016, sent a letter

together with a standard format to use for the 2015-2016 Member State reports to responsible Ministries in all EU Member States. Compared with the format by the European Commission (EC) promoted for the 2012-2014 reports, the format for the 2015-2016 is more detailed. The format follows a tabular structure that provides (1) the expenditure table following the second point of the reporting obligations, (2) a description of the application of the 2012 SGEI Decision split by sector, (3) a description of the application of the 2012 SGEI Framework, (4) complaints by third parties and (5) other issues. A detailed example of the reporting format is included in Annex 2.

## 2.2 Differences between Member State reports

**14 out of the 28 reports for 2016<sup>4</sup> clearly follow the format promoted by the EC.** Some Member State reports only use the tabular structure per SGEI but do not apply the separation between the SGEI Decision and SGEI Framework; other reports structure the SGEI per region and yet other reports follow the overall order of sectors but do not use the tabular structure per SGEI. Also some reports, such as the Irish Member State 2016 report, used the format of the previous reporting round. The following box gives some examples on differences in the reporting.

### Level of detail of the 2015-2016 Member State reports

The level of detail provided in the Member State reports differs greatly. Some Member States report only on the minimum requirements and have submitted reports of around 10 pages. Other Member State reports are very detailed and also provide additional documents such as entrustment acts. Especially the Member State reports from Belgium, Czech Republic, Estonia, Germany, Luxembourg, the Netherlands, Poland, Romania, Spain and the UK provide many details. The Member State reports from Hungary, Croatia, Cyprus and Austria provide fewer details.

The Portuguese report only includes SGEI for the autonomous region of Azores. For Belgium, separate reports have been submitted for Wallonia-Brussels and Flanders.

Only Malta did not provide a Member State report; it may be that none of the aid provided in the year 2015-2016 fell under the requirements of the 2012 SGEI Decision and SGEI Framework.

Source: SGEI Member State reports 2016.

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<sup>4</sup> As of 10 April 2017, Malta had not submitted a Member State report. There are nevertheless 28 reports because Belgium has submitted two reports, for Flanders and Wallonia-Brussels respectively.

In 2016, in its invitation to report on the SGEI implementation of the previous two years, the EC also invited the Member States to report on other instruments for providing services as mentioned in the SGEI Decision and Framework that are not provided as SGEI. The Slovenian Member State report contains detailed information on social services that are not considered as SGEI due to national legislation (see below box).

### **Information on social services in the Slovenian Member State report**

The Member State report of Slovenia states that "Pursuant to valid Slovenian laws, the majority of public services under Art. 2(1)(c) of the SGEI Decision, such as social apartments, care of the elderly, socially disadvantaged, and help to mentally disabled and movement-impaired individuals, are organised as SGEI but for which the SGEI Decision does not apply since mandatory determined (economic) prices for eligible users are subsidised exclusively through social assistance measures (direct assistance to users), in accordance with the Exercise of Rights from Public Funds Act..."

On the following pages the report details the information for these services in accordance with the format required for SGEI. Thus, Slovenia reported public financing activities that were provided as non-economic activities rather than SGEI in the sense of the SGEI Decision. By this, Slovenia answered the invitation of the EC to report also other public funding activities than those falling under the SGEI Decision and Framework.

Source: Member State report Slovenia, 2016, p.2 and input from Slovenian stakeholders.

Although Member States were invited to report such services, the detail provided in the Slovenian report is outstanding and may raise the question, whether Member States do not always feel certain of what to report.

Different articles in the SGEI Decision and points in the SGEI Framework provide alternatives or choices when implementing public services to be made at Member State level. The following discusses these points in particular to highlight aspects relevant to the difficulties encountered in fulfilling the reporting requirements.

**The SGEI Decision applies to SGEI in specific sectors independently of the compensation amount and for all other SGEI receiving less than EUR 15 million; all SGEI apart from the 'specific sectors' receiving more than EUR 15 million are subject to the SGEI Framework.** Article 2 of the SGEI Decision is applicable to state aid in the form of public service compensation not exceeding a maximum amount of EUR 15 million in areas other than transport and transport infrastructure. Transport infrastructure excludes land transport and

addresses, in particular, smaller ports and airports. In general, compensation of airports with on average fewer than 200,000 passengers per year over a period of two years and ports with on average fewer than 300,000 passengers per year over a period of two years fall under the SGEI Decision. These thresholds are a little higher for islands. For these areas, compensation to ports and airports with maximum average 300,000 passengers over two years falls under the SGEI Decision.

Besides these air and maritime links, the SGEI Decision also applies to compensation for the provision of SGEI by hospitals providing medical care (article 2(b)) and SGEI providing social needs (article 2(c)) as regards health and long-term care, childcare, access to and reintegration into the labour markets, social housing and the care and social inclusion of vulnerable groups.

### **2.2.1 Variety of SGEI reported**

Thus, the activities related to these sectors need to be clearly described in the reports in order to show that the compensation provided is compatible with EU State aid rules. Depending on how the provision of relevant services is organised, the number of SGEI reported varies strongly between Member States (see below box).

The SGEI Framework addresses all public service compensation that is not covered by the SGEI Decision following articles 106-108 of the TFEU. "Aid must be granted for a genuine and correctly defined SGEI as referred to in article 106(2) of the Treaty" (SGEI Framework point 12). The SGEI Framework excludes compensation for the provision of land transport and public service broadcasting, since other regulatory frameworks cover these SGEI (SGEI Framework point 8 and SGEI Decision recital 23).

#### **Variety of SGEI reported in Member State reports**

The number of SGEI described in the Member State reports 2015-2016 varies greatly. For example, the Member State report of Cyprus describes only one SGEI under the application of the SGEI Decision whereas the Member State report of the Netherlands describes 15 SGEI.

The majority of SGEI reported fall under the SGEI Decision. For example, SGEI falling under the SGEI Framework have been reported in France, Poland and Sweden.

Source: Information based on the Member State reports of Cyprus, France, the Netherlands, Poland, Sweden, 2016.

## 2.2.2 Differences in entrustment periods

**The duration of the period of entrustment is defined differently in the SGEI Decision and SGEI Framework.** Member States and LRA may determine the form to entrust operations for providing SGEI. The form can be decided for each SGEI separately, depending on the sector's needs and structures. For each SGEI, this form consists of one or multiple acts as described in article 4 of the SGEI Decision and under point 16 of the SGEI Framework.

This certain degree of freedom for national authorities and LRAs regarding the form of entrustment would ideally be included in the national report providing a clear description of the SGEI. The same applies for the duration of the entrustment, which also leaves some discretion to the Member States. For SGEI subject to the SGEI Decision the entrustment period may be no longer than 10 years. Longer entrustment periods need specific justification, i.e. if significant investments are necessary. Thus, they are only justifiable for certain social services such as social housing. The examples in below box show how entrustment periods differ for services subject to the SGEI Decision.

The SGEI Framework sets more flexible boundaries for the duration of the entrustment. According to point 17, the duration of the period should in general not exceed the period required for the value to decrease until only the most significant assets required for providing the SGEI remain. The period would therefore need to be justified.

### **Examples of duration of entrustment**

The Member State report of Finland provides an example for justification of the duration of the entrustment in relation to social housing. Like other property, social housing is a durable asset; therefore the timeframe is generally longer than the maximum of 10 years of support. In the Finnish case, support is granted against a commitment to keep the properties as rental housing for a long period—between 10 and 45 years. In the period 2014-2015, the duration of the support was thus longer than 10 years.

The Member State report of Hungary provides an example in which local authorities grant public service contracts within the timeframe of 10 years. In the Hungarian case, the state/local authorities own public services such as water utility and sewage facilities. The authorities only entrust providers for smaller public services which include economic activities. These smaller contracts do not exceed the 10 years of entrustment.

Source: Member State report Finland, 2016; Member State report Hungary, 2016.

### 2.2.3 Differences in calculating compensation

Member States have a certain degree of freedom as regards the method of calculating compensation. Therefore this needs to be specified when describing the SGEI in the Member State reports. The Altmark criteria provide basic requirements for national authorities and LRAs to take into account regarding the compensation of SGEI. The criteria set a framework in which over-compensation is not eligible and in which compensation must be calculated in advance objectively and in a transparent manner.

The SGEI Decision in article 5 specifies this by stating that the amount shall not exceed what is necessary to cover the net costs incurred in discharging the public service obligations, including a reasonable profit (net cost methodology). The costs to be taken into account shall include all costs needed to operate the SGEI. Alternatively the compensation may be calculated as the difference between the net cost for the undertaking of operating with the public service obligation and the net cost or profit of the same undertaking without public service obligation (net avoided cost methodology).

The SGEI Framework (point 22) states that the amount of compensation can be established on the basis of either expected costs and revenues, or the costs and revenues actually incurred, or a combination of the two, depending on the efficiency incentives that the Member State wishes to provide from the outset. In addition, the SGEI Framework (point 27) specifies that the net avoided cost methodology is to be preferred over the net cost or other calculation methodologies.

**So, both documents allow the national authorities and LRAs to choose the calculation method for compensation that best suits the activities supported. Nevertheless, SGEI Decision and SGEI Framework prioritise different methodologies.** For a clear description of the SGEI, the applied methodology would thus need to be included with a certain amount of detail in the report. The case in below box gives an example for the application of the cost allocation methodology.

#### **Example of a detailed description of the cost allocation method for medical care by hospitals in the case of Asturias, Spain**

The region of Asturias (Spain) is a LRA that provides a detailed description of the compensation mechanisms applied, in their case for aid related to medical care provided by hospitals following the SGEI Decision article 2 (b).

The region applied a cost allocation method and describes that the unit prices are specified in the annexes of the entrustment acts. The tariffs assigned to the processes include the hospital costs for in-house and joint work, healthcare-related and non-healthcare related costs, medical and surgical healthcare processes. These tariffs are invoiced by the hospitals as compensation for the expenditure required to provide the services and carry out the processes. The invoices are only paid by the public administration after verification that the invoiced activity corresponds with the activity actually carried out by the hospitals over the course of the year. The entrustment act further details the process of monitoring and audit of the resulting activity carried out by the hospitals, as well as the application of penalties for non-compliance or possible state liabilities arising from the treatment activity carried out by the hospital. Calculating these tariffs is challenged by the differences in size and capacity of the hospitals.

Source: Member State report Spain, 2016, pp. 48-49.





## **3 Involvement of LRAs in drafting the Member State reports**

In Article 1 of its Protocol No. 26, the TFEU highlights "the essential role of the national, regional and local authorities in providing, commissioning and organising services of general economic interest". SGEI are mainly produced and financed by LRAs and in many cases LRAs own the company providing the SGEI. This chapter examines the degree of involvement of LRAs in the 2015-2016 Member State reports on the application of the SGEI Decision and SGEI Framework and seeks to answer the first central question of this study. Given the particular interest in social services, a specific section is devoted to these services, before a final reflection summarises the main conclusions.

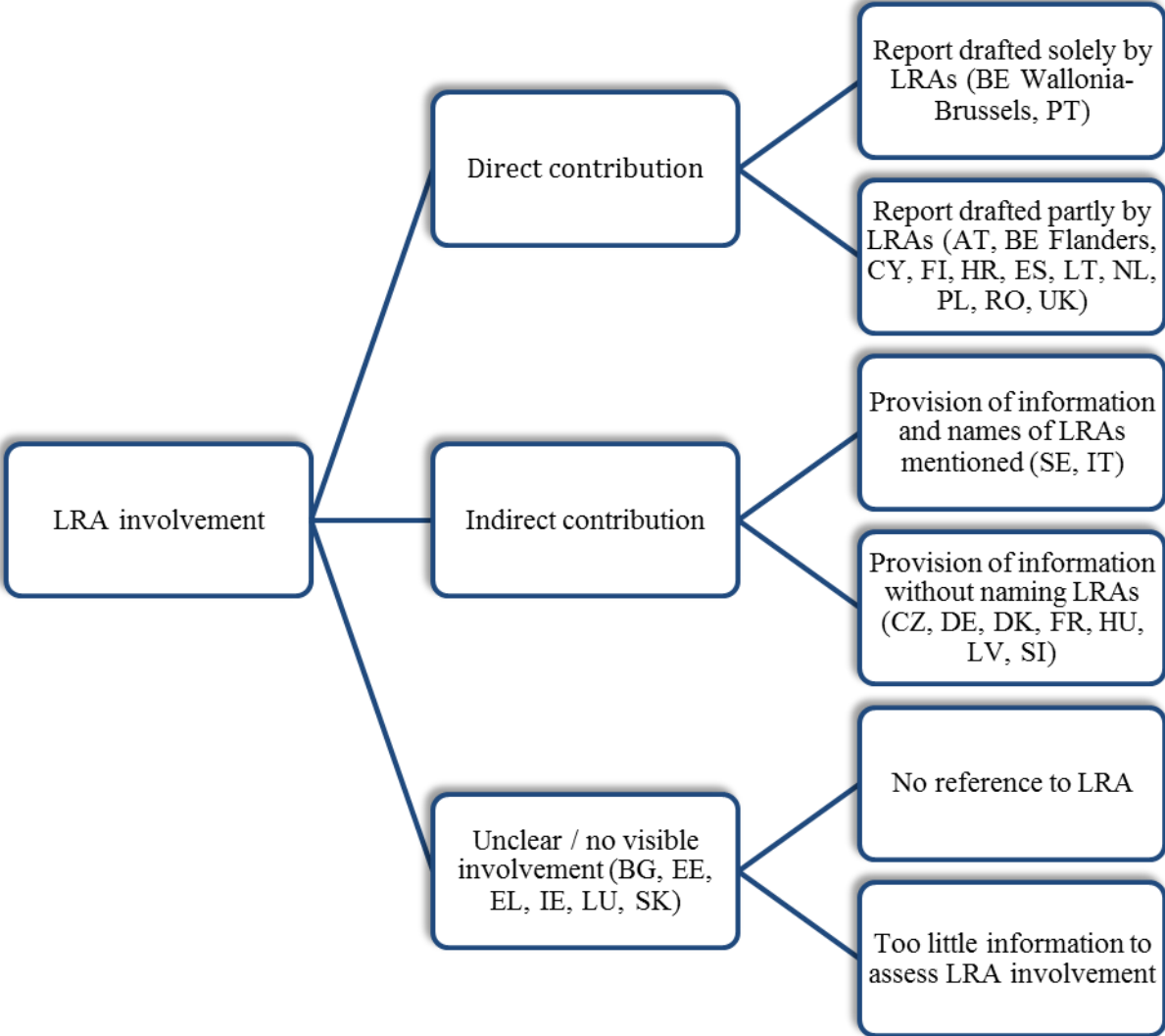
### **3.1 Different degrees of involvement of LRAs**

The degree to which the LRAs are involved in the drafting of the Member State reports varies. The Member State reports show that LRAs make a direct contribution to the report drafting in 13 out of the 28 Member State reports (46.4%), an indirect contribution in nine out of the 28 Member State reports (32.1%) and unclear or no visible contribution in six out of the 28 Member State reports (21.4%). These principal degrees of involvement can then be further differentiated, as shown in the figure below.

Some degree of variation may be explained by differences in governance set-up following the rules of subsidiarity and proportionality. In some countries LRAs have more competences and thus responsibilities as regards SGEI provision than others. This results in different degrees of involvement per type of SGEI. Despite the different competences, the Member State reports suggest different degrees of coordination of the multiple levels of governance and LRA involvement.

The following sections are structured according the degree of LRA involvement as illustrated in Figure 1.

**Figure 1 Different degrees of LRA involvement in reporting on SGEI**



Source: Spatial Foresight, 2017 based on analysis of the 2015-2016 Member State reports on the application of the SGEI Decision.

**3.1.1 Direct contribution of LRAs in drafting of Member State reports**

LRAs appear as authors of the report or parts thereof. The Member State reports from Belgium (Wallonia-Brussels) and from Portugal are solely drafted by LRAs, as explained in more detail in the box below.

## **LRAs as sole drafters of the Member State reports**

As regards Belgium, there are two different reports produced, one for the region of Flanders and one for Wallonia-Brussels. In Belgium, the federal level has hardly any competences in the fields of SGEI except for hospital care. Thus it lies in the jurisdiction of the regional authorities to draft the report. In this case, the region of Wallonia-Brussels in Belgium is to be the sole drafter of the report. In the case of Belgium, medical care provided by hospitals is described in the Flemish report. Due to the divided responsibility to provide hospital care the Belgium (Flanders) report combines inputs from the federal and regional level. Furthermore, all SGEI in the area of hospital care are compiled in the Belgium (Flanders) report. This includes services from all Belgium regions (Flanders, Wallonia, Common Community Commission, and German community). As a result, the reporting of Belgium -Flanders- and Belgium -Wallonia-Brussels- appears incoherent.

Similarly, the region of Azores in Portugal appears as the sole drafter of the report on SGEI, as there is no reference to the national level or any other region in the report. The whole report contains the heading of the Azores Office of the Presidency of the Regional Secretary of External Affairs. There is, however, no reference to lower level authorities other than the region of the Azores.

Source: Member State report Belgium (Wallonia-Brussels), 2016; Member State report Portugal, 2016.

Member State reports from Austria, Belgium (Flanders), Cyprus, Finland, Croatia, Spain, Lithuania, the Netherlands, Poland, Romania and the UK include parts drafted by LRA as well as parts drafted by national authorities. LRAs are involved mainly in filling in the tables of the standard format or providing brief descriptions to national coordination bodies. In some reports there is a clear reference to the responsible authorities, as for example in the Spanish report, which indicates the competent state, region or national Ministry. In other reports the contributor can be identified when looking at the authority responsible for granting the aid.

For the above-mentioned countries, the reports are a compilation of the inputs received from different national, regional and local authorities responsible for the provision of the SGEI. The provision of the SGEI is organised differently across all Member States, for example medical care by hospitals is provided by national authorities in one Member State and by regional authorities in others. Some Member States, for example Spain and the UK, structure their reports according to the responsible authority, making it easy to assess the contribution of authorities at different governance levels. The UK Member State report

discusses the provision of each SGEI separately for England, Scotland, Northern Ireland and Wales.

The reporting process as described on the website of the knowledge centre of Dutch local and regional authorities (Europa Decentraal) provides an example of how the input from the different authorities is compiled (see the box below). In the process of compiling the input from LRAs these contributions remained visible. The report submitted to the Commission is thus a combination of inputs received from different national, regional and local authorities.

### **Collection of inputs for the Dutch Member State report**

The Ministry of the Interior and Kingdom Relations has asked Europa Decentraal to coordinate the reporting of local and regional input relating to the application of the SGEI Decision and SGEI Framework. Those municipalities that provided SGEI received a letter from the Ministry of the Interior and Kingdom Relations and Europa Decentraal providing them with the template. Europa Decentraal collected all input from the local and regional authorities while the Ministry of the Interior and Kingdom Relations collected the information from the Ministries responsible for the relevant sector policies. Together all information compiled has been provided to the Ministry of Economic Affairs, which submitted the report to the European Commission.<sup>5</sup>

Other examples of Member State reports, which were drafted both by LRAs and national authorities are presented in the box below to illustrate the division of responsibilities for providing SGEI and drafting the reports.

### **Examples of Member State reports drafted by LRAs and national authorities**

Many reports directly include information from LRAs as well as from national authorities. In the case of Austria, the regions of Tyrol and lower Austria reported on the SGEI falling under their responsibility. The region of Tyrol reported on medical care for disaster management and mountain rescue and the region of Lower Austria reported on a show garden that fall in the category of other SGEI with a lower compensation of EUR 15 million in accordance with article 2 from the SGEI Decision. It appears that national authorities contributed to the report for the section on "funding of skills for employees in health and social care".

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<sup>5</sup> The process is described on the webpages from Europa Decentraal ([www.europadecentraal.nl/europese-commissie-maakt-deab-rapportage-lidstaten-openbaar/](http://www.europadecentraal.nl/europese-commissie-maakt-deab-rapportage-lidstaten-openbaar/)) and has been verified via written input to the study team.

The Lithuanian report is split into a general part that includes the contribution of the national authority responsible for the provision of postal services and a second part explicitly addressing SGEI in municipalities. Three municipalities, Kelmė, Kaunas and Šiauliai have provided SGEI in 2014 and 2015 and thus reported accordingly. Also the Dutch and Polish reports are a combination of contributions of responsible authorities from multiple levels. In Poland, the local authority of Wrocław reported on the provision of SGEI regarding social housing, management of municipal property and rejuvenation, the city of Krakow reported on the provision of parking lot management and the national authority reported on the provision of postal services.

Similarly the Spanish report is a compilation of information drafted and provided by a number of different regional authorities, while the national level provided information on the provision of SGEI as regards a market platform for natural gas.

Source: Member State report Austria, 2016, pp. 9; Member State report Lithuania, 2016; Member State report Poland, 2016; Member State report Spain, 2016.

### **3.1.2 Indirect contribution of LRAs in drafting of Member State reports**

The indirect contribution of LRAs can be twofold. They can indirectly contribute in the drafting of Member State reports by **providing information and being specifically mentioned for doing so or they can function as undertakings entrusted with the provision of SGEIs without being referenced in the report.**

The provision of information of LRAs to the SGEI Member State reports can take different forms. It entails, for instance that LRAs provided information to a coordinating (national) authority that used this information to draft the Member State report. This has, for example, been the case in Latvia, whose Member State report clearly mentions that the Ministry of Finance (Department for Control of Aid for Commercial Activity) coordinated the drafting exercise and "sent an information request to the Latvian authorities including certain industry ministries and all local government granting aid by applying the SGEI Decision" (Latvian Member State report, 2016, pp. 1-2). Other examples of Member State reports where LRAs have indirectly contributed to drafting are the Slovenian, Swedish, Italian, Danish, German, Czech, Hungarian and French Member States reports. The box below illustrates for two countries the processes applied.

## **Information flows for the compilation of Member State reports in the Czech Republic and in Slovenia**

In the Czech Republic the national authority responsible (Office for the Protection of Competition) prepared an Excel file, which corresponded to the information requirements outlined by European Commission. This file was complemented with a methodical guideline helping the aid providers to fill in the table correctly. The table file and the guideline were sent to public bodies on central and regional level, annexed to the written binding request for information, and published on website of the Office for the Protection of Competition. Regional authorities were asked to distribute the request of the Office to all municipalities within their catchment area. The requests were sent out and the press release was published at the beginning of 2016, with a deadline for submitting the completed tables by about mid of May. After verification, correction, if needed, and finalisation, the data were extracted separately for each type of SGEI. This was broken down into figures/tables according to the requirements of the EC. Then the report was assembled and sent to the EC.

The compilation of the Slovenian Member State report applied similar steps as those described for the Member State report of the Czech Republic, but involved even more coordination activities. It consisted of the following steps:

1. Written information from the national responsible authority (Ministry of Finance) to all ministries and municipalities about expectations regarding the reporting, containing detailed explanations and instructions as well as a template for the reporting;
2. Individual meetings of responsible authority with each ministry;
3. Conducting a seminar for all municipalities with detailed instructions on what and how to report.
4. Compilation of aggregated report based on the data received from the other ministries and municipalities.

The whole process took about four months to complete.

Source: Inputs from Czech and Slovenian national authorities

Indirect contributions of LRAs to drafting of Member State reports are not always visible in the same way. The information comes from the LRAs responsible for the provision of the SGEI or information and data is collected from the LRA acting as undertaking and being entrusted with the provision of the SGEI. In some national reports the names of the LRAs are mentioned and in others not, i.e. there is reference to LRAs but it is not clear which specific LRAs have provided the information. The box below gives some concrete examples on LRAs contributing indirectly in the drafting of Member State reports.

## **Indirect contribution of LRAs through providing information – with and without mentioning the responsible authorities**

The Italian Member State report is the result of the contributions provided by the administrations involved, as mentioned from the very beginning of the report and confirmed with the input of a representative from the Marche region.

In order to draw up the Member State report, each competent Ministry (e.g. the Ministry of Infrastructures and Transport in the case of social housing) requires from each region a series of information on pre-established templates, with the aim of collecting the same information in the same format. This is eventually forwarded to the European Policy Department of the Italian Presidency of the Council of Ministers. In order to ensure the homogeneity of the information collected, the regions are supported by the Interregional Technical Coordination.

In the Swedish case the Ministry of Enterprise and Innovation drafted the Member State report based on information from LRAs. Through written input to the study team, representatives from the Ministry mention the challenges to compiling the data from a variety of different sources and getting in touch with the responsible actors and persons.

In the Member State report of France, the national authority seems to have coordinated the drafting of the Member State report and received input from six local authorities. These authorities are, however, not specifically referred to in the main report.

The case is similar in the Czech and the German reports, where it seems that the LRAs indirectly provided information for the compilation of the Member State reports, but there is no direct reference as to what information was provided by which LRAs. The German report points out that the federal government collected information from the states. However, the process within the states is not further detailed.

Source: Member State report Czech Republic, 2016; Member State report France, 2016; Member State report Germany, 2016; Member State report Italy, 2016; Member State report Sweden 2016, Input from Marche region.

As mentioned above, LRAs may also be referred to as undertakings entrusted with the provision of the SGEI, as those undertakings can be either public or private organisations performing economic activities. In some reports, State aid to publically owned organisations, as for example postal service providers, energy companies or hospitals, is reported. The example in the box below, from the Bornholm Airport from Danish Member State report illustrates this.

### **Public service compensation for the publicly owned Bornholm Airport**

Bornholm Airport is a regional airport on the island of Bornholm in the Baltic Sea. The airport is state-owned and is operated by the Danish Transport and Construction Agency. The airport receives public service compensation via the Finance Act. "The agreement between the Danish Transport and Construction Agency and Bornholm Airport on its public service obligations lists the obligations that Bornholm Airport is obliged to fulfil. This concerns, for example, landing aids and facilities, security measures, access for all potential users and the necessary capacity."

Source: Member State report Denmark, 2016, pp.13.

In other cases, LRAs are mentioned as undertakings providing the SGEI, but the respective LRAs are not specified. The example from Slovenia in the box highlights this type of involvement in drafting the report.

### **Provision of pre-school education programmes in Slovenia**

Under national law, municipalities in Slovenia are obliged to organise a public service network for pre-school education. For the provision of pre-school education programmes within the public service network, municipalities establish one or more pre-school institutions or organise special units within the framework of existing public institutions (primary schools) of which they are the founders. "If there is a further need for pre-school education and the existing capabilities of the public network are not sufficient, a municipality must by a decision grant a concession to a private kindergarten, who is selected in a public procurement procedure and conclude a concession contract."

Source: Member State report Slovenia, 2016, pp. 5.

### **3.1.3 Unclear or no visible involvement of LRAs in the Member State reports**

There are Member State reports where LRAs are not mentioned in the report at all or the information in the report is too sparse to make it easy to assess the degree of involvement. Especially in Member States with a rather centralised system, such as Bulgaria, Greece or Estonia, LRAs do not seem to play a role in the drafting of the Member State reports. In these cases it often even remains unclear whether or in how far LRAs have actually provided information for the drafting. The Slovakian Member State report only includes the description of medical care provided by hospitals and other health care that falls under the responsibility of the national Ministry of Health. Therefore, no reference to LRAs has been made in this report. Also the Luxembourgish and Irish reports only include SGEI provided by national authorities.



Apart from the differences mentioned above, it has been sometimes difficult or unclear to specify the LRA involvement. This is mainly due to the fact, that the reports vary strongly in terms of level of detail of information provided and the type of wording applied.

### **3.2 LRA's role in relation to SGEI meeting social needs**

This study report pays specific attention to SGEI meeting social needs, social housing and medical care provided by hospitals (article 2 of the SGEI Decision). In this section we take a closer look at these SGEI and to what extent LRAs have been involved in reporting on them. The following points are non-exhaustive but aim to show the variety of LRAs' involvement and the information obtained through different approaches to the reporting exercise on SGEI.

**The provision of medical care by hospitals is mostly reported by national authorities.** In most reports, SGEI provision regarding medical care provided by hospitals is reported by national ministries of health. The Danish report is one of the few reports that mention the involvement of regional authorities in relation to hospital care. The report includes a detailed description of the Danish health service, which in the Danish opinion does not constitute State aid and does not need to be reported upon. "Operationally, the health service is organised either as public institutions and clinics or as professions that operate with public subsidies under agreements with the public authorities. The hospital service consists largely of regionally owned hospitals. Under the Hospital Act, the regions must provide treatment via their hospital services free of charge. In addition to the regions' own hospitals, free treatment is provided at some private, non-profit specialist hospitals" (Member State report Denmark, 2016, pp. 10).

**LRAs report mostly on granting aid to providers of social housing, followed by other SGEI meeting social needs.** Their role in relation to SGEI meeting social needs is in line with the expectation that LRAs are crucial players for their provision in different countries. This has been obvious both in Member State reports where LRAs directly contributed to drafting the full report or parts thereof, or where they indirectly contributed and been mentioned.

**For the provision of SGEI meeting social needs LRAs are both entrusting authorities and also undertakings receiving aid, depending on the specific competence of the LRA in their country.** Where it is possible to identify their involvement, LRAs act mostly in their role of granting the provision of the SGEI to public or private undertakings. In only a few cases is the LRA the undertaking

providing the SGEI. The variety of possible SGEI meeting social needs as described in the SGEI Decision reflects the variety of different competences of LRAs in the provision of SGEI. The following presents examples of SGEI provided and reported by LRAs following the types of **SGEI meeting social needs** as mentioned in the SGEI Decision article 2:

- The Austrian Member State report includes an example of **health care** provision. The Tyrol region granted aid to the Austrian Mountain Rescue Service for the provision of rescue and emergency medical assistance services to individuals who are injured, sick or otherwise require assistance in alpine or rough terrains, and their transport to a location where they can be transferred to the emergency services. The entrustment is based on regional legislation (Member State report Austria, 2016, pp. 4).
- The Member State report of Belgium (Flanders) describes the provision of subsidies for **childcare** following a governmental decree. A decision memorandum (a global memorandum with a decision on all applications) has been drawn up, and is signed by the general administrator of the independent government agency Child and Family.
- In the Czech Republic, LRAs have granted aid to childcare services, following the table on the amount of aid granted on childcare services<sup>6</sup>. Also the Czech authorities primarily use contracts as type of entrustment for the wide range of services mentioned in relation to childcare, for example, supporting easy-access facilities for children and young people.
- The municipality of Gouda in the Netherlands entrusted a sheltered workshop company for the provision of reintegration programmes for paid work under the heading of **access to and reintegration into the labour market** (Member State report the Netherlands, 2016). The municipal council entrusted the private undertaking on the basis of a designation decision for a period of five months, from January to June 2014.
- The Member State report of Cyprus includes one of the few examples in which LRAs are mentioned as potential undertakings providing the SGEI, in this case regarding the **care and social inclusion of vulnerable groups**. The national Social Welfare Services provide State aid to NGOs and local authorities for the operation of social care programmes. Most of the bodies receive State aid under the Social Welfare Services' *de minimis* State aid scheme. For the period 2014-2015, aid was only granted to three

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<sup>6</sup> The involvement of LRA is not explicitly mentioned in the Czech report.

agencies for which the Social Welfare Services prepared a special State Aid Plan, which was adopted by the Ministerial Council on 29 May 2013, Decision No 75.154. The three agencies are:

- I. The Theotokos Foundation;
- II. The Agios Stefanos Foundation for People with Cognitive Disabilities;
- III. The Cyprus Association for People with Autism (Member State report Cyprus, 2016, pp. 6).

**The provision of social housing** involves a variety of stakeholders such as local authorities, public companies, non-profit or limited profit associations and companies (IZA - Institute for the study of Labour et al., 2013). Member States did not report on aid granted to local authorities for the provision of social housing; rather LRAs reported on the aid granted to other (semi-) public and private undertakings. For example the Belgium reports clearly state that social housing is a local or regional competence rather than a national one (Member State report Belgium (Wallonia-Brussels, 2016, pp. 2 and Flanders, 2016, pp. 60)). In the Member State reports of Spain and Finland, regional authorities report on social housing. In the Netherlands and the UK local authorities reported on the aid granted regarding the provision of social housing (Member State report the Netherlands, 2016; Member State report the United Kingdom, 2016).

### **Examples of LRA granting aid for the provision of social housing**

The region of Asturias (Spain) presents information in the report on social housing in the region, which provided the creation of the public undertaking 'VIPASA' that manages the public housing stock.

The provincial government in the region of Åland (Finland) grants aid for the construction of rental housing and for maintaining the standards of these properties.

In the Dutch report, the municipality of Rotterdam reports on the entrustment of 'Vestia', a housing corporation, to compensate relocation of current residents.

An example from the UK report concerns the aid granted by the Hampshire County Council for the development of a site in Eastleigh Hampshire. A 10-year funding agreement entered into force in 2014 for the construction of 70 self-contained units specifically designed to meet the needs of people over the age of 55 years with vulnerabilities.

Source: Member State report Spain, 2016, pp. 58; Member State report Finland, 2016, pp. 1; Member State report the Netherlands, 2016, pp. 17; Member State report United Kingdom, 2016, pp. 63.

### **3.3 Reflections on LRA involvement**

The information regarding the involvement of LRAs in the Member State report depends on the level of detail that has been mentioned and presented in the reports. The less they are involved in the reporting, the less specific and precise the information summarised in the reports may be. Nevertheless, it is important to underline here the valuable role of LRAs in the provision of SGEI.

Considering the five delivery criteria of SGEI below, it becomes evident that LRA are essential in assuring quality and good delivery of SGEI:

- 1) quality, SGIs "correspond to basic human needs";
- 2) longevity, refers to "services that require a long-term delivery pattern";
- 3) geographical coverage is important so that "SGI contribute to combatting concentration and economic desertification";
- 4) affordability, SGI need to be affordable to the majority;
- 5) last but not least, the "inclusion and participation of the various stakeholders involved", be that users, providers or representatives of the local communities. "Such participation is the best guarantee that the above-mentioned criteria are abided by because local providers usually know the problems of their community and how to put to good use the resources available, while local users know what their needs are." (Guerini and Roelants, 2013, pp.3-4).

Furthermore, a study for the European Parliament on the provision of SGEI highlights that there are growing trends for keeping the provision of SGEI at local control. The study gives examples from actions in Malta and regions in Germany, where in order to "increase efficiency and better address the local communities' needs, municipalities and regions slowly move towards localised production and control of some SGI provisions" (Gløersen et al., 2016, pp.73).

Given the importance of LRAs in the provision of SGEI, their involvement in the reporting, whether in drafting, providing information or even being consulted needs to be taken into account. The degree of LRA involvement may in some cases be strengthened or become more explicit with a view to increasing awareness of the EC with regard to the difficulties that LRAs face in the implementation of the Decision and the Framework on SGEI. In this respect, while reporting the numbers of payments made is rather simple, the details on entrustment acts and compensation methods and calculations call for a stronger involvement of relevant LRAs and possibly even of the service providers entrusted by them so as to provide detailed information that is valuable also for other Member States and LRAs.



## **4 Problems and difficulties in complying with the SGEI Decision and SGEI Framework**

Article 9 (c) of the SGEI Decisions and point 62 (c) of the SGEI Framework request Member States to report on difficulties in the application of these documents. Following this requirement, the majority of the Member State reports for 2015-2016 address the difficulties under the "other issues" or "miscellaneous" sections of the report (see the reporting template as discussed in Chapter 2 and presented in Annex 2). The reporting on difficulties includes references on problems and challenges in complying with the application of the SGEI Decision, the application of the SGEI Framework, as well as an open question for any other comments on the application of the State aid and the SGEI package. The specific issues mentioned in the reporting template are:

- Drawing up an entrustment act (Article 4 of the SGEI Decision);
- Specifying the amount of compensation (Article 5 of the SGEI Decision);
- Determining the reasonable profit level (Article 5 (5)-(8) of the SGEI Decision);
- Regularly checking overcompensation (Article 6 of the SGEI Decision);
- Carrying out a public consultation (point 14 of the SGEI Framework);
- Complying with public procurement (point 19 of the SGEI Framework);
- Determining the net avoided costs (points 25-27 of the SGEI Framework);
- Determining the reasonable profit level (points 33-38 of the SGEI Framework).

Twelve out of the 28 Member State reports submitted in 2016 specify issues encountered in the application of the SGEI Decision and/or SGEI Framework or gave other comments. Some of these comments indicate challenges that were experienced, but did not cause any issues. This is the case in the Dutch, French and Belgian Member State reports (see the box on the following page). Some Member State reports use the section for problems to formulate questions to the Commission; these concerns and requests are further discussed in the conclusions chapter. Ten out of the 28 Member State reports mentioned that no issues were experienced. For example, Sweden reported that no difficulties were encountered and specifies that the template for the 2015-2016 Member State report was of help in structuring the report. In the remaining six reports (Croatia, Denmark, Finland, Greece, Lithuania and Cyprus), no reference to any difficulties was found.

## 4.1 Reporting challenges

**In most cases, the reported difficulties are not specific to certain SGEI or LRAs.** The reported difficulties are only in a few cases specific to the SGEI or experienced specifically by LRAs. Beyond the reports exclusively drafted by the authorities respectively responsible for the SGEI under question, the reports from the Netherlands and Romania include clearly specific difficulties experienced by LRAs. In the case of the Netherlands the regional authorities Gelderland and Zeeland and the local authority of Alkmaar are specifically mentioned with respect to difficulties they encountered. Similar is the case of Romania, where the Iasi County is specifically mentioned considering difficulties.

As regards other Member States reports that have reported on difficulties, it is not always clear what type of authority (whether it is an LRA or not) or which specific SGEI is concerned. However, it can be assumed that possibly the difficulties mainly concern LRAs, as these are, in the majority of cases, the principal SGEI providers. The box below illustrates different aspects of SGEI challenges.

### **Surmountable challenges**

The Member State report of Belgium (Flanders) states the difficulties with the calculation of reasonable profits in relation to childcare and social labour market SGEI. This was less a problem but it rather raised questions and developed a sense of uncertainty among policy-makers and services providers.

The municipality of Alkmaar that supported services focusing on care and social inclusion of vulnerable groups, states in the Member State report of the Netherlands that the full application of the requirements of the SGEI Decision was quite demanding, but not insurmountable. This applies in particular to drawing up the entrustment act, specifying the amount of compensation and determining the reasonable profit.

The Member State report of France states that the SGEI Decision requirement of drawing up the entrustment act for health establishments was not difficult, but increased the administrative costs and burden. In this case, the French authorities assume the publication of more than 3,000 resources contracts and multiannual objectives an unnecessary burden without clear added value, as the financing allocation to health establishment is mainly covered by the application of laws and regulations.

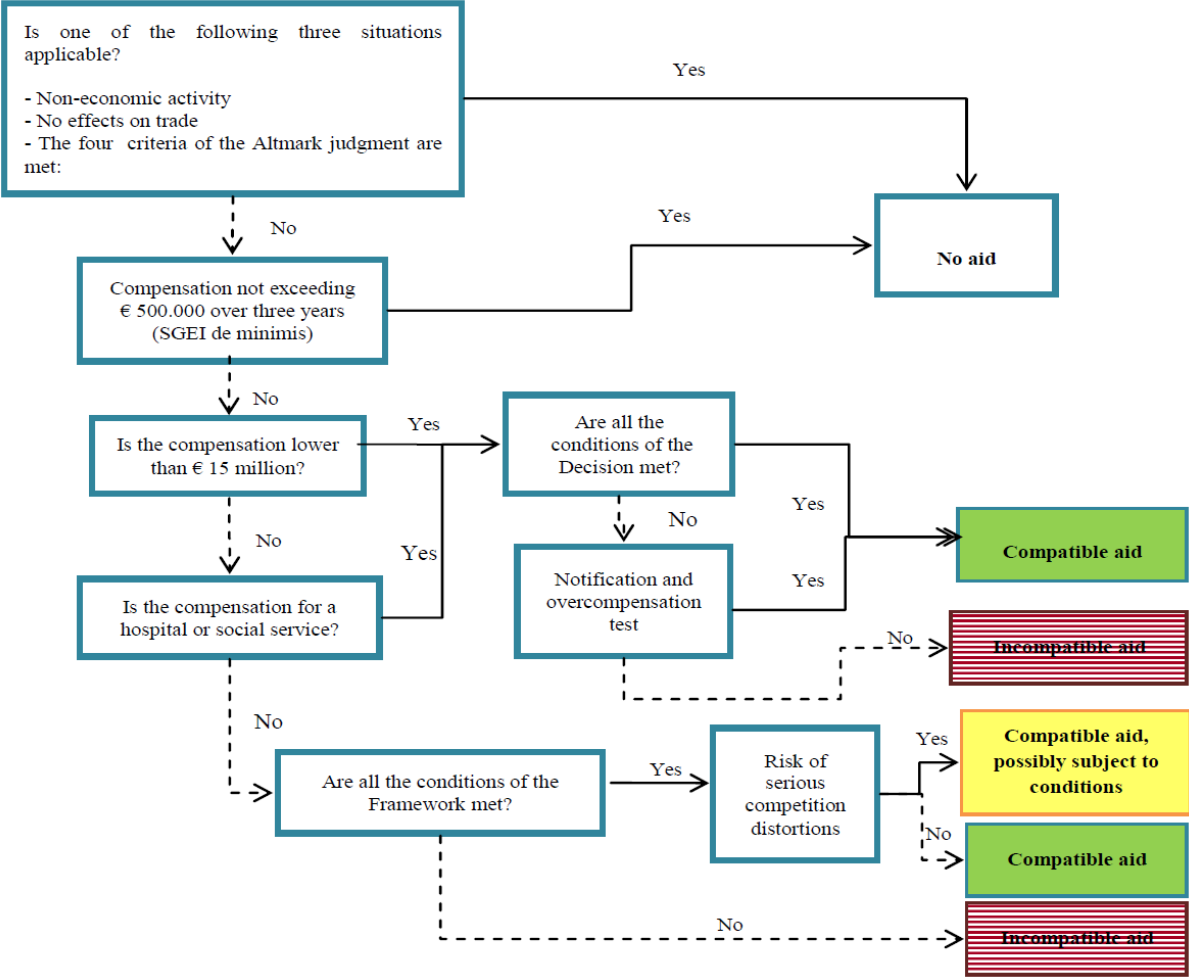
Source: Member State report Belgium (Flanders), 2016, pp. 46; Member State report the Netherlands, 2016, pp. 93; Member State report France, 2016, p. 35.



## 4.2 Origins of problems and challenges

A more detailed analysis of the complete reports allows identifying some of the most prominent origins of challenges and difficulties in complying with the SGEI Decision and SGEI Framework. They go beyond those reported under the "other" or "miscellaneous" sections of the Member State reports. Figure 2 shows the difficulties that may occur at different stages of the processes that national, regional and local authorities have to apply in relation to State aid, the provision of SGEI and the determination of compensation to SGEI.

**Figure 2 Logical steps for determining whether the SGEI legislative package applies to public service compensation**



Source: European Commission (2013, p. 29).

Authorities may already experience difficulties in the first steps of the flowchart as well as in other stages concerning the implementation of the SGEI and monitoring and reporting. The following possible difficulties have been deduced from previous study reports and analysing the Member State reports 2015-2016. Some of the difficulties may be overlapping:

- in applying the Altmark criteria;
- in differentiating economic from non-economic activities;
- in calculating the compensation;
- in determining reasonable profit;
- regarding the definition of SGEI;
- regarding the entrustment procedure;
- regarding the choice of the most suitable aid instrument;
- regarding monitoring to avoid overcompensation;
- in reporting on SGEI subject to the SGEI Decision and SGEI Framework.

The EC guidance has been prepared to clarify difficulties experienced by public authorities in the Member States, civil society organisations and other organisations directly involved in the provision of SGEI. This guidance addresses two main questions:

1. When is the compensation of an activity considered as State aid?
2. When is State aid allowed?

This guidance shows once again that the concepts of SGEI, compensation and compatible aid are not clear for all relevant authorities dealing with SGEI despite the adoption of the legislative package in 2012 that aimed, among things, to provide more clarity. Thus, the following observation may not be surprising: "Complying with Altmark is a very difficult task. Bearing in mind, however, that the first three Altmark criteria and the requirements of the 2012 SGEI package are identical, it is better for public authorities to assume that the compensation they grant is State aid rather than attempt the largely impossible feat of scaling the heights of mount Altmark" (Nicolaidis, 2014).

Experience of the past years has shown that there is need for further clarification beyond the EC Guidance. This has been addressed with the Notice on the Notion of State aid (European Commission, 2016). This notice focuses on clarifications of:

- when an entity is an undertaking;
- the imputability of the measure to the State;
- the financing from State resources;
- the occurrence of granting of an advantage;
- the selectivity of a measure;
- the effects of a measure on competitiveness and trade.

Since the Notice was not readily available when the Member States were asked to report their SGEI activities in 2016, it remains to be seen whether some of the clarifications of the Notice, which are also relevant to the provision of SGEI,

will help LRAs in the future or create further confusion in relation to the rules applicable to a given case. In the Notice the Commission provides, *inter alia*, specific clarifications on how it intends to assess the State aid nature of the funding of the construction of infrastructure sector-by-sector: airport, port, broadband, energy, research and railway infrastructure, roads, water supply and waste water networks.

### 4.3 Overview of actual problems, difficulties and gaps reported

Table 1 displays the main types of difficulties reported in the 2015-2016 Member State reports on the application of the 2012 SGEI Decision and SGEI Framework. The main difficulties in the reports have been grouped according to selected types of SGEI in the columns and the main difficulties encountered in the rows. The first three columns entail the specific sectors addressed by the SGEI Decision. The majority of reports do not only include SGEI in the fields of medical care provided by hospitals (SGEI Decision art. 2(b)), social needs (SGEI Decision art. 2 (c)) and air and maritime links (SGEI Decision art. 2 (d)) but also other sectors of SGEI provision. In Table 1, the group "other/undefined" entails both difficulties reported for SGEI for which the compensation does not exceed EUR 15 million (SGEI Decision art. 2 (a)) as well as the SGEI falling under the SGEI Framework. Only difficulties in the Member State reports of France and Ireland clearly refer to the SGEI Framework.

**Table 1 Summary of main difficulties reported in the Member State reports for 2015-2016**

|                                   | Hospitals                         | SGEI meeting social needs | Air & Maritime links  | Other / undefined                     |
|-----------------------------------|-----------------------------------|---------------------------|-----------------------|---------------------------------------|
| When applicable / what to report? |                                   |                           |                       | UK (Northern Ireland), Poland         |
| Entrustment / public procurement  |                                   | The Netherlands (Zeeland) |                       | Ireland                               |
| Economic / non-economic           |                                   |                           |                       | Latvia, Belgium (Flanders)            |
| Compensation calculation          |                                   | Czech Republic            | Romania (Iasi County) | Czech Republic, Poland, France        |
| Reasonable profit                 | Belgium (Flanders)                | Italy                     | Romania               |                                       |
| Other                             | France, The Netherlands (Alkmaar) | Czech Republic            | Italy                 | Germany, The Netherlands (Gelderland) |

Source: Spatial Foresight, based on SGEI Member State reports 2016.

In many cases problems are encountered or reported generally, without making reference to the type of SGEI in which the problems were encountered. This may be due either to the procedures applied when drafting the Member State report or to the character of the problem, i.e. referring to cross-cutting problems not specific to a certain sector or SGEI. There are, however, a few specific cases to be observed.

### **4.3.1 Applicability of the SGEI legislation**

As illustrated above in Figure 2, the applicability of the SGEI legislation may need several steps of assessment and depends, inter alia, on the sectors in which public service provision takes place.

**The provision of SGEI as regards maritime and air links poses specific challenges.** Italian authorities encountered difficulties in the implementation of the SGEI Decision requirements namely in relation to the need to ensure compatibility/consistency of the framework set out in the SGEI Decision with other relevant EU regulatory frameworks applicable to air links and airports. In particular, aligning the timing of procedures following regulation on common rules for the operation of air services (European Parliament and Council of the European Union, 2008) and the SGEI Framework (European Commission, 2011c) is challenging (Member State report Italy, 2016). Compatibility of possible State aid elements is not addressed in this regulation, either in the SGEI Communication or the Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States by transport operators from other countries (maritime cabotage) (Council of the European Union, 1992) and thus both regulatory frameworks apply even though they might not be aligned (Pesaresi et al., 2012).

Similar specific difficulties in the case of medical care provided by hospitals or SGEI meeting social needs result mainly from the differentiation between economic and non-economic activities. These difficulties are discussed in more detail in section 4.3.5, which centres on SGEI that are of particular interest to this report.

**The application of the Altmark criteria poses challenges for Member States in their process of determining what to report pursuant to the 2012 SGEI Decision and SGEI Framework.** Polish authorities note that organisers of the services reported problems related to the correct definition of the services. They hinted at difficulties distinguishing between public services which are delivered as an economic activity and those which are not (input from Polish stakeholders).

Theoretically, the Altmark criteria should provide clarity in determining the type of activities and payments that are compatible with the State aid regulation; i.e. cases in which compensation for public services does not constitute State aid. However, authorities from Northern Ireland describe the close resemblance between the Altmark criteria and the SGEI Decision as a challenge to determining which type of activities should be subject to the SGEI Decision or SGEI Framework (Member State report United Kingdom, 2016).

According to the Flemish authorities, including activities other than meeting social needs, medical care or air and maritime links in the reporting on the application of the SGEI Decision and SGEI Framework has limited added value. They specify that for the SGEI under the headings of water supply, waste collection and nature-related activities, national and regional legislation is sufficiently clear and respects EU competition law. Following the Altmark criteria, the Flemish Authorities assume therefore that these types of SGEI are neither subject to the SGEI Decision nor to the SGEI Framework. For example, in the Flemish case the provision of water supply is based on a natural monopoly or is quantitatively and qualitatively entirely dependent on the public initiative. The collection of waste from households can be considered a typical core task of government, for which the public initiative and government control is indispensable for reasons of the general interest. Waste collection is a service for all citizens and, as such, cannot be subject to normal market forces, in the interest of hygiene, environmental policy and economic reasons (Member State report, Belgium (Flanders), 2016, pp. 33).

Cruz Yábar (2013) goes even further and argues for negligence of the application of the four Altmark criteria or the 2012 SGEI Decision. Firstly, the restriction of the maximum amount does not apply to medical care provided by hospitals or SGEI meeting social needs, following the SGEI Decision implying that all compensation measures granted to these SGEI do not require public procurement, i.e. referring to the last of the four Altmark criteria. Secondly, implementing these types of SGEI does not require approval of the European Commission. Thus, a mere reporting exercise is required. Thirdly, Cruz Yábar argues that for health care services, the SGEI Decision can be summed up as a formal condition that points out the requirements for a valid and substantial entrustment act and correct calculation of the level of compensation (*ibid.*). For the latter, Cruz Yábar acknowledges that the competent authority should have sufficient capacities. These capacities may, however, be less demanding than those required to understand the application of the Altmark criteria and the following reporting exercise.

### 4.3.2 Entrustment acts

**Drawing up the entrustment act does not pose particular difficulties in itself but it is a source of higher administrative costs and burden.** Authorities from France, Belgium, the Netherlands and Ireland stress that the entrustment of service providers or drawing up an entrustment act can be challenging. These reports conclude that this step in complying with the requirements of the SGEI Decision and SGEI Framework is not a difficulty as such but the requirements defined in the SGEI package increase administrative costs and burden. The French (national) authorities report, for example, that the publication of multiannual objectives and resource contracts (>3,000 contracts) is burdensome and is, according to these authorities, an unnecessary requirement given that the financing allocated to health establishments is mainly covered by the application of other laws and regulations (Member State report of France, 2016). The province of Zeeland mentions the complexity of preparing the entrustment act. Thus, it decided to appoint external expertise for its preparation (Member State report the Netherlands, 2016). The latter is thus an example of a LRA showing that the additional capacity requirements imposed are more challenging for small administrations, like many LRAs, than for large (national) authorities.

### 4.3.3 Relation to other legislation

**Difficulties in assessing the position of the Almunia package in relation to other (national) legislation or EU regulatory frameworks considering State aid.** The German Member State report provides examples of the complexity and possible inconsistencies between different documents to be taken into account, making it difficult to assess which rule is to be applied. The German Member State report (Member State report Germany, 2016, pp. 29-31) formulates questions on the validity of different rules as regards:

- the relation between point 68 of the SGEI Communication and point 93 and point 230 of the notice on the notion of State aid (procurement for which only one bid is submitted);
- the inconsistency between article 6(1) of the SGEI Decision (need for ex-post control of actual costs) and the compatibility rules with State aid under the General Block Exemption Regulation (GBER) (European Commission, 2014).

The European Centre of Employers and Enterprises providing Public Services and Services of general interest (CEEP) argues for the provision of more coherence between different frameworks on State aid by the EC. In particular,

the Almunia package and the GBER should be reviewed and simplified for the provision of SGEI (CEEP, 2016).

Another example in this context is the application of point 14 of the SGEI Framework requesting Member States to show proper consideration to the public service needs by way of a public consultation or other appropriate instruments, which caused difficulties in relation to national Irish legislation. The added value of these consultations is questioned in relation to the tasks of the elected representatives following Irish legislation. Outcomes of the public consultation may reflect the interest of the public differently from what elected representatives might do (Member State report Ireland, 2016, pp. 14).

#### **4.3.4 Time constraints**

**Time constraints to prepare the reports in the format developed by the EC mentioned as an important difficulty among other reported difficulties.** Authorities from the Netherlands and the Czech Republic raised the issue of the changed format promoted by the European Commission for the 2015-2016 reports. The current standard format is more detailed than the previous format and assumes that the authorities providing the SGEI have all information easily available. The Member State report of the Czech Republic specifies this issue. Czech authorities already started preparing the report based on the 2013 format when they received the letter from the Commission with the amended reporting format. The collection/verification/correction and processing of the delivered data is a very time-consuming process. When the report format is sent late, the deadline set for its submission in the SGEI Decision can only be met with great difficulty (Member State report Czech Republic, 2016, pp. 4).

The various problems may be further exacerbated if different regional legislations are considered, as may occur for instance in the field of social housing. If different regions apply different terminology, definitions etc., the compilation of a Member State report can become extremely time consuming (input from stakeholders from the Marche region).

The following two sections of this chapter focus on problems and challenges most often reported in relation to hospitals and social services.

#### **4.3.5 Economic/non-economic nature**

Article 106(2) of the TFEU states that undertakings entrusted with the operation of SGEI shall be subject to rules of the treaty, in particular rules on competition. It is, however, not always evident what should be considered as an undertaking, given that many public authorities provide SGEI and different State aid

exemptions exist. The case-law of the ECJ interpreted and defined the notion of "undertakings". Moreover, the Commission published on 19 May 2016 its Notice on the Notion of State aid as referred to in Article 107(1) TFEU, where, inter alia, it recalls the definition of the notion of "undertaking" developed by the ECJ case-law with references to concrete cases (European Commission, 2016).

The ECJ defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way they are financed (European Commission, 2012a, point 9). The undertaking, inter alia, thus includes public entities financed through public money. The determining factor relevant for the SGEI package is whether the undertaking performs an activity of an economic nature. The problem of defining the economic nature of an activity is further aggravated when an undertaking performs different activities, which then in turn also affects the calculation of compensation (following section 4.3.6).

**In practice, distinguishing between economic and non-economic activities is not straightforward for LRAs.** The aim of the Almunia Package was to better differentiate between social and economic activities of SGI. But clear definitions for such differentiation are lacking. This has not been solved by the Notice on the Notion of State aid (European Commission, 2016) either, as it partially lacks reference to certain social services (e.g. social housing) and is not always specific regarding characteristics that may help to distinguish economic and non-economic activities. In general, the statement of 2007 still prevails: "In practice, apart from activities in relation to the exercise of public authority, to which internal market rules do not apply by virtue of Article 45 of the EC Treaty, it follows that the vast majority of services can be considered as "economic activities" within the meaning of EC Treaty rules on the internal market (Articles 43 and 49)" (European Commission, 2007 p. 5).

The SGEI Communication provides different examples and criteria of what could be considered an economic activity stemming from ECJ case law (European Commission, 2012a, points 16-30). Only examples are provided, as the presence of a market may differ between Member States and over time. Member States, including LRA, would need to further define the distinction between economic and non-economic activities depending on the political and economic specificities of the Member States. "Moreover, due to political choice or economic developments, the classification of a given service can change over time. What is not a market activity today may turn into one in the future, and vice versa." (European Commission, 2012a, point 12). The existence of a 'market environment' is crucial for the assessment of the economic nature.



**For the services addressed by the SGEI Decision it is particularly difficult to distinguish between economic and non-economic activities.** It is often a challenge for LRAs to determine whether activities for medical care as well as SGEI meeting social needs could have been performed as economic activities, if they lack examples illustrating the criteria that could help them identify economic activities relevant in their area or from elsewhere in Europe.

According to Pesaresi et al. (2012) the scope of the SGEI Decision is too broad. First the SGEI Decision applies to hospitals and social services regardless of the amount of aid. Second, the list of SGEI addressed by the SGEI Decision is too extensive without further specification. They assess in particular the notion of vulnerable groups in relation to care and social inclusion (article 2(c)) as being unspecific. For example, the SGEI Decision does not make any distinction between different types of childcare. However, to be included in the scope of the SGEI Decision, childcare needs to be a SGEI. This means that childcare provided without any public service mission cannot receive public service compensation on the basis of Article 106(2) TFEU. However, where a public service mission is imposed and where the conditions of the SGEI Decision are fulfilled, childcare can receive public service compensation, whether it is a collective or individual service. The same applies to long-term care and other social services (Pesaresi et al., 2012).

Housing Europe<sup>7</sup> illustrates the difficulties in applying the notion of SGEI provision to social housing only to disadvantaged citizens or socially less advantaged groups. According to Housing Europe, this additional requirement in the SGEI Decision shall be discarded, as it clashes with the subsidiarity principles mentioned in article 1 of the SGEI protocol of the TFEU. They argue that the SGEI Decision definition does not reflect current needs since it is based on 2005 Irish case law.<sup>8</sup>

Not least because of these difficulties, the Slovenian report includes a request to the EC for clearer instructions concerning the criteria for determining the economic nature of public services in the area of social security and education, and for determining public institutes as undertakings when, together with non-

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<sup>7</sup> Housing Europe is the non-profit European Federation of Public, Cooperative and Social Housing. It is a network of 44 national and regional federations gathering 43,000 housing providers in 24 countries. See <http://www.housingeurope.eu/>.

<sup>8</sup> The information derives from the position paper and letter from Marc Calon, president of Social Housing. The Commissioner for Competition Ms Vestager replied to these concerns mentioning that Member States do not have to notify the EC under the existing State aid rules. The EC's role is, in any event, limited to verifying that Member States do not make manifest errors in the definition of social housing as a SGEI, and that they comply with the basic conditions of the SGEI State aid rules, notably the necessity of avoiding overcompensation. In exercising that role the EC does not impose on Member States a specific notion of when social housing can represent a SGEI. The reply from Commissioner Vestager, Social Housin's position and letter on better EU rules for better SGEI in housing are available through <http://www.housingeurope.eu/resource-657/better-eu-rules-for-better-services-of-general-interest-in-housing>.

economic activities, they offer related services for payment (Member State report Slovenia, 2016, p. 15).

Similar to the SGEI Communication, the SGEI Guidance also provides examples for possible ways to differentiate economic and non-economic activities (European Commission, 2013, pp.30). In the case of social action centres, the Guidance explains the following: "If a center 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 center is supplying services in a market and is thus performing an economic activity within the meaning of the competition rules" (European Commission, 2013, pp.35).

In their study on support for effective use of European Structural and Investment Funds (ESIF) for health issues, Ernst & Young (2015) examined when ESIF investments in the health sector have to comply with EU State aid rules. Based on European Court Judgements, they conclude that the level of integration of the care provider into the national health system can determine whether the provider is subject to State aid or not. Based on this, they propose the following distinction for economic and non-economic activities.

- **Economic:** emergency transport services and patient transport services, medical services provided in hospitals or elsewhere, hospitals and other providers that offer services for remuneration, health care services provided by independent doctors and other private practitioners for remuneration at their own risk, independent pharmacies;
- **Non-economic:** organisation of public hospitals, an integral part of the national health service and almost entirely based on the principle of solidarity, and activities that in themselves could be of an economic nature but are carried out for the purpose of providing another non-economic service (Ernst & Young, 2015 p.7).

Especially the formulation of non-economic activities in the study mentioned above illustrates (a) the difficulty to find simple standard definitions that may be used for other sectors as well and (b) the differences that are relevant across Member State and over time. Finally, it leaves again room for manoeuvre by referring to services '*almost entirely* based on the principle of solidarity'.

### **Applicability of an economic logic to SGEI with social needs**

The Member State report of Belgium (Flanders), addresses the issue on whether the applicability of an economic logic with concepts such as reasonable profits

and rate of return on capital should be pursued for services of general interest meeting social needs. The Flemish authorities assume these concepts to be applicable in a business context but doubt their usefulness when subsidising for example training courses or reintegration measures for job seekers.

The friction between the social objectives and the economic framework create uncertainty among the local and regional authorities responsible for SGEI and among the providers of the SGEI.

Source: Member State report Belgium (Flanders), 2016, p. 46.

### 4.3.6 Calculating compensation and avoiding overcompensation

Compensation of SGEI is not State aid when it meets the criteria set out by the ECJ in the Altmark judgement. Even in this case, however, compensation should not exceed what is necessary to cover the net costs incurred in discharging the public service obligations, including a reasonable profit. Furthermore, the parameters must be established in advance in an objective and transparent manner. In accordance with the reporting obligations in the SGEI Decision and SGEI Framework, Member States should describe the compensation methods per SGEI (see Chapter 2). Thus, calculating the compensation remains relevant despite the absence of State aid pursuant to the Altmark criteria.

Cruz Yábar in his assessment on State aid and the provision of health care argues that although exempted from individual notification to the EC, SGEI falling under the SGEI Decision and SGEI Framework are still much controlled by EC on the level of compensation paid and the prevention of cross-subsidisation to different activities than those public services directly related to health care (Cruz Yábar, 2013).

**The SGEI Decision and SGEI Framework provide different methods to calculate compensation levels** as they target different types of services and partially different scales of aid. The SGEI Framework favours the net avoided cost method as the most accurate method for determining the costs of a public service obligation (Point 27 of the SGEI Framework). On the contrary, Article 5 of the SGEI Decision promotes calculating the compensation by comprising all costs incurred in operating the SGEI, following general accounting costs (art. 5(3)). This is the so-called net cost method. Alternatively, compensation may be calculated as the difference between the net costs for the undertaking of operating with the public service obligation and the net cost or profit of the same undertaking operating without the public service obligation (art. 5(2)), which refers to the net avoided cost approach. This may increase confusion for LRAs applying the different compensation calculation methods and looking for suitable justification of the method selected. This is further complicated by

differentiating between the use of expected costs and revenues vs. actually incurred costs and revenues as outlined in the SGEI Framework.

Since the SGEI Decision targets economic activities, the revenue has to be taken into consideration. If the undertaking provides multiple activities such as special or exclusive right, profits gained from these activities need to be included in the calculation of a 'reasonable profit'. The SGEI Decision provides a definition of such a reasonable profit in article 5(5). Reasonable profit "means the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the service of general economic interest for the whole period of entrustment, taking into account the level of risk." (SGEI Decision, Art. 5(5)) This entails that every authority responsible for the SGEI concerned needs information on the rate of return for a typical undertaking. The analysis of the Member State reports 2015-2016 shows that not every authority holds this type of information. In particular, LRAs might lack the capacity to collect this type of information, as illustrated by the example for Iasi County in Romania in the box below.

#### **Lack of information to calculate the compensation**

The Iasi County Council in Romania acknowledges several difficulties in the calculation of compensation for services supporting the local airport. For the local authority it is difficult to make comparisons between the economic activities supported at their local airport and activities by typical private undertakings not operating under the public authority of the county. This fact renders proper calculation of the reasonable profit a difficult task, in particular when considering the rate of returns following article 5(7) of the SGEI Decision. It is difficult for the county council to acquire an insight into the rate of returns achieved under similar types of contracts awarded under competitive conditions.

Source Member State report Romania, 2016.

**Calculating compensation including reasonable profits are often reported as a difficulty.** Following Table 1, a variety of countries report difficulties regarding compensation, including overcompensation and reasonable profit. Authorities experience these requirements of the SGEI Decision and SGEI Framework mainly as difficulties due to a lack of information to determine the compensation and reasonable profits.

**One challenge lies in acquiring the information required to determine a reasonable profit.** Including revenues in the calculation method seems to be difficult in the case of aid having a social character, following the example provided in the French report (see box below). Article 5(4) of the SGEI Decision states that the revenue shall be considered in the compensation calculation

irrespective of the classification of the aid following article 107 of the TFEU. This article of the TFEU details aid that is compatible with the internal market if it entails, for example, aid with a social character, aid to make good the damage caused by natural disasters, or aid to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

### **Lacking comparable data to determine reasonable profits for hospital care**

As described in the report of France, including the revenue in the calculation method and in particular defining the reasonable profit may not always be appropriate. In the French case, this concerns hospital care. In France, it is mainly public establishments and non-profit private establishments that carry out this activity. Therefore, comparative data is absent. According the French authorities, no Member State has defined what reasonable profit means for its hospitals.

Source: Member State report France, 2016, p. 35.

**Acquiring the relevant information to calculate the compensation increases administrative costs.** For the reporting the compensation levels need to be assessed on completeness, and verified and corrected if needed. This demands time and manpower. The amount of administrative costs for the authorities may vary regarding the type of SGEI or whether or not the undertaking only performs economic activities. Furthermore, it requires collecting, verifying and reporting all costs that are in any case compatible State aid. State aid rules on SGEI can be a significant source of administrative and legal uncertainty for public authorities in their tasks of fulfilling SGEI requirements (CEEP, 2016). As regards determining the net avoided cost, the French authorities stress that this method can prove to be highly complex. It is much more difficult to determine the amount of compensation due to the involvement of generating counterfactual scenarios. For the French authorities concerned with the provision of Postal Services falling under the SGEI Framework, making assumptions when generating these scenarios sometimes seem artificial (Member State report France, 2016, pp. 35-36).

Regardless of the calculation method used, LRAs would need to consider multiple aspects (see box below). The collection, verification, possible correction and reporting of many costs requires time and thus sufficient capacity at the LRA.

## **Different aspects relevant for compensation of social services**

The Marche region has outlined how different elements contribute to the difficulties related to the compensation calculation (input from stakeholders in the Marche region). This includes the:

- identification of the level of "reasonable profit";
- modalities to manage the "separate accounting" for the fulfilment of the service obligations by the entity in charge, in particular in the case of social services;
- definition of the criteria for the calculation of "overcompensation" in a common way among the various Italian regions; etc.

Czech authorities describe having experienced difficulties calculating the level of compensation when different actors and activities should be considered: for example, when calculating the compensation for a service that has both residential and field forms. The residential form is calculated on the basis of costs per bed, while the field form is calculated based on the number of primary care staff. Other examples highlight the difficulties incurred if different financing sources are combined, more than one service is provided by the same undertaking or the undertaking deviates from a typical public or private enterprise.

A Czech Member of the CoR highlighted the difficulty in avoiding overcompensation. Due to above complexity in calculating appropriate compensation, often it is difficult to reflect actual costs. This, however, also implies that it is difficult to guard against overcompensation, especially in situations where subsidies are provided through different channels and sources. At the same time compensation payments are often delayed.

Source: Input from Marche region; Member State report Czech Republic, 2016, p.65; Input from Czech Member of the CoR.

Despite the numerous challenges and difficulties that have been identified by LRAs with regard to SGEI provision and reporting, there are also various approaches and methods to solve problems. Those are presented in the following chapter.

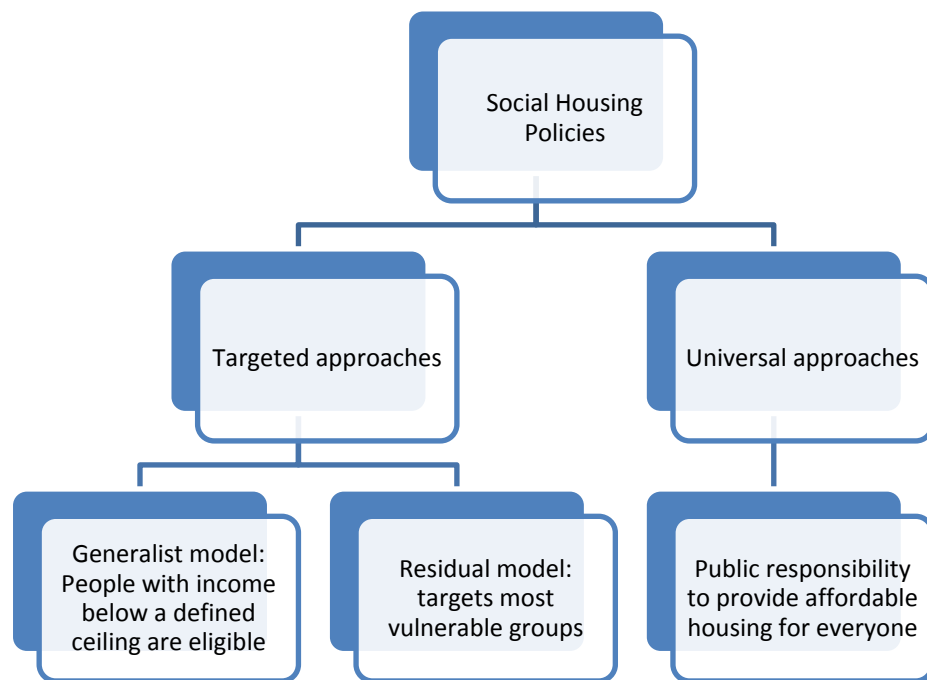
## **5 Methods and solutions to meet the SGEI Decision requirements**

As outlined in the previous chapter, different Member States reported a variety of difficulties and challenges when applying SGEI Decision requirements. Figure 2 in chapter 4 above shows the decision path to identify whether social services constitute economic activity or not. While the decision tree supports the identification of payments potentially considered as State aid, it does not provide insights into the actual approaches applied and solutions found to meet the requirements in the specific cases, taking into account the individual regional and national frameworks. Other key challenges reported in the Member State reports and in stakeholder inputs refer to different aspects of calculating an adequate compensation that reflects a reasonable profit and avoids overcompensation. This chapter will focus on these two principal challenges and highlight the approaches taken by different Member States and LRAs by looking into two social policy fields mentioned in numerous reports, i.e. social housing and health care.

### **5.1 Challenges to find solutions to meet SGEI legal requirements**

Social housing and health care are examples for historically developed social services for which the governance and framework conditions differ greatly between countries and regions. These conditions as well as cultural and institutional traditions directly affect when and how Member States and LRAs define social housing or health care as SGEI and how they calculate compensation payments. Figure 3 illustrates the variation of social housing policy approaches in the EU.

**Figure 3 Principal social housing policy approaches**



Source: Spatial Foresight, based on Gløersen et al. (2016, pp. 29).

Besides these differences in the focus of SGEI for social housing, there are different national systems as regards the governance structure, types of service providers, variation of beneficiaries e.g. due to different ceilings and different funding agreements (Gløersen et al., 2016, pp. 29-30).

The difficulties relating to the definition and the scope of social housing as SGEI result to a large extent from the SGEI Decision which allows for notification exemptions only for "housing for disadvantaged citizens or socially less advantaged groups, which due to solvability constraints are unable to obtain housing at market conditions" (SGEI Decision, recital 11). If a Member State adopts a broader definition of social housing as SGEI, the Decision does not apply and the Member State in question will have to notify its definition and the aid scheme in order to enable the Commission to verify the absence of manifest error in the definition of the SGEI.

This restrictive definition of social housing, has led to problems and disputes in some Member States, especially for those applying a universal approach to social housing (IZA - Institute for the study of Labour et al., 2013, pp. 39-40). While striving for a harmonised definition of social housing as SGEI may be beneficial for various reasons, it may be rather difficult to realise such a harmonisation, given the differences indicated between Member States (IZA - Institute for the study of Labour et al., 2013, pp. 42-45). Instead, such an



approach may be counterproductive in relation to the social objectives originally targeted with social housing policy.

In the same line, health care systems differ considerably between EU Member States. As outlined in the box below, findings of the Smits and Peerbooms ECJ case-law and the decision practice of the European Commission illustrate the challenge of finding a clear-cut definition of health care as SGEI. This is not only a matter of the type of provider but a matter of the relation with other economic activities and the basic principles applied for providing the health service.

### **The challenge of finding a clear-cut definition of health care as SGEI**

"Whilst the management of health care insurance funds pursues an exclusively social, non-economic, objective when its functioning is guided mainly by the principle of solidarity, compulsory participation and control by the State of the benefits of the activity, the Commission and the Court of Justice have expressly refused to follow this approach in relation to the provision of health care services [...]. The Commission referred in its Decision to the Smits and Peerbooms judgment of the ECJ, which identified health services provided in hospitals as an economic activity in the realm of the free movement of services, regardless of how the costs were distributed between the end-users of the services and the sickness insurance funds ...

[...] it considered that the Commission was right when it distinguished between the management of the national health systems, carried out by public bodies vested with prerogatives of public power, and the provision of health care services in hospitals, which is an economic activity regardless of the role played by the principle of solidarity when carrying out these activities and even when the costs are partially or totally born by the public authorities. [...]

In principle, therefore, it should be considered that a hospital, or rather its operator, is an undertaking when it provides health care services, also in those cases in which the latter are not paid for by those who directly benefit from them and/or when it acts in accordance with the principle of solidarity. However this remains an open issue, taking into account the limited number of precedents, and the current status quo might change in future decisions by the Commission and the EU Courts."

Source: Cruz Yábar (2013, pp. 6-8).

While the above indicated the principal background to explaining the variety of approaches taken by Member States and LRAs in the fields of social housing and health care, the following sections will look more precisely into the variety

of methods and solutions applied to meet the requirement of the SGEI Decision as reported in the Member State reports 2016.

## 5.2 Identification of relevant social services

The identification of the relevant services to be covered under the SGEI Decision and SGEI Framework is a central element of the Member States' reporting exercise. For each service identified as SGEI, the corresponding section in the Member State report requires an explanation of types of services that are subject to the SGEI Decision or Framework. The Member States apply different approaches to cope with this requirement (see Table 2).

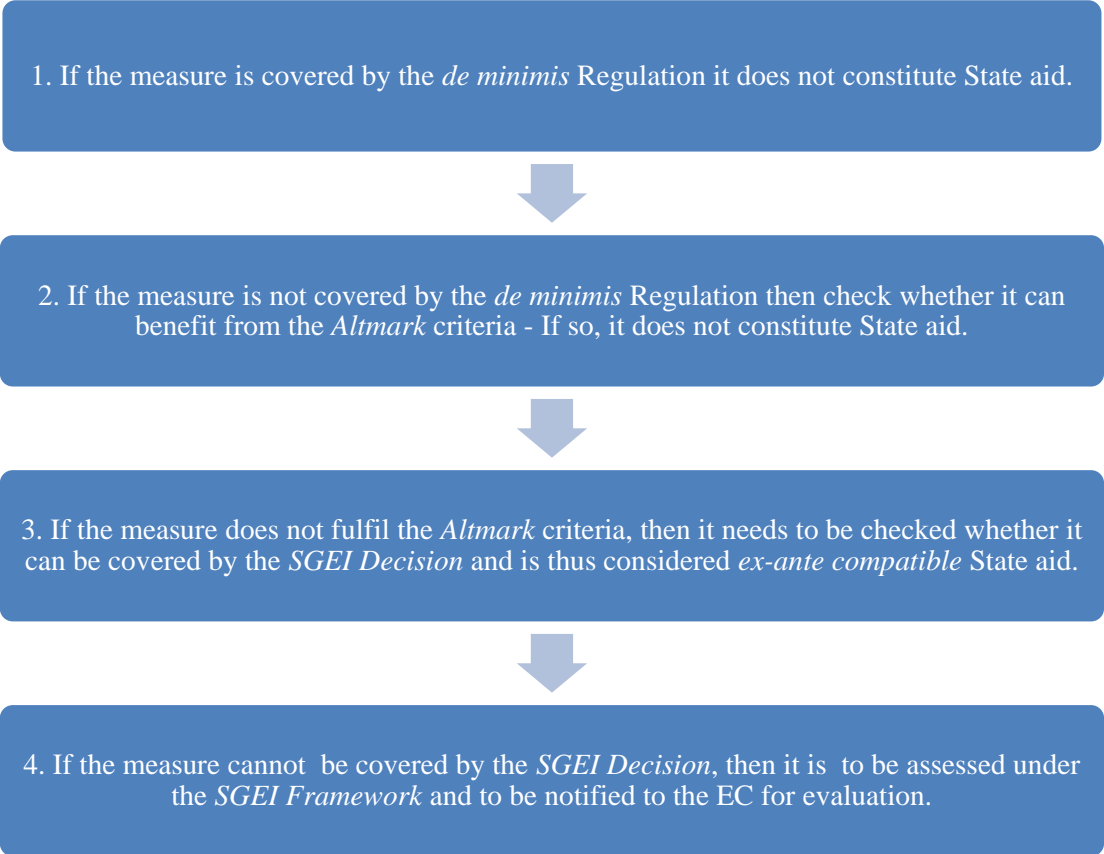
**Table 2 Examples of solutions applied to facilitate delimitation of selected social services as SGEI**

|  | Hospital / health care               | Social housing                    |
|--|--------------------------------------|-----------------------------------|
| Reference to national legislation                                    | Belgium, France, Slovakia, Spain     | France, Poland                    |
| Lists of types of services and / or further defining characteristics | Ireland                              | Belgium, Finland, France, Germany |
| Lists of types of services that have been entrusted                  | Germany, Netherlands, Latvia, Sweden |                                   |
| Lists of types of services without further indications               | Czech Republic                       | Spain                             |
| Mentioning SGEI without further explanation                          |                                      | UK                                |
| Explanation why not considered as SGEI                               | Denmark, Italy, Slovenia             | Latvia, Slovenia                  |

Source: Spatial Foresight, based on SGEI Member State reports 2016.

Quite a number of Member State reports refer to their national legislation, which then further details the characteristics of the respective social service that justify the qualification of the service as economic activity. This is presented with more or less detail in the different MS reports. Similarly, if not only the types of services but also relevant defining characteristics are listed, the level of detail varies considerably between Member State reports. The following figure may provide additional guidance on how to assess more effectively the economic character of a social service. As compared to the approach illustrated in Figure 2 (chapter 4) the approach displayed below has a different starting point, which may be easier for LRAs to access, after identifying the economic character of the service in question.

**Figure 4 Logical steps to assess the State aid nature of a social service**



Source: Based on Buendia Sierra and Panero Rias (2013, p.132).

Furthermore, differences in the level of detail of the definitions of social services as SGEI are also visible between different types of social services within one Member State report. This is especially obvious when apparently different authorities were responsible for drafting the sections on different types of services.

**Table 3 Use of typical characteristics as an approach to facilitate identification of social services as SGEI**

|   | Hospitals / health care | Social housing |
|---|-------------------------|----------------|
| Types of activities                       | ✓                       | ✓              |
| Characteristics of institutions entrusted | (✓)                     |                |
| Definition of quality standards           | (✓)                     |                |
| Characteristics of target groups          |                         | ✓              |
| Types of support granted                  |                         | ✓              |

Source: Spatial Foresight, based on SGEI Member State reports 2016.

Including characteristics of the target groups in the description of relevant services seems to be specific for social housing services and can be linked to past disputes about the targeting of social housing and its implications for these services to qualify as SGEI (see introduction to this chapter). This may also explain why especially the target groups are included in many Member State reports when social housing is defined as SGEI.

As regards the identification of social services as SGEI, two other aspects are particularly interesting:

- Several Member State reports contain sections that were drafted by different authorities, depending on their responsibilities (see Chapter 3). This includes, inter alia, reports compiled by contributions from both national authorities and LRAs. Hence, in some cases, the corresponding SGEI information only relates to the respective territory of the LRA. Examples are the Spanish and Polish Member State reports with respect to social housing<sup>9</sup>. In both cases, one region or municipality respectively is included in the Member State reports that describe the provision of social housing as SGEI. This may raise the question whether other LRAs have similar entrustments in these countries or whether these are special cases in the respective Member States.
- Many Member State reports do not list either health care and/or social housing as SGEI. In the majority of Member State reports this is not further explained, since it is not compulsory to provide information on social services if not identified as SGEI. Nevertheless, the few cases that explain why the Member States do not consider a social service to be subject to the SGEI Decision can be helpful for providing hints about the characteristics used to define social services as SGEI. The box below illustrates this with two examples.

### **Social services not considered as SGEI**

The Member State report of Denmark outlines with respect to hospitals that their services are not subject to the SGEI Decision because "the Danish health service is publicly run and public expenditure on health is financed via taxation. In Denmark, an individual citizen's financial status, connection to the labour market and personal insurance situation have no relevance for access to the services of the public health service."

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<sup>9</sup> For social housing see e.g. IZA - Institute for the study of Labour et al. (2013, pp. 51-55). For a comparison across different social services see e.g. Humer et al. (2013, pp. 157-161).

The Member State report of Latvia explains why social housing cannot be considered as SGEI and bases this judgement especially on the fact that the provision of housing through local governments fulfils a social function in their territory for disadvantaged persons not able to find housing on the market.

Source: Member State report Denmark, 2016, p. 9; Member State report Latvia, 2016, p. 7.

### 5.3 Compensation mechanisms for social services

Institutions entrusted with social service obligations are entitled to refunding the net costs incurred including a reasonable profit. Independently of any thresholds, the compensation for social services is to be calculated on the basis of the SGEI Decision, which suggests a calculation according to net costs or alternatively, according to the net avoided cost methodology (SGEI Decision, Article 5).

A review of the methods to calculate compensation payments shows that principally both types of methods suggested by the SGEI Decision are applied. For both social housing and health care, the majority of Member States and LRAs apply the net cost allocation method (see Table 4). In some countries different regions apply different methods or different methods are used for different services within health care or social housing.

**Table 4** Examples of applied compensation methodologies for selected social services as SGEI

|                               | Hospital / health care   | Social housing                              |
|-------------------------------|--|---|
| Net costs allocation          | Croatia, Czech Republic, Germany, Latvia, Luxembourg, Netherlands, Slovakia, Spain, Sweden, UK | Belgium, Czech Republic, Italy, Netherlands |
| Net avoided costs             | Bulgaria   | Germany, Poland                             |
| Net costs & net avoided costs | Belgium  | Finland, UK                                 |
| Other approaches              | Austria, France, Slovakia  | France, Luxembourg                          |

Source: Spatial Foresight, based on SGEI Member State reports 2016.

Some reports do not provide any details on the method or do not even mention them; others are very specific. Member State reports with specific descriptions help to illustrate and understand solutions found for calculating compensation payments and to avoid overcompensation. These solutions may be found at the level of Member States or LRAs.

### 5.3.1 Social housing

In the field of social housing, for instance, the Member State report of Finland provides a very detailed description differentiating between different funding instruments that not only provide information on how the compensation is calculated but also give the rationale for the different approaches chosen (see the box below). Furthermore, the Province of Åland, with a view to addressing its specific needs, has chosen its own approach, which also combines different instruments.

#### **Compensation considerations for social housing – the example of Finland**

##### **Interest-subsidy loans:**

- 80-95% of approved construction, purchase or renovation costs of the project;
- in addition to the self-financing contribution of the borrower, he/she also pays a certain percentage of the interest payable on the loan;
- amount of interest payable by the borrower depends partially on the borrower's own liability but the interest subsidy gradually declines to zero;
- interest allowed to be charged by the lender may not exceed interest typically applied to loans with similar risks and terms;
- the instrument may be supplemented with a State guarantee to overcome chronic shortage of reasonably priced housing in Finnish growth regions.

##### **Grants for improving housing conditions of groups with special needs:**

- require an interest-subsidy loan before an additional grant is approved;
- rented accommodation is suitable for special needs groups and relevant persons have a long-term need for accommodation in their area;
- requirements for grants outlined in legislation;
- beneficiary must adhere to competition and public procurement rules;
- aid paid to the extent required by the fulfilment of the public service obligation imposed on the undertaking;
- amount is based on a case-by-case basis to mirror additional cost for facilities, space, equipment for special needs groups diverging from normal residential building requirements;
- different maximum amounts of grants (10 to 50% of approved construction, acquisition or renovation costs) depend on the needs of the target group.

Source: Member State report Finland, 2016, pp. 11, 15.

The Member State report of Germany provides an example that summarises the typical approaches for the calculation of the compensation. While this does not allow insights into the precise compensation, it is useful to highlight the principal logic applied for the calculations. The boxes below give a few examples to illustrate this case.

### **Summary of typical calculation elements for social housing in Germany**

Each support scheme developed outlines the scheme-specific support conditions that determine the amount of net costs to be paid for compensation in individual cases. These amounts are determined in a way that they balance the economic disadvantage due to the public welfare obligation during the period of a fixed rent and occupancy. Compensation is paid for

- loss of earnings (fixed rent compared with market rent);
- higher expenditure for additional efforts resulting from fixed occupancy;
- maintenance;
- administration;
- possibly higher building costs due to specific needs (e.g. accessible dwellings).

The actual amount of support is defined under consideration of the respective residential market conditions such as land costs, building costs and market rent.

Source: Member State report Germany, 2016, pp.12.

Typical methods used to avoid overcompensation for social housing support include (Member State report Belgium (Flanders), 2016, p.31; Member State report Finland, 2016, p.18; Member State report Germany, 2016, p.13):

- imposing non-profit obligations;
- definition of restrictions on the use and assignment of dwellings;
- definition of very specific public welfare obligations;
- definition of transparency rules in the support notification, such as obligations to provide information, access to documents, property and buildings;
- inspection checks for controlling accreditation conditions.

### **5.3.2 Health care and hospitals**

Although quite a large number of Member State reports identify some health care services as SGEI, only some refer generally to the provision of a wide variety of health services and treatments. There are numerous cases where only very selective health care issues are identified as SGEI. Especially in the case of

very specific health related services as summarised in the table below, sometimes specific needs regarding the compensation calculation methodology arise.

**Table 5 Examples for specific types of health services provided as SGEI and their compensation methods**

|                 | Type of health services considered as SGEI   | Compensation methodology  |
|-----------------|--|---|
| <b>Austria</b>  | Mountain Rescue service  | Compensation can be granted through two ways, either by payment of actual costs after submission of an invoice and supporting documents or bi-annual lump-sum payment based on costs of previous year with evidence provided ex-post. In addition, a ceiling for compensation is defined. |
| <b>Bulgaria</b> | Medical activities outside mandatory health insurance                              | Based on the net avoided cost approach a non-standardised methodology is applied that is approved by the mayor and developed on the basis of the specific internal rules on the operations and organisation of the corresponding municipality.  |
| <b>Sweden</b>   | Occupational health care providers & pharmacy services in sparsely populated areas | Net costs that have a ceiling per employee and per pharmacy respectively. For pharmacies the ceiling varies furthermore depending on the overall revenues, i.e. the higher the revenues the lower the subsidy.  |

Source: Spatial Foresight, based on information from the Member State report Austria, 2016 pp. 2-3; Member State report Bulgaria, 2016, p. 8; Member State report Sweden, 2016 p. 3, 14.

The Latvian Member State report provides the rationale, why health care may be typically compensated based on the net cost allocation methodology: "... it is impossible to apply the net avoided cost methodology due to the fact that the



complicated and correspondingly expensive healthcare services are provided only as services paid by the state, therefore it is impossible to compare the costs.” (Member State report Latvia, 2016, p. 11)

In addition to what is outlined above, examples from the Netherlands, France and Slovakia can be used to illustrate additional approaches for defining appropriate compensation methodologies:

- For determining the compensation amount necessary to cover the costs required to carry out a certain health care services, the Dutch Healthcare Authority carries out a cost study (Member State report the Netherlands, 2016, p. 2).
- Similarly, the French so-called national costs study (étude nationale des coûts – ENC) applies a common methodology to ensure that no overcompensation takes place by allocating the paid amounts using rates resulting from activity-related costs (Member State report France, 2016, p. 5).
- In Slovakia, health care infrastructure is funded from different sources and for different types of infrastructure (e.g. hospitals and polyclinics). Funding for hospital infrastructure coming exclusively from the national budget is calculated by a methodology not further specified but outlined in the respective calls for grant application. Support for health care infrastructure co-financed by ESIF is calculated according to the net cost methodology. (Member State report Slovakia, 2016, pp. 3, 8, 13-14).

Many Member State reports specify that health care compensation is paid based on invoices paid by the service provider. Thus, they often conclude that "there is no possibility of overcompensation, since only the invoices for work actually carried out are paid." (Member State report Spain, 2016, pp. 49).

Although the calculation of a reasonable profit may be crucial for avoiding overcompensation, there are few indications on how this may be calculated. As indicated in Chapter 4, it is instead sometimes pointed out that the request to define a reasonable profit is not appropriate for hospitals, as this activity is usually carried out by either public or non-profit private institutions (Member State report France, 2016, p. 35).

The definition of a reasonable profit, understood as the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the service of general economic interest, is not appropriate for hospital care, given that this activity is mainly carried out by public establishments and

non-profit private establishments. There seems to be no national or EU-wide data base with information on what reasonable profit means for its hospitals.

Usually, the profit is considered reasonable if the return on the capital invested is not higher than the average return in the concerned sector during previous years. An exception to this rule is the calculation of a reasonable profit for hospitals in Asturias as outlined in the box below. It illustrates a possibility of how to proceed when there is a lack of private activity evidence for the service.

#### **Example for considerations to calculate a reasonable profit**

The calculation of a reasonable profit is made on basis of the following assumptions:

- investments and funds necessary to ensure that the hospitals can deal with rapid changes;
- dependence of hospitals on a single customer, which implies a high-risk in cases of changes in the national health system;
- comparison with different types of private for-profit hospitals in Spain in terms of their earnings before interest, taxes, depreciation and amortisation (EBITDA) for the years with the most up-to-date data available;
- consideration of the different status of the funded hospitals as they are all managed by non-profit foundations that have the general interest as their main aim.

Based on all these considerations a reasonable profit was calculated that amounts to about 50% - 60% of the profit earned by private for-profit hospitals, i.e. 5.5 to 6.5% profit.

Source: Member State report Spain, 2016, pp. 54-55.

The above analysis shows that the precise application and implementation of these principal rules for both social housing and health care differ from country to country and even between LRAs of a given country, as they are strongly influenced by various differences in national and/or regional frameworks. These differences include variations in geographical location, social, economic and cultural situations, traditions of administrations, financial market conditions, democratic processes – to name only a few. The examples used also show that solutions for calculating compensations and avoiding overcompensation always need to be tailored not only to the social service at stake but also to the national, regional or local conditions. Apart from the above differences the solutions also have to take into account the specific population needs. This contributes to explaining the variety of different services, for example within the health sector, that are subject to the SGEI Decision.

## 6 Policy conclusions and recommendations

The following conclusions and recommendations refer to different aspects discussed so far in the report in relation to the implementation of the SGEI Decision and SGEI Framework. This chapter starts with specific issues raised in the Member State reports with a view to highlighting the diversity of questions that national authorities and LRAs face when providing public services that are or may be considered as SGEI. This is followed by conclusions and recommendations on several aspects discussed in previous chapters.

### 6.1 Requests for clarification towards the Commission

Apart from outlining problems and challenges encountered when implementing the SGEI Decision and SGEI Framework, some Member State reports specify clarification requests towards the EC. The following box summarises these questions and requests. Most of the questions are related to one or another aspect of applying the SGEI Decision and SGEI Framework, e.g. compensation calculations. In addition, some questions refer to the application of different State aid relevant regulations.

#### Clarification requests

The Member State report of Poland (2016, p. 19) asks for a clarification on whether and under what circumstances the remuneration paid for the service should be regarded as a component of the compensation.

The Member State report of Slovenia (2016, p. 15) requests “more detailed instructions concerning the difference between (sur)charge and compensation in SGEI cases”. Furthermore, “an official interpretation of the SGEI Decision on the duration of entrustment as a condition for permitted applications of the SGEI Decision” is requested.

Within the Member State report of the United Kingdom (2016, p. 78), the authorities from Northern Ireland ask for the provision of case studies, examples or specific Commission Decisions that could help to assess whether the Altmark criteria are fulfilled.

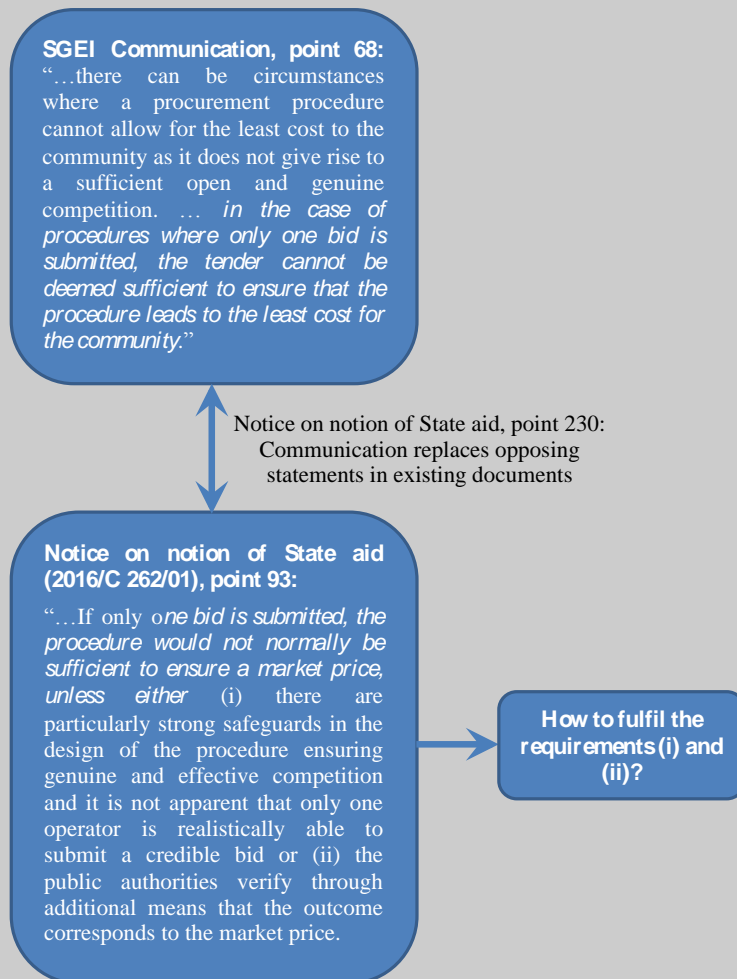
The Member State report of Germany (2016, pp. 29-31) poses two questions on the relation of the Almunia package to other regulations:

- 1) Point 68 of SGEI Communication in relation to points 93 & 230 of notice on notion of State aid (2016): There is uncertainty about which rule has to be applied in the future in cases of procurement procedures leading to one offer

only. The wording of the SGEI Communication is stricter than the wording in the Notice on the notion of State aid, which according to point 230 of this Notice should replace the ruling of point 68 of the SGEI Communication (see figure below).

- 2) Past experience suggested that entrustments in line with the Altmark criteria did not require an ex-post control of actually incurred costs if it could be ensured that the prognosis of costs was realistic and if the price offered did not include more than an appropriate profit. According to article 6(1) of the SGEI Decision, however, at least every three years actual costs and revenues have to be controlled to ensure that no overcompensation has taken place. At the same time, the rules on compatibility with State aid as in Commission Regulation No 651/2014 (European Commission, 2014) allow for the choice between reasonable projections and claw-back mechanisms. Thus, there is no reason why incurred costs have to be controlled in the frame of the SGEI Decision rather than applying the flexibility of Regulation 651/2014.

**Figure 5 Relation between SGEI Communication and Notice on the notion of State aid**



Source: Spatial Foresight, based on German Member State report, 2016.

## 6.2 Unclear legislative framework

Despite the different levels of involvement of LRAs in the drafting of the Member State reports, the complexity of the system is voiced frequently. This concerns different aspects of the SGEI Decision and SGEI Framework, inter alia:

- the application of different regulations for different public services and thresholds;
- different preferences in the SGEI Decision and SGEI Framework regarding calculation and compensation methods;
- the relevance of several regulations both at EU and national level that are not always clear and coherent;
- fulfilling the transparency requirements.

This high level of complexity faced not only by national authorities but especially by LRAs requires not only sufficient capacities, but creates additional costs, for instance, if LRAs have to pay for **external expertise** to ensure compliance with all rules.

*Recommendation:* Thus, **simplification with fewer requirements** regarding the rules to be considered and a lower number of relevant regulations (e.g. by integrating all relevant rules into one legible document) would certainly be useful. This does not only refer to the provision of SGEI but also the reporting requirements. Simplification tends to support an **effective provision** of public services. The initiative of the Italian interregional roundtable for elaborating an SGEI package amendment may indicate the need for such simplification (Input from Marche region).<sup>10</sup>

## 6.3 Incoherent reporting

The above analysis has made it clear that there are considerable differences in the ways the reporting obligations are fulfilled and in the difficulties encountered, both in implementing the SGEI package and the reporting in particular. The reports differ in terms of details provided, the structure used to present the information and the coverage of a certain SGEI in the country. Some

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<sup>10</sup> In Spring 2017, all Italian regional technical representatives dealing with State aid have been invited to participate in a roundtable that aims to propose amendments to the SGEI legislation package. Friuli Venezia Giulia region is in charge of the coordination of the table.

Member State reports, for instance, have sections on social housing or hospitals that are clearly drafted by one or a few specific LRAs. Thus, it remains an open question whether no other LRAs have (a) provided the same public service as SGEI or (b) do not consider the provision as SGEI, although providing the service in the same institutional setting as other LRAs in the country concerned. The following box illustrates this finding with respect to social housing and some incoherence observed between a relevant study and the services covered in the Member State reports.

### **Reporting tends to be incoherent**

The study “Social Housing in the EU” for several countries lists different types of social housing providers. This includes, for instance, public and private, profit and non-profit companies, which are either paid directly from regional or national budgets or receive public support through instruments such as loans. Thus, it can be concluded that in the countries concerned, entrustments are made in the field of social housing. Nevertheless, not all countries listed with a respective combination of providers and funding actually mention social housing in their Member State reports. Examples of countries mentioned accordingly in the study are Austria, Ireland and Portugal. These countries did not report any SGEI in the field of social housing in their 2016 Member State reports, although it may be assumed that support may have been more than the *de minimis* thresholds.

Sources: IZA - Institute for the study of Labour et al., 2013, pp. 51-55; Member State report Austria, 2016; Member State report Ireland, 2016; Member State report Portugal, 2016.

*Recommendation:* Insofar as this incoherence results from non-comparable or incomplete provision of information, it indicates that there is need for **better and clearer guidance** to Member States and LRAs. Such better guidance should also include **timely provision** of templates and accompanying documents in preparation of the biennial reporting.

The incoherence observed may however also result from the challenges linked to the identification of the services that need to be reported.

## **6.4 Incoherent definition of public services subject to SGEI legislation**

The example on social housing may indicate that the Member States do not consider social housing policies to fall under the SGEI Decision, i.e. they do not consider their social housing policy as SGEI. These observations reflect the **problem of defining what is to be reported**: Some reports provide the legal

basis for defining the respective SGEI. Some reports outline that they report services falling under the categories listed in the reporting template for which entrustments are made. Some reports include justifications for non-reported SGEI, but most Member States do not.

The current Almunia package and the SGEI Guidance document merely provide examples of public services that should be considered under the SGEI Decision and SGEI Framework pursuant to the case-law from the EJC. However, for most authorities, these examples seem to be too specific to support an accurate assessment of whether the SGEI Decision and Framework apply to their public service support. The usefulness of the additional explanations provided by the Notice on the notion of State aid is to be tested when the next biennial Member State reports are due. While some explanations remain rather theoretical, others provide quite specific clarifications. An example for a clearer description is the characteristics for differentiating solidarity-based social security schemes from schemes involving an economic activity (European Commission, 2016, paragraph 19-22). However, for other social services, such as health care the clarifications remain unprecise or are not included at all (e.g. social housing) (European Commission, 2016, paragraph 23-37).

*Recommendation:* **Regular provision of good examples would support LRAs** to fulfil their reporting obligations and to support an effective implementation of the SGEI Decision and SGEI Framework. It is important to ensure that the examples provided reflect the current public service provision, e.g. the increasing need for provision of broadband-related services, and outline Member State specific frameworks for better understanding.

Good examples could be provided in different ways, for instance in writing – through concrete examples rather than through guiding documents – or through seminars that would explain how to develop good SGEI schemes and data for the reporting. Ideally, this would have to take into account the specific framework of the respective Member State and public service concerned.

## **6.5 Additional administrative burden for LRAs**

The disparity in the level of detail of the Member State reports reflects partly the efforts made by the different authorities to comply with the reporting obligation. Especially for smaller authorities, in most cases LRAs, the reporting obligations imply increasing administrative costs. Authorities providing the SGEI are accustomed to applying a social logic to the provision of public services, e.g. ensure equal access to the service. However, the Almunia package introduced an economic logic to the provision of SGEIs namely resulting from requirements

related to the calculation of compensation and the need to avoid overcompensation. For the players, applying this different logic requires a certain level of administrative capacity and resources (time and human resources) and smaller local and regional authorities are lacking those resources and capacity.

For instance, reporting on social housing implies enormous reporting efforts by local authorities, since they are the ones mostly responsible for social housing. Pursuant to the aforementioned findings, while it may be in principle easy to compile the numbers on SGEI spending, it is doubtful that reports are comparable in terms of SGEI spending. Furthermore, this raises concerns about the **purpose of reporting the spending** on SGEI and the proportionality between this purpose and the administrative burden this may imply for relevant public authorities, mainly for the smallest ones. This is illustrated in the below box by highlighting the differences in completeness of selected reports.

#### **Explanatory power and comparability of SGEI spending reported**

The Member State report of France differentiates between SGEI that are financed by national or local authorities. For the spending on the local level, the report states: “The local authority tables contain figures for 6 out of the 13 regions. Figures for the other 7 regions will be forwarded to you on receipt.”

The Member State report of Germany points out that the federal government has principally received information from all but one state. Only for social housing has information been provided by all states. Since there is no further information on the collection process below state level—similarly to other Member State reports—the coherence and completeness of the information may be questioned in many reports.

Sources: Member State reports Germany, 2016. p. 1; Member State report France, 2016, p. 1.

*Recommendation:* In addition to the aforementioned recommendation for simplification of the reporting exercise, the **purpose of reporting average and total spending** on SGEI reported under the SGEI Decision should be critically assessed in terms of proportionality.

## **6.6 Lack of clear communication about reporting requirements**

Finally, taking into account the efforts made by some authorities, the different quality and coverage of reports as well as the fact that especially the social services under the SGEI Directive are not subject to notification, the **purpose of**



**the overall reporting exercise** remains blurry for most Member States and hence the LRAs. This may also be the reason why some Member State reports are apparently less precise and specific than others.

*Recommendation:* For obtaining more harmonious reports with comparable and more exhaustive information, not only should additional assistance be given to LRAs, but an explanation of the original purpose of the reporting should be clarified and communicated. Even the **fundamental revision of the reporting** may prove necessary with a view to reducing the administrative burden for small public authorities.



## Sources

Buendía Sierra, J.L., Panero Rias, J.M., 2013. The Almunia Package: State Aid and Services of General Economic Interest, in: Szyszczak, E., van de Gronden, J.W. (Eds.), . pp. 126–150.

CEEP, E.C. of E. and E. providing P.S., 2016. CEEP opinion on the EU State Aid modernisation agenda.

Council of the European Union, 1992. Council Regulation (EEC) No 3577/92 of December 1992 applying the principle of freedom to provide services to maritime transport withing Member States (maritime cabotage).

Court of Justice of the European Union, 2003. *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*.

Cruz Yábar, P., 2013. The Application of State Aid Rules to the Public Financing of Health Care Infrastructures, Staff Working Papers. JASPERS Knowledge Economy and Energy Division.

Ernst & Young, 2015. Technical Toolkit: Reflection of additional issues raised by Member States. Developed under the project “Provision of support for the effective use of European Structural and Investment (ESI) Funds for health investments.”

European Commission, 2016. Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01).

European Commission, 2014. Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance. European Commission.

European Commission, 2013. Commission Staff Working Document - Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest. European Commission.

European Commission, 2012a. 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 (2012/C 8/02).

European Commission, 2012b. Commission Regulation No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest.

European Commission, 2011a. A Quality Framework for Services of General Interest in Europe. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM(2011) 900 final. Brussels.

European Commission, 2011b. Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.

European Commission, 2011c. Communication from the Commission. European Union framework for State aid in the form of public service compensation.

European Commission, 2007. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Accompanying the Communication on “A single market for 21st century Europe” - Services of general interest, including social services of general interest: a new European commitment.

European Parliament, Council of the European Union, 2008. 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 (Recast).

Gløersen, E., Drăgulin, M., Haarich, S., Zillmer, S., Holstein, F., Lüer, C., Hans, S., 2016. Services of General Interest in the Funding Period 2014-2020. European Parliament. Policy Department B: Structural and Cohesion Policies.

Guerini, G., Roelants, B., 2013. The delivery of services of general interest in Europe and the role of social enterprises: a cooperative perspective.

Humer, A., Rauhut, D., Marques da Costa, N., 2013. European Types of Political and Territorial Organisation of Social Services of General Interest. *Romanian J. Reg. Sci.* 7, 142–164.

IZA - Institute for the study of Labour, Braga, M., Palvarini, P., 2013. Social Housing in the EU. European Parliament - Committee on Employment and Social Affairs.

Nicolaides, P., 2014. Not Surprisingly, Another Member State Fails to Prove Compliance with the Altmark Criteria.

Pesaresi, N., Sinnaeve, A., Guigue-Koeppen, V., Wiemann, J., Radulescu, M., 2012. The New State Aid Rules for Services of General Economic Interest (SGEI).

The Member States, 2012. Consolidated version of the Treaty on the Functioning of the European Union.

Member State reports on the application of the SGEI decision during 2015-2016<sup>11</sup>:

- Member State report Austria, 2016.
- Member State report Belgium (Flanders), 2016.
- Member State report Belgium (Wallonia-Brussels), 2016.
- Member State report Bulgaria, 2016.
- Member State report Croatia, 2016.
- Member State report Cyprus, 2016.
- Member State report Czech Republic, 2016.
- Member State report Denmark, 2016.
- Member State report Estonia, 2016.
- Member State report Finland, 2016.
- Member State report France, 2016.
- Member State report Germany, 2016.
- Member State report Greece, 2016.
- Member State report Hungary, 2016.
- Member State report Ireland, 2016.
- Member State report Italy, 2016.
- Member State report Latvia, 2016.
- Member State report Lithuania, 2016.
- Member State report Luxembourg, 2016.
- Member State report the Netherlands, 2016.
- Member State report Poland, 2016.
- Member State report Portugal, 2016.

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<sup>11</sup> As outlined in Section 2.2, Malta did not submit a Member State report for the period under consideration.

- Member State report Romania, 2016.
- Member State report Slovakia, 2016.
- Member State report Slovenia, 2016.
- Member State report Spain, 2016.
- Member State report Sweden, 2016.
- Member State report United Kingdom, 2016.

# **Annex 1 – Format for reporting as promoted by the Commission for the 2016 reports**

The description of the 2012 SGEI Decision application is structured in the following sections:

- Hospitals
- Social services
  - Healthcare and long-term care
  - Childcare
  - Access to and reintegration into the labour market
  - Social Housing
  - Care and social inclusion of vulnerable groups
- Air or maritime links to islands with average annual traffic below the limits set in art. 2(1)(d)
- Airports and ports with average annual traffic below the limit set in art. 2 (1)(e)
- SGEI compensation not exceeding 15 million
  - postal services
  - energy
  - waste collection
  - water supply
  - culture
  - financial services
  - other sectors (please specify)

The description of the 2012 SGEI Framework application is structured in the following sections:

- Postal services
- Energy
- Waste collection
- Water supply
- Air or maritime links to islands with average annual traffic above the limits set in the SGEI Decision art. 2(1)(d)
- Airports and ports with average annual traffic above the limit set in the SGEI Decision art. 2 (1)(e)
- Culture
- Financial services
- Other sectors (please specify)





## Annex 2 – 2015-2016 reporting template

|   |
|---|
| <b>Clear and comprehensive description of how the respective services are organised in your Member State</b>  |
| Explanation of what kind of services in the respective sector have been defined as SGEI in your Member State. Please list the contents of the services entrusted as SGEI as clearly as possible.  |
| Explanation of the (typical) <b>forms of entrustment</b> . If standardised templates for entrustments are used for a certain sector, please attach them.  |
| <b>Average duration of the entrustment (in years)</b> and the proportion of entrustments that are <b>longer than 10 years</b> (in %) per sector. Specify in which sectors SGEI were entrusted for a duration exceeding 10 years and explain how this duration is justified.   |
| Explanation as to whether (typically) exclusive or special rights are assigned to the undertakings.   |
| Which aid instruments have been used (direct subsidies, guarantees, etc.)?  |
| Typical <b>compensation mechanism</b> as regards the respective services and whether a methodology based on cost allocation or the net avoided cost methodology is used.  |
| Typical arrangements for avoiding and repaying any overcompensation.  |
| A short explanation of how the <b>transparency requirements</b> (see Article 7 of the 2012 SGEI Decision) for the aid above EUR 15 million to undertakings that also have activities outside the scope of the SGEI) are being complied with. In your answer please also include some relevant examples of information published for this purpose (e.g. some links to websites or other references), indicate whether you have a central website on which you publish this information for all aid measures concerned in your Member State (and, if so, provide the link to this website) or, alternatively, explain if and how the publication takes place at the level granting the aid (e.g. central, regional or local level). |

| <b>Amount of aid granted</b>   |      |
|--|------|
| <b>Total amount of aid granted (in millions EUR)<sup>2</sup>.</b> This includes all aid paid in your territory, including aid paid by regional and local authorities. <b>(A+B+C)</b> |      |
| 2014   | 2015 |
| <b>A: Total amount of aid granted (in millions of EUR) by national central authorities<sup>3</sup></b>   |      |
| 2014   | 2015 |
| <b>B: Total amount of aid granted (in millions of EUR) by regional authorities</b>   |      |
| 2014   | 2015 |
| <b>C: Total amount of aid granted (in millions of EUR) by local authorities</b>  |      |
| 2014   | 2015 |
| <b>Share of expenditure by aid instrument</b> (direct subsidy, guarantees etc.) (if available)   |      |
| 2014   | 2015 |
| <b>Additional quantitative information</b> (e.g. number of beneficiaries per sector, average aid amount, size of the undertakings)   |      |
| 2014   | 2015 |