



## BRIEFING FOR MEMBERS

# SUBSIDIES AND GRANTS FOR SOCIAL SERVICES – THE IMPACT OF NEW EU STATE AID RULES

What is state aid and why is it relevant for you? State aid is any government funding given to an organisation operating in a market which distorts or threatens to distort competition by favouring, for example, certain businesses or service providers. This can include tax breaks or other advantages that are not given to all providers. State aid rules need to be taken into account when public authorities fund the provision of social services through subsidies or grants, when a competitive procedure such as tendering has not been used. The rules also apply to money given by public authorities from EU funding programmes, such as the European Social Fund. This is because once the member states have received the money from the EU they control how it is used and it effectively becomes their money.

## How is the European Union involved?

State aid is in principle not permitted under the EU's Treaty on the Functioning of the European Union (TFEU) as it distorts competition and is therefore incompatible with the fair operation of the EU's internal market. EU rules lay down criteria to assist the assessment of whether public authorities' funding is or is not state aid, and if it is classified as State aid, whether it is permitted or not.

There are specific rules for the European Commission to assess "public compensation", that is the term used for the payment by a public authority, for services classified as being of public importance, which are known in EU jargon as services of general economic interest (SGEI). According to the rules (the Decision, see below), Member States have a wide margin of discretion in the definition of services that could be classified as being services of general economic interest. The Commission's task is to ensure that there is no misuse of this power to define a service and therefore for it to benefit from lighter rules. Examining official European Commission documents about social services, it can be said that practically all social services are of general interest and therefore fall under this category.

The rules dating from 2005 were revised over the course of 2010 and 2011, taking into account a public consultation, and were finalised in 2011 and 2012. The European Parliament was not involved in a legislative process as the European Commission has sole competency in this area, although published an opinion. In March 2013 the Commission published an 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*" referred to in this briefing. The Guide seeks to further clarify the contents of the rules outlined below.

## What do the rules say?

In the new package of documents relevant for social service providers there is:

A **Regulation (2012/21/EU)**<sup>1</sup> for the classification of "de minimis" aid for SGEI – when the amount of aid is so small as to be not considered to have a potential impact on competition and that is therefore not state aid.

<sup>1</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:007:0003:0010:EN:PDF> (in all official EU languages)





Having a specific *de minimis* Regulation for SGEI is new and the threshold is higher than the general regulation for other services.

A “**Decision**” that lays down the conditions under which State aid is deemed as “compatible”, and therefore permissible; when in the form of compensation for a service of general economic interest. This replaces a previous regulation.

A **Communication** (2012/C 8/02)<sup>2</sup> on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest which aims to clarify the relevant concepts used in the rules, the Regulation and Decision, and how the treaty (TFEU) and court rulings apply.

### **The Regulation** (EU No 360/2012)<sup>3</sup>

The Commission has set a compensation amount for all SGEI below which the funding is not seen as State aid, known as “*de minimis* aid”. The SGEI *de minimis* amount is set at €500,000 over three fiscal years. There is a general *de minimis* Regulation with a lower threshold (€200,000). These amounts are per organisation, not per service. Article 2 explains how to calculate the amount of *de minimis* aid. The service provider should be “entrusted” in writing with the provision of the service, (that it is officially given the responsibility), and the entrustment should mention what the service is, as well as the Regulation and that it is *de minimis* aid (article 3.1) but is not obliged to fulfil the criteria in the Decision. The need for such entrustment to refer to the Regulation is new.

This new scheme removes administrative burdens and risk of non-compliance with rules for the financing of smaller projects or services for a larger number of services than the general Regulation. The Commission also proposes that public authorities can launch a pilot initiative in order to define the task of services they will fund through a different process later under the general *de minimis* regulation (max 200,000). They say it is not possible to use the SGEI regulation because the service would not have been defined as an SGEI.

### **The Decision**

Certain categories of SGEI are exempt from the obligation to notify public service compensation to the Commission as this aid is deemed compatible with the Treaty (TFEU); if they comply with certain criteria. There is no threshold beyond which the Commission has to be notified. These categories are hospitals providing medical care and social housing, (as in the previous Decision) and additionally in this new Decision, SGEI “*meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups*”.

If the following criteria are fulfilled and laid out in an act of “entrustment” (article 4), where the provider is “entrusted” to carry out the SGI, the funding is seen as compatible state aid. A new element to the recent Decision is that the Decision itself must be referred to in the act of entrustment. The other particularly important new element is that a 4<sup>th</sup> criterion does not need to be applied (all 4 criteria were the result of the “Altmark-Trans” case of the European Court of Justice and became known as the Altmark criteria). This was that to avoid “over-compensation” the compensation should have been determined either through public procurement or on the basis of comparing the costs to that of a “typical” well-run company, plus a “reasonable profit”. However, if this criterion is met, in addition to the other criteria, the aid is not even classified as state aid.

### **The criteria that must be met are:**

- (i) the services must qualify as an SGEI as classified above, and its tasks and public service obligations (tasks to be undertaken for the public good) are clearly defined; as well as the duration of the contract;
- (ii) the parameters [guidelines] for compensation of the service's costs are objective, transparent, and are established in advance. It must include the basis for the calculation of the “compensation”, the payment for the service; for example that the compensation will be determined on the basis of a price per day, per meal based on an estimation of the number of potential users.

<sup>2</sup> [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012XC0111\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012XC0111(02):EN:NOT) (in all official EU languages)

<sup>3</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32012R0360:EN:NOT> (in all official EU languages)



In the Guide written by the Commission on the application of EU rules they state that the public authority can take into account and compensate “non-measurable tasks” (for instance for people with disabilities that need more staff time or to take into account the time given for spiritual care (question 118). Tax or other benefits must also be taken into account (art. 5.4).

**(iii)** The amount of compensation shall not exceed what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit. (article 5.1)

If all of those criteria are met, it is classified as state aid but it is considered to be compatible and the public authority is not obliged to inform the European Commission.

The issue of increased costs arising during the provision of a service is addressed in the Guide (question 118):

- *the public authority may define in the act of entrustment an ex post correction mechanism which will allow for periodic revision of the cost parameters;*
- *the public authority may update the act of entrustment if it sees that a cost parameter has to be modified. The payment amount can be calculated or length of time staff spend with persons receiving a service.”*

## How is this relevant for service providers?

Public authorities should apply all the rules mentioned above when they are giving subsidies to providers. There are often questions about when a public authority is obliged to make a call for tender for the provision of a service. The European Commission has said that public authorities do not have a choice as to whether to contract and fund social services through grants or public procurement; it depends on the situation. The Communication states that where a public authority chooses to entrust a third party with the provision of a service, it is required to comply with Union law governing public procurement, (Directive 2004/18/EC). The Guide clarifies this thus: public procurement rules apply “*when the public authority concludes a public service contract. In this case the public authority pays the service provider a fixed remuneration*”. If the service is defined in advance by the authority, public procurement rules apply, in addition to state aid rules. The procurement legislation is in the process of being revised but Directive 2004/18/EC is the legislation in force. A limited selection of rules apply to social services – see further information section to find out more.

If the need but not the service is defined or a provider proposes a service for funding a subsidy can be granted without the need to put it out for competition. The Commission has also said that if the full cost of a service is not met by the authority it does not need to be put out to tender and would not qualify as state aid. However, much of this is not in legislation or official texts, but it is rather how the Commission explains the rules. If the financing of a service is below certain thresholds (as of 2012 for social services: 200,000 Euros<sup>4</sup>); then the procurement rules do not apply.

## What has Eurodiaconia been doing?

Eurodiaconia has held members’ seminars since 2010 to build members’ understanding of such issues, provide a space to share experiences and to make recommendations. Based on members’ experiences Eurodiaconia responded to the Commission consultation on state aid rules in 2010 and has worked with partners to highlight areas of concern and make proposals to the Commission during the review process. Eurodiaconia had expressed concern at difficulty of applying the 4<sup>th</sup> Altmark criteria to social services so is pleased that this is not applicable in the same way as before (referred to above).

The revised legislation on public procurement rules is expected to be approved in September 2013.

Eurodiaconia is currently working to ensure the specificity of social services is recognised and supported. A briefing on the new directive will be available soon after the adoption of the legislation.

## What can you do?

- Inform Eurodiaconia of any problems you encounter relating to how you are funded through subsidies, such as very complex procedures or unfair treatment
- Inform relevant national/regional/local authorities of such problems and request that they take action

<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:319:0043:0044:EN:PDF>



- If the authority insists that tendering is always mandatory, present the explanation as to why this is not the case or refer them to the European Commission (Eurodiaconia can provide the contact)

## Glossary

**Decision:** In EU law, it is a legal instrument which is binding upon those individuals to which it is addressed and may be addressed to member states or individuals. Member States can delegate power to make decisions to the European Commission (therefore the European Parliament is not involved in developing them).

**“De minimis aid”:** A certain level of aid, currently €500,000 for SGEI can be granted in any one period of three years which will not count as state aid.

**Entrustment:** An act of entrustment should be a legally binding act at national level that sets out the obligations of the e.g. provider to provide the service through an official act having legal force under the national law of the relevant EU member state.

**Public procurement:** The purchase of goods or services by a public authority

**(Competitive)Tendering:** A procedure for generating competing offers from different bidders looking to obtain an award of a contract for works, supply, or services.

**Public service compensation:** the term used for the payment by a public authority for goods or services

**Regulation:** legislation of the EU that becomes immediately enforceable as law in all Member States at the same time.

**State aid:** State aid is any government funding provided by a (national, regional or local) public authority which distorts or threatens to distort competition in a market. State Aid is considered to be any advantage given by a State to an operator in their domestic economy where such aid may benefit particular industrial sectors or individual operators and affect trade in the European Union.

**Services of general interest:** services classified as being of public importance (“general interest”). They can be described as services provided by a government to its inhabitants either directly or via the private sector (for profit/non-profit) to fulfil basic needs. This broadly covers water, energy supply, communication, transport, health and social services, education and postal services.

**Services of general economic interest:** such services that are part of a market.

## Further information and links

[News and Eurodiaconia documents on social services, including information on public procurement:](#)

[Summary of the changes in the new state aid rules applicable to SGEI with the previous ones:](#)

[European Commission tool to calculate whether public financing is state aid:](#)

[European Commission web page for State Aid and Services of General Interest:](#)

[“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” \(2013\)](#)

*This document does not constitute legal advice  
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